

UNITED STATES DEPARTMENT OF THE INTERIOR

WASHINGTON, D.C. 20240

Secretary of the Interior - - - - - Bruce Babbitt

Office of Hearings and Appeals - - - - - Paul Smyth, Director

Office of the Solicitor - - - - - John D. Lesly, 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, 1993. It includes the most important administrative decisions and legal opinions that were rendered by officials of the Department during this period.

The Honorable Bruce Babbitt served as Secretary of the Interior; Ms. Bonnie Cohen, Ms. Ada Deer, Ms. Elizabeth Ann Rieke, and Messrs. Bob Armstrong, George T. Frampton, and Leslie M. Turner, as Assistant Secretaries of the Interior; Mr. John D. Leshy served as Solicitor; and Mr. Paul Smyth served as Director, Office of Hearings and Appeals.

This volume will be cited within the Department of the Interior as "100 I.D."

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- Freeman v. Summers, 52 L.D. 201; overruled, 16 IBLA 112, 81 I.D. 370; reinstated, 51 IBLA 97, 87 I.D. 535.
- Freeman v. Texas Pacific Ry., 2 L.D. 550; overruled, 7 L.D. 13.
- Fry, Silas A., 45 L.D. 20; modified, 51 L.D. 581.
- Fufts, Bill, 61 I.D. 437; overruled, 69 I.D. 181.
- Gallihier, Maria, 8 C.L.O. 137; overruled, 1 L.D. 57.
- Gallup v. Northern Pacific Ry. (unpublished); overruled so far as in conflict, 47 L.D. 303.
- Gariss v. Borin, 21 L.D. 542 (See 39 L.D. 162).
- Garrett, Joshua, 7 C.L.O. 55; overruled, 5 L.D. 158.
- Garvey v. Tuiska, 41 L.D. 510; modified, 43 L.D. 229.
- Gates v. California & Oregon R.R., 5 C.L.O. 150; overruled, 1 L.D. 336.
- Gauger, Henry, 10 L.D. 221; overruled, 24 L.D. 81.
- Glassford, A.W., 56 I.D. 88; overruled to extent inconsistent, 70 I.D. 159.
- Gleason v. Pent, 14 L.D. 375; 15 L.D. 286; vacated, 53 I.D. 447; overruled so far as in conflict, 59 I.D. 416.
- Gohrman v. Ford, 8 C.L.O. 6; overruled, 4 L.D. 580.
- Gold, Michael, 108 IBLA 231 (1989); modified, (On Recon.), 115 IBLA 218 (1990).
- Goldbelt, Inc., 74 IBLA 308; affirmed in part, vacated in part, & remanded for evidentiary hearing, 85 IBLA 273, 92 I.D. 134.
- Golden Chief "A" Placer Claim, 35 L.D. 557; modified, 37 L.D. 250.
- Golden Valley Electric Ass'n, 85 IBLA 363; vacated, (On Recon.), 98 IBLA 203.
- Goldstein v. Juneau Townsite, 23 L.D. 417; vacated, 31 L.D. 88.
- Goodale v. Olney, 12 L.D. 324; distinguished, 55 I.D. 580.
- Gotego Townsite v. Jones, 35 L.D. 18; modified, 37 L.D. 560.
- Gowdy v. Connell, 27 L.D. 56; vacated, 28 L.D. 240.
- Gowdy v. Gilbert, 19 L.D. 17; overruled, 26 L.D. 453.
- Gowdy v. Kismet Gold Mining Co., 22 L.D. 624; modified, 24 L.D. 191.
- Grampian Lode, 1 L.D. 544; overruled, 25 L.D. 459.
- Gregg v. Colorado, 15 L.D. 151; vacated, 30 L.D. 310.
- Grinnel v. Southern Pacific R.R., 22 L.D. 438; vacated, 23 L.D. 489.

- Ground Hog Lode *v.* Parole & Morning Star Lodes, 8 L.D. 430; overruled, 34 L.D. 568 (See 47 L.D. 590).
- Guidney, Alcide, 8 C.L.O. 157; overruled, 40 L.D. 399.
- Gulf & Ship Island R.R., 16 L.D. 236; modified, 19 L.D. 534.
- Gulf Oil Exploration & Production Co., 94 IBLA 364; modified, Atlantic Richfield Co., 105 IBLA 218, 95 I.D. 235.
- Gustafson, Olof, 45 L.D. 456; modified, 46 L.D. 442.
- Gwyn, James R., A-26806 (Dec. 17, 1953); distinguished, 66 I.D. 275.
- Hagood, L.N., 65 I.D. 405; overruled, 1 IBLA 42, 77 I.D. 166.
- Halvorson, Halvor K., 39 L.D. 456; overruled, 41 L.D. 505.
- Hansbrough, Henry C., 5 L.D. 155; overruled, 29 L.D. 59.
- Hardee, D.C., 7 L.D. 1; overruled so far as in conflict, 29 L.D. 698.
- Hardee *v.* U.S., 8 L.D. 391; 16 L.D. 499; overruled so far as in conflict, 29 L.D. 698.
- Hardin, James A., 10 L.D. 313; revoked, 14 L.D. 233.
- Harris, James G., 28 L.D. 90; overruled, 39 L.D. 93.
- Harrison, W.R., 19 L.D. 299; overruled, 33 L.D. 539.
- Hart *v.* Cox 42 L.D. 592; vacated, 260 U.S. 427 (See 49 L.D. 413).
- Hastings & Dakota Ry. *v.* Christenson, 22 L.D. 257; overruled, 28 L.D. 572.
- Hausman, Peter A.C., 37 L.D. 352; modified, 48 L.D. 629.
- Hayden *v.* Jamison, 24 L.D. 403; vacated, 26 L.D. 373.
- Haynes *v.* Smith, 50 L.D. 208; overruled so far as in conflict, 54 I.D. 150.
- Hellman *v.* Syverson, 15 L.D. 184; overruled, 23 L.D. 119.
- Heinzman *v.* Letroadec's Heirs, 28 L.D. 497; overruled, 38 L.D. 253.
- Heirs of (see case name).*
- Helmer, Inkerman, 34 L.D. 341; modified, 42 L.D. 472.
- Helphrey *v.* Coil, 49 L.D. 624; overruled, A-20899 (July 24, 1937).
- Henderson, John W., 40 L.D. 518; vacated, 43 L.D. 106 (See 44 L.D. 112; 49 L.D. 484).
- Hennig, Nellis J., 38 L.D. 443; recalled & vacated, 39 L.D. 211.
- Hensel, Ohmer V., 45 L.D. 557; distinguished, 66 L.D. 275.
- Herman *v.* Chase, 37 L.D. 590; overruled, 43 L.D. 246.
- Herrick, Wallace H., 24 L.D. 23; overruled, 25 L.D. 113.
- Hickey, M.A., 3 L.D. 83; modified, 5 L.D. 256.
- Hiko Bell Mining & Oil Co., 93 IBLA 143; sustained as modified, (On Recon.), 100 IBLA 371, 95 I.D. 1.
- Hildreth, Henry, 45 L.D. 464; vacated, 46 L.D. 17.
- Hindman, Ada I., 42 L.D. 327; vacated in part, 43 L.D. 191.
- Hoglund, Svan, 42 L.D. 405; vacated, 43 L.D. 538.
- Holbeck, Halvor F., A-30376 (Dec. 2, 1965); overruled, 79 I.D. 416.
- Holden, Thomas A., 16 L.D. 493; overruled, 29 L.D. 166.
- 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.
- Holman *v.* Central Montana Mines Co., 34 L.D. 568; overruled so far as in conflict, 47 L.D. 590.
- Hon *v.* Martinas, 41 L.D. 119; modified, 43 L.D. 196.
- Hooper, Henry, 6 L.D. 624; modified, 9 L.D. 86.
- Howard *v.* Northern Pacific R.R., 23 L.D. 6; overruled, 28 L.D. 126.
- Howard, Thomas, 3 L.D. 409 (See 39 L.D. 162).
- Howell, John H., 24 L.D. 35; overruled, 28 L.D. 204.
- Howell, L.C., 39 L.D. 92; in effect overruled (See 39 L.D. 411).
- Hoy, Assignee of Hess, 46 L.D. 421; overruled, 51 L.D. 287.
- Hughes *v.* Greathead, 43 L.D. 497; overruled, 49 L.D. 413 (See 260 U.S. 427).
- Hull *v.* Ingle, 24 L.D. 214; overruled, 30 L.D. 258.
- Huls, Clara, 9 L.D. 401; modified, 21 L.D. 377.
- Hulsman, Lorinda L., 32 IBLA 280; overruled, 85 IBLA 343, 92 I.D. 140.
- Humble Oil & Refining Co., 64 I.D. 5; distinguished, 65 I.D. 316.

- Hunter, Charles H., 60 I.D. 395; distinguished, 63 I.D. 65.
- Hurley, Bertha C., TA-66 (Ir.) (Mar. 21, 1952); overruled, 62 I.D. 12.
- Hyde, F.A., 27 L.D. 472; vacated, 28 L.D. 284; 40 L.D. 284; overruled, 43 L.D. 381.
- Hyde v. Warren, 14 L.D. 576; 15 L.D. 415 (See 19 L.D. 64).
- Ingram, John D., 37 L.D. 475 (See 43 L.D. 544).
- Inman v. Northern Pacific R.R., 24 L.D. 318; overruled, 28 L.D. 95.
- Instructions, 4 L.D. 297; modified, 24 L.D. 45.
- Instructions, 32 L.D. 604; overruled so far as in conflict, 50 L.D. 628; 53 I.D. 365; A-20411 (Aug. 5, 1937) (See 59 I.D. 282).
- Instructions, 51 L.D. 51; overruled so far as in conflict, 54 I.D. 36.
- Interstate Oil Corp., 50 L.D. 262; overruled so far as in conflict, 53 I.D. 288.
- Iowa R.R. Land Co., 23 L.D. 79; 24 L.D. 125; vacated, 29 L.D. 79.
- Jacks v. Belard, 29 L.D. 369; vacated, 30 L.D. 345.
- Jacobsen v. BLM, 97 IBLA 182; overruled in part, (On Recon.), 103 IBLA 83.
- Jerome P. McHugh & Assocs., 113 IBLA 341; vacated, (On Recon.), 117 IBLA 303.
- Johnson v. South Dakota, 17 L.D. 411; overruled so far as in conflict, 41 L.D. 21.
- Jones, James A., 3 L.D. 176; overruled, 8 L.D. 448.
- Jones, Sam P., 74 IBLA 242; affirmed in part, as modified, & vacated in part, 84 IBLA 331.
- Jones v. Kennett, 6 L.D. 688; overruled, 14 L.D. 429.
- Kackman, Peter, 1 L.D. 86; overruled, 16 L.D. 463.
- Kagak, Luke, F., 84 IBLA 350; overruled to extent inconsistent, Stephen Northway, 96 IBLA 301.
- Kanawha Oil & Gas Co., 50 L.D. 639; overruled so far as in conflict, 54 I.D. 371.
- Keating Gold Mining Co., 52 L.D. 671; overruled in part, 5 IBLA 137, 79 I.D. 67.
- Keller, Herman A., 14 IBLA 188, 81 I.D. 26; distinguished, 55 IBLA 200.
- Kemp, Frank A., 47 L.D. 560; overruled so far as in conflict, 60 I.D. 417.
- Kemper v. St. Paul & Pacific R.R., 2 C.L.L. 805; overruled, 18 L.D. 101.
- Kenai Natives Ass'n, Inc., 87 IBLA 58, overruled in part, Bay View, Inc., 126 IBLA 281.
- Kilner, Harold E., A-21845 (Feb. 1, 1939); overruled so far as in conflict, 59 I.D. 258.
- King v. Eastern Oregon Land Co., 23 L.D. 579; modified, 30 L.D. 19.
- Kinney, E.C., 44 L.D. 580; overruled so far as in conflict, 53 I.D. 228.
- Kinsinger v. Peck, 11 L.D. 202 (See 39 L.D. 162).
- Kiser v. Keech, 7 L.D. 25; overruled, 23 L.D. 119.
- Knight, Albert B., 30 L.D. 227; overruled, 31 L.D. 64.
- Knight v. Knight's Heirs, 39 L.D. 362; 40 L.D. 461; overruled, 43 L.D. 242.
- Kniskern v. Hastings & Dakota R.R., 6 C.L.O. 50; overruled, 1 L.D. 362.
- Kolberg, Peter F., 37 L.D. 453; overruled, 43 L.D. 181.
- Krighaum, James T., 12 L.D. 617; overruled, 26 L.D. 448.
- Krushnic, Emil L., 52 L.D. 282; vacated, 53 I.D. 42 (See 280 U.S. 306).
- Lackawanna Placer Claim, 36 L.D. 36; overruled, 37 L.D. 715.
- La Follette, Harvey M., 26 L.D. 453; overruled so far as in conflict, 59 I.D. 416.
- Lamb v. Ullery, 10 L.D. 528; overruled, 32 L.D. 331.
- L.A. Melka Marine Construction & Diving Co., 90 I.D. 322; vacated & dismissed, 90 I.D. 491.
- Largent, Edward B., 13 L.D. 397; overruled so far as in conflict, 42 L.D. 321.
- Larson, Syvert, 40 L.D. 69; overruled, 43 L.D. 242.
- Lasselle v. Missouri, Kansas & Texas Ry., 3 C.L.O. 10; overruled, 14 L.D. 278.
- Las Vegas Grant, 13 L.D. 646; 15 L.D. 58; revoked, 27 L.D. 683.
- Laughlin, Allen, 31 L.D. 256; overruled, 41 L.D. 361.
- Laughlin v. Martin, 18 L.D. 112; modified 21 L.D. 40.
- Law v. Utah, 29 L.D. 623; overruled, 47 L.D. 359.
- Layne & Bowler Expert Corp., 68 I.D. 33; overruled so far as in conflict, Schweigert, Inc. v. U.S. Court of Claims, No. 26-66 (Dec. 15, 1967), & Galland-Henning Mfg. Co., IBCA-534-12-65 (Mar. 29, 1968).
- Lemmons, Lawson H., 19 L.D. 37; overruled, 26 L.D. 389.

- Leonard, Sarah, 1 L.D. 41; overruled, 16 L.D. 463.
- Liability of Indian Tribes for State Taxes Imposed on Royalty Received from Oil & Gas Leases, 58 I.D. 535; superseded to extent inconsistent, 84 I.D. 905.
- Lieb, Paul D., 116 IBLA 279, no longer followed in part, Carol B. Rodgers, 126 IBLA 117.
- Lindberg, Anna C., 3 L.D. 95; modified, 4 L.D. 299.
- Linderman v. Wait, 6 L.D. 689; overruled, 13 L.D. 459.
- Linhart v. Santa Fe Pacific R.R., 36 L.D. 41; overruled, 41 L.D. 284 (See 43 L.D. 536).
- Liss, Merwin E., 67 I.D. 385; overruled, 80 I.D. 395.
- Little Pet Lode, 4 L.D. 17; overruled, 25 L.D. 550.
- Lock Lode, 6 L.D. 105; overruled so far as in conflict, 26 L.D. 123.
- Lockwood, Francis A., 20 L.D. 361; modified, 21 L.D. 200.
- Lomax Exploration Co., 105 IBLA 1; *modified*, Ladd Petroleum Corp., 107 IBLA 5.
- Loneragan v. Shockley, 33 L.D. 238; overruled so far as in conflict, 34 L.D. 314; 36 L.D. 199.
- Louisiana, State of, 8 L.D. 126; modified, 9 L.D. 157.
- Louisiana, State of, 24 L.D. 231; vacated, 26 L.D. 5.
- Louisiana, State of, 47 L.D. 366; 48 L.D. 201; overruled so far as in conflict, 51 L.D. 291.
- Lucy B. Hussey Lode, 5 L.D. 93; overruled, 25 L.D. 495.
- Luse, Jeanette L., 61 L.D. 103; distinguished, 71 I.D. 243.
- Luton, James W., 34 L.D. 468; overruled so far as in conflict, 35 L.D. 102.
- Lyles, Clayton, Mr. & Mrs., Messrs. Lonnie & Owen Lyles, Uniform Relocation Assistance Appeal of, 8 OHA 23; *modified*, 8 OHA 94.
- Lyman, Mary O., 24 L.D. 493; overruled so far as in conflict, 43 L.D. 221.
- Lynch, Patrick 7 L.D. 33; overruled so far as in conflict, 13 L.D. 713.
- Mable Lode, 26 L.D. 675; distinguished, 57 I.D. 63.
- Madigan, Thomas, 8 L.D. 188; overruled, 27 L.D. 448.
- Maginnis, Charles P., 31 L.D. 222; overruled, 35 L.D. 399.
- Maginnis, John S., 32 L.D. 14; modified, 42 L.D. 472.
- Maher, John M., 34 L.D. 342; modified, 42 L.D. 472.
- Mahoney, Timothy, 41 L.D. 129; overruled, 42 L.D. 313.
- Makela, Charles, 46 L.D. 509; extended, 49 L.D. 244.
- Makemson v. Snider's Heirs, 22 L.D. 511; overruled, 32 L.D. 650.
- Malesky, James A., 102 IBLA 175; *rev'd*, 106 IBLA 327.
- Malone Land & Water Co., 41 L.D. 138; overruled in part, 43 L.D. 110.
- Maney, John J., 35 L.D. 250; modified, 48 L.D. 153.
- Maple, Frank, 37 L.D. 107; overruled, 43 L.D. 181.
- Marathon Oil Co., 94 IBLA 78; vacated in part, (On Recon.), 103 IBLA 138.
- Martin v. Patrick, 41 L.D. 284; overruled, 43 L.D. 36.
- Martin, Wilbur, Sr., A-25862 (May 31, 1950); overruled to extent inconsistent, 53 IBLA 208, 88 I.D. 373.
- Mason v. Cromwell, 24 L.D. 248; vacated, 26 L.D. 368.
- Masten, E.C., 22 L.D. 337; overruled, 25 L.D. 111.
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- McBride v. Secretary of the Interior, 8 C.L.O. 10; modified, 52 L.D. 33.
- McCalla v. Acker, 29 L.D. 203; vacated, 30 L.D. 277.
- McCord, W.E., 23 L.D. 137; overruled to extent inconsistent, 56 I.D. 73.
- McCornick, William S., 41 L.D. 661; vacated, 43 L.D. 429.
- McCraney v. Hayes' Heirs, 33 L.D. 21; overruled so far as in conflict, 41 L.D. 119 (See 43 L.D. 196).
- McDonald, Roy, 34 L.D. 21; overruled, 37 L.D. 285.
- McDonogh School Fund, 11 L.D. 378; overruled, 30 L.D. 616 (See 35 L.D. 399).
- McFadden v. Mountain View Mining & Milling Co., 26 L.D. 530; vacated, 27 L.D. 358.
- McGee, Edward D., 17 L.D. 285; overruled, 29 L.D. 166.

- McGrann, Owen, 5 L.D. 10; overruled, 24 L.D. 502.
- McGregor, Carl, 37 L.D. 693; overruled, 38 L.D. 148.
- McHarry v. Stewart, 9 L.D. 344; criticized & distinguished, 56 L.D. 340.
- McKernan v. Bailey, 16 L.D. 368; overruled, 17 L.D. 494.
- McKittrick Oil Co. v. Southern Pacific R.R., 37 L.D. 243; overruled so far as in conflict, 40 L.D. 528 (See 42 L.D. 317).
- McMicken, Herbert, 10 L.D. 97; 11 L.D. 96; distinguished, 58 I.D. 257.
- McMurtrie, Nancy, 73 IBLA 247; overruled to extent inconsistent, 79 IBLA 153, 91 I.D. 122.
- McNamara v. California, 17 L.D. 296; overruled, 22 L.D. 666.
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- Mead, Robert E., 62 I.D. 111; overruled, 85 I.D. 89.
- Mee v. Hughart, 23 L.D. 455; vacated, 28 L.D. 209; in effect reinstated, 44 L.D. 414; 46 L.D. 434; 48 L.D. 195; 49 L.D. 659.
- Meeboer v. Schut's Heirs, 35 L.D. 335; overruled so far as in conflict, 41 L.D. 119 (See 43 L.D. 196).
- Mercer v. Buford Townsite, 35 L.D. 119; overruled, 35 L.D. 649.
- Meyer v. Brown, 15 L.D. 307 (See 39 L.D. 162).
- Meyer, Peter, 6 L.D. 639; modified, 12 L.D. 436.
- Midland Oilfields Co., 50 L.D. 620; overruled so far as in conflict, 54 I.D. 371.
- Mikesell, Henry D., A-24112 (Mar. 11, 1946); overruled to extent inconsistent, 70 I.D. 149.
- Miller, D., 60 I.D. 161; overruled in part, 62 I.D. 210.
- Miller, Duncan, A-20760 (Sept. 18, 1963); A-30742 (Dec. 2, 1966); A-30722 (Apr. 14, 1967); overruled, 79 I.D. 416.
- Miller, Duncan, 6 IBLA 283; overruled to extent inconsistent, 85 I.D. 89.
- Miller, Edwin J., 35 L.D. 411; overruled, 43 L.D. 181.
- Miller v. Sebastian, 19 L.D. 288; overruled, 26 L.D. 448.
- Milner & North Side R.R., 36 L.D. 488; overruled, 40 L.D. 187.
- Milton v. Lamb, 22 L.D. 339; overruled, 25 L.D. 550.
- Milwaukee, Lake Shore & Western Ry., 12 L.D. 79; overruled, 29 L.D. 112.
- Miner v. Mariott, 2 L.D. 709; modified, 28 L.D. 224.
- Mingo Oil Producers, 94 IBLA 384; vacated, (On Recon.), 98 IBLA 133.
- Minnesota & Ontario Bridge Co., 30 L.D. 77; no longer followed, 50 L.D. 359.
- Mitchell v. Brown, 3 L.D. 65; overruled, 41 L.D. 396 (See 43 L.D. 520).
- Mobil Oil Corp., 35 IBLA 375, 85 I.D. 225; limited in effect, 70 IBLA 343.
- Monitor Lode, 18 L.D. 358; overruled, 25 L.D. 495.
- Monster Lode, 35 L.D. 493; overruled so far as in conflict, 55 I.D. 348.
- Moore, Agnes Mayo, 91 IBLA 343; vacated, BLM decision *rev'd*, (On Judicial Remand), 102 IBLA 147.
- Moore, Charles H., 16 L.D. 204; overruled, 27 L.D. 481.
- Morgan v. Craig, 10 C.L.O. 234; overruled, 5 L.D. 303.
- Morgan, Henry S., 65 I.D. 369; overruled to extent inconsistent, 71 I.D. 22.
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- Moses, Zelmer R., 36 L.D. 473; overruled, 44 L.D. 570.
- Mountain Chief Nos. 8 & 9 Lode Claims, 36 L.D. 100; overruled in part, 36 L.D. 551.
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- Mulnix, Philip, Heirs of, 33 L.D. 331; overruled, 43 L.D. 532.
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- Newbanks v. Thompson, 22 L.D. 490; overruled 29 L.D. 108.
- Newlon, Robert C., 41 L.D. 421; overruled so far as in conflict, 43 L.D. 364.
- New Mexico, State of, 46 L.D. 217; overruled, 48 L.D. 98.
- New Mexico, State of, 49 L.D. 314; overruled 54 I.D. 159.
- Newton, Walter, 22 L.D. 322; modified, 25 L.D. 188.
- New York Lode & Mill Site, 5 L.D. 513; overruled, 27 L.D. 373.
- Nickel, John R., 9 L.D. 388; overruled, 41 L.D. 129 (See 42 L.D. 313).
- Northern Pacific R.R., 20 L.D. 191; modified, 22 L.D. 234; overruled so far as in conflict, 29 L.D. 550.
- Northern Pacific R.R., 21 L.D. 412; 23 L.D. 204; 25 L.D. 501; overruled, 53 I.D. 242 (See 26 L.D. 265; 33 L.D. 426; 44 L.D. 218; 117 U.S. 435).
- Northern Pacific R.R. v. Bowman, 7 L.D. 238; modified, 18 L.D. 224.
- Northern Pacific R.R. v. Burns, 6 L.D. 21; overruled, 20 L.D. 191.
- Northern Pacific R.R. v. Loomis, 21 L.D. 395; overruled, 27 L.D. 464.
- Northern Pacific R.R. v. Marshall, 17 L.D. 545; overruled, 28 L.D. 174.
- Northern Pacific R.R. v. Miller, 7 L.D. 100; overruled so far as in conflict, 16 L.D. 229.
- Northern Pacific R.R. v. Sherwood, 28 L.D. 126; overruled so far as in conflict, 29 L.D. 550.
- Northern Pacific R.R. v. Symons, 22 L.D. 686; overruled, 28 L.D. 95.
- Northern Pacific R.R. v. Urquhart, 8 L.D. 365; overruled, 28 L.D. 126.
- Northern Pacific R.R. v. Walters, 13 L.D. 230; overruled so far as in conflict, 49 L.D. 391.
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- Northern Pacific Ry., 48 L.D. 573; overruled so far as in conflict, 51 L.D. 196 (See 52 L.D. 58).
- Nunez, Roman C., 56 I.D. 363; overruled so far as in conflict, 57 I.D. 213.
- Nyman v. St. Paul Minneapolis & Manitoba Ry., 5 L.D. 396; overruled, 6 L.D. 750.
- O'Donnell, Thomas J., 28 L.D. 214; overruled, 35 L.D. 411.
- Oil & Gas Privilege & License Tax, Ft. Peck Reservation Under Law of Montana, M-36318 (Oct. 13, 1955); overruled, 84 I.D. 905.
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- Opinion of Ass't Attorney General, 35 L.D. 277; vacated, 36 L.D. 342.
- Opinion of Associate Solicitor, M-34999 (Oct. 22, 1947); distinguished, 68 I.D. 433.
- Opinion of Associate Solicitor, 64 I.D. 351; overruled, 74 I.D. 165.
- Opinion of Associate Solicitor, M-36512 (July 29, 1958); overruled to extent inconsistent, 70 I.D. 159.
- Opinion of Chief Counsel, 43 L.D. 339; explained, 68 I.D. 372.
- Opinion of Deputy Ass't Secretary (Dec. 2, 1966); overruled, 84 L.D. 905.
- Opinion of Deputy Solicitor, M-36562 (Aug. 21, 1959); overruled, 86 I.D. 151.
- Opinion of Secretary, 75 I.D. 147; vacated, 76 I.D. 69.
- Opinion of Solicitor, D-40462 (Oct. 31, 1917); overruled so far as inconsistent, 58 I.D. 85.
- Opinion of Solicitor, D-44083 (Feb. 7, 1919); overruled, M-6397 (Nov. 4, 1921) (See 58 I.D. 158).
- Opinion of Solicitor, M-27499 (Aug. 8, 1933); overruled so far as in conflict, 54 I.D. 402.
- Opinion of Solicitor, 54 I.D. 517; overruled in part, M-36410 (Feb. 11, 1957).
- Opinion of Solicitor, M-27690 (June 15, 1934); overruled to extent of conflict, 88 I.D. 586.
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- 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.
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- Willis, Cornelius, 47 L.D. 135; overruled, 49 L.D. 461.
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- Wilson *v.* Smith's Heirs, 37 L.D. 519; overruled so far as in conflict, 41 L.D. 119 (See 43 L.D. 196).
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- Wostenberg, William, A-26450 (Sept. 5, 1952); distinguished in dictum, 6 IBLA 318, 70 I.D. 439.
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XXXII TABLE OF OVERRULED AND MODIFIED CASES FOR THE
DEPARTMENT OF THE INTERIOR

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NOTE—The abbreviations used in this title refer to the
following publications: "B.L.P." to Brainard's Legal Prece-

dents 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 TECOM, INC.

IBCA-2970 *et al.*

Decided: *January 15, 1993*

Contract No. 14-08-0001-23460, Geological Survey.

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

A corporate vice-president and member of the contractor's Board of Directors, who was demonstrated to have responsibility for corporate activities substantially equivalent to that of the contractor's president, qualified under FAR 33.207(c)(2)(ii) to certify the contractor's Contract Disputes Act claims as "[a]n officer * * * of the contractor having overall responsibility for the conduct of the contractor's affairs."

**APPEARANCES: Theodore M. Bailey, P.C., Law Office of
Ronald J. Shaw, P.C., San Antonio, Texas, for Appellant;
James L. Weiner, Branch of Procurement and Patents, Division
of General Law, Office of the Solicitor, U.S. Department of the
Interior, Washington, D.C., for the Government.**

OPINION BY ADMINISTRATIVE JUDGE ROME ON CERTIFICATION

INTERIOR BOARD OF CONTRACT APPEALS

The Government has moved to dismiss appeal No. IBCA-2970, involving a claim in excess of \$50,000, on the ground that appellant Tecom did not certify the claim properly under the Contract Disputes Act of 1978 (CDA), 41 U.S.C. § 605(c)(1), and that, therefore, we lack jurisdiction to consider the appeal. The Government asserts that the corporate officer who certified the claim was not qualified to do so. Other of the above appeals, filed subsequently to IBCA-2970 and now consolidated with it, also involve claims certified by the same individual. We deem the Government's motion to cover those appeals as well. It is our duty, in any case, to ensure that we have jurisdiction. *Bender v. Williamsport Area School District*, 475 U.S. 534 (1986).

As in effect at the time these appeals were filed, the CDA did not designate any particular certifier, but the applicable Federal Acquisition Regulation (FAR), 33.207(c)(2), provided: "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." Proper certification, in accordance with the CDA and the implementing FAR, was deemed to be a jurisdictional requirement. *United States v. Grumman Aerospace Corp.*, 927 F.2d 575 (Fed. Cir. 1991), cert. denied, 112 S. Ct. 330 (1991); *W. M. Schlosser Co. v. United States*, 705 F.2d 1336 (Fed. Cir. 1983).

On October 29, 1992, after these appeals were filed, President Bush signed S. 1569, the "Federal Courts Administration Act of 1992" (Administration Act), which, in Title IX, section 907(a)(1), amended section 6(c) of the CDA, 41 U.S.C. § 605(c), in relevant part, to add to the required certification a statement that the certifier is duly authorized to certify the claim on behalf of the contractor; to state that the certification may be executed by any person authorized to bind the contractor with respect to the claim; and to provide that a certification defect shall not deprive a board of jurisdiction—the defect need only be corrected prior to the entry of final judgment. The amendment is effective with respect to all claims filed before, on, or after its enactment date, except claims, such as these, that have been the subject of an appeal before that date. Administration Act, section 907(a)(2). Thus, proper claim certification, under pre-existing law, is still a jurisdictional prerequisite to our entertaining these appeals.¹

Those of Tecom's claims before us that required certification were certified by "R. Lynn Laycock, CPA, Vice President Finance." Tecom asserts that Mr. Lynn met the certification requirements of FAR 33.207(c)(2)(ii), and we so find.

DISCUSSION

The Government relies centrally upon *Grumman* in support of its challenge to appellant's claim certifications. In *Grumman*, the court of appeals upheld the validity of FAR 33.207(c)(2) and found a certification by Grumman's Senior Vice President and Treasurer to be defective because he satisfied neither subsection (i) nor subsection (ii) of the FAR. The court concluded that subsection (ii), at issue here, requires that the certifier have overall responsibility for the conduct of the contractor's affairs in general, and not just for its financial affairs, and held that Grumman had not met its burden of proof. The court stressed, however, that: "Certainly a CEO or one of equivalent status would satisfy the second description [subsection ii], but certification by a CEO is not required by the regulation or by anything said in either of this court's opinions in this case." 927 F.2d at 581.

The general language of FAR 33.207(c)(2)(ii), "[a]n officer or general partner of the contractor having overall responsibility for the conduct of the contractor's affairs" (italics added), indicates that more than one

¹ Similarly, any ensuing amendments to the FAR (see, e.g., sec. 813 of the National Defense Authorization Act for Fiscal Year 1993, P.L. 102-484), will not apply.

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person could qualify to certify a claim under that subsection. To determine whether a certifier satisfies the FAR's requirements, we look to more than the certifier's title and examine the totality of the circumstances at the time of certification. *Aleman Food Services, Inc. v. United States*, 24 Cl. Ct. 345, 352-53 (1991).

When he certified the claims, Mr. Laycock's title was "Vice President Finance." As an officer of Tecom, he met the first requirement of FAR 33.207(c)(2)(ii). The Government alleges, however, but has not provided any evidence in support, that Mr. Laycock was "merely a financial officer" (Motion to Dismiss at 3). Moreover, the fact that Mr. Laycock's title reflects that he had financial responsibilities does not preclude him from meeting the second requirement, "overall responsibility for the conduct of the contractor's affairs." *JAYCOR*, ASBCA No. 40911, 91-3 BCA ¶ 24,082 (Vice-President-Finance actually performed as its chief executive officer with overall responsibility for its affairs and authority to act on its behalf); *Robert R. Marquis, Inc.*, ASBCA No. 38438, 91-3 BCA ¶ 24,240 (Secretary-Treasurer functioned in capacity equivalent to CEO); *Computer Systems & Resources, Inc.*, ASBCA Nos. 39836, 42018, 91-3 BCA ¶ 24,236 (Vice President/Finance and Contract Administration reported directly to the company's president who delegated to him overall management of company's day-to-day affairs); *Service Engineering Co.*, ASBCA No. 33787, 91-3 BCA ¶ 24,109 (Executive Vice President whose day-to-day responsibilities were heavily financial nonetheless had other duties and had full authority to act for the contractor and overall responsibility co-extensive with that of its president and CEO).

Affidavits may be sufficient to establish a certifier's qualifications, as in several of the above cases, and the Government must do more than make conclusory allegations to defeat the contractor's representations. *United States v. Newport News Shipbuilding & Dry Dock Co.*, 933 F.2d 996 (Fed. Cir. 1991); *Computer Systems & Resources, Inc.*, 91-3 BCA at 121, 203; *Aleman*, 24 Cl. Ct. at 353.

The Government alleges, without its own affidavits or declarations in support, that "no USGS [Government] employee has been particularly aware of any senior corporate role played by Mr. Laycock" (Reply to Opposition to Motion to Dismiss at 2). This allegation is both conclusory and not probative as to whether Mr. Laycock actually had overall responsibility for Tecom's corporate affairs in general. The Government also cites to documentation that its personnel had contact with other vice presidents of Tecom. This has little bearing upon whether Mr. Laycock was qualified to certify under subsection (ii) of the FAR, absent hard evidence that Mr. Laycock did not have the overall responsibility that Tecom insists he had.

In these appeals, Tecom has submitted Mr. Laycock's affidavit; two affidavits from Mr. Thomas L. Collins, Tecom's president, sole shareholder and Chairman of the Board of Directors at the time of

certification; affidavits from three of the company's vice presidents; and several corporate records, averring or reflecting that, when he certified the claims, Mr. Laycock was the company's senior vice president and a director; all other vice presidents reported to him; he reported directly to Mr. Collins; Mr. Laycock and Mr. Collins were the only individuals authorized to sign bids (Mr. Laycock, in fact, signed the contract); Mr. Laycock and Mr. Collins were the chief negotiators for the company in all areas; Mr. Laycock had the authority to file claims and to decide their amount; Mr. Laycock had authority to bind the company; Mr. Laycock had authority over employment matters and a range of other responsibilities; Mr. Laycock and Mr. Collins jointly managed Tecom; and Mr. Laycock acted as the substantial equivalent of the president during the entire period relevant to the claims.

Questions the Government raised, based upon state franchise tax reports and other documents, about the timing and nature of Mr. Laycock's status as a director and vice president, were resolved by Mr. Collins' second affidavit, the accompanying affidavits of other vice presidents, and other documentation.

In fact, on May 22, 1992, Mr. Laycock was elected "President and Chief Operating Officer" of Tecom. Although this occurred after he certified the claims, and it is his status at the time of certification that is relevant, we accept Tecom's assertion that the election was a formalization of Mr. Laycock's role in the company during the preceding 5 years when he and Mr. Collins, who continues to serve as Chairman of the Board, were jointly managing the company.

Accordingly, Mr. Laycock qualified under FAR 33.207(c)(2)(ii) to certify Tecom's claims and we have jurisdiction to entertain these appeals.

DECISION

The Government's motion to dismiss is denied.

CHERYL S. ROME
Administrative Judge

I CONCUR:

G. HERBERT PACKWOOD
Acting Chief Administrative Judge

UNITED STATES v. GEORGE E. WILLIAMS

Memorandum

January 19, 1993

To: Director, Office of Hearings and Appeals
From: Acting Secretary

January 13, 1993

Subject: *United States v. George E. Williams (Deceased)*, Native Allotment A-061299, IBLA 90-379.

As you know, this matter is brought before the Secretary on the request of the Alaska Legal Services Corp. (ALSC) that he assume jurisdiction and decide its March 5, 1992, petition, which is pending with your office. ALSC's petition requests that you assume jurisdiction and reverse the January 6, 1992, order of the Interior Board of Land Appeals (IBLA), which held that the State of Alaska has standing to appeal the decision of the Administrative Law Judge (ALJ) in this matter.

The Secretary had asked the Deputy Solicitor to review the matter. The Deputy Solicitor provided to me the attached memorandum. I have reviewed the Deputy Solicitor's memorandum and concur. The time has come for the Department of the Interior to reach a final decision on this longstanding matter. Accordingly, I hereby exercise my jurisdiction under 43 CFR 4.5, reverse the IBLA's order of January 6, 1992, to the extent inconsistent with the Deputy Solicitor's memorandum, and order that the State's appeal be dismissed for lack of standing. I am returning the matter to you, with instructions to enter my order dismissing the appeal, thereby allowing the BLM to proceed in compliance with the ALJ's decision.

Please provide notice of my decision to the appropriate parties.

Attachment

Memorandum

January 13, 1993

To: Secretary

From: Deputy Solicitor

Subject: *United States v. George E. Williams (Deceased)*, Native Allotment A-061299, IBLA 90-379: Petition to Assume Jurisdiction and Review January 6, 1992, IBLA Order

I. Introduction

This Alaska Native Allotment matter is before you because the Alaska Legal Services Corp. (ALSC), representing the heirs of George E. Williams, has requested by letter dated March 5, 1992, that you assume jurisdiction under 43 CFR 4.5, and decide its Petition for Review, or in the alternative, ask the Director of the Office of Hearings and Appeals (OHA) to assume jurisdiction and decide the petition. The petition, also dated March 5, 1992, was filed with and has since been pending before the Director of OHA. It requests that the Director review and reverse the January 6, 1992, holding of the Interior Board of Land Appeals (IBLA) issued in this case. In that order, the IBLA held that the State of Alaska has standing to appeal the April 30,

1990, decision of the Administrative Law Judge (ALJ) approving George Williams' allotment application. The ALJ concluded that the representatives of George Williams had satisfied their burden of proof to establish Mr. Williams' entitlement to the lands encompassed within his allotment application, filed in 1964.

You have asked for my assistance as you consider whether to exercise jurisdiction. This matter has been pending before the Department in one form or another for more than 30 years. The allotment applicant, Mr. Williams, died long ago, and the tortuous history of this case, unfortunately, might properly be compared to the endless case *Jarndyce & Jarndyce* in *Bleak House*, by Charles Dickens. Because of the length of time this case has been pending and more importantly, because I have concluded, on the IBLA's record before me, that the IBLA erred in holding that the State has standing, I recommend that you assume jurisdiction, reverse the IBLA's order to the extent inconsistent with this memorandum, and dismiss the appeal for lack of standing. The effect of such a decision would dispose of this Department's consideration of this case and leave intact the ALJ's decision on the merits that Mr. Williams satisfied the requirements for his allotment claim. The Bureau of Land Management (BLM) would then be required to proceed in accordance with the ALJ's decision.

In reviewing this case, I have relied upon the arguments raised by ALSC and the State of Alaska before the IBLA, and upon the cases and authority discussed by the IBLA in its January 6, 1992, order. Although ALSC's request that you assume jurisdiction included supporting legal arguments, I am specifically limiting the basis for my recommendation to my review of the record before the IBLA and the IBLA's order. Because the matter was fully briefed to the IBLA, I consider it unnecessary to consider any legal arguments raised by ALSC in its petition. Therefore, I also consider it unnecessary for you to request supplemental briefing prior to making a decision.¹

I. Procedural History

Mr. George E. Williams, an Alaska Native, first applied for a Native allotment in 1957 under the Alaska Native Allotment Act of 1906.² He submitted another application in 1964, which is the application that is the subject of the present case. In 1965, pursuant to the Alaska Statehood Act, the State filed a general purposes grant selection for lands which, but for Williams' application, would have included the lands for which Mr. Williams had applied.³ In 1968, Williams filed

¹ I note that in a brief filed with the IBLA, Response to Contestee's Motions of July 19, 1991, at 2 (Aug. 5, 1991), the State specifically requested that the Board's consideration of ALSC's motion to dismiss for lack of standing "be limited to the arguments made and authorities cited by the parties up to and including the filing of Contestee's October 4, 1990, REPLY TO STATE'S OPPOSITION TO MOTION TO DISMISS FOR LACK OF STANDING."

² Act of May 17, 1906, Pub. L. No. 59-171, 34 Stat. 197, amended by Act of Aug. 2, 1956, Pub. L. No. 84-931, 70 Stat. 954, repealed, with savings clause for applications pending on Dec. 18, 1971, by Alaska Native Claims Settlement Act, Pub. L. No. 92-203, § 18(a), 85 Stat. 688, 710 (repealer codified at 43 U.S.C. § 617(a)).

³ In 1981, BLM tentatively approved the State's selection, but expressly excluded the lands included within Williams' allotment application. See Appellee Attachment B, Reply to State's Opposition to Motion to Dismiss for Lack of

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evidence of use and occupancy, as required by the regulations. See 43 CFR 2561.2. Mr. Williams died in 1970. Four years later, in 1974, BLM conducted a field examination and recommended rejection of the application, which BLM did in 1975. In 1979, IBLA set aside BLM's 1975 rejection because it was done without affording the Native applicant his constitutional due process rights to a hearing. See *State of Alaska*, 95 IBLA 196, 197 (1987) (citing *John Moore*, 40 IBLA 321 (1979)).

In 1980, Congress enacted the Alaska National Interest Lands Conservation Act (ANILCA), Pub. L. No. 96-487, 94 Stat. 2371, which provided in section 905 for the legislative approval of pending Native allotments, with specified exceptions. In 1981, the State of Alaska, pursuant to ANILCA section 905(a)(5)(B), 43 U.S.C. § 1634(a)(5)(B), filed a protest against the George Williams allotment. In 1985, BLM summarily dismissed the State's protest as lacking in specificity and held that the allotment was legislatively approved pursuant to ANILCA. In 1987, the IBLA set aside the BLM's decision, holding that (1) the State's protest was sufficiently specific to meet statutory requirements, thus precluding legislative approval, and (2) the application must be adjudicated as provided in ANILCA for applications not legislatively approved. *State of Alaska*, 95 IBLA 196 (1987).

In 1988, pursuant to the IBLA's order, the BLM initiated a Government contest to adjudicate Williams' claim. On April 30, 1990, ALJ Sweitzer, after holding a hearing, decided that George Williams had met the burden of proof in demonstrating use and occupancy sufficient to satisfy the Alaska Native Allotment Act. Therefore the ALJ dismissed BLM's contest complaint. BLM and the State of Alaska appealed the decision, although BLM subsequently withdrew its appeal and is no longer a party to the proceedings. ALSC filed a motion to dismiss the State's appeal for lack of standing. Motion to Dismiss Appeal of Intervenor, *United States v. George Williams*, IBLA 90-379 (July 16, 1990) (Motion to Dismiss). The State opposed ALSC's motion to dismiss. State's Opposition to Motion to Dismiss for Lack of Standing, *id.* (Sept. 24, 1990) (State's Brief) ALSC filed a reply. Reply to State's Opposition to Motion to Dismiss for Lack of Standing, *id.* (Oct. 9, 1990) (Reply Brief).

In 1991, ALSC petitioned you to assume jurisdiction, contending that the length of time it had taken the Department to resolve this case and IBLA's inaction on the motion to dismiss justified such action on your part. On December 18, 1991, you declined the request but asked IBLA to expedite its review. On January 6, 1992, IBLA issued an order

denying the motion to dismiss and holding that the State has standing to pursue its appeal and challenge the allotment claim on the merits.

On March 5, 1992, ALSC petitioned the Director of OHA to review IBLA's order. On the same date, ALSC wrote you and asked that you reconsider your earlier decision not to assume jurisdiction, or in the alternative, ask the Director of OHA to assume jurisdiction and decide ALSC's petition for reconsideration of IBLA's order. Subsequently, the Director stayed further proceedings and further consideration of the petition before him, pending your response to ALSC's letter to you.

III. Issue

A. Standing

I begin my analysis by discussing the Department's standing requirements. In my view, the IBLA correctly characterized the Department's standing criteria applicable to this case:

To have standing to appeal to this Board, under 43 CFR 4.410(a) an appellant must be a party to the case who has been adversely affected by the decision appealed. An appellant will be considered "adversely affected" within the meaning of the regulations if the party has suffered injury to a "legally cognizable interest." *Storm Master Owners*, 103 IBLA 162, 177 (1988).

In *Storm Master Owners*, the IBLA held that an allegation of a present right of use was sufficient to confer standing. The Board discussed the "legally cognizable interest" criteria as follows:

Such interest must be more than that of a mere trespasser who has made improvements on public land "without color or claim of right." * * * However, it is not necessary that an appellant have an interest "in the land" which is adversely affected in order to be accorded standing to appeal a BLM decision * * * Thus, an appellant may properly base a claim of standing upon the mere lawful use of public land. * * * Moreover, the interest which is asserted to be adversely affected by a BLM action may proceed from a color or claim of right as to public land and need not ultimately be determined to be valid where "the existence of standing cannot be made dependent upon ultimate substantive success on appeal."

103 IBLA at 177 (citations omitted).

As discussed below, I have concluded that the two bases relied upon by the State, and a third suggested *sua sponte* by IBLA, do not fall within the above standard of a legally cognizable interest, and therefore the State's appeal should have been dismissed for lack of standing.

B. Arguments Before IBLA

When this case came before IBLA after the ALJ's adjudication on the merits, ALSC contended that the State lacked standing to appeal the ALJ's decision. ALSC argued that the State's ANILCA protest, which triggered the Government contest and adjudication, does not confer standing. ALSC also contended that the State's presence on a portion of the land in the form of a cabin constructed pursuant to a Special Land Use Permit was also insufficient to confer standing because the permit had expired in 1981 and the State's presence since has constituted that of a mere trespasser. *See Motion to Dismiss.*

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In response, the State of Alaska relied on only two alleged interests to oppose ALSC's motion to dismiss for lack of standing. First, the State contended that its protest, filed pursuant to ANILCA section 905(a)(5)(B), created a "legally cognizable interest" sufficient to confer it with standing in this case. Second, the State contended that its general purposes grant selection, filed in 1965 and purportedly encompassing the lands claimed by Williams, was an "interest in the land" that gave it standing.⁴ See State's Brief. In reply, ALSC argued that the general purposes grant selection gave rise to no legally cognizable interest in the State because it was filed after the lands had been segregated by Williams' allotment application. See Reply Brief.

C. State's ANILCA Section 905(a)(5)(B) Protest

Before discussing IBLA's order with respect to the State's protest, it is useful background to note that the reason why the Department was required to adjudicate the merits of Williams' allotment is because of the protest filed by the State pursuant to ANILCA section 905(a)(5)(B), 43 U.S.C. § 1634(a)(5)(B), which resulted in a Government contest to determine the validity of Williams' application. See State's Brief at 2. In section 905(a)(5)(B), Congress afforded the State of Alaska the right to require the Department to adjudicate a Native Allotment application on the merits (thus preventing ANILCA's legislative approval of the allotment), by filing a protest with the Secretary stating, *inter alia*, that the lands described in the allotment application are "necessary for access" to lands of the United States or the State of Alaska. No specific legal interest or claim of right to the lands is necessary for the State to file such a protest. The purpose and effect of such a protest simply is to identify a public interest contrary to the otherwise automatic legislative approval of pending allotments under ANILCA section 905, and to require this Department to adjudicate the allotment applicant's claim on the merits.

IBLA rejected the State's contention that the ANILCA protest itself conferred upon it a legally cognizable interest. Instead, the Board concluded that "[a]t best, the filing of the protest initially made the State a party to the case," but the "[d]enial of the protest did not adversely affect a legally cognizable interest so as to satisfy the other basis for standing." *Williams*, IBLA 90-379, slip op. at 3. I agree. ANILCA section 905(a)(5)(B) does not require that the State have any actual "legally cognizable interest" that is adversely affected when an adjudication determined that an allotment application is valid. *Fred J. Schikora*, 89 IBLA 251 (1985).

⁴The State did not argue in its brief that the cabin on a portion of the lands described in the allotment application conferred upon it an interest sufficient to support standing. However, IBLA did address this issue, agreeing with ALSC that the mere fact that the State constructed improvements on some of the land and once held a special land use permit (which expired over 10 years ago) is not sufficient to constitute a legally cognizable interest that would afford the State standing to appeal. *Williams*, IBLA 90-379, slip op. at 3. I agree with this portion of the Board's order.

The State contends in its brief to IBLA that it would be anomalous to have permitted it to participate in the adjudication by the ALJ, and now deny it standing to appeal the ALJ's decision approving the allotment. I disagree. Without offering a conclusive opinion on the propriety of permitting the State to participate as a party before the ALJ,⁵ I would recognize that permitting the State to intervene at that level in the proceedings is not inconsistent with the right Congress afforded the State to require adjudication of an application on the merits when the lands applied for may be necessary for access to lands of the United States or the State. As discussed previously, however, that right does not create the type of legally cognizable interest necessary to confer standing to appeal a decision approving the allotment. See *Williams*, IBLA 90-379, slip. op. at 3; *Fred J. Schikora*, *supra*.⁶

D. State's Grant Selection Under the Statehood Act

The State also contended before IBLA that its general purposes grant selection, filed in 1965 and purportedly encompassing the lands claimed by Willaims, was and "interest in the land" that gave it standing. IBLA agreed with the State and it is on this issue that I have concluded the IBLA erred.

In reaching its decision that the State has standing to appeal in this case, the IBLA relied on cases in which the State's selection postdated the Native applicant's alleged commencement of use and occupancy, but preceded the Native applicant's filing of a Native allotment application.⁷ As will be discussed below, pp. 12-13, IBLA misapplied its own case law by failing to recognize the significance of the factual difference between this case and those on which it relied to reach its decision. The distinction is highly significant, and in my opinion, dispositive.

When the State's selection application was filed *before* the allotment application was filed, the Board's decisions recognize that the State has standing to appeal a decision approving the allotment application. In such a case, the availability of the lands for state selection, and thus the *prima facie* validity of the State selection depends on a factual question of the Native's use and occupancy. *State of Alaska*, 71 IBLA 394 (1983).

Under the Alaska Statehood Act, the State's selection of lands was limited to "vacant, unappropriated, and unreserved" public lands. Alaska Statehood Act, Pub. L. No. 85-508, § 6, 72 Stat. 339 (1958). If

⁵ALSC does not concede that the State should have been granted intervenor status in the proceedings before the ALJ.

⁶I agree with *Williams*' reply brief to IBLA when it asserts that "the issue is not whether the State has the right to submit factual evidence to the BLM or to an administrative law judge prior to a determination having been made with respect to the validity of a Native allotment claim, but rather that determination having been made in the allottee's favor, the question is whether the State has a sufficient interest in the land so as to have standing under the applicable regulations and caselaw to challenge that determination [on appeal]." Reply Brief, *supra* at 9.

⁷In its Brief, the State cited *State of Alaska*, 85 IBLA 196 (1985), and *State of Alaska*, 41 IBLA 315 (1979). In each case, the State's selection application preceded the Native's allotment application.

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the lands have previously been segregated or withdrawn, they are no longer available, and the State's selection is invalid.

In a Native allotment case, lands may become segregated in one of two ways: (1) commencement of Native use and occupancy sufficient to qualify for a Native allotment, or (2) filing of a Native allotment application.

If either of the above two means of segregation *precedes* the State's filing of a selection, the land is unavailable and the State's selection must be rejected. However, in the first case, until the Allotment application is adjudicated, it is not clear whether the lands are available for State selection. In such a case the State does have standing to contest the allotment application on the merits, because the State's own interest and the validity of its selection depends on the decision on the merits whether the allotment applicant's alleged use and occupancy of the lands was sufficient to segregate them and thus preclude State selection. The IBLA relied on cases falling into this category in deciding that the State had standing in the present case.

In both *State of Alaska*, 85 IBLA 196 (1985), and *State of Alaska*, 41 IBLA 351 (1979), the State's standing was upheld to appeal and challenge the approval of a Native allotment application. In both cases, however, the State's selection applications *preceded* the allotment applications, and were rejected by BLM. In *State of Alaska*, 41 IBLA 315 (1979), for example, the State's selection application *post-dated* alleged Native use and occupancy, but *pre-dated* the Native allotment applications. Therefore, the one potential act that could have segregated the land and precluded the State's selection was the Native applicant's actual use and occupancy. Whether the State selection applications should be rejected depended on resolution of the factual issue concerning Native use and occupancy, which was relevant *both* to the availability of the lands for State selection and to the merits of the Native allotment claim. Because the validity of the selections turned precisely on the factual determination whether the Native alleged use and occupancy was sufficient to segregate the lands from selection, the Board upheld the State's standing to appeal.

On the other hand, when an allotment application is filed *before* the State's selection, it is not the Native applicant's alleged use and occupancy that will determine the validity or invalidity of the State's selection, but rather the mere filing of an acceptable allotment application. The *George Williams* case falls within this second category, and the differing implications for standing are significant and dispositive.

Thus, to the extent the State's general purposes grant selection overlapped Williams' prior-filed allotment claim, it was invalid *per se* and created no legally cognizable interest in the State. In this respect,

I agree with the brief filed by BLM in this case in 1985, addressing this issue:

The Native allotment application of George Williams was filed prior to the State's selection *and as a matter of law segregated the land from State selection. State of Alaska*, 71 IBLA 394 (1983); *also see, State of Alaska, Matrona Johnson*, 71 IBLA 63, 65, 66 (1983) and 43 CFR §§ 2091.2-1 and 2561.1(e).⁸ This segregative effect attached even if the prior application were subsequently found invalid. *John C. and Martha W. Thomas (On Reconsideration)*, 59 IBLA 364, 367 (1981). Since, as a matter of record and of law, the State's selection was never valid, it cannot be considered valid for purposes of section 905(a)(4) [requiring "valid" State selection by the State of Alaska to preclude legislative approval under ANILCA].

Answer of BLM, at 9, *Williams*, IBLA 85-541 (Aug. 5, 1985), attached as Appellee's Attachment C, Reply Brief.⁹ *Cf. Andrew Petla*, 43 IBLA 186 (1979) (State's prior selection segregates the land and thus precludes Native allotment claim based upon use and occupancy alleged to have commenced after State selection).

The Board incorrectly suggested in its January 6, 1992, order than only a "valid Native allotment application validly segregates land from subsequent selection by the State," thus suggesting that the State's interest depends upon whether the allotment claim was valid on the merits. But that is not what *State of Alaska*, 71 IBLA 394 (1983), held. The above-quoted brief of BLM correctly stated IBLA's case law establishing that the application itself segregates the land, whether the claim ultimately is deemed valid or invalid on the merits.

In this type of case, where the allotment application *precedes* the State's selection, the only factual issue that the State has standing to appeal, in an appropriate case, is whether an allotment application has in fact been filed, effectuating the segregation of the land. It was not disputed before IBLA that the State's grant selection was filed after Williams filed his allotment application, or that Williams' application was not acceptable for purposes of segregating the lands described.¹⁰ As such, the cases recognizing the State's standing to appeal Native

⁸ 43 CFR 2561(e) provides: "The filing of an acceptable application for a Native allotment will segregate the lands. Thereafter, subsequent conflicting applications for such lands shall be rejected, except when the conflicting application is made for the conveyance of lands pursuant to any provision of the Alaska Native Claims Settlement Act (43 U.S.C. 1601 *et seq.*)." The reference to an "acceptable" application refers to an application which on its face appears acceptable, and does not refer to the underlying validity of the claim on the merits. *State of Alaska*, 71 IBLA 394, 396 (1983).

⁹ I agree with the IBLA, *George Williams*, IBLA 90-379, slip. op. at 4, that a State selection application encompassing land segregated from State selection is not "automatically void" in the sense that until a final decision is made that the lands are indeed segregated (e.g., by virtue of the previous filing of an acceptable allotment application), the State has at least a "color or claim of right" sufficient to confer standing to adjudicate that issue. In the present case, on Feb. 5, 1981, BLM tentatively approved the State's selection for lands surrounding Williams' allotment claim, but specifically excluded the lands subject to Williams' allotment application from the tentative approval. Certainly if the State disputed BLM's position that the allotment application was acceptable and segregated the lands as a matter of law, it could have appealed the 1981 decision's partial denial of tentative approval to the State's selection to the extent of the lands described in Williams' application. *See State of Alaska*, 71 IBLA 394 (1983) (implicitly recognizing State's standing to appeal when BLM rejected a temporary use permit application based on segregative effect of Native allotment application).

¹⁰ As stated in fn. 9, had the State intended to contest the acceptability of the Williams' application, it could have challenged BLM's 1981 tentative approval of the State selection, which explicitly excluded the lands described in Williams' application. Further, as I have noted above in Part IV.C., the State had no cognizable interest simply by virtue of its ANILCA protest that ultimately resulted in the ALJ's 1990 decision. The State cannot, by virtue of filing its appeal, accrue to itself a cognizable legal interest to support standing to appeal.

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allotment approvals were not applicable to the facts of the *Williams* case, and were improperly relied upon by IBLA.¹¹

E. State's ANILCA § 906(e) Top Filing

In addition to concluding that the State's 1965 selection application gave it standing to appeal the ALJ's approval of Williams' allotment, IBLA in a footnote also concluded that the State's ANILCA top filing for the subject land conferred it with standing. Section 906(e) of ANILCA, 43 U.S.C. § 1635(e), permits the State to file a "future selection application" for lands that are not, on the date of such application, available within the meaning of the Statehood Act. Section 906(e) expressly provides, however, that the top-filed future selection becomes "effective" when the lands included within the application become available. Contrary to the Board's conclusion, I do not believe that this privilege afforded to the State by Congress vests in the State a "legally cognizable interest" sufficient to confer it with standing to challenge on the merits each and every pending Native allotment application that is within the areas encompassed by top-filed selections.

Even though the State may ultimately obtain the lands if an allotment is adjudicated as invalid, the mere privilege of top-filing vests in the State no actual, present, legally cognizable interest in the land and at best creates a speculative interest too tenuous to confer standing. Furthermore, section 906(e) also expressly provides that selection applications previously filed may be refiled under the "top filing" provisions, but that "no such refiling shall prejudice any claim of validity which may be asserted regarding the original filing of such application." Although not dispositive, this provision is further evidence that Congress did not intend that section 906(e) would confer a present competing and legally cognizable interest in the lands covered by the future selection application, or such an interest in the disposition of a Native allotment claim covering such lands. Instead, it merely permitted the State to file a selection application even though the lands were not available.

I also disagree with the Board's reliance on *Koniag, Inc. v. Andrus*, 580 F.2d 601 (D.C. Cir. 1978), as further support for its conclusion that the State has standing in the present case. In *Koniag*, the court concluded that the Secretary's broad interpretation of this Department's standing criteria was not clearly erroneous. In that case, the Secretary had concluded that the State had standing to challenge a determination by BIA that certain Native villages were eligible to form Native Village

¹¹The State also cited *Pedro Bay Corp.*, 78 IBLA 196 (1984), to support its standing argument. In that case, the Board upheld the standing of the Pedro Bay (Native) Corp. to challenge BLM's approval of a Native Allotment application. However, the allotment application, as amended subsequent to an interim conveyance to the Corp., covered lands encompassed within the interim conveyance. The Corp. had constructed a building on the lands and had filed a protest pursuant to ANILCA sec. 905(a)(5)(A). The specific facts of that case, and the special selection rights afforded ANCSA Native corporations distinguish it from the *Williams* case.

Corporations under ANCSA. Even though the State's interest was speculative, the court upheld the Secretary's conclusion that the interest was sufficient to confer interests set up by ANCSA and the Statehood Act.

My conclusion concerning the *Williams* case is not inconsistent with the Secretary's decision in *Koniag*. In *Koniag*, BIA's determination, pursuant to ANCSA, concerning whether a Native village was eligible to form a Village Corporation, had far-reaching consequences that could interfere in a general way with the State's statutory rights to select available lands under the Statehood Act.¹² By recognizing a village as eligible, BIA essentially determined that the village could obtain the benefits of ANCSA, which in certain significant respects had priority over the selection rights of the State, even though ANCSA post-dated the Statehood Act. ANCSA, of course, settled Native aboriginal claims which, if proven, would have pre-dated and arguably would have taken precedence over rights granted to the State in the Statehood Act. In this respect, BIA's determination concerning village eligibility is more analogous to the case in which it is an allotment applicant's alleged use and occupancy that segregates the land from State selection, rather than the present case in which *both* the application and the alleged use and occupancy pre-date State selection.

V. Conclusion

Based on the above considerations, I have concluded that the IBLA erred in deciding that the State has standing to appeal the ALJ's decision in this case. The adjudication of this case came before the Department in the form of a Government contest, prompted by the State's ANILCA protest. By recognizing the State's standing to challenge the Williams' claim on appeal, IBLA essentially allowed the State to bootstrap an ANILCA protest, which IBLA correctly recognized as insufficient for standing, onto an attempt to resurrect at this late date its invalid 1965 selection. In my view, the State has not, under the specific circumstances of this case, alleged a legally cognizable interest sufficient to confer standing. Furthermore, I am not convinced that the State's top-filed future selection application (even if properly considered by IBLA) confers upon it an interest sufficient to permit it to appeal the approval of Williams' allotment.

I recommend that you assume jurisdiction, reverse IBLA's order to the extent inconsistent with this memorandum, and dismiss the appeal for lack of standing, so that BLM may proceed in accordance with the ALJ's decision.

MARTIN J. SUUBERG
Deputy Solicitor

¹² As noted by the court, depending upon their population, eligible Native villages could select between 69,120 and 161,280 acres from the public lands within their vicinity. *Koniag*, 580 F.2d at 604; see *id.* at 607 (describing competing interests of State and Native corporations to establish the existence of eligible Native villages), and 608 n.5.

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SOUTHERN UTAH WILDERNESS ALLIANCE *Et Al.*

125 IBLA 175

Decided February 5, 1993

Appeal from a decision of the Richfield District Manager, Bureau of Land Management, approving a mining plan of operations. UT-050-89-075.

Reversed and remanded.

1. Federal Land Policy and Management Act of 1976: Plan of Operations—Federal Land Policy and Management Act of 1976: Wilderness

In order to qualify under the “grandfathered uses” exception to the non-impairment standard applicable to lands within wilderness study areas, the use in question must have been in existence either on Oct. 21, 1976, or temporarily suspended on that date, and must have continued thereafter following the logical pace and progression of development.

APPEARANCES: Scott Groene, Esq., Salt Lake City, Utah, for the Southern Utah Wilderness Alliance; Gary Macfarlane, Conservation Director, Utah Wilderness Association; David K. Grayson, Esq., Office of the Regional Solicitor, Salt Lake City, Utah, for the Bureau of Land Management; Gregory Hunt, *pro se.*

OPINION BY ADMINISTRATIVE JUDGE BURSKI

INTERIOR BOARD OF LAND APPEALS

Southern Utah Wilderness Alliance (SUWA) and the Utah Wilderness Ass’n (UWA) have appealed from a decision of the Richfield District Office, Bureau of Land Management (BLM), dated July 3, 1989, approving a mining plan of operations on certain mining claims located in secs. 10, 11, and 14, T. 32 S., R. 10 E., Salt Lake Meridian, within the Mount Pennell Wilderness Study Area (WSA), to permit the construction of road extensions within the claims. For reasons set forth below, we reverse this decision and remand the matter for further consideration.

On February 8, 1989, the Estate of Kay L. Hunt, dba, Hunt Mining (Hunt), filed a mining plan of operations for various mining claims in the “Pennell-Wolverton” group of 38 mining claims, some of which are within and some of which are outside of the boundaries of the WSA, proposing to construct approximately 2 miles of road extensions for the purpose of intersecting mineralized trends and to gain access to old portals existing on the claims. These road extensions would emanate outward from an existing cherrystemmed road which runs parallel to Straight Creek across secs. 10 and 11 leading to a communications site. These new roads were to be constructed by a bulldozer, supplemented by blasting as necessary. An undetermined number of drill holes would

be drilled along the roadways at intersections with veins and old workings. Included with the plan of operations was a summary of mining activities on the claims covering the period from 1956 through 1977.

Inasmuch as some of these claims were located within the Mount Pennell WSA, BLM prepared an Environmental Assessment (EA) of the impacts of the proposed activities. The EA noted that, as proposed, all of the activities would occur on claims within the WSA. The EA further noted that, while air quality would be adversely affected during road building and drilling, these impacts would be both negligible and temporary. With respect to the impacts to wilderness characteristics, however, the EA found that the impacts would not be temporary and that the proposed action would "constrain the Secretary's recommendation with respect to the area's suitability or non-suitability for preservation as wilderness" (EA at 13). Thus, the EA effectively found that the proposed action would violate the non-impairment standard generally applicable within WSAs. The EA concluded, nevertheless, that the activities could be allowed because the activities proposed were "grandfathered uses" within the scope of section 603 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1782 (1988).¹ Pursuant to this EA, the Acting Area Manager decided to approve the plan of operations on June 2, 1989, which decision was approved by the Acting District Manager on July 3, 1989.

On the same date that the Acting District Manager approved the plan of operations, both SUWA and UWA filed objections to the proposed action. Both groups objected to the finding that the proposed road extensions were "grandfathered uses," as the EA concluded. Additionally, UWA challenged the failure of BLM to issue an Environmental Impact Statement (EIS), as well as the failure to consider other, non-impairing alternatives, including the no action alternative. SUWA also took issue with the failure of BLM to determine whether or not each of the claims was supported by a discovery of a valuable mineral deposit and further argued that BLM should, in any event, require the posting of an adequate bond to assure reclamation. Following receipt of the decision of the Acting District Manager, SUWA filed a notice of appeal on July 11, 1989, from the approval of the plan of operations. By letter dated July 12, 1989, the District Office informed Hunt that, pursuant to 43 CFR 4.21(a), approval of the plan of operations was suspended during the pendency of the appeal. On July 27, 1989, UWA also filed a notice of appeal from the decision approving the plan of operations.

On appeal, appellants reiterate the arguments originally submitted in response to the proposed approval of the plan of operations. In answer, BLM contended that, since BLM found, correctly, that the

¹ It is important to note that, because of its finding that the activities proposed constituted "grandfathered uses," the EA expressly declined to consider a no-action alternative and two other alternatives (track-mounted drill rigs and staged exploration). See EA 2-3.

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extension of the roads contemplated by the plan of operations constituted "grandfathered uses," the fact that the extension of the roads resulted in violation of the non-impairment standard was irrelevant because "grandfathered uses" were permitted even where such uses impaired the land's suitability for inclusion in the wilderness system. Further, BLM argued that there was no requirement that it perform a validity examination in order to approve a plan of operations since, absent an application for patent or an independent determination by BLM that it wishes to challenge the validity of the claim, "the existence of the discovery will be assumed upon the filing of the claim and the continuation of the filing of appropriate assessment work" (Answer at 4). BLM also argued that, while it had concluded that the activities would impair the wilderness characteristics of the area, it had also properly concluded that such impairment would not constitute a significant impact on the quality of the human environment and, therefore, no EIS was needed.

As an initial matter, it is important to note that approval of the plan of operations was *not* premised on a finding that Hunt possessed valid existing rights within the meaning of section 701(h) of FLPMA, 90 Stat. 2786 (1976). Thus, a memorandum from Francis Rakow, a geologist with the Henry Mountain Resource Area (HMRA), to the Acting Area Manager, HMRA, dated March 17, 1989, noted that additional information would be needed in order to determine whether the claims or any of them were supported by a discovery. The memorandum explained that:

The information needed includes a base-map with locations of drill holes and assay results pinpointed. This information has been requested from the claimant and has not yet been received. Until we have this data I do not think that we can determine if there are valid existing rights on this claim group.

Not only was such information not submitted, but, in a subsequent memorandum to the State Director from the Acting State Director, Division of Renewable Resources, the Acting State Director noted that:

The BLM minerals people are unwilling to undertake an official validity examination, citing that it would be too much work and take too much time. Yet we think that a formal validity determination will be the only way to establish a position where we can rationally and legally defend ourselves.

BLM ultimately determined that it was unnecessary to resolve questions concerning the existence of valid existing rights because of its conclusion that the uses contemplated in the plan of operation were "grandfathered uses" within the scope of section 603 of FLPMA, 43 U.S.C. § 1782 (1988), and thus permissible even though they would impair the wilderness characteristics of lands within the WSA. It is, therefore, the interpretation of this concept which is central to resolution of the instant appeal.

[1] In adopting section 603 of FLPMA, 43 U.S.C. § 1782 (1988), Congress directed the Department to manage land included within

WSAs “so as not to impair the suitability of such areas for preservation as wilderness, *subject, however, to the continuation of existing mining and grazing uses and mineral leasing in the manner and degree in which the same was being conducted on October 21, 1976 * * **” In defining the scope of the underlined proviso, which is generally described as the “grandfathered uses” provision, the Department provided that:

Manner and degree means that existing operations will be defined geographically by the area of *active development* and the logical adjacent (not necessarily contiguous) *continuation of the existing activity*, and not necessarily by the boundary of a particular claim or lease * * *. [A]n existing activity, even if impairing, *may continue to be expanded in an area or progress to the next stage of development* so long as the additional impacts are not significantly different from those caused by the existing activity. In determining the manner and degree of existing operations, a rule of reason will be employed. [Italics supplied.]

43 CFR 3802.0-5(j).

In our recent decision in *Richard C. Behnke*, 122 IBLA 131 (1992), we had occasion to examine some of the parameters of the “grandfathered uses” exception to the non-impairment standard. In that case, we noted that, while the critical date is October 21, 1976, the Interim Management Policy and Guidelines for Land Under Wilderness Review (IMP), 44 FR 72014 (Dec. 12, 1979), “also permits advertence to activities occurring during the preceding year which were ‘temporarily inactive’ at that date (see IMP I.B.6.b., 44 FR 72019) and which subsequently recommenced and continued to the present following the ‘logical pace and progression of development’ (see IMP I.B.6.c, 44 FR 72019).” *Id.* at 136-37.²

While the *Behnke* case involved the question of whether a use was existing as of the critical date, this case presents a different issue. Here, appellants generally admit that some road building activities may have been occurring on the critical date, but they argue that none of these activities were occurring on any of the claims in the WSA since, by definition, WSAs were required to be roadless³ and all intruding roads were cherrystemmed out of a WSA. Further, they contend that any activity that was on-going in 1976 ceased in 1977 and had not been recommenced until the present time. Therefore, they argue, expansion of a road into a WSA could not constitute a continuation of the “logical pace and progression of development” as

²The citations in this decision to the IMP will be to the version appearing in BLM Handbook, H-8550-1. As we have noted, following the initial promulgation of the IMP in 1979 (see 44 FR 72014-34 (Dec. 12, 1979)), it was subsequently amended in 1983 (see 48 FR 31854-56 (July 12, 1983)). Thereafter, in 1987, BLM published the IMP in Handbook format, incorporating the 1983 revisions, and made it a permanent part of the BLM directives management system. See *The Wilderness Society*, 106 IBLA 46, 54-55, n.6 (1988).

³Within the context of the wilderness inventory, the term “roadless” was defined as referring to the absence of roads which have been improved and maintained by mechanical means to ensure relatively regular and continuous use. See, e.g., *Phelps Dodge Corp.*, 76 IBLA 31 (1983); *C & K Petroleum Co.*, 59 IBLA 301 (1981). While the IMP, itself, recognizes that rights-of-ways may be permitted within WSAs to the extent that they may be conformed to the non-impairment criteria (see IMP at III.C.3.), it is clear that, to the extent that the right-of-way qualifies as a road within the meaning of the above definition, the construction of the road necessarily constitutes impairment of the WSA and can only be permitted either as an incident of a valid existing right or under the “grandfathered uses” exception to the non-impairment standard.

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provided for under the "grandfathered uses" exception to the non-impairment standard.⁴

The record, as it presently exists, supports appellants' factual contentions. Thus, while Hunt provided a detailed description of activities on the claims in question, this narrative has no entry beyond 1977. Moreover, the field examinations conducted by BLM personnel tend to corroborate appellants' assertions that no road building or similar activities occurred between 1977 and the present. Thus, in a memorandum to the file dated June 29, 1989, Rakow noted that he had told a representative of SUWA that "the disturbances that [were] present dated from the early part of the century through 1978 and that the majority or northern drill trails would originate on disturbed areas dating from 68 to 73 or so." Examination of the case file makes it clear that BLM personnel proceeded on the assumption that, because road-building activities on some of the claims were occurring the critical date, all such activities with respect to such claims constituted "grandfathered uses." This, however, is not the case.

As the court noted in *Rocky Mountain Oil & Gas Ass'n v. Watt*, 696 F.2d 734, 749 (10th Cir. 1982), "The purpose of the WSA management scheme is to maintain the status quo existing October 21, 1976, so that lands then suitable for wilderness consideration will not be rendered unfit for such consideration before the Secretary makes a recommendation and the Congress acts on the recommendation under section 603(a) and (b)." Yet, at the same time, Congress was concerned that then existing uses not be barred during the period of wilderness review. This was a substantial concern since *all* BLM land was subject to initial inventory and a total ban on any impairing activity which provided no exception for existing uses would have been wildly disruptive to a broad variety of endeavors. Maintenance of existing uses would, indeed, generally not be seen as inimical to wilderness preservation since, to the extent that such activities were of a nature so as to render the land unsuitable for wilderness preservation they would have presumably already made the land on which they were occurring unfit for inclusion in the wilderness system, while to the extent that such activities did not adversely impact on wilderness characteristics their continuation "in the same manner and degree" would not normally result in changing the status quo of lands which might then qualify for wilderness preservation.

There were, however, scenarios in which it was possible for on-going activities to adversely affect a parcel of land's suitability for inclusion in the wilderness system subsequent to the critical period even though such activities had no such effect prior to the critical period. This could occur where activities, extant on October 21, 1976, were of such a

⁴The record indicates that Hunt performed some activities prior to receipt of an approved plan of operation which resulted in a charge of trespass. See Memorandum from Deputy State Director, Renewable Resources, to State Director, dated Apr. 13, 1989. Activities conducted in trespass may not, of course, be considered in determining the existence of "grandfathered uses."

nature that their cumulative effect would adversely impact the wilderness characteristics of the lands on which they were occurring even though they continued to be carried out "in the same manner and degree" as was occurring during the critical period. A similar result might occur where the logical progression "in the same manner and degree" of impairing activities would impact additional lands. An example of the former would be the on-going development of a mining claim where continued development on the parcel might result in cumulative effects which would deprive the land of its wilderness characteristics. An example of the latter might be the on-going development of an oil field where full-field development would necessitate the drilling of additional wells on lands not theretofore affected by development activities. It was in consideration of this second possibility that the Department provided that "an existing activity, even if impairing, may continue to be expanded in an area or progress to the next stage of development so long as the additional impacts are not significantly different from those caused by the existing activity." See 43 CFR 3802.0-5(j). The central question in this appeal is, therefore, whether the plan of operations proposed by Hunt involves either the continuation of a formerly non-impairing activity which now, because of cumulative effects, results in impairment of wilderness characteristics or the expansion or logical progression of impairing activities existing on October 21, 1976.

In analyzing this question, it is important to focus on the exact activity to which the "grandfathered uses" exception is being applied. The record is quite clear that a number of the claims within the WSA have been prospected in the past using existing trails without adversely affecting the suitability of the land for inclusion in the wilderness system. There seems to be no question that the continuation of this prospecting "in the same manner and degree" in which it was occurring on October 21, 1976, would not violate the non-impairment injunction. This, however, is not the activity which is being "grandfathered." Rather, it is road construction, an activity which, by its nature, is inimical to WSA status, that is being recognized as a "grandfathered use" by the decision below.

In this sense, road-building activities are unique. Since, by definition, WSAs must be roadless, *all* road construction within a WSA automatically constitutes a violation of the non-impairment standard. Whether such activities may, nevertheless, be permissible is a function of (1) whether or not such road-building activities as were occurring on the critical date can be seen either as a necessary adjunct to other activities occurring during the critical period or as a logical progression of those activities, *and* (2) whether such use had continued in its logical progression since that time. Judged under these standards, we do not believe that the record establishes that road-building activities within the limits of the claims are "grandfathered uses" within the meaning of the regulations.

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First of all, even leaving aside questions as to whether road-building activities were occurring within the critical period,⁵ there is substantial doubt whether these activities could be seen as relating to prospecting of the claims which is the asserted purpose of the instant proposal. The record establishes that the road in question was built for the purpose of gaining access to the top of Bulldog Ridge for communication site purposes. While we do not doubt that the claimants constructed the road extension and that it did have an ancillary benefit to them in providing access to parts of the claims, it also seems relatively clear that the animating purpose in its construction was to provide access to the communication site, notwithstanding Gregory Hunt's assertion that "this road was constructed for mining purposes by mining people and the communications tower was a spin-off" (Letter of Aug. 7, 1980).⁶ To the extent, therefore, that any benefit to claim exploration or development was clearly peripheral, at best, to providing access to the communication site, which access was accomplished upon the completion of the road segment, road-building activities cannot be judged to be a necessary adjunct to other on-going activities occurring during the critical period or as a logical progression of those activities.

Moreover, even assuming *arguendo* that the road building activities occurring during the critical period were part of an on-going exploration of the claims, rather than for the primary purpose of obtaining access to the communications site, the approval of new road construction at the present time could not be justified under the "grandfathered uses" exception because such activities do not represent the "logical pace and progression of development," as required by the IMP. See IMP at I.B.6.c., 44 FR 72019 (Dec. 12, 1979). There is no evidence in the record that, subsequent to construction of the road during the critical period, any other road extensions from the cherrystemmed road were undertaken or proposed to BLM until that contemplated in the plan of operations under review herein. Based on the record before us, the 12-year hiatus between road construction activities simply fails to evince the prerequisite "logical pace and

⁵ Thus, we note that, while the chronology of claim development submitted by Hunt indicates that, during the period from Sept. 1, 1976, to Sept. 1, 1977, they "[b]ulldozed extension from existing road, from mine at head of Straight Creek to top of Bulldog Ridge," this assertion is at odds with a statement in a letter dated Aug. 7, 1980, objecting to WSA status for the area, in which Gregory Hunt declared: "In 1978 my father gave the B.L.M. a document granting an approx. 50 x 150 ft. rectangular surface area for a communications site along Bulldog Ridge on our claims. Our road was then extended to the summit where the communications site now exists." If these road construction activities, as opposed to maintenance of existing roads, did not take place until 1978, they could not be "grandfathered uses" since they would not have occurred during the critical period. However, since the affidavit of labor filed in connection with these claims indicates that the work was, in fact, completed in the 1977 assessment year, we will assume, for purposes of this appeal, that it was conducted during the critical period.

⁶ Thus, the road extension constructed to the top of Bulldog Ridge proceeds away from the bulk of Hunt's claims, proceeding from the mine face located on Mt. Pennell No. 3, trending in a generally westerly direction and passing through the Copper Virgin Nos. 6 and 7, with a slight intrusion into the Mt. Pennell No. 20. In contradistinction, all of Hunt's proposed road-building activities in the plan of operations under review are to the east of the mine face and involve none of the claims crossed by the road to the communications site. There is no indication of a desire by claimants to utilize any access which may have been provided to the western claims for exploration purposes. The dissent, for its part, fails to distinguish between the road to the adit, which was clearly constructed for mining exploration purposes but is *not* qualifying under sec. 603(c) since it was not *being* constructed during the critical period, and the segment from the rock face to the communication site upon which Hunt premises its claim to grandfathered uses.

progression of development" necessary to validate an asserted "grandfathered use." Thus, the allowance of the road construction activities proposed in the plan of operations, as well as the failure of the EA to consider non-impairing alternatives, cannot be justified on the basis of "grandfathered uses" and BLM's decision on this point must be reversed.

We note, however, that Hunt has asserted that its activities could also be allowed in fulfillment of its valid existing rights. In the context of a mining claim, valid existing rights can be said to exist where the mining claim in question was supported by a discovery of a valuable mineral deposit as of the critical date (Oct. 21, 1976), and at the present time. See IMP at I.B.7.a. Even assuming that a mining claim is supported by a discovery, the non-impairment standard applies *unless* application of this standard "would unreasonably interfere with the claimant's rights to use and enjoyment of the claim." *Id.*

The mere fact that the claim was located prior to the critical date does not establish the existence of valid existing rights.⁷ Thus, this Board has expressly held that "it is not unreasonable to require a claimant to make a preliminary showing of facts which support a valid existing right." *Haulah Group*, 60 IBLA 349, 361, 88 I.D. 1113, 1121 (1981). This is in accord with the IMP, which expressly notes that "[b]efore the BLM will grant approval of operations that do not satisfy the nonimpairment criteria, the operator will be required to show evidence of a pre-FLPMA discovery." The IMP continues, "If warranted, BLM may verify data through a field examination and, only if necessary, initiate contest proceedings." IMP at III.J.5.b.

In the instant case, the case file discloses that Hunt has yet to establish to BLM's satisfaction that a discovery exists within the limits of the claims. BLM failed to pursue this question, doubtless owing to its conclusion, reversed herein, that the proposed road construction involved a "grandfathered use." On remand, Hunt should be provided with an opportunity to establish both the existence of a discovery, on each claim which it seeks to sample (see IMP at I.B.7. "a valid existing right is tied to a particular claim"), and that a refusal to permit road construction "would unreasonably interfere with the claimant's rights to use and enjoyment of the claim." If Hunt is unable to establish, to BLM's satisfaction, the existence of a pre-FLPMA discovery on any or all of the claims involved, BLM may offer other, non-impairing, access to the claims which Hunt seeks to sample. Should this prove unacceptable to Hunt, BLM would be required to bring a contest against the claims in accordance with the IMP.

⁷ Any inference in BLM's response that the mere location of a mining claim raises a presumption of validity, vis-a-vis the United States, is plainly wrong. The mere assertion of a claim to land is simply that. In all proceedings brought by the Government challenging the validity of a claim it is the claimant who is the proponent of the rule that the claim is valid and, as such, it is the claimant who must establish the validity of the claim. See, e.g., *Foster v. Seaton*, 271 F.2d 836 (D.C. Cir. 1959); *United States v. Strauss*, 59 I.D. 129 (1945). And, as both this Board and the Federal Courts have consistently held, absent the discovery of a valuable mineral deposit, the mere location of a claim affords no rights as against the United States. T3See, e.g., *Best v. Humboldt Placer Mining Co.*, 371 U.S. 334, 336 (1963); *United States v. White*, 118 IBLA 266, 98 I.D. 129 (1991).

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Insofar as the other issues pressed on appeal are concerned, in light of our resolution of the "grandfathered uses" question and the presently indeterminate status of Hunt's claim that it possesses valid existing rights, we must view these contentions as moot.

The dissent by the Chief Administrative Judge assails the disposition herein on a number of grounds, two of which may deserve a direct response. The dissent argues that the legislative history of section 603 of FLPMA supports its conclusions that once a use has been shown to be in existence during the critical period, it is preserved, unrestricted, throughout the period of review, independent of any showing that evinces the logical pace and progression of development, as mandated by the IMP. The dissent further suggests that the majority's interpretation of section 603 and the IMP somehow infringes upon the "rights" of mining claimants and leaves open the question whether there has been a "taking" of such rights. Both of these assertions are simply wrong.

The basic position of the dissent with reference to the instant appeal is that appellant must be allowed, after a hiatus of all road-building activities over the last 12 years, and *in the absence of any showing, whatsoever, that appellant has made a discovery of a valuable mineral deposit*, to construct new roads into areas not heretofore disturbed by road-building, thereby rendering large areas of a WSA unsuitable for inclusion in the wilderness system and possibly irreparably damaging the suitability of the entire WSA for preservation. The majority, by comparison, holds that, since the road-building activities which are sought to be extended into the WSA have failed to evince the "logical pace and progression of development" as required by the IMP, they may not be allowed, in the absence of a showing that they are necessary to the exercise of valid existing rights. The dissent, relying on its interpretation of section 603 of FLPMA, suggests that the majority position constitutes an "automatic termination" of a grandfathered use in violation of that section. In our view, the dissent has misinterpreted both the legislative history of section 603 and the decision herein.

The legislative history as reviewed in the dissent is flawed by errors of both omission and commission. Thus, the dissent, after first noting that the language of section 603 of FLPMA is based on section 311(c) of H.R. 13777, 94th Cong., 2nd Sess., and quoting language from the legislative history thereof which is scarcely different from the language of the statute, itself, turns to the analogous provision from S. 507, 94th Cong., 1st Sess.⁸ See *Rocky Mountain Oil & Gas Ass'n v. Watt*, *supra*

⁸We would point out, however, that sec. 102 of S. 507, upon which the dissent relies, is *not* the provision in S. 507 which is analogous to either sec. 311(c) of H.R. 13777 or to sec. 603(c) of FLPMA, as ultimately adopted. Sec. 102, as is obvious from a summary perusal of its terms, relates to the period of wilderness inventory, whereas sec. 311(c) of H.R. 13777 and sec. 603 relate to the period of wilderness study and review. These are totally discrete processes. See, e.g., *Union Oil Co. (On Reconsideration)*, 58 IBLA 166, 170 (1981). Since the inventory period has long

Continued

at 747; *Utah v. Andrus*, 486 F. Supp. 995, 1004 (D. Utah 1979). After citing language from S. 507 that “[t]he preparation and maintenance of such inventory or the identification of such areas shall not, of itself, change or prevent change in the management or use of natural resource lands,” the dissent proceeds to quote from the section-by-section analysis as follows:

The purpose of this statement is to *insure that, under no circumstances, will the pattern of uses on the national resource lands be frozen, or will uses be automatically terminated during the preparation of the inventory and the identification of areas possessing wilderness characteristics. Equity demands that activities or uses not be arbitrarily terminated or that the Secretary not be barred from considering and permitting new uses during the lengthy inventory.* [Italics added in dissent].

The dissent, however, fails to include the language from the legislative history of S. 507 which appears immediately following the last quoted sentence:

On the other hand, the “of itself” language is not meant to be license to continue to allow or disallow uses as if no inventory and identification process were being conducted. The Committee fully expects that the Secretary, wherever possible, will make management decisions which will insure that no future use or combination of uses which might be discovered as appropriate in the inventory and identification processes—be they wilderness, grazing, recreation, timbering, etc.—will be foreclosed by any use or combination of uses conducted after enactment of S. 507, but prior to the completion of those processes.

We would suggest that the Congressional direction that this provision not be read as a “license to continue to allow” existing uses where such uses would foreclose “future uses” discovered to be appropriate is totally at odds with the dissent’s implicit assertion that the Congressional desire to protect existing uses from automatically terminating upon the adoption of FLPMA means that such uses can never be terminated.

In any event, one need not make recourse to the complete text of the legislative history to divine that the interpretation espoused in the Chief Administrative Judge’s dissent is unsupportable. An examination of the language which is included, though not emphasized, in the dissent leads to the same conclusion. Thus, the legislative history as quoted by the dissent provides that “[t]he purpose of this statement is to insure that, under no circumstances, will the pattern of uses on the national resource lands be frozen or will uses be automatically terminated during the preparation of the inventory and the identification of areas possessing wilderness characteristics.” The dissent emphasizes the language providing that uses will not be “automatically terminated” and interprets this to mean that uses will

since passed, provisions relating thereto are clearly not relevant to management activities at the present time. The provision of S. 507 which is relevant herein is sec. 103(d) which provides that:

“Areas identified pursuant to section 102 as having wilderness characteristics shall be reviewed within fifteen years of enactment of this Act, pursuant to the procedures set forth in subsections 3(c) and (d) of [the Wilderness Act, 16 U.S.C. § 1131(c) and (d) (1988)]: *Provided, however,* That such review shall not, of itself, either change or prevent change in the management or use of the national resource lands.”

The language of the proviso is, of course, the same as that set forth under sec. 102(a) and the legislative history of sec. 103(d) expressly cross-references the discussion under sec. 102(a) with respect to the interpretation of the proviso.

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“never be terminated.” Not only is this interpretation linguistically flawed, it contradicts the declaration in the same sentence that “under no circumstances, will the pattern of uses on the national resource lands be *frozen*.” Under the dissent’s analysis, past uses are not so much frozen in ice as embedded in concrete.

The legislative history of S. 507 never once states that past uses will not be terminated. On the contrary, it merely provides that the adoption of S. 507 should not be read as “automatically” terminating any use. Nothing in our decision even suggests that any existing use was “automatically” terminated upon the adoption of section 603 of FLPMA. Additionally, while S. 507 provides that uses not be “arbitrarily terminated,” this language clearly recognizes that uses *can* be terminated so long as that action is *not* arbitrary. Requiring that an individual asserting the right to expand an impairing grandfathered use into a WSA not heretofore impacted show that such activities represent the “logical pace and progression of development,” as mandated by the IMP, is *not* arbitrary. On the contrary, it is part and parcel of the Department’s affirmative obligation to manage WSA’s during the period of wilderness review “so as not to impair the suitability of such areas for preservation as wilderness.”

The conclusion is inescapable that there is nothing in the legislative history of either section 103(d) of S. 507 or section 311(c) of H.R. 13777 or section 603(c) of FLPMA which gives even a modicum of support to the dissent’s interpretation that merely because a use happened to exist on the critical date that the land would be forever subject to that use. More importantly, this interpretation cannot be sustained by the plain meaning of section 603(c) of FLPMA. Thus, the critical phrase of the proviso states “subject to the *continuation* of existing mining and grazing uses and mineral leasing in the manner and degree in which the same was being conducted on the date of approval of the Act.” The dissent’s interpretation reads out the word “continuation” and effectively rewrites the proviso to read “subject to existing mining and grazing uses and mineral leasing.” The congressional utilization of the phrase “continuation of existing” uses shows that it was not only the *existence* of the use which gave rise to grandfathered rights but also the *continuation* of that use in the same manner and degree that was protected. And, it is on this concept that the IMP’s “logical pace and progression of development” standard is premised.

The Chief Administrative Judge’s dissent also asserts that “[t]he disposition of this appeal by the majority leaves open the questions of whether Congress in enacting the law (as interpreted by the majority) effected a taking of ‘grandfathered’ uses and whether sufficient administrative due process has been provided to protect these uses.” *Infra* at xxx, n.1. Insofar as the dissent raises the spectre of a “takings” argument, its contention cannot be credited.

The Board has, in the past, used the term "grandfathered rights" as a shorthand abbreviation for the protection afforded by section 603 of FLPMA. And, in the sense that this section does *grant* certain rights to existing users, that terminology is correct. However, to the extent that this section is the sole *source* of claimed rights, it is elementary that the rights granted can be limited and circumscribed in any manner Congress deems appropriate. It is well settled that the mere location of a mining claim, unsupported by the discovery of a valuable mineral deposit, affords the claimant no rights as against the Government. *See, e.g., Cameron v. United States*, 252 U.S. 450, 459 (1920). Thus, absent the existence of valid existing rights, *i.e.*, a discovery, (independently protected by section 701(h) of FLPMA, 90 Stat. 2786 (1976)), there is simply no theoretical basis upon which it could be concluded that any limitation in the protections afforded by section 603 to existing uses could constitute a taking since the only rights which such users possess are those affirmatively granted by this section.

Finally, a word should be said about the dissent's assertion that Hunt was not named by BLM as "an adverse party" in the decision under appeal, has never been made a party to this proceeding, and that, therefore, the decision "should not be binding" on him.

It is true, of course, that BLM did not name Hunt as an adverse party to this proceeding. This, however, is because the July 3, 1989, decision under review was addressed solely to Hunt and approved his plan of operations. Not only did BLM properly view it as unlikely that Hunt would appeal from its favorable decision, it would have been ludicrous for BLM to provide that if he did appeal he should serve himself. When, after having been apprised that the July 3, 1989, decision had issued, SUWA filed a notice of appeal, BLM immediately notified Hunt of this fact. *See* letter dated July 12, 1989. Moreover, SUWA provided Hunt with copies of both its notice of appeal and statement of reasons in support thereof. Having been apprised of the appeal and having been duly served with copies of SUWA's statement of reasons, Hunt would be bound by our decision even if he had not actively participated. *See Western Slope Gas Co. (On Reconsideration)*, 43 IBLA 259, 262-62 (1979).

The truth of the matter, however, is that the dissent's assertion that Hunt has never been made a party to this proceeding ignores the record in this case. Not only has Hunt frequently requested status reports on this appeal during the long period of its consideration, he has also submitted exhibits to support his claim to grandfathered "rights." *See* filing of June 16, 1991. The dissent's assertion that Hunt is *not* a party to this appeal is simply wrong.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision

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appealed from is reversed and the case file is remanded for further action not inconsistent with this opinion.

JAMES L. BURSKI
Administrative Judge

WE CONCUR:

BRUCE R. HARRIS
Deputy Chief Administrative Judge

GAIL M. FRAZIER
Administrative Judge

C. RANDALL GRANT, JR.
Administrative Judge

DAVID L. HUGHES
Administrative Judge

WILL A. IRWIN
Administrative Judge

CHIEF ADMINISTRATIVE JUDGE BYRNES DISSENTING:

I have serious misgivings about the majority opinion in this matter. For the reasons stated below, I believe that the majority opinion creates a new policy that is both contrary to congressional intent and founded on no authority hitherto enunciated by BLM. It is my view that the Board's function is to determine whether or not established policy is being followed within the Department. It is not our function to reformulate that policy.

My initial objection is to the majority finding that "the road in question was built for the purpose of gaining access to * * * [the] communication site * **." The record establishes no such thing. To the extent the record establishes a purpose for the road, the BLM field reports verify that the road was built for mining purposes *and* that the construction met the time requirement to be a "grandfathered use." See *Staff Report: Grandfathered Uses on the Mt. Pennell-Wolverton Claim Group*, May 19, 1989, by Francis Rakow, Geologist.

If it were so apparent from the record that the road was primarily for a purpose which would not be a "grandfathered use," there is no basis for the majority to "assume for purposes of this appeal, that [the use] was conducted during the critical period." If there is any doubt as to the use or time of construction, the matter should be referred for a hearing or, at the very least, set aside and remanded to BLM.

The majority must also "assume" that the road must have been used for mining purposes during the critical period, *i.e.*, around October 21, 1976, because there is no indication in the record as to how the road was used since the critical date. The majority infers from this absence

of information that the road, and presumably the claims, have been dormant for the last "12 years." I conclude that there is an absence of such information because neither BLM, nor the claimholder, nor the appellant had any way of knowing it would have to show compliance with the heretofore unknown standard enunciated today by the majority. Neither does the majority provide BLM or the appellant any opportunity to submit such evidence as may be necessary to meet its new standard. The novelty of the majority's standard explains why BLM has never considered such evidence in all the years that the majority claims this requirement was contained in the Interim Management Policy (IMP), 44 FR 72014 (Dec. 12, 1979), *as amended* at 48 FR 31854 (July 12, 1983), regulations, and statute, and why BLM has never informed holders of "grandfathered" uses that their failure to "use" these rights will cause them to be lost. I am concerned about the effect on the rights of these individuals and the potential liability of BLM.¹

The majority's conclusion that "in order to qualify as a 'grandfathered use' that use must have continued thereafter following the logical pace and progression of development," can only be justified as "implicit" in the statute. I disagree.

The language of the statute is clear.

During the period of review of such areas and until Congress has determined otherwise, the Secretary shall continue to manage such lands * * * so as not to impair the suitability of such areas for preservation as wilderness, subject, however, to the continuation of existing mining and grazing uses and mineral leasing in the manner and degree in which the same was being conducted on October 21, 1976 * * *.

43 U.S.C. § 1782(c) (1988). This section was added in the House-Senate conference committee and comes from the original House bill.

The original House committee section-by-section analysis states that:

The Committee expects the Secretary to establish priorities

in a manner which will expedite the review process *and which will cause minimum interference with existing multiple use management of the public lands.* * * *

* * * While tracts are under review, they are to be managed in a manner to preserve their wilderness character, *subject to continuation of existing grazing and mineral uses and appropriation under the mining laws.* The Secretary will continue to have authority to prevent unnecessary and undue degradation of the lands, including installation of minimum improvements, such as wildlife habitat and livestock control improvements, where needed for protection or maintenance of the lands and their resources and *for continuation of authorized uses.* [Italics added.]

(H.R. Rep. No. 1163, 94th Cong., 2d Sess. 17 (1976), *reprinted in* Committee on Energy and Natural Resources, Legislative History of the Federal Land Policy and Management Act of 1976 (Public Law 94-579), at 447 (1978)). The concept of "grandfathering" existing uses while public lands were being reviewed for wilderness designation also has a legislative history in the Senate bill.

¹ The disposition of this appeal by the majority leaves open the questions whether Congress in enacting the law (as interpreted by the majority) effected a taking of "grandfathered uses" and whether sufficient administrative due process has been provided to protect these uses.

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The language of the original wilderness inventory directive contained in section 102 of S. 507, states: "The preparation and maintenance of such inventory or the identification of such areas shall not, of itself, change or prevent change in the management or use of national resource lands." (S. Rep. No. 583, 94th Cong., 1st Sess. 4 (1975), *reprinted in* Committee on Energy and Natural Resources, Legislative History of the Federal Land Policy and Management Act of 1976 (Public Law 94-579), at 69 (1978)).

The section-by-section analysis that accompanied the bill as it was reported out of the Senate Committee states that:

Section 102 also contains a statement that the "preparation and maintenance of such inventory or the identification of such areas [possessing wilderness characteristics] shall not, of itself, change or prevent change in the management or use of the national resource lands." The purpose of this statement is to *insure that, under no circumstances, will the pattern of uses on the national resource lands be frozen, or will uses be automatically terminated* during the preparation of the inventory and the identification of areas possessing wilderness characteristics. *Equity demands that activities of users not be arbitrarily terminated or that the Secretary not be barred from considering and permitting new uses during the lengthy inventory and identification processes.* [Italics added, brackets in original.]

Id. at 44, reprinted at 109. The obvious congressional intent was to have no automatic termination of uses or activities taking place on the date of passage of the Act, through the inventory and wilderness evaluation process, until such time as Congress made a decision regarding the status of the land. This approach not only diffused opposition to the bills, but it also postponed any legal challenges to the statute until it could be rationally considered in the context of a specific wilderness designation. The logical conclusion is that the intent of these sections carried over to the section that ultimately emanated from the conference committee.

The majority decision leads to automatic termination of "grandfathered uses" without notice or due process. It is *not* logical to conclude, as does the majority, that Congress intended "grandfathered uses" would terminate at some undefined point in time during the review process. Inferring this intent has the anomalous effect of requiring holders of mining claims and grazing rights to continue and expand their uses of the land in the very potential wilderness areas that were to be reviewed. Additionally, since the process of reviewing and recommending lands for wilderness status was to have been completed within a fixed period of time, why would Congress have intended an existing use to terminate when making explicit provisions for its continuation?

Nor can the majority find any solace in either the regulations or the IMP. In defining "manner and degree" from the statute, BLM provided:

Manner and degree means that existing operations will be defined geographically by the area of active development and the logical adjacent (not necessarily contiguous) continuation of the existing activity, and not necessarily by the boundary of a particular, [sic] claim or lease, and in some cases a change in the kind of activity if the impacts

from the continuation and change of activity are not of a significantly different kind than the existing impacts. * * * *It is the actual use of the area, and not the existence of an entitlement for use, which is the controlling factor. In other words, an existing activity, even if impairing, may continue to be expanded in an area or progress to the next stage of development so long as the additional impacts are not significantly different from those caused by the existing activity. In determining the manner and degree of existing operations, a rule of reason will be employed. [Italics added.]*

43 CFR 3802.0-5(j).

This regulation further articulates the clear wording of the statute and the congressional intent to provide for the continuation *and expansion of any existing use, i.e.,* a use existing on the date of passage of the statute. The proposed road building is just such a use. There is no mention of the expiration of such a use in the regulation. Nor is there a requirement in the regulation for continuous and uninterrupted development of a "grandfathered use." There is no mention in the regulation of a penalty in the event of failure to undertake the use for any period of time. The only authority for such a restriction is invented by the majority opinion, an opinion issued some 16 years after the passage of the statute. This is clearly evident from the absence of a single citation of authority in the majority opinion on this point.

The majority makes much of the IMP. Suffice it to say, the entire intent of the IMP is *to be inclusive of existing uses prior to the date of the passage of FLPMA.* There is no mention of either expiration or automatic voiding of existing uses. The only way one is able to reach the conclusion desired by the majority is to read the IMP language allowing continuance of uses that were "temporarily suspended" on the date of passage of the Act as exclusive of activities that were occurring, but have been dormant for an undetermined period of time. This turns logic on its head. The fact BLM attempts to include dormant activities, *i.e.,* to bring these uses under the "grandfathered" provisions, does not mean the Bureau also intended to cause the same activities to expire after the passage of the Act, by the application of some unstated, unilaterally applied standard.

I, additionally find serious fault with the majority's failure to recognize that the party most adversely affected by this decision, the owner of the mining claims, was never made a party to this proceeding. While he did initially submit a limited amount of information regarding his claims, BLM's failure to name him as an adverse party in its decision is a substantial failing by the Department. *Beard Oil Co.*, 105 IBLA 285, 287 (1988). Not being a party to this action, the decision, including the finding of "abandonment," should not be binding on the claimant.²

²The obvious lack of concern regarding the fact that the claimant is not a party to the decision declaring his use "abandoned" emphasizes the majority's cavalier attitude about the onus now placed upon the user. From now on the holder of a grandfathered use must press forward with the use without regard to what one might believe to be a logical development plan. To do otherwise may well result in an unilateral finding that the user has abandoned the use because a record, as it may later exist, can be interpreted in a manner which would appear to indicate abandonment, without any suggestion that the user should be *given notice* and afforded an opportunity to show otherwise *before* the abandonment determination. This is exactly the type of automatic termination of existing uses that Congress was attempting to avoid.

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The majority also misappropriates the burden of proof in this appeal. This is why they undertake such a strained reading of the statute to achieve their stated results. My review of the record discloses that the appellants have not met their burden of proof in showing that the BLM decision was incorrect. Indeed, the majority admits that "appellants generally admit that some roadbuilding activities may have been occurring on the critical date * * *." While the appellants contend that none of these activities were occurring within the wilderness study area, they present no evidence to substantiate the allegation. BLM's analysis of the record and the on-the-ground examination rebuts these contentions.

Finally, the majority opinion will require BLM to make findings regarding "grandfathered uses" applying a vague standard, or in the alternative make a finding of valid existing rights. This approach is unduly burdensome and wasteful of Departmental resources. BLM may wish to amend its IMP to avoid such results.

Since neither the facts of this appeal nor the law support reversal of BLM's decision, I respectfully dissent.

JAMES L. BYRNES
Chief Administrative Judge

JUDGE ARNESS DISSENTING:

I agree generally with the conclusion by the Chief Administrative Judge that the record before us adequately supports the finding by BLM that the Hunt mining plan of operations should be approved. This finding rests principally on the report by BLM staff geologist Francis Rakow, who found that the uses proposed by the Hunt plan "are existing uses on the claim group. They represent exactly the same types of physical and aesthetic impacts occurring on the area at the time of enactment of FLPMA and are a geographic extension of uses existing on that date. As such, the proposed activities are grandfathered" (Report dated May 19, 1989, at 2).

The majority opinion finds that a perceived 12-year gap in road construction on the claims so effectively undermines this finding that it cannot stand, because "the twelve-year hiatus between road construction activities simply fails to evince the prerequisite 'logical pace and development' necessary to validate an asserted 'grandfathered use'" (Draft at 12). The reason why this period is chosen to bring into operation a presumption of the sort described is not stated or explained. The record before us indicates that there was road building on the claims in 1978 and again in 1988. What happened in the interval is not known. Appellants have offered no evidence to show that there was no road building activity on the claims in that interval: it is simply not known whether there was or not. The majority avoids consideration of the facts of record by resorting to a presumption that a perceived "hiatus" in mining activity had the effect

of ending that activity. The issue before us therefore becomes whether such a presumption has any foundation in law or fact and whether it should be applied in the instant case.

The activity before us for review concerns the development of mining claims. There is evidence that development was sporadic but continuous for many years, was carried on by different miners and groups of miners, and that the Hunts were interested in the work since the late 1950's, long before either the National Environmental Protection Act or FLPMA were enacted. On the record of this development, which included mineral samples produced from the claims, BLM evaluated this case using evidence produced by staff study and volunteered by the Hunts to conclude that the Hunts had acquired a "grandfathered use" so that planned road construction to permit continued exploration should be allowed.

Appellants have not shown that this finding was made in error. They have offered no proof whatever concerning the "logical pace and development" needed to establish the existence of a grandfathered right. On the record before us there is nothing to indicate that BLM erred when it found that the Hunts had the right to propose the plan of operations that they did, considering their prior activity on their claims in the WSA. The record before us supports the finding made by BLM staff that the activity proposed in the mining plan was a "grandfathered use." The contrary conclusion by the majority is founded on an ad hoc presumption that lacks a foundation in fact.

In most cases before us where there is a challenge to a finding by BLM or by the Secretary's experts, we require that an appellant provide proof sufficient to overcome the agency finding by a preponderance of the evidence. A presumption can also be used as a device to reveal a defect in a record that will render it inadequate to support a finding in some cases. This, however, has not been shown to be such a case. Rather, this case presents a situation that ought to be evaluated on its merits, as it was by BLM. There is no such presumption as the "twelve-year" presumption relied upon by the majority to reverse BLM in this instance. There is no reason known to us why a 12-year (or 9-year, as seems closer to the facts of this case) lapse in a certain activity could not be part of the logical course of development for this project. I am not willing to assume that such a 12-year rule exists unless it be shown to be a valid rule to be applied in this case. There has been no such showing.

I must therefore respectfully dissent.

FRANKLIN D. ARNESS
Administrative Judge

I CONCUR:

JOHN H. KELLY
Administrative Judge

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**ADMINISTRATIVE JUDGE MULLEN CONCURRING WITH
DISSENTING OPINIONS:**

I agree with Judges Byrnes and Arness.

Even the majority admits that Hunt had a grandfathered right. At the very least Hunt should be afforded an opportunity to defend that right.

R. W. MULLEN
Administrative Judge

ALFRED G. HOYL

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IBLA 91-8**C-0127832 through C-0127834 G. HOYL (123 IBLA 169, 99 I.D. 87 (1992)); IBLA 91-392, 92-410; HOYL (ORDER OF JUNE 3, 1992):****C0127832-C-0127834; Denial of Application for Suspension of Coal Leases; MMS-90-0328-MIN & MMS-91-0162-MIN; Order to Pay Past-Due Rentals; Petition for Reconsideration Granted; Decision & Order Reaffirmed As Modified.***ORDER*

Alfred G. Hoyl, by and through counsel, has filed a timely petition for reconsideration of our decision, issued on June 3, 1992, affirming the denial of his application for suspension of Federal coal leases by the Colorado State Office, Bureau of Land Management (BLM). *Alfred G. Hoyl*, 123 IBLA 169, 99 I.D. 87 (1992). Additionally, Hoyl has timely petitioned for reconsideration of our order, also issued on June 3, 1992, affirming two decisions by the Director, Minerals Management Service (MMS), directing Hoyl and Donald E. Wilde to pay past-due rentals on those leases. *Alfred G. Hoyl*, IBLA 91-392 and IBLA 92-410 (Order affirming MMS decisions, June 3, 1992). We grant Hoyl's petition for the purpose of responding to points raised therein, but reaffirm our decision and order as modified below.¹

Hoyl's petition, filed in three separate pleadings, notes that Hoyl did not have legal counsel before the Board and asserts generally that "[u]nsupported assumptions of fact appear to have been relied upon in BLM and Board decisionmaking," and that "BLM appears to have induced Hoyl to incur substantial obligations on the expectation that he would be provided sufficient time to produce commercial quantities of coal from his federal leases, then denied him that opportunity" (Petition at 2). Hoyl stresses that he has not held these leases for speculative purposes; that he has planned a "large-scale, underground mine" for those leases, along with certain privately owned lands, since 1976; that several of the main entries to the mine have already been constructed; and that BLM and this Board have ignored these facts. He summarizes his position as follows:

Government delays in lease issuance, an unexpected mine fire, BLM erroneous or misleading advice regarding suspensions, change of BLM position during processing of Hoyl's application, miscommunication and misunderstanding have combined with changing law and policy, weak coal markets, and defaulting operators to deny Hoyl the opportunity to mine this coal reserve. Hoyl has expended substantial personal efforts and funds to develop this mine over the past 22 years; all would be lost if the Board does not reconsider Hoyl's appeal of BLM's decision.

Id.

¹ BLM has taken several additional adverse actions against these leases since its Aug. 21, 1990, decision denying the request for suspension. Those actions are not under review in this appeal.

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Suspension to Avoid Loss of Mineral Resources on the Leases

Hoyle asserts on reconsideration that he is entitled to a suspension under section 39 of the Mineral Leasing Act (MLA), 30 U.S.C. § 209 (1988), to avoid loss of mineral resources on the leases.² BLM has discretion to grant a suspension "in the interest of conservation" under section 39 of the MLA "for the purpose of encouraging the greatest ultimate recovery of coal." 30 U.S.C. § 209 (1988). The term "conservation" includes maximizing recovery and avoiding or minimizing waste or loss of the lease mineral resource. *Solicitor's Opinion*, M-36958, 96 I.D. 15, 29 (1988). Thus, it is appropriate to issue a suspension where mineral resources would be lost if a suspension were not granted. Hoyle points out that, by decision dated December 6, 1990, BLM granted an extension of lease C-079641, held by Trapper Mining, Inc. (Trapper), for that reason. He argues that his request for suspension should also have been granted.

It is appropriate to review the circumstances in the Trapper case so that they can be compared to the present case. Trapper stated as follows in its application:

Trapper is the operator of the Trapper Mine located about six miles southwest of Craig, Colorado. The Lease [(C-079641)] is one of five federal coal leases, two state coal leases and four private and county coal leases comprising more than 10,000 acres which make up the Mine. The current plan for mining these reserves was prepared in the early 1970's, and was approved by the U.S. Geological Survey in 1976, to meet the delivery requirements over the life of the Craig Station Fuel Agreement ("CSFA"), which was signed on March 1, 1973. The Plan has been updated periodically since 1976, in accordance with law and as new data became available, to meet the requirements of the CSFA in an orderly, economic and efficient manner, taking into account all of the coal resources within all of the leases. *Mining began in 1977 and deliveries to the adjacent Craig Station Power Plant commenced in 1978. The Mine has operated continuously since that time, and the CSFA calls for continued deliveries through 2014.* The Mine was originally developed and operated by Utah International Inc., and Trapper became the operator in 1983. Current production under the CSFA is approximately 2.1 million tons per year.

Trapper operates the Mine under Permit No. C-81-010, which was renewed by the Colorado Mined Land Reclamation Division as of December 31, 1987. The Division is the regulatory authority for federal coal operations in Colorado under a state program and cooperative agreement approved by the U.S. Office of Surface Mining. The permit area boundary approved in the Permit includes all areas to be mined over the life of the Mine. The Lease is included at the extreme eastern boundary of the permit area. The Permit, which reflects an earlier version of the long range mine plan, projects that mining will commence on the Lease in 1993. But, current mine planning indicates that commencement in about the year 2000 is more realistic. [Italics supplied.]

It is thus evident that Trapper was actively pursuing an approved mining plan calling for the orderly removal of coal from the various

²That issue was not discussed in our initial decision. As explained therein, BLM had stated the position that a sec. 39 suspension would not ordinarily be warranted where operations had not commenced, but had also observed that a lease might qualify for a suspension even though no operations had commenced, as held in *Getty Oil Co. v. Clark*, 614 F. Supp. 904 (D. Wyo. 1985), *aff'd*, *Texaco Producing, Inc. v. Hodel*, 840 F.2d 776 (10th Cir. 1988). See Preamble to Rulemaking 53 FR 49984-85 (Dec. 13, 1988). Thus, in view of the absence of production on Hoyle's leases, the availability of a sec. 39 suspension seemed to turn on whether administrative actions addressing environmental concerns had denied lessees' "timely access" to the property (*Getty Oil Co. v. Clark*, *supra* at 911), rather than whether there was possible loss of the mineral resources leased.

leases covered by the plan, both Federal and non-Federal. The coal on Federal lease C-079641 is the last scheduled to be mined under the plan. That plan fell several years behind schedule, so that it was evident prior to the filing of the request for suspension that operations could not be commenced before the due diligence deadline for that lease.

BLM granted a suspension of operations and production on Trapper's lease under section 39 "[i]n order to ensure Maximum Economic Recovery [MER] and in the interest of conservation of the lease mineral resource and other natural resources on and adjacent to the lease":

Trapper has a well-designed, approved mine plan which will maximize economic coal recovery over the entire mine property and has made a substantial investment in the form of a long term contract with the Craig Station Power Plant, permitting, and equipment [*sic.*]. The diligent development due date for lease C-079641 is August 16, 1993. Trapper's mine plan is designed to extract the coal in an orderly progression across several federal leases and fee and state lands. The lease is not scheduled to begin production until shortly after the year 2000. A Logical Mining Unit is not a feasible alternative. *Because of its location and higher stripping ratios, it is unlikely that the lease could be mined as a separate operation in the future.* A suspension of operations and production would allow extraction of all of Trapper's surface reserves in an orderly sequence before the underground reserves are mined. [Italics supplied.]

(BLM Decision Granting Suspension, Dec. 6, 1990).

Trapper's situation involves an ongoing operation where an approved mine plan is presently being followed and where a market for coal produced from the leases has long been established. BLM was satisfied that, if that plan was allowed to proceed, the coal in lease C-079641 would be mined eventually, but could not be mined as originally scheduled. BLM was also satisfied that the coal covered by that lease might never be mined if additional time were not granted to allow the mine plan to run its course, evidently because the coal might have been bypassed. Thus, BLM was convinced that the coal would be lost if not held under lease to Trapper. Also, BLM could be reasonably assured that extending the lease would result in the mining of the coal, as Trapper had proven itself to be a *bona fide* developer of the resource, with an ongoing operation and established market for the coal.

By contrast, in Hoyl's case, nothing shows that the coal included in the leases would have been lost if a suspension were not allowed. To the contrary, the potential for developing the coal reserves here has not been adversely affected, since no mining has ever occurred on the leased lands. The lands are in the same condition that they were when the leases were issued, and the record shows that the lands can still be mined, even if Hoyl's leases are canceled. There is no indication that, even if the suspension were granted, the coal would be mined, as Hoyl and his predecessors in interest neither commenced operations or developed a market for the coal.

Hoyl stresses that he has previously mined three entries on fee lands directly accessing the coal included in the leases at a cost of \$7 million,

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asserting that investment places him in a better position to mine the coal than a person receiving a new lease. The question here is not whether Hoyl could develop the leased lands more economically than a new lessee, but whether coal resources would be lost if they did not remain under lease to him and the lease were not suspended. Nothing in the record shows that the availability of Hoyl's three flooded entries would be a controlling factor in whether the coal could be developed. In sum, we reject as unproven Hoyl's argument on reconsideration that "Federal coal would be lost or bypassed if some new mine operator paid a substantial bid to acquire new leases, made capital expenditures duplicating work done from Hoyl's fee leases, and high grading or production interruption would inevitably result, if production ever was achieved at all" (Petition at 7).³

Suspension Due to Preclusion of Beneficial Use of the Leases

Hoyl argues that he is entitled to a suspension under section 39 of the MLA due to preclusion of beneficial use of the leases. A section 39 suspension tolls the running of the lease term, so that such suspension, if granted, has the effect of extending the term of the lease by the period of the suspension. 43 CFR 3483.3(b)(3). The extension covers the period that the lessee was denied beneficial use of his lease by the Department. *Solicitor's Opinion*, M-36953, 92 I.D. 293, 297 (1985); *accord*, *Paul C. Kohlman*, 111 IBLA 107, 111 (1989). "Beneficial use" refers to all operations under the lease except for those necessary to maintain or preserve the mine workings, to conduct reclamation work, or to protect the leased lands, natural resources, or public health and safety.⁴ *Solicitor's Opinion*, M-36958, 96 I.D. 15, 20 n.9 (1988); *accord*, *Paul C. Kohlman*, *supra* at 111 n.3.

There are two judicially recognized situations where a suspension may be granted under section 39 due to preclusion of beneficial use of a lease. We shall consider both situations.

Preclusion Due to Government Order Suspending Operations to Protect the Environment

Where the Government suspends operations and production on a lease issued under the MLA in order to protect the environment, the lessee is entitled to an automatic extension for the period of the suspension as a matter of right. *Copper Valley Machine Works v. Andrus*, 653 F.2d 595 (D.C. Cir. 1981); *Alfred G. Hoyl*, 123 IBLA at

³ Along these lines, we note that we do not agree with Hoyl (Petition at 4) that the record shows that MER would be achieved by following his proposal to mine the Federal leases and fee lands as a unit. The single mine plan was the basis on which BLM concluded that the leases should issue. However, BLM's approval of the leases in 1981 amounted to no more than a finding that that plan had a reasonable prospect of economic success and was not *prima facie* environmentally unsound. Additional review would have been needed before a resource management and production plan (R2P2) for a single mine could have been approved. That review never occurred, because Dorchester Coal Co. (Dorchester) abandoned the single-unit concept in favor of a plan to develop each lease separately.

⁴ Although we used the term "beneficial enjoyment" in our initial decision, we intended no distinction with the term "beneficial use."

190-91, 99 I.D. at 98.⁵ In *Copper Valley*, an oil and gas lessee applied for and received a permit to conduct drilling on lands in Alaska. The permit contained a stipulation forbidding drilling operations during summer months, in order to prevent damage to tundra/permafrost surface values of the lands. That stipulation took away the right to drill (a fundamental of the beneficial use of the oil and gas lease) and was therefore held by the Court to be a Government-imposed suspension of operations and production.

There was no Government-imposed suspension of operations and production here. The record demonstrates that Dorchester was allowed to, and did, conduct exploratory drilling for 3 years on this lease.⁶ At the end of that time, an R2P2 approved by BLM was required (43 CFR 3482.1(b) (1983)), as well as a mine plan approved by OSM. See Section 11 of Leases. Although applications for such were filed, Dorchester and its successor American Shield failed to pursue those applications to completion and therefore never earned the right to mine.⁷ Thus, it cannot be said that the Government ever suspended the right to mine to protect the environment, and no extension of the lease terms for that reason was required here to compensate for such action.

Preclusion Due to Delays for Administrative Actions Addressing Environmental Concerns

It remains to determine whether delays imposed upon the lessee due to administrative actions addressing environmental concerns had the effect of denying "timely access" to the property, as in *Getty Oil Co. v. Clark, supra*.⁸ The question is whether such administrative delay "constituted a de facto suspension mandating an extension of the lease term"; if so, denial of the suspension requested by the lessee under section 39 could constitute an abuse of discretion. See *Getty Oil Co. v. Clark, supra* at 917.⁹

On reconsideration, Hoyl specifically asserts that he was harmed by BLM's delay in issuing the leases (Petition at 5, 8). Although a very long period passed between the filing of the application for leases and the date of issuance,¹⁰ no harm resulted from that delay. The diligent development deadline is set by statute at 10 years from the date of

⁵To the extent that our initial decision stated that a suspension imposed by the Government to prevent damage to the environment is "a matter of discretion" and "may be granted where activity must be suspended on a lease to prevent environmental damage" (*Alfred G. Hoyl*, 123 IBLA at 190-91, 99 I.D. at 98-99), it is hereby modified.

⁶Dorchester received approval to explore the leaseholds by drilling, to evaluate coal reserves for its mine plan. From Sept. 1981 through Oct. 1982, some 57 holes were drilled. The exploration was apparently completed by Aug. 1983, when an exploration abandonment inspection was done.

⁷As discussed below, the fact that applications were not granted is attributable principally to failure to pursue those applications, rather than to undue Government delay.

⁸In that case, concerning an oil and gas lease, 8 months prior to the deadline to establish drilling, the lessee filed an application for permit to drill (APD) an oil and gas well. The Department determined that an environmental impact statement (EIS) would be necessary to consider the environmental effects of the drilling. Review of the APD could not be completed prior to the expiration of the lease. The lessee, faced with termination of its lease for failure to drill, filed a request for suspension of the lease under section 39 of the MLA. A suspension was granted retroactive to the first day of the month that lessee commenced the required application procedure.

⁹Thus, it is not strictly true, as we stated in *Hoyl, supra*, that the lessee is entitled to a suspension as a matter of right where, through some act, omission, or delay by a Federal agency, beneficial enjoyment of a lease has been precluded. Nevertheless, the Court in *Getty* suggested that a suspension of the lease term in the interest of conservation is required where delays imposed upon the lessee due to administrative actions addressing environmental concerns have the effect of denying the lessee's operator "timely access" to the property, as it would be an abuse of discretion not to grant a suspension in such circumstances. *Getty Oil Co. v. Clark, supra* at 917.

¹⁰The applications for preference-right leases were filed on Sept. 30, 1970, but were not granted until July 1, 1981.

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lease issuance. 30 U.S.C. § 207(a) (1988). Any delay in issuing the leases had no effect on that deadline because the lessee was granted the full term allowed by law to accomplish diligent development. Hoyl stresses that, by the time BLM issued the leases, economic conditions had changed and were no longer favorable for developing coal resources. Even if it is clear in hindsight that Hoyl would have been better off if the leases were issued earlier, BLM cannot be faulted for any deterioration of economic conditions affecting coal mining.

Hoyl also points to delay in handling Dorchester's R2P2 application and its application for permit to mine. The record demonstrates that there was some administrative delay resulting from consideration of the environmental effects of Dorchester's proposed R2P2, including a demand by OSM that Dorchester present additional information for use in an EIS. Hoyl now seeks to capitalize on that delay by requesting an extension of the term of his lease. We reject this attempt for several reasons.

First, the R2P2 application that was subject to delay for environmental review is no longer pending. American Shield expressly withdrew that plan in 1988. Although BLM may properly grant a suspension retroactively (*see* 43 CFR 3483.3(b)(1)), we do not fault it for declining to do so here. We hold that, once an R2P2 application is withdrawn, the lessee or its successor loses its right to seek a suspension of the lease terms on account of any delay associated with environmental review of that plan. To hold otherwise would be to allow a lessee to extend its lease indefinitely by filing, and then withdrawing, a series of proposals requiring environmental review. That would render ineffective the stringent development requirements imposed by Congress in section 6 of the Federal Coal Lease Amendments Act (FCLAA), 30 U.S.C. § 207(b) (1988).

Second, no economic market for the coal in these leases has ever been demonstrated. In amending the regulations to provide that the due diligence requirement could be extended by a period of time equal to the duration of a section 39 suspension of operations and production, the Department stressed that the intent of Congress in FCLAA to discourage speculation in non-producing Federal coal leases "cannot be circumvented by allowing across-the-board suspensions *for lessees that cannot find an economic market.*" (Italics supplied.) *See* Preamble to Rulemaking 53 FR 49985 (Dec. 13, 1988). Stated another way, adverse economic or market conditions are not included within the term "in the interest of conservation" under section 39, and therefore do not by themselves create grounds for approval of a suspension under that section. *Id.*; *compare Mountain States Resources Corp.*, 92 IBLA 184, 193, 93 I.D. 239, 244-45 (1986) (holding that a Federal coal lease may

not be suspended under section 7(b) of the MLA due to adverse market conditions). We fully agree with that interpretation.¹¹

The record strongly suggests that, from its inception, the failure to develop this lease has been the result of a failure to find a market for the coal.¹² Although absence of market is not, by itself, controlling, it is one factor that BLM may use in deciding whether to exercise its discretion to grant a section 39 suspension.

Finally, it must be noted that the failure to develop these leases resulted not from Governmental delay, but from the affirmative choice of the lessee of record not to proceed.¹³ It is clear that those delays, more than any administrative delay, wasted much of the time allowed by law to achieve diligent development.

Hoyle attempts to equate his situation with that of Consolidation Coal Co. (Consol), which (as we noted in our initial decision) did receive a suspension under section 39 from BLM in 1986. See *Alfred G. Hoyle*, 123 IBLA at 191 n.17, 99 I.D. at 98 n.17, citing *Consolidation Coal Co.*, 111 IBLA 381, 383 (1989). Hoyle has submitted documentation on reconsideration showing the details of that suspension.

Consol owns a Federal coal lease (the Meeker lease) and a parcel covered by a prospecting permit (the James Creek parcel). It filed a preference right lease application for that parcel (the James Creek PRLA) indicating that, if its PRLA were granted, it would develop the two parcels together as a single surface mine.¹⁴ In view of substantial environmental questions surrounding granting the James Creek PRLA and the proposed surface mine, BLM decided to prepare an EIS. In the

¹¹ We are aware that BLM has granted suspensions under sec. 39 for oil and gas leases containing "stripper wells," citing adverse economic conditions. See, e.g., *Samuel Gary Jr. & Associates, Inc.*, 125 IBLA 223, 224-25 (1993). A stripper well is an oil and gas well that has been completed and is producing at a small rate, so that its income barely exceeds the operating costs of production. A *Dictionary of Mining, Mineral, and Related Terms* at 1090. The reason a suspension is granted for such a lease is that the mineral resource will be lost if the well is plugged and abandoned because it cannot be economically operated due to the low price of oil or gas. It is sure that the mineral resource will be lost, as no one will re-drill the lands in the future in the face of the evidence of marginal productivity. In those circumstances, preserving the well until the price of oil or gas rises would prevent irretrievable loss of the leased resources.

As discussed above, we are not persuaded that coal will be irretrievably lost if no suspension is granted to Hoyle.

¹² For example, in December 1983, Dorchester submitted its application to Colorado State Mined Land Reclamation Division (CMLRD) to trigger joint State and Federal review of a large scale project to mine the leases, including an application for R2P2 for BLM's review, and an application for a mine permit for review by the Office of Surface Mining Reclamation and Enforcement (OSM). On page 17 of the Executive Summary filed with that application, Dorchester expressly recognized the present lack of market for coal, stating that the "present mine bench and portal facilities accessing the Anchor seam will be maintained in a manner to facilitate reopening *should a market develop.*"

¹³ Dorchester filed three applications seeking various Government permits, one for each individual lease, from Dec. 1983 through June 1984. Those applications were deemed incomplete, and additional data was promptly demanded at several points in the next several months. However, responses to OSM's findings of inadequacy made in Mar., June, and Oct. 1984 were not filed by Dorchester until July 1985. It thus appears that much of the delay was due to Dorchester's failure to respond timely.

In April 1986, American Shield summed up the history of the leases to that point, noting the reasons for the substantial delay in complying with Government requests for additional information:

"As you may recall, the Fruita permit review is overseen and coordinated through the Colorado Joint Review Process (CJRP) * * *. Under a schedule developed in the CJRP, the Fruita permit applications were submitted in a sequential fashion in late 1983 and early 1984, and subsequently deemed to be complete by the [CMLRD]. * * * The permit review process was slowed as Dorchester prepared responses to the [CMLRD] letters. The resultant delay was a function of two independent considerations. The acquisition of additional environmental baseline information required for the adequacy response was seasonally dependent. Further, a corporate buy out of Dorchester's parent company by Damson Oil and subsequent staff reductions impaired Dorchester's ability to quickly respond to the deficiencies. * * * In view of the pending sale of the properties, your staff was advised to temporarily defer their review of that information" (American Shield letter to OSM, Apr. 18, 1986). American Shield subsequently determined not to pursue those applications.

¹⁴ Consol's PRLA application proposing surface mining on both tracts was an amendment to its original PRLA, which had proposed only development of lands within the PRLA.

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meantime, the 10-year development deadline for the Meeker lease was approaching. Consol applied for a suspension of the terms of that lease, asserting that it could not mine the Meeker lease separately from the James Creek parcel without losing a substantial amount of coal. As Hoyl stresses on reconsideration, BLM suspended the Meeker lease even though no operations had been established on it and no market had been established for the coal.

Hoyl's situation is fundamentally different from Consol's. First, Consol possessed interests in two adjacent tracts that would ripen into lease rights at widely disparate times, thus creating different development deadlines.¹⁵ Those leases covered coal lands that could most effectively be exploited as a single unit, so that it was "in the interest of conservation" for BLM to bring the two interests into step by establishing a single deadline for development. Second, at the time it filed its request for suspension, Consol faced a situation where its right to develop the Meeker lease was being delayed by BLM's consideration of the James Creek PRLA. Thus, as of the date the request was filed and for some time previously, Consol's right of timely access to the Meeker lease was being delayed by BLM's preparation of an EIS. That delay, coupled with the fact that forcing Consol to mine the Meeker lease separately would waste resources, properly brought Consol within the protection of section 39.

In contrast, Hoyl's leases were issued at the same time and thus do not present an unworkable deadline. Further, when Hoyl filed his request for suspension, no administrative action was pending before BLM, OSM, or CMLRD that was delaying his right to develop the leases. Finally, as we have held above, unlike in Consol's case, nothing indicates that coal resources would be lost if a suspension were not granted to Hoyl.

As to the significance of the existence of a market for the coal and the initiation of production, we note that the purpose behind BLM's policy to require that operations be commenced and a market established is to ensure the granting of a suspension assists development of the lease and to avoid retention of the lease for speculative purposes. In deciding whether a suspension is sought in good faith as part of an effort to develop the lease, BLM must take into account many factors. Although the contemporary presence of a market for the coal and initiation of development on the leasehold are strong indicia of good faith, they are not the only factors showing that the suspension is in aid of development. Other factors would include the past actions of the lessee and the likelihood that the proposed development plan could actually succeed.

¹⁵The Meeker lease (C-093713) was issued by BLM on June 1, 1967. The James Creek prospecting permit was issued by BLM at roughly the same time, on Sept. 1, 1966. However, no preference right lease had ever been issued for the James Creek parcel.

It is not possible to tell whether BLM had an adequate basis to conclude that Consol's lease would eventually be developed. However, we can state that BLM's decision *not* to grant a suspension to Hoyl was within its discretion. The absence of a proven market and lease operations showed that it was unlikely that the leases would be developed if the suspension were granted, a circumstance plainly violative of the develop-or-lose dictate of FCCLA.

Hoyl also condemns BLM for delaying action on his application for suspension (Petition at 9). Hoyl filed that request on April 3, 1989, along with a request for approval of an assignment of record title from American Shield, which was then lessee of record, to him and Wilde. BLM did not approve the assignment until January 1, 1990, at which time it considered his application for suspension. Hoyl asserts that, by first considering the request for approval of assignment, BLM improperly "switched the order" of its consideration of his requests, thus delaying its consideration of the critical request for suspension.

Hoyl was not a record title holder or operator for these leases in April 1989 and, therefore, lacked authority to apply for relief from production requirements. *See* 43 CFR 3483.4(b). Thus, BLM handled the requests in the proper order, as it could not consider his request for suspension until it decided whether record title could properly be transferred. BLM's delay in considering the assignment was necessary to review the assignment agreement, determine the appropriate bond amounts, solicit the opinion of the Anti-Trust Division of the U.S. Department of Justice, and review whether the estate of Gerald T. Tresner (the original holder of the preference right lease application interest) retained any interest in the leases. BLM's approval of the assignment was delayed because Hoyl needed additional time to submit performance bonds as prospective lessee of record. Nor did BLM unduly delay considering the request for suspension, once record title passed, as it was necessary for BLM to seek internal review of that request.

Finally, it is significant that, both in April 1989 (at the time Hoyl filed his request for suspension) and in January 1990 (the first time BLM could properly grant the request), there was no application (such as an R2P2 or exploration permit application) pending that required any sort of review. As a result, it cannot be said that Hoyl's right of timely access was being denied to him then by the Government. His lack of authorization to proceed can instead be traced to American Shield's withdrawal of the pending R2P2 application in June 1988.¹⁶

Hoyl complains that Dorchester and American Shield "breached its contracts" by not developing the lease and by withdrawing the pending R2P2 application, but notes that he elected not to resort to litigation

¹⁶It is clear throughout his presentation on reconsideration that Hoyl disagrees with Dorchester's and American Shield's decision not to follow his original scheme of developing these three leases as a unit. He attempts to diminish the authority of Dorchester, which he describes as his "operator," to have taken action to delay development of the leases as a unit (Petition at 6). However, the fact is that Dorchester and (later) American Shield, not Hoyl, was the legal owner of the leases. As lessee of record, they had full authority to take action to develop the lease. *See generally* 43 CFR Subpart 3482.

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to enforce those contractual terms (Petition at 8-9). If such agreement either obliged Dorchester and its successor to develop the leases or prevented it from seeking approval of a plan to mine the leases separately, it was incumbent upon Hoyl to so notify BLM. See *Fimple Enterprises, Inc.*, 70 IBLA 180, 182 (1983); *Petrol Resources Corp.*, 65 IBLA 104 (1982). Although BLM might have been able to preserve the status quo until the parties had an opportunity to settle any such dispute privately or in court (*William B. Brice*, 53 IBLA 174 (1981), *aff'd*, *Brice v. Watt*, No. C-81-0155 (D. Wyo. Dec. 4, 1981), in the absence of such notice, BLM was obliged to consider the requests of Dorchester (and later American Shield) as the legal owner of the leases.

Hoyl also suggests on reconsideration that he is now ready to proceed to develop these leases, using the original plan for developing the leases as a single unit. He asserts that plan was approved by BLM in the late 1970's and suggests that BLM's refusal to allow him to proceed as soon as he became lessee of record in January 1990 has denied him beneficial use. It is enough to note that, as BLM points out in its answer on reconsideration, it merely accepted the single-mine plan in 1981 as a concept on which to base its estimates, necessary for adjudicating the applications for preference right leases, of whether the leases could be economically developed in an environmentally safe manner. Hoyl's unified development plan was not submitted as the basis for an actual mining permit for these leases until recently.¹⁷ Thus, there had been no cognizable administrative delay in reviewing any application either when the request for suspension was filed or when Hoyl became lessee of record.

BLM generally enjoys discretion as to whether to grant an extension of a coal lease under section 39 in the interest of conservation.¹⁸ That is, the Department "is not required to grant a suspension request whenever application is made, but rather is vested with discretion to deny such a request under appropriate circumstances." *Getty Oil Co. v. Clark*, 614 F. Supp. 904, 915 (D. Wyo. 1985). A decision by BLM in the exercise of its discretion will not be disturbed on appeal if supported by a rational basis. That Congress authorized the Department in its discretion to grant suspensions under section 39 implies that the Department is also authorized by Congress to refuse to grant such suspensions. See *United States v. Wilbur*, 283 U.S. 414 (1931); *Williams v. United States*, 138 U.S. 514 (1890). Of course, Congress does not authorize the Department to act arbitrarily. *Williams v. United States*, *supra* at 524. However, Hoyl has not

¹⁷We note that, on or around Jan. 8, 1991, Hoyl applied for an exploration permit and that BLM denied application on Jan. 18, 1991. A revised application was rejected by BLM on Mar. 6, 1991. We are not aware that those rejections have been appealed.

¹⁸The only exception to that discretion would appear to be where the Government suspends operations and production, as it did in *Copper Valley*, *supra*.

established that BLM's denial of the suspension in these circumstances was in error or otherwise constituted an abuse of discretion.

Suspension under Section 7(b) of the MLA Due to Force Majeure Conditions

Hoyle has not effectively challenged our finding that the mine fire in the Fruita No. 1 Mine was not a force majeure within the meaning of section 7(b) of the MLA, 30 U.S.C. § 207(b) (1988). *Alfred G. Hoyle*, 123 IBLA at 184-87, 99 I.D. at 95-97. In any event, the record confirms both that alternatives to using those entries were available and that the failure to adopt an alternative resulted from adverse economic conditions, which do not constitute a force majeure. *Mountain States Resources Corp.*, 92 IBLA at 193, 93 I.D. at 244-45. Finally, Hoyle has recently submitted information to BLM suggesting that the flooded entries can be reopened at a minimum of expense, sharply undercutting his premise that the closure of those three entries substantially delayed development of the mine.

Estoppel

Hoyle asserts that he relied to his detriment on incorrect statements by BLM to the effect that he would receive an extension of his lease. Specifically, he asserts that he spent a great deal of money rehabilitating the leases and returning them to good standing.

First, we note that only actions taken by Hoyle *after* any alleged misadvice could properly be regarded as having been in reliance on any such misadvice. Most of the \$7 million cited by Hoyle was actually expended in the late 1970's, long before he sought BLM's advice regarding suspension of the leases. Two specific expenditures cited by Hoyle, paying overdue back rental and posting adequate lease performance bonds, were liabilities under the terms of the lease that also arose prior to the alleged misadvice and are not properly regarded as having been made in reliance thereon. However, Hoyle does assert that he gave up contractual rights against a "defaulting corporation" (evidently Dorchester/American Shield) in reliance on BLM's alleged representation that his lease would be suspended. We shall presume that is adequate to establish reliance.

Claims of estoppel are considered on the basis of four elements, which are described in *United States v. Georgia-Pacific Co.*, 421 F.2d 92, 96 (9th Cir. 1970): (1) the party to be estopped must know the facts; (2) the party to be estopped must intend that his conduct shall be acted on or must so act that the party asserting estoppel has a right to believe that it is so intended; (3) the party asserting estoppel must be ignorant of the true facts; and (4) the party asserting estoppel must detrimentally rely on the conduct of the party to be estopped. *Terra Resources, Inc.*, 107 IBLA 10, 13 (1989). Estoppel is an extraordinary remedy, especially as it relates to public lands. Estoppel must be based upon affirmative misconduct by BLM, and although estoppel may lie if reliance on BLM's statements deprived an individual of a right which

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he could have acquired, it does not lie if the effect of such action would be to grant an interest not authorized by law.

Decisions of the U.S. Supreme Court have declined to hold that estoppel may not in any circumstances run against the Government. *Heckler v. Community Health Services of Crawford*, 467 U.S. 51 (1984); *Schweiker v. Hansen*, 450 U.S. 785, 788, *reh'g denied*, 451 U.S. 1032 (1981). These same cases, however, have refused to find that the traditional elements of estoppel have been met by the party asserting its protection, thus refuting any impression of hospitality toward claims of estoppel against the Government that earlier cases may have created. *See, e.g., United States v. Wharton*, 514 F.2d 406 (9th Cir. 1975); *United States v. Lazy FC Ranch*, 481 F.2d 985 (9th Cir. 1973); and *Brandt v. Hickel*, 427 F.2d 53 (9th Cir. 1970). In *Enfield v. Kleppe*, 566 F.2d 1139 (10th Cir. 1977), the basis for asserting estoppel was not merely a letter but a published regulation. Nevertheless, the court held that a Departmental regulation misinterpreting 30 U.S.C. § 226(e) (1988), did not give rise to estoppel even though the party seeking to estop the Government apparently relied upon the regulation and refrained from actions that might have succeeded in extending his oil and gas leases. The court concluded that an administrative provision contrary to statute must be overturned no matter how well settled and how longstanding. *Id.* at 1142.

Furthermore, estoppel against the Government in matters concerning the public lands must be based upon "affirmative misconduct" such as misrepresentation or concealment of material facts. *United States v. Ruby Co.*, 588 F.2d 697, 703-04 (9th Cir. 1978); *D. F. Colson*, 63 IBLA 221 (1982); *Arpee Jones*, 61 IBLA 149 (1982). We have expressly ruled that, as a precondition for invoking estoppel, the erroneous advice upon which reliance is predicated must be "in the form of a crucial misstatement in an official decision." *Henry E. Krizman, supra*; *United States v. Morris*, 19 IBLA 350, 377, 82 I.D. 146, 159 (1975) (quoting *Marathon Oil Co.*, 16 IBLA 298, 316, 81 I.D. 447, 455 (1974)).

We reject Hoyl's claim of estoppel for several reasons. Hoyl has failed to prove that BLM actively misinformed him. At most, the record establishes that a BLM employee expressed optimism that his request would be granted and advised Hoyl that he would have a better chance of success of prevailing under section 7(b) of the MLA than under section 39.¹⁹ That was clearly not affirmative misconduct, or misconduct of any kind, as it was far from clear at that time that a suspension was not available. Nothing shows that BLM actively misled Hoyl to believe that he was legally entitled to and would definitely receive a suspension. In other words, applying the relevant judicial standard, we are not persuaded that BLM intended to give the

¹⁹ Hoyl also asserts that a BLM official told him that he "could see no reason why [Hoyl's] suspension request would not be approved," but acknowledges that that official has denied "stating his advice that positively" (Petition at 4).

impression that Hoyl could act in reliance on that advice. Moreover, there is no evidence that such advice was in the form of a crucial misstatement in an official decision. To the contrary, it appears that BLM, when approached by Hoyl as to how he might save his leases from cancellation, simply offered the possibility (not the certainty) that the leases could be suspended. To hold that BLM's good faith effort to help Hoyl to find a possible solution to his problem binds the Government to grant the request he sought would unduly restrict BLM's ability to offer constructive suggestions to prospective applicants. We decline to do so.

We also hold that it was not reasonable for Hoyl to believe that he would receive an extension. We are aware of no formal statement of position extant within the Department at the time in question on which Hoyl could have relied to support his conclusion that the leases would be suspended.

Additional Issues

Hoyl asserts that "the Department has continued to develop mechanisms and proposals to provide necessary flexibility in its decisions regarding diligent development of federal coal leases," but cites directly only to a proposed amendment to governing Departmental regulations. 56 FR 32002-48 (July 12, 1991). Those amendments have not been yet been promulgated, and there is nothing to indicate whether they will apply retroactively.²⁰

Hoyl's requests for oral argument and a hearing are denied. To the extent not expressly addressed herein, Hoyl's arguments have been considered and rejected.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the petition for reconsideration is granted, and our decision and order are reaffirmed as modified herein.

DAVID L. HUGHES
Administrative Judge

I CONCUR:

JOHN H. KELLY
Administrative Judge

APPEAL OF ROUGH ROCK COMMUNITY SCHOOL BOARD

IBCA-3037

Decided: *February 12, 1993*

Grant No. GTN 35X 01202, Bureau of Indian Affairs.

²⁰In any event, as proposed, those regulations would appear to be of no comfort to Hoyl, as they expressly provide that applications for suspension of operation may be approved only if the applicant demonstrates, among other things, that "the operator/lessee has received authorization to mine and onsite development of the mine has commenced on the lease(s) or [logical mining unit (LMU)] for which the suspension application was filed." 56 FR 32035-36 (July 12, 1991).

February 12, 1993

**Government Motion for Summary, Judgment Sustained;
Motion by Appellant Denied.**

**1. Contracts: Tribally Controlled Schools Act: Generally—
Indians: Grants: Jurisdiction**

The Board has jurisdiction to decide disputes arising from grants made under the Tribally Controlled Schools Act of 1988, 25 U.S.C. §§2501–2511.

**2. Contracts: Tribally Controlled Schools Act: Grants—Indians:
Grants: Tribally Controlled Schools Act**

Grant recipients under the Tribally Controlled Schools Act are not entitled to interest pursuant to the Prompt Payment Act on late payments, because the Prompt Payment Act by its terms applies only to contracts as such; and any payment of interest on the Tribally Controlled Schools Act grants would require express statutory authority, which clearly does not exist.

APPEARANCES: Carol L. Barbero, Esq., Geoffrey D. Strommer, Esq., Hobbs, Straus, Dean & Wilder, Washington, D.C., for Appellant; Thomas O'Hare, Esq., Department Counsel, Window Rock, Arizona, for the Government.

*OPINION BY ADMINISTRATIVE JUDGE PARRETTE
INTERIOR BOARD OF CONTRACT APPEALS*

I. Summary

On June 1, 1992, the Board received and docketed an appeal from the Rough Rock Community School Board (Rough Rock), which operated a Bureau of Indian Affairs (BIA)-funded school (the School/appellant) on the Navajo Indian Reservation located at Rough Rock, near Chinle, Arizona. The funding was pursuant to the Tribally Controlled Schools Act of 1988 (TCSA), 25 U.S.C. §§2501–2511; and the question on appeal was whether BIA is required by the Prompt Payment Act (PPA), 31 U.S.C. §§3901–3906, to pay interest on late grant payments made under the TCSA.

[1] Because the appeal involved a grant rather than a contract, the Board on the same day it docketed the appeal, requested, *sua sponte*, a briefing from the parties on the issue of its jurisdiction under the Contract Disputes Act of 1978 (CDA), 41 U.S.C. §§601–613, to decide Indian grant disputes. On July 7, 1992, it received briefs from both parties in support of jurisdiction; and on July 8, 1992, it issued an unpublished Order accepting TCSA grant dispute jurisdiction. For the sake of future appellants, we will state, *infra*, the reasons for the Board's acceptance of jurisdiction.

Subsequently, on August 6, 1992, the School filed its Complaint, alleging entitlement to interest under the PPA. On September 10, Department counsel filed an Answer denying the applicability of the PPA to TCSA grants. On October 16, the parties wrote to the Board proposing that they submit opposing motions for summary judgment with accompanying briefs, followed by reply briefs, on that issue; and

proposing a briefing schedule. By Order dated October 27, the Board accepted the parties' proposal; and, as of January 26, 1993, the briefing had been completed. The purpose of this opinion is to resolve the PPA issue.

As set forth below, the Board concludes that the PPA, in the absence of specific statutory authorization by the Congress, cannot be applied to TCSA grants, since the PPA was intended to apply primarily to procurement contracts; generally applies only to agreements in the form of contracts; and contains no provision making it applicable to grants; and the TCSA itself makes no reference to the payment of interest on late grant payments.

II. Background

The appeal was filed to overturn a May 15, 1992, final decision by the BIA Grant Officer (GO) refusing to pay the School an interest penalty under the PPA, and specifically under section 3902(a) thereof, after BIA allegedly had delayed until November 4, 1991, in transmitting the School's initial operating funds, in the amount of \$2,406,179, to it—a period of 4 months and 5 days after the July 1, 1991, due date for receipt of funds imposed by Congress in the FY 1991 Interior Appropriations Act, P.L. 101-512, 104 Stat. 1929 (1990). The amount of interest claimed was \$71,237.02.

A. Board Jurisdiction Over TCSA Grants

Rough Rock asserts that the Board has jurisdiction over TCSA disputes by virtue of 25 U.S.C. §§ 2508(e) of the TCSA and 450m-1 of the Indian Self-Determination Act (ISDA), 25 U.S.C. § 450; and Department counsel agreed. Section 2508(e) is as follows:

(e) Exceptions, problems, and disputes

Any exception or problem cited in an audit conducted pursuant to section 2506(b)(2) of this title, *any dispute regarding the amount of a grant under section 2504 of this title* (and the amount of any funds referred to in that section), any payments to be made under section 2507 of this title, and any dispute involving the amount of, or payment of, the administrative grant under section 2008a of this title *shall be handled under the provisions governing such exceptions, problems, or disputes in the case of contracts under the Indian Self-Determination and Education Assistance Act of 1975 (Public Law 93-658; 25 U.S.C. 450 et seq.)*. [Italics added.]

The legislative history of this provision indicates that the rules for dispute resolution under the ISDA, which make the CDA applicable to the ISDA, were also intended to apply to the new grant process under the TCSA in order to avoid the confusion that could be caused by establishing a new process. See floor remarks of Congressman Kildee on H.R. 5174, which became P.L. 100-427, Cong. Rec., Aug. 9, 1988, at H 6606.

The parties point out that section 2508(e) refers specifically to payment disputes, and that the provisions governing ISDA contract disputes, set forth in 25 U.S.C. § 450m-1 and made applicable by section 2508(e), specifically incorporate the CDA at subsection 450m-1(d). They conclude that the final clause of section 2508(e), read in conjunction with section 450m-1(d), clearly mandates this Board's

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jurisdiction, asserting that a grantee under the TCSA has the same rights to seek adjudication of disputes that an ISDA contractor has—no more and no less. We are compelled to agree.

But the payment of PPA interest on late TCSA grant payments is another matter.

B. Applicability to the PPA to TCSA Grants

Appellant argues for the necessity of applying the PPA to TCSA grant payments primarily on the basis of public policy—namely, that the purpose of Congress in the PPA was to make sure that when a Federal agency acquired goods or services, the agency would either pay for them promptly or else incur an interest penalty. The operation of BIA-funded schools by Indian Tribes is a service provided to BIA, appellant contends; and the fact that the legal agreement between the Tribe and BIA is in the form of a grant, rather than a contract as such, is immaterial. Thus, appellant says, we must look to Office of Management and Budget (OMB) Circular A-125, which implements the PPA, to determine if there is any reason not to apply the PPA to TCSA grants.

Appellant denies that for a contract to be subject to the PPA and to A-125, it must be a “procurement” contract subject to the Federal Acquisition Regulation (FAR), as the Government contends. Appellant also questions the Government’s assumption that ISDA contracts are not covered by the PPA, though it correctly notes that this question is not before the Board.

On the contrary, appellant says, the PPA is an Act of general applicability applying to all *entities* that fall within the Act’s scope, as is the case with other comparable Acts, such as OSHA or ERISA. As long as the entity involved satisfies the definition of “business concern” as used in A-125, as the Rough Rock school does, the PPA applies, appellant avers. Then the only relevant inquiry is whether a TCSA grant is an “enforceable agreement” under that Circular, which appellant says a TCSA grant clearly is. Thus, the School is entitled to interest on the delayed grant payment.

Department counsel does not dispute that the purpose cited by appellant is the reason for the PPA. However, he contends that the fact that the PPA refers specifically to the acquisition of goods or services clearly means that it was intended to apply to procurement contracts as such; and he argues that agreements in the form of grants do not come within that meaning. Neither does the fact that the TCSA incorporates many sections of the ISDA make a school grant an ISDA contract. In fact, counsel argues, since the Congress specifically provided for the use of grants as such in the TCSA, at 25 U.S.C. § 2502(d), a grant cannot be considered a contract.

Even if a TCSA grant were a contract under the ISDA, the Government says, the PPA regulations mandated under 31 U.S.C. § 3903 do not apply to ISDA contracts, since they are not procurement

contracts. The specific legal relationship between BIA and Rough Rock is simply that of grantor and grantee.

Finally, the Government argues, admitting *arguendo* all of appellant's allegations pertaining to the TCSA and the ISDA, as well as those relating to its economic loss in not being able to use the grant funds as anticipated, the right to the payment of interest by the Government requires a waiver of sovereign immunity, which must be done specifically and expressly by statute. The Government contends that there can be no consent to the waiver of sovereign immunity by implication or by use of ambiguous language in the statute, citing *Library of Congress v. Shaw*, 478 U.S. 310, 317-322, 106 S. Ct. 2957, 2962-2965 (1986). Since the PPA applies only to procurement contracts as such, the Government concludes, Congress has not provided for interest on grant funds under the TCSA.

III. Discussion

[2] Sympathetic as we may be (and we are) over appellant's loss of income and with the undoubted purposes of the PPA, the TCSA, and the ISDA, the Board believes it has no choice but to declare Department counsel's final argument a winner. We are also inclined to agree with the Government that the PPA, at least in its present form, was intended to apply primarily, if not exclusively, to procurement contracts, and not to every form of agreement the Government may enter into, legally binding or otherwise.

In many respects, *Library of Congress*, cited by Department counsel, *supra*, is even a stronger case for the payment of interest than the case before us. In that case, plaintiff below, a Library employee who had been successful in a job-related racial discrimination suit, had sought to include interest as a component of the attorney fees he had incurred in prosecuting his case. The lower court had awarded a 30 percent increase in his attorney fees, based on section 706(k) of the Civil Rights Act, 42 U.S.C. § 2000e-5(k), which allows the prevailing party in such a case a "reasonable attorney's fee as part of the costs" and specifies that "the United States shall be liable for costs the same as a private person."

The Court of Appeals affirmed the lower court on the theory that, although the increased amount was the equivalent of interest, the Congress had expressly waived the Government's immunity by making it liable "the same as a private person."

The Supreme Court, however, in a six to three decision, reversed the circuit court on the ground that in the absence of clear congressional consent to the award of interest, the United States is immune from an interest award. In analyzing whether Congress had waived the immunity of the United States, the Court said that the waiver had to be construed strictly in favor of the sovereign, and that it could not enlarge the waiver beyond what the language required. It added that congressional silence did not permit it to read into the statute the requisite waiver where neither the language used nor the legislative history of the act referred to interest as such; and it noted that policy

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considerations, "no matter how compelling," are insufficient, standing alone, to waive this immunity. 478 U.S. at 318-321.

In the case before us, the PPA expressly refers to contracts, not to grants; and its legislative history shows, as the Government contends, that the Act's primary application is to procurement contracts, not to various other forms of agreement. The fact that a TCSA grant, and most other forms of agreement, technically are forms of contract is irrelevant in light of the specific language of 25 U.S.C. § 2502(d), which clearly distinguishes between contracts and grants for the purpose of the TCSA.

Thus, we are forced to conclude that the Congress did not have the payment of interest in mind when it enacted the provisions of the TCSA; and we hold that grant recipients are not entitled to interest under the PPA on late payments made pursuant to TCSA grants, because the PPA by its terms applies only to contracts as such and, therefore, any payment of interest on grants would require express statutory authority, which clearly does not now exist.

IV. *Decision*

Accordingly, the Government's motion for summary judgment is granted, and appellant's motion for summary judgment is denied.

BERNARD V. PARRETTE
Administrative Judge

I CONCUR:

G. HERBERT PACKWOOD
Acting Chief Administrative Judge

APPEAL OF FOOTHILL ENGINEERING

IBCA-3119-A

Decided: *February 12, 1993*

Contract No. 1-CC-20-00920, Bureau of Reclamation.

**Appellant's Motion for Summary Judgment Granted;
Government's Motion Denied.**

1. Contracts: Construction and Operation: Duty to Inquire— Contracts: Construction and Operation: General Rules of Construction—Contracts: Form and Validity: Mistakes

In bidding on contracts, potential contractors must seek clarification of obvious, gross, and glaring errors in the Government's specifications; but they are not expected to exercise clairvoyance in spotting hidden ambiguities. Thus, a contractor is not liable for failing to realize that the Government's estimate of the lead content of paint to be removed from an old gantry crane had omitted a zero, when the number set forth was also reasonable, even though it clearly contained an apparently misplaced comma.

APPEARANCES: Ervin Refenburg, Owner, Pro Se, Foothill Engineering, Lodi, California, for Appellant; Stephen R. Palmer, Esq., Department Counsel, Sacramento, California, for the Government.

OPINION BY ADMINISTRATIVE JUDGE PARRETTE
INTERIOR BOARD OF CONTRACT APPEALS

The appeal before us involves appropriate opposing motions for summary judgment on the legal issue of whether an ambiguous number in a Bureau of Reclamation (BOR) gantry crane repainting bid solicitation was latent and therefore could be accepted as provided, or was patent and therefore required the bidder to seek clarification. Since we find for appellant on the ground that the actual error was merely typographical and thus latent, we will adopt the Government's partial statement of relevant facts, omitting footnotes, as follows.

FACTS

1. This firm fixed-price construction contract was awarded to appellant, Foothill Engineering, on June 4, 1991, in the amount of \$449,444 (AF Tab 2, Page F-1). The contract was for the rehabilitation, including paint removal and repainting, of a 100-ton gantry crane located at the Tracy Pumping Plant, near Tracy, California (AF Tab 1, Page K-1). The notice to proceed was received by the contractor on June 18, 1991, and the work was accepted by the Government as substantially complete on May 8, 1992 (AF Tab 7).

2. This appeal concerns the work required as described in specification section K.6.1. and specifically the requirement to use "blast cleaning" to remove old paint from the crane (AF Tab 1, Page K-25). As further described in specification section K.8.1.d.(1)(b), "the surfaces shall be cleaned of all defective or damaged areas of existing paint, and of all loose rust, loose mill scale, and other foreign substances by scraping, chipping, wire brushing, gritblasting, commercial grade blast cleaning, or other effective means" and "the surfaces shall be blast-cleaned to base metal, using dry, clean, hard, sharp slag or steel grit, to produce a near-white surface free of all foreign substances" (AF Tab 1, Page K-56). The contractor chose to remove the old paint by a method that included sandblasting (AF Tab 7).

3. Specification section K.8.4. provided information on the expected nature of the existing paint and the granular material after blast cleaning the crane. Section K.8.4. provided as follows:

K.8.4. HAZARDOUS WASTE

a. General—The crane was first painted about 40 years ago. The primer used on most of the metal surfaces contained large amounts of lead. Age and retouching since then have done little to reduce the amount of lead on these surfaces. Therefore, it must be assumed that the old paint which will be removed will contain enough lead to be classified as hazardous waste. It should also be assumed that the granular material used for blasting will also become sufficiently contaminated to be classified as hazardous

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waste. During removal of the old paint, the contractor shall confine the hazardous waste to the immediate work area.

b. Chemical—*The existing primer contains lead. This lead content varies from 0 to 500,00 mg/kg [sic].*

c. Disposal—The Contractor shall collect and dispose of the waste material containing lead, including the old paint removed, in a manner prescribed by: (1) the California State Department of Health Services Hazardous Waste Control Law, and (2) the California State Regulation, Title 22, Social Security, Division 4, Environmental Health, Chapter 30, Minimum Standards for Management of Hazardous and Extremely Hazardous Waste Control. Copies of the transport manifests and disposal manifests shall be forwarded to the Government in accordance with Section K.1.4. [Italics added.]

(AF Tab 1, Page K-59).

Subsection b. of section K.8.4. was amended to delete reference to the composition of paint on equipment not involved in this contract and substituted the general reference, as above, to the expected lead content of the old primer paint that was to be removed from the crane at the Tracy Pumping Plant (AF Tab 2, Page K-59). The earlier version of section b. provided as follows:

b. Chemical analysis results—The existing paint on two pieces of equipment located at the Fish Collection Facilities, nearby, has been analyzed for lead content by a chemical laboratory for the Bureau of Reclamation. *The 4-ton crane and trashrake were probably painted with the same type of primer as this crane.*

The results are shown in the following table:

Results of Chemical Analysis for Lead

Name	Content
1. Old Paint on the 4-ton crane	48,000 mg/kg
2. Old Paint on the trashrake	419,000 mg/kg

(AF Tab 2, Page K-59 (emphasis added)).

4. The contractor alleges in its complaint to the Board as follows:

Subcontractor Wilder's Painting interpreted the amendment to be the best and most recent information concerning the lead content of the primer. The amendment stated the maximum lead content to be *500,00 mg/kg*. Wilder's assumed the Bureau had made a typographical error and it should have read 500.00 mg/kg or 50,000 mg/kg—both of which are within the range of the 4-ton crane shown in the original specification. Both of these interpretations would fall within the range of Wilder's past experience with paint primers containing lead.

Wilder's had in the past disposed of the resulting by-product (used sand blast sand) from sand blasting within the State of California and bid the work accordingly. However, chemical analysis of the resulting by-product of sand blasting proved that the lead content was over the allowable amount for disposal in this manner.

Wilder's was forced to dispose of the lead contaminated sand blast outside of California. [Italics in original.]

5. The contractor first notified the Government of his claim to extra costs to dispose of the lead containing blasting material by letter dated February 26, 1992, which was received by the Government on February 27, 1992 (AF Tab 3).

6. In its February 26, 1992, letter to the Government, the contractor alleged that it was the "unusually high lead level" that caused the subcontractor to chose a disposal method different from the method originally bid (AF Tab 3). The contractor further alleged in its claim letter to the contracting officer dated June 30, 1992, that he had interpreted the lead content stated in the specification to be 500.00 mg/kg which amount was acceptable for disposal as bid (AF Tab 5).

7. The Government had intended the 500,00 mg/kg to read 500,000 mg/kg (AF Tab 6).

8. The contractor acknowledged receiving Amendment No. 001 to the specifications on Standard Form 1442 which was submitted to the Government with his bid (AF Tab 2).

ALLEGATIONS OF THE PARTIES (ABRIDGED)

A. Government Allegations

Specification section K.8.4.b. contained an obvious typographical error in that the content of lead in the paint was stated to vary between 0 and "500,00 mg/kg." The actual number that the Government intended to include was 500,000 mg/kg. The contractor alleges that he interpreted the "500,00 mg/kg" to actually be 500.00 or 50,000 mg/kg but when it came time to dispose of the material, the actual content was greater. The contractor alleges that it was this unusually high content of lead that required his subcontractor to choose a method of disposal other than the method originally bid. If the actual content was critical to the contractor's method of disposal, and therefore, to the amount he would bid, he should have inquired as to the actual number intended by the Government. "It is well settled that a contractor, faced with an obviously patent error, omission, inconsistency, or discrepancy of significance, is obliged to bring the situation to the Government's attention prior to bidding." *Hal Allred*, IBCA-2447-A, 26 IBCA 62, 70, 96 I.D. 62, 89-1A ¶ 21,568, at 108,622. Failure by the contractor to so inquire forecloses him from asserting his claim. *Id.*

B. Appellant's Allegations

The 4-ton crane was repainted by a Government contractor before this contract was advertised. The resulting sand from sandblasting was below the EPA limit on lead content. As a result, it was hauled to the local county sanitary landfill and treated just like any other construction trash.

The biggest question about the amendment is left unanswered by the Solicitor. Why did the Government issue the amendment? Did they have a recent test result from the specified 100-ton crane that was materially different from the 4-ton crane? If so, why was it not furnished with the amendment? The Government has the responsibility to deal in good faith and furnish all the pertinent information to the bidders.

Any experienced reasonable bidder would have assumed that the 4-ton crane and 100-ton crane would have the same original coatings. If

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the Government knew the cranes had different coatings, they should have tested the 100-ton crane and furnished the results with the specifications.

The Government had plans and specifications for original construction contracts of the 4-ton crane and the 100-ton crane. A review of the documents by the specifications author would have disclosed any difference in the coating system. The Government had at its disposal all of the facts on construction of these cranes (type, brands and chemical properties of the primers and paints used).

Specification writers should use amendments to clarify the original specification. In this case, the erroneous amendment did not clarify the original specification. The error forced the bidders to interpret the meaning of the amendment. It is possible the specification amendment writer meant to tell the bidders the latest information showed that the cranes had the same coatings and the maximum lead content was 50,000 mg/KG. Such action would give the Government the benefit of a lower bid on the project.

The Government has a lengthy specification review system. Designers and specification writers produce the draft documents. Contract specialists and construction engineers review and comment on the draft. Construction inspectors also review the documents before the project is advertized for bid. Again, why did the Government amend a fully reviewed document with a poorly written erroneous amendment?

The Solicitor fails to prove that the Government actually made an obvious patent error and meant the lead content to be a maximum of 500,000 mg/kg. Where are the test results and technical data to back up his statements? The error is not patent because the original contract information fortified the subcontractor's interpretation. The amendment did not state that the original specification was in error. The bidders had no reason to believe the amendment meant the lead content of the crane was 500,000 mg/kg. The Government should have supplied the test results for the 100-ton crane as it did for the 4-ton crane.

The Government has the duty to produce clear and concise bid documents. The Government failed in its duty, and a small painting subcontractor was damaged. The Government should have made a simple proof reading of the amendment before it was issued. Proof reading Government designed project documents is not a duty of the bidders, nor are the bidders compensated for such.

At the time the bid for this project was opened, the Government received the benefit of its error with lower bids. If a bidder had failed to write all of the digits on a lump sum amount in its bid, would the Government accept the bidders interpretation of its own error? I think not. Our numeric system does not require the comma “,” place holder, and only digits have value. The Solicitor should try entering a “,” in his calculator.

B. Government's Reply

The Government still maintains that the Board does not need to consider the contractor's interpretation of the specifications because the error was patent and required the contractor to inquire about its meaning or proceed at his own risk. Even if the Board considers the contractor's statement as to how he interpreted the specifications, the result is the same. The contractor's interpretation was unreasonable and he cannot rely on it now to support his claim against the Government.

The discussion by the contractor in his response is not relevant to the determination of whether the Government is entitled to summary judgment in this matter. The issue is whether the error in the specification is a patent one requiring the contractor to seek clarification from the Government.

The contractor should have inquired of the Government regarding the patent error in the specifications. Nothing provided in the contractor's response changes that conclusion. Therefore, the Government respectfully requests the Board to grant its motion for summary judgment and deny the contractor's claim in its entirety.

DISCUSSION

Although the Government's attempt to resolve this matter by motion for summary judgment is commendable, its exposition of the facts of this case was not entirely adequate.

The amendment to BOR's solicitation actually contained some 38 new pages to be substituted for old pages, within an original bid document that was approximately 1-inch thick. The changes included such items as total replacement (rather than just rehabilitation) of all motors and brakes; and clarifications or modified requirements in areas such as power availability, Government use of the crane during its rehabilitation, employee safety, structural inspection of the crane, rehabilitation of the operator's cab, asbestos removal, wallboard installation, protection of rolling or sliding surfaces, new guardrail gates (rather than simply "gate") to be installed, purchase order records, and "grit" blasting in place of sandblasting.

Some of the changes appear to be major; others seem to be merely grammatical or spelling corrections. Some of the replaced pages appear not to have been changed at all, or at least were not marked by BOR as having been changed. The Board did not always find it easy to determine from the amendment which of the changes were substantive or significant and which were not.

In days gone by, presumably because they were individually written and hand typed, virtually every construction or industrial equipment or service contract that came before the Board tended to contain numerous grammatical, spelling, and punctuation errors.

Currently, because of the wonders of the Computer Age, even if the form of the initial solicitation document is imperfect, its drafters often issue an early amendment to make it more clear and readable prior to

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the date when the bids are due. Thus, the amendment before us appears to contain few, if any, spelling mistakes.

However, Word Perfect's "Spell Check," for example, will not focus on commas within numbers. Rather, it analyzes what goes before the comma, and what comes after it, separately. If there is nothing awry in the *form* of the digits on each side of the comma, Spell Check will ignore whatever the number itself may signify, leaving it to human beings to assure that all of the digits before and after the comma are correct. Which, of course, leads us to the matter of the misplaced comma vs. the missing zero (depending on one's point of view), the primary issue in the case before us.

As a preliminary matter, before ruling on the Government's motion, we had asked Department counsel whether any prospective bidder had inquired about what number BOR had intended in K.8.4.b. of the amendment; and we were told that apparently no contractor had so inquired, and that none of the five bidders responding to the solicitation had done so.

The question in this case, therefore, is not merely whether it was reasonable for bidders to have assumed that BOR meant what it said, or whether the ambiguity in the figure "500,00" would have been patent to a reasonable proofreader; but, rather, whether the ambiguity was patent within the meaning of that term in the field of public contract law. The test is not simply a "reasonable man" test, or even a "reasonable contractor" test. It is, more realistically, (1) the obviousness and apparent seriousness of the ambiguity itself, (2) in the context of a reasonable, but busy, prospective bidder attempting to prepare a responsive, timely, and competitive bid.

Thus, while the sentence quoted by the Government from the Board's decision in *Hal Allred, supra*, is accurate, counsel appears to have overlooked two very important words in the quoted sentence, which were: "It is well settled that a contractor, faced with an obviously patent error, omission, inconsistency, or discrepancy *of significance*, is obliged to bring the situation to the Government's attention prior to bidding" (italics supplied). Our review of leading case law confirms that the two words, "of significance," are of the essence.

In the beginning, the reasonableness of the contractor's interpretation does seem to have been the primary test. In *Peter Kiewit Sons' Co. v. United States*, 109 Ct. Cl. 390 (1947), 418, the Court said:

Where the Government draws specifications which are fairly susceptible of a certain construction and the contractor actually and reasonably so construes them, justice and equity require that that construction be adopted. Where one of the parties to a contract draws the document and uses therein language which is susceptible of more than one meaning, and the intention of the parties does not otherwise appear, that meaning will be given the document which is more favorable to the party who did not draw it. This rule is especially applicable to Government contracts where the contractor has nothing to say as to its provisions [citing cases].

The court went on to say that the contractor had a right to take the specifications as the Government had written them.

The *Kiewit* approach was continued in *Beacon Construction*, 161 Ct. Cl. 1, 314 F.2d 501 (1963); *WPC Enterprises v. United States*, 163 Ct. Cl. 1, 323 F.2d 874 (1964); and in *Blount Bros. Construction v. United States*, 171 Ct. Cl. 478, 495-97; 346 F.2d 962, 972-73 (1965). In *Blount* the Court quotes from *WPC*, 163 Ct. Cl. 6-7, 323 F.2d 876-77, as follows:

Although the potential contractor may have some duty to inquire about a *major* patent discrepancy, or *obvious* omission, or a *drastic* conflict in provisions * * * he is not normally required (absent a clear warning in the contract) [i.e., a warning to seek clarification of *any* ambiguity] to seek clarification of any and all ambiguities, doubts, or possible differences in interpretation. The Government, as the author, has to shoulder the major task of seeing that within the zone of reasonableness the words of the agreement communicate the proper notions—as well as the main risk of a failure to carry that responsibility. If the [Government] chafes under the continued application of this check, it can obtain a looser rein by a more meticulous writing of its contracts and especially of the specifications. [Italics added.]

After discussing the obligation of potential contractors to seek clarification of a “*major* patent discrepancy, or *obvious* omission, or a *drastic* conflict in provisions” [italics added], the Court in *Blount* noted (346 F.2d 972-73):

However, contractors are business men, and in the business of bidding on Government contracts they are usually pressed for time and are consciously seeking to underbid a number of competitors. Consequently, they estimate only on those costs which they feel the contract terms will permit the Government to insist upon in the way of performance. They are obligated to bring to the Government's attention major discrepancies or errors which they detect in the specifications or drawings, or else fail to do so at their peril. *But they are not expected to exercise clairvoyance in spotting hidden ambiguities in the bid documents, and they are protected if they innocently construe in their own favor an ambiguity equally susceptible to another construction, for as in Peter Kiewit Sons' Co., the basic precept is that ambiguities in contracts drawn by the Government are construed against the drafter.* In the case before us the ambiguity was subtle, not blatant; the contractor was genuinely misled and not deliberately seeking to profit from a recognized error by the Government. Under these circumstances the contractor falls within the scope of the recognized formula. [Italics added; citation omitted.]

Within 3 years after *Blount*, the primary (but not exclusive) focus of the courts seemed to change from the person of the contractor to the language of the contract. In *J. A. Jones Construction v. United States*, 184 Ct. Cl. 1, 13, 395 F.2d 783, 790 (1968), for example, the court said:

Where the discrepancy occurs in the specifications themselves, the discrepancy exists from the very start. *It is the existence and type of the discrepancy, not necessarily the contractor's actual knowledge of it, that imposes a burden of inquiry on the contractor in the face of a provision like [the provision in question].*

Chris Berg v. United States, 197 Ct. Cl. 503, 515, 455 F.2d 1037, 1045 (1972), took a similar position, as have a number of more recent cases.

The clearest holding on the subject during this period, however, was probably set forth in *Mountain Home Contractors*, 192 Ct. Cl. 16, 22-23, 425 F.2d 1260, 1264-65 (1970), in which the Court reviewed the language of several of the cases noted above in order to address the

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two issues raised by the parties on appeal; namely, (1) "whether the discrepancy, omission, or ambiguity was drastic, glaring or patent"; and (2) "whether [the contractor's] interpretation of the ambiguous provisions was reasonable." The Court found that there was indeed a discrepancy between the contract's specifications, drawings, and list of alternates, but went on to say:

The ambiguity in the present contract simply does not rise to the standard we have set out in *WPC Enterprises, Inc., Beacon Constr. Co., Blount Bros. Constr. Co.*, and other cases [i.e., a drastic, glaring, or patent discrepancy of significance]. It was neither glaring nor substantial nor patently obvious. Its significance is noted by comparing the total contract price of \$4,918,600 to the amount plaintiff alleges is due him, \$19,764. Although this is not the sole determinative factor in leading us to our conclusion, it is illustrative of the overall unimportance of this one item, which is less than half of one percent of the total contract price.

In the case before us—although, as in *Mountain Home*, that is not the sole basis for our decision—the amount claimed by appellant is \$8,810.37 in extra costs, above a contract price of \$449,444.00, or less than 2 percent of the contract price.

One of the most instructive cases of the 1980's is *United States v. Turner Construction*, 819 F.2d 283, 285–286 (Fed. Cir. 1987), in which both parties insisted that the contract was not ambiguous but perfectly clear. The question was whether an "air volume control center" to be installed by the contractor necessarily included placing an air transmitter within the center itself, rather than near the source of the air as the contractor had assumed. The Government insisted that the use of the words "etc." and "as specified herein" indicated that the metal cabinet clearly included the transmitter, an argument rejected by the Armed Services Board. In affirming the ASBCA, the Court noted:

It is unlikely that this dispute would be before this court if the contract were truly clear. The more appropriate analysis, therefore, is whether the ambiguity in the contract was patent, raising the duty to inquire and, if not, whether the interpretation of the contract by the party that did not write it was reasonable. *Newsom v. United States*, 676 F.2d 647,650, 230 Ct. Cl. 301 (1982). After reviewing the relevant portions of the contract, we find no provisions "so glaring as to raise a duty to inquire," *Newsom, id.*, at 650, and therefore no patent ambiguity. * * *

Having concluded that Turner's interpretation of the contract was reasonable, we apply the rule of *contra proferentem*, which requires that a contract be construed against the party who drafted the document. *Id.* at 649. *Contra proferentem* applies when a contractor's reading of an ambiguous contract provision is reasonable in itself. *Sante Fe Engineers, Inc. v. United States*, 801 F.2d 379, 381 (Fed. Cir. 1986). *This rule correctly requires the drafter to use care and completeness in the creation of a contract.* [Italics added.]

See also *Fort Vancouver Plywood v. United States*, 860 F.2d 409 (Fed. Cir. 1988).

Finally, in *Froeschle Sons v. United States*, 891 F.2d 270, 272–73 (Fed. Cir. 1989), the drawings of the fuel lines to be installed in connection with the construction of an air launch cruise missile

maintenance facility were inconsistent; and the contractor initially ordered the wrong size of piping, incurring a substantial restocking charge when it was found to be unusable. The Armed Services Board denied the contractor's appeal for the extra costs on the ground that he had not proved that he had relied on his interpretation of the ambiguous drawings, but the Circuit Court reversed, saying:

Froeschle is not required to prove that it specifically included [the subcontractor's] price in making its bid.

It is well to remember that price adjustments of this type are equitable in nature. In the present setting, it was the government which wrote the contract and this dispute arose because the government failed to issue solicitation documents that could be relied on. *Prospective bidders are not required to perform the government's work in its stead; it too must be a responsible party in the contracting process.* [Italics added.]

The Claims Court has taken the same position. *See, e.g., Gresham, Smith v. United States*, 24 Cl. Ct. 796, 802 (1991), in which the Court, citing *WPC, supra*, said: "Contractors must inquire only as to major discrepancies, obvious omissions, or manifest conflicts in contract provisions."

Perhaps it would be helpful if, as appellant suggests, an analogy were more often drawn between the extent of a contracting officer's (CO's) duty in connection with latent bidding mistakes, and the extent of a bidder's duty in connection with latent solicitation ambiguities. The former cases generally hold that the CO cannot be held to a higher standard than the bidder because the latter is in a better position to ascertain the facts upon which to base its estimate. *See Aydin Corp.*, 229 Ct. Cl. 309, 669 F.2d 681 (1982); and *Fadeley v. United States*, 15 Cl. Ct. 706 (1988).

As the Court in *Fadeley* noted, citing *Carrier v. United States*, 6 Cl. Ct. 169 (1984), the equitable remedy of reformation to correct an unilateral mistake in a plaintiff's bid is available only if the Government knew or should have known of a mistake in a bid costly to the bidder.

In most bidding mistake cases, it is very difficult for the contractor to prove that the Government should have known of its mistake. *See, e.g., Edsall Construction Co.*, IBCA-2450, 89-3 BCA ¶ 22,177, where the bid error was not discovered until after the contract had been let and, on the basis of the FAR at 48 CFR 14.406-4(c), the Board found no basis upon which the contractor could recover its loss. In our view, an equally tough test should be applied when the Government alleges that the bidder should have known of the Government's mistake. But we do not attempt to apply such a test here, because there is no need to do so.

Clearly, in the case before us, appellant should prevail. First, the misplaced comma, which is the only *patent* aspect of the Government's mistake, could certainly appear to a reasonable contractor to be either a punctuation or typographical error; its misplacement is not a *major* ambiguity in any sense of the word. The missing zero, because it connotes a factor of 10, *is* a major error; but that error is latent, not

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patent; and we will not charge the contractor with notice of what is not there. *Peter Kiewit, Blount Bros., and Gresham, supra.*

Second, as the contractor has also pointed out, what is most unclear in this case is why BOR did not clearly tell bidders exactly what it had in mind when it changed the language of paragraph K.8.4.b. of the solicitation document. It is partly because the language of K.8.4.a. was not changed that the interpretation of K.8.4.b. apparently adopted by the contractor became reasonable. Admittedly, it is not clear from the amendment what was intended; but the unchanged existence of paragraph K.8.4.a. merely compounded the problem of what was meant, because if BOR had in fact determined that the proper number in K.8.4.b. was 500,000, it was all the more required to say so clearly.

Third, as the contractor further points out, Government contracting officers have, or have sufficient access to, the latest in photocopying and computer equipment, word processing programs, and engineering and technical expertise to assure clear writing and proper proofreading in solicitation documents. The contractor, on the other hand, particularly if it is of small business stature, often lacks these resources, and is far more pressed for time in attempting to achieve a successful bid than the Government is in soliciting bids. Thus, if the resulting Government document becomes inaccurate (*cf. Froeschle, supra*), fuzzy (*cf. Turner, supra*), or unintelligible (*cf. Harrison Western Corp., ENG BCA 5652, 93-1 BCA ¶ 25,231 (1992)*), but does not involve a major patent ambiguity, as was the case here, the resulting costs must be borne by the Government, not by the contractor. Fairness demands no less, and the law clearly supports this result. *Blount Bros.; Mountain Home, supra.*

Finally, as the contractor has also pointed out, at the time the bids were opened, the Government automatically received the benefit of its error through lower bids. In the contractor's view, the Government failed in its duty to issue a clear and concise amendment to the specifications, and the contractor should not suffer because of BOR's poorly written (or poorly proofread!) document. Thus, the contractor urges that any summary judgment should be found for the contractor.

We agree. We have no difficulty in finding that the misplacement of the comma was obvious but not major: and that the omission of the zero was major, but not patent, as partly indicated by the fact that none of the bidders or prospective bidders thought it necessary to inquire about the error.

In bidding on contracts, potential contractors must seek clarification of obvious, gross, and glaring errors in the Government's specifications; but they are not expected to exercise clairvoyance in spotting hidden ambiguities. Thus, the contractor here is not liable for failing to realize that the Government's estimate of the lead content of paint to be removed from an old gantry crane had omitted a zero, when the

number set forth was also reasonable, even though it clearly contained an apparently misplaced comma.

DECISION

Accordingly, appellant's motion for summary judgment is granted, and the Government's motion for summary judgment is denied. Since the Government has not disputed the amount of appellant's claim, appellant is hereby awarded the sum of \$8,810.37, with interest from the date BOR received the claim, in accordance with the Contract Disputes Act of 1978.

BERNARD V. PARRETTE
Administrative Judge

I CONCUR:

G. HERBERT PACKWOOD
Acting Chief Administrative Judge

March 31, 1993

**APPOLO FUELS, INC. v. OFFICE OF SURFACE MINING
RECLAMATION AND ENFORCEMENT**

125 IBLA 369

Decided: March 31, 1993

Appeals from decisions of Administrative Law Judge David Torbett (NX 89-39-R and NX 89-46-R) granting temporary relief from and vacating Notice of Violation No. 89-91-372-003 and Cessation Order No. 89-91-372-001.

Affirmed in part, dismissed as moot in part.

1. Surface Mining Control and Reclamation Act of 1977: Appeals: Generally—Surface Mining Control and Reclamation Act of 1977: Bonds: Release of—Surface Mining Control and Reclamation Act of 1977: Enforcement Procedures: Generally—Surface Mining Control and Reclamation Act of 1977: Evidence: Generally

Where, consistent with the provisions of 30 CFR 700.11(d)(1), a state has made a written determination that reclamation has been fully completed at an interim permit site pursuant to Subchapter B of Chapter 7 of Title 30 and the period of extended liability for revegetation has run, OSM may not assert jurisdiction absent a showing that the written determination was based upon fraud, collusion, or a misrepresentation of a material fact.

APPEARANCES: Margaret H. Poindexter, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Knoxville, Tennessee, for the Office of Surface Mining Reclamation and Enforcement; James R. Golden, Esq., Middlesboro, Kentucky, and Ronald D. Ray, Esq., Louisville, Kentucky, for Appolo Fuels, Inc.

OPINION BY ADMINISTRATIVE JUDGE FRAZIER

INTERIOR BOARD OF LAND APPEALS

The Office of Surface Mining Reclamation and Enforcement (OSM) has appealed from two decisions of Administrative Law Judge David Torbett (Hearings Division Docket Nos. NX 89-39-R and NX 89-46-R). The first decision, which was a bench decision and order issued on May 16, 1989, granted temporary relief to Appolo Fuels, Inc. (Appolo), from Notice of Violation (NOV) No. 89-91-372-003 and a Cessation Order (CO) No. 89-91-372-001 issued for failure to abate the NOV pursuant to section 521 of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. § 1271 (1988). The second decision, dated July 9, 1990, vacated the NOV and CO.

The State of Tennessee originally issued a permit to mine to Appolo on January 4, 1978, under permit No. 78-13. The permit was renewed

a year later under permit No. 79-39 (Tr. 49).¹ The permit site encompassed 39 acres located in the Cabin Hollow area in Claiborne County, Tennessee (Tr. 10, 11-12). In 1980 all mining was completed and the area backfilled and revegetated (Tr. 18). On December 22, 1980, the State of Tennessee, Department of Conservation, issued a release of Appolo's performance bond as to 37 of the 39 acres, retaining a \$2,000 bond on 2 acres in the permit area which contained sediment ponds (Tr. 25, Exh. R-4). The ponds were removed by April 1, 1987, and 2 years of vegetation were completed by April 1989 (Tr. 27). On March 21, 1989, OSM Inspector Glen Bartley conducted an inspection of Appolo's reclaimed surface mine and observed a slide affecting approximately 1 acre of the backfill material (Tr. 11).² On March 28, 1989, he issued NOV No. 89-91-312-003 to Appolo for a violation of interim regulation 30 CFR 715.14 for "failure to backfill all spoil material to eliminate all highwalls and spoil piles created by a slide" (Exh. R-2).

The corrective action required by the NOV included the following: "Establish temporary sedimentation control that will prevent sediment from leaving the permit area. This should be established below the slide area. Regrade the spoil material to reduce steep slopes and to compact the spoil affected by the slide. Eliminate the highwalls on the permit created by the slide" (Exh. R-2). The time for abatement of the violations expired on April 25, 1989. On April 26, 1989, Bartley reinspected the site and issued CO No. 89-91-372-001 to Appolo for failure to abate the NOV (Exh. R-3).

On May 10, 1989, Appolo filed an application for review of the NOV and CO along with an application for temporary relief. In its grounds for review and relief Appolo asserted *inter alia* that the relief sought would not adversely affect the health or safety of the public or cause significant, imminent environmental harm to land, air or water resources; that OSM does not have jurisdiction over the permit site; that Appolo was not responsible for the condition which gave rise to the NOV; that there is a substantial likelihood that the applicant will prevail in the review of the CO and underlying NOV; and that Appolo should be granted temporary relief from the effect of the CO pending a decision on review.

A temporary relief hearing was held on May 16, 1989, in Knoxville, Tennessee, before Judge David Torbett. Judge Torbett rendered a decision from the bench granting Appolo Fuels temporary relief. Judge Torbett stated that he was unable to make a finding that the granting of temporary relief would not cause environmental damage or potential environmental damage, or imminent harm to people or the environment (Tr. 85-86). He declared, however, that the Government

¹ All transcript references are to the hearing held on May 16, 1989, in Knoxville, Tennessee, before Judge David Torbett, unless otherwise noted.

² By notice published on Apr. 18, 1984 (49 FR 15496), after a hearing, OSM assumed direct Federal enforcement of the Tennessee State Regulatory program pursuant to sec. 521(b) of SMCRA, 30 U.S.C. § 1271(b) (1988), on a finding that the State was not adequately enforcing the Act. Subsequently, approval of the State regulatory program was withdrawn and a Federal program was promulgated for regulation of surface coal mining and reclamation operations on non-Federal lands. 49 FR 38874 (Oct. 1, 1984); see 30 CFR Part 942.

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has an ongoing responsibility to "prove by a preponderance of the substantial evidence" that Appolo caused the slide and concluded that the Government had not met its burden (Tr. 86, 88).

OSM appeals Judge Torbett's ruling, asserting that Appolo is not entitled to temporary relief because it failed to demonstrate that the granting of temporary relief would not cause significant, imminent environmental harm and OSM's unrefuted proof prevented Appolo from showing that the findings of the Secretary would be favorable to it.

In response, Appolo contends that it is entitled to temporary relief because OSM is unable to make a prima facie case that any violation occurred. Appolo asserts that there is ample proof in the record that temporary relief would not result in significant, imminent environmental harm. According to Appolo, the Judge's decision and findings with respect to OSM's ability to make a case, satisfy the requirement of showing a substantial likelihood that Appolo would prevail on the merits. Therefore, Appolo concludes that the Judge's decision is proper and should be upheld. In the alternative, Appolo submits that the Board should enter the findings concerning significant, imminent harm required under 30 U.S.C. § 1275(c)(3) (1988), pursuant to its own authority, or remand the case to Judge Torbett with directions to enter such findings.

A hearing on permanent relief was held on April 23, 1990, in Knoxville, Tennessee, before Judge Torbett at which time both parties stipulated that they would stand on the record created at the May 16, 1989, hearing. However, they agreed to the admission of Exhibit A-6 by Appolo, a series of state and Federal inspection reports, and Appolo recalled Robert Chedester, a licenced civil engineer, to offer rebuttal testimony (Tr. II, 6).

In his July 9, 1990, decision on the application for review of the NOV and CO, Judge Torbett summarized the facts in this case as follows:

Respondent's evidence consisted of the testimony of Inspector Glen Bartley and OSM engineer David Lane, as well as the introduction of five documentary and photographic exhibits properly numbered and entered R-1 through R-5. Applicant's evidence consisted of the testimony of Robert Chedester, Applicant's engineer, as well as the introduction of five documentary and photographic exhibits, numbered and entered A-1 through A-5.

Inspector Bartley testified that there had been a slide on an area of approximately one acre of Applicant's 39 acre site (Tr. 17). He testified that "... the area that had slid was some backfill material in addition to material above the permit ... [which] had been affected and slid also." (Tr. 17) The Inspector agree[d] on cross examination that in his report he had given a slightly different account of the slide (Tr. 21). In the report Inspector Bartley noted "that a slide had originated above the backfilled highwall ... The top of the slide was 180 feet above the permit line, and a 15 foot highwall had formed when the material above the permit had slumped. More material had slumped at the top of the backfilled highwall creating another vertical wall 8 feet in height. This slumpage of material had caused the backfilled material to move forward ..." (R-2)

Inspector Bartley testified that the site had been reclaimed in 1980, and successfully revegetated since that date (Tr. 18). He testified that he had recommended prior to the occurrence of the slide that the site be taken off the list of inspectable units (Tr. 19). He agreed that the site had been inspected since 1979 and had never been cited for

improper reclamation as to the highwall elimination or backfill stability (Tr. 23). He agreed that the bond had been released on 37 of the 39 acres in 1980, and that the two remaining acres contained ponds that were eventually eliminated in 1987 (Tr. 25, 27). He also agreed that the slide had occurred on the 37 acres that had been reclaimed and had gone through the period of extended responsibility for vegetation (Tr. 27). He agreed that the period of extended responsibility for the 2 acres containing the ponds would have ended in April of 1989, just after this citation was issued (Tr. 29, 30).

OSM's David Lane, a registered engineer, testified that he had inspected the site visually in May of 1989. He stated that there were two possible explanations for the slide, either that the backfill had been improperly reclaimed and had slumped due to instability, or that a slide from above the permit had fallen on the backfill with sufficient force to cause it to slump (Tr. 36, 37). He was unwilling to testify conclusively that either scenario was more likely than the other (Tr. 37, 38, 43, 46). He testified that in his opinion, and from his visual inspection, the slope probably did not have the 1.5 stability factor required of a 30 degree slope (Tr. 42, 45). He also testified that there was excess spoil on the bench that could have been used in the backfill (Tr. 43).

Robert Chedester, Applicant's engineer, who was not a registered engineer, testified that the site had been reclaimed in the Spring of 1979 (Tr. 50). He introduced Applicant's exhibit A-2, a post mining report that indicated that reclamation was completed on June 27, 1979 (A-2).

Chedester testified that he was on the site at least once a month, and that it had been reclaimed to permanent program standards (Tr. 50). He introduced A-3, Tennessee DSM's [Division of Surface Mining] Notice of Bond Release/Reduction, and testified that the site had a bond release in 1980 and a vegetative release in 1985 on the backfilled areas that encompassed the slide (Tr. 51). He testified that a request for pond removal had been submitted for the two remaining acres in 1984, and that the ponds had finally been removed in 1987 (Tr. 52). He stated that there had been no observable instabilities on the backfilled and reclaimed area (Tr. 53). He introduced A-5, his drawing and related photographs, which he testified showed the nature and composition of the slide (Tr. 54, A-5). Chedester testified that at the top of the slide, and off of the permit there was an old road fill, and that the slide was composed of the road fill dirt (Tr. 55). He testified that it was impossible to say conclusively what had caused the slide (Tr. 57-60). He noted, however, that the slide material was stratified, highly weathered material similar in nature to the material above the backfill and above the permit (Tr. 58). He agreed that at this point the entire area was moving as one (Tr. 58).

Chedester testified that the mining and reclamation had been done by a contract operation, and that the backfilling had been compacted through the process of placing one lift on top of the other (Tr. 67). He did not know whether the site had been tested for a 1.5 stability factor (Tr. 67). He testified at the second hearing that there was no excess or surplus spoil on the bench area (Tr. II, 7). He also introduced A-6, a series of 16 inspection reports between 1982 and 1985 that repeatedly described the site as well vegetated and with no observable highwall problems (Tr. II, 7; A-6).

(Decision of July 9, 1990, at 2-3).

Judge Torbett concluded that OSM had not presented a *prima facie* case as to the facts of violation. Judge Torbett stated that assuming *arguendo* that OSM had presented a *prima facie* case, Appolo's testimony was sufficient to rebut it (Decision of July 9, 1990, at 5). As for OSM's jurisdiction over the site in issue, Judge Torbett found that the evidence presented showed that Appolo's 37 acres were fully reclaimed as of 1985 and that OSM's jurisdiction terminated at that time. Judge Torbett referred to 30 CFR 700.11(d)(1), the Departmental regulation which sets forth the conditions under which a regulatory authority may terminate its jurisdiction over the reclaimed site of a completed surface coal mining and reclamation operation. Judge Torbett found that the requirements of this regulation had been met

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and that OSM's jurisdiction had terminated (Decision of July 9, 1990, at 8).

On appeal OSM argues that despite partial bond release, OSM retains regulatory jurisdiction over the subject site. OSM notes that Tennessee implemented the bonding requirements and standards for bond release during the interim program. OSM asserts that it did not monitor these standards and has yet to approve the site for complete bond release.

OSM disagrees with Judge Torbett's finding that OSM failed to present a prima facie case that Appolo caused the slump in the backfill as a result of its failure to comply with applicable performance standards. OSM contends that it carried its burden of proof by presenting evidence that Appolo failed to satisfy several Federal performance standards set forth in 30 CFR 715.14. OSM refers to the testimony of its engineer Lane regarding the grade of the backfill and the 1.5 static factor of safety as specified in 30 CFR 715.14. OSM contends that the existence of slopes without the requisite static factor of safety and Appolo's failure to compact the backfill during reclamation are both evidence that Appolo's mining operation caused the slide.

In response Appolo contends that OSM did not establish a prima facie case. According to Appolo, the evidence connecting its actions with a slide which occurred almost 10 years after completion of reclamation is contradictory and inconclusive at best. Appolo refers to OSM's own witness, Lane, claiming his testimony supports its contention that it is not possible to determine what caused the slide. Appolo asserts that there is ample evidence to support Judge Torbett's decision that "the cause of the slump of applicant's backfill did not occur because of any failure of the Applicant to comply with the Act and regulations," and that "the probable cause of the slide was the unique weather phenomenon" which had been described in the record (Decision at 5). Appolo notes that inspection reports of the site describe the reclamation work as "excellent" and "very successful" and that no NOV was ever written under 30 CFR 715.14 despite repeated inspections. Appolo points out that NOV No. 89-91-372-005 which cited Appolo for having "excess spoil" on the site was voluntarily vacated by OSM.

Regarding the stability factor, Appolo contends that Lane's testimony that the required static factor of safety had not been achieved was not based upon any analysis of the material in the slide itself or of Appolo's initial mining permit and subsequent inspections. According to Appolo, Lane's testimony was speculation which cannot rise to the level of evidence necessary to establish a prima facie violation. Refuting OSM's testimony that Appolo made no attempt to compact the backfill, Appolo referred to Chedester's testimony that compaction did take place through the process of placing one lift on top of the other. Appolo

contends that the entire reclamation process was assiduously inspected through the course of reclamation and at regular intervals since. Appolo reasons that for OSM to now claim that the slide was caused by failure to meet this standard some 10 years earlier is "second guessing in the face of the facts."

Appolo contends that even assuming OSM met its burden of presenting a prima facie case, Appolo presented sufficient evidence to contradict the facts of violation. Appolo asserts that it rebutted OSM's evidence on the issue of excess spoil, the static factor of safety and compaction of the backfilled material.

Appolo asserts that OSM does not have jurisdiction over it because the site is not "a surface coal mining operation" and because it was not "engaged in a surface coal mining operation." Appolo underscores its argument noting that OSM's jurisdiction ends when two events have occurred: first, the operator must have successfully completed all reclamation; second, the period of extended liability for vegetation as set forth in 30 U.S.C. § 1265 (1988), must have passed. According to Appolo, both events have occurred on this site and therefore, OSM can no longer assert jurisdiction.

[1] The jurisdictional issue in this case focuses on the applicability of Departmental regulation 30 CFR 700.11(d)(1):

A regulatory authority may terminate its jurisdiction under the regulatory program over the reclaimed site of a completed surface coal mining and reclamation operation, or increment thereof, when:

- (i) The regulatory authority determines in writing that under the initial program, all requirements imposed under subchapter B of this chapter have been successfully completed; or
- (ii) The regulatory authority determines in writing that under the permanent program, all requirements imposed under the applicable regulatory program have been successfully completed or, where a performance bond was required, the regulatory authority has made a final decision in accordance with the State or Federal program counterpart to part 800 of this chapter to release the performance bond fully.

This regulation was challenged by the National Wildlife Federation in a case captioned *Nat'l Wildlife Federation v. Lujan*, No. 88-2416 (August 30, 1990) before the United States District Court for the District of Columbia in accordance with 30 U.S.C. § 1276(a) (1988). On December 10, 1991, the United States Court of Appeals for the District of Columbia Circuit reversed the opinion of the district court which had invalidated 30 FR 700.11(d). See 950 F.2d 765 (1991). Appellant argues that the decision of the Court of Appeals is dispositive of this appeal.

The Administrative Law Judge concluded that when the Secretary issued the final rule set forth above, 30 CFR 700.11(d), establishing standards for determining when a mine site is no longer a surface coal mining and reclamation operation and thus terminating regulatory jurisdiction, it applied in this case. The Administrative Law Judge concluded that "bond release with an accompanying statement that the site has been reclaimed to initial performance standards is sufficient to extinguish Agency authority" (Decision at 8). He found that Appolo met the standard of the regulation by presenting evidence to show that

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the State of Tennessee released bond on 37 of 39 acres of its Permit 79-39 (A-3); that inspection reports on the site dating between 1982-1985 consistently noted the successful vegetation over the area and the growth of grasses and trees (A-6); that the testimony of Chedester showed that the site had been reclaimed to interim performance standards in 1980, and that Appolo had completed its 2-year extended responsibility for the area including the slide site as of 1985. For reasons which we will set forth, we agree with Judge Torbett and find that OSM had no jurisdiction over the acreage involved in the landslide.

In order to understand our holding, it is necessary to review, at some length, the rationale behind the eventual adoption of 30 CFR 700.11(d)(1). On June 26, 1987, OSM published a proposed rule with the express purpose of providing a definite standard for determinations of when regulatory jurisdiction terminated under SMCRA. See 52 FR 24092-95 (June 26, 1987). The preamble to the proposed rule recognized that nothing in SMCRA explicitly provided for the termination of regulatory jurisdiction once that jurisdiction had attached to a surface mining operation. OSM noted, however, that the general practice of State regulatory authorities had been "to terminate regulatory jurisdiction upon the final release of the performance bond, or, where no bond was required, upon a judgment by the regulatory authority that reclamation had been completed." 52 FR 24092 (June 26, 1987). As a result, after bond release, State regulatory authorities generally stopped inspections of those sites, deeming the provisions of the State regulatory program no longer applicable and thus depriving the regulatory authorities of jurisdiction to enforce the State program at those sites.

OSM noted that, insofar as operations under the initial program and coal exploration activities were concerned, it had in the past taken the position that, since the Act did not require bonding for these operations, release of a bond required by State authorities did not terminate jurisdiction under SMCRA. See, e.g., *OSM v. Calvert & Marsh Coal Co.*, 95 IBLA 182 (1987); *Grafton Coal Co.*, 3 IBSMA 175, 88 I.D. 613 (1981). Moreover, OSM admitted that it had conducted oversight inspections and taken enforcement actions even at permanent program sites where the State had released the bond, which actions had resulted in generating conflicts between OSM and the States and OSM and the operators. 52 FR 24092-93 (June 26, 1987).

OSM recognized that the States objected to having OSM second-guess their determinations under the approved State permanent programs. Additionally, OSM acknowledged the concerns of operators that "without a point certain established for termination of jurisdiction, operators will be subject to perpetual liability under the Act," and

noted that the operators were concerned that such liability might adversely impact upon their ability to obtain bonds on other sites. *Id.*

To resolve these controversies, OSM proposed to amend 30 CFR 700.11 by adding a new paragraph providing that the applicability of the regulations implementing the Act to a completed coal mining and reclamation operation would terminate when the regulatory authority made a written determination that certain conditions were met. Thus, as initially proposed, 30 CFR 700.11(d) provided, in relevant part, that "[t]he applicability of this chapter to a completed surface coal mining and reclamation operation or coal exploration operation shall terminate when: (1) The regulatory authority determines in writing that under the initial program, all requirements imposed under Subchapter B have been successfully completed * * *." 52 FR 24095 (June 26, 1987).

In justifying its proposal, OSM noted that:

The issue of jurisdiction turns on the point at which a surface coal mining and reclamation operation or a coal exploration operation has met the requirements of the Act, such that it is no longer an operation and is no longer subject to regulation. The purpose of the proposed rule is to ensure that the regulatory authority makes a conscious decision that an operation is completed and has met those requirements.

The statutory scheme of the Act envisions that mining is a temporary use of the land, which must be restored to a condition capable of supporting the uses it was capable of supporting prior to any mining or those other uses authorized by the Act. Thus although it does not clearly specify when enforcement authority ends, the Act does not contemplate perpetual regulation. It is apparent that jurisdiction under the Act must end simultaneously for State regulatory authorities and OSMRE because once the Act's reclamation requirements are completed at a site, it no longer is a surface coal mining and reclamation operation.

52 FR 24093 (June 26, 1987).

Differentiating between the release of a bond under the permanent program which did signify completion of reclamation and release of a bond under the initial program which did not necessarily correlate to a determination as to the proper completion of reclamation, OSM proposed a general rule which would be applicable to all operations "that the regulatory authority make a written determination that the operation has met the applicable requirements." *Id.* at 24094.

Of particular importance in the confines of the instant appeal, OSM noted that it had also considered the issue of the status of sites where mining and reclamation had ceased prior to the effective date of the proposed rule. OSM declared:

For initial program operations where a State bond was required and has been released, OSMRE would presume, absent clear and convincing evidence to the contrary, that all requirements of the Act were met upon final bond release. This also presumes that the process includes a written determination of compliance with all regulatory requirements. Such documentation could take the form of an approved bond release application or other document that the State regulatory authority has used to accompany final bond release.

Id.

The proposed regulations were the subject of comments by State regulatory authorities, coal industry representatives, and environmental groups. On November 2, 1988, the Department promulgated final rules dealing with the termination of regulatory

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jurisdiction under SMCRA. See 53 FR 44356-63 (Nov. 2, 1988). In the preamble to the final rule, OSM revisited the question of whether or not termination of regulatory jurisdiction was permissible under SMCRA. While agreeing with a number of commentators who had argued that there was no specific provision providing for the termination of regulatory jurisdiction, OSM nonetheless concluded that eventual termination of jurisdiction was inherent in the Act. Thus, OSM argued:

A reclaimed site of a surface coal and reclamation operation * * * is no longer subject to regulatory jurisdiction under either a Federal or State regulatory program when all reclamation requirements of the regulatory program have been successfully completed and the period of extended liability for revegetation has expired. Nothing in the Act requires a permittee to be subject to regulatory jurisdiction beyond this point.

It was not the intent of the Surface Mining Act that the regulatory authority maintain perpetual jurisdiction over all lands that were mined. It is recognized that the Surface Mining Act does not impose requirements upon fully reclaimed land. *Termination of jurisdiction may occur when reclamation is in fact accomplished and the period of extended responsibility for revegetation has run.* The regulatory authority is vested with the authority to determine that reclamation has been completed. [Italics supplied.]

Id. at 44357.

The final rule adopted did, however, differ from the proposed rule in a number of ways. Of relevance herein was the modification of the introductory language of paragraph (d) to clarify that "successful completion of an operation and termination of regulatory authority jurisdiction may occur for the entire permit area [or] an increment within that permit area" consistent with the provisions of 30 CFR 800.40(c) which permitted performance bond release for incremental areas within a permit area. *Id.*

In addition to clearly providing that regulatory authority could be terminated on an incremental basis within a single permit,³ OSM also added a new section, 30 CFR 700.11(d)(2), providing that:

Following a termination under paragraph (d)(1) of this section, the regulatory authority shall reassert jurisdiction under the regulatory program over a site if it is demonstrated that the bond release or written determination referred to in paragraph(d)(1) of this section was based upon fraud, collusion, or misrepresentation of a material fact.

Finally, we note that, in discussing the effect of the regulatory changes with respect to the interim program, OSM took particular note of the problems which had surfaced with respect to premature bond releases:

OSMRE acknowledges that there have been some initial program final bond releases by States without full reclamation. * * * Because States have been using initial program bond releases as a mechanism for terminating regulatory jurisdiction, OSMRE recognizes the need to clarify the standard for termination. Post-bond release problems which occurred in the past support the need for such a rule. This rule will clarify what standard the States must meet to terminate regulatory jurisdiction, *the mechanism to*

³ We note that while OSM consistently characterizes the action by the State of Tennessee as a "partial" bond release, it is, in fact, correctly deemed to be a "final" bond release of an "incremental" area of the permit. See generally 30 CFR 800.40(c).

be used for future terminations, and the standard OSMRE would use to review such terminations. [Italics supplied.]

Id. at 44360. Focussing on the underlined phrase of the last sentence, OSM now argues⁴ that this regulation has no relevancy to determinations as to whether or not past State efforts to terminate regulatory jurisdiction were efficacious. Rather, OSM argues that this regulation is completely prospective and cannot serve as a basis for ratifying past actions purporting to terminate regulatory jurisdiction. See Reply Brief at 2-3; Brief of Respondent before Judge Torbett at 6-9. The logical result of this argument is that *all* past State efforts to terminate regulatory jurisdiction under the initial program should be considered ineffective and void. We do not agree.

First of all, there is simply nothing in either the language of the regulation or the regulatory history which evinces an intent to make this provision purely prospective. On the contrary, in the preamble to the proposed rulemaking, the Department clearly stated that “[f]or initial program operations where a State bond was required and has been released, OSMRE would presume, absent clear and convincing evidence to the contrary, that all requirements of the Act were met upon final bond release.” 52 FR 24094 (June 26, 1987). Nothing in the preamble to the final rule contradicts or even brings into question this declaration. Indeed, the language on which OSM now purports to rely actually strengthens the conclusion that past actions by State regulatory authorities to terminate jurisdiction would be recognized absent clear and convincing evidence that the reclamation requirements of SMCRA had not been met when regulatory jurisdiction was terminated.

Thus, the preamble declared that the rule clarified: (1) “what standard the States must meet to terminate regulatory jurisdiction,” (2) “the mechanism to be used for future terminations,” and (3) “the standard OSMRE would use to review such terminations.” 53 FR 44360 (Nov. 2, 1988). We would point out that the adjective “future” is used only in reference to “the mechanism” which *must* be used by States to terminate jurisdiction. Far from indicating that past State attempts to terminate jurisdiction were ineffective, this actually *limits* OSM’s jurisdiction to challenge those attempts where such a challenge is based on the failure of the State to observe the procedures delineated in the regulation. Such a challenge may only be made to “future” terminations. This interpretation is fortified by another section of the preamble.

In its brief before Judge Torbett, OSM attempted to buttress its argument that these regulations were irrelevant by citing the following sentence from the preamble to the final rule: “Accordingly, this rule is

⁴OSM has now, in the face of the Circuit Court reversal of the District Court, abandoned its apparent reliance on the decision of the District Court in *Nat’l Wildlife Federation v. Lujan*, *supra*. We must, however, record our agreement with appellee that it is somewhat surprising for an agency appellant to cite a decision invalidating an agency regulation in support of its arguments before this Board when, at the same time, the Department of Justice is actively pursuing attempts, at the behest of the agency, to have that decision reversed on appeal, which attempts prove ultimately successful.

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prospective only." *Id.* at 44362. Not only was this sentence taken out of context, it is demonstrable that, when read in context, this statement clearly undermines OSM's present argument.

One commentator had complained, in the context of coal exploration permits for which previous written determinations of reclamation had been made under an approved program, that it might be difficult for State regulatory agencies to obtain copies of these documents since they might have been archived. Responding to this concern, the Department noted:

This comment relates to an approach outlined in the proposed preamble (52 FR 24094) concerning the status of sites where mining or exploration was determined to be completed by the regulatory authority prior to the effective date of this rule. That approach, for which OSMRE specifically invited comments, suggested that if States wished to terminate jurisdiction at completed sites where no bond was required or where bond release did not include a written determination of compliance, they would need to revisit such cases and make the written determination required by this rule. OSMRE believes that the approach outlined in the proposed rule provided inadequate recognition of the fact that States already terminate jurisdiction under their approved programs and therefore *no need exists for States to disturb past final determinations unless such determinations were inconsistent with the approved programs.* Accordingly, the rule is prospective. *It does not invalidate previous actions by State regulatory authorities to terminate their jurisdiction but instead formalizes the standards that must be incorporated into approved programs and applied thereafter.* [Italics supplied.]

53 FR 44362 (Nov. 2, 1988). It is obvious from the foregoing that the preamble's reference to the rule's prospectivity is not fairly read as a determination that past actions by the regulatory authority operating under an approved program to terminate jurisdiction were ineffective but rather as a determination that these past actions would not be challenged so long as they were not inconsistent with the approved program.

Admittedly, this reference was made in the context of the permanent program wherein, under all approved State programs, final release of a bond was only permissible upon a showing of successful reclamation and after the extended period of liability for successful revegetation has expired. Therefore, this analysis should not be read as automatically foreclosing any inquiry into the circumstances of bond release and termination of jurisdiction under the interim program since bond release was not necessarily constrained by the requirements attendant to bond release under the permanent program. It does, however, clearly establish that OSM's present argument that the regulation simply has no relevancy with respect to past actions by the States is simply unsustainable.

The record is clear that on December 22, 1980, the State of Tennessee issued a total bond release of 37 acres, which release was based upon a written declaration that reclamation had been successfully completed. If OSM wishes to challenge the termination of State regulatory jurisdiction over an interim program permit which occurred prior to the adoption of these regulations such as occurred

herein, OSM must establish, consistent with 30 CFR 700.11(d)(2), that the written determination was based on fraud, collusion, or a misrepresentation of material fact.⁵ OSM has totally failed to establish any sustainable basis for such a conclusion.

The documentary evidence submitted by Appolo provides absolutely no basis for any conclusion other than that reclamation occurred in accordance both with the permit and with the interim program regulations. Such is the evidence not only of the bond release but of numerous post-release inspection reports by both Tennessee and, later, OSM, which reported on revegetation in laudatory and, indeed, glowing terms. The only arguable support for any other conclusion is based solely on Lane's surmise that the reclamation appeared to have violated the minimum static safety factor. See 30 CFR 715.14(b)(2)(iii). Lane's assertion occurred in the following colloquy:

Q [By Ms. Poindexter] What was the grade approximately?

A We shot grades that were around 30% in that area, mostly in the high twenties, some were over thirty.

Q And what does the reg require?

A I noticed in one of our exhibits—and I'm not sure which exhibit that is—

Q Well, if I may, I'll ask you to look at what's been marked as R-5 and ask if you can identify that?

A Okay. Yes, this is a cross section of the area showing both pre-mining and the contour after mining. The contour after mining here is called out to be 28 degrees with terraces and I think that those slopes were present out there. The regulations require that in slopes deeper than two to one, that the applicant—that the permittee have a 1.5 static factor of safety. I would question whether that 1.5 was provided, just given the situation out there.

Q Why is that?

A Well, it's not stable and even if the slide above did—was the cause, if the mass had the 1.5 factor of safety, it looked like very little weight came from above onto the slide to bring that factor safety down below one which would cause the slide.

Q So what are you saying, what came from above was not sufficient to take out this backfill?

A If they had the 1.5 factor of safety, that's just based on my observations yesterday at the amount of material from the above slide, yes.

Q It should have held even under the weight?

A Yes, with a 1.5 factor of safety.

(Tr. 41-42).

Lane's questioning of whether or not the 1.5-static safety factor had been achieved nearly a decade after reclamation had been completed at the site, based solely on his visual estimate of the volume of material which had moved from above the permit area into the permit area, must be contrasted with the consistent pattern of reports in the record, covering the years immediately following reclamation, which attest to the marked success of revegetation efforts and which never once suggest that there was anything wrong with any aspect of the reclamation which Appolo had carried out. See, e.g., Report of Kim Mowery, dated June 24, 1982 ("An excellent vegetative cover has been established on this area with an excellent stand of sericea, fescue and

⁵ We note that, within the context of this provision, a "misrepresentation of a material fact" may be said to exist "[i]f an operator applies for release but has not fulfilled his obligations" under the Act. *Nat'l Wildlife Federation v. Lujan*, *supra* at 770 (quoting from the Brief for the Secretary at 27, n.11).

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locust now well established); Report of Edwin M. Atkins, dated September 25, 1984 ("The area is extremely well revegetated and stable"); Report of John D. Aday, dated September 17, 1985 ("Vegetation over the disturbed area is abundant and consist[s] of a variety of grasses and trees. No violations or environmental problems were observed during this mine site visit").

We have no difficulty in finding that Lane's testimony that he "would question" whether the required static factor had been achieved failed to establish by a preponderance of the entire evidence (much less on a basis of clear and convincing evidence as suggested in the preamble to the proposed rule) that there had been any misstatement of a material fact by Appolo in obtaining the incremental bond release involved herein. Accordingly, we find ourselves in agreement with Judge Torbett that OSM had established no basis for voiding the termination of jurisdiction by Tennessee and further find that the 37 acres involved herein did not constitute part of a surface mining operation at the time that the NOV and CO issued. Therefore, we affirm Judge Torbett's decision dated July 9, 1990, vacating the NOV and CO. In view of the foregoing, we consider OSM's appeal of Judge Torbett's decision of May 16, 1989, granting temporary relief, docketed as IBLA 89-503, to be moot and dismiss the appeal on that basis.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision in IBLA 90-480 is affirmed and the appeal from the decision in IBLA 89-503 is dismissed as moot.

GAIL M. FRAZIER
Administrative Judge

I CONCUR:

JAMES L. BURSKI
Administrative Judge

Memorandum

To: Director, Office of Hearings and Appeals

From: Acting Secretary

Subject: *United States v. George E. Williams (Deceased)*, Native Allotment A-061299, IBLA 90-379

As you know, this matter is brought before the Secretary on the request of the Alaska Legal Services Corp. (ALSC) that he assume jurisdiction and decide its March 5, 1992, petition, which is pending with your office. ALSC's petition requests that you assume jurisdiction and reverse the January 6, 1992, order of the Interior Board of Land Appeals (IBLA), which held that the State of Alaska has standing to

appeal the decision of the Administrative Law Judge (ALJ) in this matter.

The Secretary had asked the Deputy Solicitor to review the matter. The Deputy Solicitor provided to me the attached memorandum. I have reviewed the Deputy Solicitor's memorandum and concur. The time has come for the Department of the Interior to reach a final decision on this longstanding matter. Accordingly, I hereby exercise my jurisdiction under 43 CFR 4.5, reverse IBLA's order of January 6 1992, to the extent inconsistent with the Deputy Solicitor's memorandum, and order that the State's appeal be dismissed for lack of standing. I am returning the matter to you, with instructions to enter my order dismissing the appeal, thereby allowing the BLM to proceed in compliance with the ALJ's decision.

Please provide notice of my decision to the appropriate parties.

Attachment

Memorandum

To: Secretary

From: Deputy Solicitor

Subject: *United States v. George E. Williams (Deceased)*, Native Allotment A-061299, IBLA 90-379: Petition to Assume Jurisdiction and Review January 6, 1992, IBLA Order

I. Introduction

This Alaska Native Allotment matter is before you because the Alaska Legal Services Corp. (ALSC), representing the heirs of George E. Williams, has requested by letter dated March 5, 1992, that you assume jurisdiction under 43 CFR 4.5, and decide its Petition for Review, or in the alternative, ask the Director of the Office of Hearings and Appeals (OHA) to assume jurisdiction and decide the petition. The petition, also dated March 5, 1992, was filed with and has since been pending before the Director of OHA. It requests that the Director review and reverse the January 6, 1992, holding of the Interior Board of Land Appeals (IBLA) issued in this case. In that order, IBLA held that the State of Alaska has standing to appeal the April 30, 1990, decision of the Administrative Law Judge (ALJ) approving George Williams' allotment application. The ALJ concluded that the representatives of George Williams had satisfied their burden of proof to establish Mr. Williams' entitlement to the lands encompassed within his allotment application, filed in 1964.

You have asked for my assistance as you consider whether to exercise jurisdiction. This matter has been pending before the Department in one form or another for more than 30 years. The allotment applicant, Mr. Williams, died long ago, and the tortuous history of this case, unfortunately, might properly be compared to the endless case *Jarndyce & Jarndyce* in *Bleak House*, by Charles Dickens. Because of

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the length of time this case has been pending and more importantly, because I have concluded, on IBLA's record before me, that the IBLA erred in holding that the State has standing, I recommend that you assume jurisdiction, reverse IBLA's order to the extent inconsistent with this memorandum, and dismiss the appeal for lack of standing. The effect of such a decision would dispose of this Department's consideration of this case and leave intact the ALJ's decision on the merits that Mr. Williams satisfied the requirements for his allotment claim. The BLM would then be required to proceed in accordance with the ALJ's decision.

In reviewing this case, I have relied upon the arguments raised by ALSC and the State of Alaska before the IBLA, and upon the cases and authority discussed by IBLA in its January 6, 1992, order. Although ALSC's request that you assume jurisdiction included supporting legal arguments, I am specifically limiting IBLA and IBLA's order. Because the matter was fully briefed to IBLA, I consider it unnecessary to consider any legal arguments raised by ALSC in its petition. Therefore, I also consider it unnecessary for you to request supplemental briefing prior to making a decision.¹

II. Procedural History

Mr. George E. Williams, an Alaska Native, first applied for a Native allotment in 1957 under the Alaska Native Allotment Act of 1906.² He submitted another application in 1964, which is the application that is the subject of the present case. In 1965, pursuant to the Alaska Statehood Act, the State filed a general purposes grant selection for lands which, but for Williams' application, would have included the lands for which Mr. Williams had applied.³ In 1968, Williams filed evidence of use and occupancy, as required by the regulations. See 43 CFR 2561.2. Mr. Williams died in 1970. Four years later, in 1974, BLM conducted a field examination and recommended rejection of the application, which BLM did in 1975. In 1979, IBLA set aside BLM's 1975 rejection because it was done without affording the Native applicant his constitutional due process rights to a hearing. See *State of Alaska*, 95 IBLA 196, 197 (1987) (citing *John Moore*, 40 IBLA 321 (1979)).

In 1980, Congress enacted the Alaska National Interest Lands Conservation Act (ANILCA), Pub. L. No. 96-487, 94 Stat. 2371, which

¹ I note that in a brief with the IBLA, Response to Contestee's Motions of July 19, 1991, at 2 (Aug. 5, 1991), the State specifically requested that the Board's consideration of ALSC's motion to dismiss for lack of standing "be limited to the arguments made and authorities cited by the parties up to and including the filing of Contestee's Oct. 4, 1990, REPLY TO STATE'S OPPOSITION TO MOTION TO DISMISS FOR LACK OF STANDING."

² Act of May 17, 1906, Pub. L. No. 59-171, 34 Stat. 197, amended by Act of Aug. 2, 1956, Pub. L. No. 84-931, 70 Stat. 954, repealed with savings clause for applications pending on Dec. 18, 1971, by Alaska Native Claims Settlement Act, Publ. L. No. 92-203, §18(a), 85 Stat. 688, 710 (repealer codified at 43 U.S.C. §1617(a)).

³ In 1981, BLM tentatively approved the State's selection, but expressly excluded the lands included within Williams' allotment application. See Appellee Attachment B, Reply to State's opposition to Motion to Dismiss for Lack of Standing, *U.S. v. George Williams*, IBLA 90-379 (Oct. 9, 1990) (Feb. 4, 1981, Decision of BLM on A-063034, General Purposes Grant State Selection)).

provided in section 905 for the legislative approval of pending Native allotments, with specified exceptions. In 1981, the State of Alaska, pursuant to ANILCA § 905(a)(5)(B), 43 U.S.C. § 1634(a)(5)(B), filed a protest against the George Williams allotment. In 1985, BLM summarily dismissed the State's protest as lacking in specificity and held that the allotment was legislatively approved pursuant to ANILCA. In 1987, IBLA set aside BLM's decision, holding that (1) the State's protest was sufficiently specific to meet statutory requirements, thus precluding legislative approval, and (2) the application must be adjudicated as provided in ANILCA for applications not legislatively approved. *State of Alaska*, 95 IBLA 196 (1987).

In 1988, pursuant to IBLA's order, the BLM initiated a Government contest to adjudicate Williams' claim. On April 30, 1990, ALJ Sweitzer, after holding a hearing, decided that George Williams had met the burden of proof in demonstrating use and occupancy sufficient to satisfy the Alaska Native Allotment Act. Therefore the ALJ dismissed BLM's contest complaint. BLM and the State of Alaska appealed the decision, although BLM subsequently withdrew its appeal and is no longer a party to the proceedings. ALSC filed a motion to dismiss the State's appeal for lack of standing. Motion to Dismiss Appeal of Intervenor, *U.S. v. George Williams*, IBLA 90-379 (July 16, 1990) (Motion to Dismiss). The State opposed ALSC's motion to dismiss. State's Opposition to Motion to Dismiss for Lack of Standing, *id.* (Sept. 24, 1990) (State's Brief). ALSC filed a reply. Reply to State's opposition to Motion to Dismiss for Lack of Standing, *id.* (Oct. 9, 1990) (Reply Brief).

In 1991, ALSC petitioned you to assume jurisdiction, contending that the length of time it had taken the Department to resolve this case and the IBLA's inaction on the motion to dismiss justified such action on your part. On December 18, 1991, you declined the request but asked IBLA to expedite its review. On January 6, 1992, IBLA issued an order denying the motion to dismiss and holding that the State has standing to pursue its appeal and challenge the allotment claim on the merits.

On March 5, 1992, ALSC petitioned the Director of OHA to review IBLA's order. On the same date, ALSC wrote you and asked that you consider your earlier decision not to assume jurisdiction, or in the alternative, ask the Director of OHA to assume jurisdiction and decide ALSC's petition for reconsideration of IBLA's order. Subsequently, the Director stayed further proceedings and further consideration of the Petition before him, pending your response to ALSC's letter to you.

III. Issue

Did IBLA err in deciding that the State of Alaska has standing to appeal the ALJ's April 1990 decision, which found that Mr. Williams had satisfied the requirements for entitlement to a Native allotment, and which dismissed BLM's contest complaint?

IV. Legal Analysis

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A. Standing

I begin my analysis by discussing the Department's standing requirements. In my view, the IBLA correctly characterized the Department's standing criteria applicable to this case:

To have standing to appeal to this Board, under 43 CFR 4.410(a) an appellant must be a party to the case who has been adversely affected by the decision appealed. An appellant will be considered "adversely affected" within the meaning of the regulations if the party has suffered injury to a "legally cognizable interest." *Storm Master Owners*, 103 IBLA 162, 177 (1988).

In *Storm Master Owners*, IBLA held that an allegation of a present right of use was sufficient to confer standing. The Board discussed the "legally cognizable interest" criteria as follows:

Such interest must be more than that of a mere trespasser who has made improvements on public land "without color or claim of right." * * * However, it is not necessary that an appellant have an interest "in the land" which is adversely affected in order to be accorded standing to appeal a BLM decision * * *. Thus, an appellant may properly base a claim of standing upon the mere lawful use of public land. * * * Moreover, the interest which is asserted to be adversely affected by a BLM action may proceed from a color or claim of right as to public land and need not ultimately be determined to be valid where "the existence of standing cannot be made dependent upon ultimate substantive success on appeal."

103 IBLA at 177 (citations omitted).

As discussed below, I have concluded that the two bases relied upon by the State, and a third suggested *sua sponte* by IBLA, do not fall within the above standard of a legally cognizable interest, and therefore the State's appeal should have been dismissed for lack of standing.

B. Arguments Before IBLA

When this case came before IBLA after the ALJ's adjudication on the merits, ALSC contended that the State lacked standing to appeal the ALJ's decision. ALSC argued that the State's ANILCA protest, which triggered the Government contest and adjudication, does not confer standing. ALSC also contended that the State's presence on a portion of the land in the form of a cabin constructed pursuant to a Special Land Use Permit was also insufficient to confer standing because the permit had expired in 1981 and the State's presence since has constituted that of a mere trespasser. *See Motion to Dismiss*.

In response, the State of Alaska relied on only two alleged interests to oppose ALSC's motion to dismiss for lack of standing. First, the State contended that its protest, filed pursuant to ANILCA § 905(a)(5)(B), created a "legally cognizable interest" sufficient to confer it with standing in this case. Second, the State contended that its general purposes grant selection, filed in 1965 and purportedly encompassing the lands claimed by Williams, was an "interest in the land" that gave

it standing.⁴ See State's Brief. In reply, ALSC argued that the general purposes grant selection gave rise to no legally cognizable interest in the State because it was filed after the lands had been segregated by Williams' allotment application. See Reply Brief.

C. State's ANILCA § 905(a)(5)(B) Protest

Before discussing IBLA's order with respect to the State's protest, it is useful background to note that the reasons why the Department was required to adjudicate the merits of Williams' allotment is because of the protest filed by the State pursuant to ANILCA § 905(a)(5)(B), 43 U.S.C. § 1634(a)(5)(B), 43 U.S.C. §§ 1634(a)(5)(B) which resulted in a Government contest to determine the validity of Williams' application. See State's Brief at 2. In section 905(a)(5)(B), Congress afforded the State of Alaska the right to require the Department to adjudicate a Native allotment application on the merits (thus preventing ANILCA's legislative approval of the allotment), by filing a protest with the Secretary stating; *inter alia*, that the lands described in the allotment application are "necessary for access" to lands of the United States or the State of Alaska. No specific legal interest or claim of right to the lands is necessary for the State to file such a protest. The purpose and effect of such a protest simply is to identify a public interest contrary to the otherwise automatic legislative approval of pending allotments under ANILCA § 905, and to require this Department to adjudicate the allotment applicant's claim on the merits.

IBLA rejected the State's contention that ANILCA protest itself conferred upon it a legally cognizable interest. Instead, the Board concluded that "[a]t best, the filing of the protest initially made the State a party to the case," but that "[d]enial of the protest did not adversely affect a legally cognizable interest so as to satisfy the other basis for standing." *Williams*, IBLA 90-379, slip op. at 3. I agree. ANILCA § 905(a)(5)(B) does not require that the State have any actual "legally cognizable interest" in order to file a protest. Nor, by affording the State the right to require an adjudication on the merits, does it confer upon the State a "legally cognizable interest" that is adversely affected when an adjudication determined that an allotment application is valid. *Fred J. Schikora*, 89 IBLA 251 (1985).

The State contends in its brief to IBLA that it would be anomalous to have permitted it to participate in the adjudication by the ALJ, and now deny it standing to appeal the ALJ's decision approving the allotment. I disagree. Without offering a conclusive opinion on the propriety of permitting the State to participate as a party before the ALJ,⁵ I would recognize that permitting the State to intervene at that

⁴The State did not argue in its brief that the cabin on a portion of the lands described in the allotment application conferred upon it an interest sufficient to support standing. However, IBLA did address this issue, agreeing with ALSC that the mere fact that the State constructed improvements on some of the land and once held a special land use permit (which expired over 10 years ago) is not sufficient to constitute a legally cognizable interest that would afford the State standing to appeal. *Williams*, IBLA 90-379, slip op. at 3. I agree with this portion of the Board's order.

⁵ALSC does not concede that the State should have been granted intervenor status in the proceedings before the ALJ.

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level in the proceedings is not inconsistent with the right Congress afforded the State to require adjudication of an application on the merits when the lands applied for may be necessary for access to lands of the United States or the State. As discussed previously, however, that right does not create the type of legally cognizable interest necessary to confer standing to appeal a decision approving the allotment. See *Williams*, IBLA 90-379, slip. op. at 3; *Fred J. Schikora*, *supra*.⁶

D. State's Grant Selection Under the Statehood Act

The State also contended before IBLA that its general purposes grant selection, filed in 1965, and purportedly encompassing the lands claimed by Williams, was an "interest in the land" that gave it standing. IBLA agreed with the State, and it is on this issue that I have concluded IBLA erred.

In reaching its decision that the State has standing to appeal in this case, IBLA relied on cases in which the State's selection post-dated the Native applicant's alleged commencement of use and occupancy, but preceded the Native applicant's filing of a Native allotment application.⁷ As will be discussed below, pp. 82-83, IBLA misapplied its own case law by failing to recognize the significance of the factual difference between this case and those on which it relied to reach its decision. The distinction is highly significant, and in my opinion, dispositive.

When the State's selection application was filed *before* the allotment application was filed, the Board's decisions recognize that the State has standing to appeal a decision approving the allotment application. In such a case, the availability of the lands for State selection, and thus the *prima facie* validity of the State selection depends on a factual question of the Native's use and occupancy. *State of Alaska*, 71 IBLA 394 (1983).

Under the Alaska Statehood Act, the State's selection of lands was limited to "vacant, unappropriated, and unreserved" public lands. Alaska Statehood Act, Pub. L. No. 85-508, § 6, 72 Stat. 339 (1958). If the lands have previously been segregated or withdrawn, they are no longer available, and the State's selection is invalid.

In a Native allotment case, lands may become segregated in one of two ways: (1) commencement of Native use and occupancy sufficient to qualify for a Native allotment, or (2) filing of a Native allotment application.

⁶I agree with Williams' reply brief to IBLA when it asserts that "the issue is not whether the State has the right to submit factual evidence to the BLM or to an administrative law judge prior to a determination having been made with respect to the validity of a Native allotment claim, but rather that determination having been made in the allottee's favor, the question is whether the State has a sufficient interest in the land so as to have standing under the applicable regulations and caselaw to challenge that determination [on appeal]." Reply Brief at 9.

⁷In its brief, the State cited *State of Alaska*, 85 IBLA 196 (1985), and *State of Alaska*, 41 IBLA 315 (1979). In each case, the State's selection application preceded the Native's allotment application.

If either of the above two means of segregation *precedes* the State's filing of a selection, the land is unavailable and the State's selection must be rejected. However, in the first case, until the allotment application is adjudicated, it is not clear whether the lands are available for State selection. In such a case, the State does have standing to contest the allotment application on the merits, because the State's own interest and the validity of its selection depends on the decision on the merits whether the allotment applicant's alleged use and occupancy of the lands was sufficient to segregate them and thus preclude State selection. IBLA relied on cases falling into this category in deciding that the State had standing in the present case.

In both *State of Alaska*, 85 IBLA 196 (1985), and *State of Alaska* 41 IBLA 351 (1979), the State's standing was upheld to appeal and challenge the approval of a Native allotment application. In both cases, however, the State's selection applications *preceded* the allotment applications, and were rejected by BLM. In *State of Alaska*, 41 IBLA 315 (1979), for example, the State's selection application *post-dated* alleged Native use and occupancy, but *pre-dated* the Native allotment applications. Therefore, the one potential act that could have segregated the land and precluded the State's selection was the Native applicant's actual use and occupancy. Whether the State selection applications should be rejected depended on resolution of the factual issue concerning Native use and occupancy, which was relevant *both* to the availability of the lands for State selection and to the merits of the Native allotment claim. Because the validity of the selections turned precisely on the factual determination whether the Native alleged use and occupancy was sufficient to segregate the lands from selection, the Board upheld the State's standing to appeal.

On the other hand, when an allotment application is filed *before* the State's selection, it is not the Native applicant's alleged use and occupancy that will determine the validity or invalidity of the State's selection, but rather the mere filing of an acceptable allotment application. The *George Williams* case falls within this second category, and the differing implications for standing are significant and dispositive.

Thus, to the extent the State's general purposes grant selection overlapped Williams' prior-filed allotment claim, it was invalid *per se* and created no legally cognizable interest in the State. In this respect, I agree with the brief filed by BLM in this case in 1985, addressing this issue:

The Native allotment application of George Williams was filed prior to the State's selection and as a matter of law segregated the land from State selection. *State of Alaska*, 71 IBLA 394 (1983); also see, *State of Alaska, Matriona Johnson* 71 IBLA 63, 65, 66 (1983) and 43 CFR §§ 2091.2-1 and 2561.1(e).⁸ This segregative effect attached even if

⁸ 43 CFR 2561(e) provides: "The filing of an acceptable application for a Native allotment will segregate the lands. Thereafter, subsequent conflicting applications for such lands shall be rejected, except when the conflicting application is made for the conveyance of lands pursuant to any provision of the Alaska Native Claims Settlement Act (43 U.S.C. 1601 *et seq.*). The reference to an "acceptable" application refers to an application which on its face appears

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the prior application were subsequently found invalid. *John C. and Martha W. Thomas (On Reconsideration)*, 59 IBLA 364, 367 (1981). Since, as a matter of record and of law, the State's selection was never valid, it cannot be considered valid for purposes of section 905(a)(4) [requiring "valid" State selection by the State of Alaska to preclude legislative approval under ANILCA].

Answer of BLM, at 9, *Williams*, IBLA 85-541 (Aug. 5, 1985), attached as Appellee's Attachment C, Reply Brief.⁹ *Cf. Andrew Petla*, 43 IBLA 186 (1979) (State's prior selection segregates the land and thus precludes Native allotment claim based upon use and occupancy alleged to have commenced after State selection).

The Board incorrectly suggested in its January 6, 1992, order that only a "valid Native allotment application validly segregates land from subsequent selection by the State," thus suggesting that the State's interest depends upon whether the allotment claim was valid on the merits. But that is not what *State of Alaska*, 71 IBLA 394 (1983), held. The above-quoted brief of BLM correctly stated IBLA's case law establishing that the application itself segregates the land, whether the claim ultimately is deemed valid or invalid on the merits.

In this type of case, where the allotment application *precedes* the State's selection, the only factual issue that the State has standing to appeal, in an appropriate case, is whether an allotment application has in fact been filed, effectuating the segregation of the land. It was not disputed before IBLA that the State's grant selection was filed after Williams filed his allotment application, or that Williams' application was not acceptable for purposes of segregating the lands described.¹⁰ As such, the cases recognizing the State's standing to appeal Native allotment approvals were not applicable to the facts of the *Williams* case, and were improperly relied upon by IBLA.¹¹

E. State's ANILCA § 906(e) Top Filing

acceptable, and does not refer to the underlying validity of the claim on the merits. *State of Alaska*, 71 IBLA 394, 396 (1983).

⁹ I agree with IBLA, *George Williams*, IBLA 90-379, slip. op. at 4, that a State selection application encompassing land segregated from State selection is not "automatically void" in the sense that until a final decision is made that the lands are indeed segregated (e.g., by virtue of the previous filing of an acceptable allotment application), the State has at least a "color or claim of right" sufficient to confer standing to adjudicate that issue. In the present case, on Feb. 5, 1981, BLM tentatively approved the State's selection for lands surrounding Williams' allotment claim, but specifically excluded the lands subject to Williams' allotment application from the tentative approval. Certainly if the State disputed BLM's position that the allotment application was acceptable and segregated the lands as a matter of law, it could have appealed the 1981 decision's partial denial of tentative approval to the State's selection to the extent of the lands described in Williams' application. See *State of Alaska*, 71 IBLA 394 (1983) (implicitly recognizing State's standing to appeal when BLM rejected a temporary use permit application based on segregative effect of Native allotment application).

¹⁰ As stated in f. 9, had the State intended to contest the acceptability of the Williams application, it could have challenged BLM's 1981 tentative approval of the State selection, which explicitly excluded the lands described in Williams' application. Further, as I noted above in Part IV.C., the State had no cognizable interest simply by virtue of its ANILCA protest that ultimately resulted in the ALJ's 1990 decision. The State cannot, by virtue of filing its appeal, accrue to itself a cognizable legal interest to support standing to appeal.

¹¹ The State also cited *Pedro Bay Corp.*, 78 IBLA 196 (1984), to support its standing argument. In that case, the Board upheld the standing of the Pedro Bay (Native) Corp. to challenge BLM's approval of a Native allotment application. However, the allotment application, as amended subsequent to an interim conveyance to the Corp., covered lands encompassed within the interim conveyance. The Corp. had constructed a building on the lands and had filed a protest pursuant to ANILCA § 905(a)(5)(A). The specific facts of that case, and the special selection rights afforded ANCSA Native Corps. distinguish it from the *Williams* case.

In addition to concluding that the State's 1965 selection application gave it standing to appeal the ALJ's approval of Williams' allotment, IBLA in a footnote also concluded that the State's ANILCA top filing for the subject land conferred it with standing. Section 906(e) of ANILCA, 43 U.S.C. § 1635(e), permits the State to file a "future selection application" for lands that are not, on the date of such application, available within the meaning of the Statehood Act. Section 906(e) expressly provides, however, that the top-filed future selection becomes "effective" when the lands included within the application become available. Contrary to the Board's conclusion, I do not believe that this privilege afforded to the State by Congress vests in the State a "legally cognizable interest" sufficient to confer it with standing to challenge on the merits each and every pending Native allotment application that is within the areas encompassed by top-filed selections.

Even though the State may ultimately obtain the lands if an allotment is adjudicated as invalid, the mere privilege of top-filing vests in the State no actual, present, legally cognizable interest in the land and at best creates a speculative interest too tenuous to confer standing. Furthermore, section 906(e) also expressly provides that selection applications previously filed may be refiled under the "top filing" provisions, but that "no such refiling shall prejudice any claim of validity which may be asserted regarding the original filing of such application." Although not dispositive, this provision is further evidence that Congress did not intend that section 906(e) would confer a present competing and legally cognizable interest in the lands covered by the future selection application, or such an interest in the disposition of a Native allotment claim covering such lands. Instead, it merely permitted the State to file a selection application even though the lands were not available.

I also disagree with the Board's reliance upon *Koniag, Inc. v. Andrus*, 580 F.2d 601 (D.C. Cir. 1978), as further support for its conclusion that the State has standing in the present case. In *Koniag*, the court concluded that the Secretary's broad interpretation of this Department's standing criteria was not clearly erroneous. In that case, the Secretary had concluded that the State had standing to challenge a determination by the Bureau of Indian Affairs that certain Native villages were eligible to form Native Village Corporations under ANSCA. Even though the State's interest was speculative, the court upheld the Secretary's conclusion that the interest was sufficient to confer standing, in light of the competing State and Native selection interests set up by ANSCA and the Statehood Act.

My conclusion concerning the *Williams* case is not inconsistent with the Secretary's decision in *Koniag*. In *Koniag*, the BIA's determination, pursuant to ANSCA, concerning whether a Native village was eligible to form a Village Corporation, had far-reaching consequences that could interfere in a general way with the State's statutory rights to

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select available lands under the Statehood Act.¹² By recognizing a village as eligible, BIA essentially determined that the village could obtain the benefits of ANCSA, which in certain significant respects had priority over the selection rights of the State, even though ANCSA post-dated the Statehood Act. ANCSA, of course, settled Native aboriginal claims which, if proven, would have pre-dated and arguably would have taken precedence over rights granted to the State in the Statehood Act. In this respect, BIA's determination concerning village eligibility is more analogous to the case in which it is an allotment applicant's alleged use and occupancy that segregates the land from State selection, rather than the present case in which *both* the application and the alleged use and occupancy pre-date State selection.

V. CONCLUSION

Based on the above considerations, I have concluded that IBLA erred in deciding that the State has standing to appeal the ALJ's decision in this case. The adjudication of this case came before the Department in the form of a Government contest, prompted by the State's ANILCA protest. By recognizing the State's standing to challenge the Williams claim on appeal, IBLA essentially allowed the State to bootstrap an ANILCA protest, which IBLA correctly recognized as insufficient for standing, onto an attempt to resurrect at this late date its invalid 1965 selection. In my view, the State has not, under the specific circumstances of this case, alleged a legally cognizable interest sufficient to confer standing. Furthermore, I am not convinced that the State's top-filed future selection application (even if properly considered by IBLA) confers upon it an interest sufficient to permit it to appeal the approval of Williams' allotment.

I recommend that you assume jurisdiction, reverse IBLA's order to the extent inconsistent with this memorandum, and dismiss the appeal for lack of standing, so that BLM may proceed in accordance with the ALJ's decision.

MARTIN J. SUUBERG
Deputy Solicitor

APPLICABILITY OF SEC. 522(e) OF THE SURFACE MINING CONTROL AND RECLAMATION ACT TO SUBSIDENCE*

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Surface Mining Control and Reclamation Act of 1977: Words and Phrases

¹² As noted by the court, depending upon their population, eligible Native villages could select between 69,120 and 161,280 acres from the public lands within their vicinity. *Koniag*, 580 F.2d at 604; *see id.* at 607 (describing competing interests of State and Native corps. to establish the existence of eligible Native villages), and 608 n.5.

*Not in chronological order.

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select available lands under the Statehood Act.¹² By recognizing a village as eligible, BIA essentially determined that the village could obtain the benefits of ANCSA, which in certain significant respects had priority over the selection rights of the State, even though ANCSA post-dated the Statehood Act. ANCSA, of course, settled Native aboriginal claims which, if proven, would have pre-dated and arguably would have taken precedence over rights granted to the State in the Statehood Act. In this respect, BIA's determination concerning village eligibility is more analogous to the case in which it is an allotment applicant's alleged use and occupancy that segregates the land from State selection, rather than the present case in which *both* the application and the alleged use and occupancy pre-date State selection.

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*Not in chronological order.

"Surface Coal Mining Operations." The term "surface coal mining operations" is defined in sec. 701(28)(a) of SMCRA, 30 U.S.C. § 1291(28)(a). The most sound parsing of that paragraph is that it includes only surface coal mine, and surface activities connected with those surface operations and surface impacts that are incident to an underground mine that are subject to sec. 516. Under this construction, subsidence is not included within the term "surface coal mining operations," because subsidence is not an activity conducted on the surface of lands. However, subsidence is still specifically regulated under sec. 516 of SMCRA.

Surface Mining Control and Reclamation Act of 1977: Generally

Sec. 522(e) of SMCRA, 30 U.S.C. § 1272(e), prohibits only "surface coal mining operations" within areas designated by Congress for special protection, subject to certain exceptions. Since subsidence is not included in the term "surface coal mining operations," subsidence is not prohibited by sec. 522(e).

Memorandum

To: Assistant Secretary, Land and Minerals Management; Director,
Office of Surface Mining Reclamation and Enforcement.

From: Solicitor

Subject: Applicability of Section 522(e) of the Surface Mining Control
and Reclamation Act to Subsidence

By memorandum dated January 4, 1991, you have requested our evaluation of the applicability of section 522(e) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1272(e) (hereinafter SMCRA or the Act), to subsidence from underground coal mining. You stated that you are considering a notice of inquiry to request comments on the need for further rulemaking to address the surface effects of underground mining under section 516, and that you are also considering clarifying that section 522(e) does not apply to subsidence from underground mining.¹

Based on our evaluation of SMCRA, its legislative history, past regulatory actions on this issue, and relevant case authority, we conclude that subsidence from underground mining is properly regulated solely under SMCRA section 516 and not under section 522(e). For subsidence, section 516 gives all of the protection intended by Congress for the same environmental values served by section 522(e).

SUMMARY OF ANALYSIS

¹In 1985, the Office of Surface Mining Reclamation and Enforcement (OSM) advised the court *In re Permanent Surface Mining Regulation Litigation (II)*, 620 F. Supp. 1519 (D.D.C. 1985), that it intended to undertake a rulemaking on this subject. The decision was announced in response to citizen plaintiffs' supplemental brief concerning OSM's interpretation of its sec. 522(e) buffer zone regulations at 30 CFR 761.11. See, *In re Permanent Surface Mining Regulations (II)*, *supra*. Citizen plaintiffs' brief stated that their concern related to information from OSM officials that the rule did not bar all surface impacts, including all subsidence impacts, within the sec. 522(e) buffer zones. The decision was published in the *Federal Register* notice which recognized that there might be some lack of clarity as to what is a surface impact of underground mining subject to the prohibitions of sec. 522(e)(4) and (5). 50 FR 13250 (Apr. 3, 1985).

OSM subsequently proposed a rule on this subject. 53 FR 52374 (Dec. 27, 1988). The comments received on that proposed rule, and OSM's analysis of the issues, indicated to OSM that this was fundamentally a legal issue. OSM therefore decided to seek a formal Solicitor's Opinion on this matter. In light of the conclusion we have reached in this Opinion, no changes will be necessary in the regulations on this issue, at 30 CFR Part 761.

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In any question of statutory interpretation, such as the one you have posed, the threshold question is always

whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for * * * the agency must give effect to the unambiguously expressed intent of Congress. If, however, * * * the statute is silent or ambiguous with respect to the specific issue, the question * * * is whether the agency's answer is based on a permissible construction of the statute.

Chevron, U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837, 842-43 (1984) (Chevron, U.S.A.).

With respect to the applicability of section 522(e) to subsidence from underground mining, we conclude that Congress has spoken to the question at issue. Section 522(e) prohibits only "surface coal mining operations" within areas designated by Congress as needing special protection, subject to certain exceptions. Neither section 522(e) nor the definition of "surface coal mining operations" in section 701(28) mentions subsidence, nor does the legislative history of either provision. As is explained at length below, section 701(28) defines "surface coal mining operations" to include "activities conducted on the surface of lands * * * in connection with * * * surface operations and surface impacts incident to an underground mine." 30 U.S.C. § 1291(28)(A). Subsidence from underground mining results only from activities that take place below the surface of lands, not from activities conducted on the surface of lands. Therefore, logically subsidence from underground mining is not included in the definition of surface coal mining operations."

Consistent with the exclusion of subsidence from the definition of "surface coal mining operations," Congress specifically addressed the regulation of subsidence in section 516. Section 516 authorizes the Secretary to promulgate regulations "directed toward the surface effects of underground coal mining operations." Section 516 is not directed solely toward "surface coal mining operations," but specifically includes subsidence. 30 U.S.C. § 1266.

Section 522(e), on the other hand, protects certain Federal, public, and private lands by prohibiting activities which are "surface coal mining operations." Since subsidence is not included in the definition of "surface coal mining operations," and is specifically regulated under section 516 without regard to that definition, the authority to address this important concern is expressly and exclusively contained in section 516.

Moreover, as discussed below, even if the above conclusions were not required by the terms of the statute and the legislative history, OSM would have ample opportunity to adopt the interpretation you are contemplating. That is, even if SMCRA were regarded as silent or ambiguous on this issue, OSM clearly could interpret SMCRA as

regulating subsidence under section 516 and not under section 522(e). *Chevron, U.S.A., supra.*

BACKGROUND

SMCRA is a complex and delicately balanced piece of legislation that was developed over a number of years. Its development involved negotiation of compromises to address a series of highly controversial and difficult issues. Some of the hard-fought issues were resolved in relatively general terms, with the specific details left to the implementing agency, OSM.

Title V of the Act is the portion that sets forth the basic regulatory requirements for coal mining operations for which permits are required under the Act. Title V includes provisions which establish regulatory schemes for surface coal mining, underground coal mining, and protection of lands unsuitable for surface coal mining operations. This opinion discusses one of the ways in which these regulatory schemes interrelate.

Analysis of the structure of Title V and the Act as a whole confirms that Congress set out related but separate regulatory schemes for surface and underground mining. The legislative history emphasizes that the differences in the nature and consequences of the two types of mining require significant differences in regulatory approach.² Congress had received ample testimony prior to the passage of the Act regarding the differences in both the nature and consequences of the two types of coal mining.³

For instance, Congress was aware that the types of environmental risks associated with underground mining are, for the most part, significantly different from those associated with surface mining. Environmental impacts associated with (pre-SMCRA) unregulated or unreclaimed underground mines included subsidence and hydrological problems that were hidden deep underground and not observable at the surface for an unpredictably long time. Such surface consequences could be severe and longlasting. The problems in some cases remained fundamentally inaccessible or unchangeable because of adverse technological, geological, and hydrological conditions.

By contrast, most of the impacts of unregulated pre-SMCRA surface mining resulted from surface activities that were more immediate and more readily observable, and the resulting conditions were relatively accessible for reclamation.⁴

² See SMCRA sec. 516(a):

The Secretary shall promulgate rules and regulations directed toward the surface effects of underground coal mining operations * * *. *Provided, however,* That in adopting any rules and regulations the Secretary shall consider the distinct difference between surface coal mining and underground coal mining.

30 U.S.C. § 1266(a). See also SMCRA secs. 516(b)(10) and (d), 30 U.S.C. §§ 1266(b)(10) and (d).

³ See, e.g., H.R. Rep. No. 218, 95th Cong., 1st Sess. 59 (1977); S. Rep. No. 128, 95th Cong., 2nd Sess. 50 (1977); H.R. Rep. No. 1445, 94th Cong., 2nd Sess. 19 (1976); S. Rep. No. 402, 93rd Cong., 2nd Sess. 83 (1973); H.R. Rep. No. 1072, 93rd Cong. 2nd Sess. 57, 108 (1974); H.R. Rep. No. 1462, 92nd Cong., 2d Sess. 32 (1972); 123 Cong. Rec. 8083, 8154 (1977); 123 Cong. Rec. 7996 (1977); 123 Cong. Rec. 3726 (1977).

⁴ See H.R. Rep. No. 1445, 94th Cong., 2d Sess. 20-22 (1976).

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Congress crafted regulatory programs in SMCRA at sections 515 and 516 to deal with the characteristic problems associated with each type of coal mining. Section 515 establishes the regulatory requirements for surface mining.⁵ This section is implemented in large part at 30 CFR Part 816.

Section 516 establishes the regulatory requirements for underground coal mining, including provisions for the control of subsidence from underground coal mining.⁶ This section of SMCRA is implemented in large part at 30 CFR Part 817, which sets forth the performance standards for underground coal mining.⁷ The provisions concerning subsidence control in Part 817 include damage and maintaining the value and reasonably foreseeable use of surface lands, or using mine technology for planned subsidence in a predictable and controlled manner; compliance with the subsidence control plan; repair of material damage; and a detailed plan of underground workings.⁸

In addition to the regulation of surface and underground coal mining under sections 515 and 516, under section 522(e) SMCRA imposes certain prohibitions on surface coal mining operations on lands designated by Congress as unsuitable for those operations.⁹ Congress

⁵Sec. 515 of the Act sets out the environmental protection performance standards for surface coal mining, including standards for backfilling and grading to approximate original contour; revegetation; reconstruction of prime farmlands; impoundments; augering; protecting the hydrologic balance; protecting fish and wildlife values; disposal of excess spoil, mine waste, and acid-forming and toxic materials; use of explosives; and construction of roads.

⁶SMCRA sec. 516 provides in relevant part:

(a) The Secretary shall promulgate rules and regulations directed toward the surface effects of underground coal mining operations, embodying the following requirements and in accordance with the procedures established under section 501 of this Act: *Provided, however,* That in adopting any rules and regulations the Secretary shall consider the distinct difference between surface coal mining and underground coal mining * * *

(b) Each permit issued under any approved State or Federal program pursuant to this Act and relating to underground coal mining shall require the operator to—

(1) adopt measures consistent with known technology in order to prevent subsidence causing material damage to the extent technologically and economically feasible, maximize mine stability, and maintain the value and reasonably foreseeable use of such surface lands, except in those instances where the mining technology used requires planned subsidence in a predictable and controlled manner: *Provided,* That nothing in this subsection shall be construed to prohibit the standard method of room and pillar mining;

* * * * *

(c) In order to protect the stability of the land, the regulatory authority shall suspend underground coal mining under urbanized areas, cities, towns, and major impoundments, or permanent streams if he finds imminent danger to inhabitants of the urbanized areas, cities, towns, and communities.

(d) The provisions of title V of this Act relating to State and Federal programs, permits, bonds, inspection and enforcement, public review, and administrative and judicial review shall be applicable to surface operations and surface impacts incident to an underground coal mine with such modifications to the permit application requirements, permit approval or denial procedures, and bond requirements as are necessary to accommodate the distinct difference between surface and underground coal mining * * *.

30 U.S.C. § 1266.

⁷The performance standards in 30 CFR Part 817 include protection of the hydrologic balance, use of explosives, disposal of excess spoil and coal mine waste, backfilling and grading, revegetation, and subsidence control.

⁸30 CFR 817.121 (1990).

⁹Sec. 522(e) provides, in relevant part, as follows:

After the enactment of this Act and subject to valid existing rights *no surface coal mining operations* except those which exist on the date of enactment of this Act shall be permitted—

(1) on any land within the boundaries of units of the National Park System, the National Wildlife Refuge Systems, the National System of Trails, the National Wilderness Preservation System, the Wild and Scenic Rivers System, including study rivers designated under section 5(a) of the Wild and Scenic Rivers Act and National Recreation Areas designated by Act of Congress;

(2) on any Federal lands within the boundaries of any national forest: *Provided, however,* That surface coal mining operations may be permitted on such lands if the Secretary finds that there are no significant recreational, timber, economic, or other values which may be incompatible with such surface mining operations and—

Continued

determined that the nature and purpose of certain areas and land uses were incompatible with surface coal mining operations.¹⁰ Therefore, SMCRA section 522(e) states that with certain exceptions, surface coal mining operations are prohibited on or within specified distances of those lands and uses. The process for implementing section 522(e) requires a determination, as a prerequisite for permit issuance under section 515 or 516, whether a requester has the right to conduct a surface coal mining operation on such lands. *See* 30 CFR 761.12 (1990).

Under section 511(e), if a person who proposes to conduct a surface coal mining operation on lands protected by section 522(e) does not qualify for one of the statutory exceptions, then the person cannot conduct the intended operation on such lands. *See* 30 CFR 773.15(c)(3)(ii) (1990). The person is therefore ineligible to obtain a permit for the operation. On the other hand, if the person is entitled to an exception from the section 522(e) prohibitions for the intended surface coal mining operation, then the person is eligible to receive a permit under the appropriate section of SMCRA. Section 522(e) does not specifically mention subsidence as an activity subject to its prohibitions.

Section 522(e) is implemented primarily at 30 CFR Part 761. That part provides definitions of key terms concerning SMCRA section 522(e) and describes the procedures to be followed in implementing the prohibitions of section 522(e).¹¹

In section 701(28) of SMCRA, Congress defined the term "surface coal mining operations" as used in section 522(e) to mean, in pertinent part, activities conducted on the surface of lands in connection with a surface coal mine or subject to the requirements of section 516 surface operations and surface impacts incident to an underground coal mine * * * and * * * the areas upon which such activities occur or where such activities disturb the natural land surface.

(A) surface operations and impacts are incident to an underground coal mine; or
(B) where the Secretary of Agriculture determines, with respect to lands which do not have significant forest cover within those national forests west of the 100th meridian, that surface mining is in compliance with the Multiple-Use Sustained-Yield Act of 1969, the Federal Coal Leasing Amendments Act of 1975, the National Forest Management Act of 1976, and the provisions of this Act: *And provided further*, that no surface coal mining operations may be permitted within the boundaries of the Custer National Forest;

(3) which will adversely affect any publicly owned part or places included in the National Register of Historic Sites unless approved jointly by the regulatory authority and the Federal, State, or local agency with jurisdiction over the park or the historic site;

(4) within one hundred feet of the outside right-of-way line of any public road, except where mine access roads or haulage roads join such right-of-way line and except that the regulatory authority may permit such roads to be relocated or the area affected to lie within one hundred feet of such road, if after public notice and opportunity for public hearing in the locality a written finding is made that the interests of the public and the landowners affected thereby will be protected; or

(5) within three hundred feet from any occupied dwelling, unless waived by the owner thereof, nor within three hundred feet of any public building, school, church, community, or institutional building, public park, or within one hundred feet of a cemetery.

30 U.S.C. § 1272(e) (italics added).

¹⁰S. Rep. No. 128, 95th Cong. 1st Sess. 55 (1977).

¹¹Part 761 was first adopted in 1979 as part of the Permanent Program rules. The definition of "valid existing rights" in that rulemaking has been subject to repeated rulemaking actions and court challenges concerning issues not directly relevant to the subject of this opinion. *In re Permanent Surface Mining Regulation Litigation (I)*, No. 70-1144 (D.D.C. Feb. 26, 1980), 14 ERC 1083, 1091; *In re Permanent Surface Mining Regulation Litigation II, Round III—VER*, No. 79-1144 (D.D.C. Mar. 22, 1985), 22 ERC 1557, 1564. OSM is currently contemplating further rulemaking to impelment sec. 522(e), including a new definition of "valid existing rights."

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30 U.S.C. § 1291(28).¹² Section 701(28) also does not specifically mention subsidence as included within its terms.

The issue we address in this opinion is whether the provisions of section 522(e), which expressly apply to "surface coal mining operations," should be construed as applying to subsidence from underground mining, which is not referenced in the definition of that term. Analysis of this issue requires an understanding of how a prohibition of subsidence under section 522(e) would affect the underground mining of coal in the United States.

If section 522(e) were to apply to subsidence from underground mining, the operator would be required to plan the operation to preclude mining in all portions of the underground workings where mining would cause subsidence affecting a protected surface feature. The surface area affected by subsidence is usually considerably larger than the area actually mined underground. Because subsidence typically occurs in a funnel shape radiating upward and outward from the underground mine cave-in, any cracks or depressions on the surface may extend well beyond the area directly above the mine. Thus, to ensure that subsidence would not take place within a surface area specified in section 522(e), underground mine operations would be required to leave coal in place around each protected feature for a horizontal distance much larger than the protected area.

Traditional room and pillar mining can be conducted to avoid subsidence under protected features and areas, by leaving portions of the coal in place.¹³ Because of the size and mobility of the mining equipment used, room and pillar mining can move from place-to-place in the underground workings.

¹² Sec. 701(28) provides in full as follows:

"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 516 surface operations and surfaces impacts incident to an underground coal mine, the products of which enter commerce or the operations of which directly or indirectly affect interstate commerce. Such activities include excavation for the purpose of obtaining coal including such common methods as contour, strip, auger, mountaintop removal, box cut, open pit, and area mining, the uses of explosives and blasting, and in situ distillation or retorting, leaching or other chemical or physical processing, and the cleaning, concentrating, or other processing or preparation, loading of coal for interstate commerce at or near the mine site: *Provided, however* That such activities do not include the extraction of coal incidental to the extraction of other minerals where coal does not exceed 16% per centum of the tonnage of minerals removed for purposes of commercial use or sale or coal explorations subject to section 512 of this Act; and

(B) the areas upon which such activities occur or where such activities disturb the natural land surface. Such areas shall also include any adjacent land the use of which is incidental to any such activities, all lands affected by 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, and excavations, workings, impoundments, dams, ventilation shafts, entryways, refuse banks, dumps, stockpiles, overburden piles, spoil banks, culm banks, tailings, holes or depressions, 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.

30 U.S.C. § 1291(28).

¹³ Room and pillar mining is a system of mining in which as much as 50 percent or more of the mineral is recovered in the first working as mining advances. The mineral is mined in rooms separated by narrow pillars. The coal in the pillars may be removed by subsequent working, in which the roof is allowed to cave in successive blocks. The first working in rooms is an advancing, and the removing of the pillar a retreating method. *A Dictionary of Mining, Mineral, and Related Terms*, U.S. Department of Interior 941 (1968).

Longwall mining is conducted with several large pieces of capital-intensive equipment.¹⁴ This equipment is used to mine a contiguous series of straight panels of coal from an area that must be relatively large in order to be economically feasible. One longwall unit costs many millions of dollars. Longwall mining typically does not allow the operator to mine part of a particular panel, stop mining, move further down the panel, and recommence mining. Each panel must be wide and long enough to yield enough coal removed in one straight line, to justify the time and expense involved in setting up to longwall mine that panel.¹⁵ If there are numerous protected features on the surface, and if section 522(e) exceptions are unavailable for most features, a significant portion of the coal would be unavailable for recovery by the less flexible longwall method if section 522(e) applied to subsidence. As a result, application of section 522(e) to subsidence might severely impair or effectively prohibit longwall mining, particularly in the midwestern and eastern United States.¹⁶

In the past, OSM has not taken a definitive position on the issue of the applicability of section 522(e) to subsidence. In some documents, OSM has apparently taken the position that section 522(e) does apply to subsidence from underground mining.¹⁷

However, in its approvals of State regulatory programs, OSM has not required States to apply the lands unsuitable prohibitions to subsidence. In fact, OSM has accepted both the policy of some States not to apply the prohibitions only to subsidence causing material damage.¹⁸ Because OSM arguably has taken conflicting or unclear

¹⁴ Longwall mining is a system of mining in which the mineral seam is removed in one operation from a long working face or wall that may be up to 700 feet in width. The panel from which the coal is removed may be 10,000 or more feet in length. The space from which the coal has been removed is allowed to collapse or is filled with stone or debris. *Id.* at 657; Merritt, *As Time Changes, So Do Longwalls*, Coal, February 1991, at 40. Longwall mining operations using precursors to modern technology are reported as having existed in the United States as early as 1874. *Culp v. Consol Pennsylvania Coal Co.*, No. 87-1688, Mem. Op. at 17 (W.D. Pa., May 4, 1989).

¹⁵ See Stafanko, R., *Coal Mining Technology* 96-170 (1983); Thomas, L. J., *An Introduction to Mining* 237-91 (1973); Cummins, A. and Given, I., *Mining Engineering Handbook*, Vol. I, Ch. 12 (1973); Olson, J. & Tandanand, S., *Mechanized Longwall Mining: A Review Emphasizing Foreign Technology* IC 8740 (1977); Katell, S., et al., *Basic Estimated Capital Investment & Operating Costs for Underground Bituminous Coal Mines* OC 8689.

¹⁶ As of February 1991, there were 96 longwall mining operations reported operable in the United States. Merritt, *As Time Changes, So Do Longwalls*, Coal, February 1991, at 40.

¹⁷ In the 1979 rulemaking which first established permanent program rules under SMCRA, OSM dealt with this issue in two provisions. Concerning the definitions at 30 CFR 761.5, OSM rejected a comment that "surface operations and impacts incident to an underground mine" should be limited to subsidence. 44 FR 14990 (Mar. 13, 1979). Such operations and impacts are permitted in some circumstances in National Forests under an exception to sec. 522(e)(2). The negative implication would appear to be that such operations and impacts (including subsidence) are otherwise prohibited by sec. 522(e).

In the preamble discussion of sec. 761.11(d), which concerned the prohibition on mining within 100 feet of the right-of-way of a public road, OSM accepted a comment that the 100 feet should be measured horizontally "so that underground mining below a public road is not prohibited." OSM stated its belief that mining under a road should not be prohibited "where it would be safe to do so." The negative implication from this last clause would appear to be that mining under a public road should be prohibited where it would be unsafe to do so, but the preamble does not discuss whether such prohibition would come from sec. 516 or from an interpretation that sec. 522(e) prohibits subsidence that causes material damage.

See also letter of Patrick Boggs, Office of Surface Mining, to Ralph Albright, Jr., regarding *Otter Creek Coal Co. v. U.S.* January 19, 1981; and *Determination of Valid Existing Rights Within the Otter Creek Wilderness Area of Monongahela National Forest*; Notice, 49 FR 31228, 31231, 31233 (Aug. 3, 1984), characterizing subsidence as a prohibited surface impact under sec. 522(e); and Federal Defendant's Supplemental Memorandum on the Relationship Between Sec. 522(e) and the Surface Impacts of Underground Coal Mining at 8, *In Re Permanent Surface Mining Regulation Litigation II*, No. 79-1144 (D.D.C. 1985).

¹⁸ Statement of Interstate Mining Compact Commission Re Oversight Hearing on Subsidence Issues, Before the Mining and Natural Resources Subcommittee, Committee on Interior and Insular Affairs, U.S. House of Representatives, June 28, 1990; *Proposed Revision to the Permanent Program Regulations Implementing Section 522(e)*

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positions in the past, you have proposed to develop a definitive position on this issue, and have asked us to give you clear legal direction as to whether OSM's preferred position is consistent with the Act.

DISCUSSION

The issue addressed by this opinion may be briefly summarized as follows: Is subsidence from underground mining properly regulated solely under the regulatory scheme of SMCRA section 516, or do the prohibitions in SMCRA section 522(e) also apply? This question involves the proper interpretation of three main-SMCRA provisions. Specifically, the issue is the proper interpretation of the phrase "surface coal mining operations" as used in section 522(e) and defined in section 701(28). If this term includes subsidence, then section 522(e) prohibits activities that would cause subsidence from underground mining within the protected areas. If the term does not include subsidence, then subsidence is regulated solely under section 516. Thus, to determine the proper interpretation of the phrase, we must look to and interpret section 701(28), as well as sections 516 and 522(e).

Based on our review of those sections, we conclude that the best reading of the law is that subsidence from underground mining is properly regulated under section 516, and not under section 522(e). This is consistent with the provisions of SMCRA and with the legislative history of the Act. Further, to the extent that there is uncertainty because of the unclear language of the Act, this interpretation is within OSM's reasonable discretion, under *Chevron U.S.A., Inc. v. Natural Resources Defense Council* 467 U.S. 837 (1984), as discussed below. This reading will promote the general statutory scheme of SMCRA and fully protect the public interest. With respect to subsidence, OSM has the authority under section 516 to protect the health, safety, and environmental values that underlie section 522(e).

While the definition of "surface coal mining operations" in SMCRA section 701(28) is not a clearly drafted provision, we believe that paragraph (A) of the definition includes only surface activities which are connected with a surface coal mine, and surface activities connected with those surface operations and surface impacts that are incident to an underground mine and that are subject to section 516.¹⁹

of the Surface Mining Control and Reclamation Act of 1977, Draft Environmental Impact Statement: OSM-EIS-29 (December 1990), prepared by OSM, Table II-1 at II-4. Examination of these two documents indicates there is some confusion as to how States implement sec. 522(e) concerning subsidence.

¹⁹ We have reviewed the argument that "subject to" language of sec. 701(28)(A) means that the sec. 522(e) prohibitions are subservient to the provisions of sec. 516, so that sec. 522(e) cannot result in stricter prohibitions than sec. 516 imposes. This argument would effectively render sec. 522(e) a nullity with regard to surface activities of underground mining operations that are regulated and permitted under sec. 516. For example, under this argument, face-up or mine portal areas would be allowed within areas covered by sec. 522(e). We do not believe that this result was intended for Congress.

An alternative theory is that the "subject to" language is merely a cross-reference indicating which activities conducted on the surface in connection with an underground coal mine are surface coal mining operations, namely those that

Continued

This interpretation is consistent with the description of the effect of section 701(28) in the Senate Report on the version of the definition that was adopted:

"Surface [coal] mining operations" * * * includes all areas upon which occur surface mining activities and *surface activities incident to underground mining*. It also includes all roads, facilities, structures, property, and materials on the surface resulting from or incident to *such activities* * * *.

S. Rep. No. 128, 95th Cong., 1st Sess. 98 (1977) (*italics added*).

Under this construction, subsidence would not be included within the term "surface coal mining operations" because it is not an activity conducted on the surface of lands. Surface activities associated with surface operations incident to underground mining, and surface activities associated with surface impacts incident to underground mining would be included in the definition. This reading of subsection 701(28), however, would not mean that subsidence would be exempt from regulation under the Act, since Congress specifically provided for regulation of subsidence under section 516 of SMCRA.

Paragraph (B) of section 701(28) supports this interpretation.

Paragraph (A) refers to "*activities* conducted on the surface of lands in connection with a surface coal mine or * * * *surface operations and surface impacts* incident to an underground coal mine * * *."

Paragraph (B) refers to "the areas upon which *such activities* occur or where *such activities* disturb the natural land surface" and to holes or depressions "resulting from or incident to *such activities* * * *" (*italics added*). The only "activities" to which paragraph (B) could refer are those described in paragraph (A), namely those conducted on the surface of lands in connection with a surface coal mine or in connection with the surface operations and impacts incident to an underground coal mine.²⁰

are subject to regulation under sec. 516 of SMCRA. We believe that this theory, which comports with the plain meaning of the statutory provision, is the sounder theory. This conclusion is supported by H.R. Rep. No. 493, 95th Cong., 1st Sess. 113 (1977), which indicates that the phrase "subject to section 516" was added as a minor technical amendment in conference. The report makes no reference to any special significance for the phrase.

²⁰ We recognize that at least one other parsing of the language of sec. 701(28)(A) is possible. Under that alternative reading, sec. 701(28)(A) would be read to apply to two categories of surface phenomena:

[1] Activities conducted on the surface of lands in connection with a surface coal mine or [2] subject to the requirements of section 516 surface operations and surface impacts incident to an underground coal mine * * *. This parsing would require that the phrase "surface impacts incident to an underground coal mine" (in the second category) be read as independent of the words in the first category concerning "activities conducted on the surface of lands."

There are at least three problems with this parsing of sec. 701(28)(A). First, it would render the phrase "on the surface of lands" superfluous, since all "[a]ctivities conducted * * * in connection with a surface coal mine" necessarily occur on the surface of lands. The phrase only has meaning if it modifies "[a]ctivities conducted * * * in connection with * * * an underground coal mine * * *."

Second, the remainder of paragraph (A) and all of paragraph (B) of this definition would not apply to underground coal mines, since those provisions refer back to the surface *activities* covered in the first sentence of paragraph (A). We do not believe Congress could have intended such a result.

Third, this construction would require the reader to conclude that the phrase "in connection with" was not intended to apply to surface operations and surface impacts incident to an underground coal mine. This result would conflict with OSM's position since the inception of the program that the term "surface coal mining operation" includes surface facilities operated in connection with an underground coal mine. The latter is a position which we regard as consistent with the Act and with legislative intent. This position was recently reaffirmed in a rulemaking concerning surface facilities in connection with an underground coal mine. 53 FR 47384 (Nov. 22, 1988).

Consequently, we believe this alternative parsing is not a sound interpretation of the definition.

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This interpretation that subsidence from underground mining is not a surface coal mining operation is consistent with the overall scheme of the Act. To begin with, Congress clearly intended that section 516 set forth comprehensive regulatory requirements for the surface impacts of underground mining, including subsidence.²¹

As noted previously, section 516(b) sets the foundation for a regulatory scheme intended to control subsidence to the extent technologically and economically feasible in order to protect the value and use of surface lands.²² Section 516(c) authorizes suspension of underground mining under urban areas and water bodies, when there is imminent danger to inhabitants. Section 516(c) applies in those situations in which an underground mine has been permitted because all applicable permitting standards, including standards for prevention of material damage, have been met, but actual underground mining poses a serious subsidence danger to inhabitants of urban areas and water bodies.

We believe, based on our reading of the language of section 516 and of the legislative history, that Congress intended section 516(c), in combination with other regulatory provisions under section 516, to offer sufficient prohibition, prevention, or repair of subsidence damage to those features that Congress considered vulnerable to significant impairment from subsidence. The existence of this comprehensive regulatory scheme in section 516 makes it unlikely that Congress also intended to prohibit subsidence under section 522(e).

The legislative history of section 516 contains ample references to Congress' focus on control rather than prohibition. The following is pertinent House Report language:

Surface subsidence has a different effect on different land uses. Generally, no appreciable impact is realized on agricultural land and similar types of land and productivity is not affected. On the other hand when subsidence occurs under developed land such as that in an urbanized area, substantial damage results to surface improvements be they private homes, commercial buildings or public road and schools. One characteristic of subsidence which disrupts surface land uses is its unpredictable occurrence in terms of both time and location. Subsidence occurs, seemingly on a random basis, at least up to 60 years after mining and even in those areas it is still occurring. *It is the intent of this section to provide the Secretary with the authority to require the design and conduct of*

²¹ See, e.g., H.R. Rep. No. 218, 95th Cong., 1st Sess. 93, 126 (1977).

²² 30 U.S.C. § 1266(b)(1). Implementing regulations concerning subsidence control are set forth primarily at 30 CFR 784.20 concerning subsidence control plan requirements, and 30 CFR 817.121 concerning subsidence control performance standards. Sec. 516(b)(1) contains language exempting planned, predictable, and controlled subsidence, such as that resulting from longwall mining. We conclude that this exemption language constitutes an exemption only from the requirement of sec. 516(b)(1) to prevent subsidence. Longwall mining is not exempt from the requirements to maximize mine stability and maintain the value and foreseeable use of surface lands. This reading of the Act's requirements is supported by the fact that a subsidence control plan is required for a longwall mining operation. This reading is also supported by the opinion of the U.S. Court of Appeals for the District of Columbia Circuit upholding OSM's regulations requiring repair of damage to land from subsidence. Those regulations, which are based in part on SMCRA sec. 516(b)(1), do not exempt longwall mining. See *National Wildlife Fed'n v. Hodel*, 839 F.2d 694, 739 (D.C. Cir. 1988). You have advised that OSM is currently contemplating a rulemaking that could address the issue of whether an operator has an obligation to prevent material damage from planned subsidence.

underground mining methods to control subsidence to the extent technologically and economically feasible in order to protect the value and use of surface lands.

H.R. Rep. No. 218, 95th Cong., 1st Sess. 126 (1977) (*italics added*).²³

In those extreme cases in which Congress felt that prohibition could be necessary, it provided broad authority under section 516(c):

In order to prevent the creation of additional subsidence hazards from underground mining in developing areas, subsection (c) provides permissive authority to the regulatory agency to prohibit underground coal mining in urbanized areas, cities, towns and communities, and under or adjacent to industrial buildings, major impoundments or permanent streams.

S. Rep. No. 128 at 84–85. It is reasonable to conclude that Congress addressed specifically in section 516(c), the limited types of surface features that might be so significantly affected by subsidence from underground mining that a subsidence prohibition could be appropriate.²⁴ This conclusion that prohibition was to be imposed solely under 516(c) is buttressed by the discussion in the House report quoted above, that subsidence has no appreciable impact on agricultural land and similar types of land. It is not necessary to impose the prohibitions of section 522(e) on subsidence because the surface features that might need such protection are covered by section 516(c).

This conclusion is also supported by the discussion in the 1977 Senate report on section 522(e) which notes that “surface coal mining” is prohibited within the specified distances of public roads, occupied buildings, and active underground mines, “for reasons of public health and safety.” S. Rep. No. 128 at 55. If one of Congress’ purposes in section 522(e)(4)-(5) was to protect public health and safety, prohibition of subsidence in all section 522(e) areas would be unnecessary. Irrespective of all section 522(e), an underground mine must meet the requirements of section 516 to prevent material damage and to maintain the value and use of lands, and those requirements should prevent risks to public health and safety. Moreover, if an unforeseen subsidence danger were to arise, section 516(c) sets forth procedures to prohibit underground mining as necessary, providing a second level of authority allowing protection for public health and safety. Therefore, Congress had already addressed in section 516 those subsidence control measures necessary to address public health and safety.

Our interpretation is also consistent with Congress’ intent to encourage underground mining and full coal resource recovery. The statute and

²³ See also H.R. Rep. No. 1445, 94th Cong., 2d Sess. 71–72 (1976); H.R. Rep. No. 896, 94th Cong., 2d Sess. 73–74 (1976); H.R. Rep. No. 45, 94th Cong., 1st Sess. 115–116 (1975); H.R. Rep. No. 1072, 93rd Cong., 2d Sess. 108–109 (1974).

²⁴ We note that this interpretation is consistent with the fact that there is a relative dearth of legislative history discussing the types of harms or consequences which Congress intended to preclude in areas protected under sec. 522(e), and no reference to subsidence as an impact which was to be precluded in sec. 522(e) areas. In contrast, as noted above, there is abundant testimony and discussion in the legislative history as to both the need to control subsidence and Congress’ intent to control subsidence under sec. 516. If all subsidence were prohibited by sec. 522(e), then that section would become as significant to SMCRA’s regulatory scheme for subsidence as sec. 516. In fact, it would render sec. 516(c) largely superfluous. Yet the term “subsidence” does not even appear in sec. 522(e) or in its legislative history.

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legislative history express Congress' intent to "encourage the full utilization of coal resources through the development and application of underground extraction technologies." SMCRA section 102(k), 30 U.S.C. § 1202(k). Similarly, Congress found that

it is * * * essential to the national interest to insure the existence of an expanding and economically healthy underground coal mining industry.

SMCRA section 101(b), 30 U.S.C. § 1201(b). In fact, there is evidence that Congress wished to encourage longwall mining in particular:

Underground mining is to be conducted in such a way as to assure appropriate permanent support to prevent surface subsidence of land and the value and use of surface lands, except in those instances where the mining technology approved by the regulatory authority at the outset results in planned subsidence. Thus, operators may use underground mining techniques, such as long-wall mining, which completely extract the coal and which result in predictable and controllable subsidence.

S. Rep. No. 128, 95th Cong., 1st Sess. 84 (1977). *See also* S. Rep. No. 28, 94th Cong., 1st Sess. 215 (1975).²⁵

Clearly, if subsidence is likely to occur from room and pillar underground mining and is a virtually inevitable consequence of longwall mining, then prohibiting all subsidence below homes, roads, and other features specified in section 522(e) would make it substantially less feasible to mine and would substantially reduce the level of coal recovery in areas where such features are common on the surface. Applying the section 522(e) prohibitions to subsidence would therefore frustrate congressional intent to promote underground mining.

To summarize the discussion thus far, a close reading of section 701(28), an analysis of the language and legislative history of section 516, and a consideration of the congressional intent in sections 101(b) and 102(k) all lead to the same conclusion—that the best reading of the law is that section 522(e) does not apply to mining activities conducted *under* the surface of lands, even if such activities lead to subsidence.

In December 1988, OSM proposed two alternative policies on the applicability of section 522(e) to subsidence. One proposal was that all subsidence would be subject to the prohibitions of section 522(e). The other proposal was that subsidence causing material damage would be subject to section 522(e). 53 FR 52374 (December 27, 1988). Because these theories have recently been given serious consideration by OSM, we evaluate them briefly in this opinion.

²⁵ Congressman Udall, the bill's principal sponsor, commented on this issue as follows:

The House Bill contemplates rules to "Prevent subsidence to the extent technologically and economically feasible." The word prevent led to fears expressed by the Secretary of the Interior Morton, that the effect would be to allow longwall mining, with its obvious subsidence * * * In fact the bill's sponsors consider longwall mining ecologically preferable and it and other methods of controlled subsidence are explicitly endorsed.

120 Cong. Rec. 22731 (1974).

The first alternative proposal was based on the argument that subsidence is a surface impact of underground mining, that surface impacts of underground mining are surface coal mining operations under section 701(28), and thus that *all subsidence* is a surface coal mining operation prohibited under section 522(e). One problem with this interpretation is that subsidence may or may not cause surface damage. Congress did not intend to prevent subsidence that causes no surface damage. All of the congressional concern about subsidence from underground mining is expressed in discussions of the damage caused by subsidence, and Congress repeatedly recognized that there was little concern about subsidence that caused no significant damage to surface features or uses or to human life or safety.²⁶ Indeed, there is little reason to regulate or prohibit subsidence that does not impair surface features and uses and does not endanger human life or safety.

Application of the section 522(e) prohibition to all subsidence would be unnecessarily restrictive, in light of Congress' recognition that subsidence would cause no significant damage to agriculture and similar uses. Many of the types of features listed in section 522(e) are low-intensity uses that are similar to agricultural land uses in that they have low vulnerability to significant damage from subsidence.

This alternative was also based in part on the argument that, given the serious congressional concern about subsidence, it would be illogical to conclude that Congress did not intend to include subsidence within the definition of "surface coal mining operations" or that Congress would have allowed subsidence within the areas protected by section 522(e). We do not find this argument persuasive.

To begin with, under SMCRA, certain impacts of coal mining are subject to regulation even if they are not included in the definition of a surface coal mining operation and are therefore not subject to the prohibitions of section 522(e). For example, offsite water supply diminution and air and water pollution attendant to erosion are also specifically regulated under SMCRA, even though they are not surface coal mining operations per se. SMCRA §§ 515(b)(4) and 717, 30 U.S.C. §§ 1265(b)(4) and 1307. Therefore, it is not necessary to include subsidence within the definition of a surface coal mining operation in order to regulate subsidence under section 516.

Second, as noted above, there are no significant lapses in regulatory coverage under our reading of SMCRA, since subsidence is fully and specifically regulated under section 516. The requirements of the existing regulatory scheme for subsidence apply equally in areas covered by section 522(e) and in areas not so covered.

The second proposed alternative interpretation was that *subsidence causing material damage* is a surface coal mining operation subject to

²⁶H.R. Rep. No. 218, 95th Cong., 1st Sess. 126 (1977); H.R. Rep. No. 1445, 94th Cong., 2d Sess. 71-72 (1976); H.R. Rep. No. 896, 94th Cong., 2d Sess. 73-74 (1976); H.R. Rep. No. 45, 94th Cong., 1st Sess. 115-116 (1975); H.R. Rep. No. 1072, 93rd Cong., 2d Sess. 108-109 (1974).

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section 522(e). Proponents of this alternative contend that Congress intended that only subsidence that causes material damage be precluded. Prohibition of material damage would not preclude underground mining of all section 522(e)(4) and (e)(5) areas, because an operator could either negotiate a waiver of the prohibition or purchase the protected features.

We do not find the arguments for a material damage standard persuasive for several reasons. First, a material damage standard does not comport with the parsing of the definition at SMCRA section 701(28)(A), as outlined above, which we believe best gives meaning to all of the words of the statutory provision and therefore is the best and most defensible interpretation of the language of section 701(28).

Second, as outlined above, we conclude that Congress intended to regulate subsidence under section 516, rather than under section 522(e), as indicated by both the provisions of the Act and the legislative history. Application of a material damage test might cause significant costs and impairment of underground mining.²⁷ This is because section 516(b)(1) requires prevention of material damage only "to the extent technologically and economically feasible," while this interpretation of section 522(e) would require prevention of all material damage.

If subsidence causing material damage were prohibited, an operator would be precluded from causing subsidence except to the extent the operator could demonstrate that (1) although subsidence might occur under the protected features, no material damage would occur from the subsidence; (2) the operation would avoid mining within the area from which subsidence could damage the protected features; or (3) under the exceptions in section 522(e), the operator had, for example, obtained waivers from homeowners or permission from the regulatory authority concerning subsidence under public roads. To the extent that these requirements would significantly increase the costs of mining, or significantly decrease the amount of coal available for mining, the material damage standard also would frustrate the congressional intent to encourage full utilization of coal, to ensure an expanding underground mining industry, and to encourage longwall mining.²⁸

²⁷ We have seen no firm or final conclusions as to the extent to which costs and impairment would occur. Review of a preliminary draft Environmental Impact Statement indicates OSM has initially determined that there would be no significant decrease in coal production from application of a material damage standard. *Proposed Revision to the Permanent Program Regulations Implementing Section 522(e) of the Surface Mining Control and Reclamation Act of 1977*, Draft Environmental Impact Statement: OSM-EIS-29 (Dec. 1990), prepared by OSM, at IV-51-IV-54. To the extent that is true, interpreting sec. 522(e) as prohibiting subsidence causing material damage would add nothing to the protections already afforded by sec. 516(b)(1).

²⁸ We note that either of the two alternative arguments discussed above could be accompanied by an independent argument that sec. 522(e) is not redundant of or in conflict with sec. 516(c), and that the two sections are complementary components of the SMCRA regulatory scheme. This argument asserts that sec. 516(c) covers subsidence that is actually taking place and creating a hazard to life and safety, while sec. 522(e) determines whether mining is permissible, to start with, in the specified areas. If mining is allowed in the specified areas under sec. 522(e) (e.g., because the operator establishes VER), and if the mining that then occurs creates a hazard to life or safety, then sec. 516(c) is applicable.

Continued

Finally, to the extent there is confusion as to the meaning of the term "surface coal mining operations," an agency's interpretation of a statute it administers is entitled to great deference. OSM has indicated that it interprets section 516 to be the statutory basis for regulating subsidence from underground mining, and that it interprets section 522(e) as not applying to subsidence. This interpretation is a choice within the bounds of OSM's discretion because it is consistent with the Act and the legislative history, and it is therefore entitled to deference.

Since Congress has not made a clear determination, the agency has discretion to adopt a reasonable option for determining the applicability of section 522(e) to subsidence.

[I]f the statute is silent or ambiguous with respect to the specific issue, the question * * * is whether the agency's answer is based on a permissible construction of the statute.

Chevron, U.S.A., 467 U.S. at 843. A reviewing court need not conclude that the agency's interpretation of the statute is the only permissible one, only that it is reasonable and not arbitrary, capricious, or contrary to law.²⁹

Under section 516, OSM has ample authority to regulate surface effects of underground mining under existing regulations or under any additional regulations that OSM might reasonably conclude are necessary to implement the Act. There would be no regulatory hiatus if section 522(e) does not apply to subsidence. However, if OSM were to identify any environmental values or public interests that warrant additional protection, OSM has full authority under section 516 and other SMCRA provisions, to develop standards to protect such values or interests, without the disruption in the underground mining industry that would result from applying section 522(e) prohibitions to subsidence.

CONCLUSION

Based on the above analysis of the statute, the legislative history, OSM's regulatory actions implementing these provisions, and pertinent case authority, we conclude that OSM may properly regulate subsidence solely under section 516 of SMCRA and not under section 522(e) of SMCRA. Our conclusion that subsidence is properly regulated only under section 516 recognizes that regulation under section 516

We do not find this line of analysis persuasive. It is true that sec. 522(e) and sec. 516(c) would not be coextensive in their coverage, assuming sec. 522(e) applied to subsidence. Nevertheless, there would be a substantial overlap between the two provisions. Moreover, as discussed above, we have concluded that subsidence was not intended to be addressed in sec. 522(e), and to apply the prohibitions of sec. 522(e) to subsidence would frustrate congressional aims in a way that is not mandated by the terms of the Act or its legislative history.

²⁹ See *Nat'l Wildlife Fed'n v. Hodel*, 839 F.2d 694, 741, 748 (D.C. Cir. 1988):

We * * * conclude * * * that, at best, the legislative history of [SMCRA] creates some ambiguity—perhaps enough to support [plaintiff's] position had it been adopted by the Secretary. But it is far from sufficient to constitute a specific legislative intent contradicting the Secretary's interpretation. Congress has evidently delegated to the Secretary the authority to flesh out the meaning of [this term], * * * and the Secretary has done so in an entirely reasonable fashion * * *

Accord, Nat'l Wildlife Fed'n v. Lujan, No. 90-5114, slip op. at 10 (D.C. Cir. Mar. 22, 1991):

Because the SMCRA does not evince a clear congressional intent on the issue * * *, the question becomes whether the Secretary's regulation is based on a permissible interpretation of the Act and is not an arbitrary or capricious change in policy.

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may not have precisely the same effect as regulation under section 522(e). We believe that this result was intended by Congress, which sought to control rather than proscribe subsidence, and to encourage longwall mining. We believe that regulation under section 516 will achieve full protection of the environmental values which Congress sought to protect from subsidence under the Act.

THOMAS L. SANSONETTI
Solicitor

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April 20, 1992

OWNERSHIP OF SUBMERGED LANDS IN NORTHERN ALASKA IN LIGHT OF *UTAH DIVISION OF STATE LANDS v. UNITED STATES**

M-36911 (Supp. I)

April 20, 1992

Withdrawals and Reservations: Effect of

In order to defeat a future state's title to submerged lands, the two-pronged test articulated in *Utah Division of State Lands v. United States*, 482 U.S. 193 (1987), must be successfully applied. That test requires that: (1) Congress clearly intended to include land under navigable waters within the reservation and (2) affirmatively intended to defeat future state title to such land. This test does apply to the PLO 82 withdrawal.

Withdrawals and Reservations: Effects of

That the text and purpose of PLO 82, by its broad and all inclusive language, clearly intended to include lands underlying navigable waters.

Withdrawals and Reservations: Effect of

Where the Executive intended through PLO 1621 to defeat Alaska's future title to submerged lands within the boundaries of the National Petroleum Reserve Numbered 4, and the proposed boundaries of the Arctic National Wildlife Refuge, and that Congress affirmed this executive intent in sec. 6(e) of the Alaska Statehood Act.

Withdrawals and Reservations: Effect of

Where sec. 11(b) of the Alaska Statehood Act is an express retention of lands for military purposes within the meaning of sec. 5(a) of the Submerged Lands Act.

This supplemental decision modifies the findings in M-36911 and harmonizes them with the Supreme Court decision in *Utah Division of State Lands v. United States*, 482 U.S. 193 (1987).

Memorandum

To: Secretary

From: Solicitor

Subject: Ownership of Submerged Lands in Northern Alaska in Light of *Utah Division of State Lands v. United States*

I. INTRODUCTION AND BACKGROUND

You have asked me to determine the impact of the United States Supreme Court's decision in *Utah Division of State Lands v. United States*, 482 U.S. 193 (1987) (*Utah Lake*), on the conclusions reached in Solicitor's Opinion M-36911, issued by former Solicitor Leo Krulitz in 1978, entitled "The Effect of Public Land Order 82 on the Ownership of Coastal Submerged Lands in Northern Alaska," 86 I.D. 151 (1979) (the Krulitz Opinion).

Public Land Order 82 (January 22, 1943) (PLO 82), was issued by Acting Secretary of the Interior Abe Fortas at the height of World War II. The order withdrew public lands in three areas of the Territory of

*Not in chronological order.

Alaska from operation of the public land laws, including the mining and mineral-leasing laws, "for use in connection with the prosecution of the war."¹ The three areas were northern Alaska (also commonly referred to as the "North Slope"), the Alaska Peninsula, and the Katalla-Yakataga region.² Only the northern Alaska withdrawal is at issue in this Opinion. PLO 82 was revoked in 1960,³ nearly 2 years after Alaska was admitted to the Union.⁴

On December 12, 1978, Solicitor Krulitz addressed, in M-36911, two issues arising from the withdrawal made by PLO 82 in northern Alaska: (1) the extent of the withdrawal and (2) its effect on state ownership of inland and offshore submerged lands⁵ in northern Alaska. 86 I.D. 151, 152. The Solicitor concluded that "PLO 82 expressly reserved the submerged lands underlying the inland navigable waters within the area it withdrew in northern Alaska." *Id.* at 174-75. He further held that title to the inland submerged lands did not pass to Alaska upon statehood, nor upon revocation of PLO 82 in 1960. *Id.* at 175. In contrast to the inland submerged lands, the Solicitor found that PLO 82 did not withdraw the coastal submerged lands, which passed to Alaska upon statehood. *Id.* Former Secretary of the Interior Cecil Andrus concurred in the 1978 Opinion.⁶

In 1987, 9 years after the Krulitz Opinion was issued, the Supreme Court considered, in *Utah Lake*, a claim by the United States that it had reserved to itself the bed of an inland navigable lake while Utah was a territory, and that the lakebed remained in Federal ownership when Utah became a state in 1896.⁷ In a 5-4 decision, the Court rejected the United States' claim and held that the bed of Utah Lake had not been included in the Federal reservation in question. The Court further concluded that even if the lakebed had been reserved, the evidence was insufficient to establish that the United States intended to defeat Utah's title to the bed when Utah was admitted to the Union.

In December 1988, then Secretary of the Interior Donald P. Hodel asked the Solicitor to review the Krulitz Opinion in light of *Utah Lake* and to advise him whether the Supreme Court's decision required the Department to reconsider its position as to the effect of PLO 82 on title

¹ 8 FR 1599 (1943) (Appendix 1).

² See map of Alaska (Appendix 2).

³ PLO 2215, 25 FR 12599 (1960).

⁴ Alaska was admitted to the Union on Jan. 3, 1959, Proc. No. 3269, 24 FR 81-82 (1959).

⁵ Although the title of the Krulitz Opinion refers only to "coastal" submerged lands, the Opinion addressed ownership of both coastal and inland submerged lands. The Krulitz Opinion uses the terms "coastal submerged lands" and "offshore submerged lands" interchangeably.

⁶ By letter dated Feb. 23, 1979, Secretary Andrus notified the Alaska Native Claims Appeal Board (ANCAB) of the Opinion and directed ANCAB to apply the Opinion to all cases posing similar legal and policy issues. See *Appeal of State of Alaska* (Kuugpik Corp.), ANCAB No. VLS 78-32, 3 ANCAB 297, 303-04 (1979). Following Secretary Andrus' direction, ANCAB applied the Krulitz Opinion and held that the State does not own inland submerged lands under navigable waters within the area withdrawn by PLO 82 (in this case, the bed of the Nechelek Channel of the Colville River).

⁷ 482 U.S. 193, 208-09.

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to submerged lands.⁸ Secretary Hodel also asked the Solicitor to consider the effect of the *Utah Lake* decision on Executive Order (EO) No. 908, withdrawing the Chugach National Forest in Alaska.⁹ The Secretary then assumed jurisdiction of two cases before the Interior Board of Land Appeals (IBLA) pending guidance from the Solicitor on the effect of the PLO 82 and Chugach National Forest withdrawals in light of the *Utah Lake* decision.¹⁰ In June 1991, you renewed Secretary Hodel's request and asked me to review the 1978 Krulitz Opinion to determine whether it should be modified in light of the 1987 Supreme Court decision.

Matters related to land status within PLO 82 and other pre-statehood withdrawals in Alaska are now under litigation in the United States Supreme Court¹¹ and in the Federal district court in Alaska.¹² While this Opinion considers only the applicability of the *Utah Lake* principles to the PLO 82 withdrawal, it is anticipated that the State of Alaska and other interested parties will raise future questions on other pre-statehood withdrawals and reservations.¹³ Therefore, this Opinion devotes considerable attention to the analysis of the *Utah*

⁸Memorandum, dated Dec. 20, 1988, from Secretary of the Interior Donald P. Hodel to Solicitor, captioned "Appeal of *State of Alaska v. Morgan Coal Co.*" See also memorandum, dated Dec. 20, 1988, from Secretary Hodel to Director, Office of Hearings and Appeals, under the identical caption.

⁹EO No. 908 (1908) (unpublished).

¹⁰The Secretary's assumption of jurisdiction was pursuant to 43 CFR 4.5. First, Secretary Hodel directed the IBLA to stay *Morgan Coal Co.*, IBLA 86-1234, a challenge by Alaska to the Department's position on PLO 82. Second, he directed the IBLA to reopen and stay *State of Alaska* (Katalla River), IBLA 85-768, 102 IBLA 357 (1988), a dispute over rights to oil and gas in the bed of the Katalla River. The IBLA held that *Utah Lake* compelled the conclusion that EO No. 908, the withdrawal for the Chugach National Forest, did not include the lands underlying navigable waters (specifically, the Katalla River). Thus, IBLA concluded title to the bed of the Katalla River passed to Alaska upon statehood.

In addition to these two IBLA cases, the IBLA itself has stayed at least four proceedings pending Departmental review of the Krulitz Opinion. These cases include: (1) *State of Alaska*, IBLA 86-1498, concerning the Jago River in the Arctic National Wildlife Refuge; (2) *State of Alaska*, IBLA Nos. 86-1262 and 86-1397 (Consol.), involving State selections of the Kasagarluk Lagoon and Chukchi Sea; (3) *State of Alaska*, IBLA 86-1500, Seldovia Lighthouse, an appeal by the State of a BLM conveyance of submerged lands to a Native corporation relying on EO 3406; and (4) *State of Alaska*, IBLA 87-116, Haida Lighthouse, an appeal by the State of BLM's conveyance of submerged lands to a Native corporation under EO No. 3406.

¹¹In *United States v. Alaska*, No. 84, Original (filed May 1979), pending before a Special Master in the Supreme Court, Alaska has argued, *inter alia*, that *Utah Lake* compels a finding that the U.S. did not retain submerged lands in connection with the withdrawals for the Arctic National Wildlife Refuge and the National Petroleum Reserve Numbered 4 (NPR-4) (NPR-4 was renamed National Petroleum Reserve—Alaska (NPR-A) in 1976, 42 U.S.C. § 6501). Both of these areas were also withdrawn by PLO 82. The Special Master has not yet issued a final decision in this case. See Briefs of State of Alaska, dated Sept. 23, 1987, and Oct. 9, 1987.

¹²Since 1980, the State has filed three lawsuits (now consolidated) claiming that 25 percent of the area within NPR-A that was opened by Congress to oil and gas leasing in 1980 was land beneath inland navigable waters. The State claims that title to these lands passed to Alaska upon statehood. *Alaska v. U.S.*, Civil No. A-83-343 (filed July 5, 1983), consolidated with Case Nos. A-84-435 (filed Oct. 11, 1984) and A-86-181 (filed Mar. 27, 1986). See also *Alaska v. U.S.*, Civil No. A-87-450 (filed Sept. 18, 1987) (title to bed of the Kowparuk River within the PLO 82 reservation).

¹³At the time of Alaska Statehood, there were 90-95 million acres of Federal reservations in Alaska. Many of these reservations still exist for a variety of purposes, including parks, refuges, and military reservations. According to Departmental figures the total acreage of public lands in withdrawal status as of Oct. 1956 amounted to 92,310,000 acres. See *Alaska Statehood: Hearings before the Committee on Interior and Insular Affairs, U.S. Senate on S. 49 and S. 35, 85th Cong.*, 1st Sess. 197 (1957) (1957 Senate Hearings); see also *Statehood for Alaska: Hearings before the Subcommittee on Territorial and Insular Affairs of the Committee on Interior and Insular Affairs, House of Representatives on [Misc. Statehood Bills]*, 85th Cong., 1st Sess. 235 (1957) (1957 House Hearings).

A "withdrawal" of land refers to a statute, EO, or an administrative order that removes Federal lands from the operation of specified public land laws, including use, disposition, and mining laws, that otherwise might apply. A "reservation" is a withdrawal of land for a particular Federal purpose or purposes, such as for national parks or military uses. See generally, Baynard, E., *Public Land Law and Procedure*, § 5.36 (1986); see also Coggins, George & Wilkinson, Charles, *Federal Public Land and Natural Resources Law*, 239-40 (2d ed. 1987).

Lake decision before determining its specific application to the PLO 82 withdrawal.

I have reconsidered the 1978 Krulitz Opinion; examined the language, history and purpose of PLO 82; construed the Alaska Statehood Act of 1958 (Statehood Act or ASA)¹⁴ and the Submerged Lands Act of 1953;¹⁵ and analyzed the *Utah Lake* decision and its two-part standard for Federal retention of inland submerged lands in pre-statehood reservations to determine its applicability to the PLO 82 withdrawal. I conclude that the principles articulated by the Supreme Court in *Utah Lake* apply to PLO 82. I further conclude that, pursuant to those principles and the Alaska Statehood Act, the lands underlying inland navigable waters in the area withdrawn by PLO 82 in northern Alaska were: (1) part of the withdrawal in the first instance, and (2) retained by the United States upon Alaska's admission to the Union with an intent to defeat state title.¹⁶ Therefore, the *Utah Lake* decision does not require that I reverse the conclusions of the Krulitz Opinion, although significant additional analysis has been performed.¹⁷ This Opinion supplements the Krulitz Opinion and supersedes it to the extent of any inconsistencies.¹⁸

My research has led me to conclude that Congress had a number of concerns before it at the time of the Alaska Statehood Act. In the area of PLO 82, I believe they were conflicting. In reaching my conclusions, I am compelled to highlight the significant level of Executive Branch activity immediately prior to Alaska Statehood which evinces an intent to rescind PLO 82. Statements of Secretary Seaton and modification of PLO 82 in 1958 raise an argument that at least for part of the area within PLO 82, the Federal intent to reserve submerged lands and to defeat state title to those lands was less than clear.

Nonetheless, my review of the history of executive and congressional activity leading to passage of the Alaska Statehood Act discloses no formal revocation of PLO 82. The record also discloses a contemporaneous concern on the part of the Executive Branch and Congress to preserve withdrawals made for military purposes in northern Alaska. It appears that the intent to preserve withdrawals was clear and affirmative. The competing interest in making lands available to the State—including submerged lands—appeared to be of lesser priority to Congress in northern Alaska than issues of national defense.

¹⁴ 72 Stat. 339, 48 U.S.C. note prec. § 21.

¹⁵ 43 U.S.C. §§ 1301-1315.

¹⁶ After PLO 82 was revoked in 1960, Alaska was entitled to select lands in the area formerly withdrawn by PLO 82, and not otherwise reserved, subject to the President's approval. Alaska Statehood Act, § 6(b), 72 Stat. 339, 340. See *infra* n. 43.

¹⁷ The analysis in this Opinion is controlling in the disposition of those cases before the Department pertaining to the area withdrawn by PLO 82, e.g., the *Morgan Coal* case, see *supra* n. 10. This Opinion does not determine the effect of the *Utah Lake* decision on the Chugach National Forest withdrawal (*Katalla River* case).

¹⁸ As previously noted, the Krulitz Opinion considered the effect of PLO 82 on both offshore and inland submerged lands on the North Slope. This review of the Krulitz Opinion is limited to its discussion and conclusions regarding lands under inland navigable waters within the area withdrawn by PLO 82.

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This review sets out the historical documents I relied upon in reaching this decision. These materials were obtained from a variety of archival sources. These documents, I believe, best set out the competing concerns Congress had before it at the time of Alaska Statehood, and which lead me to this difficult conclusion. If other materials exist, I would be delighted to review them.

A. History of Public Land Order 82

Public Land Order 82 was issued by Acting Secretary of the Interior Abe Fortas on January 22, 1943. PLO 82 provided in pertinent part:

WITHDRAWING PUBLIC LANDS FOR USE IN CONNECTION WITH THE PROSECUTION OF THE WAR

By virtue of the authority vested in the President and pursuant to Executive Order No. 9146 of April 24, 1942, *It is ordered as follows:*

Subject to valid existing rights, (1) all public lands, including all public lands in the Chugach National Forest, within the following-described areas are hereby withdrawn from sale, location, selection, and entry under the public-land laws of the United States, including the mining laws, and from leasing under the mineral-leasing laws, and (2) the minerals in such lands are hereby reserved under the jurisdiction of the Secretary of the Interior, for use in connection with the prosecution of the war. * * *

8 FR 1599 (1943).

As established in 1943, PLO 82 withdrew three tracts of land in distinct regions of Alaska: Northern Alaska, the Alaska Peninsula and Katalla-Yakataga. PLO 82 provided legal descriptions of the lands withdrawn within each of the areas and provided estimates of affected acreage as follows: 15,600,000 acres in the Alaska Peninsula, 3,040,000 acres in Katalla-Yakataga and 48,800,000 acres in Northern Alaska.¹⁹

The PLO 82 description of the Northern Alaska withdrawal is as follows:

NORTHERN ALASKA

All that part of Alaska lying north of a line beginning at a point on the boundary between the United States and Canada, on the divide between the north and south forks of the Firth River, approximate latitude 68°52' N., longitude 141°00' W., thence westerly, along this divide, and the periphery of the watershed northward to the Arctic Ocean, along the crest of portions of the Brooks Range and the De Long Mountains, to Cape Lisburne.

¹⁹Solicitor Krulitz noted that the acreage figures did not correlate with any existing map of the areas. 86 I.D. 151, 161-64. The acreages do not correspond to any independent measurements made since 1943 using planimeter or other technology not available then. The survey methods available in 1943 to estimate acreage in this type of remote, partially mountainous terrain would not be expected to produce accurate figures. Accordingly, the acreages recited provide no reliable evidence as to whether the drafters of PLO 82 believed they were including or excluding submerged lands. *Id.*

8 FR 1599 (1943). This area encompassed the area of the pre-existing Naval Petroleum Reserve Numbered 4 (NPR-4) and much of the area later withdrawn for the Arctic National Wildlife Range (ANWR).²⁰

It is useful to examine PLO 82 in its historical context. Alaska was purchased from Russia under the terms of a treaty signed March 30, 1867. 15 Stat. 539. The Senate approved this treaty April 9, 1867, and President Andrew Johnson signed it May 28, 1867. *Id.* By the Act of May 17, 1884, Congress established Alaska as a civil and judicial district with a civil government, a governor and a district court system. 23 Stat. 24. This statute applied the general laws of Oregon to Alaska. *Id.* Congress established the Territory of Alaska by the Act of August 24, 1912. 37 Stat. 512. This Act extended the Constitution and the laws of the United States to Alaska and provided for an elected Territorial legislature. *Id.*

By letter of February 8, 1923, to the Secretary of the Interior, Acting Secretary of the Navy Theodore Roosevelt suggested that certain lands in northern Alaska be withdrawn and designated as NPR-4 "in view [of] the future needs of the American Navy for an adequate supply of fuel oil and other petroleum products" and for other purposes. The letter stated, "[c]onsiderable evidence of the existence of petroleum in large quantities is already available." President Warren G. Harding signed EO No. 3797-A establishing NPR-4 on February 27, 1923.²¹ The EO was amended by PLO 289, July 20, 1945 (signed by Abe Fortas, Acting Secretary of the Interior) (10 FR 9479 (1945)) to delete the penultimate paragraph, which read as follows: "Said lands to be so reserved for six years for classification, examination, and preparation of plans for development and until otherwise ordered by the Congress or the President." The effect of this modification was to remove any time limitation from the withdrawal.

As previously noted, PLO 82 was issued on January 22, 1943, during World War II. The United States had entered the war approximately 13 months earlier after the bombing of Pearl Harbor on December 7, 1941.²² When PLO 82 was signed in 1943, Japan had actually invaded North America and occupied three islands in the Aleutian chain—Kiska, Attu and Agattu.²³

²⁰ PLO 2214, 25 FR 12598-99 (1960). ANWR consisted of approximately 9 million acres when established in 1960. Of that amount, approximately 5 million of the 9 million acres were included within PLO 82. This Opinion will deal with only those lands originally withdrawn by PLO 82.

²¹ The President's authority to make withdrawals derives from two sources: (1) express congressional delegations, such as the Act of June 25, 1910, 36 Stat. 847 (Pickett Act), which was an express delegation by Congress of its power over the public lands; and (2) implied authority granted by Congress to the Executive. The implied withdrawal authority of the President was the focus of the decision in *U.S. v. Midwest Coal Co.*, 236 U.S. 459 (1915). There, the Supreme Court held that Congress had, by acquiescence over a long period of time, impliedly granted to the President the power to withdraw public lands as the agent for Congress. See also 40 Op. Att. Gen. 73 (1941); *Portland General Electric Co. v. Kleppe*, 441 F. Supp. 859 (D. Wyo. 1977). In 1976, Congress repealed the President's implied withdrawal authority in the Federal Land Policy and Management Act, PLO 94-579, title VII, § 704(a), 90 Stat. 2744, 2793.

²² World War II began with Germany's invasion of Poland on Sept. 1, 1939. The U.S. declared war on Japan Dec. 8, 1941, the day after the Japanese attacked Pearl Harbor. World War II ended Sept. 2, 1945, with the formal surrender of Japan to the U.S. and its allies.

²³ Vol. 23, *Collier's Encyclopedia* 606, 617 (1983).

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Contemporaneous documents generated by the Commissioner of the General Land Office and the Director of the United States Geological Survey reveal the views of key Interior Department officials about the withdrawal. They show that a major focus of PLO 82 was the oil and gas resources of northern Alaska. They also show that there was disagreement as to whether the withdrawal was needed.²⁴ After PLO 82 was established, the Department of the Navy participated with the Department of the Interior in administering northern Alaska.²⁵

The area encompassed by PLO 82 in northern Alaska is a virtually treeless area, physically cut off from the rest of the State by the Brooks Range, an east to west mountain chain. North of the range, the Arctic Slope is a flat plain marked by thousands of water bodies. The physical geography and the geology of the area, particularly NPR-4, is described in a joint United States Geological Survey/United States Navy publication prepared in 1953.²⁶ The United States Geological Survey conducted broad studies in the area of NPR-4 from 1923 to 1926 and published the results in 1930 as United States Geological Survey Bulletin 815.²⁷ The Navy along with Geological Survey personnel conducted extensive exploration of NPR-4 and adjacent areas from 1945 to 1953. USGS Bulletin 301.

Between January 1943 and December 6, 1960, when PLO 82 was revoked, the Interior Department issued 24 public land orders modifying PLO 82 or otherwise applying to the withdrawal area.²⁸ A

²⁴ Memoranda of Nov. 20, 1942, from Fred. W. Johnson, Commissioner of the General Land Office, and Nov. 16, 1942, from W. C. Mendenhall, Director of the U.S. Geological Survey, discuss the strategic military position of Alaska and the possibility of oil and gas resources in the three reserved tracts. 86 I.D. 151, 178-80. Commissioner Johnson stated: "[t]he strategic position of Alaska with relation to the war effort has multiplied many fold the need for exploration for the purpose of locating and developing a supply of oil and gas within the territory." *Id.* Commissioner Johnson went on to note that despite favorable oil and gas leasing terms available to private operators under the oil and gas leasing laws:

there is no commercial oil or gas well in Alaska at this time. Furthermore, the possibility of immediate operations in the areas is slight * * *. This withdrawal is proposed as an effective means of reserving the land to permit of the perfection of the necessary arrangements and of completion of any exploration program that may be undertaken. *Id.* With regard to the North Slope withdrawal, Mr. Mendenhall expressed the view that the most promising oil lands were already embraced within NPR-4. He stated:

The boundaries of Naval Reserve No. 4 include not only the lands that are most hopeful for exploration in this part of Alaska, but far more land than can conceivably be explored for oil, by drilling, during the present emergency. I see no present necessity for enlarging Naval Reserve No. 4 and therefore, do not advise the withdrawal that you describe under the caption "Northern Alaska."

Id. A handwritten note dated Nov. 18, 1942, and signed "Wolfsohn" was appended at the bottom of this memorandum as follows: "Note: I discussed with Secretary Ickes and he instructed that we proceed with the withdrawal of the three (3) areas." 86 I.D. at 180.

²⁵ See, e.g., Memorandum of Agreement between the Bureau of Land Management (BLM), U.S. Department of the Interior and the Office of Naval Petroleum Reserves, Department of the Navy, Apr. 2, 1957, which, among other provisions, assigned exclusive jurisdiction over oil and gas deposits in Naval Petroleum Reserve No. 4 to the Navy and required consent of the Navy for activities permitted or administered by the BLM.

²⁶ Reed, John C., CDR, USNR, *Exploration of Naval Petroleum Reserve No. 4 & Adjacent Areas Northern Alaska, 1944-53 Part I, History of the Exploration*, U.S. Geological Survey Professional Paper 301 (1958) (USGS Bulletin 301) at 7-13.

²⁷ Smith, Philip S. and Mertie, J. B., Jr., *Geology and Mineral Resources of Northwestern Alaska*, USGS 815.

²⁸ The following public land orders affected PLO 82:

PLO #

Federal Register
Reference

151

12 FR 495 (1947)*

233

9 FR 6570 (1944)

Continued

number of these orders set aside sites for specific military uses for the Navy and the United States Air Force. Others accomplished diverse purposes, such as reservation of a school or weather station sites. Three of the early modifications to PLO 82 pertained to oil, gas and coal.²⁹ On August 14, 1946, Acting Secretary of the Interior Oscar L. Chapman issued PLO 323 (11 FR 9141 (1946)), which revoked the withdrawals of the Alaska Peninsula and Katalla-Yakataga tracts formerly withdrawn under PLO 82. Accordingly, after this date PLO 82 applied only to northern Alaska lands.

In 1958, PLO 82 was further modified to permit mining locations and mineral leasing on lands within the boundaries of PLO 82, except for the area of NPR-4, and except for an area included in an application for withdrawal filed by the Bureau of Sport Fisheries and Wildlife for use as the Arctic National Wildlife Range.³⁰ PLO 1621, April 18, 1958 (signed by Fred A. Seaton, Secretary of the Interior) (23 FR 2637 (1958)), provided these latter lands (*i.e.*, the lands requested for wildlife purposes) would remain segregated from leasing under the mineral leasing laws, and from location under the mining laws.³¹ PLO

250	9 FR 14072 (1944)
254	9 FR 14784 (1944)
289	10 FR 9479 (1945)
299	10 FR 13077(1945)
323	11 FR 9141-42 (1946)
394	12 FR 5731 (1947)
715	16 FR 3586 (1951)
806	17 FR 1650 (1952)
1288	21 FR 2686 (1956)
1313	21 FR 5416 (1956)
1457	22 FR 6300-01 (1957)
1571	23 FR 54 (1958)
1587	23 FR 1031(1958)
1600	23 FR 1828 (1958)
1621	23 FR 2637 (1958)
1624	23 FR 2987 (1958)
1851	24 FR 4054-55 (1959)
1932	24 FR 6316-17 (1959)
1950	23 FR 6872 (1959)
1965	24 FR 7200(1959)
2188	25 FR 8146 (1960)
2214	25 FR 12598-99 (1960)
2215	25 FR 12599 (1960)

*Though PLO 151 was issued on July 19, 1943, it was classified secret and was released from this status by letter of the Secretary of Commerce dated Oct. 31, 1946, and published at 12 FR 495 (1947). There is a misprint in 43 CFR Appendix-Table of Public Land Orders, 1942-1991 at 129.

²⁹These modifications are as follows: (1) PLO 250, Nov. 20, 1944 (signed by Abe Fortas, Acting Secretary of the Interior)—to permit the issuance of free coal mining permits and the mining and removal, under the supervision of the Secretary of the Interior, of coal deposits necessary for fuel in Indian and other Federal institutions (9 FR 14072 (1944)); (2) PLO 254, Dec. 15, 1944 (signed by Harold Ickes, Secretary of the Interior)—to permit the issuance of new oil and gas leases pursuant to preference right applications under sec. 1 of the Act of July 29, 1942 (56 Stat. 726, 30 U.S.C. § 226b) (9 FR 14784 (1944)); (3) PLO 299, Oct. 9, 1945 (signed by Harold Ickes, Secretary of the Interior)—to permit the issuance of coal permits and leases (10 FR 13077 (1945)).

³⁰The Arctic National Wildlife Range was redesignated as the Arctic National Wildlife Refuge by Title III of ANILCA, 16 U.S.C. § 668dd note.

³¹In connection with the opening of PLO 82 to mineral development, it is worth noting that in 1954 an important change occurred in the mining laws. A mining claimant who went to patent no longer obtained the oil and gas within the subsurface estate. 30 U.S.C. §§ 521-524 (1958). Accordingly, in 1958 the U.S. could open the area to mineral development without losing control over the oil and gas resources.

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1621 stated that approximately 16,000 acres of lands to be opened to mineral development lay within the known geologic structure of the Gubik gas field and that the area would be offered for oil and gas leasing through competitive bidding. PLO 1965, August 29, 1959, (also signed by Secretary Seaton) (24 FR 7200 (1959)) *amended* PLO 1621:

to the extent necessary to permit the preparation and filing of leasing maps affecting all lands situated within the known geologic structure of the Gubik gas field, and lying within the two-mile buffer zone adjacent to Naval Petroleum Reserve No. 4, established by Public Land Order No. 1621 * * * This action was taken upon recommendation of the Department of the Navy that leasing of the lands involved go forward in order to protect against loss of revenues to the United States through drainage of adjacent lands located within Naval Petroleum Reserve No. 4.

24 FR 7200 (1959).

Throughout the post-war period in the 1950s, Interior, in consultation with the Navy, considered terminating PLO 82 and the NPR-4 reservation. By 1954, the Navy had concluded PLO 82 could be relinquished. However, the Navy advocated retention of the NPR-4 withdrawal. See discussion in Section IV, *infra*.

PLO 2214, establishing the Arctic National Wildlife Range, was issued by Secretary Seaton on December 6, 1960 (25 FR 12598-99 (1960)). Immediately upon establishing the range, which kept the area in a reserved status, Secretary Seaton revoked PLO 82 by means of PLO 2215 (25 FR 12599 (1960)).³²

B. The Krulitz Opinion

The history of PLO 82 played an important role in the Opinion prepared by Solicitor Krulitz in 1978. He observed at the outset of his Opinion that ownership of submerged lands in the area of northern Alaska described in PLO 82 depended on three factors: (1) whether PLO 82 withdrew submerged lands; (2) if so, whether PLO 82 prevented transfer of title to these lands from the United States to Alaska upon statehood in 1959; and (3) if so, whether revocation of PLO 82 2 years after statehood vested ownership of the submerged lands in Alaska. 86 I.D. 151, 152.

After an extensive review of the history, text, and purpose of PLO 82 and an analysis of the applicable statutes and legal principles, Solicitor Krulitz summarized his findings regarding inland submerged lands as follows:

I conclude that PLO 82 expressly reserved the submerged lands underlying the inland navigable waters within the area it withdrew in northern Alaska, and that therefore such lands did not pass to the State of Alaska under the Alaska Statehood Act by operation of the Submerged Lands Act, and did not pass to the State upon revocation of PLO 82.

Id. at 174-75.

³²PLO 2215 was issued on the same day as PLO 2214, Dec. 6, 1960. See also 86 I.D. 151, 170.

In reaching these conclusions, the Solicitor reasoned that: (1) the United States had full sovereign power over lands in the territories, including the power to reserve lands under navigable waters to itself or convey them to third parties, *id.* at 154–55; (2) the term “public lands” appearing in the title and body of PLO 82 could be construed to encompass submerged lands in light of judicial precedent and Departmental interpretation in 1943, *id.* at 156–57; (3) the “sweeping language” employed in PLO 82 to describe the area withdrawn on the North Slope implied the order withdrew everything within the exterior boundaries of the withdrawal, including submerged lands, *id.* at 164; (4) the purpose of PLO 82 to protect critical regions of Alaska from private interference with the Federal oil and gas program needed for the war effort evinced a secretarial intent to withdraw submerged lands as well as uplands on the North Slope, *id.* at 164–169; (5) PLO 82 “expressly retained” inland submerged lands when Alaska entered the Union, pursuant to the Submerged Lands Act of 1953, made applicable to Alaska by the Alaska Statehood Act of 1958, *id.* at 172; (6) the withdrawal of inland submerged lands by PLO 82 fell within the “public exigency” exception to the judicial inference against disposals of lands under navigable waters during the territorial period, *id.* at 173–74, citing *United States v. Holt State Bank*, 270 U.S. 49 (1926); and (7) the revocation of PLO 82 after Alaska Statehood did not transfer title to the inland submerged lands to the State because the Submerged Lands Act grant operated only at the moment of Alaska statehood, not 2 years later, *id.* at 174. Each of these factors is discussed more fully below.

1. Authority of the United States Over Submerged Lands in the Territories

Solicitor Krulitz began his analysis with a review of the Federal Government’s power to regulate and dispose of lands beneath navigable waters during the territorial period. He noted that, under the common law, the United States held title to lands beneath navigable waters as the territorial sovereign. 86 I.D. 151, 154. However, once a state entered the Union, title to the beds of navigable waters passed to the state. *Id.*, citing *Shively v. Bowlby*, 152 U.S. 1, 49–50 (1894). The concept of a state acquiring title to lands under navigable waters within its boundaries upon statehood, known as the equal footing doctrine, is not mentioned in the Krulitz Opinion by name. Nevertheless, the Solicitor stated its fundamental principle and discussed the major Supreme Court decisions enunciating and reaffirming the doctrine. *Id.* at 154–55.³³

As early as 1850, in *Goodtitle v. Kibbe*, 50 U.S. (9 How.) 471, 478 (1850),³⁴ the Supreme Court recognized that the United States had the

³³ See *infra* Sec. II.B for discussion of equal footing doctrine.

³⁴ *Goodtitle* involved a congressional grant of lands beneath a navigable river. The grant was made *after* Alabama’s admission into the Union. The Court held that no title passed to the patentee because title to the submerged lands had passed to Alabama upon statehood. However, Chief Justice Taney, writing for the whole court, stated:

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authority to convey lands under navigable waters in the territories to private parties. Almost half a century later, in *Shively v. Bowlby*, 152 U.S. 1 (1894), the Supreme Court established that the Federal Government had the power under the Constitution to convey lands under navigable waters to third parties during the territorial period. *Id.* at 48.³⁵ Solicitor Krulitz summarized his review of the relevant cases as follows: "Thus, it was well-settled that the submerged land during the territorial period was property of the United States, subject to retention or disposal by Congress." 86 I.D. 151, 155, citing U.S. Const. Art. IV, Sec. 3, Cl. 2.³⁶

2. Meaning of the Phrase "Public Lands" in the Territory of Alaska

Having established that the United States had the authority to withdraw submerged lands in the Territory of Alaska by means of PLO 82, Solicitor Krulitz next examined the text of the order to determine if the Secretary had intended to do so. He observed that PLO 82 expressly withdrew "all public lands" in the areas of Alaska described in the order. *Id.* at 154. However, the order does not define "public lands." PLO 82 reads in relevant part:

WITHDRAWING PUBLIC LANDS FOR USE IN CONNECTION WITH THE PROSECUTION OF THE WAR

By virtue of the authority vested in the President and pursuant to Executive Order No. 9146 of April 24, 1942, *It is ordered as follows:*

Subject to valid existing rights, (1) *all public lands*, including *all public lands* in the Chugach National Forest, within the following described areas are hereby withdrawn
* * *

8 FR 1599 (italics added). EO No. 9146, which in the opening paragraph of PLO 82 declares to be the legal basis for the withdrawal, likewise contains no definition of "public lands." In the EO, President Franklin D. Roosevelt delegated his authority to withdraw or reserve the "public lands of the United States" to the Secretary of the Interior.³⁷ 86 I.D. 151, 165 n. 15. However, the Executive Order does

³⁵Undoubtedly Congress might have granted this land to the patentee, or confirmed his Spanish grant, *before* Alabama became a State. But this was not done." 50 U.S. (9 How.) 471, 478 (italics added).

³⁶*Shively* concerned a private party's claim that he had been granted a portion of the bed of the (navigable) Columbia River by the U.S. while Oregon was a territory. The Court held that the pre-statehood grant from the U.S. passed no title to the submerged lands to the grantee. Rather, title to the submerged lands passed to Oregon at statehood. See also *U.S. v. Holt State Bank*, 270 U.S. 49 (1926), where the Court held the U.S. did not intend to include the bed of a navigable lake within the Red Lake Indian Reservation for the Benefit of the Chippewa Indians before Minnesota became a state. Title to the lakebed thus passed to Minnesota upon statehood. *Id.* at 58. In *Montana Power Co. v. Rochester*, 127 F.2d 189 (9th Cir. 1942), the court held the U.S. had power to hold lands under inland navigable waters in the Flathead Indian Reservation in trust for the Indians, as against the claims of a subsequently created state. Because the Federal reservation at issue there was an Indian reservation created by treaty, it was treated as a grant to third parties, as opposed to a Federal retention of submerged lands. See *infra* n. 44 and accompanying text.

³⁷Article IV, Sec. 3, Clause 2 provides: "Congress shall have Power to dispose of and make all needful rules and regulations respecting the Territory or other Property belonging to the United States." As explained in n.37 *infra*, Congress has at times delegated its constitutional power to withdraw public lands to the Executive, either expressly or by implication.

³⁸EO No. 9146 reads:

Continued

not specify whether submerged lands are embraced within the term "public lands."

To determine what the drafters of PLO 82 meant by the words "public lands" in 1942-43, Solicitor Krulitz looked to "the contemporaneous intent of the Department in withdrawing and reserving 'public lands.'" 86 I.D. 151, 154, citing *Udall v. Oelochlager*, 389 F.2d 974 (D.C. Cir. 1968) and *Hynes v. Grimes Packing Co.*, 337 U.S. 86 (1949). He concluded that PLO 82 could be construed to include submerged lands according to legal precedent existing at the time of PLO 82's creation and "the common Departmental understanding in 1943 regarding Alaska." 86 I.D. 151, 157.

In making this determination, Solicitor Krulitz considered two opinions to be of particular relevance. First, the United States Supreme Court decision in *Alaska Pacific Fisheries v. United States*, 248 U.S. 78 (1918), indicated that public lands in Alaska may include submerged lands. In that decision, the Court considered whether an 1891 Act of Congress setting aside "the body of *lands* known as Annette Islands" in Alaska as a reservation for the Metlakahtla Indians embraced only the upland areas of the islands or also included adjacent waters and submerged lands. *Id.* at 86-87 (italics added). The Court found that Congress' purpose in creating the reservation was to assist and encourage the Metlakahtlans to become self-sustaining. Noting that the Indians, who were largely fishermen and hunters, could not sustain themselves from the use of the uplands alone, the Court held that the reservation in the 1891 Act embraced "the whole of what is known as Annette Islands," including the surrounding waters and submerged lands. *Id.* at 89.

Second, Solicitor Krulitz relied on a Solicitor's Opinion, signed by Acting Solicitor Kirgis on April 19, 1937 (6 years before PLO 82 was signed) on "the authority of the Secretary of the Interior to reserve waters in connection with * * * land reservations for Alaskan Natives under the Act of May 1, 1936." 86 I.D. 151, 156-57, citing 56 I.D. 110 (1937). The 1936 Act had extended the Indian Reorganization Act to Alaska and authorized the Secretary to reserve "public lands" adjacent to lands previously reserved for Alaska Natives, or other "public lands" occupied by them. The Kirgis Opinion concluded that "public lands" in Alaska, under the 1936 Act, included waters adjacent to any lands already reserved or being reserved for the Natives. 56 I.D. 110, 115. In reaching this decision, the Acting Solicitor reasoned:

The term "public lands" is synonymous with the term "public domain," and the tidewaters of the territories of the United States and the lands under them have been

By virtue of the authority vested in me by the act of June 25, 1910, c. 421, 36 Stat. 847, and as President of the United States, I hereby authorize the Secretary of the Interior to sign all orders withdrawing or reserving public lands of the United States, and all orders revoking or modifying such orders * * *

EO No. 9146, 3 CFR 1149-50 (1938-43). PLO 82 was issued pursuant to the presidential delegation of authority contained in EO No. 9146. In 1943, the President's withdrawal power derived, in turn, from both express congressional acts, such as the Pickett Act, 36 Stat. 847, and implied executive powers. See *U.S. v. Midwest Oil*, 236 U.S. 459 (1915); 40 Op. Atty. Gen. 73 (1941); *Portland General Electric Co. v. Kleppe*, 441 F. Supp. 859 (D. Wyo. 1977).

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classified as part of the public domain since they belong exclusively to the United States Government and are subject to its disposition.

Id. at 114, citing *Alaska Pacific Fisheries*, 248 U.S. at 87.

Twelve years later, the United States Supreme Court construed the identical statute that was at issue in the 1937 Solicitor's Opinion—the Act of May 1, 1936, 49 Stat. 1250–51—in *Hynes v. Grimes Packing Co.*, 337 U.S. 86 (1949). The Court held that both the 1936 Act and EO No. 9146 (the same EO under which PLO 82 was issued) authorized the Secretary of the Interior to include lands beneath navigable waters in the withdrawal of “public lands” under section 2 of the statute.³⁸ The Court cited with approval the 1937 Solicitor's Opinion and applied a similar analysis. *Id.* at 114. Although *Hynes v. Grimes*, was decided 6 years after PLO 82 was issued, Solicitor Krulitz emphasized the importance of that case:

Overall, this case is significant in manifesting a continuing attitude by the Supreme Court not to accord talismanic significance to the words “public lands,” but instead to recognize in some instances that the term “public lands” as used in Executive Order 9146 (the legal basis for PLO 82) can include submerged lands.

86 I.D. 151, 158. Thus, the meaning of “public lands” in Alaska, the Krulitz Opinion concluded, “turn[s] on the language and purpose of the specific withdrawal at issue.” *Id.* at 159.

3. PLO 82's Description of the North Slope Withdrawal

Turning to the specific language of the withdrawal order, Solicitor Krulitz noted that PLO 82 withdrew “*all public lands*” in “Northern Alaska,” consisting of “[*all that part of Alaska lying north of a line*]” described in the order. 86 I.D. 151, 160 (italics added). The “sweeping language” employed in PLO 82 to describe the area withdrawn in northern Alaska implied that inland submerged lands were included within the boundaries of the withdrawal. *Id.* at 164. Any lands intended to be excluded from the withdrawal, Solicitor Krulitz reasoned, would have required a “specifically-worded exception to that effect.” *Id.*³⁹ No such exceptions were made in the order either express or implied. In fact, the only limitation that PLO 82 imposed on the vast withdrawals it made in Alaska is the order's concession to “valid existing rights.” *Id.*⁴⁰

4. Purpose of PLO 82

³⁸The Supreme Court was unanimous on the point that “public lands,” within the meaning of sec. 2 of the Act of May 1, 1936, included adjacent tidelands and coastal waters in the reservation for the Karluk Indians. 337 U.S. at 127–28, 136.

³⁹This conclusion follows from the rule of construction for Federal reservations that, in general, all lands within the metes and bounds of the reservation perimeter (including lands underlying navigable waters) are intended to be included in the reservation. 86 I.D. 151, 164, n. 13, citing *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 634 (1970). In *Choctaw*, the Supreme Court held the U.S. conveyed title to the bed of the navigable portion of the Arkansas River within Oklahoma in the Federal grants made to the Choctaw and Cherokee Nations under various treaties.

⁴⁰See *supra* n. 19 and accompanying text.

Because the inclusion of submerged lands in a withdrawal of "public lands" in Alaska depends largely on the withdrawal's purpose, the Krulitz Opinion next focused on the intent and purpose of PLO 82. Public land orders, the Solicitor observed, should be construed to effectuate the purpose of the withdrawals. *Id.* at 164, citing *Hynes v. Grimes Packing Co.*, 337 U.S. 86, 116 (1949); *United States v. Alaska*, 423 F.2d 764, 767 (9th Cir. 1970) *cert. denied*, 400 U.S. 967 (1970); see also *Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 87 (1918). If the withdrawal's purpose requires the inclusion of areas of navigable water, then the navigable water body and the submerged lands beneath it will be assumed to be included. 423 F.2d at 767.

The principal purpose of PLO 82, Solicitor Krulitz determined, was to preclude interference by private claimants and lessees with the Federal oil and gas development program on the North Slope needed for the war effort. This purpose supported a construction of PLO 82 that withdrew inland submerged lands. 86 I.D. 151, 164-69. As the Solicitor explained:

[T]he drafters of PLO 82 need not have foreseen federal development efforts directly on or over the submerged lands in question in order to withdraw them. Rather, the purpose [of PLO 82] was to prevent private activity anywhere in the general area from interfering with proposed federal activity * * *. Such private activity on or near inland submerged lands might well have posed complications to proposed federal activity on the submerged lands or on adjacent uplands. It would have been unwise to stop the withdrawal at the boundaries of inland waters.

Id. at 168.

Solicitor Krulitz noted that the Secretary had reason to fear private interference with the Federal oil and gas program in the areas withdrawn by PLO 82 in 1943, including in and around the beds of inland waters. *Id.* at 168. It was not until after 1947, 4 years after PLO 82 was issued, that the Interior Department determined that the Mineral Leasing Act of 1920, as amended, 30 U.S.C. §§ 181 *et seq.*, did not authorize the issuance of oil and gas leases on submerged lands off the coasts of the United States.⁴¹ In fact, permits had been issued under the Mineral Leasing Act for submerged lands in the Arctic Ocean, in bays, swamps, and bayous in Texas and Louisiana, and in the Gulf of Mexico offshore of those two states. *Id.* at 167-68. Furthermore, in the statutes extending the mining laws to Alaska and the amendments to those laws, Congress expressly authorized mining for gold and other precious metals in submerged lands.⁴² *Id.* at 168. Such activities would certainly have justified including submerged lands in the PLO 82 reservation to prevent the possibility that total Federal control over them might be frustrated.

5. Submerged Lands Act of 1953 and Alaska Statehood Act of 1958

⁴¹ Solicitor's Opinion, 60 I.D. 26 (1947); see *Justheim v. McKay*, 229 F.2d 29 (D. C. Cir.), *cert. denied*, 356 U.S. 933 (1956).

⁴² Act of June 6, 1900, § 26, 31 Stat. 329, as amended by the Act of May 31, 1938, 52 Stat. 588, and the Act of Aug. 8, 1947, § 1, 61 Stat. 916; see 30 U.S.C. § 49a.

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After determining that lands under inland navigable waters were included in the PLO 82 withdrawal, Solicitor Krulitz considered whether the United States "expressly retained" the inland submerged lands, pursuant to the Submerged Lands Act of 1953, when Alaska entered the Union on January 3, 1959. *Id.* at 170-72. The Submerged Lands Act, 43 U.S.C. §§ 1301-1315, was enacted 10 years after PLO 82 was issued, but before Alaska Statehood. Section 6(m) of the Alaska Statehood Act made the Submerged Lands Act applicable to Alaska. 72 Stat. 339, 343.

The Submerged Lands Act granted and confirmed to the states title to the lands beneath inland navigable waters within the states, and granted to the states the submerged lands within the boundaries of the states lying off their coasts. 43 U.S.C. §§ 1311(a) and 1312. Under these provisions, Solicitor Krulitz reasoned, all coastal submerged lands as well as lands underlying inland navigable waters in Alaska "would unquestionably have passed to the State upon its admission to the Union." 86 I.D. 151, 171. However, section 5(a) of the Act exempts certain categories of lands from the general grant of submerged lands to the states including: "all lands *expressly retained* by or ceded to the United States when the State entered the Union (otherwise than by a general retention or cession of lands underlying the marginal sea) * * *" 43 U.S.C. § 1313(a) (italics added). Solicitor Krulitz concluded that, under the "expressly retained" exception in section 5(a) of the Submerged Lands Act, title to lands under inland navigable waters within PLO 82 did not pass to Alaska at the time of statehood. 86 I.D. 151, 172.

6. The *Holt State Bank* Standard for Federal Disposals of Lands Under Inland Navigable Waters

After reviewing the history, text and purpose of PLO 82, analyzing the judicial and Departmental legal precedents in 1943 regarding withdrawals of submerged lands, and applying the 1953 Submerged Lands Act to the PLO 82 withdrawal, Solicitor Krulitz finally considered the applicable rule for determining whether inland submerged lands were included in the PLO 82 withdrawal. *Id.* at 172-74. He acknowledged the two leading Supreme Court cases reiterating the longstanding Federal policy of regarding lands under navigable waters in the territories as held for the ultimate benefit of future states. *Shively v. Bowlby*, 152 U.S. 1 (1894); *United States v. Holt State Bank*, 270 U.S. 49 (1926). Those cases established that the United States has refrained from disposing of such lands except when impelled to do so by some "international duty or public exigency." 152 U.S. at 57-58; 270 U.S. at 55. In *Holt State Bank*, the Court announced a frequently-quoted formula for determining if a conveyance by the United States includes submerged lands: "[D]isposals by the United

States during the territorial period are not lightly to be inferred, and should not be regarded as intended *unless the intention was definitely declared or otherwise made very plain.*" 270 U.S. at 55 (italics added).

Solicitor Krulitz initially distinguished the *Holt State Bank* and *Shively v. Bowlby* line of cases because they involved Federal "disposals," as opposed to reservations or withdrawals, of submerged lands. 86 I.D. 151, 173. However, even if the PLO 82 withdrawal were regarded as a "disposal" of public lands, PLO 82 fell clearly within the "international duty or public exigency" exception to the presumption in favor of state ownership of lands beneath navigable waters. *Id.* at 173-74. The Solicitor noted "PLO 82's direct relationship to the prosecution of World War II—a 'public exigency' beyond challenge." *Id.* Federal retention of this area of high oil and gas potential to facilitate national defense and to protect national supplies of valuable fuel thus constituted a "public exigency" sufficient to meet the strict test for defeating state ownership established by *Holt State Bank* and *Shively v. Bowlby*. *Id.*

7. Revocation of PLO 82 in 1960

Finally, Solicitor Krulitz examined the effect of the revocation of PLO 82 by PLO 2215 in December 1960 (25 FR 12599 (1960)) on Alaska's title to the inland submerged lands in the former PLO 82 withdrawal. 86 I.D. 151, 174. He concluded that with respect to states admitted after its enactment, the Submerged Lands Act grant operates only at the time of statehood. Therefore, the revocation of PLO 82 2 years after Alaska Statehood did not transfer title to the inland submerged lands within the former PLO 82 withdrawal to the State. *Id.* at 174-75. On the contrary, because the Solicitor found the United States had "expressly retained" the inland submerged lands on the North Slope at the time of Alaska Statehood, pursuant to section 5(a) of the Submerged Lands Act, 43 U.S.C. § 1313(a), this constituted a "permanent retention by the United States of those submerged lands." *Id.* at 174.⁴³

II. THE UTAH LAKE DECISION AND ITS EFFECT ON THE KRULITZ OPINION

A. Introduction

⁴³ See 86 I.D. 151, 174 n. 34, quoting sec. 4 of the Alaska Statehood Act, which provides that the State "forever disclaims all right and title to any lands not granted or confirmed to the State * * *." Solicitor Krulitz explained that inland submerged lands remained in Federal ownership despite the revocation of PLO 82 in 1960 "except where the State of Alaska has selected the submerged lands in question and the Federal Government has approved these selections." 86 I.D. 151, 153. In 1971, under ANCSA, 43 U.S.C. §§ 1601 *et seq.*, Congress authorized selections by eight Native village corporations and a Native regional corporation within the boundaries of the former PLO 82 withdrawal. In 1983, Solicitor Coldiron clarified the State's right to select submerged lands within the former PLO 82 withdrawal in Solicitor's Opinion, M-36949, entitled "State Selections of Onshore Lands Underlying Navigable Waters in the Geographic Area of Revoked Public Land Order 82," 91 I.D. 67 (1984). He held that PLO 2215, which revoked PLO 82, returned formerly reserved submerged lands to the status of "public lands" and made them available for selection by the State. *Id.* at 67, 69. In sec. 901 of ANILCA, 43 U.S.C. § 1631, *as amended* in 1988, Congress authorized conveyances of lands under inland navigable waters in Alaska to Alaska Native corporations and the State of Alaska if the submerged lands had been retained by the Federal Government at the time of statehood.

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The *Utah Lake* case is the latest decision in line of cases defining the equal footing doctrine as it applies to state title to lands underlying inland navigable waters. This section will review the history of the equal footing doctrine and analyze the application of it in *Utah Lake*. Since the 1978 Solicitor's Opinion was issued, the Supreme Court of the United States has decided two cases that directly applied the equal footing doctrine to determine whether the Federal Government or a state owns lands beneath particular inland navigable waters. See *Utah Division of State Lands v. United States*, 482 U.S. 193 (1987) (*Utah Lake*); *Montana v. United States*, 450 U.S. 544 (1981) (*Montana*). Neither case changed existing law concerning the equal footing doctrine, but as I will discuss, in *Utah Lake*, the Supreme Court articulated a specific two-part pronged inquiry applicable to equal footing cases involving Federal reservations and withdrawals.

In *Montana*, the Court considered whether the United States had recognized and conveyed beneficial title to the bed of the Big Horn River to the Crow Tribe or whether the United States had, at the time of the treaties, retained full ownership of the submerged lands, which then passed to the State of Montana when it was admitted to the Union.⁴⁴ The Court concluded that the specific treaty language and the historical circumstances under which the Crow Reservation was created were not sufficient to overcome the strong presumption against conveyance, and therefore title to the bed of the river passed to the State of Montana upon its admission to the Union. The *Montana* decision reaffirmed and relied on well-established equal footing doctrine principles, and did nothing to alter the law as it existed in 1978, when Solicitor Krulitz issued his Opinion.

In *Utah Lake*, however, the Supreme Court considered for the first time a claim by the United States that it had reserved to itself—rather than conveyed to a third party—submerged lands beneath inland navigable waters, and thereby defeated the title a future state otherwise would have obtained under the equal footing doctrine. In deciding the case, the Court provided specific guidance concerning what is required for a pre-statehood Federal reservation of lands beneath inland navigable waters to overcome the equal footing doctrine and defeat state title.

B. The Equal Footing Doctrine

Under the equal footing doctrine a new state is admitted to the Union on an "equal footing" with the Thirteen Original States. As a general matter, ownership of lands beneath inland navigable waters is

⁴⁴The Big Horn River was within the aboriginal territory of the Crow Tribe. While generally treaties are viewed as a reservation of rights by tribes and not a grant of rights to them, *U.S. v. Winans*, 198 U.S. 371, 381 (1905), the Court in *Montana*, for purposes of the equal footing doctrine, viewed the Treaties as conveyances by the U.S. of recognized beneficial title to the Tribe, rather than a "reservation" of title by the U.S. for itself, as trustee of the Tribe.

considered an incident of sovereignty.⁴⁵ When the United States was formed, the Original States "claimed title to the lands under navigable waters within their boundaries as the sovereign successors to the English Crown." *Utah Lake*, 482 U.S. at 196. Because new states are admitted to the United States on an "equal footing," the doctrine provides that "[a]s a general principle, the Federal Government holds such lands in trust [during the territorial period] for future States, to be granted to such States when they enter the Union and assume sovereignty." *Montana*, 450 U.S. at 551 (citing *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212, 222-23, 229 (1845)).

Although the Federal Government is considered to hold lands beneath inland navigable waters in trust for future states, it is by now well-established that Congress has the power to convey such lands prior to statehood and thereby defeat the title a new state would otherwise acquire under the equal footing doctrine. *Montana*, 450 U.S. at 551. However, "because control over the property underlying navigable waters is so strongly identified with the sovereign power of government, * * * it will not be held that the United States has conveyed such land except because of 'some international duty or public exigency.'" *Id.* at 552 (quoting *United States v. Holt State Bank*, 270 U.S. 49, 55 (1926) (*Holt State Bank*)). Thus, the Supreme Court has inferred a "congressional policy to dispose of [lands under navigable waters] only in the most unusual circumstances." *Utah Lake*, 482 U.S. at 197.

A court deciding a question of title to the bed of a navigable water must, therefore, begin with a strong presumption against conveyance by the United States, * * * and must not infer such a conveyance 'unless the intention was definitely declared or otherwise made plain,' *United States v. Holt State Bank*, [270 U.S.] at 55, or was rendered 'in clear and especial words,' *Martin v. Waddell*, [41 U.S. (16 Pet.) 367,] 411 [(1842)], or 'unless the claim confirmed in terms embraces the land under the waters of the stream,' *Packer v. Bird*, [137 U.S. 661,] 672 [(1891)].

Montana, 450 U.S. at 552.

C. *Utah Lake* Decision

The dispute in *Utah Lake* arose over ownership to the bed of Utah Lake, a navigable freshwater lake covering 150 square miles. The Department of the Interior issued oil and gas leases for the lands underlying the lake, and the State of Utah brought suit, claiming ownership of the bed under the equal footing doctrine. The United States asserted ownership based on pre-statehood statutes and Executive Branch actions selecting and reserving the site of the lake for reservoir purposes.

In 1888, 8 years before Utah's admission to the Union, Congress authorized the United States Geological Survey to select sites for reservoirs and other irrigation facilities, and provided that all such lands "which may hereafter be designated or selected" as such, were

⁴⁵ See *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212, 229 (1845).

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reserved as property of the United States and withdrawn from entry, settlement or occupation. Sundry Appropriations Act of 1888, 25 Stat. 505, 527 (1888 Act) (*italics added*). The law was passed in response to concerns that homesteaders on public lands in the West might claim lands suitable for reservoir sites or irrigation works, and in doing so, interfere with future reclamation efforts. *Utah Lake*, 482 U.S. at 198-99.

In 1889, Major John Wesley Powell, Director of the United States Geological Survey, submitted a report stating that the "site of Utah Lake in Utah County in the Territory of Utah is hereby selected as a reservoir site, together with all lands situate within two statute miles of the border of said lake at high water." *Id.* at 199. The next year, because of the unintended expansive effect of the 1888 Act, which by statute had reserved all lands that "may" be designated under the Act, Congress repealed the Act, but provided "that reservoir sites heretofore located or selected shall remain segregated and reserved from entry or settlement as provided by [the 1888 Act]." *Id.*

In the *Utah Lake* litigation, the United States contended that Major Powell's selection of the lake site pursuant to the 1888 Act, and the 1890 Act confirming sites that had been located and selected, reserved title to the bed of Utah Lake in the United States, and that the bed remained in Federal ownership upon Utah's admission to the Union. *Id.* at 200. The State of Utah contended that although the Federal Government had the authority to defeat a future state's title under the equal footing doctrine by a conveyance of submerged lands to a third party, the Federal Government lacked any authority to defeat a state's title by a Federal *reservation* of submerged lands beneath navigable waters. In addition, the State argued that even if the Federal Government had such authority, it had not accomplished that result with respect to the bed of Utah Lake.

The Supreme Court rejected the United States' claim of ownership of the bed of Utah Lake, concluding that under the facts of the case, the United States had not intended to reserve the bed of the lake within the reservoir site.⁴⁶ The Court further concluded that even if such a reservation had been accomplished, the evidence did not establish an intent by the United States to defeat the future state's title.

In deciding the *Utah Lake* case, the Court reiterated the strength of the equal footing doctrine, the strong "congressional policy to dispose of sovereign lands only in the most unusual circumstances," *id.* at 197, and the fact that a congressional intent to defeat a state's title to land

⁴⁶The Court expressed some skepticism about Utah's argument that the U.S. completely lacked the power to reserve submerged lands to itself, even though it could convey such lands to third parties and thereby defeat a future state's title. Because the Court held, under the facts of the case, that no reservation was accomplished, it did not decide the question. See *Utah Lake*, 482 U.S. at 200-01. The dissent in *Utah Lake* expressly concluded that Congress does have the power under the Constitution "to prevent ownership of land underlying a navigable water from passing to a new State by reserving the land to itself for an appropriate public purpose." *Id.* at 209 (White, Jr., dissenting).

under navigable waters is not lightly inferred, and “should not be regarded as intended unless the intention was definitely declared or otherwise made very plain.” *Id.* (quoting *Holt State Bank*, 270 U.S. at 55.). The Court repeated the high standard of proof applicable to the equal footing inquiry, which must “begin with a strong presumption against conveyance by the United States, and must not infer such a conveyance unless the intention was definitely declared or otherwise made plain, or was rendered in clear and especial words, or unless the claim confirmed in terms embraces the land under the waters of the stream.” *Id.* at 198 (quoting *Montana*, 450 U.S. at 552 (omitting internal quotations and citations)).

In addition to reiterating the standard of proof necessary to defeat a state’s acquisition of title under the equal footing doctrine, the Court in *Utah Lake* articulated two distinct inquiries to which that standard of proof applies:

Given the longstanding policy of holding land under navigable waters for the ultimate benefit of the States, * * * we would not infer an intent to defeat a State’s equal footing entitlement from the mere act of reservation itself. Assuming, *arguendo*,^[47] that a [federal] reservation of land could be effective to overcome the strong presumption against the defeat of a state title, *the United States would not merely be required to establish that Congress clearly intended to include land under navigable waters within the federal reservation; the United States would additionally have to establish that Congress affirmatively intended to defeat the future State’s title to such land.*

Id. at 202 (italics and bracketed material added).

The Court explained the two-pronged inquiry not as a new principle of law,⁴⁸ but as the logical corollary to the usual inquiry applied in cases involving a conveyance by the United States to a third party. The Court pointed out that “[w]hen Congress intends to convey land under navigable waters to a private party, *of necessity* it must also intend to defeat the future State’s [title],” *id.*, because once ownership has been conveyed away by the United States to a private party, the United States no longer has ownership to pass to the State at the time of statehood. A *reservation* of such lands to the Federal Government, however, does not automatically carry with it the necessary implication of defeating the future state’s title, because continued Federal ownership and control of reserved submerged lands during the territorial period is not “of necessity” inconsistent with permitting the future state to take title. *Id.* Therefore, the Court announced that when the United States seeks to establish its continued ownership based on a reservation, it must also establish, by the same standard of proof required for showing the initial reservation, that the reservation was intended to defeat state title.

⁴⁷ See *supra* n. 46 and accompanying text.

⁴⁸ In 1971, in *U.S. v. City of Anchorage*, 437 F.2d 1081, 1083 (9th Cir. 1971), the court of appeals similarly suggested a two-part inquiry in a case involving the Alaska Railroad Act. The court distinguished between the Federal reservation of submerged lands and the retention of such lands after the admission of Alaska to the Union. The court held that the submerged lands by necessary implication had been reserved by the Federal Government and of necessity had been retained by the Federal Government at statehood. *Id.* at 1084–85; See *U.S. v. Alaska*, 423 F.2d 764 (9th Cir. 1970) (Federal reservation and retention of submerged lands in Kenai Moose Range).

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In applying the above principles to the facts of the *Utah Lake* case, the Court first examined the language of the 1888 Act. It concluded that the general reservation accomplished by the statute did not expressly refer to and did not necessarily include lands under navigable waters. The Court reiterated the principle that "Congress has never undertaken by general laws to dispose of land under navigable waters." *Id.* at 203 (quoting *Shively v. Bowlby*, 152 U.S. 1, 48 (1894)). The Court also examined the purposes, goals, and structure of the Act, and concluded that it could not be construed to reserve lands beneath navigable waters. *Id.* at 207.

In addition, although the Geological Survey's statements concerning the Utah Lake site possibly suggested an intent to segregate and reserve the bed of the lake, the Court concluded that such statements "cannot be taken as unambiguous statements" and "need not be taken as a statement" of intent to include the lakebed within the 1889 reservation. *Id.* at 205 n. * & 206. Nor did the Court find in the 1890 Act of Congress, ratifying site selections, a "clear demonstration" of intent to ratify reservation of the bed of Utah Lake. *Id.* at 207. Thus, in light of the strong presumption against disposals or reservations of lands beneath navigable waters, the Court concluded that the evidence was insufficient to demonstrate such intent by the United States. Consequently, the Utah Lake site failed the first prong of the two-pronged test.

While this finding was sufficient to dispose of the case, the Court in *Utah Lake* also discussed the second prong of the inquiry for cases involving Federal reservations. It concluded that even if a Federal reservation of the lakebed had been effected, "Congress did not clearly express an intention to defeat Utah's claim to the lakebed under the equal footing doctrine upon entry into statehood." *Id.* at 208. The United States had offered no evidence of congressional intent to defeat Utah's entitlement. *Id.* Furthermore, based on the structure, history, and purpose of the 1888 Act, the Court concluded that the statute strongly suggested that Congress had no such intention. *Id.* The Court noted that "[t]he transfer of title of the bed of Utah Lake to Utah * * * would not necessarily prevent the Federal Government from subsequently developing a reservoir or water reclamation project." *Id.* (italics added). In other words, the Federal purpose for reserving the submerged lands could be fully satisfied without the necessity of continued Federal ownership at statehood.

Repeating the *Holt State Bank* standard as applied to both prongs of the inquiry, the Court concluded that "Congress did not definitely declare or otherwise make very plain either its intention to reserve the bed of Utah Lake or to defeat Utah's title to the bed under the equal footing doctrine." *Id.* at 209.

I conclude that the *Utah Lake* decision did not change existing law concerning the equal footing doctrine. Both the strong presumption that lands beneath inland navigable waters are held in trust for future states, and the standard of proof required to overcome that presumption, are reaffirmed, but not changed by the Court. The Court reiterates the strong showing that must be made to defeat a state's title, citing most frequently the *Holt State Bank* summary that such intent is "not lightly to be inferred, and should not be regarded as intended unless the intention was definitely declared or otherwise made very plain." *Utah Lake*, 482 U.S. at 197, 198, 201-02, 207, 209.⁴⁹

However, I also conclude that the Court has for the first time clearly identified the two-pronged nature of the inquiry to be undertaken when the United States claims continued Federal ownership of title to lands beneath inland navigable waters after a state has been admitted to the Union. I think it critical to this analysis that while *Utah Lake* did not purport to change existing law or overturn the legal principles relied upon by Solicitor Krulitz, the Court has provided a clear articulation of the two-pronged inquiry with which to examine the conclusions reached by Solicitor Krulitz concerning Federal reservation and retention of lands beneath inland navigable waters within the PLO 82 withdrawal area in northern Alaska.

Quite apart from the conclusions reached, the Krulitz Opinion employs an analytical framework which does not fully track with the equal footing approach contained in *Utah Lake*. Both the Krulitz Opinion and *Utah Lake* generally rely on the same well-established equal footing doctrine principles, but there is a disjuncture between the two. Certainly, while Solicitor Krulitz discussed extensively the Federal Government's intent to include lands beneath navigable waters within the lands reserved by PLO 82, he did not utilize the two-pronged inquiry articulated in *Utah Lake*, *i.e.*, did the United States establish that Congress (1) clearly intended to include land under navigable waters within the reservation and (2) affirmatively intended to defeat future state title to such land. In addition, although Solicitor Krulitz analyzed and discussed the Alaska Statehood Act and the Submerged Lands Act, he did not distinguish clearly between the Submerged Lands Act and the equal footing doctrine, and did not address the relationship between the two. 86 I.D. 151, 172. Many of the facts and circumstances discussed by Solicitor Krulitz remain relevant to applying the *Utah Lake* inquiry to PLO 82 and the Statehood Act. Nevertheless, in light of the more precise guidance provided by *Utah Lake*, I believe the issues examined and conclusions reached by Solicitor Krulitz warrant reexamination.

III. APPLICATION OF THE *UTAH LAKE* TEST TO THE CREATION OF THE PLO 82 WITHDRAWAL IN 1943

⁴⁹The standard of proof can also be satisfied, of course, if the intent "was rendered in clear and especial words, or *** the claim confirmed in terms embraces the land under the waters of the stream." *Utah Lake*, 482 U.S. at 198.

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In Section II., *supra*, I determined that the *Utah Lake* test applies to PLO 82. In this section, I will determine whether the executive withdrawal in 1943 satisfied the two-part test. In Section IV., *infra*, I will examine congressional and executive actions through the revocation of PLO 82 to determine whether Congress or the Executive Branch affirmatively intended to defeat Alaska's title to lands underlying inland navigable waters within PLO 82. In Section V., *infra*, I will apply the *Utah Lake* test to the Alaska Statehood Act.

I believe it is necessary to examine the withdrawal at its inception, subsequent congressional and executive actions, and relevant statutory language at the time of statehood to ensure that Congress' intent in this matter is known. To the degree an executive withdrawal encompassed submerged lands and was intended to defeat state title, congressional ratification of a withdrawal without submerged lands would indicate that title to the submerged lands passed to the state at the time of statehood.

It has been argued by the State of Alaska that an executive withdrawal—rather than a congressional act of reservation—cannot alone defeat state title to the submerged lands.⁵⁰ That proposition is not at issue in this Opinion because I have determined that Congress, in the Alaska Statehood Act, did address the disposition of the entire area encompassed by PLO 82 in northern Alaska. As noted above, the Statehood Act will be discussed in detail in Section V., *infra*.

A. Application of the *Utah Lake* Decision to Executive, as Well as Congressional, Withdrawals

The two-part test in *Utah Lake* referred specifically to the intent of Congress—not the Executive Branch—to reserve and retain submerged lands. The Court in *Utah Lake* did not address the question whether the Executive, as well as Congress, may withdraw or reserve submerged lands so as to defeat a future state's title. *Utah Lake* involved a purported congressional withdrawal of lands under the Sundry Appropriations Act of 1888, 25 Stat. 505 and ratification of executive action in the 1890 Act. PLO 82 was an executive withdrawal issued by Acting Secretary of the Interior Fortas pursuant to a delegation of authority by President Franklin D. Roosevelt. The delegation was accomplished by EO No. 9146, which, in turn, was issued under the authority of the Pickett Act, 36 Stat. 847, and the powers of the President. The Supreme Court has long recognized that the Executive Branch acts as the agent for Congress in exercising its constitutional authority over the public domain. *United States v.*

⁵⁰ See Alaska's Second Supplemental Brief on Questions 8, 9, 10, and 11 of the Joint Statement of Questions Presented and Contentions of the Parties, at 22-23, *U.S. v. Alaska*, No. 84, Original (brief filed Sept. 23, 1987).

Midwest Oil Co., 236 U.S. 459, 471–475 (1915).⁵¹ To the degree an executive withdrawal has been ratified by Congress, the authority for defeasance of state title is clear. Thus, in this case, it is important to examine the Executive's intent at the time of withdrawal and Congress' intent at the time of statehood. This analysis focuses on the PLO 82 withdrawal to adduce intent.

B. Intent to Withdraw Lands under Inland Navigable Waters

The text and purpose of PLO 82 demonstrate that the Secretary clearly intended to include lands underlying inland navigable waters in the withdrawal in 1943. Many of the legal and evidentiary considerations discussed in the Krulitz Opinion are relevant to the *Utah Lake* inquiry even though Solicitor Krulitz did not explicitly apply the strong presumption in favor of state title to lands beneath inland navigable waters within pre-statehood reservations. His exhaustive analysis of the Secretary's intent to withdraw inland submerged lands, including an examination of the history, language and purpose of PLO 82, comports fully with the equal footing inquiry of *Holt State Bank, supra*, reaffirmed in *Utah Lake*. The most compelling evidence of secretarial intent to include inland submerged lands within the PLO 82 withdrawal follows.

First, the all-inclusive language of PLO 82, withdrawing "all that part of Alaska" north of the Brooks Range and the De Long Mountains, including "the watershed northward to the Arctic Ocean," evinced a clear intent by the Secretary to include inland submerged lands within the areas withdrawn on the North Slope. 86 I.D. 151, 160. This intent was reinforced by a contemporaneous map of the withdrawal outlining the vast area, without excluding any bodies of waters or lands beneath them. *Id.* at 161–62, 164.

Second, PLO 82's reference to "public lands" was consistent with an intent to withdraw submerged lands under contemporaneous judicial and Departmental precedents construing various statutory land withdrawals in Alaska. *Id.* at 155–57. These precedents established that a construction of "public lands" to embrace submerged lands was essential if it furthered the purpose of the withdrawal. *Alaska Pacific Fisheries Co. v. United States*, 248 U.S. 78, 87 (1918) (intent to reserve submerged lands may be determined by necessary inference from the purposes of the reservation);⁵² *Hynes v. Grimes Packing Co.*, 337 U.S.

⁵⁰ See *supra* n. 21. See also U.S. Const. Art. IV, § 3, cl. 2 (Property Clause) and Art. I, § 8, cl. 18 (Necessary and Proper Clause).

⁵² The Supreme Court stated in *Alaska Pacific Fisheries Co. v. U.S.*, 248 U.S. 78, 87 (1918):

The principal question for decision is whether the reservation created by the Act of 1891 embraces only the upland of the islands or includes as well the adjacent waters and submerged land. The question is one of construction—of determining what Congress intended by the words "the body of lands known as Annette Islands." As an appreciation of the circumstances in which words are used usually is conducive and at times is essential to a right understanding of them, it is important, in approaching a solution of the question stated, to have in mind the circumstances in which the reservation was created—the power of Congress in the premises, the location and character of the islands, the situation and needs of the Indians and the object to be attained.

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86, 116 (1949) (1936 statute authorizing Secretary of the Interior to withdraw "public lands" in Alaska included submerged lands in light of the withdrawal's purpose).

Third, the purpose of PLO 82 supports a finding that Secretary Ickes intended to withdraw inland submerged lands in his 1942 direction to Departmental officials to proceed with the PLO 82 withdrawal. Background documents demonstrate the order was primarily aimed at protecting the oil and gas resources of the three regions designated in PLO 82 for possible Federal development in support of World War II.⁵³ Submerged lands in Alaska in 1943 were subject to entry and location under the mining laws and mineral leasing laws. 86 I.D. 151, 159, 168. Not including submerged lands within PLO 82 would have frustrated its purpose.

This situation contrasts sharply with that in *Utah Lake*, where the Court found the lakebed was not subject to settlement, location, or entry under the public land laws applicable in Utah. Further, by virtue of the navigational servitude ownership of the lakebed was not necessary to carry out the purposes of the withdrawal, *i.e.*, reservoir protection. Thus, the Supreme Court found no need to infer a reservation of the bed of Utah Lake in connection with the Federal reservation at issue there.⁵⁴ In this case, excluding lands under inland navigable waters from the PLO 82 withdrawal would have been incompatible with the Secretarial intent to withdraw all the petroliferous areas of the North Slope for use in the war effort. Such an exclusion might have left as much as 25 percent of the potentially most productive areas on the North Slope outside of the withdrawal and available for private entry or leasing.⁵⁵ It would have been highly illogical indeed for Secretary Ickes to have directed the withdrawal of the uplands for Federal oil and gas development, but to have permitted the potential draining of the federal petroleum reserves by third party leasing of submerged lands within the withdrawn area.

For the foregoing reasons, I agree with Solicitor Krulitz that the Secretary in 1943 clearly intended to include the lands under inland navigable waters within the PLO 82 withdrawal on the North Slope.

C. Intent to Defeat the Future State's Title

Even if inland submerged lands on the North Slope of the Territory of Alaska were included in the PLO 82 withdrawal in the first instance, *Utah Lake* additionally requires a determination of affirmative intent on the part of the Federal Government to defeat the future State of

⁵³ See *supra* n. 24 and accompanying text.

⁵⁴ The Court noted that "[t]he transfer of title of the bed of Utah Lake to Utah ***would not necessarily prevent the Federal Government from subsequently developing a reservoir or water reclamation project at the lake." 482 U.S. at 208 (italics added).

⁵⁵ See claims made by the State of Alaska in *Alaska v. U.S.*, Civ. No. A-83-343, pending in the Federal district court in Alaska.

Alaska's title to the submerged lands upon Alaska's admission to the Union. This is the second prong of the Supreme Court's analysis in *Utah Lake*. As the Court explained, the Federal Government may intend to reserve lands under inland navigable waters for a particular purpose but also intend to let the state obtain title to those lands at statehood. 482 U.S. at 202. Although the Court did not specify the time period to which the second part of the *Utah Lake* inquiry applies, I will focus in this section on the intent of the Federal Government at the time of PLO 82's creation in 1943.

Under the test outlined in *Utah Lake*, the United States must establish that the withdrawal of inland submerged lands within PLO 82 was intended to defeat Alaska's title by the same standard of proof that is required for showing that submerged lands were included in the initial withdrawal. This is a rigorous standard, which the United States failed to meet in *Utah Lake*. The Supreme Court reasoned that the United States had presented no evidence of a congressional intent to defeat Utah's claim to the bed of Utah Lake under the equal footing doctrine, "and the structure and the history of the 1888 Act strongly suggest that Congress had no such intention." 482 U.S. at 208. The Court noted that the Act, on its face, did not purport to defeat the entitlement of future states to any land reserved under the Act. *Id.* It further noted that the broad scope of the 1888 Act, which effectively reserved all public lands in the western United States, *id.*, was inconsistent with an intent to defeat a future state's title to the land under navigable waters within the reservation, in light of the congressional policy of defeating state's title to such lands only "in exceptional instances" involving "international duty or public exigency." *Id.*, quoting *United States v. Holt State Bank*, 270 U.S. at 55.

Applying the above principles to the PLO 82 withdrawal in 1943, I find that many of the same considerations in *Utah Lake* are present here. Like the 1888 Act in *Utah Lake*, PLO 82, on its face, did not purport to defeat for all time the future State of Alaska's equal footing entitlement to inland submerged lands withdrawn by PLO 82. Moreover, the broad language of PLO 82 is similarly difficult to reconcile with an intent to defeat Alaska's title to the lands under navigable water within the withdrawal area. Under the Court's reasoning in *Utah Lake*, these factors alone strongly suggest that Acting Secretary Fortas did not manifest an intention to defeat permanently any future state's entitlement to the inland submerged lands within the PLO 82 withdrawal in 1943.

On the other hand, as the caption of the order indicates, PLO 82 withdrew public lands "for use in connection with the prosecution of the war." Solicitor Krulitz aptly described PLO 82's relationship to the prosecution of World War II as "a 'public exigency' beyond challenge." 86 I.D. 151, 174. I agree. The North Slope of Alaska was of critical strategic importance during World War II, given its petroleum reserves

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and proximity to the Pacific theater. Applying the second prong of the *Utah Lake* test to the withdrawal in 1943, had statehood been imminent, I would conclude as a necessary inference flowing from the purpose of the withdrawal, that inland submerged lands were intended to be retained in Federal ownership. However, no petitions seeking statehood were pending before Congress when PLO 82 was issued on January 3, 1943. In fact, only one statehood bill had even been introduced in Congress up to that time—in 1916, some 27 years before the issuance of PLO 82.⁵⁶ A thorough review of the Departmental files from this period found at the National Archives has been conducted.⁵⁷ The review has produced no evidence to suggest that Acting Secretary Fortas had even considered the effect of this withdrawal on the title to submerged lands upon future statehood, let alone formulated an intent to defeat the future state's title to submerged lands located therein. Thus, the second prong of the *Utah Lake* test had not been met as of the date of the original withdrawal.

Because the second prong of this test was not met at the time PLO 82 was issued, and with the termination of World War II upon which the original withdrawal was grounded, it is necessary to determine whether the Executive, Congress, or both, subsequently formulated a clear intent to withhold the submerged lands within this withdrawal from a future state.

IV. CONGRESSIONAL AND EXECUTIVE ACTIONS THROUGH REVOCATION OF PLO 82 IN 1960

Because I have concluded that in 1943 PLO 82 only met the first prong of the *Utah Lake* test but did not meet the second prong, I will now look to congressional and executive actions between 1943 and 1960 to determine whether Congress or the Executive Branch affirmatively intended to defeat Alaska's title to the lands beneath inland navigable waters within PLO 82.

A. Pre-Statehood Congressional Policy Concerning Submerged Lands in Alaska

In 1898, a congressional policy was articulated to hold submerged lands underlying navigable waters in trust for any future state or states created out of the Territory of Alaska. Alaska Right-of-Way Act, 30 Stat. 409. In pertinent part, the Act reads:

⁵⁶The second statehood bill was introduced by Delegate Anthony Dimond in Dec. 1943, almost 1 year after PLO 82 was signed. See "Alaska's Struggle for Statehood," 39 Neb. L. Rev. 253, 256-57 (1960). Former Secretary of the Interior Seaton stated in his article that "although a small but increasing number of Alaskans had considered and discussed statehood for several preceding years, 1945 can be noted as the beginning of the active statehood movement." *Id.* at 257.

⁵⁷These files are located within Record Group 48, Central Classified Files, Civil Division, U.S. Department of the Interior, U.S. National Archives and within Record Group 80, Military Records, U.S. Department of the Navy, U.S. National Archives. In addition, records of Secretary Seaton contained at the Eisenhower Library were reviewed.

Provided, That nothing in this Act contained shall be construed as impairing in any degree the title of any State that may hereafter be created out of said District, or any part thereof, to tide lands and beds of any its navigable waters, or the right of such State to regulate the use thereof, nor the right of the United States to resume possession of such lands, it being declared that all such rights shall continue to be held by the United States in trust for the people of any State or States which may hereafter be erected out of said District.

30 Stat. 409.⁵⁸ The 1898 Act, read as a whole and giving meaning to each of its various provisions, demonstrates a congressional policy and goal that lands be held "in trust for the people" of any state or states created out of the District, later Territory, of Alaska.⁵⁹ The same Congress that passed the ASA considered and enacted two laws that acknowledged continued vitality of the Alaska Right-of-Way Act of 1898. Oil and gas leasing legislation was enacted to allow Federal leases to include all lands within the described boundaries of a lease, including any water bottoms under inland navigable waters. 72 Stat. 322 (1958 Alaska Oil and Gas Act). Since there was no authority to lease the lands beneath the waters themselves,⁶⁰ in most instances the

⁵⁸The Alaska Right-of-Way Act is codified at 43 U.S.C. §§ 687a, 687a-2-687a-5, and 942-1-942-9 and 16 U.S.C. §§ 607a and 615a.

⁵⁹The Alaska Right-of-Way Act appears to be a statement that the equal footing doctrine would apply to Alaska. The proviso was enacted by Congress following the decision by the U.S. Supreme Court in *Shively v. Bowlby*, 152 U.S. 1 (1893), which held that during territorial administration Congress might grant title or exclusive rights to land in a case of international duty or public exigency. During Alaska Statehood deliberations Congress discussed the significance of the equal footing doctrine and the Alaska Right-of-Way Act:

SENATOR CORDON. Another question that we have to determine is that of land beneath navigable waters above high tide. Again my understanding of the law is that the title to lands beneath the navigable waters goes to the State by virtue of its admission as a State.

SENATOR JACKSON. That is my understanding.

* * * * *

SENATOR JACKSON. * * * The Supreme Court has passed on the question in a number of decisions, and has held that the beds of navigable streams belong to the State.

MR. SLAUGHTER [Chief, Reference Division, Office of Legislative Counsel, Department of Interior]. That is correct.

* * * * *

SENATOR JACKSON * * * It is a rule of law that the Court has adopted, based on State sovereignty, that the beds of the streams themselves belong to the States; that all 49 States have that property right.

MR. BENNETT [Assistant Solicitor of the Department of the Interior and Legislative Counsel]. I think the Supreme Court has discussed it also in terms of the lands having been federal prior to the admission of the State and then the "equal-footing" clause gives a newly admitted State the same right that the Original Thirteen had; and the Original Thirteen had that title by virtue of sovereignty. So you have the new States coming in on the same footing due to the "equal-footing" clause.

* * * * *

MR. SLAUGHTER. Furthermore, in the case of Alaska, in the 1898 statute [the Alaska Right-of-Way Act], the Congress specifically included a provision which was referred to in the committee the other day, looking forward to ultimate transfer to the State.

SENATOR CORDON. What is that provision?

MR. SLAUGHTER. It says:

Provided, That nothing in this act shall be construed as impairing in any degree the title of any State that may hereafter be erected out of the Territory of Alaska any part thereof, to tidelands and beds of any of its navigable waters, nor the rights of such State to regulate the use thereof, nor the right of the United States to resume possession of such lands, it being declared that all such rights shall continue to be held by the United States in trust for the people of any State or States which may hereafter be erected out of said Territory.

The term "navigable waters" as herein used shall be held to include all tidewater up to the line of ordinary high tide and all nontidal waters of navigable streams up to the line of ordinary high water mark.

Admission of Alaska in the Union: Hearings on S. 50 before the Senate Committee on Interior and Insular Affairs, 83d Cong., 2d Sess. 223-24 (1954) (bracketed material added).

A memorandum to the same effect was prepared for the Committee and included in the printed hearings. In pertinent part the memorandum states, "As to the submerged lands inland from the low-tide mark, a new State would become vested with title thereto upon admission, under the Pollard and equal footing rules." *Id.* at 225.

⁶⁰As stated in the Senate Report for H.R. 8054 (1958 Alaska Oil and Gas Act):

Under existing law, no person or agency has the power to grant oil or gas leases in areas beneath navigable waters. Such authority is precluded by the act of May 14, 1898 * * * which declares that tidelands and the beds of navigable waters within the Territory are held in trust for the State or States which may be erected out of the Territory.

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Bureau of Land Management affixed a statement by rubber stamp to exclude lands within the described boundary which may be beneath navigable waters. See S. Rep. No. 1720, 85th Cong., 2d Sess. 4 (1958).

As a result, development of oil resources was impeded because most developers were reluctant to proceed if "later legislation might open up water bottoms to leasing by others who * * * could come in and acquire lands in any oil structure which might be discovered * * *." *Id.* Conceivably the "later legislation" referenced in the Senate Report could be eventual statehood for Alaska resulting in a state leasing program for lands underlying inland navigable waters.⁶¹

As a result of this dilemma, on July 3, 1958, 4 days before enactment of the recently passed Alaska Statehood Act, the 1958 Alaska Oil and Gas Act was enacted, providing for leasing of oil and gas deposits in lands beneath nontidal waters in the Territory of Alaska:

Sec. 2. All deposits of oil and gas owned or hereafter acquired by the United States in lands beneath nontidal navigable waters in the Territory of Alaska * * * may be leased * * * by the Secretary under and pursuant to the provisions of the Mineral Leasing Act * * *.

* * * * *

Sec. 7. Upon the transfer to the Territory of Alaska or to any future State or States erected out of the Territory of Alaska of title to any of the lands beneath nontidal navigable waters * * * the provisions of this Act shall cease to apply to any lands which are so transferred * * * but all the right, title, and interest of the United States under such lease (or application or offer for lease) * * * shall vest in the Territory of Alaska or the State to which title to those lands beneath nontidal navigable waters * * * is transferred.

72 Stat. 322, 323-24. The 1958 Alaska Oil and Gas Act clearly anticipated Alaska Statehood by requiring that the preference leasing right established by the Act would cease to apply to lands beneath nontidal navigable waters upon transfer of such lands to the Territory of Alaska or to any future state created out of the Territory of Alaska. *Id.* at 324. However, for any lease issued pursuant to the 1958 Alaska Oil and Gas Act (or application or offer for such a lease) and existing at the time of statehood, Congress provided that the new State of Alaska would take title to the lands subject to the existing lease or

S. Rep. No. 1720, 85th Cong., 2d Sess. 3 (1958).

In his letter to Congress transmitting proposed legislation Hatfield Chilson, Under Secretary of the Interior, noted that the Federal Government only had authority to lease lands bordering inland navigable waters. "At the present time neither the Federal Government nor the Territory has authority to lease these water-covered areas, which are held in trust for the benefit of a future State or States." *Id.* at 9.

⁶¹Review of the House Interior and Insular Affairs Committee Report for H.R. 8054 (1958 Alaska Oil and Gas Act) illustrates that the House Committee had Alaska Statehood in mind at the time it considered the bill:

The committee reiterates that title to the water-covered lands involved in H.R. 8054, under the terms of Alaska statehood legislation now pending in the House—and indeed as contained in earlier bills which in the past were approved at different times by both Houses of the Congress—would pass to Alaska upon her admission into the Union. It is believed that, pending favorable action on statehood legislation, enactment of H.R. 8054 will serve to stimulate prospecting and development of the oil and gas resources in the inland underwater and abutting areas of the Territory of Alaska.

H.R. Rep. No. 774, 85th Cong., 1st Sess. 2 (1957).

application or offer for such a lease which might later become effective.
Id.

The Alaska Right-of-Way Act of 1898 was also cited during consideration of the legislation which granted title to the Territory of Alaska to all lands offshore surveyed townsites between the line of mean high tide and the pierhead line. 71 Stat. 623 (1957 Alaska Tidal Waters Act) Reference to the Alaska Right-of-Way Act appeared in the Senate and House Committee Reports for the 1957 Alaska Tidal Waters Act as well as the Interior Department letter transmitting the proposed legislation.⁶² Further, while the 1957 Alaska Tidal Waters Act granted title to the Territory to tidal lands including oil and gas deposits offshore surveyed townsites, it excepted all oil and gas deposits located between the line of mean high tide and the pierhead line along the Arctic Coast of NPR-4. 71 Stat. 623, 624.

Other Alaska legislation from this period is not so illuminating. For example, legislation which provided for selection by the territorial government of 1 million acres from vacant, unappropriated, and unreserved public lands. 70 Stat. 709 (1956 Alaska Mental Health Act) Section 202(c) of the Act affirmatively stated that mineral deposits within selected lands were to be included in the grant, except that: "mineral deposits in lands which on January 1, 1956, were subject to public land order numbered 82 of January 22, 1943, shall not be included in said grants, but shall continue to be reserved to the United States." 70 Stat. 709, 711. This provision indicates that in 1956 Congress recognized the continued viability of PLO 82 and expressed its desire to reserve minerals within PLO 82 from conveyance to the Territory. The 1956 Alaska Mental Health Act also limited selections to vacant and unappropriated lands, which arguably would not include lands within PLO 82 considered withdrawn from application of the public land laws in 1956. Another interpretation was that section 202(c) was needed in case PLO 82 lands were selected around communities in the PLO 82 withdrawal area. Yet another interpretation is that even if PLO 82 were revoked, the state could not get title to minerals in lands which on January 1, 1956 were withdrawn by PLO 82. Legislative history on this provision is minimal, since the language was adopted without debate on the Senate floor. *See* 102 Cong. Rec. 9760 (1956); *see also* S. Rep. No. 2053, 84th Cong., 2nd Sess. (1957) (oil and gas lands withdrawn by NPR-4 would not be available for selection, not being in the vacant, unappropriated, unreserved category).

⁶²The letter states in part:

The tidelands in Alaska * * * are reserved for the future State by section 2 of the act of May 14, 1898 (citations omitted). Consequently, these tidelands may be disposed of only as Congress provides in the future. In the meantime this Department has the responsibility of administering these lands, without the authority to dispose of them, to lease them, or to grant, in any permanent form, permission to use them.
H.R. Rep. No. 950, 85th Cong., 1st Sess. 3 (1957), transmittal letter to Congressman Sam Rayburn, Feb. 20, 1957, by Hatfield Chilson, Assistant Secretary of the Interior.

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From this brief review of pre-statehood congressional policy concerning submerged lands in Alaska, it is evident that Congress intended to effectuate the equal footing doctrine and understood its legal significance. Contemporaneous with the statehood proceedings, Congress recognized that the Federal Government holds submerged lands in trust for a future state. It is also evident that when Congress burdened the operation of the equal footing doctrine, it did so in clear terms, e.g., the State would take title subject to leases issued under the 1958 Alaska Oil and Gas Act. Congress considered the issues associated with the oil and gas reserves in NPR-4 and the minerals within PLO 82, and unequivocally provided protection for these resources in the 1957 Alaska Tidal Waters Act and 1956 Alaska Mental Health Act, respectively. As demonstrated in Section V., *infra*, the statehood proceedings also imply an intent to retain under Federal administration and management the varied and diverse Federal reservations owned by the United States in Alaska, most of which were previously withdrawn public lands.

B. Executive Branch Policy Concerning Federal Withdrawals in Alaska

It is not surprising, considering the large areas withdrawn by the Federal Government prior to statehood, that throughout the Alaska Statehood proceedings, Congress expressed dissatisfaction with large Federal withdrawals and reservations in the Territory.⁶³ See, e.g., S. Rep. No. 1028, 83d Cong., 2d Sess. 2-7 (1954); H.R. Rep. No. 624, 85th Cong., 1st Sess. 5-8 (1957). This congressional concern was recognized by the Department of the Interior and the Department of Defense. The Secretary of the Interior's memorandum (signed by Assistant Secretary Orme Lewis) of May 18, 1953, directed the heads of bureaus and offices to review land withdrawals in Alaska to "reduce or revoke withdrawals * * * whenever it is found that the withdrawals are not required for some essential purpose."⁶⁴

In 1954, as a part of the Alaska Statehood hearings, the Senate Interior and Insular Affairs Committee heard testimony from Department of Defense officials on what lands reserved or withdrawn in the Territory of Alaska for the military could be returned to the public domain. Department of Defense testimony indicates that the total amount of acreage owned or controlled by Defense was less than 3.5 million acres at the time.⁶⁵ The gross acreage for the Navy was given as 648,000 acres, but it was acknowledged that the figure did not include the petroleum reserves of 48,800,000 acres controlled by the

⁶³ See *supra* n. 13.

⁶⁴ S. Rep. No. 1028, 83d Cong., 2d Sess. 40 (1954).

⁶⁵ Senate Interior and Insular Affairs Committee Hearings on Alaska Statehood, 83rd Cong., 2d Sess. 160 (1954) (1954 Senate Hearings).

Navy.⁶⁶ After questioning by committee members regarding the need for retaining the entire 48,800,000 acres (comprising PLO 82), the Navy witness indicated that a decision to release any of the lands would have to be reached with the approval of the President and the Congress.⁶⁷ In response to specific questions, the Department of the Navy submitted a letter for the record that reads in pertinent part:

(a) Are there plans for future activity at Naval Petroleum Reserve No. 4?

Exploration work in the reserve was suspended last year after consultation with the Senate and House Armed Services Committees * * * No further exploration nor oil field development is planned for this reserve * * *.

(b) Can the Navy give up either the whole or part of the oil and gas reserve?

The Navy would interpose no objection to returning the reserve to the public domain under the administration of the Interior Department. This, however, is a policy matter for determination by the White House and by Congress through the Senate and House Armed Services Committees. Insofar as the oil potential of this territory is concerned, the Navy's primary interest is in its ultimate economical development whether by private or governmental interests.

(c) Are there security aspects which would prevent the return of the reserves?

There are no security considerations with regard to the area of Naval Petroleum Reserve No. 4, although certain limited portions are utilized by the Air Force.

1954 Senate Hearings, *supra* at 191.

As the Department of the Interior moved toward eventual revocation of PLO 82, it sought the views of appropriate executive and congressional sources with an interest in the PLO 82 lands.⁶⁸ On April 1, 1953, Director of the Bureau of Land Management Marion Clawson wrote a letter to Rear Admiral Joseph F. Jolley, Chief of the Bureau of Yards and Docks, Department of the Navy, asking whether the Navy had "a continuing need for the public lands adjacent to and included within Naval Reserve No. 4 and whether Executive Order No. 3797-A of February 27, 1923, establishing the reserve, and Public Land Order No. 82 be modified or revoked, in whole or in part."⁶⁹ This letter states that Mr. Clawson had received inquiries on the matter from the Alaska Delegate to Congress, E. L. Bartlett, and from Robert A. Smithson, President of the Anchorage Chamber of Commerce. By May 5, 1954, the Secretary of the Navy clearly articulated the Navy's view that it would have no objection to the revocation of PLO 82 as long as

⁶⁶ *Id.* at 161.

⁶⁷ *Id.* at 166.

⁶⁸ On Nov. 20, 1957, Secretary Seaton announced plans to open 20 million acres in Alaska to mining and mineral leasing. See "Secretary Seaton Plans to Open 20 Million Acres in Alaska to Mining, Mineral Leasing; Biggest Wildlife Range Sought" Department of Interior, Information Service, Nov. 20, 1957. A summary of the Executive Branch actions associated with PLO 82 appears in the Department of the Interior materials released on Nov. 20, 1957, in conjunction with Secretary Seaton's announcement of plans to open 20 million acres in Alaska to mining and mineral leasing were: (1) Statement of Secretary Fred A. Seaton on "Steps to Open Twenty Million Acres in Northern Alaska to Mining and Mineral Leasing"; (2) "Background Summary of Proposed Modification of Public Land Order No. 82" (Background Summary); (3) "Map of Alaska"; and (4) Statement by the Governor of the Territory of Alaska, Michael A. Stepovich, on "Proposed Modification of Public Land Order No. 82."

⁶⁹ In fact, revocation of PLO 82 was contemplated by the Executive in the late 1940's. The Secretary of the Interior wrote to the Department of the Navy on Mar. 31, 1948, asking the Department of Navy's views on revoking PLO 82. In his response Secretary of the Interior J. A. Krug, Acting Secretary to the Navy W. John Kenney opposed revoking PLO 82 until exploration had proceeded to a point where it could be evaluated as a military petroleum reserve.

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NPR-4 was preserved.⁷⁰ To ensure that this occurred, the Assistant Secretary of the Navy requested that any revocation order specifically exempt the lands of NPR-4 from its provisions.⁷¹ On June 4, 1955, the Acting Secretary of the Interior wrote to the Chairmen of the House and Senate Armed Services Committees and the House and Senate Interior and Insular Affairs Committees requesting their views on the revocation of PLO 82.⁷² The only response was from the Chairman of the House Armed Services Committee who expressed his satisfaction in a June 7, 1955 letter that Interior would leave intact NPR-4.⁷³

A transcript from a conference held on May 17, 1954, further indicates that the Department of the Interior contemplated revocation of PLO 82:

Land Management proposes to revoke the order within a very short time, perhaps about June 1, 1954, but the revocation will state that the area will not be open for oil and gas leasing until the expiration of a 90-day waiting interval to permit any persons interested to study the available technical data and until such time as a land survey net is projected on paper over the area and announcement is made of the availability of the lands for leasing * * * [A]bout September 1954, [Land Management] will be able to open at least the Gubik structure for application * * * periodically, from then on, other areas will be opened according to the interest priority.

Comments of Irving Senzel, Assistant to the Chief, Division of Lands, Bureau of Land Management, at Conference on Northern Alaska, May 17, 1954, John C. Reed, Staff Coordinator, U.S. Geological Survey, serving as Chairman (bracketed material added). This passage indicates that in 1954 BLM contemplated a phased opening of northern Alaska, including the Gubik structure, to leasing. These plans for a phased leasing program were eventually set in motion in 1958 with the modification of PLO 82 by PLO 1621.⁷⁴

C. PLO 1621 Plainly Demonstrates an Executive Intent to Defeat State Title to Submerged Lands within ANWR and NPR-4

PLO 1621 was signed on April 18, 1958. At the time of Alaska Statehood, PLO 82 had been amended or modified eighteen times. In anticipation of what would eventually become PLO 1621, the Department of the Interior publicly announced on November 20, 1957, plans to open 20 million acres of PLO 82 to mineral leasing and mining claims; to set aside a total of 9 million acres, of which 5 million acres were within PLO 82, for the proposed Alaska National Wildlife Range; to continue to bar entry into NPR-4; and, to further protect the 23 million acres of NPR-4 by establishing a 2-mile buffer along the border of the petroleum reserve which would account for the balance

⁷⁰ See Background Summary at 3.

⁷¹ *Id.* at 3.

⁷² It was mentioned in the letters that some of the lands of PLO 82 might be reserved for defense purposes.

⁷³ See Background Summary at 4.

⁷⁴ PLO 1621, 23 FR 2637 (1958).

of the acres withdrawn by PLO 82.⁷⁵ In part, these plans were eventually made effective with the issuance of PLO 1621 on April 18, 1958.⁷⁶

By specifically citing NPR-4 and the withdrawal application for the Arctic National Wildlife Range in PLO 1621, the Executive Branch enhanced the underlying protection provided by PLO 82 by plainly demonstrating the goal of retaining ANWR and NPR-4 in Federal ownership. Furthermore, PLO 1621 did not revoke any prior orders, but rather was a modification of PLO 82. Thus the modification left in place prior withdrawals such as PLO 82 and Executive Order No. 3797-A. As a matter of longstanding interpretation of public land orders, PLO 82 could only be terminated by express revocation, as was done in 1960 by PLO 2215.⁷⁷ In other words, public land orders are not revoked by "modification" or repealed by implication.

Departmental regulations existing at the time of the Arctic National Wildlife Range application expressly protected the lands from entry until final action was taken on the withdrawal. The Arctic National Wildlife Range application for withdrawal⁷⁸ was made pursuant to the provisions of 43 CFR 295.9-295.15 (1959 Supp.). In pertinent part the applicable regulations provided:

The noting of the receipt of the application * * * shall temporarily segregate such lands from settlement, location, sale, selection, entry, lease and other forms of disposal under the public land laws, including the mining and the mineral leasing laws * * * until final action on the application for withdrawal or reservation has been taken.

43 CFR 295.11 (1959 Supp.).

Attached to the application was a justification memorandum of November 7, 1957, from the Director, Bureau of Sport Fisheries and Wildlife to the Director, Bureau of Land Management.⁷⁹ The memorandum definitely declares that the Arctic National Wildlife Range required both submerged lands and uplands to effectuate the purposes of the withdrawal. The memorandum states in pertinent part:

The portion of the Arctic plain included in the proposal is a major habitat, particularly in summer, for the great herds of Arctic caribou, and the countless lakes, ponds, and marshes found here are nesting grounds for large numbers of migratory waterfowl that spend about half of each year in the United States. Thus the production here is

⁷⁵ See *supra* n. 68.

⁷⁶ 23 FR 2637-38 (1958). PLO 1621 stated that approximately 16,000 acres of lands to be opened to mineral development lay within the known geologic structure of the Gubik gas field and that the area would be offered for oil and gas leasing through competitive bidding. On July 25, 1958, the Department announced its plan to lease 16,000 acres of public lands in the Gubik Field on a competitive basis and 4 million adjoining acres on a non-competitive basis. According to a Sept. 4, 1958, *New York Times* article, bids for Gubik Field were opened Sept. 3, 1958. On July 29, 1958, notice was published (23 FR 5700 (1958)) announcing the availability of 4 million acres in the PLO 82 area for noncompetitive leasing. The notice stated that approved leasing maps describing the 4 million acres of land had been prepared. According to testimony by Max Caplan, Minerals Staff Officer, BLM, by 1959 some leasing maps had been prepared and 4 million acres were opened to noncompetitive leasing in October 1958 as well as 16,000 acres to competitive leasing in the Gubik gas field. *Alaska Mineral Leasing, Hearing before the Subcommittee on Public Lands of the Committee on Interior and Insular Affairs, United States Senate [Misc. Bills]*, 86th Cong., 1st Sess. 17 (1959).

⁷⁷ *Wilbur v. U.S.*, 46 F.2d 217 (1930), *aff'd* 283 U.S. 414 (1931).

⁷⁸ The proposed ANSR withdrawal was modified twice to preclude mining locations until on or after Sept. 1, 1959, and until on or after Sept. 1, 1960. See 23 FR 7592 (1958); 24 FR 7143 (1959).

⁷⁹ See letter dated June 16, 1976, from Robert E. Price, Regional Solicitor, U.S. Department of the Interior to Mr. Gordon Watson, Area Director, U.S. Fish and Wildlife Service at 3.

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important to a great many sportsmen. The river bottoms with their willow thickets furnish habitat for moose. This section of the seacoast provides habitat for polar bears, Arctic foxes, seals, and whales.

The final public land events relevant to PLO 82 occurred after statehood. On December 6, 1960, after Congress failed to enact legislation to establish the Arctic National Wildlife Range with limited mineral entry,⁸⁰ the Secretary established the Arctic National Wildlife Range under the authority delegated by Executive Order 10355⁸¹:

1. For the purpose of preserving unique wildlife, wilderness and recreational values, all of the hereinafter described area in northeastern Alaska, containing approximately 8,900,000 acres is hereby, *subject to valid existing rights*, and the provisions of any *existing withdrawals* [e.g., PLO 82], *withdrawn* from all forms of appropriation under the public land laws, including the mining but not the mineral leasing laws. * * *, and reserved for use of the United States Fish and Wildlife Service as the Arctic National Wildlife Range.

25 FR 12598-99 (1960) (italics and bracketed material added). That same day, the Secretary revoked PLO 82 by PLO 2215, advising that the area subject to the revocation contained approximately 48,000,000 acres. The order, however, preserved previous NPR-4 withdrawals within the PLO 82 area and further provided:

2. The following-described lands lying within the exterior boundaries of the area described in paragraph 1 [PLO 82] *are withdrawn by Executive Order No. 3797-A of February 27, 1923 for Naval Petroleum Reserve No. 4, for classification, examination and preparation of plans for development and until otherwise ordered by the Congress or the President.*

* * * * *

The area described contains approximately 23,000,000 acres. Jurisdiction over the lands in [NPR-4] is vested in the Department of the Navy [citations omitted]. These lands, therefore, are not affected by the opening hereinafter provided by this order.

25 FR 12599 (1960) (italics and bracketed material added). The order continues in section 3 by notifying the reader that the PLO 82 lands in paragraph 1 also included the area described in a Bureau of Sport Fisheries and Wildlife withdrawal application and remained "segregated" from all forms of disposal under the public land laws until final action was taken on the withdrawal application. This provision of the order assured that there was no lapse or hiatus between establishing the range and revoking PLO 82.⁸² PLO 2215 also provided notice that the prior withdrawal for NPR-4 remained in effect.

Submerged lands were included within ANWR and NPR-4 by "necessary implication." See *United States v. State of Alaska*, 423 F.2d 764, cert. denied, 400 U.S. 967 (9th Cir. 1970); *United States v. City of Anchorage*, 437 F.2d 1081 (9th Cir. 1971). In the case of ANWR, one of the stated purposes of the range was the protection not only of the

⁸⁰ See H.R. Rep. No. 771, 86th Cong., 1st Sess. (1959).

⁸¹ EO No. 10355, 3 CFR 873-74 (1949-1953).

⁸² If the area had been opened to entry under the public land laws before the establishment of ANWR, mining claims could have been filed after the opening but before the establishment of ANWR.

land habitat of certain species but also the water habitat for migratory waterfowl and such mammals as polar bears, seals and whales. Therefore, it is not surprising that the submerged lands along the coastline and inland are specifically included within the perimeter description of the Arctic National Wildlife Range. *See also* H.R. Rep. No. 771, 86th Cong., 1st Sess. 3 (1959).

As for NPR-4, the Executive's actions clearly intended to have this area reserved at the time of statehood to ensure the military access to needed minerals, oil and gas. To transfer the inland submerged lands to the State would have frustrated any Federal oil and gas program. A situation in which the State could also issue leases to adjacent submerged lands would have undermined the purposes of both Executive Order No. 3797-A and PLO 82. The ability to manage for oil and gas development would have been defeated just as moose survival would have been defeated at the Kenai Moose Range if the State could issue oil and gas leases in inland submerged lands.⁸³

D. Congress Affirmed Executive Intent to Defeat State Title to Submerged Lands in ANWR and NPR-4

In the ASA, Congress affirmed the intent of the Executive Branch to defeat state title to submerged lands in ANWR and NPR-4. Section 6(e) of the ASA provides for the transfer of all real and personal property of the United States situated in the Territory of Alaska which is specifically used for the sole purpose of conservation and protection of the fisheries and wildlife of Alaska, except that such transfer: "[s]hall not include lands *withdrawn or otherwise set apart* as refuges or reservations for the protection of wildlife * * *" 72 Stat. 339, 341 (italics added).⁸⁴ The ANWR lands were clearly set apart (*i.e.*, segregated) as a refuge or reservation for wildlife. As such the lands were specifically withheld by section 6(e) from being transferred to the State of Alaska under the equal footing doctrine because they were lands "otherwise set apart as reservations for the protection of wildlife." *Id.* Furthermore, I view the earlier withdrawal status provided by PLO 82, in addition to the segregative effect of PLO 1621 to preserve this area as a wildlife refuge as meeting the second prong of the *Utah Lake* test.⁸⁵ Thus, section 6(e) established the affirmative intent to defeat the equal footing doctrine with respect to the submerged lands for ANWR.

An examination of the legislative history for section 6(e) reveals that the Department originally proposed it in 1950 as an amendment to one

⁸³ In *U.S. v. Alaska*, *supra*, the Ninth Circuit Court of Appeals is very instructive on this issue:

Water, in other words, is just as essential to the continued existence of the moose as it is to any other semi-aquatic animal in Alaska. If the Order failed to withdraw the navigable water in the designated area, it amounted to nothing more than an impotent gesture. If it failed to withdraw the land under the water, it would be just as sterile. *Id.* at 767.

⁸⁴ The words "set apart" are the precise words used to effectuate the withdrawal of NPR-4. EO 3797-A reads that the public lands will be "set apart" for oil and gas.

⁸⁵ *See supra* n. 20.

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of the statehood bills. The Department's explanation of the effect of the provision was as follows:

Under the language of the proposed amendment, the State of Alaska would obtain title to all real and personal property of the United States primarily used in the administration of the Alaska game law and the Alaska commercial fisheries laws. On the other hand, the *United States would retain* administrative jurisdiction over the Pribilof Islands, and over all other Federal lands and waters in Alaska which have been *set aside* as wildlife refuges or reservations pursuant to the fur seal and sea otter laws, the migratory bird laws, or *other Federal statutes of general application*.

S. Rep. No. 1929, 81st Cong., 2d Sess. 14 (1950) (italics added). The same interpretation is reflected in the House and Senate Reports accompanying the bill that was enacted as the Statehood Act. See S. Rep. No. 1163, 85th Cong. 1st Sess. 17 (1957) and H.R. Rep. No. 624, 85th Cong., 1st Sess. 19 (1957).

When the Secretary established the 649 square mile Izembek National Wildlife Range by PLO 2216 on December 6, 1960,⁸⁶ the Department provided that the described lands excluded "lands beneath navigable waters as defined in section 2 of the Submerged Lands Act of 1953."⁸⁷ A Departmental press release further elaborated that "State-owned inland navigable water areas are not included in the Range."⁸⁸ Similarly, when the Department established on the same day⁸⁹ the 1.8 million acre Kuskokwim National Wildlife Range the same reference to section 2 of the Submerged Lands Act of 1953 appeared in the *Federal Register* notice.⁹⁰ In addition, the accompanying press release made clear that: "State-owned inland navigable water areas are not included in the Range. Furthermore, the Range does not include any lands or waters granted to the State of Alaska by virtue of the Alaska Statehood Act." See "Secretary Seaton Establishes 1.8 Million Acre Kuskokwim National Wildlife Range in Alaska," Department of the Information, Information Service, at 2 (December 7, 1960). The Arctic National Wildlife Range was established the same day, and no such admission or declaration of state ownership of inland submerged lands was conceded. I view this as significant. Again, this demonstrates that the Department considered the underlying withdrawal of PLO 82 on its own as sufficient to withhold the submerged lands within the PLO 82 area from transfer to the State. Furthermore, the segregation of ANWR by the application for withdrawal and PLO 1621 reserved the submerged lands of ANWR under section 6(e) of the ASA as lands "otherwise set apart as reservations for the protection of wildlife."⁹¹ Whether examined independently or jointly, I believe that PLO 82 and

⁸⁶ 25 FR 12599-12600 (1960).

⁸⁷ *Id.* at 12600.

⁸⁸ See "Secretary Seaton Creates Izembek National Wildlife Range in Alaska," Department of the Interior, Information Service, at 1 (Dec. 7, 1960).

⁸⁹ 25 FR 12597-98 (1960).

⁹⁰ *Id.* at 12598.

⁹¹ See page 3 of the Department of the Interior explanatory memorandum, July 4, 1958, to White House on the enrolled Alaska Statehood bill which treated the segregation for ANWR as a withdrawal from public entry.

the segregation reserved the submerged lands of ANWR from transfer to the State.

Section 11(b) of the ASA provides still further Federal protection of the submerged lands within NPR-4:

Notwithstanding the admission of the State of Alaska into the Union, authority is reserved in the United States, subject to the proviso hereinafter set forth, for the exercise by Congress * * * of exclusive legislation * * * in all cases whatsoever over such tracts or parcels of land as, immediately prior to admission of said State, are owned by the United States and held for military, naval, Air Force or Coast Guard purposes, including naval petroleum reserve numbered 4 * * *.

72 Stat. 339, 347. Section 11(b) illustrates that NPR-4 was expressly withheld from the State.

The Senate Report on the Statehood Act, ascribes this meaning to section 11(b):

This section also reserves the right in Congress to exercise the power of exclusive legislation *over lands* owned, used, and *held by* the United States for defense or Coast Guard purposes, immediately *prior to admission* of the State into the Union, *including Naval Petroleum Reserve No. 4*. Such power of exclusive legislation is subject only to the right of the State to serve process. However, the State may exercise its full jurisdiction over such areas unless and until Congress supersedes the State actions. The federal power of exclusive legislation will continue only so long as the lands are used for the stated purposes. Thus, the new State will be entitled to exercise its full jurisdiction within military reservations which are in existence at the date of admission, subject to the right of Congress to supersede any and all laws, regardless of their subject matter, for as long as the land is used for the stated purposes, after which time full jurisdiction will revert to the State. The provisions of section 11 do not apply to special national defense withdrawals made pursuant to section 10.

S. Rep. No. 1163, 85th Cong., 1st Sess. 26 (1957) (italics added).

PLO 1621 reaffirmed the intent to include the submerged lands of NPR-4 and ANWR in order to accomplish the purposes of these reservations. When PLO 2215 revoked PLO 82, yet again the submerged lands of the NPR-4 were kept in a withdrawn status. I consider the decisions of the Court of Appeals for the Ninth Circuit in *Alaska v. United States*, *supra*, and *United States v. City of Anchorage*, *supra*, as instructive in the method of analyzing public land orders to determine the intent to include submerged lands. Neither ANWR nor NPR-4 could be administered and preserved for their primary purposes absent the inclusion of the submerged lands.

The ASA and its legislative history demonstrates that Congress clearly intended to defeat state title to the submerged lands in NPR-4 and ANWR. It can be argued that this conclusion is less certain for the remaining lands in PLO 82 which were opened to mineral entry and mineral leasing by PLO 1621.

E. PLO 1621 Did Not Operate to Exclude Submerged Lands from PLO 82

At the time of Alaska Statehood, PLO 82 had been amended by PLO 1621, to permit mining and mineral leasing in two portions of that part

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of PLO 82 which withdrew northern Alaska.⁹² The Secretary of the Interior's action in PLO 1621 to open certain portions of PLO 82 to both mineral leasing under secretarial supervision and mining is not inconsistent with the land being held for military purposes and with Congress' action in the Statehood Act to reserve exclusive legislative jurisdiction over PLO 82 lands.⁹³ See discussion in Section V.F., *infra*.

No conflict with military purposes occurs from mineral leasing to private parties under the supervision of the Federal Government. In the Department of the Interior's November 20, 1957 Background Summary,⁹⁴ that accompanied Secretary Seaton's announcement to open 20 million acres in northern Alaska to mining and mineral leasing, the Department addressed the benefits of the opening. The document states:

Also to be taken into consideration is the fact that any program undertaken to find and develop the natural gas reserves has an equally good opportunity of finding oil. *If commercial quantities of oil are found and marketed, the benefits to be derived therefrom, both from an economic and military viewpoint, might and probably would exceed by far those to be anticipated from exploitation of the natural gas reserves, including probably, the construction and operation of shipping and storage facilities, and comprehending perhaps even refining and the production of the many products associated with refining.*

Background Summary at 4-5 (italics added). This shows that the Department believed that mining and mineral leasing were compatible with the military purposes of PLO 82 and that benefit to the military would result therefrom. In fact, in 1958 Congress established the policy in section 6 of the Engle Act, 43 U.S.C. § 158, that all defense withdrawals were to be reviewed, and if possible, opened to mineral leasing under the Mineral Leasing Act. The Engle Act gave the Secretary of Defense authority to determine whether and when mineral leasing would occur in defense withdrawals and what conditions would be included in the leases. 43 U.S.C. § 158. Only then could the Secretary of the Interior issue the mineral leases. Similarly, the Secretary of the Interior could have determined whether and when to lease and what conditions would be included in the leases in areas within PLO 82. These same safeguards are not available when leasing is conducted by the State.

In 1943, when PLO 82 was first promulgated, mining claim locations secured title to the oil and gas beneath the claim to the mining claimant. Upon passage of the Multiple Mineral Development Act of 1954, 30 U.S.C. §§ 521-531, a mining claimant no longer obtained title

⁹²23 FR 2637-38 (1958). PLO 1621 opened two areas on the North Slope to mining and minerals leasing. The first lay between the Canning and Colville Rivers. The second area lay west of NPR-4 and lay between that Reserve and Cape Lisburne. The portions of PLO 82 which withdrew the Katalla-Yakataga area in southern Alaska and the Alaska Peninsula in Southwest Alaska had already been completely revoked by PLO 323. 11 FR 9141-42 (1946).

⁹³We are aware of the tension between the holding of ANWR lands for military purposes under PLO 82 and the segregation of ANSR lands under PLO 1621 in order to study them for use as a wildlife refuge. Nonetheless, while the Executive had begun at the time of statehood the necessary steps towards the creation of a refuge, the Executive had not yet formalized this change of purpose. Consequently, the lands were still formally held for military purposes at statehood and remained protected under sec. 11(b).

⁹⁴See *supra* n. 68.

to leasable minerals such as oil, gas, and coal within the boundaries of the claim. After 1947, mining claims within the beds of navigable waters in Alaska no longer vested any title at all, but only the right to extract minerals. 30 U.S.C. § 49(a). The Mineral Leasing Act, 30 U.S.C. §§ 181 *et seq.*, had also undergone substantial amendments. Neither mineral leasing activity nor mining carried the threat to Federal control over petroleum production that they had in 1943. The modification of PLO 82 did not allow unfettered production of the oil and gas, but development of the oil and gas under Federal statutes and regulations. Production could be ordered to be suspended. 30 U.S.C. § 209 (1958). This would preclude Federal liability in the event of a military evacuation. Royalty could be taken in kind if needed for military purposes. 30 U.S.C. § 192 (1958). Furthermore, the military could obtain oil and gas from Federal lessees in Alaska through purchase without first having to expend considerable exploration, development and production costs. These modifications provided no threat or danger in case of national emergency, nor would there be any financial obligation accruing to the Federal Government in case of increased military activity. In fact, it constituted a financial benefit to the United States not to have to incur the costs associated with bringing oil and gas on line. Further, although the lands had been opened to mining claims since September 1, 1958, there is no indication of any conflict between miners and military users.

Finally, the contemporaneous interpretation of the Department was that PLO 82 was intact at statehood. In a July 4, 1958, explanatory memorandum to the White House, the Department included the following as among the withdrawals already in effect north and west of section 10 line:

Naval Petroleum Reserve No. 4 and the area covered by Public Land Order 82—areas already under the exclusive control of the Federal Government—contain about 48,800,000 acres. PLO 82 lands were opened to mineral entry, only, on April 16, 1958. No homesteading or other entry under the public land laws is permitted in either of these areas at the present time.

See Explanatory Memorandum at 2, *supra* n. 91.

Although I conclude that PLO 82 continued to hold submerged lands after its modification by PLO 1621, still meeting the first prong of the *Utah Lake* test, when viewed in the best light for the State, the opening of certain areas of PLO 82 to mining and oil and gas development evinces no intent with respect to title of such lands after statehood. That PLO 1621 only modified PLO 82, rather than revoking it, implies that ownership of the lands subject to it would not change at statehood.⁹⁵ Nonetheless, this is not sufficient to meet the second

⁹⁵ The final statehood debates on the Senate floor after the issuance of PLO 1621, demonstrate a congressional intent to withhold the entire PLO 82 area from the State. For example:

MR. WATKINS. I do not understand that it would ever become anything but Federal property even though it were within the State of Alaska.

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prong of the *Utah Lake* test. To resolve this issue, it is necessary to examine the Alaska Statehood Act and its legislative history to determine whether there existed an affirmative intent to defeat state title to the remainder of the submerged lands within PLO 82.

V. APPLICATION OF THE *UTAH LAKE* TEST TO ALASKA STATEHOOD

I have concluded in Section III., *supra*, that in 1943 PLO 82 only met the first prong of the *Utah Lake* test. In Section IV., *supra*, I concluded that those portions of PLO 82 comprising ANWR and NPR-4 met the second prong of the *Utah Lake* test. I also concluded that PLO 1621 which opened the remaining portions of PLO 82 to mining and mineral leasing did not operate to remove submerged lands from PLO 82, but that there was insufficient evidence of executive intent to defeat state title to submerged lands in those portions of PLO 82. I now turn to the Alaska Statehood Act to determine whether Congress expressed or otherwise made plain an intent to defeat state title for all PLO 82 lands in northern Alaska.

A. Congress had Authority to Defeat State Title to Submerged Lands at Statehood

Although the *Utah Lake* test is applicable here, Congress' express treatment in the ASA of certain reservations existing at the time of statehood distinguishes this case from the *Utah Lake* case. In *Utah Lake*, Congress did not address the then existing Utah Lake withdrawal in the Utah Statehood Act.⁹⁶ Here, Congress expressly addressed in the ASA what lands would pass to the State. The Supreme Court has repeatedly recognized Congress' power to defeat state title to submerged lands prior to statehood. *See, e.g., United States v. Holt State Bank*, 270 U.S. 49 (1926); *Shively v. Bowlby*, 152 U.S. 1 (1894); and *Goodtitle v. Kibbe*, 50 U.S. (9 How.) 471 (1850). In *Alabama v. Texas*, 347 U.S. 272 (1954), the Supreme Court stated:

Article 4, § 3, Cl. 2 of the Constitution provides that 'The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory and other Property belonging to the United States.' The power over the public land thus entrusted to Congress is without limitations. 'And it is not for the courts to say how that trust shall be administered. That is for Congress to determine.' *United States v. California*, 332 U.S. 19, 27 * * *.

Id. at 273. In fact, the Court acknowledges as much in *Utah Lake*:

MR. JACKSON. [One of the Floor Managers of the Statehood Bill] * * * The Federal Government is asking to have exclusive jurisdiction reserved to administer this area, if necessary. That is all that is meant.

MR. WATKINS. That does not mean that the legal ownership changes at all.

MR. JACKSON. Not at all. We are talking principally about two communities, Nome and Kotzebue, in addition to one or two others. In all of Alaska, the Federal Government owns 99.9 percent of the land. One-tenth of 1 percent of the land in Alaska is either privately owned or owned by a city or some other political subdivision of the Territory. In this particular area, I think the percentage is even greater than 99.9, because the particular area involved is the north country, north of the Brooks Range.

104 Cong. Rec. 12626 (1958).

⁹⁶28 Stat. 107 (1894).

The Property Clause grants Congress plenary power to regulate and dispose of land within the Territories * * *

Although arguably there is nothing in the Constitution to prevent the Federal Government from defeating a State's title to land under navigable waters by its own reservation for a particular use, the strong presumption is against finding an intent to defeat the State's title.

482 U.S. at 201.

In the issue at hand, while Congress did address certain reservations existing at the time of Alaska Statehood,⁹⁷ it by no means addressed all the withdrawals in the Territory of Alaska nor were all the lands in the Territory of Alaska withdrawn at the time of statehood. Thus, for the most part submerged lands underlying navigable bodies of water within Alaska did pass to the State of Alaska at statehood.

B. The ASA Constitutes a Compact Between the Future State of Alaska and the United States by which Alaska Agreed to Receive Only Those Lands Granted or Confirmed to It Under the Statehood Act

Section 1 of the ASA provides in part:

[T]he State of Alaska is hereby declared to be a State of the United States of America, [and] is declared admitted into the Union on an equal footing with the other States in all respects whatever * * *

72 Stat. 339 (bracketed material added).

Section 4 of the ASA provides in part:

As a compact with the United States said State and its people do agree and declare that they forever disclaim all right and title to any land or other property not granted or confirmed to the state or its political subdivisions by or under the authority of this Act, the right or title to which is held by the United States * * *

72 Stat. 339. This section makes clear that the United States and Alaska entered a compact by which Alaska became a state on the condition that its people "disclaim all right and title" to the lands not granted or confirmed to it in the ASA.

Section 5 of the ASA establishes Congress' intent to withhold at least some Federal land from the new State:

The State of Alaska and its political subdivisions, respectively, shall have and retain title to all property, real and personal, title to which is in the Territory of Alaska or any of the subdivisions. *Except* as provided in section 6 hereof, the United States shall retain title to all property, real and personal, to which it has title, including public lands.

72 Stat. 339, 340 (italics added).

Sections 7 and 8 of the ASA set out the procedures for Alaska to secure statehood. Section 8(b) called for a plebiscite of all voting citizens of Alaska concerning the terms of the compact offered to them in exchange for statehood. Various propositions were put to the voters who had to approve all the propositions to secure statehood. Section 8 provides in part:

⁹⁷ See, *inter alia*, secs. 4, 6, and 11 of the ASA, 72 Stat. 339, 340-43, 347-48.

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(b) At an election designated by proclamation of the Governor of Alaska, which may be the general election held pursuant to subsection (a) of this section, or a Territorial general election, or a special election, there shall be submitted to the electors qualified to vote in said election, for adoption or rejection, by separate ballot on each, the following propositions: * * * (3) *All provisions of the Act of Congress approved [date of approval of this Act] reserving rights or powers to the United States, as well as those prescribing the terms or conditions of the grants of lands or other property therein made to the State of Alaska, are consented to fully by said State and its people.*⁹⁸

In the event each of the foregoing propositions is adopted at said election by a majority of the legal votes cast on said submission, the proposed constitution of the proposed State of Alaska, ratified by the people at the election held on April 24, 1956, shall be deemed amended accordingly. *In the event any one of the foregoing propositions is not adopted at said election by a majority of the legal votes cast on said submission, the provisions of this Act shall thereupon cease to be effective * * **

72 Stat. 339, 343-44 (italics added).⁹⁸

The foregoing establishes four important elements in the agreement between Alaska and the United States which resulted in statehood for Alaska. First, Alaska entered the Union on an equal footing with other states. Second, the Statehood Act is a compact. Third, the voters of Alaska reviewed and approved the compact. Fourth, Alaska would only get those lands granted or confirmed to it under the ASA, nothing more. 72 Stat. 339-40, 344.

C. Section 6(m) of the Alaska Statehood Act Applies the Submerged Lands Act to Alaska

Section 6 of the ASA contains 13 major subdivisions, (a) through (m). 72 Stat. 339, 340-343. Each of these subdivisions contains one or more grants or confirmations of title, and each contains one or more terms, conditions, or limitations on those grants or confirmations. I will discuss in depth section 6(m) because of its relevance to PLO 82.

Section 6(m) of the ASA provides in full:

The Submerged Lands Act of 1953 (Public Law 31, Eighty-third Congress, first session; 67 Stat. 29) shall be applicable to the State of Alaska and the said State shall have the same rights as do existing States thereunder.

72 Stat. 339, 343.

Unlike the State of Utah, which received its statehood 57 years before the passage of the Submerged Lands Act in 1953, Alaska received statehood 5 ½ years after the Submerged Lands Act, and section 6(m) made the Submerged Lands Act applicable to Alaska.

The Submerged Lands Act, 43 U.S.C. §§ 1301-1315 (SLA), accomplished two major purposes. First, it made a new grant of submerged lands to all states bounded by the Atlantic Ocean, the

⁹⁸The plebiscite passed on Aug. 26, 1958, and the Acting Governor certified its passage in a letter to the President on Dec. 23, 1958. See also Proc. No. 3269, 24 FR 81-82 (1959).

Pacific Ocean, the Gulf of Mexico, or the Great Lakes.⁹⁹ Second, it statutorily confirmed and codified the judicial decisions embodying the equal footing doctrine that ordinarily states were vested with title to submerged lands beneath inland navigable waters, except in certain circumstances.

Section 3(a) of the SLA states:

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

43 U.S.C. § 1311(a) (*italics added*).

Given that earlier judicial decisions had eroded the constitutional basis for the presumption that states were vested with title to submerged lands beneath inland navigable waters, Congress feared that the Supreme Court would repudiate state title to inland navigable waters¹⁰⁰ in the same manner it had repudiated state title to the bed of the marginal sea. *See, e.g., United States v. California*, 332 U.S. 19 (1947), *United States v. Louisiana*, 339 U.S. 699 (1950), *United States v. Texas*, 339 U.S. 707 (1950). The Senate Report accompanying the bill that would become the Submerged Lands Act states:

State officials from every inland state in the Union, except three, testified or submitted statements that in their opinion the decision [*United States v. California*] had clouded the long asserted titles of the inland States to lands and natural resources below navigable waters within the boundaries of the inland States.

S. Rep. No. 133, 83d Cong., 1st Sess. 62 (1953) (*bracketed material added*).¹⁰¹

Congress had heard testimony that the doctrine of state ownership of the beds of navigable inland waters was an extension of the rule of state ownership of the marginal sea. Hence, Congress assumed that because the Supreme Court had overruled state title to the marginal sea, it might, as a logical extension, overrule state title to inland submerged lands as well. *Id.* at 62-63.

The Senate Committee on Interior and Insular Affairs stated the purpose of the Submerged Lands Act in reporting the bill out of committee:

The purpose of this legislation is to write the law for the future as the Supreme Court believed it to be in the past—that the States shall all have proprietary use of all of the lands beneath inland navigable waters within their territorial jurisdiction whether

⁹⁹Sec. 4 of the SLA, 43 U.S.C. § 1312.

¹⁰⁰*See* S. Rep. No. 133, 83d Cong., 1st Sess. (1957) and *Minority Views*, S. Rep. No. 133 (Part 2), 83d Cong., 1st Sess. (1957).

¹⁰¹The same Senate Report cites the source of this title as "*Pollard v. Hagan* (3 How. 212, 229 1845)." *Id.* at 7.

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inland or seaward subject to only the governmental powers delegated to the United States by the Constitution.

Id. at 8. The Senate Judiciary Committee had similar language. *Id.* at 56-57.

While the Submerged Lands Act confirmed and granted to the states title to the submerged lands beneath inland navigable waters and the marginal sea, the Act also listed the circumstances under which title to these lands would not pass to a state. These circumstances are set out in sections 2(f),¹⁰² 5(a), 5(b), and 5(c)¹⁰³ of the Submerged Lands Act. The Submerged Lands Act also reasserted the primary right of the United States to the use and control of the waters above such submerged lands in sections 3(d) and 6,¹⁰⁴ and stated that these primary Federal powers did not include the title to the submerged lands and the natural resources located therein. These primary Federal powers include the navigational servitude, regulation of navigation, regulation of commerce, control of floods, generation of power, maintenance of national defense, and supervision of international affairs.

¹⁰²Sec. 2(f) states:

The term 'lands beneath navigable waters' does not include the beds of streams in lands now or heretofore constituting a part of the public lands of the United States if such streams were not meandered in connection with the public survey of such lands under the laws of the United States and if the title to the beds of such streams was lawfully patented or conveyed by the United States or any State to any person; * * *

43 U.S.C. § 1301(f).

¹⁰³Secs. 5(a), (b), and (c) state:

There is excepted from the operation of section 1311 of this title—

(a) all tracts or parcels of land together with all accretions thereto, resources therein, or improvements thereon, title to which has been lawfully and expressly acquired by the United States from any State or from any person in whom title had vested under the law of the State or of the United States, and all lands which the United States lawfully holds under the law of the State; *all lands expressly retained by or ceded to the United States when the State entered the Union* (otherwise than by a general retention or cession of lands underlying the marginal sea); all lands acquired by the United States by eminent domain proceedings, purchase, cession, gift, or otherwise in a proprietary capacity; all lands filled in, built up, or otherwise reclaimed by the United States for its own use; and any rights the United States has in lands presently and actually occupied by the United States under claim of right;

(b) such lands beneath navigable waters held, or any interest in which is held by the United States for the benefit of any tribe, band, or group of Indians or for individual Indians; and

(c) all structures and improvements constructed by the United States in the exercise of its navigational servitude.

43 U.S.C. §§ 1313(a), (b), and (c) (italics added).

¹⁰⁴Sec. 3(d) states:

Nothing in this subchapter or subchapter I of this chapter shall affect the use, development, improvement, or control by or under the constitutional authority of the United States of said lands and waters for the purposes of navigation or flood control or the production of power, or be construed as the release or relinquishment of any rights of the United States arising under the constitutional authority of Congress to regulate or improve navigation, or to provide for flood control, or the production of power; * * *

43 U.S.C. § 1314.

Sec. 6 states:

(a) The United States retains all its navigational servitude and rights in and powers of regulation and control of said lands and navigable waters for the constitutional purposes of commerce, navigation, national defense, and international affairs, all of which shall be paramount to, but shall not be deemed to include, proprietary rights of ownership, or the rights of management, administration, leasing, use, and development of the lands and natural resources which are specifically recognized, confirmed, established, and vested in and assigned to the respective States and others by section 1311 of this title.

(b) In time of war or when necessary for national defense, and the Congress or the President shall so prescribe, the United States shall have the right of first refusal to purchase at the prevailing market price, all or any portion of the said natural resources, or to acquire and use any portion of said lands by proceeding in accordance with due process of law and paying just compensation therefor.

43 U.S.C. § 1314.

In sum, section 6(m) of the ASA applies the SLA to Alaska. Section 3(a) of the SLA effectively grants to the State title to lands underlying navigable bodies of water, with the exceptions set out in sections 2(f), 5(a), 5(b) and 5(c) of the SLA. The relevant exception is section 5(a) of the SLA which excludes from the grant "all lands expressly retained by or ceded to the United States when the State entered the Union * * *" 43 U.S.C. § 1313(a).

D. The Relationship Between the *Utah Lake* Test and the Submerged Lands Act

The State of Alaska has argued that section 1 of the ASA which states that Alaska "is declared admitted into the Union on an equal footing with the other States in all respects whatever * * *" (72 Stat. 339) acts as a grant of lands to the State under the equal footing doctrine. Section 1 cannot be read in isolation, however, and I must look at other sections of the ASA to determine whether Congress intended to pass title to the inland submerged lands in PLO 82.

The language of at least sections 4, 5, 6 and 11 defines the application of section 1.¹⁰⁵ In section 4, the State agreed to "disclaim all right and title to any land or other property not granted or confirmed to the State or its political subdivisions by or under the authority of this Act * * *" Section 5 provides that: "Except as provided in section 6 hereof, the United States shall retain title to all property, real and personal, to which it has title, including public lands." 72 Stat. 339, 340. This plain reading of the ASA does not read the reference to equal footing in section 1 out of the ASA.

Even though I have concluded that section 1 of the ASA must be read in context with the other sections of the Act, including section 6(m), to my knowledge no court has expressly held that the SLA has completely subsumed the equal footing doctrine as to submerged lands underlying navigable bodies of water so that the doctrine no longer has any vitality apart from the SLA.¹⁰⁶ One could argue that Congress merged the two inquiries because the *Utah Lake* test asks whether Congress affirmatively intended to defeat a future state's title to such land, and section 5(a) of the SLA affirmatively expresses this congressional intent where lands are "expressly retained by or ceded to the United States" at statehood.¹⁰⁷ The essential distinction between the two analyses is that the *Utah Lake* test is premised on a strong

¹⁰⁵The 1957 Senate Report recognized that sec. 1 was defined by other sections of the ASA. "Section 1 declares that * * * the State of Alaska is admitted into the Union on an equal footing with other states, subject to the provisions of the act * * *" S. Rep. No. 1163, 85th Cong., 1st Sess. at 15 (1957). The House Report contains a similar understanding: "Section 1 provides that subject to the provisions of this act * * * the State of Alaska is recognized and declared admitted into the Union on an equal footing with all other States." H.R. Rep. No. 624, 85th Cong., 1st Sess. 18 (1957).

¹⁰⁶In *Utah Lake*, the Court found there was no reservation of the bed of Utah Lake. Therefore, the Court did not need to examine the provisions of the SLA regarding Federal retention of submerged lands and any possible conflict between the judicially inferred congressional policy of the equal-footing doctrine and the express statement of congressional policy in the SLA. The Ninth Circuit in *U.S. v. Alaska*, 423 F.2d 764 (9th Cir. 1970), suggests that where a specific provision of the Statehood Act addresses a particular withdrawal there is no need to examine the SLA.

¹⁰⁷This would be true for all of the exceptions to a grant of state title in the SLA. See 43 U.S.C. §§ 1301(f), and 1313(a), (b), and (c).

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presumption against defeat of state title,¹⁰⁸ while the SLA is arguably controlled by the rule of construction that grants by the Federal Government be construed favorably to the government "inferences being resolved not against but for the government."¹⁰⁹ Although an argument exists that Congress subsumed the equal footing doctrine, in whole or in part, into the SLA, it is not necessary to resolve this issue here because I will independently apply both (1) the *Utah Lake* test to determine whether Congress expressed or otherwise made very plain an intent to defeat state title to submerged lands in PLO 82 and (2) the SLA to determine whether PLO 82 meets the exception for lands expressly retained or ceded to the United States at statehood. I now turn to the pertinent legislative history of the ASA and, in particular, section 11(b) to determine whether Congress demonstrated an intent to defeat the state title to the submerged lands contained in PLO 82.

E. Congress Expressed in the Alaska Statehood Act Concern Over Certain Petroliferous and Military Areas in Alaska and Gave Them Special Treatment

During the statehood debate, the Congress considered whether to preclude the new State of Alaska from ownership or selection up to 95 million acres of Federal reservations.¹¹⁰ These included over 48 million acres of lands on the North Slope held under PLO 82. The understanding repeatedly expressed during the Alaska Statehood proceedings was that the State would be excluded from these lands:

[There] is a naval petroleum reserve which encompasses practically all of northern Alaska, and it is part of the land which *the State will not be able to choose* under the Saylor bill or any other bill because it is already a Federal withdrawal or reserve.

Hearings on Miscellaneous Statehood Bills Before the House Committee on Interior and Insular Affairs, Subcommittee on Territories and Insular Possessions, 83rd Cong., 1st Sess. 158 (1953) (1953 House Hearings) (*italics and bracketed material added*) (Statement of Mr. George Sundborg, General Manager, Alaska Development Board). The understanding on the Senate side was the same. Senator Barrett, member of the Senate Interior and Insular Affairs Committee, stated: "[T]he Federal Government is keeping all of those reservations, those reserved lands, for itself." Hearings on S. 50 Before the Senate Committee on Interior and Insular Affairs, 83rd Cong., 1st Sess. 91 (1953) (1953 Senate Hearings).

The Senate's 1954 hearings contain the following exchange:

SENATOR SMATHERS. * * * [T]here is a more valuable part south of the middle line there and [the proponents of statehood] said that would be the profitable area and they

¹⁰⁸ 482 U.S. at 201.

¹⁰⁹ 86 I.D. 151, 172, citing *Great Northern Ry. Co. v. U.S.*, 315 U.S. 262 (1942); *Caldwell v. U.S.*, 250 U.S. 14 (1919); and *Shively v. Bowlby*, 152 U.S. 1, 10 (1893).

¹¹⁰ See *supra* n. 13.

would not mind leaving that vast expanse of tundra in the north in the hands of the Federal Government.

* * * * *

SENATOR JACKSON. George [Senator Smathers], I will say that the northern portion of Alaska, essentially the top tier of area, is now an oil reserve * * *. It runs all the way to Canada * * * the middle area is naval, and the western and eastern portions of the top tier are under Public Land Order No. 82.

* * * * *

SENATOR CORDON. It may be that the petroleum reserve is a good reason *not to grant the land in that area to the State of Alaska*, but that is no reason for not including it within the State boundaries for administrative purposes.

Hearings on S. 50 Before the Senate Committee on Interior and Insular Affairs, 83rd Cong., 2nd Sess. 9-10 (1954) (1954 Senate Hearings) (italics and bracketed material added).

Later in those same hearings members of the Senate Interior Committee confirmed that PLO 82 would prevent any non-federal use of the lands withdrawn thereby:

SENATOR CORDON. I have a note here that Naval Petroleum Reserve No. 4 covers about 28 million acres, and that Public Land Order 82, which is a reservation order, covers about 49 million acres, all north of the Brooks Range, and that the naval reserve is entirely within that public land order. So the total area north of the range which is reserved would be about 49 million acres.

SENATOR SMATHERS. That means that in that reserve, no individual, company or individual can go in there; that the Navy must give them authority to go in?

DR. REED [Staff Coordinator, Office of the Director, Geological Survey]. That is within the pink area [NPR-4], sir; and with the gray area [PLO 82] the same is true, but not because of the Navy.

SENATOR CORDON. *The reservation there is absolute.*

DR. REED. Yes.

1954 Senate Hearings at 115 (italics and bracketed material added).

At the request of the Senate Committee on Interior and Insular Affairs, the Navy prepared an amendment to the proposed statehood act that would have authorized the prospective state to make selections within the PLO 82 withdrawal area.¹¹¹ The amendment was never enacted, thus arguably reflecting Congress' intent that PLO 82 continue as a bar to state acquisition of lands in the PLO 82 withdrawal area.

As the Senate committee's rejection of the PLO 82 amendment demonstrates, Congress understood that, without contrary congressional directives, the many Federal administrative withdrawals in Alaska defeated the prospective state's rights to select land therein. That understanding is clear in the following exchange in the 1957 House Hearings:

¹¹¹See letter from Thomas S. Gates, Jr., Acting Secretary of the Navy, to Senator Hugh Butler, Chairman of the Senate Committee on Interior and Insular Affairs, dated Feb. 17, 1954, reprinted in Senate Hearings at 350.

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DR. MILLER. I have one question. I think it probably should be directed to Mr. Bartlett [Delegate from Alaska]. That is on page 2:

The State of Alaska shall consist of all the Territory, together with the Territorial waters appurtenant thereto, now included in the Territory of Alaska.

That I understand. However, do you later on in the bill then make some exceptions for the withdrawal of lands that have already been established by the Federal Government?

MR. BARTLETT. Yes, *all existing reservations are continued* in that status, Dr. Miller.

DR. MILLER. Do you know how many acres are now in reservation withdrawals?

MR. BARTLETT. I doubt if anyone even in the Interior Department could answer that specifically. I think a good estimate would be between 90 and 95 million acres.

DR. MILLER. Between 90 and 95 million. I have a map here. It is an old one, I know. I have been looking it over. And I find a lot of the rich mineral lands, the rich oil lands, that have been described in the testimony, apparently are in the withdrawal, the Territorial withdrawal. And in that respect I have a letter dated March 14, [1957] addressed to our chairman, Mr. O'Brien, in which an attempt is made to bring up to date the withdrawals of the Alaska land as of October 1956; *oil and gas reservations north of the Brooks Range, including naval petroleum company reserves, 48,800,000 acres* [referring to PLO 82].

Now that presumably *would not be available for oil development by the new State* so that it could become a State.

1957 House Hearings at 235 (*italics and bracketed material added*).

As to military areas, the Department of Defense repeatedly expressed concern about the wisdom of statehood for Alaska due to the strategic location and military commitment to the region.¹¹² As a result, defense issues received serious consideration during the statehood proceedings.¹¹³ For this reason, consideration was given to a proposal to limit the boundaries of the State to only a portion of the Territory of Alaska for defense reasons.¹¹⁴

Later, the boundary issue was addressed by the Administration's proposal of what would become section 10 of the ASA.¹¹⁵ As embodied in section 10 of the ASA, a line was drawn through the middle of Alaska. South and east of the line, the State could freely select lands; north and west of the line, the State could only select lands with consent of the President, and the President could create at any future

¹¹²Hearings on S. 49 Before the Senate Committee on Interior and Insular Affairs, 85th Cong. 1st Sess. 104 (1957) (1957 Senate Hearings).

¹¹³President Eisenhower endorsed Alaska Statehood subject to "area limitations and other safeguards for the conduct of defense activities so vitally necessary to our national security * * *" Annual Budget Message to the Congress for Fiscal Year 1958, *Public Papers of the Presidents*, Dwight D. Eisenhower at 57 (Jan. 16, 1957). Upon passage of the Alaska Statehood Act the President noted in his signing statement that his defense concerns had been addressed by sec. 10. Statement by the President Upon Signing Alaska Statehood Bill, *Public Papers of the Presidents*, Dwight D. Eisenhower at 525 (July 7, 1958).

¹¹⁴Hearings on S. 49 Before the Senate Committee on Interior and Insular Affairs, 85th Cong., 1st Sess. 104 (1957) (1957 Senate Hearings).

¹¹⁵See Department of the Interior transmittal letter of Mar. 22, 1957 *Alaska Statehood: Hearings before the Committee on Interior and Insular Affairs, United States on S. 49 and S.35*, 85th Cong., 1st Sess. 2 (1957). Alaska Delegate Bartlett stated: "The proposal [sec. 10] was acceptable to Alaskans * * * because of the fact that it did not propose to diminish the boundaries of Alaska." *Id.* at 11.

time national defense withdrawals and administer the area under exclusive legislative jurisdiction.

The precise delineation of the section 10 line through the State received some modification, but the basic concept remained intact throughout the statehood proceedings. The final line appears in section 10(b) of the ASA and generally follows 5 miles from the right bank of the Porcupine, Yukon and Kuskokwim Rivers, and then along the shore of Kuskokwim Bay. Thereafter, the line follows certain longitudes and latitudes to the Pacific Ocean (PYK Line).¹¹⁶

In section 6(b) of the ASA, Congress provided that no state selections could be made north or west of the PYK Line unless previously approved by the President or his delegee.¹¹⁷ Congress reaffirmed the PYK line and the limitation on state selection in section 906(p) of ANILCA in 1980. 43 U.S.C. § 1635(p).

F. Section 11(b) Makes Plain Congress' Intent to Defeat State Title to Submerged Lands Which Immediately Prior to Statehood Were Owned by the United States and Held for Military Purposes

In measuring the ASA against the *Utah Lake* test, I now examine section 11(b) to determine whether the language, purpose, and effect of the section make plain that Congress, at the time of statehood, intended to defeat state title to lands beneath navigable waters on lands described in section 11(b).

Section 11(b) reads in part as follows:

Notwithstanding the admission of the State of Alaska into the Union, authority is reserved in the United States, subject to the proviso hereinafter set forth, for the exercise by the Congress of the United States of the power of exclusive legislation, as provided by article I, section 8, clause 17 of the Constitution of the United States, in all cases whatsoever over such tracts or parcels of land as, immediately prior to the admission of said State, are owned by the United States and held for military, naval, Air Force, or Coast Guard purposes, including naval petroleum reserve numbered 4, whether such

¹¹⁶Sec. 10(b) of the ASA states:

(b) Special national defense withdrawals established under subsection (a) of this section shall be confined to those portions of Alaska that are situated to the north or west of the following line: Beginning at the point where the Porcupine River crosses the international boundary between Alaska and Canada; thence along a line parallel to, and five miles from, the right bank of the main channel of the Porcupine River to its confluence with the Yukon River; thence along a line parallel to, and five miles from, the right bank of the main channel of the Yukon River to its most southerly point of intersection with the meridian of longitude 160 degrees west of Greenwich; thence south to the intersection of said meridian with the Kuskokwim River; thence along a line parallel to, and five miles from the right bank of the Kuskokwim River; thence along the shoreline of Kuskokwim Bay to its intersection with the meridian with the parallel of latitude 57 degrees 30 minutes north; thence east to the intersection of said parallel with the meridian of longitude 156 degrees west of Greenwich; thence south to the intersection of said meridian with the parallel of latitude 50 degrees north.

72 Stat. 339, 345.

¹¹⁷Sec. 6(b) of the ASA states:

The State of Alaska, in addition to any other grants made in this section, is hereby granted and shall be entitled to select, within twenty-five years after the admission of Alaska into the Union, not to exceed one hundred and two million five hundred and fifty thousand acres from the public lands of the United States in Alaska which are vacant, unappropriated, and unreserved at the time of their selection: *Provided*, That nothing herein contained shall affect any valid existing claim, location, or entry under the laws of the United States, whether for homestead, mineral, right-of-way, or other purpose whatsoever, or shall affect the rights of any such owner, claimant, locator, or entryman to the full use and enjoyment of the lands so occupied: *And provided further*, *That no selection hereunder shall be made in the area north and west of the line described in section 10 without approval of the President or his designated representative.*

72 Stat. 339, 340 (italics added).

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lands were acquired by cession and transfer to the United States by Russia and set aside by Act of Congress or by Executive order or proclamation of the President or the Governor of Alaska for the use of the United States, or were acquired by the United States by purchase, condemnation, donation, exchange, or otherwise * * *.

72 Stat. 339, 347 (italics added).

There is no dispute that virtually all the lands within PLO 82 were owned by the United States immediately prior to the admission of the State.¹¹⁸ Moreover, I believe that the phrase "immediately prior to the admission of said State" makes very plain Congress' intent to include submerged lands in this section. Under the equal-footing doctrine it is land status at the moment of statehood that determines what lands underlying navigable bodies of water pass to the State. Accordingly, the reference in section 11(b) to "immediately prior to the admission of said State" demonstrates congressional intent to exclude the effect of the equal footing doctrine to pass title to the State in determining which lands would be covered by this provision. This view is confirmed by the first phrase of section 11(b): "Notwithstanding the admission of the State of Alaska into the Union * * *" In other words, in interpreting section 11(b) one may not consider what effect the admission of the State might otherwise have had on the lands subject to section 11(b).

Further, section 11(b) requires lands owned by the United States to be held¹¹⁹ for "military, naval, Air Force, or Coast Guard purposes, including naval petroleum reserve numbered 4 * * *."¹²⁰ PLO 82 itself contains the heading: "Withdrawing Public Lands in Connection with the Prosecution of the War." This is plainly a military purpose. Although one motivation for PLO 82 was the search for oil and gas, the United States quickly learned that it needed the area of the withdrawal for other military purposes, especially as military activities shifted from the "hot war" of World War II to the "cold war" with the Soviet Union. Other military uses employed in the PLO 82 area comprised long range radio navigation, the use of electronic surveillance, including radar, and scientific research necessary for future combat in polar regions.

¹¹⁸ 104 Cong. Rec. 12626 (1958). See *supra* n. 95.

¹¹⁹ "Held" is a term broader than the term "reservation." "Held" can in this context also mean "to have authority over" and include lands occupied or appropriated by the military. So "held" as used in sec. 11(b) expands the scope of lands captured by sec. 11(b) rather than limiting it. For example, it would include lands outside of a formal reservation, but actually occupied by, or subject to the authority of, the military.

¹²⁰ One could argue that because NPR-4 was specifically included in this sentence of sec. 11(b) Congress meant to exclude PLO 82. I am unpersuaded. I believe the better inference is that because all naval petroleum reserves were excluded from the Engle Act, 43 U.S.C. § 155, addressing defense withdrawals, it was necessary to specifically name NPR-4 in the list of military purpose withdrawals to assure its protection as a pre-existing defense withdrawal. See S. Rep. No. 1163, 85th Cong., 1st Sess. 3 (1957); *Hearings on S. 49 Before Senate Interior and Insular Affairs Committee*, 85th Cong., 1st Sess. 101 (1957). Moreover, a reading that the reference to the petroleum reserve specifically excluded PLO 82 would raise questions about every other military naval, Air Force, and Coast Guard facility in the State because they, like PLO 82, are not specifically enumerated. Lastly, the third proviso to sec. 11(b) lists "military, naval, Air Force, and Coast Guard purposes" but does not reference the petroleum reserve. This strongly suggests that Congress intended the more general references to control and that the earlier specific reference to the petroleum reserve was merely to overcome an inference arising from the Engle Act.

A report prepared by the Office of Naval Research, Department of the Navy, describes research projects sponsored or authorized by the Department of the Navy, which clearly required the use of inland waters and submerged lands, including waters, bays, and lagoons, during the period of PLO 82.¹²¹

PLO 82 was still in effect at the time of statehood and, therefore, continued to hold lands for military purposes. While the activities permitted within the withdrawal were changed from time to time, the lands, including submerged lands, originally in the northern Alaska portion of PLO 82 had not been altered or deleted in any way at the time of statehood. See discussion in Section IV, *supra*. It was not until December 6, 1960, almost 2 years after statehood, that PLO 82 was actually revoked.¹²²

Therefore, the submerged lands within PLO 82 meet the requirements of section 11(b) that (1) immediately prior to admission of the State they were owned by the United States and (2) immediately prior to the admission of the State they were held for military purposes.

Section 11(b) continues:

whether such lands were acquired by cession and transfer to the United States by Russia and set aside by Act of Congress or by Executive order or proclamation of the President or the Governor of Alaska for the use of the United States, or were acquired by the United States by purchase, condemnation, donation, exchange, or otherwise * * *

72 Stat. 339, 347.

All lands within PLO 82 were acquired "by cession and transfer to the United States by Russia." A question arises whether the phrase "and set aside by Act of Congress or by Executive order or proclamation of the President" includes a public land order, like PLO 82. As stated earlier, Acting Secretary Fortas issued PLO 82 under a presidential delegation of authority in EO 9146. EO 9146 reads, in part:

AUTHORIZING THE SECRETARY OF THE INTERIOR TO WITHDRAW AND
RESERVE PUBLIC LANDS

By virtue of the authority vested in me by the act of June 25, 1910, c. 421, 36 Stat. 847, and as President of the United States, I hereby authorize the Secretary of the Interior to sign all orders withdrawing or reserving public lands of the United States, and all orders revoking or modifying such orders * * *

EO No. 9146, 3 CFR 1149-50 (1938-1943). The courts have held that the action of the Secretary in this context constitutes the action of the President. In *Wilbur v. United States*, 46 F.2d 217 (1930), *aff'd* 283 U.S. 414 (1931), the D.C. Circuit addressed the Supreme Court precedent on this issue as follows:

¹²¹ Reed, John C. and Ronhovde, Andreas G., *Arctic Laboratory* at 175-80 (1971) (prepared under Office of Naval Research, Department of the Navy, Contract No. N00014-70-A-0219-001). Further, Mr. Max Brewer, Director of the Naval Arctic Research Laboratory (NARL), from Sept. 1956 through July 1971, prepared the list appearing as Appendix 3 of permanent military facilities that the military had been constructed and used throughout the North Slope during the years leading up to and through the revocation of PLO 82. Numerous other sites were used briefly for military purposes. Mr. Brewer is now an employee of the U.S. Geological Survey in Anchorage, Alaska.

¹²² 25 FR 12599 (1960).

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It is settled law that 'the president speaks and acts through the heads of the several departments in relation to subjects which appertain to their respective duties' (*Wilcox v. Jackson*, 13 Pet. 498, 513, 10 L.Ed. 264), and that 'the acts of the heads of departments, within the scope of their powers, are in law the acts of the President' (*Wolsey v. Chapman*, 101 U.S. 755, 769, 25 L.Ed. 915) * * * If the President himself had signed the order in this case, and sent it to the registers and receivers who were to act under it, as notice to them of what they were to do in respect to the sales of the public lands, we cannot doubt that the lands would have been reserved by proclamation within the meaning of the statute. Such being the case, it follows necessarily from the decision in *Wilcox v. Jackson* that such an order sent out from the appropriate executive department in the regular course of business is the legal equivalent of the President's own order to the same effect. It was, therefore, as we think, such a proclamation by the President reserving the lands from sale as was contemplated by the act.' See, also, *United States v. Morrison*, 240 U.S. 192, 36 S.Ct. 326, 60 L.Ed. 599; *Northern Pacific Railway Co. v. Wismer*, 246 U.S. 283, 38 S.Ct. 240, 62 L.Ed. 716; *Relation of the President to the Executive Departments*, 7 Op. Attys. Gen. 453.

46 F.2d at 219-20.

Consequently, I conclude that Acting Secretary Fortas' action in issuing PLO 82 constituted an "Executive order or proclamation of the President" within the meaning of section 11(b). Moreover, if this were not the case, the same defect would exist under section 11(b) for pre-statehood defense withdrawals in Alaska virtually all of which were established by public land order. The legislative history of the ASA contains nothing to show that Congress thought public land orders would be ineffective under section 11(b). In fact, the legislative history strongly supports my conclusion. See Section V.E., *supra*.

Section 11(b) continues with three provisos related to my consideration here. The first reads:

(i) That the State of Alaska shall always have the right to serve civil or criminal process within the said tracts or parcels of land in suits or prosecutions for or on account of rights acquired, obligations incurred, or crimes committed within the said State but outside of the said tracts or parcels of lands * * *

72 Stat. 339, 347. This proviso allows the State of Alaska to pursue criminals and serve civil process within these reserved areas for actions occurring outside of the reserved areas. This power is recognized as consistent with exclusive legislative jurisdiction in the Federal Government and does not evince an intent either for or against state title.

The second proviso reads:

(ii) that the reservation of authority in the United States for the exercise by the Congress of the United States of the power of exclusive legislation over the lands aforesaid shall not operate to prevent such lands from being a part of the State of Alaska, or to prevent the said State from exercising over or upon such lands, concurrently with the United States, any jurisdiction whatsoever which it would have in the absence of such reservation of authority and which is consistent with the laws hereafter enacted by the Congress pursuant to such reservation of authority * * *.

72 Stat. 339, 347. This makes clear that despite the reservation of authority to exercise exclusive legislative jurisdiction¹²³ for certain lands, the lands would still be considered to be part of the State of Alaska. This expressly resolved the legal issue whether lands in this status were actually within a state. See *Howard v. Commissioners of the Sinking Fund of the City of Louisville, et al.*, 344 U.S. 624, 626 (1952). It also allows the State to legislate in these areas to the extent consistent with future laws Congress may enact for these areas. This allows state laws consistent with congressional purposes for the military holdings to remain in effect in these areas, but assures that Congress could authorize any Federal activities it chose in these areas without state law interference.

The third proviso reads:

(iii) that such power of exclusive legislation shall rest and remain in the United States only so long as the particular tract or parcel of land involved is owned by the United States and used for military, naval, Air Force, or Coast Guard purposes.

72 Stat. 339, 347. This provides for the termination of exclusive legislative jurisdiction when the lands subject to section 11(b) are no longer owned by the United States and used for military purposes. At that time, jurisdiction would revert to the State. S. Rep. No. 1163, 85th Cong., 1st Sess. 26(1957).

This proviso is exceedingly important as it makes plain Congress' intent to defeat state title to submerged lands within lands held for military purposes. If submerged lands were not included in the military lands held under section 11(b) and thus passed to the State at statehood, the third proviso would cause the lands to fall outside the ambit of section 11(b). Submerged lands would be both included under the first sentence of section 11(b) and excluded under the third proviso. Statutes should be construed to avoid an inconsistent or meaningless result. *Hughes Air Corp. v. Public Utilities Commission of California*, 644 F.2d 1334, 1338 (9th Cir. 1981) Moreover, there would be no mechanism in the ASA for Congress to reestablish exclusive legislative jurisdiction over these lands. Further, from a pure statutory construction perspective, excluding submerged lands under proviso three would render meaningless two phrases in the first sentence of the section: "[n]otwithstanding the admission of the State of Alaska into the Union" and "immediately prior to the admission of said State * * *."

Section 11(b) concludes with the following:

¹²³ Even though sec. 11(b) refers to "the power of exclusive legislation," when the State is permitted to exercise some degree of jurisdiction "concurrently with the United States," as in sec. 11(b), this is commonly referred to as "concurrent jurisdiction." See, e.g., 1964 Op. Att'y Gen., No. 2. See also letters from Deputy Attorney General William P. Rogers to Committee Chairman, dated May 14, 1957, contained in H.R. Rep. No. 624, 85th Cong., 1st Sess. 31-32 (1957) and S. Rep. No. 1163, immediately displace any state law inconsistent with congressional purposes for the areas referenced in sec. 11(b). In *Evans v. Cornman*, 398 U.S. 419, 424 (1970), the Supreme Court lists a number of instances of application of state law within areas of exclusive legislative jurisdiction that Congress had unilaterally and voluntarily retroceded.

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The provisions of this subsection shall not apply to lands within such special national defense withdrawal or withdrawals as may be established pursuant to section 10 of this Act until such lands cease to be subject to the exclusive jurisdiction reserved to the United States by that section.

72 Stat. 339, 347-48. This language provides that when the President includes section 11(b) lands in an emergency defense withdrawal under the provisions of section 10, section 10 applies until the lands are removed from the emergency defense withdrawal. For example, since the President can exercise section 10 authority anywhere north and west of the PYK Line, it is possible that PLO 82 on the North Slope could have become subject to an emergency defense withdrawal under section 10. In that event, the exclusive legislative jurisdiction provisions of section 10 would have controlled. S. Rep. No. 1163, 85th Cong., 1st Sess. 26 (1957).

G. Congress Must Have Intended to Defeat State Title to Submerged Lands Within Section 11(b) in order to Carry Out the Congressional Reservation of the Power of Exclusive Legislation and Congressional Control of All Land Held for Military Purposes

While exclusive legislative jurisdiction as a concept does not require Federal ownership of all lands within the boundary of exclusive legislative jurisdiction, in section 11(b) Congress tied exclusive legislative jurisdiction to lands *owned* by the United States. Congress did not want state law to interfere with potential military activities on Federal lands held for military purposes within Alaska.¹²⁴ Exclusive legislative jurisdiction and defeat of state title to submerged lands would prevent laws and state authorized activities incompatible with Federal uses from applying to lands held for military purposes. In this way, the military and any other agencies authorized by Congress to act in section 11(b) areas would not be affected by, for example, state contract law inconsistent with Federal contract law or state authorized occupancy of submerged lands, such as state leasing, that could interfere with ongoing military studies and operations and future military options. See, e.g., *Humble Pipe Line Co. v. Waggonner*, 376 U.S. 369, 373 (1964).

Exclusive legislative jurisdiction under section 11(b) attaches only so long as the lands are owned by the United States and held for military purposes. If section 11(b) did not defeat state title at statehood, then imposition of exclusive legislative jurisdiction under section 11(b) would have been impossible on any lands in Alaska underlying navigable bodies of water within lands held for military, naval, Air Force or Coast Guard purposes, including NPR-4. Though Congress could have authorized exclusive legislative jurisdiction over non-Federal property, it did not do so in section 11(b). Compare section

¹²⁴Sec. V.E., *supra*.

11(b) *with* sections 10(a) and 10(c) (making exclusive legislative jurisdiction applicable within the "exterior boundaries" of a national defense withdrawal).

Finally, if section 11(b) did not defeat state title to submerged lands within areas held for military purposes throughout Alaska, then a substantial risk exists that the submerged lands in every military facility in Alaska existing at statehood thereupon passed to Alaska. It is inconceivable that Congress intended to make submerged lands available to state leasing or other state-authorized activity within pre-statehood military facilities in Alaska. Military use of state-owned submerged lands within section 11(b) areas would either require compensation to the State as provided in section 6(b) of the Submerged Lands Act, 43 U.S.C. § 1314(b), or condemnation or purchase. Floor discussions demonstrate that Congress had no intention of paying for the acquisition of lands in northern Alaska for military purposes.¹²⁵ I believe that this makes very plain Congress' intent in section 11(b) to defeat state title to submerged lands in areas held for military purposes.

H. Section 10 Is Not An Effective Cure to an Interpretation that Section 11(b) did not Defeat State Title to Submerged Lands

Section 11(b) reserves to Congress the power of exclusive legislation for Federal lands used immediately prior to statehood for military purposes in Alaska. Section 10(a) authorizes the President to establish after statehood special national defense withdrawals north and west of the PYK Line in Alaska. Under section 10(c) these defense withdrawals would reserve exclusive legislative jurisdiction over all lands within the exterior boundaries of such withdrawals. One could argue that section 10 is available to cure the holes left in lands held for military purposes, if section 11(b) is interpreted not to have defeated state title to submerged lands. This argument is flawed for two reasons.

First, section 10 is not designed to cure a submerged lands problem. Although section 10 may allow the imposition of exclusive legislative jurisdiction over state-owned lands north and west of the PYK line, it cannot be read as answering the question of Congress' intent regarding submerged lands. Moreover, section 10 would do nothing to restore title to the Federal Government to any submerged lands that might have passed to the State. As stated in Section V.G., *supra*, military use of state-owned submerged lands would require compensation to the

¹²⁵ As stated by Senator Saltonstall:

The question is whether the particular section [section 10] of the bill referred to is valid or invalid. If it is invalid, What [sic] are the possibilities of getting the land back by condemnation or purchase? On that question I disagree with the Senator from Vermont, who says that the Federal Government can purchase 102,000 acres. 104 Cong. Rec. 12626 (1958) (bracketed material added). Senator Saltonstall was talking about the cost of acquiring the few privately owned lands (102,000 acres) north and west of the PYK line, if sec. 10 were invalid for the purpose of allowing the Federal Government to impose exclusive legislative jurisdiction upon them after statehood. No one in Congress ever contemplated the cost of reacquiring the millions of acres of submerged lands within military withdrawals throughout Alaska because Congress understood that existing withdrawals would prevent submerged lands within these military withdrawals from passage to the State. See Sec. V.E., *supra*.

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State or acquisition by condemnation or purchase, and Congress had no intention of paying for the military use.¹²⁶

Second, even if section 10 arguably is available north and west of the PYK Line to cure section 11(b), it would still leave gaps in exclusive legislative jurisdiction in lands underlying navigable bodies of water south and east of the PYK Line. If section 11(b) is read not to have defeated state title, there is no mechanism at all in the ASA for effecting exclusive legislative jurisdiction on submerged lands held for military purposes south and east of the PYK Line. These are the military bases in closest proximity to urban areas of Alaska. Under this reading, Congress' purpose of holding these section 11(b) lands in readiness for military activity would be severely constrained. This awkward result makes very plain that Congress intended in section 11(b) to defeat state title to submerged lands in areas held for military purposes, including PLO 82.

I. Section 11(b) Constituted an Express Retention of Submerged Lands for Purposes of Section 5(a) of the Submerged Lands Act

Section 6(m) of the ASA expressly applies the SLA to Alaska. 72 Stat. 339, 343. I now examine section 11(b) to determine whether it also constitutes an exception from the operation of section 3(a) of the SLA granting "title to and ownership of the lands beneath navigable waters * * *." 43 U.S.C. § 1311(a). Section 5(a) of the SLA excepts from the grant under section 3(a) of the SLA "all lands expressly retained by or ceded to the United States when the State entered the Union * * *." 43 U.S.C. § 1313(a).

As stated in the Section V.G., *supra*, of this Opinion, PLO 82 lands are included in section 11(b) of the ASA which reserved exclusive legislative jurisdiction "in all cases whatsoever over such tracts or parcels of lands as, immediately prior to the admission of said State, are owned by the United States and held for military * * * purposes * * *." Under the third proviso of section 11(b), the lands remain in this status "only so long as the particular tract or parcel of land involved is owned by the United States and used for * * * military purposes." 72 Stat. 339, 347-48.

The purpose of section 11(b) is undeniably to retain certain lands owned by the United States prior to statehood and held for military, naval, Air Force or Coast Guard purposes, so as to allow the continued use of the lands for these purposes. If submerged lands were not included in this retention of the lands, the third proviso of section 11(b) would cause the lands to fall outside the ambit of section 11(b). Submerged lands would be both included under the first sentence of section 11(b) and excluded under the third proviso. This statute should

¹²⁶ See *supra* n. 125.

be construed to avoid this meaningless or inconsistent result. *Hughes Air Corp.*, 644 F.2d at 1338.

Section 11(b) demonstrated a congressional intent to defeat state title to submerged lands as required by the *Utah Lake* test. Likewise, section 11(b) also constituted an express retention of submerged lands within the meaning of section 5(a) of the SLA. Accordingly, the submerged lands did not pass to the State under section 3(a) of the SLA.¹²⁷

VI. CONCLUSION

In summary, I have concluded:

1. The *Utah Lake* test applies to lands in PLO 82. See Section II, *supra*.
2. (a) Lands beneath inland navigable waters were included in the PLO 82 withdrawal and reservation of northern Alaska in 1943. See Section III.B., *supra*.
 (b) The Secretary expressed no intent to defeat the title of a future state to inland submerged lands within the PLO 82 withdrawal area in 1943. See Section III.C., *supra*.
3. (a) In 1957 and 1958, the Executive intended to include submerged lands in the withdrawal of NPR-4 and the proposed withdrawal of the Arctic National Wildlife Range. See Section IV.B., *supra*.
 (b) The Executive intended to defeat the future state's title to submerged lands within the boundaries of NPR-4 and the proposed boundaries of the Arctic National Wildlife Range (See Section IV.C., *supra*), and Congress affirmed this executive intent in the Alaska Statehood Act. See Section IV.D., *supra*.
 (c) The Executive took no official action prior to Alaska Statehood on January 3, 1959, to delete from reserved status those inland submerged lands that lay within the boundaries of the PLO 82 withdrawal, but outside of NPR-4 and the proposed Arctic National Wildlife Range. See Section IV.E., *supra*.
 (d) The Executive did not expressly address the defeat of state title to those portions of the PLO 82 withdrawal outside of NPR-4 and the proposed Arctic National Wildlife Range. See Section IV.E., *supra*.
4. Alaska's title to lands under inland navigable waters within the boundaries of PLO-82 was defeated by congressional action in section 11(b) of the Alaska Statehood Act retaining Federal lands held for military purposes. See Section V.F., *supra*.
 (a) Congress intended to include lands underlying navigable bodies of water within areas subject to section 11(b) in order to carry out congressional purposes for those lands. See Section V.G., *supra*.

¹²⁷ Because I determined that sec. 11(b) constituted an express retention of lands within the meaning of sec. 5(a) of the SLA, I need not determine whether it also constituted a cession of lands by the State under the same section.

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(b) The submerged lands within the boundaries of PLO-82 were expressly retained by the United States under the Submerged Lands Act at the time of Alaska Statehood. See Section V.I, *supra*.

Based on the foregoing conclusions, I find that the Federal withdrawal and retention of lands under inland navigable waters within the boundaries of PLO 82 in northern Alaska met the two-pronged test set out in *Utah Lake*: (1) Inland submerged lands were included in the withdrawal at its creation in 1943 and remained in the withdrawal through the moment of Alaska Statehood; and (2) Congress affirmatively intended in the Alaska Statehood Act to defeat Alaska's title to the submerged lands within PLO 82.

THOMAS L. SANSONETTI
Solicitor

I CONCUR: MANUAL LUJAN
Date: April 20, 1992

October 16, 1991

**AUTHORITY OF THE SECRETARY TO WITHDRAW LANDS
WITHIN NATIONAL PARKS & WILDLIFE REFUGES FOR
SELECTION BY UNDERSELECTED ALASKA NATIVE
VILLAGE CORPORATIONS***

M-36972

October 16, 1991

**Alaska National Interest Lands Conservation Act: Generally—
Alaska Native Claims Settlement Act: Generally—Withdrawals
and Reservations: Effects of**

Sec. 1410 of ANILCA authorizes the Secretary to withdraw lands within units of national parks and wildlife refuges to satisfy village corporation ANCSA entitlements if the land had been withdrawn during the original ANCSA selection period for selection by specific village corporation. Because lands within national parks in existence on Dec. 18, 1971 (the date of ANCSA's enactment) were excluded from the original withdrawals, such park lands may not be withdrawn now. The Secretary may withdraw park lands added to the National Park system after ANCSA's enactment.

**Wildlife Refuges and Projects: Generally—Alaska National
Interest Lands Conservation Act: Generally—Withdrawals and
Reservations: Effects of**

The Secretary may withdraw wildlife refuge lands regardless of the date on which the lands were placed in the National Wildlife Refuge. However, sec. 1410 does not authorize the Secretary to withdraw park or refuge lands located outside the boundaries of the original ANCSA withdrawals.

Memorandum

To: Secretary

From: Solicitor

Subject: Authority of the Secretary to Withdraw Lands Within
National Parks & Wildlife Refuges for Selection by Underselected
Alaska Native Village Corporations

Section 1410 of the Alaska National Interest Lands Conservation Act (ANILCA)¹ is the statutory mechanism for fulfilling the remaining land entitlements of underselected Alaska Native village corporations under the Alaska Native Claims Settlement Act (ANCSA).² Section 1410, which amended section 22(j) of ANCSA, authorizes the Secretary to rewithdraw, and to permit subsequent selection of, public lands within the areas originally withdrawn by ANCSA for selection by underselected village corporations.³

*Not in chronological order.

¹ANCSA, Pub. L. No. 96-487, 94 Stat. 2371 (1980), as amended, is partially codified in various parts of titles 16, 43, and 48 of the U.S. Code. Sec. 1410 is codified in its entirety at 43 U.S.C. § 1621(j) (1988). This Opinion concerns only the provisions codified at 43 U.S.C. § 1621(j)(2), relating to village corporation underselection.

²ANCSA, Pub. L. No. 92-203, 85 Stat. 688 (1971), as amended, is codified at 43 U.S.C. §§ 1601 *et seq.* (1988).

³ANCSA defines "public lands" as

all Federal lands and interests therein located in Alaska except: (1) the smallest practicable tract, as determined by the Secretary, enclosing land actually used in connection with the administration of any Federal installation, and (2) land selections of the State of Alaska which have been patented or tentatively approved under section 6(g) of the

Continued

You have asked whether section 1410 of ANILCA authorizes the Secretary to withdraw lands in national parks and national wildlife refuges within the original ANCSA withdrawals to satisfy the ANCSA entitlements of underselected village corporations. To date, the Bureau of Land Management (BLM) has identified 17 village corporations as underselected. In 10 of these cases, the only lands remaining in Federal ownership within the areas originally withdrawn by ANCSA for selection by these village corporations are lands within units of national parks or wildlife refuges.⁴

Nothing in section 1410 on its face indicates that park and refuge lands within the original ANCSA withdrawals are unavailable for rewithdrawal by the Secretary for village corporation selection. Other sections of ANILCA, however, suggest that park and refuge lands might not be available for this purpose.

We have analyzed the text of section 1410, the language and design of ANILCA as a whole, and its legislative history. For the reasons set forth in this Opinion, we conclude that section 1410 authorizes the Secretary to withdraw lands within units of national parks and wildlife refuges to satisfy village corporation ANCSA entitlements if the lands had been withdrawn during the original ANCSA selection period for selection by the specific village corporation in question. Because lands within national parks in existence on December 18, 1971 (the date of ANCSA's enactment) were excluded from the original withdrawals, such park lands may not be withdrawn now. Thus, the Secretary may withdraw only park lands added to the National Park System *after* December 18, 1971. The Secretary may withdraw wildlife refuge lands regardless of the date on which the lands were placed in the National Wildlife Refuge System. However, section 1410 does not authorize the Secretary to withdraw park or refuge lands located outside the boundaries of the original ANCSA withdrawals.⁵

Alaska Statehood Act, as amended (72 Stat. 341, 77 Stat. 223), or identified for selection by the State prior to January 17, 1969 * * *.

43 U.S.C. § 1602(e) (1988). Units of the National Park System and National Wildlife Refuge System in Alaska are thus public lands under ANCSA.

⁴ The 10 village corporations and the acreages by which they are underselected are as follows:

	<i>Region/Village</i>	<i>Acre</i>
Aleut Region		
Nelson Lagoon		3,728
Pauloff Harbor		1,815
Arctic Slope Region		
Anaktuvuk Pass		677
Kaktovik		2,106
Bristol Bay Region		
Manokotak		536
Calista Region		
Aniak		85
Bethel		33,458
Mekoryuk		6,147
Chugach Region		
English Bay		9,826
NANA Region		
Selawik		6,022
TOTAL		64,400

⁵ This Opinion will not resolve the underselection problem of Kaktovik Inupiat Corp. (KIC), a village corporation organized for the Village of Kaktovik, which is situated within the Arctic National Wildlife Refuge (ANWR). A 1988

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I. BACKGROUND

Enacted on December 2, 1980, ANILCA represented a compromise among Native, Federal, State, private, and environmental interests concerning the distribution and use of the estimated 360 to 375 million acres of land in Alaska.⁶ To understand the overall structure and purposes of ANILCA and the priorities the Act accords to competing uses of Alaska lands, the following background is provided.

A. Alaska Statehood Act (1958)

The Alaska Statehood Act⁷, enacted in 1958, authorized the State to select approximately 105 million acres of Federal land—28 percent of the entire State. The Statehood Act did not resolve, however, Native aboriginal claims to land in Alaska.⁸ The State's right to select particular lands was thus constrained by the cloud of unresolved Native aboriginal claims which hovered over the State's selection rights for more than a decade after Alaska Statehood.

At the time of Statehood, strong differences also existed between those who advocated the economic development of Alaska for its mineral and other resources, and environmentalists who sought to preserve the pristine beauty and wilderness of Alaska. The tension among the Natives, State, conservationists, and development interests increased throughout the 1960s. In 1968, then Secretary of the Interior Stewart Udall announced the closing of all public lands to appropriation to preserve the land ownership status quo until Native claims could be resolved.⁹ This land freeze effectively stopped further selection of land by the State of Alaska and temporarily halted most development on Federal lands. During the late sixties, substantial oil and gas discoveries were made on the State lands on the North Slope. Pressure for a legislative solution to the land claims intensified.

B. Alaska Native Claims Settlement Act (1971)

Congress attempted to settle Native aboriginal claims, as well as to accommodate State, conservation and private interests, by enactment

amendment to sec. 1302(h) of ANILCA prohibits conveyance of land within the coastal plain of ANWR without express congressional approval:

Nothing in this Act [ANILCA] or any other provision of law shall be construed as authorizing the Secretary to convey, by exchange or otherwise, lands or interest in lands within the coastal plain of the Arctic National Wildlife Refuge (other than land validly selected prior to July 28, 1987), without prior approval by Act of Congress.

16 U.S.C. § 3192(h)(2) (1988), Pub. L. No. 100-395, § 201, 102 Stat. 979, 981 (1988). While this provision prohibits the conveyance of land within the coastal plain of ANWR, it does not preclude the Secretary from withdrawing nor KIC from selecting lands in this area to resolve KIC's underselection problem.

This Opinion also will not address any underselection problems of the 10 village corporations in Southeast Alaska, listed in sec. 16 of ANCSA, 43 U.S.C. § 1615, because each of those village corporations has secured special legislation.

⁶The uplands figure is used in this discussion to avoid the issue of acreage entitlement for submerged lands. All acreage figures are approximate and are intended only to assist in the general understanding of the problem.

⁷Alaska Statehood Act, Pub. L. No. 85-508, § 6, 72 Stat. 339, 340 (1958) (codified at 48 U.S.C. note prec. sec. 21 (1988)).

⁸*Id.*, § 4, 72 Stat. 339 (1958).

⁹Pub. L. Order 4582, 34 FR 1025 (1969). On Dec. 8, 1968, Secretary Udall approved the application for withdrawal which segregated the land. The withdrawal was signed on Jan. 17, 1969, and published on Jan. 20, 1969.

of ANCSA on December 18, 1971. In consideration for the extinguishment of Native claims based on aboriginal title, as of the date of ANCSA's enactment, Congress granted to Alaska Natives approximately 1 billion dollars and 40 million acres of land.¹⁰ Most of the 40 million acres of land entitlement was to be divided among more than 200 village corporations and 12 regional corporations established under ANCSA.¹¹

Enactment of ANCSA terminated the statewide land freeze and permitted further filing of State selections.¹² In addition, section 4(a) of ANCSA, 43 U.S.C. § 1603(a), confirmed the State's title to lands tentatively approved to the State, thus giving title security to companies that had oil and gas leases on State lands on the North Slope. ANCSA further addressed development interests by authorizing a protected transportation and utility corridor from north to south. 43 U.S.C. § 1616(c). The establishment of this corridor permitted construction of the Trans-Alaska Pipeline and enabled development of the North Slope oil fields to proceed.

Conservation concerns were addressed in section 17(d)(2) of ANCSA, which directed the Secretary to withdraw up to 80 million acres for possible inclusion in new or existing units of the national park, forest, wildlife refuge, and wild and scenic river systems. 43 U.S.C. § 1616(d)(2). The Secretary was given 2 years to make recommendations to Congress on the section 17(d)(2) lands. Congress was allowed an additional 5 years from the date of the Secretary's recommendations to take appropriate action. *Id.* In addition to this specific withdrawal authority, section 17(d)(1) of ANCSA withdrew for 90 days all unreserved public lands. The provision specified that any further withdrawals would require an affirmative act by the Secretary. It also authorized the Secretary to classify the lands in such additional withdrawals and to open the lands to appropriation and disposal under the public land laws.¹³ Pursuant to section 17(d)(1) virtually all land in Alaska was withdrawn. 43 U.S.C. § 1616(d)(1).

1. Village Corporation Entitlement

The general land entitlement framework established by ANCSA called for lands in the immediate vicinity of Native villages to be made available for conveyance to the ANCSA corporations for those villages. In section 11(a)(1) of ANCSA, Congress withdrew all the public lands in the township(s)¹⁴ in which a village was located, 43 U.S.C.

¹⁰ 43 U.S.C. §§ 1601 *et seq.* See also H.R. Rep. No. 523, 92d Cong., 1st Sess. 2, reprinted in 1971 U.S. Code Cong. & Admin. News at 2193. While the figures used in ANCSA total approximately 40 million acres of land, ANCSA affects approximately 50 million acres due, primarily, to the conveyance of split estates and to elections under sec. 19 of ANCSA, 43 U.S.C. § 1618, to take title to existing reservations.

¹¹ See n. 10, *supra*.

¹² 43 U.S.C. § 1616(d)(1), revoking Pub. L. Order 4582 (1969).

¹³ Prior to ANCSA, the Secretary had no general power to withdraw and classify lands in Alaska as he possessed with respect to the 48 contiguous states pursuant to the Taylor Grazing Act, 43 U.S.C. §§ 315 *et seq.* (1988).

¹⁴ An average full township consists of 23,040 acres; thus, 25 full townships totals 576,000 acres. However, in Alaska more than 25 percent of all townships consist of less than 23,040 acres because of various survey rules and topography.

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§ 1610(a)(1)(A), and two rings of additional townships that surrounded the original township(s). 43 U.S.C. §§ 1610(a)(1)(B) and (C). A village corporation was required to select all available land in the township(s) in which the village was located. 43 U.S.C. § 1611(a)(1). The average inland village corporation had 25 townships of land withdrawn for its selection.

Many villages, however, did not find sufficient acreage within these withdrawals to satisfy their land entitlements. In some instances, substantial acreage within the statutory 25 township withdrawals was unavailable for selection. In numerous cases, villages were near sea coasts and water occupied the area that otherwise would have been withdrawn. If the village corporation did not have sufficient land in its initial congressional withdrawal to meet its entitlement, ANCSA required the Secretary to make "deficiency withdrawals" of "lands of a character similar to those on which the village [was] located and *in order of proximity to the center of the Native village.*" 43 U.S.C. § 1610(a)(3)(A) (*italics added*).

The acreage entitlement of particular village corporations varied from a minimum of three townships (69,120 acres) to a maximum of seven townships (161,280 acres) based on the 1970 village population. 43 U.S.C. § 1613(a). This statutorily mandated entitlement is commonly referred to as the "12(a) entitlement." The regional corporations were given the discretion to allocate additional acreage to village corporations. 43 U.S.C. § 1611(b). This allocated acreage is known as the "12(b) entitlement." Village corporations had 3 years from the date of ANCSA's enactment to make 12(a) selections (December 18, 1974) and 4 years to make 12(b) selections (December 18, 1975). 43 U.S.C. § 1611; 43 CFR 2651.3 (1990). It is these village corporation selection rights that are addressed in this Opinion.

ANCSA accorded Native selection rights preference, in many instances, over competing interests. For example, lands within existing units of the National Wildlife Refuge System and within National Forests, as well as lands previously selected by, or tentatively approved for conveyance to, the State of Alaska were made available for Native selection. 43 U.S.C. §§ 1610(a)(1) and (2); 43 U.S.C. § 1611(a)(1). Certain limitations were imposed on these selections. For example, a village corporation could not receive more than 69,120 acres from either existing wildlife refuges or national forests. 43 U.S.C. § 1611(a)(1). Similarly, a village corporation could obtain no more than 69,120 acres of land from those previously selected by, or tentatively approved for conveyance to, the State of Alaska. *Id.* Although the State could identify lands it wished to select within the ANCSA withdrawals, the Secretary could neither tentatively approve nor convey these lands

Most ANCSA sec. 11(a)(1), 43 U.S.C. § 1610(a)(1), withdrawals consist of less than 25 full townships because the majority of villages are located along the coast.

to the State. The State was compelled to await expiration of the ANCSA selection deadlines before it could make further selections of lands withdrawn for Native selection.

ANCSA treated units of the National Park System differently from units of the National Wildlife Refuge System. Lands within national parks were unavailable for withdrawals for Native corporation selection. 43 U.S.C. § 1610(a)(1).¹⁵

2. Village Corporation Underselection

One of the difficulties the Secretary encountered in implementing ANCSA was the failure of some village corporations to select sufficient acreage to meet their entitlements before the selection deadlines expired. Because the deadlines for selection were statutory, the Secretary could not permit additional selections.¹⁶

On March 3, 1978, the Department addressed this problem in a Secretarial decision document outlining the Department's policy regarding various problems that had developed in the course of ANCSA's implementation.¹⁷ One section of this document, entitled "ANCSA Issue 4-E," proposed general legislation authorizing the Secretary to resolve village corporation underselections by administrative withdrawals not to exceed twice the amount of the underselection. Issue 4-E expressly identified wildlife refuges and national forests as among the lands the Secretary intended to make available for rewithdrawal and selection.

On July 14, 1978, at the request of the Administration, Senator Henry M. Jackson, Chairman of the Senate Committee on Energy and Natural Resources, introduced S. 3303,¹⁸ which contained language virtually identical to section 1410 of ANILCA. Senator Jackson placed in the *Congressional Record* a letter from the Secretary of the Interior explaining the purpose of various provisions in the bill, including the provision eventually enacted as section 1410. The letter specified that "[l]and available for rewithdrawal would include all land which was considered public land and available for withdrawal at the time [ANCSA] was passed in 1971, *irrespective of classification of the land subsequent to passage of [ANCSA]*."¹⁹ This legislative solution was designed to fulfill village corporation entitlements in a manner consistent with the original ANCSA conveyance scheme.

3. Conservation Withdrawals

¹⁵Lands within defense withdrawals on the date of ANCSA's enactment were also unavailable for withdrawal, with the exception of Naval Petroleum Reserve Numbered 4.

¹⁶Villages did not meet the selection deadlines for a variety of reasons. In some instances, a village corporation simply did not select enough land. In other instances, surveys established that actual acreage was less than had been estimated. In certain cases, village corporations later were determined to be underselected after recomputation pursuant to the Submerged Lands Act Amendments, 43 U.S.C. § 1631 (1988). Numerous village selections contained many more Native allotments than originally estimated and this significantly reduced the amount of land available for selection.

¹⁷See *infra* at 22-23.

¹⁸124 Cong. Rec. 20,913 (1978).

¹⁹124 Cong. Rec. 20,915 (1978) (italics added).

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Another difficulty the Secretary encountered in implementing ANCSA concerned lands withdrawn for conservation purposes. Following enactment of ANCSA, the Secretary timely made the withdrawals and recommendations of land for inclusion in the national parks, forests, wildlife refuges and the wild and scenic river systems, as called for by section 17(d)(2) of ANCSA. As the statutory date for expiration of the section 17(d)(2) withdrawals approached, Congress was unable to reach agreement on which lands should be added to the national park and refuge systems and other units of protected lands. The State, anxious to select some of the lands in dispute, filed selection applications on these lands on November 14, 1978. On November 16, 1978, then Secretary of the Interior Cecil Andrus placed 110 million acres of land in emergency withdrawals using his authority under section 204(e) of the Federal Land Policy and Management Act. 43 U.S.C. § 1714(e).²⁰ On December 1, 1978, President Carter designated 56 million acres as national monuments under the Antiquities Act. 16 U.S.C. § 431.²¹ These actions by the President and the Secretary effectively blocked the State's selection applications for section 17(d)(2) lands until Congress enacted ANILCA.

C. Alaska National Interest Lands Conservation Act (1980)

The legislative effort to set aside lands for conservation, as well as to correct some of the Native selection problems under ANCSA, culminated in the enactment of ANILCA on December 2, 1980. Congress placed approximately 139.9 million acres of land, subject to valid State or Native selections, into protective withdrawals, designated in ANILCA as conservation system units.²² Titles IX and XIV of ANILCA addressed various problems that arose during the 9-year effort to implement ANCSA. Of the 139.9 million acres of land in the conservation system units, parks and refuges make up approximately 94 percent or 131.7 million acres.²³ Of particular note,

²⁰ 43 FR 59756 (1978).

²¹ 43 FR 57009-57132 (1978).

²² The 139.9 million acreage figure is derived from acreages set forth in Titles II, III, V, and VI of ANILCA, and the official maps published pursuant to sec. 103 of ANILCA, 16 U.S.C. § 3103.

"Conservation system unit" is defined in sec. 102(4) as:

any unit in *Alaska of the National Park System, National Wildlife Refuge System, National Wild and Scenic Rivers Systems, National Trails System, National Wilderness Preservation System, or a National Forest Monument* including existing units, units established, designated, or expanded by or under the provisions of this Act, additions to such units, and any such unit established, designated, or expanded hereafter.

16 U.S.C. § 3102(4) (1988) (italics added).

²³ The gross areas of conservation system units are as follows:

<i>Region/Village</i>	<i>Acres</i>
National Wildlife Refuge System	77 million
National Park System	54.7 million
National Forest Monument System	5.6 million
Wild and Scenic Rivers System and	
National Trails System (outside the park, refuge, or forest systems)	2.6 million

All wilderness areas are within the park, refuge, or forest systems.

section 1410 of ANILCA—enacted in a form virtually identical to that recommended by the Department in 1978—authorized the Secretary to make withdrawals to resolve the Native corporation underselection problem.²⁴

II. ANALYSIS OF PRINCIPAL STATUTORY PROVISIONS

In construing the relevant provisions of ANCSA and ANILCA, we must first determine “whether Congress has directly spoken to the precise question at issue.” *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984); accord *State of Ohio v. U.S. Department of the Interior*, 880 F.2d 432, 441 (D.C. Cir. 1989). If so, we “must give effect to the unambiguously expressed intent of Congress.” *Chevron*, at 843. The Supreme Court explained its approach to construing statutes in *K Mart Corp. v. Cartier*, 486 U.S. 281 (1988). In ascertaining the meaning of a statute, “the court must look to the particular statutory language at issue as well as the language and design of the statute as a whole.” *Id.* at 291.²⁵ Moreover, the Court stated in *Chevron* and has reiterated since then that a court or agency must use “traditional tools of statutory construction”—including legislative history, when appropriate—to determine if Congress “had an intention on the precise question at issue.” *Chevron*, 467 U.S. at 843 n. 9; accord *Wisconsin Public Intervenor v. Mortier*, U.S. , 111 S.Ct. 2476, 2484–85 n. 4 (1991).²⁶

Applying these principles to the matter at hand, we begin by examining the text of section 1410 of ANILCA and identifying the precise question at issue. Next, we will determine if Congress has directly addressed this issue in section 1410 or in another provision of ANILCA. Finally, we will examine the legislative history of the relevant provisions to ascertain if it clarifies the statutory text.

Section 1410 of ANILCA

1. Text and Structure

²⁴ We note that, in 1984, BLM published a proposed regulation to implement the provisions of sec. 1410. The proposed regulation specifically precluded the selection of lands within “[c]onservation system units created or enlarged by [ANILCA].” 49 FR 31475, 31476 (1984). In the final rulemaking and “[a]fter carefully reviewing the issues raised by the comments and the impact of the provisions of the proposed rulemaking on the question of selection and withdrawal of lands for the Native Corporations,” BLM withdrew the proposed underselection provisions in their entirety. 50 FR 15546 (1985). BLM explained that the retraction of these provisions would provide the Department with additional time to review and make a decision on which lands might be available for resolving underselection problems. *Id.*

²⁵ The Supreme Court followed this approach in *Davis v. Michigan Dept. of Treasury*, U.S. , 109 S.Ct. 1500, 1504 (1989), stating: “It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.”

²⁶ In *Wisconsin Public Intervenor v. Mortier*, the Supreme Court reaffirmed the utility of legislative history in construing statutes. Writing for a unanimous Court, Justice White observed: “As for the propriety of using legislative history at all, common sense suggests that inquiry benefits from reviewing additional information rather than ignoring it.” U.S. , 111 S.Ct. 2476, 2484–85 n.4 (1991). Seven Justices joined in the opinion. Justice Scalia filed a concurring opinion, objecting to the Court’s use of legislative history to reach its decision.

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Section 1410 of ANILCA amended section 22(j) of ANCSA. Section 22(j)(2), 43 U.S.C. § 1621(j)(2),²⁷ specifically addresses the issue of village corporation underselection:

Where lands selected and conveyed, or to be conveyed to a Village Corporation are insufficient to fulfill the Corporation's entitlement under section 1611(b), 1613(a), 1615(b), or 1615(d) of this title, the Secretary is authorized to withdraw twice the amount of unfulfilled entitlement and provide the Village Corporation ninety days from receipt of notice from the Secretary to select from the lands withdrawn the land it desires to fulfill its entitlement. In making the withdrawal, the Secretary shall first withdraw public lands that were formerly withdrawn for selection by the concerned Village Corporation by or pursuant to section 1610(a)(1), 1610(a)(3), 1615(a), or 1615(d) of this title. Should such lands no longer be available, the Secretary may withdraw public lands that are vacant, unreserved, and unappropriated, except that the Secretary may withdraw public lands which had been previously withdrawn pursuant to section 1616(d)(1) of this title. Any subsequent selection by the Village Corporation shall be in the manner provided in this chapter for such original selections.²⁸

The opening sentence of paragraph two of section 1410 squarely addresses the principal problem facing underselected ANCSA village corporations, namely, the expiration of the statutory deadlines for making ANCSA village corporation selections and the concomitant termination of the original ANCSA withdrawals for such selections. Section 1410 gives underselected village corporations a renewed opportunity to fulfill their land entitlements by empowering the Secretary to withdraw twice the amount of unfulfilled entitlement and to give the affected village corporation 90 days from receipt of notice to select from the withdrawn lands. This grant of Secretarial authority recognizes the Secretary's existing statutory responsibility to convey a certain amount of acreage pursuant to ANCSA.

Section 1410 goes on to establish an order of priority and set limitations on the exercise of Secretarial authority. The Secretary must first withdraw lands previously withdrawn for selection by the concerned village corporations. These withdrawals consist of the 25 township and deficiency withdrawals discussed earlier.²⁹ Section 1410 makes no distinction among previously withdrawn lands. Nor does section 1410 specifically refer to lands in parks, refuges or other conservation system units within the original ANCSA withdrawals. Absent any express limitations, all lands within the original withdrawals are potentially available for rewithdrawal under section 1410.

2. "Should such lands no longer be available"

The third sentence of section 1410, paragraph two, which includes the phrase "[s]hould such lands no longer be available," 43 U.S.C.

²⁷ This provision is commonly referred to as "section 1410 of ANILCA" although it actually comprises only the second paragraph of sec. 1410. Sec. 1410 of ANILCA amended sec. 22(j) of ANCSA by replacing the original text of sec. 22(j). Only ANCSA sec. 22(j)(2) addresses village corporation underselection.

²⁸ The reference to subsec. (1) of sec. 1616(d) was omitted in 43 U.S.C. § 1621(j)(2) (1988).

²⁹ See *supra* at 6-7.

§ 1621(j)(2), gives rise to the precise question at issue in this Opinion: Are lands within national parks and wildlife refuges that were formerly withdrawn for village corporation selection “available” for rewithdrawal by the Secretary, pursuant to section 1410, to satisfy the ANCSA entitlements of village corporations?

No explanation of this phrase or definition of the term “available” is included in section 1410. As previously noted, the statute is silent as to withdrawals of park and refuge lands. Nevertheless, section 1410 can reasonably be read to contemplate precisely such withdrawals. In the 9 years between enactment of ANCSA and ANILCA vast changes occurred in land ownership patterns in Alaska. In many instances, when a village corporation did not timely select land initially withdrawn for its selection, that land was selected by and conveyed out of Federal ownership to Native regional corporations, the State of Alaska, or nearby village corporations. Thus, in the context of post-ANCSA land ownership in Alaska, the phrase “should such land no longer be available” logically refers to previously withdrawn lands that are no longer in Federal ownership. By contrast, lands that are still in Federal ownership *are* available for Native selection under section 1410, irrespective of Federal reclassifications or changes of use after ANCSA.³⁰ Accordingly, lands in national parks and wildlife refuges within the original ANCSA withdrawals are “available” for rewithdrawal pursuant to section 1410.

3. “Vacant, unreserved and unappropriated” Lands

If lands that were originally withdrawn for village corporation selection are no longer in Federal ownership, then the Secretary may withdraw public lands outside the original withdrawals, provided the lands are “vacant, unreserved, and unappropriated.” Accordingly, the Secretary may not withdraw park or refuge lands, pursuant to section 1410, if such lands are outside the original ANCSA withdrawals.

The “vacant, unreserved and unappropriated” requirement applicable to withdrawals outside the original ANCSA withdrawal areas lends additional support to our conclusion that “available” public lands within the original withdrawals are not necessarily vacant, unreserved and unappropriated. In other words, they may be park and refuge lands.

There is, however, an exception to the vacant, unreserved and unappropriated criteria for public lands that had been previously withdrawn under section 17(d)(1) of ANCSA. 43 U.S.C. § 1616(d)(1). This exception was necessary because section 17(d)(1) was used to withdraw virtually all land in Alaska. Given the breadth of section 17(d)(1), the exception merely clarifies that section 17(d)(1) by itself

³⁰ See *supra* at 8. See also *infra* at 24–26.

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was not intended to prevent new withdrawals pursuant to section 1410 of ANILCA³¹

4. Section 1410 as an Amendment to ANCSA

The last sentence of section 1410 clarifies that any village corporation selections filed for land withdrawn pursuant to section 1410 must be filed in the same manner provided in ANCSA for original selections. This ensures the applicability of important limitations imposed on certain withdrawals under ANCSA, such as the 69,120-acre cap on lands in wildlife refuges established prior to ANCSA and the complete unavailability of lands placed in units of the National Park System before enactment of ANCSA. This provision also makes current ANCSA regulations (43 CFR Part 2650 (1990)) applicable to the filing of section 1410 selections. The only exception to the applicability of the ANCSA regulations is the time frame for filing selections under section 1410, which is spelled out in the statute itself.

The final provision of section 1410 of ANILCA highlights the amendatory aspect of section 1410. Congress enacted section 1410 to fulfill Native land entitlements established under ANCSA and made section 1410 a part of ANCSA itself. The ANCSA definition of "public lands" applies to all parts of Titles IX and XIV of ANILCA, including section 1410. 16 U.S.C. § 3102. This is a specific exception to the definition of public lands contained in section 102(3) of ANILCA, which applies to all other provisions of ANILCA. *Id.*³²

As an amendment to ANCSA, section 1410 follows the framework laid out in ANCSA. It requires that the land initially withdrawn for selection by the village corporation be rewithdrawn if it is still available. If the land is unavailable, a process similar to the original ANCSA "deficiency withdrawals" is to be followed whereby the Secretary must identify other public lands for selection by underselected villages. Thus, the basic intent of ANCSA—to enable village corporations to select land as close to the village as possible—is kept intact under section 1410 of ANILCA.

If section 1410 were narrowly construed to preclude the rewithdrawal of lands in Federal parks and refuges, nine of the 17 underselected village corporations identified to date would be unable to obtain land originally withdrawn for them in the vicinity of their villages—an important goal of ANCSA. Interpreting section 1410 in this manner would significantly frustrate the objective of section 1410 and would prevent the underselection problem from being resolved. The canon of

³¹ A similar exception, relating to the vacant, unreserved and unappropriated criteria of the Alaska Statehood Act, is set out in sec. 906(j) of ANILCA, 43 U.S.C. § 1616(j) (1988).

³² In addition, sec. 1412 of ANILCA, 43 U.S.C. § 1639, expressly articulates that the provisions of ANCSA are fully applicable to ANILCA and that nothing in ANILCA, except as specifically provided should be construed to alter or amend any provision of ANCSA. See *infra* at 20–22.

statutory construction requiring a liberal construction of remedial statutes precludes a construction of section 1410 that would thwart the solution to village corporation underselection that Congress intended to achieve through section 1410.³³

In summarizing our textual analysis of section 1410, we conclude that certain lands within national parks and wildlife refuges are "available" for rewithdrawal by the Secretary, pursuant to section 1410, for selection by underselected villages. In order to be withdrawn from a park or refuge, the land must have been included in one of the ANCSA section 11 withdrawals and must still be Federal land. The statute requires that lands originally withdrawn pursuant to section 11 of ANCSA be rewithdrawn before other lands are considered by the Secretary.

B. Provisions of ANILCA Indicating Lands in Parks and Refuges are Available for Village Corporation Selection

1. Section 906(o)(1) of ANILCA

Section 906(o)(1) of ANILCA supports the interpretation that section 1410 authorizes the Secretary to rewithdraw lands in the park and refuge systems for village corporation selection.³⁴ Section 906(o)(1) deals with administration of selected lands in conservation system units and provides for management of those lands by the respective unit manager "unless, before, on, or after December 2, 1980 (the date of ANILCA's enactment), such land has been validly selected by and conveyed to a Native corporation." Section 906(o)(1) states:

Notwithstanding any other provision of law, subject to valid existing rights any land withdrawn pursuant to section 17(d)(1) of the Alaska Native Claims Settlement Act [43 U.S.C.A. § 616(d)(1)] and within the boundaries of any conservation system unit, National Recreation Area, National Conservation Area, new national forest or forest addition, shall be added to such unit and administered accordingly unless, before, on, or after December 2, 1980, such land has been validly selected by and conveyed to a Native Corporation, or unless before December 2, 1980, such land has been validly selected by, and after December 2, 1980, is conveyed to the State. At such time as the entitlement of any Native Corporation to land under the Alaska Native Claims Settlement Act [43 U.S.C.A. § 601 et seq.] is satisfied, any land within a conservation system unit selected by such Native Corporation shall, to the extent that such land is in excess of its entitlement, become part of such unit and administered accordingly * * *.

43 U.S.C. § 1635(o)(1) (*italics added*).

Section 906(o) applies expressly to lands in conservation system units, which include park and refuge lands, and recognizes that there will be valid selections by Native corporations within conservation system

³³ See *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 268 (1977).

³⁴ In *Wilderness Society v. Griles*, 824 F.2d 4 (D.C. Cir. 1987), the court examined the interplay between secs. 906(o) and 1410 of ANILCA in the context of a challenge to the Department's regulations excluding submerged lands from being "charged" against the State's or Native corporations' land grant. In concluding that the plaintiffs lacked standing to challenge these regulations, the court considered whether conservation system units were subject to future selections. In n.5, 824 F.2d at 9, the court specifically concluded that sec. 1410, 43 U.S.C. § 1621(j)(2), when read in conjunction with sec. 906(o)(1), 43 U.S.C. § 635(o)(1), permits the Secretary to withdraw lands in conservation system units to remedy Native underselection.

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units after enactment of ANILCA. If Congress had intended this language to exclude park and refuge lands, which comprise 94 percent of conservation system units, surely Congress would have so stated. We conclude that, by the language of section 906(o), Congress contemplated and recognized that valid ANCSA selections could still be made in parks and refuges in Alaska.³⁵

2. Section 901(e)(5) of ANILCA, Repealed

Although section 901(e)(5) of ANILCA was subsequently repealed,³⁶ as a contemporaneous provision of section 1410, the original statutory language offers further support for the conclusions reached in this Opinion. As originally enacted, section 901(e)(5) provided in pertinent part:

If such selections are insufficient to fulfill the acreage entitlement of such Corporation or Group pursuant to the Alaska Native Claims Settlement Act, the provisions of section 1410 shall apply to such Corporation or Group, but no land within the boundaries of a conservation system unit shall be withdrawn for such Corporation or Group pursuant to section 1410 unless such land was withdrawn under section 11(a) of the Alaska Native Claims Settlement Act. Any replacement acreage conveyed to a Native Corporation or Native Group from lands withdrawn pursuant to section 1410 shall be subject to the provisions of sections 1611, 1613, 1615, 1616 and 1621 of the Alaska Native Claims Settlement Act.

The overlap with section 1410 is repetitive to a large extent, even to the point of spelling out which provisions of ANCSA apply. There is no doubt, however, that in looking at section 1410 Congress intended that lands in conservation system units could be made available to underselected village corporations. The intent to limit this to the original 25 township and deficiency withdrawals is underscored by the careful articulation that only lands previously withdrawn under section 11(a) of ANCSA were to be made available in conservation system units.

Section 901 was enacted to address the conflict between Native corporations and the State of Alaska over title to submerged lands. The section authorized Natives to disclaim ownership of submerged lands and select replacement acreage. Section 901(e)(5) provided that where Natives disclaimed submerged lands they could utilize the provisions of section 1410 to select replacement lands. In 1988, Congress enacted amendments to the Submerged Lands Act that dealt with the submerged lands issue in a different way (not relevant here) and thereby rendered section 901(e)(5) obsolete. Pub. L. No. 100-395, 102 Stat. 979 (1988).

³⁵ The legislative history indicates that Congress carefully considered this aspect of sec. 906(o) and recognized that valid ANCSA selections could be made in conservation system units after 1980. *See infra* at 29.

³⁶ Sec. 901(e)(5) of ANILCA, Pub. L. No. 96-487, 94 Stat. 2371, 2432 (1980), repealed by Pub. L. No. 100-395, 102 Stat. 979 (1988). The former provisions of secs. 901 were replaced by a new sec. 901 that did not address all of the matters previously covered by sec. 901(e)(5). Specifically, the new sec. 901 did not address underselection as did the original sec. 901.

C. Provisions of ANILCA Suggesting Lands in Parks and Refuges are Not Available for Village Corporation Selection: Sections 206 and 304(c)

Sections 206 and 304(c) of ANILCA constitute general legislative withdrawals of national park and wildlife refuge lands from the operation of the general public land laws including the mining laws. Both sections also specify that the withdrawn lands are not subject to "future selections" by the State of Alaska and Native corporations.

Section 206 of ANILCA, relating to lands in the National Park System, reads:

Subject to valid existing rights, and except as explicitly provided otherwise in this Act, the Federal lands within units of the National Park System established or expanded by or pursuant to this Act are hereby withdrawn from all forms of appropriation or disposal under the public land laws, including location, entry, and patent under the United States mining laws, disposition under the mineral leasing laws, and from future selections by the State of Alaska and Native Corporations.

16 U.S.C. § 410hh-5 (italics added).

Section 304(c) of ANILCA, relating to lands in the National Wildlife Refuge System, reads:

All public lands (including whatever submerged lands, if any, beneath navigable waters of the United States (as that term is defined in section 1301(a) of Title 43, United States Code) were retained in Federal ownership at the time of statehood) in each National Wildlife Refuge and any other National Wildlife Refuge System Unit in Alaska are hereby withdrawn, subject to valid existing rights, from future selections by the State of Alaska and Native Corporations, from all forms of appropriation or disposal under the public land laws, including location, entry and patent under the mining laws but not from operation of mineral leasing laws.

94 Stat. 2393 (italics added).

The limitation on "future selections" within parks and refuges under sections 206 and 304(c) of ANILCA should not be construed to apply to selections made pursuant to section 1410 of ANILCA. Section 1410 is an amendment to and a part of ANCSA. As provided in sections 1410 and 1412 of ANILCA, selections under 1410 are to be treated and processed as ANCSA selections. The intent of section 1410, as demonstrated by the requirement to utilize, if possible, the original ANCSA withdrawals, was to make the 1410 selections ANCSA selections. Therefore, selections pursuant to section 1410 of ANILCA should be treated as original ANCSA selections to the fullest extent possible and not as "future selections" within the meaning of sections 206 and 304(c) of ANILCA.

As discussed above, we believe the term "future selections" does not embrace selections under section 1410. However, we recognize the possibility of a contrary interpretation whereby "future selections" means selections carried out at some point *after* enactment of ANILCA. Even under this reading of "future selections," sections 206 and 304(c) can be read in harmony with section 1410.

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It is a fundamental canon of statutory construction that specific provisions of a statute take precedence over general provisions. Contrasting section 1410 with sections 206 and 304(c), it is apparent that the latter sections have broad application, while section 1410 is narrower and more specific. Sections 206 and 304 effect the withdrawal of lands in parks and refuges established or expanded under Title II and Title III of ANILCA. These are general administrative provisions that withdraw vast land areas from appropriation and disposal under the public land laws.³⁷ The two sections preclude selection by a broad class, i.e., the State and Native corporations. In contrast, section 1410 applies only to a subset of Native corporations, the undersampled Native *village* corporations. Since section 1410 is the more specific provision, its terms should prevail over the general terms of sections 206 and 304(c).

Thus, any apparent conflict between section 1410, on the one hand, and sections 206 and 304(c), on the other, can be resolved by reading section 1410 as an exception to the general provisos of sections 206 and 304(c). Read in this way, all three provisions of ANILCA are given effect. Conversely, if sections 206 and 304(c) are read to override section 1410, section 1410 is stripped, in large part, of its remedial effect. The canons of statutory construction support a harmonious interpretation of the three sections rather than an interpretation that renders one section largely ineffective.³⁸ See *Mountain States Telephone and Telegraph Co. v. Pueblo of Santa Ana*, 472 U.S. 237, 252-53 (1985).

D. Section 1412 of ANILCA

Section 1412 of ANILCA, read with section 1410, clarifies that the provisions of ANCSA apply to section 1410 withdrawals. Section 1412 provides:

Except as specifically provided in this Act [ANILCA], (i) the provisions of the Alaska Native Claims Settlement Act (43 U.S.C. §§ 1601 et seq.) are fully applicable to this Act [ANILCA], and (ii) nothing in this Act [ANILCA] shall be construed to alter or amend any of such provisions.

43 U.S.C. § 1639.

³⁷ The gross areas of park and refuge lands in Alaska consist of 131.7 million acres. According to information supplied by BLM, a total of about 62,294 acres are needed to fulfill the original ANCSA entitlements of the nine villages referenced in n.4, *supra*. Less than five one hundredths of one percent (.05 percent) of the lands in park and refuges will be needed to solve the village corporation undersampling problem. Only five out of every 10,000 acres in national parks and wildlife refuges are expected to be selected pursuant to the implementation of this Opinion.

³⁸ Sec. 206 contains the proviso, "except as explicitly provided otherwise in this Act," which suggests that Congress recognized there would be some future selections within parks. Sec. 304(c) contains no similar proviso. We have found nothing in the legislative history of ANILCA to explain why the proviso is in sec. 206 and not in sec. 304(c), or, indeed, whether the difference in wording of the two sections has any significance at all. We note, however, that parks had been accorded more protection than refuges under ANCSA (i.e., pre-ANCSA parks were not available for village selections). Thus, Congress may have considered that explicit language was needed in sec. 206 to signal that parks were entirely closed to future selection. In any event, a conclusion that sec. 304(c) has precedence over sec. 1410 simply because sec. 304(c) lacks the "except for" proviso would result in more protection being accorded refuges than parks. Such a result would be inconsistent with the ANCSA scheme.

Thus, the first clause of section 1412 complements the last sentence of section 1410 concerning the manner of selection. This is important since section 1410 only deals with the limited problem of selection deadlines and expired withdrawals. Section 1410 contains no guidance on other aspects of selection and conveyance to ANCSA corporations. For instance, it does not repeat the provisions for reservation of easements which allow public access across Native corporation land. 43 U.S.C. § 1616(b). Nor does it repeat the patent provision requirements of sections 14(c)(1)-(4), 43 U.S.C. §§ 1613(c)(1)-(4). Without the reference to ANCSA, the implementation of section 1410 selections would lack important elements of the administrative framework provided under ANCSA.

The second clause of section 1412 mandates that the provisions of ANILCA not be construed to amend provisions of ANCSA, except as "specifically provided" in ANILCA. Thus, section 1412 acts as a supremacy clause to resolve inadvertent conflicts between ANILCA and ANCSA. (*See* S. Rep. No. 413, 96th Cong., 1st Sess. (1979)) Through section 1412, Congress averted problems that might result from the interplay of the two acts.

Section 1412 therefore precludes construction of any other provision of ANILCA as altering section 1410, unless that intent is expressly indicated. No provision of ANILCA, including sections 206 or 304(c), expressly refers to or limits the application of section 1410. Section 1410, as an amendment to ANCSA, must be given full effect according to its own terms. Thus, section 1410 permits withdrawal of lands in refuges and parks that were formerly withdrawn by section 11 of ANCSA.

In addition, having become part of ANCSA itself, the provisions of section 1410 of ANILCA are entitled to the protection of section 26 of ANCSA, which provides:

To the extent that there is a conflict between any provision of this Act and any other Federal laws applicable to Alaska, the provisions of this Act shall govern.

85 Stat. 715 (1971).

Construing section 1410 of ANILCA as we have avoids any conflict between ANCSA and other Federal laws. Construing it differently would create a conflict with the land entitlements intended by ANCSA.

Furthermore, section 1412 of ANILCA preserves the supremacy provisions of section 26 of ANCSA. Ordinarily, the later act would prevail over the earlier act. In this case, however, Congress provided in section 1412 that the earlier act [ANCSA] would continue to prevail in any conflict between the two acts unless ANILCA "specifically provided" otherwise.

III. LEGISLATIVE HISTORY OF ANILCA

The published legislative history of ANILCA reinforces our conclusion that section 1410 authorizes the Secretary to rewithdraw public lands

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within the original ANCSA withdrawals, including refuges and post-ANCSA parks, for village corporation selections to correct underselections.

There is extensive legislative history for section 1410 which demonstrates a clear and consistent intent on the part of the Administration and the Congress to give the Secretary authority to correct the underselection problem by rewithdrawing lands previously withdrawn for selection by underselected village corporations in a manner most consistent with the original intent of ANCSA. The language that was to become section 1410 was introduced more than 2 years before ANILCA was enacted and was consistently included in the various bills that were precursors to ANILCA. This language was accompanied by separate explanatory material that supports the interpretation presented in this Opinion.

In contrast, the legislative history does not contain any specific comment on the language in sections 206 and 304(c) withdrawing refuges and parks from future State and Native selections. There is no published statement by a Member of Congress and no language in any committee report to indicate that sections 206 and 304(c) were intended to limit or supersede the language of section 1410. There is nothing in the legislative history to suggest that Congress regarded sections 206 and 304(c) as conflicting with section 1410.

A. Section 1410

The language that was to become the portion of section 1410 addressed in this Opinion and referred to herein as the "proposed 1410 language" originated during President Carter's Administration. The proposed 1410 language was introduced in Congress in 1978 and was included, virtually unchanged, in each of the legislative proposals that preceded and ultimately became ANILCA in 1980.³⁹ The Department of the Interior proposed the language and provided accompanying commentary. This commentary consistently reflected an intent that the underselection problem be resolved in a manner most consistent with the original intent of ANCSA, and *expressly* indicated that refuges would be available for rewithdrawal.

On July 14, 1978, at the request of the Administration, Senator Henry Jackson, Chairman of the Senate Committee on Energy and Natural Resources, introduced the proposed 1410 language in the Senate. It was part of S. 3303, a bill to amend ANCSA. 124 Cong. Rec. 20,913 (1978) (S. 3303, sec. 2). The Acting Secretary of the Interior in his transmittal letter to accompany the proposed ANCSA amendments,

³⁹The only difference between the proposed 1410 language and sec. 1410 as enacted was the inclusion of a comma. The early version began: "Where lands selected and conveyed, or to be conveyed, * * *." In later versions, the comma after the second "conveyed" was deleted.

provided the following explanation of section 2 of S. 3303 which was inserted in the *Congressional Record*:

SECTION 2—UNDERSELECTIONS

Provides general authority under certain circumstances for the Secretary to withdraw available land and allow Village Corporations a period of time to make additional selections to achieve entitlements granted by the Settlement Act. For a variety of reasons, some Village Corporations have failed to select sufficient and available land, within the time periods specified in the Settlement Act, to fulfill the entitlement granted the Corporations. Congress has previously passed legislation correcting such insufficiencies for two Village Corporations. At this time, three more Village Corporations are underselected and as many as a dozen more could be found to be underselected when their land selections are finally adjudicated. The Settlement Act does not give the Secretary the authority to correct underselection problems. An amendment to the Act giving the Secretary general authority to make the additional withdrawals necessary to correct these deficiencies as they are finally identified, is considered the most satisfactory way to correct these problems. The alternative is legislation on an individual Village Corporation basis * * *.

* * * * *

The general authority granted by this amendment would allow the Secretary to rewithdraw available land in the area originally withdrawn for selection by the Village Corporation. This would include land within the boundaries of both the original "village" and the "deficiency" withdrawals. *Land available for rewithdrawal would include all land which was considered public land and available for withdrawal at the time the Settlement Act was passed in 1971, irrespective of classification of the land subsequent to passage of the Settlement Act.* If sufficient land to correct the problem is not available in the original withdrawals, other vacant, unreserved and unappropriated public land (including lands solely withdrawn for purposes of classification under section 17(d)(1) of the Settlement Act) would be reviewed and withdrawn as needed. The new withdrawal would not exceed two times the remaining entitlement of the Village Corporation and the Corporation would have 90 days from notice by the Secretary to select its remaining entitlement. Thereafter, the selection would be accepted and processed as if originally filed under the Settlement Act.

Further background on this amendment is contained in Issue 4-E of the Department's review of the implementation of the Settlement Act, completed March 3, 1978.

124 Cong. Rec. 20,915 (1978) (italics added).

The Administration's explanation plainly discloses that section 1410 was to provide the Secretary with general authority to correct the underselection problem by rewithdrawing Federal lands in a manner which, to the extent possible, corresponded to the original withdrawals.

The Department's explanatory text refers to the Secretary's authority to "rewithdraw available land." "Available land" is further explained in this text as including land that was "public land and available for withdrawal at the time [ANCSA] was passed in 1971." Additional explanation of "available" is not given. Nowhere in the Administration's explanation of its proposed 1410 language, however, is there any suggestion that refuges and post-ANCSA parks would be considered unavailable for rewithdrawal by the Secretary.

The proposed 1410 language was preceded by an issue paper prepared by the Department. The section of the document entitled "ANCSA Issue 4-E" addressed the question of how the Department of the

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Interior should resolve the underselection entitlement by some Native corporations. As disclosed in the Issue 4-E section, the proposed solution had involved making land available from refuges or forests previously withdrawn for the affected corporation.

The section of the issue paper on ANCSA Issue 4-E provides:

For major corrections, or where conditions do not permit minor corrections, seek general legislation that would authorize the Secretary, upon finding an actual underselection existed, and in his discretion, to consider a request from the affected corporation(s) to:

Withdraw lands not to exceed two times the amount of underselection, and

Allow the corporation to select, in accordance with the appropriate selection procedures of the ANCSA, the entitled acreage within a period of 6 months of notification by the Secretary.

The lands subject to withdrawal by the Secretary would be (1) public lands not withdrawn or reserved for a specific purpose; not entered or appropriated under the public land laws, including the mining laws, but not the mineral leasing laws; not selected by the State of Alaska; or (2) are public lands in a National Wildlife Refuge or National Forest and were previously withdrawn for selection by the involved corporation under Section 11 or 16 of the ANCSA.

In making the withdrawals the Secretary would have to withdraw lands, if available, that were previously withdrawn for selection by the involved corporation by section 11 or 16. Only if such lands were not available would other lands be withdrawn.

Underselections considered here involve only Village or Regional corporation selections under sections 12(a), 12(b), and 12(c) or Village corporation selections under section 16(a). They do not include any possible underselections under section 14(h).

Memorandum to The Secretary from Assistant Secretary—Land and Water Resources, March 3, 1978 (Alaska Native Claims Settlement Act Implementation and Policy Review) (ANCSA ISSUE 4-E) (*italics added*).

The language of S. 3303, section 2, was incorporated as section 1405 in the version of H.R. 39 reported by the Senate Committee on Energy and Natural Resources in 1978. *See* S. Rep. No. 1300, 95th Cong., 2d Sess., 73-74 (1978). The Committee report provided the following explanation for section 1405:

This section gives the Secretary of the Interior the necessary authority to withdraw available lands for Village Corporation selection in those instances where it is determined a Village Corporation has not selected sufficient land to obtain its full entitlement. The Secretary is to make every effort to rewithdraw available land for underselected Villages from the original Village and deficiency withdrawals. *Lands considered available for rewithdrawal would include all lands within those withdrawals which was [sic] considered public land and available for withdrawal at the time the ANCSA was passed in 1971, irrespective of classification of the land subsequent to passage of the ANCSA * * *.*

Id. at 261-62 (*italics added*).

In the 96th Congress, both the House Committee on Interior and Insular Affairs and the Committee on Merchant Marine and Fisheries reported H.R. 39 with the section 1410 language included. *See* H.R.

Rep. No. 97, 96th Cong., 1st Sess., pt. 1, at 128 (1979) (Section 1405); H.R. Rep. No. 97, 96th Cong., 1st Sess., pt. 2, at 85 (1979) (Section 1405). The explanation provided in the Interior Committee report is identical to the above-quoted Senate Energy Committee Report in the 95th Congress. See H.R. Rep. No. 97, 96th Cong., 1st Sess., pt. 1, at 322. The Merchant Marine and Fisheries Committee simply referred to the Interior Committee's Report for an explanation. See H.R. Rep. No. 97, 96th Cong., 1st Sess., pt. 2, at 209.

The Senate Energy and Natural Resources Committee, reporting H.R. 39 in the 96th Congress, included the underselection provision as section 1410. See S. Rep. No. 413, 96th Cong., 1st Sess., 87 (1979). The Senate Committee's explanation of section 1410 repeats that contained in its report on H.R. 39 in the 95th Congress and adopted by the House Committee reports. See *id.* at 313.

In summary, the legislative history of section 1410 reveals a singular, unchanged, and uncontroverted intent on the part of the Administration and the Congress that the statutory provision provide the Secretary with general authority to correct the underselection problem by rewithdrawing, to the extent such lands are still in Federal ownership, the same lands originally withdrawn for Native selection pursuant to ANCSA. In this way, Congress sought to approximate as fully as possible the original pattern and intent of ANCSA for village corporation selections.

B. Sections 206 and 304(c)

In contrast to the legislative history of section 1410, the language inserted in sections 206 and 304(c) withdrawing parks and refuges from future State and Native selections is not explained in the committee reports. We have discovered no language in the legislative history that would indicate whether these sections were considered as conflicting with or superseding the language and remedial intent of section 1410.

The general withdrawals eventually enacted as sections 206 and 304(c) originated in the ANILCA debate over whether to allow mining and mineral development within conservation system units in Alaska.⁴⁰ The House Interior Committee version of H.R. 39, reported in the 95th Congress, contained broad language withdrawing all conservation system unit lands in Alaska from entry or appropriation under the mining laws and mineral leasing laws, except as specifically provided elsewhere in the bill. See H.R. Rep. No. 1045, 95th Cong., 2d Sess., pt. 1, at 62.

The language withdrawing parks from future State and Native selections first appeared in 1978, without explanation, in the Senate

⁴⁰ Compare 123 Cong. Rec. 14,535 (1977) (statement by Senator Metcalf), with 123 Cong. Rec. 21,736 (1977) (statement by Senator Stevens) and with 124 Cong. Rec. 1519 (1978) (statement of Secretary Andrus); see also 124 Cong. Rec. 13,857 (1978) (comparison of four Alaska lands bills with regard to oil, gas, and mineral development).

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Energy Committee version of H.R. 39. *See* S. Rep. No. 1300, 95th Cong., 2d Sess., 10 (1978). The same bill contained a withdrawal provision for refuges comparable to section 304(c), but without any reference to future State and Native selections. *Id.* at 14. Significantly, the same version of H.R. 39 reported by the Senate committee also contained proposed 1410 language for correcting underselections. The Senate Committee report contained the explanations of the proposed 1410 language discussed above and never mentioned the proposed 206 and 304(b)(2) language.

Neither the 95th Congress House version of H.R. 39, nor the 96th Congress H.R. 39, contained language withdrawing park or refuge lands from future State or Native selection. *See* H.R. Rep. No. 97, 96th Cong., 1st Sess., pt. 1 (1979); H.R. Rep. No. 97, 96th Cong., 1st Sess., pt. 2 (1979). Both versions of H.R. 39 contained the language of section 1410 and accompanying explanations in the committee reports.

When the Senate Energy Committee reported its version of H.R. 39 in late 1979, the bill included language in both sections 206 and 304 withdrawing park and refuge lands from future State and Native corporation selections. *See* S. Rep. No. 413, 96th Cong., 1st Sess., 11-12 (1979) (Sections 206 and 304(b)(3)). No explanation of the language is provided. Nowhere did the Committee suggest a conflict between these provisions and section 1410. Nor did the Committee suggest that this language was intended to limit or defeat the Secretary's authority under section 1410 to rewithdraw Federal lands within the original withdrawal area, including refuges and post-ANCSA parks. The committee report is silent on these points. To read conflict into these provisions would frustrate the purpose and intent of section 1410 as repeatedly reflected in the committee reports. *See Watt v. Alaska*, 451 U.S. 259, 270-72 (1981) (silence in legislative history itself may be suggestive).

C. Section 906(o)

Further support for our construction of section 1410 can be found in the legislative history of section 906(o). Section 906(o) concerns the status of lands within conservation system units.

Earlier versions of language that became section 906(o) provided that lands withdrawn pursuant to section 17(d)(1) of ANCSA and within the boundaries of conservation system units were to be added to such units and administered accordingly "unless, before, on, or after the date of the enactment of this Act, such land has been validly selected by and conveyed to a Native Corporation." (Italics added.) H.R. Rep. No. 1045, 95th Cong., 2d Sess. pt. 1, at 40 (1978) (Section 805(p)); *see also* S. Rep. No. 1300, 95th Cong., 2d Sess. 44 (1978) (Section 906(o)); H.R. Rep. No. 97, 96th Cong., 1st Sess., pt. 1, at 76 (1979) (Section 806(o)).

In the 96th Congress, when the Senate Committee on Energy and Natural Resources reported H.R. 39, section 906(o) of the reported bill contained essentially the same language as in previous versions, but added "or the State of Alaska," at the end, so that the section read as follows:

[906](o) STATUS OF LANDS WITHIN UNITS.—(1) Notwithstanding any other provision of law, subject to valid existing rights any land withdrawn pursuant to section 17(d)(1) of the Alaska Native Claims Settlement Act and within the boundaries of any conservation system unit, National Recreation Area, National Conservation Area, new national forest or forest addition, shall be added to such unit and administered accordingly unless, before, on, or after the date of the enactment of this Act, such land has been validly selected by and conveyed to a Native Corporation, or *the State of Alaska*.

S. Rep. No. 413, 96th Cong., 1st Sess. 51 (1979) (*italics added*).

Senators Metzenbaum and Tsongas, concerned about the effect of the above change, specifically addressed the matter in their additional views printed in the Committee Report. *Id.* at 428–29. The Senators quoted the State's explanation for adding the language, but found it unclear on "a crucial point." *Id.* The Senators indicated their understanding that section 906(o) was not intended to authorize any new State selections within conservation system units. Section 906(o) was further amended on the Senate floor to distinguish between selections by the State and selections by the Natives. If Congress intended that there would be no further Native selections after enactment from within conservation system units, including parks and refuges, it would be reasonable to expect some discussion at this point, either in the dissenting views or on the floor. Instead, Congress enacted section 906(o) which recognizes the possibility of further Native selections. Additional explanations in the legislative history concerning this final change is contained in statements inserted in the *Congressional Record*.⁴¹ In both the Senate and House, the explanations for the final change in language emphasize an intent to prevent further State selections within conservation system units, but mention no concern about section 1410 permitting further Native selections within conservation system unit lands.

V. CONCLUSION

Section 1410 of ANILCA is the sole statutory mechanism available to the Secretary to satisfy the remaining acreage entitlements of underselected Alaska Native village corporations pursuant to ANCSA. We conclude that the language of section 1410 and related provisions of ANILCA, the structure and purposes of ANILCA, and relevant legislative history all demonstrate that the Secretary is authorized to

⁴¹ See 126 Cong. Rec. 21881 (Aug. 19, 1980) (statement inserted by Senator Tsongas); 126 Cong. Rec. 29281 (Nov. 12, 1980) (statement inserted by Congressman Udall).

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withdraw lands within wildlife refuges and post-ANCSA parks within the original ANCSA withdrawals.

THOMAS L. SANSONETTI
Solicitor

BOR RESPONSIBILITIES IN OPERATING BULL LAKE RESERVOIR*

M-36973

February 21, 1992

Reclamation Lands: Generally—Indians: Hunting, Fishing and Gathering Rights

The Act of Mar. 14, 1940, requires the BOR to further both irrigation and Tribal fishing uses of the Bull Lake Reservoir. However, the 1940 Act also requires that inconsistencies between Tribal uses and reservoir purposes must be resolved to permit fulfillment of the reservoir purposes.

Reclamation Lands: Generally—Indians: Hunting, Fishing and Gathering Rights

Where there is no reserved water right for maintenance of pool elevations in Bull Lake Reservoir, the Shoshone and Arapahoe Tribes cannot require the BOR to maintain a particular reservoir level.

Memorandum

To: Assistant Secretary, Water and Science

From: Solicitor

Subject: Bureau of Reclamation Responsibilities in Operating Bull Lake Reservoir

This responds to your May 21, 1991, request for advice as to the Bureau of Reclamation's (Reclamation) responsibility in operating the Bull Lake Reservoir in Wyoming. The Shoshone and Arapahoe Tribes of the Wind River Reservation (Reservation) have sought the Department of the Interior's (Department) assistance in protecting and enhancing fishery resources in the reservoir. The reservoir lies within the exterior boundaries of the Reservation. You have asked how Reclamation should handle those requests in light of competing Reclamation project needs. In particular, this responds to the request of the Shoshone and Arapahoe Tribes (the Tribes) that Reclamation maintain specified water levels in Bull Lake Reservoir.¹

*Not in chronological order.

¹The Tribes submitted a request that Reclamation maintain reservoir levels at 127,000 acre-feet or more. See letter from John Washakie, Chairman, Shoshone Business Council, and Burton Hutchinson, Chairman, Northern Arapahoe Business Council, to David Allison, Superintendent, Wind River Agency, U.S. Bureau of Indian Affairs, dated Apr. 11, 1990. This Office has consulted many interested parties and considered the numerous submissions presented in regard to this Opinion. In particular, we have considered the statements submitted by the Tribes' attorneys. On the issue of whether this legal guidance is necessary, counsel for the Tribes have argued both sides. On Apr. 16, 1991, the Tribes' attorneys challenged the need for an opinion, writing: "A '1988 Regional [sic] Solicitor's Opinion on this

Continued

Reclamation's ability and responsibility to maintain minimum water levels in Bull Lake Reservoir derive from three legal authorities.² First, the 1940 statute under which Reclamation obtained its rights at Bull Lake provides that Indian uses of Bull Lake will continue so long as they are not inconsistent with reservoir purposes. Second, Reclamation must honor its legal obligations as reflected in the contracts it has entered with irrigators and in the decreed water rights of the irrigators. Third, pursuant to the July 3, 1868 treaty which created the Wind River Reservation, the Tribes reserved the right to fish and hunt at Bull Lake. In light of these obligations, we conclude that Reclamation should maintain the water levels necessary to preserve and enhance Tribal fishing interests to the extent that such levels can be reconciled with the reservoir purpose of providing water for irrigation.

I. BACKGROUND

Bull Lake Creek flows both into and out of Bull Lake, before it joins the Wind River, a tributary of the Big Horn River. In its natural state, Bull Lake held approximately 70,000 acre-feet of water. From 1936 through 1938, Reclamation built Bull Lake Dam across the outlet of Bull Lake Creek. The construction of Bull Lake Dam created Bull Lake Reservoir, which holds an additional capacity of approximately 150,000 acre-feet. The original Lake remains beneath the active reservoir. Because it lies below the level of the dam's headgate, it is not available for use by irrigators. Together the reservoir and underlying lake comprise a body of water totalling approximately 220,000 acre-feet. The entire reservoir lies within the Wind River Indian Reservation in Wyoming.³

question is adequate guidance from the Tribes' point of view. That opinion concluded that the reservoir should be operated to serve both fisheries and irrigation needs." Letter from Susan M. Williams and Robert Thompson to Thomas L. Sansonetti, Solicitor, U.S. Dept. of the Interior, dated Apr. 16, 1991. Previously, a member of the same law firm as Ms. Williams, also representing the Tribes, had testified before the Senate Special Investigating Committee of the Senate Select Committee on Indian Affairs on the need for additional guidance to Reclamation and the Dept. of the Interior:

Although the 1988 Regional [sic] Solicitor's precise reasoning and conclusion often are difficult to decipher, [Reclamation] appears to conclude that the statute prohibits it from managing the Reservoir in such a way as to protect the tribal fishery while supplying water to non-Indian farmers * * *.

The difficulties with the Regional [sic] Solicitor's Opinion are numerous and substantial. Most fundamentally the Opinion does not answer the principal question being asked—namely, whether, in times of water shortage, the Tribes or non-Indian irrigators have first call upon the water in Bull Lake and Bull Lake Creek * * *. The real question is precisely what happens when these respective obligations come into conflict. The [Field Solicitor's] Opinion does not attempt to give specific content to the fiduciary duties of the United States in these circumstances.

Federal Government's Relationship with American Indians, Hearings Before the Special Committee on Investigations, Select Committee on Indian Affairs, May 16, 1989, 101st Cong., 1st Sess., pt. 9, at 78–79 (1989) (Testimony of Kevin Gover).

We agree with Mr. Gover's testimony that additional guidance is necessary, particularly in light of the Tribes' subsequent 1990 request. Thus, in this Opinion, we attempt to answer the principal question of whether in times of water shortage the duties of the U.S. to the Tribes outweigh the contractual and statutory duties owed to irrigators.

²This Opinion relies upon prior Opinions of the Office of the Solicitor including Solicitor's Opinion, M–29200, July 31, 1937 (Kirgis Opinion), Solicitor's Opinion, 58 I.D. 331 (1943) (Gardner Opinion), and Opinion of Field Solicitor Aldrich, Oct. 28, 1988 (Aldrich Opinion). While Field Solicitor Aldrich's Opinion provides advice to Reclamation's local office, this Opinion, as well as the Kirgis and Gardner Opinions, provide guidance for the entire Dept. of the Interior.

³See U.S. Dept. of the Interior, Project Data at 983–90 (1981) (Project Data).

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The dam and reservoir at Bull Lake have been the subject of Federal statutes, Solicitor's opinions, and court cases⁴ that are relevant to the issues you have raised. The Secretary authorized a reservoir at Bull Lake on June 19, 1918, as part of an Indian irrigation project which had been authorized by the Act of March 2, 1917. 39 Stat. 993. The Bureau of Indian Affairs (BIA) did not undertake construction of Bull Lake Dam. In 1920, Congress transferred the entire project to Reclamation and subjected it to the Reclamation laws. 41 Stat. 915, 43 U.S.C. §597. The 1920 Act provides for the creation of the:

Riverton project, Wyoming: For the reclamation of lands within and in the vicinity of the ceded portion [5] of the Wind River or Shoshone Reservation, including operation and maintenance, continuation of construction, and incidental operations, \$100,000: *Provided*, That said land shall be subject to all the charges, terms, conditions, provisions, and limitations of the reclamation act and acts amendatory thereof or supplementary thereto and suitable provision shall be made by the Secretary of the Interior in fixing the charges to provide for reimbursement of the entire expenditure in accordance with the reclamation law and other laws applicable to said lands.

41 Stat. 915.

On July 31, 1937, while Reclamation was planning and constructing Bull Lake Dam, Acting Solicitor Kirgis issued an Opinion for the Secretary, addressing the instructions for appraising the Indian interests to be affected by the dam and reservoir. The Opinion responded to questions about how the land, the permanent improvements to the land and the personal property on it should be appraised.⁶

The Act of March 14, 1940, 54 Stat. 49 (the 1940 Act), addressed the use of Tribal property for Reclamation purposes at Bull Lake. Section 1 of the 1940 Act grants to the United States:

a flowage easement and an easement for a dam site, together with all rights and privileges incident to the use and enjoyment of said easements, over tribal and allotted lands of the Wind River * * * Reservation * * * for the construction of Bull Lake Dam and Reservoir * * * in connection with the Riverton reclamation project.

54 Stat. 49. Section 3 of that Act provides:

The easements herein granted shall not interfere with the use by the Indians of the Wind River or Shoshone Indian Reservation of the lands herein dealt with and the water of Bull Lake Creek and the reservoir insofar as the use by the Indians shall not be inconsistent with the use of said lands for reservoir purposes.

Id.

⁴In re: *The General Adjudication of All Rights to Use Water in the Big Horn River System & All Other Sources, State of Wyoming*, 753 P.2d 76 (Wyo. 1988) (*Big Horn Decision*); *Northern Arapaho Tribe v. Hodel*, 808 F.2d 71 (10th Cir. 1987); *Decheri v. Christopoulos*, 604 P.2d 1039 (Wyo. 1980).

⁵This language refers to the fact that the Shoshone and Arapahoe Tribes had ceded certain portions of the original Wind River Reservation to the Government and that these lands had been opened for non-Indian settlement. *Big Horn Decision* at 84.

⁶Kirgis Opinion at 5.

Congress enacted the legislation conveying the easement in 1940, after Reclamation had completed construction of the dam in 1938. *Compare* 54 Stat. 49 *with* Project Data at 983-90.

The legislative history of the 1940 Act is sparse,⁷ but, according to the legislative history, Congress intended to compensate the Tribes for the lands which had been affected by construction of the dam. Congress intended only to acquire easement interests in Reservation lands. The government would pay the "fair and reasonable value of the lands affected and of the damages to be accrued by virtue of the construction of Bull Lake Dam and Reservoir * * *" S. Rep. No. 1036, 76th Cong., 1st Sess. 2 (1939). The land values were determined pursuant to an appraisal method developed by the Bureau of Reclamation and the Office of Indian Affairs, and discussed by Acting Solicitor Kirgis. According to the reports, Tribal representatives concurred in the appraisal method. Congress did not compensate the Tribes for any Tribal interest in the water or fish resources of the original Bull Lake and Bull Lake Creek.⁸

Solicitor Gardner reviewed the Tribes' right to control hunting and fishing on Bull Lake Reservoir and Bull Lake Creek in a 1943 Opinion, 58 I.D. 331 (1943), which Assistant Secretary Chapman adopted. *Id.* at 348. That Opinion considered whether hunting and fishing on various sections of the Wind River Reservation should be controlled by the Wyoming State Game and Fish Commission, the Secretary of the Interior or the Tribes. The Solicitor concluded that control over hunting and fishing at Bull Lake resided with the Tribes. *Id.* at 334.

In 1970, Congress reauthorized the Riverton Project as part of the Pick-Sloan Missouri Basin Project. At that time, Congress added some project improvements and additional project purposes. 84 Stat. 861. The purposes identified in the 1970 amendments included relief to water users, improvement of project works, land rehabilitation, water conservation, fish and wildlife conservation and development, flood control and silt control. 84 Stat. 861.

The water rights at Bull Lake Reservoir are being determined in *In Re: the General Adjudication of All Rights to Use Water in the Big Horn River System and All Other Sources, State of Wyoming*, 753 P.2d 76

⁷ S. Rep. No. 1036, 76th Cong., 1st Sess. (1939) and H.R. Rep. No. 1617, 76th Cong., 3d Sess. (1940). The Senate and House Committees on Indian Affairs published virtually identical reports. Both recommended that the bill as introduced be passed without amendment. S. Rep. No. 1036 consists of a letter from the Senate Committee on Indian Affairs chaired by Senator O'Mahoney. The report includes a letter dated July 19, 1939, from E. K. Burlew, Acting Secretary of the Interior, to the President of the Senate. This letter transmitted the draft of the legislation which had the intended purpose of compensating the Wind River Reservation Tribes for the Indian lands utilized in the construction of Bull Lake Dam and the filling of the Reservoir. Acting Secretary Burlew's letter further states that the Business Councils of the two Tribes had approved the appraisal instructions on Oct. 26, 1937. *Id.* at 1-2. An identical letter was attached to the report from the House Committee on Indian Affairs. See H.R. Rep. No. 1617, 76th Cong., 3d Sess. 1-2 (1940).

⁸ 54 Stat. 49; S. Rep. No. 1036, 76th Cong., 1st Sess. (1939) and H.R. Rep. No. 1617, 76th Cong., 3rd Sess. (1940). At least as early as 1935, the Dept. of the Interior recognized that fluctuating reservoir levels would reduce the value of Bull Lake and its environs. Letter to Mr. John Collier, Office of Indian Affairs, from Robert Marshall, Office of Indian Affairs, Sept. 7, 1935. See also Memorandum to Mr. Collier from T. W. Sheat, Office of Indian Affairs, June 30, 1936. The Kirgis Opinion included instructions to the appraisers that they should make an "appraisal of incidental damages, if any, suffered by lands remaining in Tribal ownership by reason of the severance therefrom of the lands to be taken by the United States." Kirgis Opinion at 7.

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(Wyo. 1988) (*Big Horn Decision*). In 1988, the Wyoming Supreme Court confirmed a lower court decree in the Big Horn River General Stream Adjudication granting the Tribes a reserved water right of 499,862 acre-feet per year.⁹ *Id.* at 83. The court divided the adjudication into three phases. Phase one quantified the Federal Indian reserved right for the Tribes and has been completed. *Id.* at 85. Phase two, which is also completed, quantified the Federal reserved water rights for other Federal reservations such as National Forest, Bureau of Land Management and Park Service lands. *Id.* Phase three will adjudicate the State-granted water rights. *Id.*

The adjudication of the Tribes' reserved rights in phase one denied a Tribal water right to either the naturally occurring water in Bull Lake or the water stored in Bull Lake Reservoir. *In Re: the General Adjudication of All Rights to Use Water in the Big Horn River System and All Other Sources, State of Wyoming*, Report of Special Master Roncalio Concerning Reserved Water Right Claims by and on Behalf of the Tribes of the Wind River Indian Reservation, Wyoming, at 251-52 (1982) (Special Master's Report). However, the Special Master did recognize a Tribal right to water in Bull Lake Creek of 296 acre-feet per year. *Id.* at 330. This finding was later approved by the Wyoming Supreme Court. 753 P.2d at 86. Reclamation, as the holder of state permits, asserted claims to state granted rights to the water stored in Bull Lake Reservoir.¹⁰ Reclamation's right to the water stored in Bull Lake Reservoir has been adjudicated by operation of the 1985 Decree. Amended Big Horn Adjudication Phase III Procedures, at 4 (January 22, 1986). The Tribes do not have any claims pending for water from Bull Lake Reservoir.

Demand on the water stored in Bull Lake Reservoir and Bull Lake Creek has increased as competing water uses have developed. The users of irrigation water in the Midvale Irrigation District hold state water permits that, together with their contracts with Reclamation, entitle them to all of the water stored by Reclamation in Bull Lake Reservoir under Reclamation's permit nos. 1408R and 3912RE.¹¹ Both state and Federal project irrigators along the river historically have diverted all the natural flow of the river during the summer. Thus, Federal project users in the Midvale Irrigation District must rely on Bull Lake Reservoir storage to meet their needs above the natural flow. The natural flow of the Wind River diminishes over the course of the summer, which makes the level of storage in Bull Lake Reservoir important to the Midvale irrigators. The Midvale water users expect Reclamation to operate the reservoir in accordance with their

⁹ Although a higher figure appears in some documents, there was an error in computation, and this figure is agreed to by the U.S. in a letter from James Clear, U.S. Dept. of Justice, to Special Master Dolan dated June 27, 1991.

¹⁰ The existence of a permit acts as a claim which is ruled on as part of the adjudication. *Big Horn Decision* at 85.

¹¹ Permit 1408R for Reservoir storage was issued in Dec. 1906. Permit 3912RE for the expansion of the Reservoir was issued in Jan. 1923.

permits and contracts so as to provide sufficient water at the appropriate times.

The Tribes of the surrounding Reservation have asked for Reclamation to operate the reservoir and outlet stream to preserve and enhance the fishery.¹² In addition to naturally occurring fish in Bull Lake, the U.S. Fish and Wildlife Service stocks the reservoir with fish. The reservoir now supports the ling cod, a native fish, as well as other fish, and the outlet stream supports fish as well.¹³ Fluctuations of reservoir depth and stream flow occasioned by use of the reservoir for irrigation purposes may have a detrimental effect upon both populations of fish.¹⁴ The fluctuating reservoir levels affect some lake fish by interfering with spawning but do not result in direct mortality to fish.¹⁵

II. DISCUSSION

1. Tribal fishing interests in Bull Lake and Bull Lake Creek

As stated above, a prior Solicitor's Opinion addresses, to some degree, the Tribes' interest in the fishery resources of Bull Lake and Bull Lake Creek. 58 I.D. 331 (1943). In that Opinion, Solicitor Gardner considered the hunting and fishing interests of the Indians in two Reservation Reservoirs, Bull Lake and Ray Lake. The Solicitor first concluded that as a general proposition Indians may hunt and fish on their reservations. *Id.* at 332. In regard to these Tribes in particular, the Solicitor stated that: "[t]he treaty of July 3, 1868, which created the Wind River Reservation, contained no express recognition of hunting or fishing rights, but no such provision is necessary. The Indians retain such rights by the very nature of the grant." *Id.* at 333, (citing *United States v. Winans*, 198 U.S. 371, 381 (1905)). He then addressed whether the Tribal Councils have authority to regulate hunting and fishing on the diminished portion¹⁶ of the reservation. *Id.* at 332. Finally, the Solicitor concluded that the Tribes had authority to regulate hunting and fishing by both Indians and non-Indians on Bull Lake and Ray Lake. *Id.* at 348.

In reaching this conclusion the Solicitor considered whether there were any "special circumstances affecting the rights of the tribal councils to

¹² See letter from John Washakie, Chairman, Shoshone Business Council, and Burton Hutchinson, Chairman, Northern Arapahoe Business Council, to David Allison, Superintendent, Wind River Agency, U.S. BIA dated Apr. 11, 1990.

¹³ See D. Vogel, *Instream Flow Recommendations for Fishery Resources in the Major Rivers and Streams on the Wind River Indian Reservation*, Wyoming (U.S. Fish & Wildlife Service 1980).

¹⁴ See, e.g., letter of Susan M. Williams and Robert Thompson to Thomas L. Sansonetti, *supra*, and letter of Burton Hutchinson and John Washakie to David Allison, *supra*. To the extent that Reclamation may have opportunities to mitigate the effects of fluctuating water levels on spawning fish through such measures as the selective placement of riprap, we encourage Reclamation to consider such technical improvements.

¹⁵ In a memorandum from Ass't Regional Director, Fisheries and Federal Aid, Region 6, BOR to Director, Fish and Wildlife Service, dated Aug. 6, 1990, in re: Fish Stocking in Bull Lake on the Wind River Indian Reservation, Wyoming, the following was noted: "Over the past 40 years, low water levels in the reservoir have never caused a fish kill. Fish populations have gone through serious declines, but they have always been able to rebuild."

¹⁶ The "diminished portion" of the Reservation refers to that part of the Reservation which was never opened to non-Indian settlement under the public land laws pursuant to a cession agreement between the U.S. and the Tribes. Act of Mar. 3, 1905, 33 Stat. 1016. Bull Lake and Ray Lake both are within this portion of the Wind River Reservation.

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regulate fishing in the waters of Bull and Ray Lakes." *Id.* at 334. With regard to Bull Lake, the Solicitor concluded that the 1940 Act:

only granted easements to the United States over tribal and allotted lands of the Wind River Reservation for a dam site and reservoir purposes in connection with the development of the Riverton Reclamation project. Not only did this act not extinguish Indian title, but section 3 thereof expressly provided: *'The easements herein granted shall not interfere with the use by the Indians of the Wind River or Shoshone Indian Reservation of the lands herein dealt with and the waters of Bull Lake Creek and the reservoir insofar as the use by the Indians shall not be inconsistent with the use of said lands for reservoir purposes.'* This express reservation of existing rights confirms the conclusion that Indian control of the lake for fishing purposes was not affected in any way. I am not informed, and I have no reason to suppose that fishing activities will be 'inconsistent with the use of said lands for reservoir purposes.'

Id. at 334 (italics).

Thus, Solicitor Gardner recognized that Congress had addressed the issue of inconsistencies between reservoir and Indian purposes. However, Solicitor Gardner believed that Reclamation's operation of the reservoir for irrigation and the exercise of the Tribes' fishing rights would not conflict. Solicitor Gardner did not conclude that Tribal use of the Lake was unaffected by the construction of the reservoir. As stated above, he assumed that the reservoir and Tribal fishing uses of the lake would not be inconsistent, and concluded that the Act did not affect Tribal control of hunting and fishing.

Solicitor Gardner correctly determined that the Tribes possess the right to fish and hunt in Bull Lake Creek and Bull Lake Reservoir. The courts have recognized the Shoshone and Arapahoe fishing and hunting rights as trust assets, which the Secretary protects. *Northern Arapaho Tribe v. Hodel*, 808 F.2d 741 (10th Cir. 1987). The issue you have raised is the extent to which the 1940 Act affected the Department's responsibility to protect the Tribes' interest in the fishery resource. The 1940 Act subordinated the retained use of some Reservation land and the waters of Bull Lake and Bull Lake Creek by the Tribes to the use by the United States for reservoir purposes. 54 Stat. 49.

In obtaining the easement and prescribing the purposes and operations of the enlarged facility, Congress did not express an intent to take the Tribes' right to fish and, in fact, determined that Tribal use of the lands may continue to the extent that such use was not inconsistent with reservoir purposes. 54 Stat. 49. Acting Solicitor Kirgis, writing 3 years before the Act, did not even comment upon the value of the Tribal fishing rights. Kirgis Opinion at 10. Solicitor Gardner, writing after completion of the dam, reflected the congressional determination that the Tribes could use the reservoir in a manner consistent with its purposes. Gardner Opinion at 334. Thus, although Congress decided to limit Tribal activities in the event that inconsistent demands developed, it clearly anticipated that the fishery would remain and

that the Tribes would continue to have the right to fish there. Neither Congress nor either Solicitor who commented on Bull Lake believed that Tribal fishing rights would be substantially affected by the reservoir use of the lake. Therefore, it is reasonable to infer that Congress intended that the reservoir should be operated to maintain the fishery and the Tribes would continue to exercise their fishing rights.

Nevertheless, Congress also provided that where the two uses are inconsistent, Tribal fishing, not reservoir purposes must yield. The earlier Solicitors were correct that there are few circumstances where reservoir operations will be inconsistent with the right to exercise fishery rights. The primary source of conflict, in some years, seems to be that fluctuating reservoir levels interfere with the ability of certain fish to spawn, thus, the drawing down of the reservoir to supply contract storage water does seem to present an occasional but genuine conflict. We conclude that, under the terms of the 1940 Act, while the Tribes continue to have the right to fish, they do not possess the right to control reservoir levels for fish maintenance. 54 Stat. 49.

The Secretary has a duty, which arises from the 1940 Act, to maintain the fishery to the extent possible consistent with reservoir purposes. This statutory construction gives full meaning to the two statutory provisions which allow fishing and reservoir uses. See *FAA Administrator v. Robertson*, 422 U.S. 255, 261 (1975). It permits Tribal fishing to continue yet also allows Reclamation to operate the facility for reservoir purposes. This interpretation also construes language for the benefit of the Indian Tribes by avoiding any unnecessary reduction of fishing rights. *Choate v. Trapp*, 224 U.S. 665, 675 (1912).¹⁷

While the language of the 1940 Act unambiguously precludes Tribal uses of the land which are inconsistent with reservoir purposes, a narrow construction of the term "inconsistent" will be most favorable to the Tribes, and is required by the principles of statutory construction set out above. Accordingly, "inconsistent" should be construed to mean any actions which cause a conflict which cannot be avoided. Thus, Reclamation's easement is a limited one. Reclamation must avoid any unnecessary action which would adversely affect Tribal fishing in the Lake and the fishery resource involved.

Moreover, Congress has authorized the quantification of the reserved water rights of the Indian tribes in general stream adjudications pursuant to the "McCarren Amendment," 43 U.S.C. § 666, and *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545 (1983). The State of Wyoming adjudication has quantified the Indian reserved water rights of the Shoshone and Arapahoe Tribes. The adjudication did not award the Tribes a water right in Bull Lake Reservoir. *Big Horn Decision*.

¹⁷ Statutes affecting Indian rights should, when possible, be read as protecting such rights and in a manner favorable to Indians. *Choate v. Trapp*, *supra*. There is a strong presumption that treaty rights have not been abrogated by subsequent Congressional enactments. *Menominee Tribe v. U.S.*, 391 U.S. 404 (1968).

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Pursuant to the Wyoming adjudication other parties have been awarded water rights to the water in Bull Lake Reservoir, Reclamation for storage and non-Indian water users for various beneficial uses, including irrigation. Thus, Reclamation must deliver water from Bull Lake Reservoir in accordance to the *Big Horn* Decision and whatever water delivery contracts exist to carry out the Decision. If the Decision and the contracts work to the detriment of the Tribal interest in the Bull Lake fishery, Reclamation must act in conformance with the Decision and the contracts.

2. Limits on flexibility in management of Reclamation facilities

Neither the United States nor the Tribes claimed, and the Special Master did not award, any Tribal water rights in Bull Lake. See Special Master's Report at 76-77, 82-86, and 251-52. Therefore, because the Tribes have no water rights in Bull Lake and they presently have no contract right to water stored in Bull Lake Reservoir, the Tribes have neither the right to call upon Bull Lake Reservoir storage nor any right to require specific water surface elevations in Bull Lake Reservoir. See Special Master's Report at 251-52 (1982).¹⁸

Reclamation holds permits and certificates for water stored in Bull Lake. The United States lacks authority to reallocate such water rights solely in order to benefit the Indian fishing interests. *Nevada v. United States*, 463 U.S. 110 (1983). Beneficial interest in the water stored in Bull Lake Reservoir and covered by contract is held by project water users. *Ickes v. Fox*, 300 U.S. 82 (1937), *Nevada v. United States, supra*. Thus, because the water stored in Bull Lake Reservoir is not a trust asset of the Tribes, the United States is not free to reallocate project water rights "like so many bushels of wheat to be bartered, sold, or shifted about as the Government might see fit." *Id.* at 126.

The Department's ability to maintain or enhance the fishery depends on the operational flexibility within the available water supply consistent with project obligations pursuant to statute and contracts with water users. Within those constraints Reclamation retains discretion in deciding how to operate project facilities. Within the limits of this discretion, the Secretary must take measures to protect the Tribes' right to hunt and fish. For example, if Reclamation could schedule water deliveries pursuant to the *Big Horn* Decision and contracts on day one or day two to fully satisfy the non-Indian water users rights, but the water delivery on day one would be detrimental to the fishery, Reclamation must make its delivery on day two.

¹⁸ All of the available storage capacity at Bull Lake Reservoir is currently under contract. See Project Data at 983, 986 and Contract No. 14-06-600-444A at 10.

A situation which arose at the Newlands Project in Nevada two decades ago is instructive concerning the Secretary's duty as trustee for Indian Tribes. The Newlands Project diverts water out of the Truckee River which flows into Pyramid Lake. These diversions caused the level of the lake to drop and affected the Pyramid Lake fishery. Pursuant to the Administrative Procedure Act, 5 U.S.C. § 706, the Pyramid Lake Paiute Tribe challenged the operating criteria and procedures which the Secretary had promulgated to reduce waste of water and diversions away from the Indian reservation in *Pyramid Lake Paiute Tribe of Indians v. Morton*, 354 F. Supp. 252 (D.D.C. 1973) (*Pyramid Lake*). In response to the Tribe's suit the court ruled that:

In order to fulfill his fiduciary duty, the Secretary must insure, to the extent of his power, that all water not obligated by court decree or contract with the District goes to Pyramid Lake * * *.

The Secretary was obliged to formulate a closely developed regulation that would preserve water for the Tribe. He was further obliged to assert his statutory and contractual authority to the fullest extent possible to accomplish this result.¹⁹

Id. at 256.

The *Pyramid Lake* case provides useful guidance to the Department of the Interior on the manner in which the Secretary is to fulfill his responsibility to Indian Tribes and his contract obligations to the Project water users. The Department must ensure that all water is delivered to Project water users pursuant to court decree and contract. The use of the Secretary's discretion is necessary to fulfill the Department's responsibility to the Tribes. While ensuring that water delivery, the Department must endeavor to protect the Tribes' right to hunt and fish to the fullest extent of the Secretary's discretion.²⁰

III. SUMMARY AND CONCLUSION

The Act of March 14, 1940 requires Reclamation to operate the Riverton Reclamation Project to further both irrigation and Tribal fishing uses of the Reservoir. Should those purposes become inconsistent, Congress has addressed how the inconsistency must be

¹⁹ In *Pyramid Lake*, the District Court for the District of Columbia ruled that the Department must consider its trust responsibility to Indian Tribes in adopting regulations formulating a management plan for an irrigation project. In that context, the court found that the Department had responsibility for managing water deliveries to the Newlands Reclamation Project. The court also required the U.S. to provide water to the lake which was not obligated by court decree or contracts. 354 F. Supp. at 256.

While several *Pyramid Lake* and Bull Lake facts differ, the key difference is the existence of a statute concerning inconsistent uses. In *Pyramid Lake*, no statute concerning competing interests was available; whereas, in this case we do have a statute to interpret. Congress has directed how inconsistent uses between the Tribal uses and reservoir purposes should be resolved at Bull Lake.

²⁰ This Office understands that the Commissioner of Reclamation is pursuing a cooperative approach in initiating a comprehensive Wind River Management Study. The Commissioner intends to work with all affected Departmental agencies, the Tribes, the State of Wyoming, and all other major water users to develop a water management plan for the entire Wind River Basin. See memorandum to Asst Secretary, Water and Science, from Commissioner Underwood, re: Bull Lake Reservoir, Riverton Unit, Pick-Sloan Missouri Basin Program, Wyoming, dated Feb. 5, 1992. Technical discussions have already been held where comments from the parties have been received, information exchanged, and options explored. For example, this Office has been provided with minutes of a Jan. 9, 1992, technical discussion between Reclamation and representatives of the Tribes. At this technical discussion a variety of improvements were discussed, including, for example: ice control for headgate protection, modification of fish habitat, and sediment removal at Pilot Butte Reservoir. See memorandum to Barry Gutwein, Natural Resources Consulting Engineers, et al., from Ed Maurer, re: Wind River Meeting, dated Jan. 10, 1992. This Office continues to support efforts to cooperatively resolve water management issues in this region.

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resolved. Inconsistencies between Tribal uses and reservoir purposes must be resolved to permit fulfillment of the reservoir purposes.

In the *Big Horn* adjudication, the Tribes received no reserved water right for maintenance of pool elevations in Bull Lake Reservoir. Therefore, the Tribes may not require Reclamation to maintain a particular Reservoir level. However, Reclamation should carefully consider Tribal requests and manage Reservoir levels so as to avoid unnecessary actions which would limit the ability of the Tribes to fish in Bull Lake.

In operating project facilities, Reclamation must first and foremost fulfill its obligations pursuant to applicable court decrees and its contracts with the Project water users, while exercising its available discretion to protect the Tribal interest in the Bull Lake fishery.

THOMAS L. SANSONETTI
Solicitor

I CONCUR: MANUEL LUJAN
DATE: FEBRUARY 21, 1992

INSPECTOR GENERAL'S REPORT ON LAND ACQUISITIONS

M-36974

July 30, 1992

Acquired Lands

The land acquisitions in question are not subject to the requirements of so-called procurement laws. However, specific actions related to land acquisition may provide bureaus with an opportunity to contract certain functions.

Generally, the bureaus have the authority to pay in excess of appraisal values for property acquired.

Contracts: Generally

The relationship between Departmental bureaus and nonprofit organizations are neither contractual nor agency relationships giving rise to inappropriate obligations prior to the commitment of resources for acquisition.

Authority exists to pay overhead and administration costs of the nonprofit organizations.

No authority exists for bureaus to pay interest for income foregone as a result of the acquisition by nonprofit organizations.

While option costs are utilized by nonprofit organizations, and have resulted in payments in excess of costs from bureaus to the nonprofit organizations, the arrangements are legal. The interaction of nonprofit organizations and Departmental bureaus does not give rise to a Federal advisory committee relationship.

Memorandum

To: Secretary

From: Solicitor

Subject: Inspector General's Report on Land Acquisitions

July 30, 1992

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THOMAS L. SANSONETTI
Solicitor

I CONCUR: MANUEL LUJAN
DATE: FEBRUARY 21, 1992

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Memorandum

To: Secretary

From: Solicitor

Subject: Inspector General's Report on Land Acquisitions

By memorandum dated June 8, 1992, you have requested that I review the Inspector General's (I.G.) Audit Report: "Department of the Interior Land Acquisitions Conducted with the Assistance of Nonprofit Organizations," Report No. 92-I-833 (I.G. Report), and prepare an opinion reviewing the practices which the I.G. believes may not be in accordance with the law.

As noted by the I.G., nonprofit conservation organizations ("nonprofits") have made significant contributions to meeting Departmental acquisition priorities. Furthermore, these nonprofit organizations operate with the assistance of bureaus to identify and acquire lands of high priority to the Department. The notion of private sector assistance to the Department in meeting identified priority acquisitions does not seem to raise any considerable legal or policy problems. Rather, the implementation of these nonprofit-bureau relationships raised questions in the context of the I.G.'s report.

This memorandum devotes considerable attention to the way in which nonprofit organizations and Departmental entities interact. It attempts to analyze the legal nature of the relationships, and whether any current practices raise issues that need to be addressed by management of the Department. While the immediate question raised in the I.G. report involves the authority of the Department to exceed fair market value in purchasing land previously acquired by a nonprofit organization, I believe this question is best answered in a comprehensive review of the way in which these acquisition transactions occur.

THE INSPECTOR GENERAL'S REPORT

The purpose of the I.G. Report was to audit land acquisitions made by the Fish and Wildlife Service (FWS), the National Park Service (NPS) and the Bureau of Land Management (BLM), through appropriations from the Land and Water Conservation Fund (LWCF), 16 U.S.C. § 460l-4-11, and, in the case of FWS, also from the Migratory Bird Conservation Fund (MBCF), 16 U.S.C. § 715 *et seq.*, with the assistance of nonprofits. Specifically, the Report states that the overall objective of the audit was to review the propriety of such land acquisitions to determine whether:

* * *(1) the Department was buying land at excessive prices, (2) nonprofit organizations were benefiting unduly from their participation in the Department's land acquisition process, and (3) lands acquired with the assistance of nonprofit organizations were actually needed by the acquiring bureau.

I.G. Report at 2. During the period covered by the audit, October 1, 1985, to September 30, 1991, Congress provided about \$992 million for land acquisitions by FWS, NPS, and BLM. These three agencies identified a total of 317 transactions during the audit period, with a combined value of about \$222.6 million, in which acquisitions were made with the assistance of nonprofits. Of this total funding, \$546 million was made available to the FWS for land acquisitions, of which

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\$367 million was appropriated from the LWCF and \$179 million deposited in the MBCF. Nonprofit organizations were involved in 159 land acquisitions, in which the FWS paid the nonprofits a total of \$135.6 million, or 25 percent of the total FWS land acquisition funds available. Congress appropriated almost \$388 million to the NPS for land acquisitions under the LWCF during the same period, of which 89 transactions, totalling \$47 million, or 12 percent of total funding, involved nonprofit organizations. Total funding for BLM under the LWCF was approximately \$58 million, of which 69 transactions, valued at almost \$40 million, or 70 percent of total funding, involved nonprofit organizations.

While nonprofit organizations have been involved with Federal agency land acquisitions for more than a quarter-century¹, the growing financial resources of the Nation's major conservation organizations, combined with a dramatic increase in funding available under the LWCF², has significantly expanded the overall financial involvement nonprofit organizations currently have with Federal land acquisition transactions.

Of the transactions involving nonprofit organizations during the 1986-1991 period, the I.G. selected 130 acquisitions totalling about \$134 million on which to base his report. As a result of his audit of these land acquisition transactions the I.G. states:

We identified a total of \$7.1 million from the Land and Water Conservation Fund and the Migratory Bird Conservation Fund that we considered excessive that was paid to tax exempt nonprofit organizations for financing and arranging sales of property to the Department.

I.G. Report at 5. This figure is broken down into two segments. The first, totalling \$5.2 million, represents the amount which the Report claims FWS paid in excess of Fair Market Value. It appears that within the context of this Report "Fair Market Value" is used interchangeably with the term "Appraised Fair Market Value."³

The I.G. was able to specifically document these costs, because as is stated in the Report:

The U.S. Fish and Wildlife Service issued instructions that authorized and sanctioned the practice of purchasing property from nonprofit organizations for amounts greater than the property's fair market value. Specifically, the Service's land acquisition program managers were instructed to use letters of intent, which provide that the Service will purchase property from cooperating nonprofit organizations for the prices paid by the nonprofit organization, *plus any interest, overhead, and direct costs incurred by the*

¹A 1981 report by the General Accounting Office, noted that 4.5 percent of land acquired by NPS, FWS, and the Forest Service during the period 1965-1979 was acquired through the use of nonprofit conservation organizations. ("Overview of Federal Land Acquisition and Management Practices," CED 81-135.)

²Funding under the LWCF for the FWS, NPS, and BLM increased 141 percent between 1986 and 1991, from \$91.4 million to 219.8 million per year.

³Although the subheading of the report which discusses this issue is entitled "Purchase Prices Exceeded Fair Market Value," in citing specific examples of acquisitions, the report refers to FWS payments to nonprofits exceeding the *appraised* fair market value.

nonprofit organization, even when reimbursement of these costs causes the sales price to exceed the appraised fair market value. (Italics added.)

I.G. Report at 5. The second component, consisting of \$1.9 million, represents financial gains realized by the nonprofits on property sold to the Department, even though the price was at or below fair market value. The Report states that:

In these transactions the nonprofit organizations arranged to purchase property for less than fair market value and to sell the property to a Departmental bureau for the property's appraised value in accordance with the Relocation Assistance Act. However, the nonprofit organizations in most cases just held an option until the Departmental bureau had funds available to buy the property.

I.G. Report at 8.

The second part of the Report focuses on appraisal and property valuations, in which the I.G. finds considerable procedural problems. Although no fixed dollar amount is assigned as a loss to the Government, the Report states:

We found, however, that certain land purchases were made before the appraisal process had been completed or were made in excess of the appraisal value with no documentary evidence to justify the increased price. In addition, the value of the land acquired was based on appraisals that were an average of 400 days old at the time of acquisition, with the age of 71 of the 93 appraisals reviewed exceeding 180 days. As a result, the Department currently has little assurance that the fair market value estimates used by its bureaus are timely, complete, and accurate and that prices paid to nonprofit organizations are reasonable and well supported.

I.G. Report at 16. The I.G. Report concludes that, "because of the breakdowns observed in valuing properties," the Government's interests are not adequately protected in dealing with nonprofits.

One recommendation in the I.G. Report is that the Assistant Secretary for Fish and Wildlife and Parks obtain:

[A] Solicitor's opinion on (a) the allowability of paying interest costs and (b) the Department's authority to exceed the appraised fair market value by paying added nonprofit charges such as interest and overhead.⁴

I.G. Report at 10. As noted in the introduction, this opinion will analyze the components involved in a nonprofit acquiring land for the Service to identify potential legal issues.

BACKGROUND

Although the practice of nonprofits purchasing and holding properties for later conveyance to Federal land acquisition bureaus has been utilized for several decades, the statutes and regulations governing Federal land acquisitions do not deal directly with this relationship.

In 1983⁵, as the result of a joint effort between NPS, FWS, BLM and the Forest Service, guidelines were drafted to better define the

⁴ Note that by memorandum of Feb. 19, 1992, the Director of the FWS requested a Solicitor's opinion on these issues. That request has been merged into this Opinion.

⁵ The 1983 guidelines were adopted at the urging of the Office of Management and Budget and the General Accounting Office in order to establish a policy for determining what the working relationship between the agencies and nonprofits should be in acquiring lands.

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relationship between nonprofits and these land acquisition bureaus. Following an opportunity for public review and comment, pursuant to notice in the *Federal Register*, final guidelines were published, also in the *Federal Register* (30 FR 36342, 1983), setting down basic principles to be followed in these transactions. The introduction to these guidelines stated both the purposes of these relationships and the broad array of partners which might assist the land acquisition agencies in achieving those purposes:

Because of the lengthy time requirement in the budgeting and appropriations process, Federal Agencies are frequently unable to acquire land in response to imminent threats to critical resources or to buy needed resources under favorable terms. With the ability to act quickly in the private market and maintain flexible working relationships with landowners, nonprofit conservation organizations or other corporations, individuals, or entities (hereinafter "other entities") can assist and support the Federal Land Acquisition program.

The guidelines outline basic principles that should govern the role of nonprofits and other entities in acquiring land or interests in land for ultimate Federal acquisition. In summary those basic principles are:

1. Nonprofit conservation organizations and other entities are not agents of the Federal Government, unless specifically designated by mutual consent.
2. The nonprofits and other entities are typically independent groups who freely negotiate real estate actions anywhere and anytime they desire and at their own risk.
3. Because of statutory, budgetary, and policy considerations, the objectives of the Federal agencies must be paramount to those of the nonprofit conservation organizations and other entities.
4. Lands or interests in land proposed for acquisition through a nonprofit or other entity should be in accord with priorities outlined by the agency and must be within the boundaries of authorized areas, consistent with existing authorities, and limited to tracts that the agency has determined need to be acquired.
5. In each case where a nonprofit organization or other entity seeks prior assurance from an agency or an agency requests the assistance of a nonprofit organization the proposal of the agency should be outlined in a letter of intent to the nonprofit organization or other entity.
6. In cases where a nonprofit organization or other entity or a Federal agency has requested and received a letter of intent and the nonprofit conservation organization or other entity has secured an option to buy and does not or will not own title prior to a binding Federal commitment to purchase, the option price, the sale price to the Federal agency, and the appraisal data must be disclosed before a decision to purchase is made by the Federal agency.

The letter of intent is the document establishing the pre-acquisition relationship between the Federal agency and the nonprofit or other entity. As stated in the *Federal Register* notice, this letter should provide the nonprofit or other entity with a minimum of:

1. Land or interest in land needed;
2. the estimated value;
3. the projected time frame as to when the agency intends to acquire the property from the nonprofit organization or other entity; and
4. a statement indicating that should the agency be unable or decline for policy reasons to purchase the land within the projected time frame, disposition of the land or interests in land by the nonprofit organization or other entity is without liability to the government.

Although BLM is involved with a limited number of direct acquisitions involving nonprofit organizations, the vast number of transactions between nonprofits and BLM involve land exchanges, which are covered by provisions of the Federal Land Policy and Management Act of 1976, *as amended*, 43 U.S.C. § 1716. The FWS and NPS have been involved in the majority of direct acquisitions involving nonprofit organizations. Consequently, the balance of this discussion will focus primarily on FWS and NPS transactions.

While both the FWS and the NPS were parties to the 1983 "Guidelines for Transactions Between Nonprofit Conservation Organizations and Federal Agencies," our research indicates that the two bureaus have taken differing approaches in implementing acquisitions involving nonprofits.

Both bureaus utilize a letter of intent to reduce to writing in a formalized manner the understanding between the parties. It is apparent in talking with those involved with the acquisition process within the bureaus that discussions between bureau and nonprofit personnel involving land acquisitions are routine. However, it is clear that the vast majority of properties subject to such letters are parcels high on the bureau acquisition priority system. The bureau seeks the assistance of the nonprofit to ensure that a specific parcel will be available from a willing seller at the time when funding for the property is appropriated.

The major difference in utilizing nonprofit organizations in the acquisition procedures between the FWS and the NPS is that in signing a letter of intent, the Director of the FWS specifically indicates that the nonprofit will be paid its purchase price for the property plus reimbursement for direct expenses, overhead, and foregone interest. All such expenses claimed by the nonprofit must be verified to the satisfaction of the Service before they are paid.

The NPS, on the other hand, does not agree to pay any such expenses. However, as the result of a meeting with NPS acquisition officials, it is apparent that at the time NPS acquires a property from a nonprofit, it routinely pays a price above the appraised value of the property

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which would appear to approximate a value which would equal the costs paid to the nonprofit by the FWS in similar transactions.

Reprogramming guidelines found at pp.4-6 of the House Report accompanying the FY 1992 Interior and Related Agencies Appropriations Act instruct the Department to present over-appraisal acquisitions to the Appropriations Subcommittees for review. When the NPS agrees to pay a nonprofit an amount greater than the appraised value for a property, it routinely sends a letter notifying the Appropriations Subcommittees of its intent to proceed with the transaction in 30 days, unless otherwise notified. We are unaware of instances in which the Subcommittees have advised the NPS not to proceed with such a transaction.

The FWS, on the other hand, precludes the notification process by paying a nonprofit no more than the appraised value for a property. The administrative and overhead costs paid to the nonprofit are not viewed by the FWS as a component of the purchase price, and thus the Service does not consider such acquisitions as "over-appraisal transactions," requiring Subcommittee notification.

LEGAL ISSUES

I. The Legal Relationship between Agencies and Nonprofit organizations involved in Land Acquisition Transactions

In addressing the legal issues raised in the I.G. Report, we begin with the basic, but essential threshold questions that define the legal relationships between the land acquisition agencies and the nonprofit organizations that sell properties to the Federal Government. The "letters of intent" delineate the general arrangement between the agencies and nonprofits before the nonprofits first acquire properties from third party sellers.

The first question presented by these transactions is whether the nonprofit is the agent of the Government for purposes of these acquisition. The nonprofit is not an agent of the Government when it acquires the real property, as set forth in the letters of intent, because the law of agency recognizes that a principal may not employ an agent to do that which the principal cannot himself do. 3 C.J.S. §§ 291-294; *California Sand and Gravel, Inc. v. United States*, 22 Ct. Cl. 19 (1990).

The facts briefly restated are that at the request of the NPS or the FWS in a letter of intent, the nonprofit acquires property in its own name. This is done because at the time of the request the Government does not have the funds available to purchase the property. After appropriated funds become available, the Government subsequently purchases the land from the nonprofit and pays interest and all direct overhead expenses incurred.

The Antideficiency Act is the linchpin of the legislative machinery established to protect and preserve the congressional power of the purse. It provides:

"No officer or employee of the United States shall make or authorize an expenditure from or create or authorize an obligation under any appropriation or fund in excess of the amount available therein; nor shall any such officer or employee involve the Government in any contract or other obligation, for the payment of money for any purpose, in advance of appropriations made for such purpose, unless such contract or obligation is authorized by law." 31 U.S.C. § 665(a).

This section prohibits the FWS and the NPS from purchasing goods, services and land without funds appropriated for that purpose. Since an agent cannot be given any authority greater than that possessed by the principal, the nonprofit clearly cannot be considered an agent of the Government since the Government has no authority to purchase the land until Congress authorizes and appropriates funds for the purchase.

It is important to emphasize that an agent of the Government must act within his delegated authority. *See St. Louis Union Trust Co. v. United States*, 617 F.2d 1293, 1300 n.7. (8th Cir. 1980). It is well established that apparent authority does not apply to Government agents. *California Sand*.

Formation of a principal-agent relationship does not require a written document. An agency relationship may be created by an overt act of the parties, or by ratification. *Leather's Best, Inc. v. S.S. Mormaclynx*, 451 F.2d 800,808 (C.A.N.Y. 1971). *See e.g.*, 48 CFR 1.602.3. The letter of intent expressly states that no obligation is imposed on either party. Therefore, it cannot be argued that this letter establishes an agency relationship.

Second, the letter of intent does not establish a contract between the Department and the nonprofit. There is no stated consideration nor are there included any mutual promises. *See National By-Products, Inc. v. United States*, 186 Ct.Cl. 546, 560; 405 F.2d 1256, 1264 (1969). Neither party is given any remedy in the event there is failure to perform. What this letter of intent appears to be is a statement of possible future intent on the part of the Government to take some action, if it so chooses. This, in our opinion, is nonbinding and does not create a contract of any type. *Tilley v. Cook County*, 103 U.S. 155 (1880). *Appeal of Andonian Associates, Inc.*, IBCA 482-2-65, 65-2 BCA ¶ 4951 (1965). It is, nevertheless, important that the bureaus reiterate this view to potential nonprofit purchasers. The 1983 policy contains an explicit statement that should be included in letters of intent. This language should be included in each letter.

The third inquiry associated with assessing the appropriateness of these expenditures, is whether they involve the purchase of supplies or services for which the procurement process is applicable under the Federal Acquisition Regulations (FAR).

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The Federal procurement laws and regulations are not applicable to the purchase of real property or services associated with such purchases.

The Office of Federal Procurement Policy Act of 1974 (Procurement Act) was passed by Congress to establish policies, procedures, and practices which will provide the Government with property and services of the requisite quality, within the time needed, at the lowest cost. 41 U.S.C. § 401 *et seq.*, (Pub. L. 93-400), *as amended by* (Pub. L. 96-83, and OFPP Policy Letter 85-1, Federal Acquisition Regulations System, dated August 19, 1985). Under the Procurement Act, the term "procurement" is defined to include, "all stages of the process of acquiring property or services, beginning with the process for determining a need for property or services and ending with contract completion and closeout* * *." The statute specifically excludes real property from the procurement regulations. 41 U.S.C. § 403, and 41 U.S.C. § 405(a).

Under the Procurement Act, the Office of Federal Procurement Policy promulgated what is now the FAR. The FAR is the major Government-wide regulation governing Federal procurement. The FAR was established for the codification and publication of uniform policies and procedures for "acquisitions" by all executive agencies. (48 CFR 1.101). The FAR applies to all acquisitions except where expressly precluded. 48 CFR 1.103. The term "acquisition" is defined in the FAR as:

the acquiring by contract with appropriated funds of supplies and services (including construction) by and for the use of the Federal Government through purchase or lease, whether the supplies or services are already in existence or must be created, developed, demonstrated, and evaluated* * *

(48 CFR 2.101.) The term "supplies" is defined in the FAR as, "*all property except land or interest in land.*" (Italics added.) (48 CFR 2.101).

Thus, land acquisitions have been excluded from the procurement process. The result is the same whether the land acquisition is made by the Government or a third party on its behalf. Land acquisition activities of third parties would not be subject to the FAR, since the FAR only applies to acquisitions by the Government and because land acquisitions, in any case, are excluded from the FAR. Consequently, the purchase of land from a nonprofit would still not constitute a procurement contract.

In the usual circumstance where the Government purchases the land directly from the seller without the involvement of a third party, the services related to that purchase (e.g. appraisal services, title searches) would be available for competition under the procurement regulations. While this is the common practice of the Department, there is no legal obligation to use the procurement process in acquiring these services

so long as they are considered to "relate to the acquisition of land." 48 CFR 2.101. As a legal matter, the Government is free to use the appraisal of the seller.

In a traditional acquisition of privately owned land the NPS procures title evidence, surveys and appraisals in order to determine the landowner, the tracts to be acquired, and the Government's estimate of market value. These services and reports are acquired by competitive bidding.

The NPS recognizes that nonprofits, before offering land to the Government for purchase or entering an option agreement, have incurred appraisal, survey and title costs just as any prudent private purchaser would do. Further, the nonprofit reflects these costs, in whole or in part, in the price at which it will offer the land for purchase by NPS. These nonprofit transactional costs are not itemized or reviewed by NPS.

In dealing with nonprofit organizations, NPS expends its own funds for title evidence. NPS seldom needs to do survey work, but here the practice is mixed. NPS may spend funds for a survey under FAR, if needed, or accept what might be characterized as a "donation" of a survey from a nonprofit. On appraisals it is the NPS policy to purchase its own appraisals under the FAR. Only with the personal approval of the Director will the NPS accept for review an appraisal done by a nonprofit and then only before the nonprofit initiates negotiations with the landowner. NPS then reviews in-house the appraisal to see whether it will approve the appraiser's estimate of just compensation. The latter course is the exception.

FWS follows a slightly different procedure. All FWS and Departmental requirements remain applicable to the appraisal, title and survey work that is acquired by the nonprofit. With an agreed upon letter of intent, a nonprofit will ask the FWS to identify acceptable appraisers. The completed appraisal will then be reviewed by a FWS reviewer and must meet all Service requirements for a Federal appraisal. Nonprofits will also utilize title companies and title attorneys that are preferred by FWS. Once again, all title work must meet all Governmental requirements and is subject to independent FWS review and approval.

As a business matter, it makes good sense for the Government to perform an independent appraisal whether through a contractor or in-house to ensure that the Government receives the best price for the service.

II. Costs paid by agencies to nonprofits organization

We now turn to questions raised in the I. G. Report regarding the costs land acquisition agencies pay nonprofits in connection with transactions which are subject to letters of intent.

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A. Authority for a bureau to pay more than the appraised market value to acquire a property

With regard to the FWS' policy of paying a nonprofit's administrative costs, overhead and interest, in addition to the purchase price of a property, the I.G. Report states that: "In our opinion, the Service's policy and practice are not consistent with provisions of the Relocation Assistance Act, which requires Federal agencies to purchase property at its fair market value."⁶

I.G. Report at 5.

Section 301(3) of the Relocation Assistance Act states that:

Before the initiation of negotiations for real property, the head of the Federal agency concerned shall establish an amount which he believes to be just compensation therefor and shall make a prompt offer to acquire the property for the full amount so established. *In no event, shall such amount be less than the agency's approved appraisal of the fair market value of such property.*

42 U.S.C. §4651(3). Beyond the plain meaning of the words of this section, the legislative history of the Act reveals that one of the specific purposes of this section was to depart from past practices where sellers are made an offer by the Government on a "take it or leave it basis." (H.R. Rep. No. 91-1656, 91st Cong., 2nd. Sess. (1970)). The House Report goes on to state that:

* * * [T]he proposed policy recognizes that individual appraisers and appraisals are not infallible, and for that reason places the responsibility on the acquiring agency to determine, in advance of negotiations, an amount which it regards as the fair market value of such property, and to make an offer to the property owner for the full amount so determined.

Id. The regulations to implement this Act, as it applies to all Federal agencies, were promulgated by the Department of Transportation, and appear at 49 CFR 24. Section 24.102 of those regulations states that: "The *initial* offer to the property owner may not be less than the amount of the Agency's approved appraisal, *but may exceed that amount if the Agency determines that a greater amount reflects just compensation for the property.*" (Italics added.) See *United States v. Fuller*, 409 U.S. 488, 490 (1972).

A Bureau in seeking to acquire property may indeed offer a seller an amount greater than the appraised market value.

B. Authority for a bureau to pay administrative and overhead costs

The Department of the Interior and Related Agencies Appropriations Act for Fiscal Year 1992 appropriates monies for FWS land acquisition, as follows: "[f]or expenses necessary to carry out the provisions of the

⁶Here, again, it should be pointed out that the I.G. report uses the terms "fair market value" and "appraised fair market value" interchangeably. Two sentences prior to this one, the Report refers to the Service's payment of nonprofit costs, "even when reimbursement of these costs causes the sales price to exceed the appraised fair market value."

Land and Water Conservation Fund Act of 1965, *as amended* (16 U.S.C. § 460l-4-11), *including administrative expenses*, and for acquisition of land or waters, or interest therein, in accordance with statutory authority applicable to the United States Fish and Wildlife Service* * *." (italics added). 105 Stat. 994 (1992) (appropriations act). The appropriations act appropriates monies for the NPS land acquisition as follows: "[f]or expenses necessary to carry out the provisions of the Land and Water Conservation Fund Act of 1965, as amended (16 U.S.C. § 460l-4-11), *including administrative expenses*, and for acquisition of land or waters, or interest therein, in accordance with statutory authority applicable to the National Park Service* * *." (Italics added). 105 Stat. 998.

The appropriations act states that administrative expenses are included in the land acquisition appropriations for NPS and FWS. NPS and FWS may pay their own administrative expenses related to land acquisitions from these appropriations.

The appropriations language does not make specific reference to the indirect costs that may be linked to the purchase of land, e.g., appraisal and title search fees and title insurance. Because the act does not specifically address the issue, the question arises as to the legal authority of an agency's use of appropriated funds for these indirect costs. The basic rule of law applicable to this issue is found at 31 U.S.C. § 1301(a): "Appropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law." It is important to recognize, however, that this section does not require that every item of expenditure be specified in detail by the appropriations act.

The concept that an agency has reasonable discretion in determining how to carry out the objectives of the appropriation is known as the "necessary expense doctrine."

It is a well-settled rule of statutory construction that where an appropriation is made for a particular object, by implication it confers authority to incur expenses which are necessary or proper or incident to the proper execution of the object, unless there is another appropriation which makes more specific provision for such expenditures, or unless they are prohibited by law, or unless it is manifestly evident from various precedent appropriation acts that Congress has specifically legislated for certain expenses of the Government creating the implication that such expenditures should not be incurred except by this express authority.

6 Comp. Gen. 619, 621 (1927). Thus, an appropriation made for a specific object is available for expenses *necessarily incident* to accomplishing that object unless prohibited by law or otherwise provided for.

An expenditure is justified under the necessary expense doctrine if it meets three tests:

1. The expenditure bears a logical relationship to the appropriation sought to be charged;
2. The expenditure is not prohibited by law;

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3. The expenditure is not otherwise provided for because it falls within the scope of some other appropriation or statutory scheme.

See, e.g., 63 Comp. Gen. 422, 427-28 (1984).

In applying these tests to the legality of the Interior bureaus funding their administrative expenses and costs related to land acquisition from the land acquisition appropriations, we note at the outset that the determination that a given item is reasonably necessary in accomplishing an authorized purpose is generally within the discretion of the applicable agency. "When [GAO] review[s] an expenditure with reference to its availability for the purpose at issue, the question is not whether we would have exercised that discretion in the same manner. Rather, the question is whether the expenditure falls within the agency's legitimate range of discretion, or whether its relationship to an authorized purpose or function is so attenuated as to take it beyond that range." *In the Matter of Implementation of Army Safety Program*, (unpublished GAO Decision, B-223608, December 19, 1988); see also 65 Comp. Gen. 738 (1986) (whether appropriated funds are available for a particular purpose must be evaluated in light of the specific circumstances and statutory authorities involved). Clearly there is adequate administrative justification for the bureaus to conclude that payment of costs related to the purchase of lands, as appraisal costs, title insurance, and overhead are necessary to accomplish the purpose of the appropriation, which is to fund the acquisition of land. Obviously, there are limits as to what would be considered a necessary expenditure. Overly broad "overhead" costs may raise a factual issue as to whether or not a cost is necessary.

Accordingly, the bureaus may conclude that it is appropriate to pay for costs directly relating to land acquisition under authority of the Department's annual appropriations for land acquisition.

Among the authorities given the FWS in the Land and Water Conservation Act for which the appropriations act authorizes administrative expenses is the "* * *Federal acquisition and development of lands." There is no law that precludes the FWS from making payment to an outside nonprofit organization for administrative acts in furtherance of the purposes of the Land and Water Conservation Act when funds have been appropriated for administrative purposes.

Note that 16 U.S.C. § 460l-8 provides that grant payments may be made to states to carry out the purposes of 16 U.S.C. § 460l-4-11 for planning, acquisition or development, and that § 460l-8(e) provides that the acquisition money provided to states does not include "incidental costs relating to acquisition." The fact that Congress found it necessary to exempt "incidental costs" from purposes for which funds may be provided to states implies that payments for "incidental costs"

are contemplated by the remainder of the conservation provisions within 16 U.S.C. § 460l-4-11.

Furthermore, the FWS in transmitting its reprogramming requests has routinely informed the Congress as to the nature of the administrative expenditures that had been approved in association with land acquisitions from nonprofit organizations.⁷ The fact there has been no objection voiced or attempt to reverse this practice adds weight to the position that Congress concurs in this expenditure of administrative funds under the Appropriations Act.

C. Authority for a bureau to pay interest charges to nonprofits

In reviewing the bureaus' payment practices to nonprofits in these transactions, the payment of interest is of particular concern. We note that the Federal Government is not authorized to pay interest unless it is expressly provided for by statute or by contract. *See, e.g., United States ex. rel. Angarica v. Bayard*, 127 U.S. 251 (1888); *United States v. Alcea Band of Tillamooks*, 341 U.S. 48 (1951); *United States v. N.Y. Rayon Importing Co.*, 329 U.S. 654 (1947). There is no statutory authority that directs the FWS to reimburse the seller for interest payment. Therefore, the reimbursement of interest to a seller could only be permitted if specifically provided for in a contract. Even if it were conceded that the letter of intent between the agency and the nonprofit which provides for the reimbursement of interest was a contract, and we believe it is not, OMB Circular No. A-122, "Cost Principles for Nonprofit Organizations" (46 FR 17185, 1980), which sets forth principles for determining costs of grants, contracts and other agreements with nonprofit organizations, states at Attachment B(19)(a) that, "Costs incurred for interest on borrowed capital or temporary use of endowment funds, however represented, are unallowable." (This OMB circular was adopted in the FAR at 48 CFR 31.702, under Subpart 31.7 - "Contracts with Nonprofit Organizations.") Therefore, since we are not aware of any express statutory authority for the agencies to pay interest to nonprofit organizations, and A-122 specifically prohibits the payment of interest in contracts and other arrangements with nonprofit organizations, there is no basis to support an agency's reimbursement of interest expenses.

III. Propriety of the relationship between land acquisition agencies and nonprofit organizations

Beyond the basic issues involved in analyzing the legal relationship between the Department's land acquisition agencies and the nonprofit organizations, and reviewing the costs allowed in such transactions,

⁷As an example of such notification, in a Dec. 3, 1990 letter to Congressman Sidney Yates, Chairman of the House Appropriations Subcommittee on Interior and Related Agencies, regarding an acquisition involving the Nature Conservancy, the Assistant Secretary-Policy Management and Budget stated, "In accordance with the terms and conditions of the Service's agreement with TNC the purchase price for this property will include interest, overhead and other administrative costs, as summarized in the enclosed analysis."

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there are certain aspects of these relationships raised by the I.G. Report and our own research which raise substantial questions.

A. Overpayment Issue

The I.G.'s report outlines specific NPS, BLM and FWS transactions in which nonprofit organizations realized proceeds in excess of identified costs. This issue is distinguished from the cost issues discussed above, in that it focuses not on costs related to the purchase of the property or with prices paid above appraised value. Rather, this question deals with transactions in which the nonprofit purchases property under complicated technical arrangements which result in prices paid to the nonprofit from the agency in excess of what the nonprofit paid the original third party owner. Often these transactions involve options in which the nonprofit had very little capital invested and almost no risk involved.

Typically, an option is a contract between a prospective buyer and prospective seller, giving the buyer the right to purchase property (in this case) at a given price before the option expires. Usually, an option is purchased in the hopes that another buyer will be willing to pay a higher price for the property than the price in the contract, before the option expires. For example, a nonprofit could negotiate and purchase an option from a private landowner for \$10,000, giving it the right to buy a given parcel for \$1 million, within one year. If, in turn, a Federal Agency seeks to acquire that property during the term of the option, it must deal with the option-holder. Thus, the nonprofit could ask considerably more than \$1 million for the property, and if the agency agreed to pay that price, the nonprofit would exercise its option and the land would pass from the third party owner to the Federal Agency. The nonprofit would then collect the difference between the price paid by the agency and the \$1 million price for which the nonprofit has the option of purchasing the property.

As an example cited in the I.G. Report (p.9), The Trust for Public Land invested \$1,000 to buy an option to purchase a 217-acre parcel of land for \$2 million for a Wildlife Management Area. As a result, the Trust for Public Land realized a gain of about \$200,000 when the FWS purchased the property nine months later for \$2.2 million.

We recognize the public policy considerations and the perceptions created in the public mind by these transactions. In order to avoid these types of outcomes in the future, the I.G. Report recommends that the acquiring agencies limit prices paid to the nonprofit organizations when their assistance is requested by a Departmental bureau to either the nonprofit organization's purchase price plus allowable expenses per the Relocation Assistance Act or to the approved appraisal value, whichever is less." I.G. Report at 10. It should be recognized that the "profits" realized by the nonprofits in these transactions are typically

not the result of overpayments by the Federal Government, but rather, more likely have resulted from an underpayment by the nonprofit to the third party. A potential solution is that nonprofits be encouraged or required to fully disclose that they hold a letter of intent from a Federal agency in negotiating transactions with third parties and that they are seeking to purchase their land in contemplation of a future sale to the Federal Government. The current guidelines only require that the nonprofit make full disclosure to the land acquisition agency of the terms of its transaction with the third party seller.

B. The nonprofit organizations are not, in this instance, advisory committees

Section 3(2) of Federal Advisory Committee Act (FACA) defines "advisory committee" as "any committee, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee or other subgroup thereof* * * which is * * * established or utilized by one or more agencies, in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal government* * *" 5 U.S.C. App. § 3(2). The nonprofit organizations that sell land to the Department were not established by the Federal Government.

The leading case on determination of whether an outside group is an advisory committee is *Public Citizen v. Department of Justice*, 491 U.S. 440 (1989). In *Public Citizen*, the Court discussed several factors to be considered in deciding if an agency is *using* an organization as an advisory committee under the Act. The factors include: (1) whether the Government prompted formation of the group, (2) whether the organization is funded by the Government, and (3) whether the organization is amenable to management under FACA by the agency.

Other cases have looked at the regularity of meetings, purposes of the meetings, formality of the agency's relationship to the organization, and the types and nature of communication between the organization and the agency.

We understand each bureau internally studies land areas within its jurisdiction and identifies areas that should be protected. Each bureau then develops a priority list for land acquisition, which ranks the areas in priority order based on the bureau's mission. The bureau lists are reviewed annually by the Department as part of the Department's budget formulation process. The lists are then merged according to established administration criteria. A list of Departmental priorities covering FWS and NPS is the final result.⁸ The Department's priority list is released to the public at the same time it is made available to

⁸The development of land acquisition priorities by the NPS involves both a public participation and a budget prioritization process. At the local level the various areas of the National Park System develop land protection plans. These plans identify the tracts of land that will be acquired, the interest in lands (i.e., easement, fee, etc.) to be acquired, and priority of acquisition. Members of the public are invited to participate in this process and comment on the draft land protection plans. NPS, after considering the public comment, finalizes the plan.

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the Congress. Until release to the Congress, each year's list is an internal document, and is not available to any outside source (including the nonprofit organizations).

The prioritization regarding which tracts will be acquired then goes into a budget competition with other tracts in other areas of the National Park System. The result is an NPS land acquisition plan, nationwide. The NPS program then competes with the Departmental acquisitions for appropriations from the Land and Water Conservation Fund. The Department makes a recommendation to OMB and the President's budget establishes the priorities for acquisition of land for the Department. This latter process does not involve the nonprofits, and their advice is not sought on how the Administration's acquisition program should be implemented.

The FWS identifies lands appropriate for acquisition pursuant to the Land Protection Plan (LPP) process. Prior to the start of a new refuge or the expansion of an existing refuge, FWS completes an LPP. This is done through public notice and often individual mailings to known land owners. Public meetings are held and important natural resources are identified. The LPP priorities are listed, tract-by-tract, as high, medium, or low priority. Threats to individual tracts are also reviewed. Following budget prioritization with OMB, acquisition is then accomplished on a case-by-case basis.

We are informed that, because the priority lists for each bureau and the Department are revised each year, the above-described procedures are an ongoing process subject to continuing revisions. At any time, any party, including states, nonprofit organizations and private landowners may (and do) suggest to a bureau that a specific tract of land should be acquired. No suggestion for acquisitions is accepted until the bureau studies the situation itself and reaches an independent conclusion. No entity is relied on as a preferred or regular source for suggesting potential land acquisition projects.

Under the holding in *Public Citizen*, receipt, and even ultimate acceptance, of an unsolicited suggestion from an outside organization does not transform the entity into a FACA committee. Where the bureaus have responsibility for initiating their own land acquisition priority lists and independently considering suggestions for inclusion, they cannot be said to be "utilizing" the nonprofit organization as a source of advice within the meaning of the Act.

Even if receipt of such unsolicited input from the nonprofit organizations were to be considered as the receipt of advice, none of the usual factors is present to begin to bring the entities within the ambit of the FACA. In *Public Citizen*, the Supreme Court concluded, based on an analysis of the legislative history behind FACA, that the FACA is essentially limited to "groups organized by or closely tied to

the Federal Government and thus enjoying quasi-public status." This analysis leads us to the same result the Court found in *Public Citizen*.⁹ There is no advisory committee relationship in this instance.

C. Ethical considerations

In staff discussions with acquisition personnel of the FWS and the NPS, it was clear that there existed no policy to favor certain nonprofit groups over others in assisting with land acquisitions. Certain organizations over time have been utilized more frequently, based on a variety of factors.¹⁰ Nevertheless, staff indicated a willingness to work with any group or individuals on acquisition priorities.

Such willingness to work with all sources is significant. It is important to avoid the substance or appearance of favoring certain groups or individuals over others, absent clear, objective criteria. The 1965 Executive Order on Prescribing Standards of Ethical Conduct for Government Officers and Employees (hereinafter cited as E.O. 11222), directs that employees "avoid any action* * * which might result in, or create the appearance of -

- (1) using public office for private gain;
- (2) giving preferential treatment to any organization or person;
- (3) impeding Government efficiency or economy;
- (4) losing complete independence or partiality of action;
- (5) making a Government decision outside official channels; or
- (6) affecting adversely the confidence of the public in the integrity of the Government.

E.O. 11222, section 201(c).

Again, the facts we have produced lead to no policy of favoritism of particular groups, or of attempting to limit sources of assistance in the acquisition program.

CONCLUSIONS AND RECOMMENDATIONS

In this review of the Departmental-nonprofit transfers, I have concluded:

1. The relationship between Departmental bureaus and nonprofit organizations are neither contractual nor agency relationships giving rise to inappropriate obligations prior to the commitment of resources for acquisition. (Page 200).
2. The land acquisitions in question are not subject to the requirements of so-called procurement laws. (Page 201). However, specific actions

⁹In *Public Citizen*, the Appellant contended the American Bar Association (ABA) views on judicial nominations brought the ABA under FACA. The Court rejected this argument.

¹⁰Three nonprofit organizations—The Nature Conservancy, The Trust for Public Lands and The Conservation Fund—accounted for 239, or 75 percent, of the 317 land acquisition transactions with FWS, NPS and BLM, involving nonprofits during the 1986 to 1991 period covered by the I.G. Report. Bureau personnel cite these organizations' superior financial and staff resources, on a national level, as a primary reason for their ability to assist in the majority of land transactions involving nonprofits.

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related to land acquisition may provide bureaus with an opportunity to contract certain functions.

3. Generally, the bureaus have the authority to pay in excess of appraisal values for property acquired. (Page 203).

4. Authority exists to pay overhead and administration costs of the nonprofit organizations. (Page 204).

5. No authority exists for bureaus to pay interest for income foregone as a result of the acquisition by nonprofits. (Page 206).

6. While option costs are utilized by nonprofits and have resulted in payments in excess of costs from bureaus to the nonprofits, the arrangements are legal. (Page 207).

7. The interaction of nonprofits and Departmental bureaus does not give rise to a Federal advisory committee relationship. (Page 208).

In light of our review of the law and facts, the following recommendations are offered for management consideration.

1. Differing procedures are utilized for the reimbursement of costs between the FWS and NPS. No clear criteria exists for paying over appraised value. We recommend that policymakers consider whether a unified approach would be appropriate.

2. There is a disparity between the bureaus with regard to appraisals prior to the acquisition of lands from nonprofit organizations. Generally, the FWS accepts the appraisal commissioned by the nonprofit as the basis of its acquisition. Generally, the NPS relies on an independent appraisal. The merits of the approaches should be considered and reviewed.

3. The payment of foregone interest is inappropriate and should not form the basis for bureau reimbursement in transactions with the nonprofits.

4. With respect to option contracts held by nonprofits, a potential solution would be to require disclosure by the nonprofits of a letter of intent between the nonprofit and the bureau.

5. The relationship between the bureaus and the nonprofits disclose no factual basis for a conflict of interest situation. However, care ought to be given to avoiding even the appearance of impropriety or special relationships. Perhaps reiteration of the 1983 policy would re-emphasize the open nature of the process.

6. The Department should review bureau compliance with the 1983 policy.

THOMAS L. SANSONETTI
Solicitor

August 4, 1993

APPEALS OF HARDRIVES, INC.IBCA 2319 *et al.*

Decided: August 4, 1993

Contract No. 6-CC-30-04090, Bureau of Reclamation.**Appeals Sustained in Part.****1. Contracts: Construction and Operation: Changes and Extras—Contracts: Construction and Operation: Drawings and Specifications—Contracts: Disputes and Remedies: Equitable Adjustments**

The Board found that appellant contractor, under a BOR contract for canal construction for an irrigation district, had proved specifications, prepared by an A/E firm hired by the district, to be defective. Earthwork elevations were erroneous due to inadequate survey information; they also had been altered arbitrarily without notice; and the estimated borrow quantity, while appearing to a reasonable bidder to be overstated, was greatly underestimated. Borrow quantities provided by the A/E during the job continued to be materially inaccurate. The defective specifications constituted a constructive change compensable under the contract's Changes clause.

2. Contracts: Construction and Operation: Changes and Extras—Contracts: Construction and Operation: Drawings and Specifications—Contracts: Disputes and Remedies: Equitable Adjustments

Appellant established many discrepancies and design errors affecting structures work and amounting to a constructive change.

3. Contracts: Construction and Operation: Actions of Parties—Contracts: Construction and Operation: Changes and Extras—Contracts: Disputes and Remedies: Equitable Adjustments

When a combination of actions and inactions by BOR and by the A/E, which was paid by its client irrigation district, but which also served as BOR's authorized representative in administering the contract, resulted in non-objective treatment and hindered the contractor's work, the Board found that BOR had breached its duty to cooperate, causing a constructive change.

4. Contracts: Construction and Operation: Actions of Parties—Contracts: Disputes and Remedies: Burden of Proof—Contracts: Performance or Default: Compensable Delays

In awarding appellant a 370-day time extension, the Board resolved credibility issues in its favor and found that it had proved, with expert testimony and analysis, that specific delays were due to actions or inactions for which BOR was responsible; that Project completion was delayed as a result; and that BOR had not proved any overall Project delay by appellant.

5. Contracts: Disputes and Remedies: Burden of Proof—Contracts: Disputes and Remedies: Damages: Measurement—Contracts: Disputes and Remedies: Equitable Adjustments

When the evidence established BOR's liability and: (1) the impracticability of proving actual losses directly; (2) the reasonableness of the contractor's bid; (3) the reasonableness of its actual costs; and (4) its lack of responsibility for added costs, the

Board found the appellant justified in using the modified total cost method for its quantum proof.

**6. Contracts: Construction and Operation: Actions of Parties—
Contracts: Disputes and Remedies: Damages: Measurement—
Contracts: Disputes and Remedies: Equitable Adjustments—
Contracts: Performance or Default: Waiver and Estoppel**

Because BOR had instructed during the contract that 1986 AGC equipment ownership and operating rates were to be used, and its contracting officers had used those rates for modifications, the Board found that BOR had waived a contract provision invoking ownership rates derived from 1974 AGC tables.

**7. Contracts: Disputes and Remedies: Burden of Proof—
Contracts: Disputes and Remedies: Damages: Measurement—
Contracts: Disputes and Remedies: Equitable Adjustments**

When the contractor met its burden to prove that compensable delay occurred, and that it could not take on other jobs during the contract period and, at hearing, BOR did not contest use of the Eichleay formula to compute unabsorbed overhead, the Board found that the daily figure used by both parties was appropriate.

**8. Contracts: Disputes and Remedies: Damages: Measurement—
Contracts: Disputes and Remedies: Equitable Adjustments**

The Board held that a 10-percent profit rate was reasonable and that the Contractor Proposals clause, concerning proposals for modifications for work performed by subcontractors, and weighted profit averages derived by BOR to limit profit to 8.85 percent, did not apply.

**9. Contracts: Construction and Operation: Duty to Inquire—
Contracts: Disputes and Remedies: Burden of Proof—Contracts:
Disputes and Remedies: Damages: Measurement—Contracts:
Disputes and Remedies: Equitable Adjustments—Contracts:
Performance or Default: Waiver and Estoppel**

Absent clear proof that BOR was responsible for a concrete slab that had to be removed, the Board deducted the removal costs from costs charged to BOR. The Board also deducted the costs of correcting one-gate turnouts to two gates because, even if the drawings were deemed latently ambiguous, appellant had not met its burden to prove that it had relied upon its interpretation at the time of bid. Also, the contract called for inquiry in the event of drawing discrepancies. Although the turnouts had been installed under inspectors' oversight, there was no evidence that they had been aware of the error and, under the Inspection of Construction clause, they could not waive contract requirements.

**10. Contracts: Construction and Operation: Changes and
Extras—Contracts: Construction and Operation: Drawings and
Specifications—Contracts: Disputes and Remedies: Burden of
Proof—Contracts: Disputes and Remedies: Damages:
Measurement—Contracts: Disputes and Remedies: Equitable
Adjustments**

In awarding appellant an equitable adjustment under the Changes clause for complying with an order to repair storm damage caused by defective specifications, when BOR disputed quantum only, the Board found appellant's proof persuasive.

**11. Contracts: Construction and Operation: Changes and
Extras—Contracts: Construction and Operation: Drawings and
Specifications—Contracts: Disputes and Remedies: Burden of**

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**Proof—Contracts: Disputes and Remedies: Damages:
Measurement—Contracts: Disputes and Remedies: Equitable
Adjustments**

When BOR acknowledged liability for a contract change due to defective specifications, albeit contested appellant's quantum claim for lowering and extending a siphon, the Board accepted conservative cost estimates made by appellant's onsite project manager in the absence of any cost-effective way of segregating extra costs.

**12. Contracts: Construction and Operation: Changes and
Extras—Contracts: Construction and Operation: Drawings and
Specifications—Contracts: Disputes and Remedies: Burden of
Proof—Contracts: Disputes and Remedies: Equitable
Adjustments**

On appellant's claim for excess costs due to defective soil stabilization specifications, the Board found that contemporaneous documentation supported the testimony of appellant's project manager and BOR's inspector that, although the stabilization solution penetration requirement had been waived, appellant had been directed to use the full contract estimated quantity of solution which it had on hand. In finding appellant entitled to an equitable adjustment under the Changes clause, the Board resolved credibility issues in its favor.

**13. Contracts: Construction and Operation: Drawings and
Specifications—Contracts: Construction and Operation: Duty to
Inquire—Contracts: Disputes and Remedies: Burden of Proof—
Contracts: Performance or Default: Waiver and Estoppel**

In denying appellant's claim for the costs of removing and encasing banded mitered pipe bends, the Board found that the contract required encasement; even if the contract were deemed patently or latently ambiguous, appellant had not met its pre-bid duty of inquiry, or its burden to prove reliance at the time of bid, respectively. Appellant also failed to prove that banded bends had been approved as an alternative design and that BOR was estopped from requiring encasement or that BOR's enforcement of the specifications constituted economic waste.

**14. Contracts: Construction and Operation: Drawings and
Specifications—Contracts: Construction and Operation: Duty to
Inquire**

In denying appellant's claim for the costs of placing sealant in transverse contraction joints, the Board found that the specifications and drawings both plainly required it. Therefore, the contract's order of precedence provision, relied upon by appellant when it elected not to place sealant, did not absolve it from its duty of inquiry.

**15. Contracts: Construction and Operation: Changes and
Extras—Contracts: Disputes and Remedies: Equitable
Adjustments**

When entitlement to compensation for complying with a direction to perform extra sump and wells work was undisputed, the Board awarded appellant an equitable adjustment.

**16. Contracts: Construction and Operation: Drawings and
Specifications—Contracts: Disputes and Remedies: Burden of
Proof—Contracts: Disputes and Remedies: Damages:
Measurement**

When it was undisputed that certain progress payments had been late and some Prompt Payment Act interest was due, the Board awarded it based upon dates established in an Independent Government Estimate because it provided the best-supported evidence of when the "proper" invoices required by the contract had been received.

17. Contracts: Construction and Operation: Drawings and Specifications

The Board found that the contract clearly required contractors to include the cost of certain borrow area royalties in their bids, as appellant and its subcontractor had done, and denied appellant's claim to recover them.

APPEARANCES: Graeme Hancock, John R. Jefferies, Fennemore Craig, Phoenix, Arizona, for Appellant; Fritz L. Goreham, Wayne C. Nordwall, U.S. Department of the Interior, Phoenix, Arizona, for the Government.

OPINION BY ADMINISTRATIVE JUDGE ROME

INTERIOR BOARD OF CONTRACT APPEALS

Hardrives has appealed under the Contract Disputes Act of 1978 (CDA), 41 U.S.C. § 605(c)(5), largely from the contracting officer's failure to issue decisions on its claims under its contract with the Bureau of Reclamation (BOR) for the construction of the Hohokam Canal (Canal or Project), part of the Central Arizona Project (CAP). After a 3-week hearing and thousands of pages of transcript, exhibits, and briefs, the parties' combined, oft-disputed, proposed findings of fact totalled over 1000. For the complex procedural background, see *Hardrives, Inc.*, IBCA No. 2319, *et al.*, 91-2 BCA ¶ 23,769 (granting motion to stay); *Hardrives, Inc.*, IBCA No. 2319, *et al.*, 93-2 BCA ¶ 25,669 (opinion on certification); and *Hardrives, Inc.*, IBCA No. 2319, *et al.*, BCA , 1992 IBCA LEXIS 11 (12/30/92 opinion denying motions to dismiss). We make only those findings necessary to the understanding and resolution of the appeals. Of those, with editing, we have adopted some uncontested proposed findings (U).

FINDINGS OF FACT

I. The Contract

1.U. The Hohokam Irrigation and Drainage District (District) obtained Government financing for the Canal. It hired Franzoy-Corey, Architects and Engineers, Inc. (FC or A/E), to prepare the specifications¹ and to manage construction for BOR, at District expense (Appellant's Exhibits (AX) 7, 10, 15, 21, 22, 51; Transcript (Tr.) 3543-45).

1.2.U. FC prepared the Canal specifications, served as Construction Engineer, and administered the Project as BOR's authorized representative. BOR retained the right to assume contract administration (Government's Exhibit (GX) 2A at § I.1.1(d) and (e); AX

¹ Unless otherwise indicated, the term "specifications" includes drawings, plans, and earthwork computer analyses provided by FC as part of the contract documents.

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22 at 11/18/85 agt. at ¶¶ 1, 4; AX 51; AX 134 at Tr. 2/9/87 mtg., lined version with typed names at end at 13; amended complaint and answer (c&a) ¶¶ 21, 25, 29; Tr. 112-13, 426, 3085).

2.3.U. FC admits that its primary concern was to protect the District (Tr. 3559-60).

4. BOR awarded the contract, in the bid amount of \$6,743,617.65, to Hardrives² on May 15, 1986, which thereafter subcontracted with MRT Construction, Inc. (MRT), for earthwork, and with Valley Ditch Lining, Inc. (Valley Ditch), for trenching and lining. The contract covered construction of about 14.1 miles of concrete-lined Canal and the Kleck Road Turnout. BOR prepared the specifications for, and administered, the turnout portion of the contract, not at issue. Of Hardrives' bid, \$6,225,188.30 pertained to the Canal. Hardrives received the notice to proceed on June 12, 1986. It was to complete the Canal and turnout in 270 days, by March 9, 1987, extended to March 10, 1987, by modification 45 (c&a ¶¶ 3, 4, 17; AX 19, 44, 45; GX 1; GX 2A at § H.1 and at specifications (spec.) 1.1.1 and 1.1.2 a.; GX 2C; GX 478 at Tab A; Tr. 112-13, 237-40, 247-48, 1647).

5. The bid schedule called for lump sums and unit pricing based upon given estimated quantities. Among the latter, excavation for canal was estimated at 280,608 cubic yards (c.y.), for which Hardrives bid \$2.78 per c.y., for a total of \$780,094.24; excavation from borrow was 409,684 c.y., bid at \$1.08, for a total of \$442,458.72; excavation for pipe trenches was 18,174 c.y., bid at \$4.85, for a total of \$88,143.90; compacting embankments was 186,749 c.y., bid at \$1.26, for a total of \$235,303.74; construction of canal lining was estimated at various amounts of linear feet (l.f.) and bid at varying unit prices; furnishing and applying soil stabilizing solution was estimated at 21,245 l.f., bid at \$0.38 per l.f., for a total of \$8,073.10; and structural reinforced concrete work, excluding precast, was estimated at 1,241 c.y., bid at \$410, for a total of \$508,810. The schedule stated that estimated quantities were for bid comparison and, except under the contract's Variation in Estimated Quantity clause (VEQ), no claim was to be made for any excess or deficiency (GX 1 at F-11, *et seq.*).

Among others addressed below, the contract contained the following relevant Canal specifications, in pertinent part (all at GX 2A):

6. For staking the work, "the District" was to establish reference points for horizontal alignment with vertical control to be provided by benchmarks. The contractor was to make all detail surveys needed for construction (spec. 1.1.3).

7. Project design was based upon the geological description, drawings, logs of subsurface explorations, and test data contained in the specifications. Bidders were encouraged to conduct their own tests. "The District" denied any representation that information provided,

²On Aug. 12, 1986, Hardrives notified BOR that, to transact business in Arizona, it had to change its name in that State to U.S. Industrial Constructors, Inc. For consistency with the parties, we use "Hardrives" (BCA 2414 Appeal File (AF) at Tab 8).

other than at the point from which derived, depicted conditions to be encountered. Conclusions about materials to be excavated, difficulties, or other work affected by geology or subsurface conditions, were said to be the contractor's responsibility. The upper hundreds of feet of valley fill were said to be loose, but with thick clay below interbedded with sands and gravels "often partially cemented." Detailed test information was said to be available at FC's offices (spec. 1.3.12; *see also* spec. 1.3.13).

8. The contract's boring logs indicated that weakly or moderately cemented materials had been encountered (GX 2C at 80). They provided: "Where used in these specifications, the terms 'weakly', 'moderately', and 'strongly' cemented refer to materials * * * easily crushed with finger pressure, broken manually, or required a hammer blow to break, respectively" (GX 2C at 72).

9. The Site Drainage clause, at § 2.3.1a., provided: "The Contractor shall handle all flows from natural drainage channels intercepted by the work * * *. He shall provide and maintain any temporary construction required to bypass or * * * cause the flows to be harmless to the work and adjacent property."

10. Direct payment for earthwork would be made only for that required for construction of open canal, excavation for pipe trenches, and excavation from borrow (spec. 3.1.1).

11. "To the extent that they exist[ed]," mass diagrams and earthwork data would be available at FC's offices. "The District" disclaimed any representation that the information was accurate or complete, denied responsibility for conclusions the contractor might reach, and noted that the information was not intended to prescribe the contractor's excavation and hauling procedures. "The District" reserved the right to use and distribute earthwork materials during work. The contract provided further:

The ground elevations shown on the drawings and used in the earthwork analysis were established photogrammetrically from aerial surveys. The vertical accuracy of the ground elevations is + 0.25 feet, subject to standard industry tolerances. The bidder/contractor may elect to verify, at his own expense, the accuracy of the elevations. If in the opinion of the Contractor any deviations cause an increase in cost, these costs shall be included in the unit prices submitted in the bid schedule.

Payment for earthwork items will be made to the neat line dimensions shown on the plans and the quantities in the bid schedule * * *.

(spec. 3.1.2). Again, the contractor was to assume responsibility for the nature and difficulty of materials to be excavated. "The District" disclaimed any representation that the excavation could be performed or maintained at the pay lines described or shown in the specifications (spec. 3.2.1).

12. Compacted materials required certain moisture content, with moistening at the excavation site to be done to the extent practicable, supplemented at the compaction site if necessary (spec. 3.1.3).

13. There were clearing, grubbing, and stripping requirements (*see* specs. 2.1.1a., 3.2.6, 3.4.1).

14. The Excavation from Borrow clause provided:

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Where the canal excavation at any section does not furnish sufficient suitable material for embankments, additional material shall be obtained from Borrow Areas A and B. Borrow Area C will be made available to the Contractor upon * * * written notice [to FC]. *However, the Contractor will be charged \$0.15 for each [c.y.] of material removed from Borrow Area C.*

* * * * *

Payment * * * for "Excavation from Borrow" will be made at the unit price per [c.y.] bid * * *. This price shall include the costs of excavating, hauling, placing embankment, moisture application, *plus the \$0.15 per [c.y.] cost of purchasing only borrow material from Borrow Area C,* and all other work described in this paragraph, except * * * clearing and grubbing * * *. [Italics in original.]

(spec. 3.2.6a.; *see also* spec. 3.4.2a.). There was no limit upon free-haul distance for excavation and no overhaul was to be paid. All costs were to be included in bid prices for canal or borrow excavation (spec. 3.2.7).

15. Where original ground surface was below Canal grade, and construction of fill below Canal bottom was prescribed, the fill was to be placed as compacted embankment. Where the original ground surface was below the base of a structure, fill to form a foundation was to be placed as compacted embankment (specs. 3.4.2a., 3.4.3a.).

16. Concrete structures were to be located as on the drawings and built to the lines, grades, and dimensions shown. There were to be no allowances above bid prices for minor modifications or extensions to adapt a structure to a site (spec. 5.1).

17. The Drawings clause, at § 10.1.1, provided:

The drawings which form a part of these specifications show the work to be done * * *

Specifications and details shown on these drawings which are not applicable * * * shall be disregarded. Where details shown differ from the requirements of these specifications, the specifications shall govern. In the event there are minor differences as determined by the Contracting Officer between details and dimensions shown on the drawings and those of existing features at the site, the details and dimensions of existing features at the site shall govern.

The Contractor shall check all drawings carefully and advise the Contracting Officer of any errors or omissions discovered.

* * * the specifications drawings will be supplemented by such additional or revised general and detail drawings as may be necessary or desirable as the work progresses; and the Contractor shall do no work without proper drawings and instructions.

The contract contained the following relevant General Provisions, in pertinent part:

18. Liquidated damages for failure to complete the Canal work on time were \$1,000 per each day of delay (§ H.3).

19. Under, § H.4, the contractor was to provide to the contracting officer for approval a construction schedule in the form of a progress chart showing the order of work and time periods for completion of the various elements. If, in the opinion of the contracting officer, the contractor fell behind its approved schedule, it was to take steps necessary to improve progress. If the contracting officer determined that the contractor was not prosecuting the work with sufficient diligence to ensure completion within the contract period, the

contracting officer could terminate the contractor's right to proceed, in accordance with the Default clause. The contract also provided that the contractor was to give FC, for information, a complete construction program, which the contractor was to revise in a timely manner as necessary. The program was to depict work scheduling and progress details, or the contractor could use and provide a critical path method or similar analysis (§ H.8).

20. Time extensions were to depend upon the extent to which changes caused delay (§ H.7).

21. The term "Contracting Officer" included authorized representatives acting within the limits of their delegated authority (§ I.1.1(b)). FC was said to be the District's representative for construction surveillance and contract coordination with the duty to monitor compliance with the specifications and to report violations to the contracting officer (§ I.1.1(d)). Authority to modify the contract on behalf of BOR was limited to contracting officers. Unless otherwise provided in the contract, the contractor assumed all risks of performance in accordance with any written or oral order, including interpretation, of a person not authorized in writing to issue it (§ I.1.2).

22. The contractor was to comply "without unnecessary delay" with any written or oral order, including interpretation, of the contracting officer or his authorized representative, except that, if the contractor considered the order to have been issued without proper authority, or to be a change under the Changes clause, it immediately was to request written confirmation from the contracting officer. Performance pending receipt of confirmation was to be at the contractor's risk (§ I.1.3).

23. If cost or pricing data were submitted for any non-competitively priced contract modification, BOR could examine documentation to evaluate the data's accuracy, completeness, and currency (§ I.1.5).

24. The Site Investigation and Conditions Affecting the Work clause, § I.2.4, provided that the contractor acknowledged that it had ascertained the nature of the work; investigated conditions, including conformation and conditions of the ground; and satisfied itself as to surface and subsurface materials or obstacles to be encountered, as reasonably found from a site inspection, exploratory work done, and from the drawings and specifications. Any failure by the contractor to do so was not to relieve it from determining the difficulty and cost of the work, or from performing without additional expense to BOR, which assumed no responsibility for conclusions based upon information it had made available.

25. a. Under the Specifications and Drawings For Construction clause, § I.2.16, anything mentioned in the specifications and not shown on the drawings, or vice versa, was deemed included in both. In case of differences, the specifications governed. Discrepancies in figures, drawings or specifications were to be submitted promptly to the contracting officer, who promptly was to make a determination in writing. Any adjustment by the contractor without such a

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determination was to be at its own risk. Shop drawings were those submitted by the contractor or subcontractor showing in detail the proposed fabrication, assembly, and installation of materials or equipment. The contractor was to coordinate shop drawings and to review them for accuracy and completeness. The contracting officer was to indicate approval or disapproval and, if not approved as submitted, was to indicate the reasons. Any work before approval was to be at the contractor's risk. The clause also provided:

(e) * * * Approval by the Contracting Officer shall not relieve the Contractor from responsibility for any errors or omissions in such drawings, nor from responsibility for complying with the requirements of this contract, except with respect to variations described and approved in accordance with (f) below.

(f) If shop drawings show variations from the contract requirements, the Contractor shall describe such variations in writing, separate from the drawings, at the time of submission. If the Contracting Officer approves any such variation, the Contracting Officer shall issue an appropriate contract modification, except that, if the variation is minor or does not involve a change in price or in time of performance, a modification need not be issued.

b. The Administration Of Specifications And Drawings For Construction clause, § I.2.17, provided that, if individuals other than the contracting officer were authorized to approve shop drawings, the authorization was to appear in the contract or otherwise be provided in writing to the contractor by the contracting officer. They did not have authority to approve technical data varying from contract requirements that involved a change in price or in performance time and BOR was not to be liable for any increase in cost or time resulting from the contractor's reliance on such approvals. Adjustments for BOR delay in approving requests for approval "of shop drawings or other technical data" were to be made only if BOR approval were required and if the requests were "properly and timely submitted and approvable" 14 (§ I.2.17(c)). Any adjustment was to be under the Suspension of Work clause.

c. The Inspection of Construction clause, at § I.3.1(c)(3), provided that inspections were for the sole benefit of BOR and did not relieve the contractor from providing adequate quality control measures or "[c]onstitute or imply acceptance." The clause also stated: "(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." The contractor, without charge, was to replace or correct work found by BOR not to conform to contract requirements unless, in the public interest, BOR agreed to accept it with a price adjustment (§ I.3.1(f)).

26. The contractor's operations, including forces employed, sequence, and method, were to be subject to the contracting officer's approval at all times during performance and were to insure completion of the work during the contract period (§ I.2.22).

27. The VEQ clause stated that if a unit-priced item varied more than 15 percent above or below the estimated quantity, an equitable adjustment was to be made upon demand of either party, based upon any increase or decrease in costs due solely to the variation above 115 percent or below 85 percent of the estimate. If the variation caused an increase in time to complete the work, the contractor could request an extension, subject to contracting officer approval (§ I.4.1).

28. The Changes clause, § I.4.5, provided:

(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;
- (3) In the Government-furnished facilities, equipment, materials, services, or site; or
- (4) Directing acceleration in the 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 as a change 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 * * *, 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 * * *. 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.

(e) The Contractor must submit any proposal under this clause within 30 days after (1) receipt of a written change order under paragraph (a) above or (2) the furnishing of a written notice under paragraph (b) above, by submitting to the Contracting Officer a written statement describing the general nature and amount of the proposal, unless this period is extended by the Government. The statement of proposal for adjustment may be included in the notice under paragraph (b) above.

29. a. Under the Pricing of Adjustments clause, § I.4.6, when costs were a factor in BOR evaluation or determination of a price adjustment under the Changes or other clause, they were to be in accordance with cited provisions of the Federal Acquisition Regulation (FAR), as supplemented by any applicable contract clauses. The applicable FAR provisions were "those in effect on the date of this contract."

b. The Change Order Accounting-Modification clause, § I.4.7, provided that the contractor was to maintain sufficient records and data to establish the cost of the work. If the estimated cost of a proposal or claim were to exceed \$100,000, the contractor was to keep separate accounts of all incurred segregable direct costs of work, changed and unchanged, allocable to the proposal or claim.

c. The Contractor Proposals—Reclamation clause, § I.4.8, provided:

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(a) The Contractor, in connection with any proposal it makes for a contract modification, shall furnish a price breakdown, itemized as required by the Contracting Officer. Unless otherwise directed, [it] shall be in sufficient detail to permit an analysis of all material, labor, equipment, subcontract, and overhead costs, as well as any profit * * *. Any amount claimed for subcontracts shall be supported by a similar price breakdown * * * * *

(b) If adjustments are allowed for work performed wholly or substantially by subcontractors * * *, [they] may include an allowance for the prime contractor's indirect cost and profit. However, the total of such allowances * * * shall not exceed 10 percent of the adjustment allowed for the subcontractor * * *.

30. The Differing Site Conditions clause, at § I.4.11(a)(1) and (b), provided that the contractor was to notify the contracting officer of subsurface or latent physical conditions differing materially from those indicated in the contract. If the contracting officer found they so differed and caused an increase in the cost or time of performance, an equitable adjustment was to be made and the contract modified.

31. a. Under the Default clause, § I.4.14, if the contractor failed to prosecute the work, to insure its completion within the contract period, BOR could terminate the contractor's right to proceed, unless delay arose from unforeseeable causes beyond the contractor's control and without its fault or negligence, including acts of BOR in its contractual capacity. The time for completion was to be extended if deemed warranted by the contracting officer.

b. Regarding Government-caused delays, the Suspension of Work clause, § I.4.12, provided:

(b) If the performance 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 * * * (excluding profit) necessarily caused by the unreasonable suspension, delay, or interruption, and the contract modified * * *. 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 if [sic] provided for or excluded under any other term or condition of this contract.

32. a. The Equipment Ownership and Operating Expense clause, § I.4.16, provided that adjustments under the Changes, Differing Site Conditions, or Suspension clauses could include allowance for ownership of equipment by the contractor or any subcontractor. Allowances for ownership and operating expenses were to be based upon the contractor's actual cost records when possible. Except for fully depreciated equipment, for which a reasonable use charge could be agreed upon within limits, the clause provided that allowance for certain depreciation, taxes, insurance, and incidental costs were to be calculated using Tables in the Contractor's Equipment Manual, 1974 Edition, published by the Associated General Contractors of America (AGC) (referred to at hearing as the "yellow book"), and were to constitute the hourly cost of equipment ownership.

b. The Forward to the 1974 yellow book twice stresses that it is intended as a guide only, subject to adjustment to fit the experience of individual equipment owners (GX 577).

33. The Administration of Funds clause, §I.5.6, disclaimed any warranty that funds would be available for payment of earnings, including contract adjustments. The contractor was to notify the contracting officer if it appeared that such funds would be exhausted within 30 days. The contracting officer then could advise of any additional funds available. Prosecution of work at a rate that would exhaust available funds before the end of the fiscal year was to be at the contractor's risk.

II. IBCA 2375/2475

Earthwork, Trenching and Lining, Structures, and Contract Management

A. Earthwork Overview

34. To ensure proper water flow, the Canal had to be built at specified elevations. The contract included detailed information about the vertical elevation of existing ground and the design elevation of the bottom (invert) of the Canal (c&a ¶ 7; GX 2C at 4-23; AX 528).

35. After clearing and grubbing, Hardrives moved more earth to construct the Canal embankments. Depending upon the difference between existing ground and design elevations, the embankments were formed either by excavating "cut" dirt or by adding "fill" to raise the existing ground level, or both. Embankments either were compacted or non-compacted. A compacted embankment consisted of fill dirt placed and compacted to a specified density. Substantially all of the fill used to build the portion of the embankments beneath the Canal had to be compacted. The area of compaction changed based upon the elevation of existing grade compared to the Canal invert. The degree of embankment slope also depended upon the difference between the height of the Canal invert and existing ground. If the invert were above existing ground, the embankments required more dirt and flatter slopes. The contract required more fill dirt than was available from cut, but the contractor had to use all material excavated from the Canal before it would be paid for obtaining extra dirt (borrow) elsewhere (specs. 2.1.1a., 3.4.1; GX 2C at 31; Tr. 130-133, 136-39, 146, 150, 158, 169-72).

36.U. To assist in planning construction activities, the contract documents included a computer printout prepared by FC describing the amount of material to be excavated and the amount of fill at all points along the Canal. The printout showed existing ground elevations, the elevation of the Canal invert, and the volume of dirt to be excavated at each 100-foot segment (station) of the Canal. BOR also provided Hardrives with drawings graphically depicting the elevation data contained in the printout (AX 528; GX 2C; Tr. 269-78).

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37. The data in the specifications correlated to the cut-fill information in FC's computer printout (AX 458).

38.U. Contractors routinely use earthwork quantities and elevations in bid documents to determine work required and to estimate costs (Tr. 1715).

39. In determining bid prices and its anticipated construction schedule, Hardrives relied upon FC's station to station cut/fill information in the computer printout and related drawings. It used the given elevations and earthwork quantities to anticipate haul distances and balance points (where hauled or other cut will equal required fill) to determine the most efficient way to move dirt between cut, fill, and borrow areas (AX 502; Tr. 269-70, 274, 278-80, 284-85, 1191-92, 1385-90).

40.U. Hardrives did not have any information before construction began to suggest that the ground elevations in the contract documents were inaccurate. Before MRT, the earthwork subcontractor, began working, it reviewed and relied upon the earthwork quantities and elevations in the contract to plan its operations (AX 100; Tr. 287-91, 1192, 1396, 2114-16).

41. MRT was not aware of FC's computer printout until after the job was underway. It then found it to be inaccurate and did not use it. It reviewed revisions, but did not find them trustworthy either. It did use the drawings prepared by FC, which, like the printout, depicted alleged existing grades and the elevations to which the contractor was to build. MRT used that information to identify anticipated quantities of cut and fill in portions (reaches) of the Canal (AX 100; Tr. 1192-93; 1974-78).

42. BOR's Chief of the Construction Division, Mr. Fraser, opined:

*** this contract included an express warranty as to the accuracy of the original ground profile. [Specification 3.1.2] states in part:

"The ground elevation shown on the drawings and used in the earthwork analysis were [sic] established photogrammetrically from aerial surveys. The vertical accuracy of the ground elevation is + .25 feet, subject to standard industry tolerances."

* * * * *

*** Bidders are not required to prepare their bids based on their own prebid surveys and investigations. A reasonable job site inspection would not include surveying to check the elevations shown in the specifications. [Footnote omitted.] (AX 458 at 6, 8).

B. Trenching and Lining Overview

43.U. During the first stage of earthwork, the contractor had to construct preliminary Canal embankment. It built a "pad" upon which the trencher would travel while trimming the final inside shape (prism) of the Canal. The contract also required an operations and maintenance (O & M) road. In constructing the embankment, MRT left excess dirt along the Canal sides and invert to enable the trenching equipment to trim the dirt and deposit it where the O & M road was to be built. The contractor had estimated the amount of dirt needed, and the amount to be removed by the trencher, so that it would not

require more to complete the road and would not leave excess material when trenching was complete (AX 512D; specs. 1.3.3; 3.4.2b; Tr. 130, 133, 142-43, 145-50, 166-67).

44.U. After its trencher had formed the prism, Hardrives' subcontractor, Valley Ditch, used a continuous paving machine, which sat in the prism and was pulled along by a bulldozer, to line it (Tr. 178-79, 181, 192, 194).

45. The contract specified prism moisture content. If paving fell too far behind trenching, the prism would dry, and more water and reshaping would be required. To prevent this, Valley Ditch tried to keep the paving less than 1 work day behind the trenching. It was not always able to do so (GX 159 A and B; Tr. 179-82).

46.U. As paving proceeded, workers finished the lining surface and others tooled grooves in it (AX 449; Tr. 192).

C. Structures Overview

47. The contract required 65 siphons, culverts, field turnouts, lateral turnouts, bridges, and other structures, of which 26 were siphons, pipe drops, and culverts having separate inlet and outlet structures within the Canal prism (spec. 5.1; see GX 2C at 44-45, 54; Tr. 113, 125).

48.U. Underground concrete pipe had to be installed as a siphon at numerous locations where the Canal crossed roads, rail lines, and other canals to convey the Canal water underneath (Tr. 119-20, 2992).

49.U. All of these structures extended into the Canal prism. Therefore, it was more efficient to complete the trenching and lining before beginning the structures in a particular location. The alternative would have required stopping the trencher and paving machine and lifting them out of the prism with a crane every time structures were encountered (Tr. 128-42, 196-228, 262-63, 529-30, 1738-39, 1986).

50. The paving machine paved over the area where turnouts and other structures were to be constructed. Before the concrete hardened, a hand-trowel was used to cut the concrete adjacent to the future structure. When the cut piece had cured, it was removed with a backhoe. The structure then could be built at the opening (AX 584; Tr. 208-12, 215-16).

51.U. When a structure was complete, hand-placed lining was required between it and the machine-placed lining. The hand-placed took more time, equipment, and materials than the machine-placed, and created more breaks or gaps in the Canal. Completing the trenching and lining before the structures kept hand-placed lining to a minimum (Tr. 203-04).

D. Finish and Cleanup Work

52.U. After the structures were built in a particular area, final Canal shaping, finishing, and grading; completion of the O & M road; cleanup; and several smaller work items were required. It was most

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efficient and economical to perform the finishing operations after all others had seen completed in a reach, so that the final work would not have to be redone (Tr. 228-30).

E. Construction

53. Hardrives submitted a construction schedule prepared before work began to attempt to comply with the contract requirement and to provide an initial outline showing an orderly progression. It was not a critical path analysis and depicted "early" start and finish dates as identical to "late" ones, with no float. During construction, the schedule was not used, but Hardrives and MRT planned to adhere to a sequential operation (GX 478H; Tr. 261, 886-88, 891, 895-96, 1442-44).

54. MRT began earthwork on July 22, 1986, within 1 day of the schedule. It planned to complete the initial embankment by about December 15, 1986, 2 days earlier than the schedule (GX 478H; Tr. 244).

55. The "schedule" gave an October 1, 1986, start and a December 15, 1986, finish for trenching and lining. Valley Ditch told Hardrives that it planned to start on October 15, and to finish in late January 1987. It expected to complete early, though, as it had in other jobs, to enhance its good reputation. The plan was for it to complete all trenching and lining without catching up with the earthwork and having to demobilize. Assuming placement of 400 c.y. of concrete daily, Valley Ditch expected to complete lining within 45 working days, including 4 10-hour days per week. Lining, not trenching, controlled its progress; it could trench much faster than it could pave. Downtime was anticipated for equipment modification for varying canal widths, breakdowns, and weather (AX 527; GX 478H; Tr. 244-45, 256, 262, 264, 1181-84, 1264-68, 1305-06, 1321-23, 2826).

56. U. To finish the Project on time, the contractor scheduled trenching and lining so that enough would be completed to begin the structures, and then to begin final grading work (Tr. 255, 260-63).

F. Earthwork Problems

1. Elevation Errors

57. To set the slope stakes and construction stakes, Hardrives hired Mr. Rice, a licensed civil engineer and registered surveyor with experience on Federal, state, and private projects, including prior canal and other work on the CAP (Tr. 292-301, 1490-1511).

58. Mr. Rice attempted to set construction stakes about one-half mile ahead of MRT's earthwork, to avoid getting too far ahead, which would subject the stakes to loss due to weather, animal traffic or other causes, and necessitate rework (Tr. 299-300, 1507).

59.U. As Mr. Rice began slope staking in the first reach, he discovered that original ground elevations were lower than indicated in the contract, by an average of about 0.8 foot (Tr. 291-92, 302-03, 1514).

60.U. Mr. Rice did not know of the elevation "bust" before he began surveying (Tr. 1513).

61.U. Mr. Rice also discovered that the survey bench marks, which had been set by FC, were not accurate. FC did not address the problem (AX 49; Tr. 1518-21, 1581, 1586-87).

62.U. Hardrives informed FC about the erroneous elevations immediately upon discovery. Ms. Hodges, FC's project manager, responded that the 0.8-foot discrepancy likely was an isolated problem and ordered work to continue (Tr. 303-05, 309, 1680-81).

63. Ms. Hodges was not an engineer and had not been involved in earthwork construction prior to joining FC (Tr. 3487).

64.U. Based upon his initial review of actual field elevations and those in the contract documents, Mr. Rice found that FC's elevations were inaccurate by as much as 2 feet (Tr. 1522-24).

65.U. FC's internal memorandum of August 25, 1986, reported the discrepancies between contract elevations and those found by Mr. Rice (AX 67; Tr. 310-11).

66. Hardrives continued to notify FC of elevation problems as it slope staked and promptly sent FC copies of Mr. Rice's survey notes for each new Canal section (Tr. 311-13, 329).

67.U. FC also discovered significant errors in the elevations. In an internal memorandum of August 11, 1986 (AX 65), FC's Mr. Boston noted:

After reviewing computer earthwork run for HoHoKam Main Canal, I found an error in canal invert elevation between Sta. 110+67.23 and Sta. 135+58. The grade shown on the plans is about 1.71 feet higher than the grade used in the earthwork calculations.

It appears that a change was made to the plans after the computer run was made. The earthwork calc's are not adjusted for this change.

I believe the change in earthwork quantities would be significant enough to warrant new calculations and a plan/ spec revision.

68. FC had had pre-contract concerns, based upon its experience with other Government canal projects that had suffered from inaccurate aerial surveys. Despite those concerns, and despite its own check, completed the day after bid opening, which revealed elevation discrepancies greater than the 0.25-foot contract tolerance, FC did not tell Hardrives that elevations could be inaccurate throughout the Project until September 1986, when the contractor discovered a 4-foot discrepancy between actual and contract-supplied ground elevations (AX 458; Tr. 329-45).

69.U. By letters to Hardrives and the District of November 4, 1986, with copies to BOR, FC asserted that its consultant, Cooper Aerial Survey Co. (Cooper), had not met accuracy requirements. The discrepancies ranged from 4 feet too low at station 430 to 2 feet too high at station 461 (AX 88, 89, 542; Tr. 310-11, 2150-51).

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70.U. BOR and FC admit that some contract elevations were inaccurate throughout the Canal. About 4 percent were accurate; about 20 percent were within ± 0.25 foot, and about 69 percent were within 1 foot of actual elevations (AX 207; GX 478-N; c&a ¶ 39; Tr. 3162-65).

71.U. FC asserts that erroneous aerial surveys caused the elevation errors, which it concedes contributed to additional earthwork (Tr. 3547).

72.U. BOR did nothing substantial during construction to investigate the earthwork problem (Tr. 1679).

2. The Shrink Factor Error and its Effect upon Borrow Calculations, Haul Distances and Overall Planning

73.U. When a c.y. of earth in natural state is excavated, transported, and compacted, it usually becomes less than a c.y. Project site dirt was compacted naturally to about 85-percent density. The contract required "compacted embankment" to be compacted to 95 percent. Thus, more than a c.y. had to be excavated to fill a c.y. after compaction. This is the "shrink factor" (spec. 3.1.3; Tr. 355, 522, 2116-17, 2710-16, 3077-78).

74.U. In preparing the contract documents, FC used a shrink factor of 30 percent, equivalent to a cut/fill ratio of 1.43. Based upon this, the contract anticipated borrow at 409,684 c.y. (AX 594; Tr. 2718, 2720, 2723, 2725, 3318-19, 3513).

75.U. Prior to submitting Hardrives' bid, Mr. Hite, then its vice-president and civil division head, who signed and was in charge of the contract, discussed with one of his estimators that the contract's shrink factor seemed too high. The estimator stated that dirt to be excavated from borrow areas might be 50,000 c.y. less than indicated in FC's estimates. Anticipating an underrun, Hardrives priced borrow work without profit or overhead, to avoid losing money (Tr. 2098, 2106-07, 2117-18).

76. Mr. Blattner, with 45 years' experience in the construction industry, including significant experience with BOR, was offered by appellant and recognized as an expert by the Board. He would have expected about 15 percent shrink. Hardrives did not inquire about it pre-bid. In Mr. Blattner's opinion, while he and some contractors likely would inquire if they thought a shrink factor was erroneous, others would not, because it often is a matter of judgment. There is no evidence that any bidder on this Project inquired. Any pre-bid inquiries would have been directed to FC, which knew that the shrink was erroneous and thought that it had overstated its borrow estimate. It had done so deliberately, without notice to bidders, as a "cushion," to avoid future change orders and administrative difficulties (AX 179; Tr. 1705-14, 1722-24, 1749-50, 2117-24, 2728-30, 2732, 2898, 2923, 3107-08, 3443-44, 3492-94).

77. That shrink might be inaccurate would not put a contractor on notice that contract ground elevations were inaccurate (Tr. 1205, 2122, 2734-35).

78. During construction, as FC made new computer runs, it changed its reported borrow figure from the bid schedule amount of 409,684 c.y. to 628,614 c.y. while, internally, it estimated 532,000 c.y. Its post-contract analysis reported 494,046 c.y. BOR's November 20, 1991, post-contract analysis, which assumed FC's final survey quantities were accurate (disputed by Hardrives), computed borrow at 512,408 c.y. BOR's December 19, 1991, final quantities analysis, also relying upon FC's survey figures, applied a corrected cut/fill ratio and arrived at an adjusted bid schedule amount of 311,296 c.y. Thus, absent the other contract defects, Hardrives would have been correct that borrow had been overestimated in the bid schedule (AX 132, 174, 179, 605; GX 478 at quantum analysis and at Tab I; Tr. 3200-3204, 3235, 3277-3284, 3319, 3492-94).

79. Although MRT did not knowingly consider a shrink factor in estimating its own job costs, it used the contract estimate for borrow, which incorporated one (AX 502; see AX 594; Tr. 1920, 1959, 2900).

80.U. Mr. Duin, with a bachelor of science degree in civil engineering, with honors, and significant experience in the construction industry and earthwork operations, was retained by Hardrives in about January 1988, as a consultant. He was offered by appellant and qualified by the Board as an expert witness in estimating, construction, and engineering matters pertaining to the Project. In his experience, it would be prudent for a contractor to bid borrow work at cost if it expected an underrun. It would be balancing its bid to account for the incorrectly estimated quantity (Tr. 2681-2708, 2733-34).

81.U. In Mr. Duin's opinion, FC was obligated to adjust the shrink factor and to provide Hardrives with accurate quantities and information after the first balance point (Tr. 2743-45).

82.U. After the Project, FC figured shrink at about 23 percent, cut/fill at 1.3. At hearing, BOR calculated it at 18 percent, cut/fill at 1.226 (AX 132; GX 478 at Tab K; Tr. 2731-32, 3202, 3233-34, 3318-19, 3513).

83.U. At a predesign meeting, Mr. Corey, a founder of FC, had expressed the need for an accurate cut/fill ratio, but FC never provided Hardrives with an analysis of earthwork quantities using an accurate shrink factor (AX 23; Tr. 521, 1676, 3513, 3526-27, 3539).

84.U. Mr. Chapman, Chief of BOR's Arizona Projects Office's (APO) Major Claims Branch, acknowledged at hearing that FC's shrink factor was too high, and that this resulted in FC's providing Hardrives with misleading information (Tr. 2928-29, 4068-69).³

³BOR has objected to appellant's allegation that the contract's shrink factor was misleading, because Hardrives did not use that factor. However, BOR did not contest this proposed finding of fact. Also, although Hardrives did not rely upon the contract's shrink factor, per se, it did rely upon the contract representation that the given borrow quantity, and related cut/fill ratio, were indeed FC's (and, thus, BOR's) actual estimate and not deliberately misstated. The contractor also relied upon the given ground elevations and excavation quantities, and their relationship to borrow and to the nature of the work to be done.

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85. The borrow figures in excess of 600,000 c.y. that FC provided to Hardrives and MRT during construction were misleading (Tr. 4068-69).

3. The Quarter of a Foot Lowering of Elevations

86.U. In addition to random elevation errors and the faulty shrink factor, undisclosed, FC artificially had lowered all ground elevations in the contract documents by 0.25 foot to account for settlement by earthmoving equipment (AX 49, 67, 134, 458; Tr. 315-20, 325, 411, 1537-39, 2746).

87. Such an undisclosed artificial lowering is not common. It affects the accuracy of unit prices, pay quantities, and job planning. Mr. Anderson, APO's Chief of Engineering at Project time, could not recall any project where BOR had so lowered original ground elevations (Tr. 1623-24, 1724-25, 2746, 2890, 3082, 3090).

88.U. In Mr. Anderson's opinion, bidders should be notified about a lowering of existing ground elevations by 0.25 foot (Tr. 3090-94).

89.U. The specifications indicated that the contractor would be paid based upon volume of earth moved, measured between neat line (design line) and existing grade—not existing grade less 0.25 foot (see spec. 3.1.2; Tr. 318-20, 325-26, 3375, 3552).

90.U. The lowering affected pay quantities for excavation for canal and compacted embankment. The contractor had assumed it would be paid, based upon existing grade, for all c.y. moved and placed (Tr. 1724-26).

91. Even after Hardrives notified FC, by at least August 1987, about elevation discrepancies, FC did not disclose that it had lowered ground elevations by 0.25 foot (AX 67; Tr. 317-28, 1077-78).

4. Slope Errors

92. In addition to the other elevation errors, Hardrives found discrepancies in the designated slopes for canal embankment. FC attempted to correct the problem by plan and specification revisions (PSR's) 8 and 9, but Hardrives discovered numerous additional fill sections with discrepancies, totalling almost 20,000 l.f. of slope (AX 49; GX 5; Tr. 1535-37).

5. Borrow Area C Not Available As Represented

93. For Borrow Area C, near the Canal, the contract indicated that contractors could dig a 4-foot-deep hole to secure borrow, but a new owner acquired the property and only would allow MRT to excavate dirt by leveling the property and removing the top portion of soil, which required more work, time, and expense (AX 74; AX 172, Tr. 1864-67, 2801-02).

6. Caliche

94. During construction, caliche (hard, rock-like material) was discovered, mainly at two locations, which was considerably harder than contract indications. FC was notified upon discovery. The caliche could not be broken by finger pressure or by hand, without a tool. In one area, it stopped Valley Ditch's trencher, which had to be lifted from the Canal and relocated. FC directed over-excavation and removal of the caliche. Placement and compaction of additional material in the embankment was required before Valley Ditch could return the trencher. The remedial operation was concluded within 5 days. In the other area, Valley Ditch was allowed to pave over the caliche, but was able to trench only 282 l.f. on the day the caliche impeded it, compared to its average 1,229 l.f. per day (AX 82, 84, 86, 136, 141, 512G, 586; GX 2C at 72; GX 159A (10/15/86-10/21/86 and 1/27/87); Tr. 427-29, 504-14, 520, 545-48, 1276-79, 1333-34).

G. Contract Administration Problems

1. FC's Treatment of Elevation Problems

95.U. Before preparing contract documents, FC hired Cooper to perform aerial surveys to determine existing ground elevations. In its original May 1, 1984, proposal, Cooper agreed to conduct a high-level flight at 2,900 feet to produce aerial photographs and provide cross-sectional data accurate to within ± 0.5 foot. Photographs from such a high-level flight should not be used, however, to determine ground elevations due to their accuracy limitation (AX 3, 272, 458; Tr. 1594, 1599, 1601, 1603-04).

96. FC set ground control and called for the flight, which occurred on August 6, 1984 (AX 458; Tr. 1616).

97. FC requested 0.25-foot accuracy. Cooper stated that it needed to conduct lower flights. On August 8, 1984, 2 days after its flight based upon its May 1 proposal, Cooper submitted a proposal for a lower flight. FC did not approve it. Amidst FC and Cooper personnel changes and miscommunications over several months, FC instructed Cooper to determine existing ground elevations, although there had been no lower flight. FC faced deadlines and was in a hurry to get its plans approved (AX 6, 11, 14, 272, 458; Tr. 1595, 1598-99, 1604-11, 1615, 1627-28, 1635).

98. Notes of FC's December 11, 1985, design review meeting record:

Fred C[orey].—Has not seen an aerial survey yet * * * within its specified accuracy. Company running into earthwork problems on aerial jobs such as Tonopah. Fred recommends to put burden of proof, that aerial surveys are not accurate for pay items, on the contractor. Put paragraph in specifications stating that contractor can get services of registered surveyor to shoot pay quantities before and after construction at his expense. Fred suggests that we need better accuracy than ± 0.5 feet. HoHoKam vertical accuracy is + 0.25 feet.

(AX 23; Tr. 1610, 1612, 1615).

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99.U. Compounding matters, when Cooper had conducted the high-level flight, there had been about 2 to 3 feet of cotton along 4.6 miles of the Canal, which decreased the photogrammetric survey's accuracy (Tr. 1616-17).

100. FC had received advance warning from an engineering company that vegetative ground cover could prevent an accurate photogrammetric survey (AX 4; Tr. 1616-18).

101.U. After photogrammetric surveys, it is customary for designers to conduct ground surveys to confirm the accuracy of elevations determined by the photo surveys (Tr. 1620).

102.U. In March 1986, FC conducted a cursory field check at random locations, which showed ground elevations to be "somewhat erratic" (AX 272; 458, Tr. 1622).

103.U. On April 25, 1986, the day after bid opening and 3 months before construction began, FC found the elevations to be off by an average of 0.36 foot (AX 458; Tr. 3505).

104. Industry standard is that 80 percent of all elevations must be within the required accuracy (AX 458).

105.U. FC complained to Cooper that 84 percent of the survey points did not meet the contract's 0.25-foot vertical accuracy requirement; that 67.7 percent did not satisfy a 0.5-foot industry standard; and that discrepancies of more than 1 foot were not uncommon. FC and Cooper blamed each other (AX 133, 207, 272, 458).

106. FC's use of the aerial survey figures, failure to check them in a timely manner, and continued use of them after problems were revealed, were contrary to BOR's and industry's engineering standards (AX 458; Tr. 4051-53, 4059, 4061, 4065-66).

107.U. Mr. Babitzke, one of BOR's claims analysts, admitted that only 20 percent of the data points that he evaluated met the 0.25-foot contract standard (GX 478N; Tr. 3261-64).

2. FC's Delays in Re-Surveying

108.U. FC notified Cooper in September 1986, that the contract ground elevations were inaccurate. Cooper offered to resurvey, which would have taken a month. FC advised that it did not have time for that to occur (Tr. 1622-23).

109. FC began to resurvey in October 1986, starting east of about station 515 because MRT had completed the initial earthwork westerly (Hardrives and MRT worked from west to east). Thus, the only elevation data available west of station 515 was accumulated by Mr. Rice (GX 117; Tr. 235, 344-47, 351-52).

110.U. FC did not provide new elevations and quantities until January 20, 1987. By then, MRT had completed a substantial portion of the initial earthwork (AX 131; Tr. 361-62, 367-69, 1859).

111.U. BOR acknowledges that it should not have taken FC until January 20, 1987, to resurvey the Canal or to provide a revised

computer run. FC's project manager Hodges felt that FC should have resolved the earth quantities problem (Tr. 1681-83, 1827, 4065).

112. Until January 20, 1987, MRT had been forced to build the embankments based upon the slope stakes and substantially inaccurate contract elevations (Tr. 362-64, 366-67, 473).

113.U. BOR admits that if it had been administering the contract and had received information that the elevations were inaccurate, it immediately would have conducted a ground survey and issued a modification, to minimize impact. Because FC was administering the contract, however, BOR would not assist unless FC so requested (Tr. 3085-89).

114.U. On March 26, 1987, FC informed Hardrives that the computer run provided on January 20, 1987, was inaccurate. FC provided another revision, but it also was inaccurate (AX 174; GX 91; Tr. 459, 1530-31).

115.U. It was in these revised computer runs that FC indicated that borrow would be in excess of 628,000 c.y., although it actually anticipated about 532,000 c.y. (see above and Tr. 3493-94).

116.U. FC complicated matters by indicating to the contractor that it was moving more borrow than it actually was moving (Tr. 2788-89).

3. Payment Delays

117. Hardrives, and thus MRT, were not always timely paid, in part due to FC. For example, FC was to prepare monthly vouchers for BOR, but relied upon Hardrives to do its paperwork for about a year, delaying matters (AX 161; GX 496; Tr. 440-46, 4267-68).

118. While payments were delayed, MRT was in dire financial straits after contract inaccuracies and changes had severely affected its work (AX 152, 154; Tr. 446, 475-79).

119. As of a meeting on February 9, 1987, Hardrives had expected retainage to be reduced to 5 percent. By March 2, 1987, it had not been; FC said only that it would "get back to" Hardrives (AX 161; Tr. 443).

120.U. To sustain MRT, Hardrives tried to pay it in most cases immediately upon receipt of funds from BOR, even though the subcontract only required payment within 10 days thereafter (Tr. 1353-54).

121. Throughout the Project, MRT's measure, by load count, of earthwork performed, did not match FC's computer run. MRT repeatedly asserted that it was moving more quantities than those for which it was being paid. When Hardrives protested use of the January 1987, computer run for pay purposes, FC threatened to hold its payments (Tr. 449-50, 474, 1870).

We address these issues further, below.

4. Delays in Design Resolution

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122. FC and BOR issued 48 PSR's and required Hardrives to respond to every request for proposal (GX 4, 5; Tr. 548, 559-60, 2154).

123. U. FC told Hardrives that change orders would not issue until an acceptable pricing proposal was provided (AX 221; Tr. 560).

124. Early on, to attempt to speed matters, Hardrives responded to requests for proposals, although the contracting officer had not issued change orders (Tr. 549, 560-61, 2154-55).

125. FC rejected at least most of Hardrives' initial submissions. If FC did not accept a proposal, it took no action on the underlying engineering issue. If it did accept one, it tried to negotiate a "time and materials," "cost not to exceed" modification. If the work were completed for less than the ceiling, only actual costs would be paid. If there were excess costs, Hardrives would not be reimbursed. Also, it was to sign a complete release. Hardrives did not agree to such modifications. FC then issued unilateral undefinitized modifications providing that commencement of work constituted agreement to a price ceiling (normally a price first proposed by Hardrives). To obtain any adjustment, Hardrives was to submit a proposal within 30 days of receipt of the modification (see GX 4 at 28; Tr. 552-55, 2157, 2161).

126. On March 4, 1988, contracting officer Harding informed Hardrives that proposals had not been received or had not been sufficiently detailed. As of March 10, 1988, Hardrives had completed work described in several modifications and had not been paid. Aborted negotiations ensued. On April 20, 1988, after the Project largely had been competed, the contracting officer still sought proposals, stating that the release requirement had not changed (AX 396; GX 4 at 29; Tr. 2155-59).

127. The procedures and restrictions sought to be imposed upon Hardrives were atypical and unacceptable (Tr. 1705-1714, 1740-41).

128. Hardrives successfully had negotiated modifications and payment with BOR directly concerning the Kleck Road Turnout (Tr. 2158).

H. Hardrives' and MRT's Attempts to Resolve Problems and Claims

129. By letter to Hardrives of November 19, 1986, after FC had not resolved the earthwork problems known months before, MRT detailed the problems and their adverse impact upon its operations and finances. It foresaw the need to shut down shortly if compensation for changes were not negotiated and received immediately (AX 100; Tr. 384-88, 390).

130. By copy of FC's notification to the District, BOR was notified by at least November 4, 1986, of elevation inaccuracy, increased borrow, and excess cost problems. BOR met with FC concerning the problems prior to November 20, 1986. By letter to BOR of November 24, 1986, Hardrives cited the earthwork problems, their impact,

forthcoming claims, and requested a meeting. One month later BOR asked FC to convene a meeting with Hardrives, the District, FC, and BOR "as soon as possible." FC did not schedule one until February 9, 1987. BOR did not attend because FC failed to notify it (AX 89, 101, 108, 119, 120, 326; Tr. 391-94, 435-37, 2135-37).

131. On January 2, 1987, MRT added a third shift. It eventually had to discontinue it because it could not afford it (GX 117; Tr. 475-76).

132.U. By the end of January 1987, Hardrives still had not been notified of FC's 0.25-foot elevation adjustment. It was notified orally prior to the February meeting, but given no explanation (Tr. 405, 409-11).

133. At the February 9, 1987, meeting, among other things:

a) Hardrives questioned the rationale of the .25 foot adjustment and the lack of notice.

b) Hardrives sought clarification of the .25 foot reduction's relation to FC's computer runs. FC stated that it had no practical effect, but that FC promptly would supply data about the reduction and latest computer run.

c) Hardrives stressed the need for cash flow to MRT; noted that Valley Ditch had had to demobilize due to the earthwork problems; and discussed problems with caliche.

d) FC first sought a VEQ proposal; Hardrives asserted that the problems amounted to a changed condition. FC stated that BOR was aware that there would be substantial quantity overruns and was urging FC to prepare a modification. Hardrives noted that it intended to file a claim, to protect its rights to interest, and to move matters along more quickly. FC stated that a claim would make no difference; it would work toward prompt resolution by modification.

e) FC conveyed its satisfaction with MRT's methods of operation.

f) To assist with Hardrives' and MRT's cash flow problems, and due to completion to date and known work overruns, FC said it would recommend that BOR drop retainage to five percent and ultimately to zero.

g) FC undertook promptly to secure payments for earthwork performed, upon receipt of information from Hardrives, with unresolved matters to be negotiated thereafter. Hardrives inquired how to submit information to effect the speediest resolution; FC did not direct a format.

h) FC stated that the December pay voucher had been released for payment and that the January voucher was close to release. FC recognized problems with slow processing and MRT's need for money.

i) FC noted that the meeting was being taped and that everyone would get a copy of the discussion.

The meeting had been amicable. Hardrives expected prompt resolution of problems and monetary relief. It requested a transcript, but was not given one until at least 2 months after the meeting, when it filed a Freedom of Information Act (FOIA) request (AX 134, 163, 181; Tr. 406-31, 444-45, 495, 2137-42, 2246-47).

134. On February 12, 1987, Hardrives sent FC its calculation of the requested pricing changes and time extension due to earthwork problems. FC rejected it as not in accordance with FAR requirements, noted that new computer run information now applied, and sought inclusion of a proposal from MRT. Hardrives undertook to submit a new proposal (AX 137, 142, 144).

135.U. On March 2, 1987, FC and Hardrives met to discuss continued problems; FC had not fulfilled prior promises (AX 161; Tr. 438-50, 457).

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136. By letters to Hardrives of March 2 and 3, 1987, treated as a claim, MRT stressed the negative impact of the erroneous elevations upon its financial stability and that it might be forced to shut down within 15 days without relief (AX 152, 154, 159).

137. FC did not secure retainage reduction, did not provide data concerning the 0.25-foot adjustment, and did not expedite monthly payments (Tr. 2141). Rather, it blocked retainage reduction. When Hardrives on March 9, 1987, requested elimination of retainage, citing as security \$424,076.27 retained to date, and payment and performance bonds, FC advised BOR not to reduce retainage, noting that, although earthwork progress was good, other work remained. FC concluded: "The balance of the work yet to be done is in the structures and pipe. We believe that the elimination of retention would put our client, [the District], at risk. We recommend that the retainage not be reduced at this time. The district concurs with this viewpoint" (AX 165). BOR followed FC's recommendation (AX 175).

138. FC opined that earthwork problems did not affect structures and pipe work (AX 165), but the entire record demonstrates that it was considerably affected and delayed (see also Tr. 466-67).

139. On March 10, 1987, invoking the contract's Administration of Funds clause, Hardrives notified the contracting officer that it believed that the value of work performed, plus the apparent value of outstanding change orders, modifications, and claims, would exhaust available funds within 30 days. Hardrives cited the risk of proceeding without a commitment of sufficient funds, and notified the contracting officer of its intent to cease operations on April 10, 1987, until sufficient funds were made available. By letter of April 2, 1987, the contracting officer responded that there were sufficient funds remaining in the contract as of that date and that work cessation would subject Hardrives to action under the Default clause (AX 176, 180).

140.U. To alleviate the financial impact of the erroneous elevations upon Hardrives, by letter of April 3, 1987, BOR instructed FC to issue a modification to increase performance time and to provide additional payments to Hardrives. FC did not do so (AX 185; Tr. 481-82).

141.U. On April 9, 1987, MRT submitted a "revised claim" to Hardrives showing increased costs and requesting a 148-day extension (AX 190).

142. FC had stressed to Hardrives that all contract administration matters, including claims and disputes, were to be processed through FC. Frustrated with FC, however, Hardrives arranged for a meeting with the contracting officer, then Mr. Cain, the original one on the Project. The meeting occurred on April 9, 1987, among at least Mr. Cain; his assistant, Mr. Mayhew; Hardrives' representatives; and Mr. Franzoy of FC. All but the BOR personnel had attended the February meeting. Prior to the April meeting, Mr. Mayhew had informed

Hardrives orally that BOR had reserved funds to resolve the earthwork problems. During the meeting, Mr. Franzoy disclaimed knowledge of the problems. The contracting officer acknowledged them and directed FC quickly to try to quantify the "earthwork bust" and to prepare a modification for Hardrives' review. The contracting officer expected it to exceed \$1 million. Mr. Franzoy was instructed to contact Hardrives as soon as possible. Hardrives was assured that he would inform it about the value and timing of the modification by that afternoon, or no later than the next day (AX 192; Tr. 482-85, 2140-46).

143. Mr. Franzoy did not contact Hardrives or return its several calls. FC told Hardrives that he was in meetings, not to be disturbed. MRT then notified Hardrives of its insolvency due to defective contract documents and payment delays. It had continued under hardship, hoping Hardrives could resolve the problems through the meetings and expected modification. On April 13, 1987, Hardrives informed BOR that it had been forced to terminate MRT and that it would complete MRT's work "in as efficient manner as possible given the quality of the contract documents and direction we have received, to date" (AX 192; Tr. 487-89, 710-11, 2146).

144. On April 14, 1987, BOR notified Hardrives that it was FC's position that there would be no adjustment in payments. BOR alleged that it could not act without action by FC and did not issue the anticipated modification (AX 193; Tr. 490-92, 2147).

145. Mr. Cain and Mr. Mayhew, who had expressed understanding of Hardrives' and MRT's problems, retired shortly after the April 9, 1987, meeting (Tr. 493-94).

146. U. On April 15, 1987, Hardrives filed a certified claim for equitable adjustment in price and time due to the defective specifications and FC's failure timely to cure the problems (AF for IBCA 2375, V, Tab 6 at 7; Tr. 495).

147. On April 22, 1987, Mr. Ellis, now contracting officer, informed Hardrives that FC would contact it for information necessary to process its "proposal" and to expect a reply within 30 to 60 days after receipt of the information (AX 201). BOR requested that FC perform a technical analysis. FC alleged that Hardrives' claim was insufficient, did not meet the criteria for certified claims, erroneously was based upon "so called 'defective documents,'" and that a decision by the contracting officer on that aspect had to be rendered "prior to any serious analysis" (AX 213).

148. By letter to FC of May 19, 1987, BOR characterized Hardrives' claim as a request for equitable adjustment and stressed to FC that it was its responsibility to prepare a technical analysis, alleging that the contracting officer could not make a decision without one. FC requested a detailed breakdown of equipment, labor, materials, incidentals, overhead, and profit from Hardrives, which provided it on June 16, 1987 (AX 227, 229).

149. On August 17, 1987, Ms. Hodges submitted a "rough draft" to BOR, stating that the contractor was entitled to a time extension for

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earthwork overruns and payment for increased concrete, but generally denying Hardrives' claims. In graphic terms, BOR rejected most of the draft, noting that there were contract changes, and that the requirement for more haul had changed the nature of the work (AX 280; Tr. 3474-76).

150. Mr. Salisbury, Ms. Hodges' supervisor, was assigned to redo the analysis. He, too, was not an engineer. He drafted his analysis, dated November 23, 1987, with no firsthand knowledge of the earthwork problems. He concluded, *inter alia*, that it was "readily apparent" that the defective documents claim was "based on supposition, innuendo, and unsupported documentation." BOR did not approve of this draft either (AX 333, 334, 358; Tr. 3440, 3476, 3480-82, 3487).

151. The contract documents had been based upon some done for another CAP project by Mr. Salisbury, with no professional training (Tr. 3491-92).

152. FC's final analysis, by Mr. Salisbury, was dated January 28, 1988. He concluded, *inter alia*, that the VEQ clause applied and that the contractor was entitled to payment for extra borrow and for excavation and compaction costs (AX 132; GX 17; Tr. 3458-59).

153.U. The contracting officer prepared a draft decision for an Assistant BOR Commissioner's comments, which included the following:

[Paragraph 8 states]: "There is a changed condition in that more material was excavated from borrow pits and hauled to embankments than could have been anticipated * * * * * The decision apparently confused the terms "changed condition" and "constructive change." Further, our review indicates that the Government's interests will not be best served by the use of the constructive change theory because this principle is equivalent to a condition of defective specifications. * * * Using a constructive change is tantamount to agreeing with theory [sic] posed by the contractor * * *. As you are aware, the Government would be potentially liable for related costs incurred since the inception of the contract under the constructive change theory.

It is recommended that your revised position be based upon [Type I] differing site conditions * * *.

(AX 446; Tr. 3473).

154. Three months later, by letter of September 14, 1988, to the Field Solicitor's office that tried these appeals, a disgruntled former Hardrives employee accused it of fraud, and no contracting officer's decision issued (AX 459; Tr. 4240). Our earlier opinions address the ensuing civil fraud case. In his June 6, 1991, ruling in favor of Hardrives, dismissing the Government's case, United States District Court Judge Copple found the ex-employee devoid of credibility (*United States v. Hardrives, Inc.*, No. 90 CV-1656 (D. Ariz.), appended to appellant's 7/29/91 motion to lift stay).

I. Elevation Problems' Impact Upon Earthwork

155. The erroneous elevations, in particular, had a profound impact upon MRT's and Hardrives' abilities to plan and complete the job

efficiently. At most locations, the elevations were lower than indicated in the contract, meaning canal excavation was less; more borrow was required; haul distances were longer; and the planned direction of borrow hauls changed; requiring backtracking and hauling dirt to unanticipated places. Areas where elevations were higher than indicated reduced borrow, but were intermingled randomly with areas requiring more borrow, and could not be predicted. No significant area remained unaffected by the erroneous elevations (AX 88, 100; GX 478-N; Tr. 348-357, 372-74, 384-88).

156. Neither Hardrives nor MRT prepared a mass diagram, but it is clear from the entire record, including expert testimony, that they had planned the job based upon the contract information and that a mass diagram was not necessary to estimate haul lengths and costs (see Tr. 1047-48, 1390, 1716, 2751-53, 2787).

157. Hardrives and MRT could not analyze or plan earthwork once underway, because FC and BOR never gave them accurate elevation information or quantities. Beyond the immediate areas staked by Mr. Rice, they could not determine balance points, haul lengths, borrow needs, most efficient source, amount, and timing of pre-wetting, equipment needed, other aspects of the work, or performance times (Tr. 175-76, 347-48, 364, 369-72, 380-82, 417, 473-74, 1682, 1863, 2149-50, 2181, 2919-20).

158.U. BOR admits that it was not Hardrives' responsibility to conduct new engineering surveys and recalculate quantities after the erroneous elevations were discovered (Tr. 1682-83).

159. When the earthwork first fell behind schedule, Hardrives deployed an additional project manager, but without accurate information, it was unable to evaluate acceleration, additional workforce, equipment or takeover options (Tr. 1201-03, 1729, 1733-34, 2183-86, 2803, 2814).

160. BOR's Deputy Construction Engineer and its chief claims analyst admit that lack of accurate information on ground elevations would adversely affect Hardrives' ability to plan (Tr. 3095-97, 4191-92, 4219).

161.U. Mr. Canez, a civil engineer with extensive experience at BOR, who served as its inspector and its only representative somewhat regularly on site, acknowledged that a discrepancy as little as one-half foot in elevations would be a serious problem and eliminate the contractor's ability to balance the material (Tr. 1642-49, 1669).

162. Mr. Canez agreed that problems become more difficult when a bust exceeds one-half foot and even greater when discrepancies are inconsistent, as here. Discrepancies of this magnitude change significantly the contractor's haul sources and deposit sites (Tr. 1670-71).

163.U. FC never informed Mr. Canez that the busts were as great as 4 feet too high, and 2 feet too low (Tr. 1670-71).

164.U. During the Project, Mr. Canez was not aware that FC had lowered original ground elevations by 0.25 foot. He agreed that this

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would make a difference in earthwork quantities and payment due (Tr. 1678).

165.U. Despite the changes in the earthwork operation, Hardrives was still being paid at the original unit price for borrow (Tr. 403).

166. Based upon the entire record, including expert testimony, and testimony by BOR's personnel, appellant has proved that the earthwork fell behind, and the delay could not be remedied by the contractor, due to the considerable problems and additional work encountered by MRT and Hardrives because of contract inaccuracies and FC's faulty contract management, not because of deficiencies in MRT's or Hardrives' operations. Although MRT planned to use more scrapers and average more scraper hours per day than it was always able to do, and there were some equipment and weather delays, as in most projects, neither FC nor BOR criticized MRT's earthwork operations, nor suggested that it alter its methods, even when earthwork fell behind schedule. FC's field personnel complimented MRT. Mr. Canez was not critical of Hardrives' or of MRT's operations and efforts. He was critical of FC. BOR has not provided persuasive, competent, countervailing evidence that MRT or Hardrives would not have been able to complete the job on time even if there had not been the numerous delay-causing problems attributable to FC and BOR (see AX 175, 190, 533, 543; GX 117, 118, 478, as amended; Tr. 458, 465-66, 493, 1642-49, 1657-58, 1804, 1808-11, 1813-14, 1935-36, 1949-50, 2142, 2180, 2817-22, 2917, 3185, 3380, 3401, 4318-24).

J. Trenching and Lining Problems

167. Although Valley Ditch had planned to complete trenching and lining in mid-December 1986 to January 1987, and its price had assumed uninterrupted work, it was unable to complete work until about June 16, 1987 (AX 242, 541; GX 159B, 478-H; Tr. 522, 531, 1267, 1270-71, 1325).

168. Due to the delays experienced by MRT, lining caught up with it on November 25, 1986. Valley Ditch had to demobilize its paving that day, which was shut down until January 14, 1987. It performed some machine testing and trenching during the week ended December 5, 1986, then had to shut down until January 6. It did not know when it could re start and had 10 pieces of equipment idle on site (AX 242, 541; GX 159A, 162; Tr. 383-84, 405, 717-18, 720-21, 1094, 1271-72, 1280, 1283, 1292, 2150).

169. Valley Ditch remobilized and began trenching on January 6, 1987. Lining started on January 14. On January 28, it had to demobilize again because it had caught up with the earthwork. On March 30, it began readying its equipment for further operations. In the interim, it had used some on another project. It began trenching again on April 20, 1987, and lining on April 23. It would not have been

efficient or cost-saving for it to return sooner and work piecemeal as earthwork permitted. Lining was completed in June 1987 (AX 242, 541; GX 159A, 162; Tr. 522, 718, 721, 1094-97, 1205-06, 1267, 1270, 1272-76, 1282-84).

170. Valley Ditch's owner planned to retire in 1987 and intended the Project to be its last job. Due to Project delays, he was forced to keep its home office open longer than planned (Tr. 1303-04, 2479).

171. There were some Valley Ditch equipment breakdowns and adjustments but none shown to have delayed completion of its work. It had been able to meet its work completion estimate on every other job and never had been late (GX 159A&B; Tr. 1306).

172. In May to mid-June 1987, trenching and lining, particularly lining, were the critical activities on the job (AX 527; Tr. 1218).

K. Impact Upon Structures

1. Delays Attributable To Earthwork

173.U. Excavation was beyond a structure's dimensions; Hardrives built forms to shape the structure; installed reinforcement steel; poured concrete; stripped the forms to be used at another location; backfilled; and hand-placed lining if required to connect the structure with machine-placed lining (Tr. 1987-90, 2001-03).

174.U. Hardrives planned to have its various structures crews follow the lining crews as closely as possible, starting with an excavation and pipe crew. Once that crew progressed, Hardrives would organize carpenter, rebar, and pour and placement crews (Tr. 2005, 2071-72).

175. The structures crews had prior experience with irrigation projects, and with the types of structures involved here. FC's on-site inspector Stanley stated that "they did very good work, very good work" (Tr. 3435). Hardrives was not able to develop or use the specialized crews as planned. Several times it hired additional people for the crews but had to lay them off due to delays in trenching and lining and in resolving design problems (Tr. 534-36, 1108, 2006-07, 2092).

176. Several times lining had been completed past a structure's designated location, but construction was not begun immediately. BOR did not prove Hardrives responsible for the delays (GX 159A&B, 161, 519).

2. Delays Due To Design Problems

a. Miscellaneous

177. Throughout, defects in structure specifications prevented uninterrupted construction. Hardrives was not able to sequence its operations, build its crews to anticipated size, or maintain continuity (Tr. 526, 2032, 2034, 2051-52).

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178.U. For turnouts to divert water from the Canal, stationing on the drawings did not match farmers' existing field ditches (Tr. 2046).

179.U. There were elevation discrepancies from one drawing to another and structural dimensions that did not match (Tr. 526-527).

180. In addition to the erroneous elevations affecting earthwork, invert grades shown on FC's January 12, 1987, computer run did not match plan elevations at 27 locations (AX 324; Tr. 1529, 1531-33).

181. While forming and pouring broken back structures, Hardrives found that FC had miscalculated concrete required. Hardrives poured as much as 15 more yards per structure than had been indicated. This increased its cost, including due to a \$2 per c.y. price increase for concrete ordered after March 15, 1987 (Tr. 522-525, 2007-11).

182. Hardrives notified FC whenever it encountered discrepancies in structure specifications (Tr. 527).

183.U. Typically on jobs of this size, the engineer's field representative has authority to resolve minor discrepancies within a day. Here, 50-75 percent of the minor structure problems could have been resolved in the field. However, FC's field personnel had no authority and had to involve its FC's main office, which took several days or weeks to provide a solution. Ms. Hodges stated that she had all the responsibility but none of the authority (Tr. 528, 1112-14, 1211-16, 2020-22).

184.U. Ms. Hodges' authority concerning modifications was simply to request proposals from Hardrives. It was her understanding that, even if no change order issued, BOR could demand a proposal from Hardrives before any extra work would be ordered or paid (Tr. 1818-20, 1822).

185.U. Mr. Canez was critical of FC's staffing and administration of the Project, including Ms. Hodges' lack of authority. At times, FC did not have an engineer available to supervise construction (Tr. 1658, 1662-67).

186.U. Because Hardrives did not receive timely responses from FC, it had to wait for instructions, or to move its crews inefficiently to other structures. Mr. Rice continuously had to resurvey structure locations because Hardrives was unable to build when first surveyed due to contract document problems (Tr. 530, 713-14, 1214-15, 1217, 1540-42).

187.U. When various structures problems arose, FC, in many instances, asked Hardrives to design and price a revision to resolve the problems (*see, e.g.*, Tr. 2052-54).

188.U. The structures delays affected MRT's ability to complete the final grading around the Canal and structures (Tr. 1900-1901).

189.U. In its June 16, 1987, claim letter to FC, Hardrives noted that the number of PSR's had reached 48 and that Hardrives could not complete the construction until FC completed the design (GX 6-D).

190. The inefficiencies caused by Hardrives' inability to establish its specialized structures crews and to maintain its as-planned schedule were not readily quantifiable (Tr. 531, 1217).

b. O & M Road Blocked

191. U. As designed, a structure at station 670 would have blocked part of an O & M road used by another irrigation district. Mr. Rice found the error. Hardrives immediately notified FC and suggested moving the structure by about 12 feet, at no cost. However, FC instructed Hardrives to install it as designed (AX 587; Tr. 567-72).

192. U. Hardrives installed the siphon as directed, but did not install the structure because the irrigation district discovered the blocking problem and notified FC. FC issued a PSR in November 1986, containing two alternative designs (GX 5 at Tab 39; Tr. 572-75).

193. U. On February 10, 1987, FC issued PSR 39-A, instructing Hardrives to do what it originally had proposed, but not until it had submitted an itemized proposal for a modification. On February 19, 1987, Hardrives submitted its proposal in the amount of \$14,729.92, containing detailed breakdowns of all aspects of work. Until the structure was completed, water could not go into the Canal. Thus, as of February 1987, apart from other problems, the contract could not be completed because Hardrives was waiting for instructions from FC regarding station 670. As of July 27, 1987, Hardrives had not been instructed to proceed and no change order had issued. BOR transmitted Modification 16 for PSR 39-A to FC on August 17, 1987. It did not include an extension of time and contained a release unacceptable to Hardrives (AX 143; GX 4 at Tab 16; Tr. 583-99).

194. Except for disputed clauses (including a notice that there was no guarantee of funds), Modification 16 was based upon a July 27, 1987, agreement with BOR that Hardrives would do the work for \$10,231.27. The parties had left any time extension as "disputed" until the actual time was determined (GX 4 at Tab 16; Tr. 591-93, 595).

195. On December 14, 1987, replacing Modification 16, BOR issued Modification 27, a unilateral change order to complete the work for \$10,231.27, plus overhead. It did not contain the release clause, but still contained the disputed funds clause (GX 4 at Tab 027; Tr. 603-04).

c. PSR 19

196. U. Hardrives was not provided guidance concerning changes to five broken back structures. When it began constructing one at station 722, it discovered a discrepancy in the specifications and conferred with Mr. Canez as to whether broken back or check and pipe inlet structures were required⁴ (Tr. 2013-14).

⁴With a broken back structure, water flows directly from the canal through the inlet. A check and pipe inlet contains internal weir walls to slow and control the flow of water (Tr. 564-65).

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197.U. On July 29, 1986, FC transmitted PSR 19, deleting the five broken back structures and replacing them with check and pipes, describing the changes as a "clarification." Hardrives informed FC that it considered PSR 19 a compensable change (AX 55; Tr. 532-33, 605-10).

198. Mr. Locke had received PSR 19, but his crew had begun constructing the slab base for a broken back structure at station 722 ± 40, before he notified them to stop. He had reached other crews to instruct them not to do PSR 19 work (AX 512 M; Tr. 1247-48, 2013-14).

199.U. FC eventually agreed that PSR 19 was a change and, by letter of December 11, 1986, asked Hardrives to submit a proposal by December 15. BOR recognized that the change was due to inadequate or defective specifications (AX 115, 290; Tr. 533, 610-11).

200.U. On February 19, 1987, Hardrives sent its proposal to FC with a breakdown of costs for each structure. It took until then because the request had come at Christmas time and it had to contact suppliers, who did not respond until after the first of the year (AX 145; Tr. 533, 612-15).

201.U. After submitting its proposal in February, Hardrives raised PSR 19 at every weekly meeting throughout the rest of 1987 (Tr. 621).

202. FC admits that it had no sense of urgency about resolving the check and pipe issue (Tr. 3458).⁵

203.U. FC did not forward the proposal to BOR until March 9, 1987 (AX 160; Tr. 615).

204.U. Between February 19 and May 12, 1987, Hardrives did not receive instructions to proceed with the PSR 19 changes; FC had notified it not to do so until a modification issued (AX 56, 221; Tr. 617-18).

205.U. In May 1987, FC told Hardrives to revise its price as too high. Hardrives suggested various changes to FC's design of the check and pipe structures to lower their cost (Tr. 533, 618, 622).

206.U. As of June 2, 1987, FC still maintained that Hardrives had to revise its price before it would authorize the work. On June 4, 1987, FC requested another proposal (AX 55, 245; Tr. 619-22).

207. On September 30, 1987, FC provided a new set of drawings with Hardrives' suggested changes. On October 20, 1987, after receiving pricing from suppliers, Hardrives submitted a revised proposal at a price of about \$47,011 and a 25-day performance time (AX 306, 314; Tr. 533, 622-25).

208.U. Mr. Canez' weekly report for September 24-30, 1987, indicates that, as of the end of September, the structures were 95 percent complete and Hardrives was waiting for direction on the five check and pipe inlets (AX 519; Tr. 3522-23). I11209.U. Mr. Canez'

⁵ Mr. Salisbury opined that the contractor had no sense of urgency either, but he was not competent to testify about the contractor's views and the great weight of the evidence is to the contrary.

report also states that FC discovered that two turnouts had been constructed with one gate, whereas the drawings detailed two (AX 519).

210. Hardrives' Mr. Matheny had interpreted a combination of drawings and a table to require one gate. Although he had seen a drawing depicting two, the drawings had been inaccurate in that pipe required for two structures had been switched, and Mr. Matheny judged that they likely were inaccurate in depicting two gates when the tables appeared to depict one. Mr. Matheny did not know what any shop drawings submitted to FC had depicted and did not inquire of FC or BOR about gates prior to construction. During the work, in May 1987, inspectors did not object to the one-gate installation. Mr. Matheny later found that he had an unused matching gate or gates and raised the issue. On September 30, 1987, Hardrives was directed to install two gates, which FC and BOR interpreted the drawings to require (AX 357, 408 at 4-5; Tr. 646-47, 1658, 1660-61; 2033-34, 2036-45).

211. By October 1987, trenching and lining (but for several hundred feet of hand lining) and major structures, excluding minor cleanup, were complete, except for the five check and pipes. A broken back transition, four small weirs, and other miscellaneous work (including modifying the two turnouts), also remained, some of which had been scheduled deliberately for Project end (AX 343, 378, 519-Canez weekly report 11/16-11/19/87, attch.; GX 2C at 54; GX 161, 520; Tr. 627, 3711-12).

212.U. FC knew that PSR 19 and the five check and pipes had to be done for Hardrives to complete the Project, but Hardrives had not received the change order or instructions to build. FC stressed that it was not to work on PSR 19 until FC issued a modification. Hardrives had completed all adjacent concrete lining (except hand-placed), siphon installation and outlet structures. Cleanup and finish grading were hampered because it had to avoid the areas where the check and pipes were to be placed. Finishing operations, including O & M road earthwork, would have been more efficient if Hardrives had been able to begin at one end of the Canal and proceed continuously to the other (AX 143; Tr. 608-10, 627, 711-12, 1119-20).

213. While waiting for PSR 19, Hardrives had skilled personnel doing unskilled labor, paying their skilled rates, so they would not seek other employment (Tr. 654-55, 1207-08, 2054-55, 2062-63).

214.U. On November 30, 1987, BOR directed FC to issue an undefinitized modification on the check and pipe structures (AX 338).

215.U. On December 4, 1987, Hardrives met with BOR and FC to discuss Project delays. It informed BOR that it would be forced to demobilize on December 23, if it did not receive direction. On December 4, FC sent BOR an undefinitized modification draft; FC's engineer's estimate, done in September 1987; and Hardrives' October 1987, proposal for the five structures (AX 340, 343; Tr. 602, 626-29).

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216.U. On December 11, 1987, the contracting officer, then Ms. White, signed undefinitized, unilateral Modification 28; on December 14, BOR sent it to Hardrives (AX 347; Tr. 628-29, 1117).

217. Modification 28 contained \$47,011 and 25-day price and time ceilings, the same proposed by Hardrives nearly 2 months earlier. The modification did not increase reserved funds. If Hardrives began work, it agreed to be bound by the modification's limitations; if it disagreed, it was not to begin and was to notify the contracting officer (AX 314, 347; Tr. 630-31, 1117).

218. On December 17, 1987, Hardrives informed the contracting officer that it was unable to agree because the overhead estimate in its October proposal was inaccurate and dated and field overhead alone for the 25-day period would exceed the amount of the modification. It offered to submit a revised estimate. It also objected to the lack of additional funding, noting that, in spring of 1987, when it had become clear that the cost to complete would exceed funds reserved, it had been assured of more funding and had relied upon that in staying on the job (AX 350).

219. From the outset, Hardrives had objected to the release, "No Change In Reservation Of Funds," and "Contractor's Agreement To Limitations" clauses contained in proposed modifications, because it was concerned about the impact of the job changes, about giving up claims, and about performing extra work at its own risk (Tr. 2162-65).

220.U. BOR sent Hardrives unilateral, undefinitized modification 30, dated January 5, 1988, to replace modification 28, with the same price and time ceilings, albeit subject to overhead audit. It still contained the "Contractor's Agreement to Limitations" and "No Change In Reservation Of Funds" clauses (AX 366; Tr. 632-33).

221.U. BOR admits that Hardrives did not receive clear direction on the five check and pipe inlets until January 22, 1988 (when BOR issued a cure notice, below) (AX 602; Tr. 4212).

222.U. Structures work was not completed until spring 1988, because Hardrives had to await instructions for the five inlets (Tr. 712-13).

223.U. Ms. Ramirez, BOR's technician, admitted that it could issue unilateral modifications. Sometimes the contracting officer had authorized them for a negotiated price. When Hardrives filed its appeals, then contracting officer Harding decided not to issue any more unilateral modifications, although Ms. Ramirez had wanted to do so (Tr. 3604-05, 3613, 3647).

224. Although he preferred the "request a proposal route," and that the contractor do the paperwork and agree to cost in advance, BOR's Mr. Anderson acknowledged the considerable importance of resolving changes and modifications as soon as possible and that BOR could issue unilateral modifications directing work, with settlement paperwork to follow. He also admitted that BOR yielded virtually all responsibility for construction and problem management to FC and

determined not to intervene unless FC so requested (Tr. 3087-88). The entire record establishes that FC was inordinately slow, and failed to manage the structures problem originating with its defective specifications, and that BOR was slow to address it.

L. Cure Notice

225. On January 22, 1988, BOR issued a cure notice, identifying 81 items that it considered critical to March 1, 1988, water deliveries and 52 items not critical but required. Hardrives was to respond satisfactorily or the contract might be terminated for default (AX 374; Tr. 641-42).

226.U. Hardrives responded to the cure notice on January 29, 1988, addressing each item listed (AX 378; Tr. 641-42).

227.U. The first items were the five check and pipes, pending since August 1986. Hardrives had received unilateral modification 30 for them only 2 weeks before the notice (AX 338, 343, 366; Tr. 633-35, 642-43).

228. For the modification, Hardrives had had to submit rebar drawings to FC for approval. It had done so in late December 1987, to January 1988. It did not receive approval, or of rebar drawings for the broken back outlet at station 670, another cure item, until January 27, 1988, after the cure notice (Tr. 643-45, 1117-18).

229.U. When the cure notice was received, the remaining structures were on the critical path (Tr. 666, 1108).

230.U. The other cure items (1) were under construction and completed within days after the notice, (2) had been accepted by FC and now were said to be defective, (3) were incidental to the five check and pipes and the broken back outlet at station 670, (4) related to storm damage at the end of 1987, (5) were contract changes, (6) already were complete, (7) involved testing best left to Project end, and (8) were miscellaneous minor items such as trash racks and ladders that Hardrives planned to install last to minimize vandalism (AX 393; Tr. 260, 642, 645-666, 723-26, 1125).

231. When Hardrives received the cure notice, which it considered its first unencumbered directive to complete work, in order to finish the five check and pipes in time, it had to build them at once, rather than sequentially as planned, resulting in five times the material costs for forming, extra backhoes and other equipment, and overtime (Tr. 641-42, 715, 717, 892, 2066-68).

232. The Project was accepted as substantially complete on March 17, 1988, 373 days after the March 10, 1987, due date. Hardrives accepts responsibility for 3 days' delay due to embankment repairs. On April 28, 1988, BOR decided to release the remaining \$200,000 retainage. We have not been directed to any evidence that liquidated damages were assessed (c&a ¶ 34; AX 433; GX 478 at Tab A).

M. Criticism Of FC

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233. BOR has criticized FC's specifications for the District's CAP water system in general, finding them error-prone (AX 17, 361, 466).

234.U. An Interior Department Office of Inspector General (IG) audit of BOR projects where A/E's such as FC had drafted the specifications and managed the project, found potential conflicts of interest and management and contract problems, including failure promptly to rectify deficient specifications and lax control over payments. Regarding this contract, the IG report (AX 361) stated:

Deficiencies in the specifications * * * could add about \$1.042 million to the cost of the [Canal]. Elevations used by [FC] to write the excavation specification (originally estimated at 409,684 [c.y.]) were inaccurate and resulted in an underestimate of 201,195 [c.y.] (50 percent) of material for the canal * * *. The construction contractor considered such a significant difference to be a change of conditions instead of an increase in quantity * * *.

According to the [COTR], [BOR] will likely pay some additional amount on this claim. However, we believe that a determination of [FC's] liability for deficient specifications should first be made prior to any payment for this deficiency. Having the same consultant engineer that designed the deficient specifications also perform contract administration is not conducive to an objective resolution * * *.

235. BOR has assessed that FC administered the contract poorly. IG Auditor Macy's report of a March 29, 1988, meeting among auditors and contracting officer Harding records:

Art [Harding] stated that [FC] wrote the contract specifications and served as the on-site construction engineers directing the work. At times, BOR had no representatives at the job site and felt that this was a mistake. * * * Art said that BOR agrees that [FC] did a poor job of administering the contract * * *.

(GX 38 at Tab A-7-2 at A-7-13).

236.U. BOR's claims analyst Chapman admits that processing change orders through FC, the District, and BOR was cumbersome and that having FC administer the contract was not conducive to objective claims analysis. BOR no longer enters into such agreements (c&a ¶ 30; Tr. 4090-92, 4096).

237. Judge Copple found that FC had a double conflict of interest.

N. Delay Attributable To BOR

238. BOR's challenge to Hardrives' proof was not persuasive. BOR did not offer expert witnesses. The testimony of its analysts was diminished by the fact that, except for a last minute deposition of Mr. Duin, BOR did not conduct discovery and relied principally upon material gathered in the failed Department of Justice (DOJ) fraud case. BOR's key analysts did not review the district court trial and deposition testimony of Hardrives' witnesses and did not have personal, contemporaneous, knowledge of the job. They relied upon information supplied by FC, which they did not subject to close scrutiny, undermining the objectivity of their work. Some of their quantum and other exhibits changed significantly during and after

hearing. Mr. Babitzke, BOR's principal spokesman on earthwork, relied in part upon material he had prepared to advance DOJ's case, further undermining its objectivity (*see, e.g.*, Tr. 2941-42, 3084-85, 3162, 3172, 3177, 3181, 3187, 3205, 3209-13, 3215-23, 3249-50, 3269, 3297-3301, 3327-29, 3331-32, 3336-37, 3345-46, 3987, 4125-26). Ms. Hodges' testimony was very limited and of little impact, except to confirm her lack of authority to resolve problems. We did not credit the testimony of FC's Salisbury and Franzoy due to their obvious bias. Although scheduled, BOR did not call MRT's former principal, Mr. Tripp. No contracting officer testified.

239. Based upon the considerable evidence of record, we find that the earthwork and structure specifications were defective. Hardrives relied upon them in evaluating and submitting its bid. It reasonably believed, based upon the contract information, that borrow had been overestimated when, in fact, it had been greatly underestimated. MRT also relied upon defective specifications in bidding and planning its work.

240. Upon weighing all of the evidence, the Board accepts the contractor's proof, including, but not limited to, the testimony and analysis of: its project manager Locke, whom Judge Copple found to be "totally credible" (6/6/91 ruling), as do we; Mr. Hite; structures supervisor Matheny; surveyor Rice; Hardrives' president, Mr. Hall; MRT's former principal, Mr. Acreman; Valley Ditch's Mr. Crabtree; and appellant's expert witnesses, Mr. Duin and Mr. Blattner. Each of these gentlemen was credible, persuasive, and backed by documentary evidence, as well as by the corroborating records and credible testimony of BOR's Mr. Canez. That proof establishes that Hardrives could have completed the Project essentially on time but for the earthwork and structure problems resulting from defective specifications, FC's and BOR's failures to respond timely or appropriately, and other contract misadministration. Hardrives was delayed by 370 days through no proven fault of its own. Of the 370 days, the Board accepts expert Duin's allocation of 149 days to earthwork problems and 221 days to trenching and lining, structures and mismanagement delays (AX 527; Tr. 2448, 2826-2848, 4323).

O. Non-Delay Damages

1. Hardrives' Accounting System Was Good

241. Each foreman completed a daily job cost report identifying work performed, all employees on the job, their craft codes, pay rates, and all hours worked. Each craft code and activity had a different cost code. The daily reports also identified each piece of equipment used by a particular crew. This information was entered into Hardrives' accounting system weekly (AX 495; Tr. 731, 737-39, 2257-61).

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242.U. Hardrives and its subcontractors also prepared certified payrolls identifying the various employees, hours worked, and pay rates. The payrolls were submitted to BOR weekly (Tr. 2263).

243.U. All material and equipment rental expenses were accounted for and processed as they were received (Tr. 2269).

244.U. Hardrives also accounted for all fixed overhead expenses for its Arizona operations, including salaried supervision, support equipment, living per diems, office yard expenses, contracted services, and incidentals. These expenses represented 14.41 percent of direct Project costs. The auditors found Hardrives' field overhead rate to be 17.8 percent (AX 521 at Tab J; GX 33 at 5-6; Tr. 2177-80, 2291-2310, 3927).

245. One auditor told Hardrives' president that its system was comparatively sophisticated and its books as good as any and better than most (Tr. 1356).

246. Hardrives' Chief Financial Officer (CFO), Mr. Sinjem, is a licensed certified public accountant with a fine academic background, including a degree in accounting, with honors, and considerable auditing and accounting experience (Tr. 2248-56). His testimony was credible and persuasive, as was that of Hardrives' other witnesses concerning Hardrives' accounting system.⁶ Based upon the testimony and documents of record, we find that Hardrives had a good accounting system.

2. Cost Segregation Was Impracticable

247. Hardrives has attempted to segregate costs when possible. However, despite its good accounting system, it was unable to segregate most costs or to attribute specific increased costs to specific earthwork and structure problems. This is because FC defined the job improperly originally, it changed repeatedly, and the changes, problems, and costs were intertwined (GX 38 at Tab A-7-2 at A-7-12; Tr. 1730, 1733, 1767-68, 1895, 1902-03, 2056, 2060-61, 2191-93, 2414-18, 2606, 2611-12, 2627-28, 2658, 2273-74, 2811, 3496, 4278-79).

248.U. The contracting officer recognized the difficulty in determining the impact upon Hardrives. He commented to the auditors: "BOR is completing an analysis of Hardrives' work, and alleged inefficiencies to be used in settlement of the claims. However, this is very difficult to do since BOR changed the contractors [sic] excavation requirements and the original method of work" (GX 38 at Tab A-7-2 at A-7-12).

3. Hardrives' Bid Was Reasonable

⁶BOR's post-hearing allegations as to its "belief" that the daily cost reports are not originals and were prepared by Mr. Sinjem for hearing, are untimely, unsubstantiated, and contradicted by the credible testimony of appellant's witnesses.

249. Hardrives' bid was only 9.3 percent lower than the second lowest bid and was 3.3 percent higher than BOR's estimate. It was based upon estimates compiled by two estimators. The chief estimator, who testified at hearing, was a registered professional engineer with many years of experience. There is no evidence that BOR questioned the bid contemporaneously. Mr. Duin's expert analysis, which the Board accepts, also establishes that the bid was reasonable, and we so find (AX 488, 540; Tr. 232-34, 1378-83, 2851-52, 2869, 3622).

250.U. Based upon its estimate and bid submitted, Hardrives expected the job to be profitable, by as much as \$1 million (Tr. 1441, 2128).

251. BOR has not controverted successfully appellant's evidence that its individual bid prices were reasonable, and logically based, and we so find (AX 490, 502; Tr. 1378-98, 1720-21, 1737-38, 2031, 2065).

4. Hardrives' Total Cost Calculations

252. Judge Copple found that the Interior Department's IG auditors, aware of the civil fraud investigation, and encouraged by the contracting officer to minimize costs and to find claims overstated, because BOR believed it would be subject to liability, were unlikely to have approached their job objectively. The testimony and documentary evidence presented at hearing, including that the auditors were participating in the Government's investigation and that the audit reports were prepared in that context, lead us to the same conclusion. Also, although, prior to its exit conference with the auditors, Hardrives requested a copy of the draft audit report, they did not supply one for review and comment. Ultimately, Hardrives obtained a copy of the audit report only through a FOIA request. Further, the auditors who conducted the audit and testified at hearing were not certified public accountants. Both took, but neither one passed, the CPA examination. Due to all of these impediments, we give the audit report and auditors' testimony little relative weight (GX 38 at Tab A-7-2 at A-7-8-A-7-15; Tr. 1359-60, 3862, 3867-78, 3898-3907, 4006, 4261-62).

253. In presenting its total costs, appellant used the daily job cost reports and certified payrolls. It summarized the components, including labor, equipment, materials, subcontractor expenses, various overhead, and other markups, in AX 521. In AX 522, it gave day-by-day breakdown of the labor and equipment hours depicted on the daily progress reports and certified payrolls, summarized on a monthly basis in AX 521 (Tr. 2264-73).

254.U. To calculate its labor costs, Hardrives used a labor burden rate of 32.53 percent of the actual wage rate. This represents FICA and 66 unemployment taxes, general insurance costs, workers' compensation, and any other benefits required by law, and was confirmed by the auditors (AX 521 at Tab D-1; Tr. 2286-87).

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255. Hardrives asked BOR to waive the portion of the Contractor Proposals clause (Finding of Fact (FF) 29c.) limiting a contractor's recovery for overhead and profit in the event of its proposal for a modification for work performed by a subcontractor. The contracting officer reported to the auditors that he "[felt] that he will accept [the waiver], since he thinks the provision is inequitable for a construction broker firm like Hardrives" (GX 38 at Tab A-7-2 at A-7-11).

256. Based upon its original job cost estimate, Hardrives had anticipated a profit of 11.84 percent. In its claims, it used a 10-percent profit rate, which the auditors also used. We find the 10-percent rate to be fair and reasonable under the circumstances of these appeals (12/89 audit report; Tr. 2339, 2655).

257. Hardrives' bond rate applicable to this Project, and claimed, is 0.4 percent of all amounts received, except for home office overhead, claim interest, and any attorney fees reimbursed. It claims an effective sales tax rate of 3.575 percent which, under the circumstances of these appeals, we accept⁷ (AX 521 at Tab J-3; GX 33 at 14, n. 15; Tr. 2339-43).

258. a. Hardrives' and MRT's accounting systems did not track and segregate all equipment expenses. At hearing, BOR used relatively low ownership rates derived from the "yellow book" in conjunction with equipment operating rates derived from the AGC's 1986 Contractors' Equipment Cost Guide (AX 536, described at hearing as the "1986 AGC rates"), which are lower than the yellow book's relatively high operating rates. Expert testimony was that the yellow book is outdated and, at a minimum, it is inequitable to use it for ownership rates, but to disallow its use for operating rates. BOR offered that "pressure" had been applied unsuccessfully to AGC for years to revise the yellow book, but alleged that the rates BOR used were not dated. Its chief claims analyst, Mr. Chapman, conceded that, for settlement purposes, BOR "almost always" uses 1986 AGC rates, not the yellow book. He stated that, when an audit is required, for claims over \$300,000, the auditors use the yellow book. BOR has not supplied the authority for this policy.

b. During the contract, neither FC, BOR, nor the contractor used the yellow book. At first, FC instructed Hardrives to use "blue book" rates to price proposals. Later, pursuant to BOR's recommendation, specifically that of Mr. Harding, a cost/price analyst who became the contracting officer, FC instructed Hardrives to use 1986 AGC rates for proposals and modifications. No distinction was made for proposals over \$300,000. Hardrives obtained a computer system that applied the 1986 AGC rates in light of local conditions. FC and BOR also used the

⁷The auditors found a higher bond rate of 0.48 percent, but appellant asserts that it negotiated a lower one. BOR states that the sales tax rate is 3.55 percent. Appellant asserts that the tax is calculated upon all amounts received from the Government, including payment to compensate for the 3.55 percent tax and, to make itself whole, it must collect 3.575 percent. Because there is only 0.00025 difference; the recomputation of tax would be very time consuming to little effect; and BOR was willing to apply a higher bond rate and, at one point, a much higher daily overhead rate than we use (*infra*), we accept appellant's sales tax rate without rendering any opinion as to whether such an adjustment is properly chargeable to the Government under other circumstances.

1986 AGC rates for modifications which had been reviewed and approved by contracting officers. In its damage analysis, AX 521, appellant used equipment ownership and operating costs based upon the same 1986 AGC rates used during the Project (AX 169, 536; GX 500; Tr. 876-80, 2187-89, 2275-77, 3012-13, 3892, 4006-11, 4196-97, 4203-06, 4220-21, 4260-61, 4282-87, 4335-36, 4346-47).

259. The 1986 AGC rates were significantly lower than the rates charged by independent equipment rental companies in the area during 1986-87. After MRT's subcontract was terminated, Hardrives rented its equipment at rates exceeding the 1986 AGC rates but did not use the higher rates in its damage calculations (AX 521; Tr. 2583, 4256-61).

5. *Direct Costs*

a. *Earthwork*

260. Using the 1986 AGC rates, for the initial earthwork, *i.e.* construction of Canal berm for the trenching and lining operations, Hardrives and MRT incurred costs of \$2,747,865—including direct costs for MRT of \$2,001,409 and for Hardrives' completion of MRT's work of \$400,440 (total \$2,401,849), plus field overhead of \$346,016. Excluding \$23,268 required to repair an earthen ditch, a cost for which Hardrives was responsible, earthwork costs exceeded BOR's payments by \$1,359,416 (see AX 521 at Tab A, sheet 1; Tr. 2418-46).

261. In the opinion of construction expert Blattner, given the inaccurate elevations throughout the length of the Canal, the considerable amount of extra dirt moved, and the shifting job requirements, the earthwork costs were reasonable and relatively modest (Tr. 1732-33). Based upon his testimony, the weight of the other persuasive evidence, and the fact that job performance time more than doubled, we find the earthwork costs, and Hardrives' other costs, to be reasonable.

b. *Segregable Concrete Costs*

262. After applying certain credits for BOR, including due to the fact that five broken back structures originally were required under the contract, Hardrives was able to segregate extra costs due to a March 1987, price increase for concrete, and the additional costs required to convert the broken backs to check and pipe inlets. Those costs total \$53,010 (see AX 521 at Tab A, sheet 4; Tr. 2487-90, 2494-98).

c. *Unsegregable Impact Of Structure Inefficiencies, Defective Elevations and Contract Misadministration*

263. After crediting the estimated direct and field overhead costs of the two-gate turnout correction, which totalled \$26,885, and of removal

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of the slab at station 722 + 40, which totalled \$3,315, both of which we find to be Hardrives' responsibility, Hardrives incurred additional, unsegregable, direct job costs, including field overhead, of \$1,181,998 for the inefficient operation of its structures crews and the impact of the defective elevations and contract misadministration upon its operations (AX 521 at Tab A, sheet 4; Tr. 2499-2506).

6. Home Office Overhead

264. U. Hardrives has six divisions, performing different work, with their own personnel and division managers. Corporate office staff supplement and support the divisions. The civil division was responsible for the Project (Tr. 1342-43).

265. Hardrives has corporate and divisional overheads (Tr. 3918).

266. U. Given the construction season in Minnesota, Hardrives generally reduces its administrative staff during the winter (Tr. 1350).

267. U. For the Project, the civil division maintained its office staff through the winter. Also, Hardrives was required to maintain additional corporate staff to assist the civil division (Tr. 1351, 1362-63).

268. During the first few months of the Project, Hardrives was able to submit bids on other projects in Arizona. As of summer 1987, due to losses sustained on the Project, the civil division was unable to take on additional work. Ultimately, Hardrives was forced to close it (Tr. 1351-52, 1361, 2175).

269. U. From the beginning of the Project, the civil division did not have any other jobs (Tr. 1364).

270. U. Using the *Eichleay* formula, Hardrives' daily home office overhead rate was \$847.76. On a percentage basis, the home office overhead expenses represent 3.625 percent of the revenues generated during the contract. Hardrives used the \$847.76 figure in its proof book. Auditor Macy generally has no objection to computation of overhead on a daily basis (AX 521 at Tab J-2; Tr. 2311-27, 4237-38).

271. Originally, BOR calculated Hardrives' daily unabsorbed home office overhead at \$1,434.85 (apparently \$1,273 marked up for profit, bond and tax); then used \$1,273; then, during hearing, used \$847.76 (GX 518, 518(1), 518(2); Tr. 2330-2334, 4037-38).⁸

⁸ At hearing, Hardrives presented \$1,273 as an alternative overhead rate. It urged that, during winter, the Project had to absorb the majority of its home office overhead expenses and if the seasonality of its construction business were accounted for in the *Eichleay* formula, based upon a weighted average of monthly overhead rates applicable to the Project, the daily overhead rate would be \$1,273, which reflects its costs and the impact of Project delays more accurately than the *Eichleay* calculation used in its proof book. BOR's auditor Macy disagreed (Tr. 2327-29, 3922-23). In post-hearing briefing, BOR suggests that corporate and civil division overheads should be combined, for a rate of \$337 per day. Hardrives established that separate calculations were required to ensure that civil division overhead was applied only to that division's revenue and that other divisions' overhead was not applied to civil division revenues. Its calculations did not include other divisions' overhead (Tr. 2317-25, 2543, 4235-37). We are not persuaded to modify the \$847.76 daily rate used by both parties in their quantum proof at hearing.

272. At the \$847.76 daily rate, given the 370 days of delay charged to BOR, unabsorbed overhead totals \$313,670 (AX 521 at Tab J-2; Tr. 2334).

7. Total Earthwork Quantum

273. Accounting for home office overhead for the 149 days of delay attributable to the earthwork, the increase in earthwork costs, including bond, profit, and tax is \$1,683,930. This includes the extra costs of caliche excavation (\$18,195) and costs associated with MRT's default (\$2,903), both of which we find to be BOR's responsibility⁹ and for which we make no deduction (AX 521 at Tab A, sheet 3; Tr. 2448, 2451).

8. Valley Ditch Quantum

274. Information used in assessing Valley Ditch's damages was derived from the audit, the best evidence in its case. Due to the delays and disruptions it experienced, and taking into account the period when it was employed elsewhere (but including its demobilization and remobilization and associated costs), using 1986 AGC rates, and excluding certain costs disallowed by the auditors and not now claimed, Valley Ditch incurred additional costs of \$129,539. This includes \$44,460 for equipment standby, \$8,575 for mobilization, \$32,105 in direct (field) overhead, and \$32,623 in home office overhead. Profit at 10 percent was used, although Valley Ditch's normal profit rate was higher. Hardrives' direct and field overhead and markup brings total Valley Ditch-related excess costs to \$177,096 (AX 521 at Tab A, sheets 1, 4, and Tab I, AX 541; GX 35, 57 at Tab P-8-1 at 8-1(1); Tr. 1267, 1270, 1273-75, 1282, 1303-04, 2473-83, 2491-92).

9. Other Delay and Impact Quantum

275. Accounting for the 221 days of delay associated with structures and general contract mismanagement, increased costs include segregable concrete costs of \$274,565.¹⁰ Unsegregable loss of efficiency and impact costs (crediting BOR with the contractor's total estimated costs, including burden, of correcting the two-gate turnout error, which were \$32,127, and of removing the concrete slab at station 722+40, which were \$3,961) are \$1,419,493. The total is \$1,694,058 (AX-521 at Tab A, sheet 4).10.

Total Quantum IBCA 2375/2475

⁹ Our findings regarding BOR's responsibility are in the context of the appeal before us. Hardrives' contract was with BOR, not with FC. Our findings should not be interpreted to allocate any particular measure of responsibility between FC and BOR.

¹⁰ Expert Duin allocated the 221 delay days to the concrete structure work and the resulting \$187,354 in unabsorbed overhead costs are included in this \$274,565 figure. He noted, however, that the delay essentially was intermingled with overall contract misadministration delays.

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276. With the stated credits, and after eliminating \$58,547 in duplicative home office overhead, and adjusting profit and tax accordingly, total earthwork (including MRT and Hardrives), Valley Ditch, structures, mismanagement, delay, and impact quantum is \$3,488,260 (AX 521 at Tab A, sheet 4; Tr. 2512).

277. The contracting officer received Hardrives' certified claim, in the amount of \$2,423,260.38,¹¹ on April 17, 1987 (AF for IBCA 2375 at Tab V, No. 6). In response to a certification challenge by BOR, Hardrives recertified its claim on December 9, 1987, in the amended amount of \$3,773,997.30. We have found the December submission to be an amended, and not a new claim (12/30/92 opinion denying motions to dismiss).

III. Storm Damage Claim—IBCA 2518

278.U. In August 1987, Hardrives began installing a siphon pipe at station 135 under Fast Track Road. The contract required that it be placed with at least 3 feet of cover. The road at that location had a "Texas culvert," a dip to allow storm water to cross. In FC's design, the culvert was to move floodwater in runoff canals from the south to the north side of the Canal. When it reached the road, runoff was to cross over the pipe installed by Hardrives in the Texas culvert and proceed to the north side of the road into a designated floodway (AX 589; GX 2C at 68 (drawing No. V-4); GX 10; Tr. 677-78, 684-89).

279.U. During construction, Hardrives discovered that there would be insufficient cover if the pipe were placed at the contract-specified elevation. Instead of 3 feet, the pipe would be only 0.3 foot under the road. Hardrives immediately notified FC and re-surveyed to confirm the elevations (AF for IBCA 2518 at Exh. 17; AX 327; Tr. 677-78, 686, 3705).

280. BOR does not contest, and we find, that the pipe design was defective.

281.U. FC directed Hardrives to install the pipe at the contract-specified elevation and to place 2 feet of cover over it to prevent traffic on Fast Track Road from damaging it. This caused a hump that blocked the Texas culvert. FC stated that it would redesign drainage to account for the obstruction (AX 327; Tr. 687-88, 690, 1128).

282.U. During early November 1987, 2 months after FC directed Hardrives to install the pipe as designed, it rained about 1.2 inches near the Project in 2 days—20 percent of the area's yearly rainfall (Tr. 3706-07).

283.U. When the storm runoff came down the Canal's south side, it could not cross Fast Track Road as intended and ran into a berm, which was not part of natural drainage and had been built by a farmer after Hardrives had completed that portion of the Canal. The

¹¹ Hardrives' claim, and those below, also sought time extensions.

floodwater ponded; broke through a 1-foot embankment built per contract requirements; entered the Canal; destroyed 10 to 12 concrete panels; and proceeded downstream through all the siphons and structures that Hardrives had completed in this area (AX 319; Tr. 690-95, 702-03, 729, 773-74, 3696).

284.U. The floodwater carried silt, mud, rocks, trash, and other debris down the Canal for 3 miles before the water stopped at a closed gate (GX 112 A-E; Tr. 696; 700-02, 3708).

285. At the time of the storm, Hardrives had completed most of its work in the area and was awaiting FC's design solution to problems at Fast Track Road before completing the remainder (AX 322, 343; GX 366 at 5-6, Item 28; Tr. 703, 728-29, 3393-97).

286. Mr. Canez investigated and three draft reports stated: "Personally, I do not see how we could pin this on the contractor." He suggested only that the contractor could have constructed a V ditch (a drainage ditch) and reduced pipe cover to only 6 inches to 1 foot (AX 319, 322). His final report, prepared after a visit with FC, eliminates his opinion that the contractor was not liable and adds that the contract called for a 1-foot berm that could have prevented some damage. Mr. Canez appeared to recall at hearing that the V ditch and berm had not been constructed because Hardrives was waiting for FC's revised design (AX 319, 322; GX 20; Tr. 703-04, 3397). Consistently, BOR's claims analyst Whetstine concluded that "a delay in providing direction for correction of a design deficiency immediately upstream of the damaged lining may have caused the contractor to wait before completing temporary or permanent drainage facilities" (GX 502).

287.U. Although the contract called for a V ditch, the elevation of the pipe at Fast Track Road interfered with its construction. Mr. Whetstine acknowledged the design problem and that FC should not have allowed 3 months to expire without providing information to Hardrives to resolve it (Tr. 605, 703-06, 3704, 3714).

288.U. FC directed Hardrives to repair the damage without additional compensation. Hardrives had to (1) pump rain water from the Canal, (2) remove mud and other debris from it and clean affected siphons and other structures, (3) reconstruct the damaged concrete panels with hand-placed lining, (4) regrade the area where the water had ponded and broken into the Canal, and (5) completely clean the Canal (c&a ¶ 91; Tr. 730-31).

289. FC found Hardrives' resulting claim to be meritless (GX 20).

290.U. BOR commented as follows about FC's analysis (AX 415):

C.6. The pipe, installed per specifications, failed to meet the 3 ft. minimum cover requirement. This discrepancy was brought to the Engineer's attention on or about August 10, 1987.

* * * * *

E.1 Contractor also claims expense. It should be noted that contractor has never received a site plan for this crossing.

* * * * *

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The contractor did give notice of a conflict in the specifications prior to the damage; from the specifications and site visits, they could have reasonably assumed that there was no danger from flooding.

H. We disagree with the Engineer. It is our opinion that failure to resolve the drainage/cover problem places some liabilities on [BOR]. It must also be noted that if the contractor had completed the irrigation crossing at this location, the damage would not have occurred. We recommend negotiating an equitable adjustment * * *.

291.U. FC eventually accepted responsibility for inadequate pipe cover. However, it alleged that, under the Site Drainage clause (FF 9), Hardrives was responsible for repair of storm damage (AX 448; GX 20, 357; Tr. 1698-99).

292. BOR analyst Chapman, and a contracting officer's decision dated April 14, 1988, admit that the storm damage claim has merit in part. Hardrives has not received any payment (AX 416; GX 4 (Modification 043); Tr. 2346, 4097-98).

293. The weight of the evidence is that the overriding causes of the storm damage were the defective design of the pipe and FC's failure timely to address and cure the drainage problem (see above and Tr. 694, 727-29).

294.U. Hardrives properly kept track of the labor hours, equipment, and materials used to clean up the storm damage (Tr. 731).

295. Hardrives worked on repairing the storm damage at periods from November 1987, to early February 1988. It was performing some, but little, other work, awaiting resolution of the PSR 19 problem. Delay days overlap with those awarded in IBCA 2375/2475 and are not considered. Excess, reasonable, costs and burden not accounted for elsewhere total \$27,578 (AX 521 at Tab A, sheet 2; AX 527; Tr. 740-41, 1126-27, 2343-44, 3672-75).77

296. The contracting officer received the storm damage claim, in the amount of \$91,195.41, on February 8, 1988 (AF for IBCA 2518 at Tab 23).

IV. FCG Canal Crossing Claim—IBCA 2524

297.U. The contract required installation of a 60-inch reinforced concrete pipe, with 3 feet of cover, to siphon water under the Florence/Casa Grande Canal (FCGC), which crosses the Canal at about station 42+50. The contractor could either jack pipe underneath the FCGC, divert the FCGC, or take advantage of a period when water was not flowing in it, and excavate a trench for the pipe. Hardrives elected the latter (c&a ¶ 115; spec. 7.1.1; AX 454; GX 2C at 41; GX 111-A; Tr. 118-19; 741-42, 745).

298. Water was drained from the FCGC only during November each year and Hardrives had a limited time to install the siphon (Tr. 742, 750).

299.U. When Hardrives began excavating, it found that the contract's FCGC bottom elevation was inaccurate because the bottom was covered by about 2.34 feet of silt. If Hardrives had installed the

pipe as specified, it would have been covered only by the silt, which would have eroded. Hardrives promptly notified FC (AX 90, 590; GX 5 at Tab 36; Tr. 743-49).

300.U. After Hardrives confirmed true bottom, FC directed it to lower the siphon about 2.3 feet. Because of the new depth, Hardrives had to perform additional work and backhoe operations became more difficult and inefficient. The siphon lowering also required changes in the trench side slopes. While Hardrives was excavating to the new depth, FC ordered it to flatten the slopes for safety, which increased the amount and difficulty of excavation. The flatter slopes and deeper trench also caused problems with an earthen dam that Hardrives had constructed in the FCGC to prevent water entry. Material that had been placed into the dam had to be moved (c&a ¶ 118; AX 125, 590; Tr. 749-50, 752-63).

301.U. After excavation, Hardrives laid the siphon, but due to its lowering, the pipe was not long enough to reach the designated elevations of its associated inlet and outlet structures. Hardrives had its supplier prepare drawings for pipe extensions (Tr. 765-68).

302.U. It took about 4 months to design the pipe extensions, obtain FC's and BOR's approval, and manufacture the pipe. Hardrives could not complete the inlet and outlet structures here until the extensions were installed (Tr. 768-69; 774-75).

303. Among other costs, heavy equipment for the additional pipe work had to be transported several miles around the Canal, now full of water; dirt, pipe, forms, and rebar had to be moved in and out; and there was extra excavation, including digging a ditch twice, and extra backfill (Tr. 1174-78, 2065-66).

304.U. BOR and FC admit that the lowering of the siphon was a change and that this claim has some merit, but Hardrives has not received any payment. The contracting officer received Hardrives' claim, in the amount of \$40,211.68, on December 28, 1987 (AX 454; GX 12; Tr. 2377, 4099).

305. Without engaging in complex swing and lift time equipment calculations that were not cost-effective, Hardrives could not segregate the cost of the additional work. It could not determine exactly what dirt was excavated due to the lowering of the siphon or to the adjustment to the slopes. Estimated conservatively, direct costs, including field overhead, total \$20,974. Delay days overlap with those awarded in IBCA 2375/2475 and are not considered. Excess, reasonable, costs and burden not accounted for elsewhere total \$25,063 (AX 521 at Tab A, sheet 2; GX 44 at Tab C-15; Tr. 769-72, 1173-81, 2366-76).

V. Soil Stabilization Claim—IBCA 2511

306. The contract's soil stabilization clause provided in part:

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a. General—The Contractor shall be required to obtain and apply a soil stabilizing solution to the subgrade of a selected test section of the canal prism for the purpose of reducing possible failures of the canal.

* * * * *

Product Availability—As part of a proposed field trial and study and in cooperation with [BOR] and the District, the manufacturer of Dustgard will make approximately 4,600 gallons * * * available at no charge * * * This quantity will be roughly 50 percent of the total quantity needed. Additional quantities of the product can be purchased from the same location.

d. Application—The soil stabilizing solution shall be sprayed evenly over the entire canal prism from inside edge to inside edge of berms, including the refill area after excavation, and also the material to be compacted in the refill area, between stations 2+90 and 226+85. Application of the solution must be in such a manner that penetration of the 5-percent magnesium chloride solution will be at least 6 inches into the canal subgrade.

The application rate and number of passes required to obtain the 5 percent concentration and 6-inch penetration shall be at the discretion of the Contractor, but must be compatible with the type of sprayer being used and the method of application so that an excessive accumulation of the solution will not occur in the canal invert or elsewhere.

(GX 3 at spec. 7.2.7 (blue pages)).

307.U. The soil stabilization requirement covered over 4 miles. The solution had to penetrate Canal embankment by 6 inches after trenching but before lining. When it dries, magnesium chloride causes surface dirt to bind and crust (c&a ¶¶ 132, 133; GX 3 at spec. 7.2.7; Tr. 776–81, 792–93).

308. Hardrives had planned to test the process, and application rates, with a fire hose and then to make three passes with a water truck with an attached spray bar, adjusted for the proper application rate. The spray bar method would have required one person to operate the truck and a potentially part time foreman. The fire hose method required two full time people (GX 482, 483, 561; Tr. 779–80, 783, 786, 793–94, 913–19, 1444–45).

309.U. BOR's intent, expressed to FC in a pre-contract memorandum dated March 10, 1986, was that: "Application is to be by water truck with modified spray arm. The coverage will probably be one-half the canal section per pass. The penetration of the solutions will determine the rate of application and the number of passes needed" (AX 30 at 3).

310. The beneficiaries of the soil stabilization test program were the District and the supplier of the solution (AX 30 at 4).

311. Hardrives had purchased the contract-estimated amount of solution to be purchased (Tr. 785).

312.U. Before the overall test program, Hardrives arranged for field tests to determine the magnesium chloride solution's penetrability. BOR, FC, and independent testing lab personnel attended (Tr. 780–82).

313. For the field tests, Hardrives used a truck and a fire hose with a variable-rate nozzle to test rates and penetrability and determine proper spray bar design (Tr. 782–83).

314.U. Six-inch penetration could not be achieved, as BOR and FC eventually recognized. The solution ran down the Canal sides and collected in the invert. FC orally released Hardrives from this penetration requirement (AX 222, 233, 235, 256; Tr. 783-88, 795-96, 3450, 3655).

315. Based upon the foregoing and all of the evidence of record, we find that the soil stabilization specification was defective.

316. After FC's oral release of Hardrives from the 6-inch penetration requirement, Hardrives and Mr. Canez asked for written confirmation and direction from FC, but did not receive it (GX 159B at 5/6/87 Canez report; Tr. 1688-89, 4110-11).

317. FC first instructed Hardrives to make three passes in the contract-specified test area. Mr. Canez agrees with Hardrives that FC later directed it to use the entire amount of solution, which it had on hand. FC instructed Hardrives to apply it evenly throughout essentially the contract-specified test area until it was used up (AX 222, 519 (Canez reports for 5/6-8/87); GX 483; Tr. 785-89, 920-24, 1689).¹²

318. Hardrives understood that it was to continue with the fire hose. In any case, application rate adjustments necessary as soil penetration rates changed with succeeding solution applications dictated use of the hose. It required more labor and time than the planned spray bar (Tr. 783, 787, 794, 796, 917-19).

319. Soil stabilization took longer than planned because of soil impenetrability and the directive to use all of the solution. It delayed trenching and lining (Tr. 787-804, 1330, 1689-90).

320.U. Hardrives kept track of the costs associated with the soil stabilization (Tr. 804-09).

321. After the work was finished, on August 19, 1987, FC transmitted no-cost Modification 23, stated to be issued by BOR. The modification, which contained a release of claims, described the contract change regarding soil stabilization as follows: "In specifications paragraph 7.2.7(d) change the soil stabilization penetration depth from 6" to 3", as applicable, *applying total plan quantity as detailed*" (GX 487 (emphasis added)). Mr. Hite signed the modification on August 25, after excising the release clause and writing that Hardrives had incurred delay and increased costs due to the specification defect. On September 22, 1987, BOR requested a proposal, which Hardrives submitted on November 12. On December 29, 1987, after receiving no response, Hardrives submitted its certified claim in the amount of \$55,231.66 (AF for IBCA 2511 at Tabs 14-20; GX 486, 487).

¹²Mr. Salisbury prepared a technical analysis of this claim on Jan. 14, 1988, in which he alleged that he had instructed Hardrives to do no more work than what it had bid and to apply the plan quantity of material in the test section in three applications and no more. He testified similarly at hearing (AF for IBCA 2511 at Tab 21; Tr. 3451). BOR acknowledges that the technical analysis was many months after the fact (Tr. 4143). Mr. Locke agreed that FC had made such an instruction originally, but testified that it later was changed (Tr. 920). Contemporaneous documentation supports Mr. Locke.

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322. A BOR supervisor reported to the auditors that BOR was at fault, that the solution requirement should have been eliminated, and that Hardrives had been required to attain penetration where none could be achieved (GX 38 at Tab A-7-3 at A-7-17).

323. Crediting BOR because Hardrives did not use its own water truck as planned but rented it at a \$264 higher cost, and crediting it with Hardrives' estimate of planned costs, Hardrives incurred excess, reasonable, costs and burden not accounted for elsewhere of \$21,780 in complying with the order to apply all of the solution. Delay days overlap with those awarded in IBCA 2375/2475 and are not considered (AX 508, 521 at Tab A, sheet 2, Tab O, 522; Tr. 2391-96, 2560, 2562-63, 2566-73, 2653).

324. The contracting officer received Hardrives' claim on January 6, 1988 (AF for IBCA 2511 at Tabs 18, 20).

I. Pipe Bend Encasement Claim—IBCA 2510

325.U. Hardrives installed reinforced concrete pressure pipes and siphons that had horizontal and vertical bends to channel water around or under obstacles along the Canal (Tr. 811).

326. Reinforced concrete pressure pipe was to be manufactured in accordance with BOR's standard specifications (spec. 4.2.1). The Fittings For Reinforced Concrete Pressure Pipe specification (spec. 4.2.2) provided:

a. General-*** curves and bends, connections at structures and encasements *** shall be furnished and installed as shown on the drawings and in accordance with this paragraph and paragraph 4.2.3 [Laying Reinforced Concrete Pressure Pipe]. *** [C]urves, and bends, connections at structures and encasements *** shall conform to [BOR's standard specifications].

* * * * *

b. Approval of fittings-***

* * * * *

Any fabrication or procurement performed before approval of details shall be at the Contractor's risk. Approval by the Construction Engineer of the Contractor's details shall not be held to relieve the Contractor of any part of the Contractor's responsibility to meet all the requirements of these specifications or of the responsibility for the correctness of the Contractor's details.

* * * * *

d. Curves and bends -

(1) General—Where shown on the drawings, changes in alignment and grade shall be made with miter bends. Other changes in alignment and grade shall be made by pulling the pipe joints, by using beveled end pipe, by using a combination of pulling pipe joints and beveled end pipe, or with miter bends: Provided, That no direct payment will be made to the Contractor for concrete, including cement and reinforcing bars, in encasements and blocking for miter bends, and the cost shall be included in the cost of the pipe. ***

(2) Miter bends—Miter bends shall be fabricated as shown on the Drawings. ***

* * * * *

Reinforcement at bends shall be lapped or welded as shown on the above drawing [but none specified] * * *. After the reinforcement has been lapped or welded, the space between the mitered pipe units shall be filled with mortar. * * * *The mortared space in the bend shall be completely wrapped with welded-wire fabric, which shall be covered with a suitable mortar band. The mortar shall be allowed to cure before the miter bends are encased or blocked with concrete.*

Miter bends shall be encased or blocked with concrete as shown on the Drawings.
[Emphasis added.]

327.U. Hardrives reasonably concluded that it could block or encase pipe bends, depending upon what was shown on the drawings (Tr. 813-14).

328.U. The contract included drawings identifying various pipe bends. All referred to another drawing, V-5, entitled "Pipe Bend Details and Encasement," which depicted the types of possible bends and different methods of reinforcement, and showed a "banded mitered pipe bend" that was neither encased nor blocked (GX 2C, GX 556; Tr. 814-19).

329. No drawing showed an encased banded mitered pipe bend (GX 2C, 556; Tr. 821-22, 1152, 1154-55, 3043).

330.U. BOR's manual, "Commonly Used Drawings for Open Irrigation Systems," which provides standard drawings in detail, does not show how to encase a banded mitered pipe bend (GX 558, 559; Tr. 3043-44).

331. However, the dimension table in drawing V-5 setting the thickness for bands referred only to pipe up to 36 inches in diameter. There were no pipe sizes in the contract between 36 inches and 42 inches and no pipe at issue smaller than 42 inches in diameter. Every drawing in the contract depicting pipe bends 42 inches in diameter or larger showed the pipe bends as encased (GX 547-554, 556; Tr. 957, 3002).

332. Notes to Drawing V-5 provided that "1. Contractor may submit alternative design for approval" and "3. *Encase all pipe bends when [diameter is greater than or equal to 42 inches]*" (GX 556 (italics added); Tr. 820, 3001, 3003).

333.U. A mitered bend is formed during pipe fabrication (Tr. 812-13).

334. A banded mitered pipe bend has a band of mortar and wire mesh (Tr. 817-18, 978, 2993).

335. Encasing entails building a form and pouring a concrete collar around the pipe bend. In blocking, a large monolithic piece of concrete is placed under or along a bend. Blocking supports the joint, disperses water pressure, and prevents pipe movement and leakage. Encasing does the same, but secures pipe more firmly and protects it against ground settlement, vibrations, and exterior and interior water forces. Banding resists hydraulic pressures and prevents leakage, but does not prevent pipe displacement from external forces. If encasement is required, there is no point in banding (GX 562, 570; Tr. 822-23, 966-67, 978, 2994-97, 3006-07, 3045).

336.U. BOR's claims analyst Green had never seen an encased banded mitered pipe bend used on any project (Tr. 3044-45).

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337. Hardrives had received a quote, pre-bid, from Ameron for banded mitered pipe bends. It is not clear whether it covered pipe of 42 inches in diameter or more, or whether Hardrives' bid was estimated based upon factory-supplied banded bends. Mr. Locke, who was not involved in the bid process (Tr. 1037), testified that he decided during the Project that ready-made banded mitered bends would "cut [his] cost" of pipe installation (Tr. 819). Although the factory-made bends were more expensive than straight pipe, they were cheaper than ordering straight pipe, cutting it to form bends, and blocking or encasing the bends. Mr. Locke admitted that Note 3 on drawing V-5 provided that the contractor was to encase all pipe bends, including banded mitered pipe bends, when pipe diameter was equal to or greater than 42 inches (Tr. 820-21). Because the drawings did not show any encased banded mitered pipe bends, however, and because Note 1 to drawing V-5 allowed submission of alternative designs for approval, he concluded that encasing or blocking banded mitered pipe bends was not a contract requirement (GX 556; Tr. 816-21).

338. Before it ordered pipe, Hardrives submitted drawings to FC which depicted banded mitered pipe bends without encasement. Hardrives did not submit rebar drawings, required for encasement. There is no evidence that the submissions stated that the banded mitered pipe bends were in lieu of blocking or encasement or that Hardrives requested approval for an alternate design. FC returned the drawings to Hardrives with no expression of disapproval and did not request rebar drawings (Tr. 821-23, 978, 3049).

339. Upon, or soon after, placement of at least one banded mitered pipe bend without encasement, FC told Hardrives that encasement was required to prevent joint leakage. Hardrives disagreed and FC issued field order No. 2 on September 26, 1986, directing placement of encased pipe bends, stating: "[M]itered pipe bends as supplied by the pipe supplier per pipe drawings does [sic] not suffice as an alternative to encasement." Hardrives continued to backfill. On October 3, FC issued field order No. 3 stating that Hardrives was backfilling at its own risk and might be required to re-excavate and place concrete encasements as directed in field order No. 2 at no additional cost (AF for IBCA 2510 at Tabs 9 and 11; GX 159A (10/3/86 Stanley and Canez reports; Tr. 823-25, 828, 1162, 3437).

340. By letter of September 29, 1986, Ameron asserted that it had manufactured mitered pipe bends "in accordance with the detail for 'banded mitered pipe bends for reinforced concrete pressure pipe' as shown on [drawing V-5]" and that it had that option, or of providing pipe to be encased in the field. It stated that it had elected the banded option, which would provide a water tight bend, and that "further encasement" was not required unless needed for some other purpose (AF for IBCA 2510 at Tab 12).

341. Hardrives was directed to encase all banded mitered pipe bends of 42 inches in diameter or more and did so, ultimately filing a claim (AF for IBCA 2510 at Tab 19; Tr. 827-29, 1224-25, 3003).

Because we find for BOR, we do not reach quantum.

VII. The Joint Sealant Claim—IBCA 2319/2514

342. The Contraction Joints For Concrete Canal Lining specification, 5.2.3, provides in pertinent part:

a. General—Contraction joints shall be constructed in unreinforced and reinforced (hand placed) concrete lining as shown on the Drawings.

Joints shall be continuous across the canal section. Transverse contraction joints shall be terminated at the top of the side slopes and a 3/4-inch-minimum-depth groove shall be tooled across the concrete curb from the end of each transverse joint. No filler or sealant will be required for these tooled grooves.

* * * * *

c. Materials—Elastomeric sealant—The sealant shall conform to [BOR] "Specifications for Elastomeric Joint Sealer", dated August 1, 1983.

d. Sampling, testing, and certification—Elastomeric sealant—The Government will require certification of each batch of elastomeric sealant prior to use. However, acceptance of the joint sealant materials * * * will not be made until the materials have been satisfactorily applied at the jobsite.

* * * * *

e. Placing elastomeric sealant—The canal lining concrete shall be cured at least 7 days before the two-component elastomeric sealant is placed in the joint grooves. Immediately before placing the sealant in the joint grooves, the joint grooves shall be thoroughly cleaned. * * * Elastomeric sealant shall not be placed while rain is falling. At the time of placing the joint sealant, the joint groove shall be clean * * *.

Before use, each component of the elastomeric sealant shall be thoroughly mixed * * * * *

* * * * *

The extrusion machine for mixing and placing the sealant shall conform to the manufacturer's recommendations. * * *

The method of mixing and placing shall result in a homogenous material. The sealant shall be extruded at the bottom of the joint groove and shall be tooled as necessary to work the sealant into intimate contact with the bonding surfaces without entrapping air bubbles. The top surface of the sealant shall be tooled to the shape shown on the drawing.

Elastomeric sealant which does not cure to a homogenous, rubber-like compound, which does not bond to the joint groove faces, or which does not comply with any other requirements of this paragraph shall be removed. The joint groove shall then be recleaned and new sealant placed therein by the Contractor at no additional cost to the Government.

Sealant pulled out of joints or damaged by the Contractor's operations or otherwise damaged during the contract period, shall be replaced * * *.

343. Payment for concrete canal lining work was to be at the bid price and to include the cost of joint sealer (specs. 5.2.5; 5.3.21).

344. The drawing of a contraction joint, No. 7506, showed elastomeric sealant in the bottom of the joint groove (GX 2C at 31, GX 538).

345.U. Mr. Rodgers, a registered professional engineer, in the construction business since 1949, prepared most of Hardrives' bid estimate (Tr. 1378-82).

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346.U. Prior to the estimate, Mr. Rodgers and his assistant examined the Project site. They also examined two other BOR canal projects. On one, sealant was installed in transverse contraction joints; on the other, it was not (Tr. 1382-85).

347. Mr. Rodgers anticipated construction of the Canal lining with a slip form paving machine. Because the contract required transverse contraction joints at 10-foot intervals in the lining, he planned that they would be tooled (Tr. 1400).

348. A "transverse contraction joint," as used in § 5.2.3a., is a groove formed in concrete either by a template (form board) or by tooling. On the job, Valley Ditch hand-tooled the portion of the joint in the Canal and then "hit the curb" with a stick to form the portion located there, which it considered to be the same as tooling. BOR deemed that this method satisfied the specifications. To avoid cracking in the curb, the need to continue the groove placed in the canal up to and over the curb is stressed by BOR. Because it is impractical to place the curb groove at the same time as the groove in a canal, curb grooving is usually done separately (Tr. 1297-98, 1312-13, 2976-81).

349.U. Use of a paving machine and hand tooling were reasonable assumptions (Tr. 3026-27, 3104-05).

350.U. Hand tooling the transverse grooves is the custom and practice in the industry (Tr. 1300).

351. Elastomeric sealant is a caulking compound commonly used to seal contraction joints to form a water-tight seal (Tr. 830, 2969-70).

352.U. In preparing his estimate, Mr. Rodgers first reviewed drawing No. 7506 and concluded that transverse contraction joints required elastomeric sealant (GX 538; Tr. 1401).

353.U. While under that assumption, he listed 25 cents per l.f. of contraction joints, for all equipment, time, materials, and other non-labor expenses. He did not specifically allocate part of the 25 cents to sealant; rather, he used 25 cents as an arbitrary, or "bogeyed," number (AX 494; Tr. 1403-05, 1415, 1420, 1456-59).

354.U. Mr. Rogers then examined the specifications for the first time. After reviewing § 5.2.3a., he perceived a conflict between the specifications and the plans and concluded that no sealant would be required for tooled grooves (GX 537; Tr. 1405-06).

355. Mr. Rogers brought the alleged conflict to Mr. Hite's attention. The 25 cents was left in the bid as a contingency. A minor amount of joint sealant was required in any case for certain construction joints (Tr. 1415, 1420-22, 1459, 1462-63, 1474-75).

356.U. Mr. Rogers did not question FC or BOR about the matter until after contract award. Appellant concedes that it did not make a pre-bid inquiry (Reply Brief at 326; Tr. 1416, 1462-63, 1474-75).

357. In a series of exchanges, Hardrives sought a change order, alleging that sealant was not required in transverse contraction joints. FC and BOR disagreed. On April 14, 1987, BOR issued a show cause

notice, stating that Hardrives had failed to cure a condition deemed to endanger contract performance and that BOR was considering a default termination. On April 23, Hardrives responded that it fully intended to place the sealant and that the delay in completion of the canal lining was due to delays associated with the earthwork portion of the Project, unrelated to sealant (AF for IBCA 2319 at Tab V(a), multiple correspondence).

358.U. Prior to the show cause notice, Hardrives had ordered the sealant and had it on site (AX 203; Tr. 862-63).

359. Under Hardrives' plan, however, the Project had not been ready for the sealing, because the Canal lining had not been completed nor the Canal cleaned. Nonetheless, it began to prepare for and to seal upon receipt of the notice (AX 203, 519; Tr. 863-65).

Because we find for BOR, we do not reach quantum.

VIII. Sump and Wells Claim—IBCA 2519

360.U. During construction, Hardrives encountered a sump and wells near the Canal that were not on the drawings (c&a ¶ 153; Tr. 872-73).

361.U. By letter of August 11, 1986, enclosing PSR 21, FC asked Hardrives to develop an itemized proposal to cap a well in a right-of-way at station 410+00 (AF for IBCA 2519 at Tab 4; AX 64).

362. It later was determined that unsuitable materials had to be excavated from a sluice pit (apparently the "sump") and that an abandoned well at station 355+50 required capping (AF for IBCA 2519; AX 105; GX 497).

363. On November 17, 1986, FC estimated that the work would take 4 days and cost \$5,500 (AF for IBCA 2519 at Tabs 9, 11, 13, 14; AX 105).

364.U. On November 20, 1986, BOR issued undefinitized unilateral Modification 9, directing Hardrives to excavate unsuitable materials from the sluice pit and to cap the wells (c&a ¶ 155; AX 105).

365. MRT started the work on about November 7, 1986, and completed it on about November 20, using Hardrives' backhoe in at least one case (AX 521 at Tab P; Tr. 873-74, 2345, 2347).

366. On November 20, 1986, BOR asked FC to seek a proposal from Hardrives to be submitted by December 19. On December 9, FC asked for a proposal for Modification 9 and for other modification work, to be submitted by December 18 (AF for IBCA 2519 at Tabs 14, 15).

367. The record includes three invoices from MRT to Hardrives, each dated December 13, 1986, totalling \$6,299.47. Two of them, totalling \$2,744.68, were marked "Received" by Hardrives on December 19, 1986. Hardrives submitted those two to FC on March 19, 1987, with its proposal. Whether the other invoice, in the amount of \$3,554.79, had been provided to Hardrives at the time is unclear, but the lack of a "Received" stamp, and events below, suggest that it had not been. Hardrives' proposal cited \$6,240.17 in subcontractor costs and burden,

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to which Hardrives added its own costs and burden, for a grand total of \$9,512.98 (AX 521 at Tab P; GX 13, 497; Tr. 873).

368. By letter to Hardrives of June 16, 1987, FC stated that the contractor's proposal had omitted the costs to cap the well at station 355+50 and that FC could not write a definitizing modification without that information (AF for IBCA 2519 at Tab 18).

369. Whether the letter was received is unclear because, on February 23, 1988, Hardrives wrote to the contracting officer that there had been no action on its March 19, 1987, submission and asserted a claim for \$11,452.51. The claim included \$6,240.55 in subcontractor costs and burden. Hardrives sought a 1-day extension. We find that the contracting officer received the claim no later than March 3, 1988. There is no apparent correlation between the omitted MRT invoice and the claim increase because subcontractor costs remained virtually the same. However, the station number for the work covered by the third invoice suggests that it pertains to the omission noted by FC. Hardrives included costs reflected on the third invoice in its revised claim amount presented at hearing (AF for IBCA 2519 at Tab 19; GX 13, 497).

370. On April 14, 1988, the contracting officer issued a decision stating that it had always been BOR's intent to compensate the contractor; that the claim had merit; and that an equitable adjustment would be negotiated upon completion of a pending audit (AF for IBCA 2519 at Tab 21).

371. On September 20, 1988, FC transmitted a price negotiation memorandum to BOR. It noted that it was disregarding a price ceiling contained in Modification 9 and concluded:

The basic costs that the contractor is requesting are generally not out of reason, as this memorandum will demonstrate. There are various mark-ups for overhead and extended overhead which are issues that may be tied to overall project claims and may not be able to be resolved during negotiation of this modification.

(GX 497, Negotiation Memorandum at 2). FC recommended payment of \$3,530.86, accepting all claimed direct costs, tax, and bond, but applying only one direct overhead and profit calculation and excluding extended overhead (GX 497, Negotiation Memorandum at 6-8).

372.U. BOR admits that the claim has merit, but has never paid anything to Hardrives (Tr. 875, 2350, 3617-18, 3637-38, 4100).

373. Hardrives modified its claim amount for consistency with the calculation of its other claims and to avoid duplication or augmentation of indirect costs. We find that appellant demonstrated direct costs, including field overhead, not accounted for elsewhere, of \$4,402. To that we add profit, bond, and tax at the stated rates, for a total of \$5,035. The extension sought overlaps with that awarded in IBCA 2375/2475 and is not considered (AX 521 at Tab A, sheet 2, and Tab P; Tr. 2346-50, 2364-66).

IX. Interest on Delayed Payments—IBCA 2516

374. The Payments clause, § I.5.1, provided in pertinent part:

(b) The Government shall make progress payments monthly as the work proceeds, or at more frequent intervals as determined by the Contracting Officer, on estimates approved by the Contracting Officer. * * * [T]he Contracting Officer may authorize material delivered on the site and preparatory work done to be taken into consideration.

375. However, the Administration of Payments clause, § I.5.2, provided:

(a) Payments shall be made as close to 30 calendar days as administratively possible after receipt by the Government of signed invoices from the Contractor on estimates approved by the Contracting Officer.

(b) *Material delivered on the site may be included in the estimates only if the Contractor furnishes satisfactory evidence (1) that it has acquired title to such material and (2) that the material shall be used to perform the contract.* [Italics added.] The Mobilization and Preparatory Work clause, § I.5.3, provided for progress payments for such work. Certain mobilization costs were to be paid at intervals.

376. The Prompt Payment Act (PPA) clause, § I.5.12, provided in part:

INTEREST ON OVERDUE PAYMENTS

(a) The [PPA] * * * is applicable * * * and requires the payment to Contractors of interest on overdue payments * * *.

(b) Determinations of interest due will be made in accordance with the [PPA] and Office of Management and Budget [OMB] Circular A-125.

PAYMENT DUE DATE

(a) Payments under this contract will be due on the 35th calendar day after the later of:

(1) the date of actual receipt of a proper invoice in the office designated to receive the invoice, or

(2) the date the supplies or services are accepted by the Government.

(b) For the purpose of determining the due date for payment and for no other purpose, acceptance will be deemed to occur on the 30th calendar day after the date of delivery of the supplies, or performance of the services required, in accordance with the terms of the contract.

* * * * *

(d) Payment shall be deemed to be made on the date of issuance of the Government check.

INVOICE REQUIREMENTS

(a) Invoices shall be submitted * * * to the Government office designated to receive invoices in this contract * * *. [Italics added.]

A "proper invoice" had to contain basic price and quantity and other information, along with "other substantiating documentation or information as required by the contract."

377. OMB Circular A-125 provided, *inter alia*:

3. Policy. * * * *Agencies will pay interest penalties without the need for business concerns requesting them* * * *.

* * * * *

8. Interest Penalty Requirement

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a. An interest penalty will be paid when all of the following conditions are met:

* * * * *

- A proper invoice has been received * * *.

* * * * *

c. Interest penalties are not required when payment is delayed because of a disagreement between a Federal agency and a business concern over the amount of the payment or other issues concerning compliance with the terms of a contract * * *. Claims concerning disputes, and any interest that may be payable with respect to the period while the dispute is being settled, will be resolved in accordance with the [CDA]. [Italics added.]

(GX 497 at OMB Circular A-125 at 2).

378. Hardrives seeks interest for alleged late payment of vouchers 1-11, covering about the first year of the contract, through May 25, 1987 (AX 521 at Tab R; AX 588).

379.U. It was FC's responsibility to prepare BOR's monthly payment vouchers (AX 51, 226; Tr. 1694, 3647).

380. For about 1 year after contract award, FC required Hardrives to do the paperwork for it, without instructing Hardrives as to standard BOR format (AX 226; Tr. 441, 1098-99).

381. Normally, on the 25th of each month, Hardrives met with FC to discuss the monthly progress payment (Tr. 670-71, 1098, 1831).

382. Often, FC would seek more information, or ask for changes, before it would submit a voucher to BOR. On occasion, after Hardrives believed agreement had been reached, Ms. Hodges would request changes and, after resubmittal, sometimes would request more. FC did not forward any part of the vouchers, even if related to Kleck Road Turnout work administered by BOR, until Hardrives had made all requested changes (GX 51; GX 497 at contact reports; Tr. 671-73, 1832).

383. Hardrives did not get paid within 30 days of submission of any of the 11 vouchers at issue (AX 588).

384. BOR admits that "on six occasions Hardrives did not get paid within 30 days from the date it submitted *proper* vouchers" (italics added) (BOR's proposed findings at 127, No. 605; GX 496).

385. On May 15, 1987, BOR reminded FC that it was to prepare the vouchers, stating that Hardrives' submissions had not been in standard BOR format, which had contributed to payment delay. BOR noted that Hardrives had requested the proper format; directed FC to supply it promptly; and strongly recommended that FC prepare the vouchers (AX 226).

386. Mr. Canez was asked to attend progress payment meetings and the procedure was changed so that, if FC disagreed with Hardrives, FC still would forward the voucher to BOR, noting the disagreement. In Mr. Canez' opinion, this was the proper procedure. Beginning with voucher 12, progress payments were much faster (see AX 410; GX 496 at Hardrives' 11/30/87 claim letter; Tr. 671, 673, 1694-95).

387. BOR policy is to process all vouchers by not more than 5 working days after receipt (GX 496 at BOR 3/10/87 letter to FC).

388. February 26, 1987, Hardrives wrote to FC complaining of late payments; asserting financial burden and profit jeopardy due to potential loss of prompt payment discounts from its suppliers; and requesting interest. When BOR inquired about the reasons for payment delays, FC cited format disagreements, and that it was waiting for lien releases in certain cases, among other things (GX 496).

389. If a lien waiver is not with a request for payment for materials, BOR does not consider it a "proper invoice" (Tr. 3615-16).

390. On April 7, 1987, BOR found that the interest request had merit in part. On April 14, though, the contracting officer denied it, alleging that the payment period began when BOR's payment office received a proper, authorized invoice; that any interest would be based upon any delays by that office; that "[t]he courts have held that the Contracting Office [sic] does not have authority to award interest" absent a claim under "Section 611" of the CDA; and that a demand was not a claim (GX 496).

391. Ms. Ramirez opined that undisputed interest could have been paid automatically (Tr. 3644-45).

392. On December 3, 1987, the contracting officer received Hardrives' claim for interest in the amount of \$17,216.38 (GX 496).

393. On February 2, 1988, the contracting officer advised Hardrives that its claim had some merit and that it would be notified when BOR was prepared to negotiate it (AX 379).

394. On February 10, 1988, Hardrives appealed to this Board, which remanded the appeal for decision by the contracting officer within 60 days. On June 15, 1988, Hardrives refiled its appeal because the contracting officer had not issued a decision (GX 496).

395. BOR has not paid Hardrives any interest (Tr. 676-77).

396. Interest rates are undisputed; the parties have agreed to a 30-day payment period, rather than 35; and BOR now asserts that the period began when FC received a "proper invoice," *i.e.*, one as finally revised per FC's directions. In all but two cases, the deemed "proper invoice" dates are later than Hardrives' original submissions. Appellant contends without support, that the triggering date is the voucher's "cut-off" date. For this appeal, we accept BOR's triggering date. Appellant has not directed us to documentary evidence that its original invoices in question were "proper," or segregated any alleged "proper" portions, and BOR has supplied evidence that the invoices were improper, at least in part. Regarding payment dates, BOR's were supplied by its fiscal office in Denver. Appellant's are substantially the same, varying by 1 day in BOR's favor and by 4 days in appellant's favor. Because appellant has not directed us to documentary evidence of payment dates, we accept BOR's record (AX 521 at Tab R at R-1; AX 588; GX 496 at Technical Analysis and at FC's 12/28/87 analysis; Tr. 3615-17, 3639).

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397. An April 1987 prenegotiation memorandum, reviewed by BOR in July 1988, for a proposed Modification 46 (ultimately not issued) recorded the Independent Government Estimate (IGE) of interest due Hardrives at \$3,868.13, using a 30-day payment period. BOR's maximum negotiation objective adopted that estimate. The minimum objective, which used a 35-day payment period and fewer days of delay, was \$1,964.71. Both calculations credited BOR with overpayments for mobilization costs and for Borrow Area C material. Hardrives has not directed us to any evidence that BOR was mistaken about the mobilization cost overpayment. Accordingly, for purposes of the interest claim, we accept that there was one. Also, it is clear that Borrow Area C costs were disputed and, therefore, not the basis for an interest penalty. At hearing, BOR presented a revised estimate that \$1,735.55 was due, with no explanation of the dates upon which it was based or of its differences from the IGE estimate (GX 496; Tr. 3617).¹⁰⁰ We find that the IGE is the best-supported calculation. Thus, interest due is \$3,868.13, plus CDA interest as of December 3, 1987.

X. Borrow Area "C" Royalty Claim—IBCA 2414/2515

For the relevant contract provision see specification 3.2.6 (FF 14).

399. Per MRT's diary for November 4, 1986, Ms. Hodges thought BOR would pay the contractor 15 cents per c.y. for Borrow Area C material (GX 117).

400. BOR paid Hardrives \$14,893 for Borrow Area C royalties, but deducted it from a later progress payment, as having been paid in error (c&a ¶¶ 172, 173; GX 496).

401. Hardrives included the royalty cost of Borrow Area C material in its bid price for excavation from borrow. MRT also included the cost in its price to Hardrives (AX 502 (black book); Tr. 1477-79, 1918).

402. On July 10, 1987, Hardrives submitted a claim for \$14,893 to recover the Borrow Area C surcharge (AF for IBCA 2414 at Tab 17).

Because we find for BOR, we do not reach quantum.

DISCUSSION

IBCA 2375/2475

[1] The Government impliedly warrants the correctness and adequacy for the job of design specifications, like those in this appeal. The warranty is not superceded by disclaimers, as in this contract, alerting bidders to investigate the site, plans and scope of work, nor affected by the fact that an A/E prepared the specifications. *United States v. Spearin*, 248 U.S. 132, 136 (1918); *Hollerbach v. United States*, 233 U.S. 165 (1914); *Pathman Construction Co.*, ASBCA No. 22343, 81-1 BCA ¶ 15,010; *Pilcher, Livingston &, Wallace, Inc.*, ASBCA No. 13391, 70-1 BCA ¶ 8331 at 38,763-64. The warranty extends to the contract's survey information; if it contains significant

and pervasive errors, the specifications are defective. *H. M. Byars Construction Co., and Nevada Paving Inc., a Joint Venture*, IBCA No. 1098-2-76, 77-2 BCA ¶ 12,568 at 60,937. Here, appellant, and its subcontractors MRT and Valley Ditch, suffered from a series of specification defects that caused overlapping problems and augmented them.

Regarding defective earthwork specifications, first, the contract stated that “[t]he vertical accuracy of the ground elevations is ± 0.25 feet, subject to standard industry tolerances” (FF 11). Bidders were invited to verify this at their expense. Industry standard is that 80 percent of all elevations must be within the required accuracy (FF 104). FC had inserted the bidder verification language because it had had prior bad experience with inaccurate aerial surveys and earthwork problems and wanted to put the onus upon the contractor, should such difficulties occur on this Project (FF 98). However, BOR’s Chief of Construction acknowledged that this was unreasonable and deemed the “ ± 0.25 feet” representation to be “an express warranty as to the accuracy of the original ground profile” (FF 42).

Earthwork elevations did not approximate the ± 0.25 feet warranty. They were inaccurate at random throughout the 14-mile-long Project, by as much as 4 feet at one point, and never consistently or predictably. The erroneous elevations impeded every aspect of the earthwork, including trenching, lining and structures (FF 53, 56, 69.U.-71.U., 112, 149, 155, 157, 160, 161.U., 162, 167-69, 171-72, 175).

Second, in bidding and planning, Hardrives had relied upon the specifications, including FC’s computer printout describing the amount of material to be excavated and the amount of fill at all points along the Canal. MRT did not rely upon the printout, but relied upon other specifications containing essentially the same information. The cut/fill ratio, or “shrink factor,” portrayed in these contract documents was inordinately high, strongly suggesting to a reasonable bidder that shrink would be less than indicated and borrow would underrun the estimated quantity, as Hardrives judged. It priced its borrow and related bids accordingly without inquiring of BOR or FC about shrink. According to expert Duin, this was, in effect, balanced bidding and the prudent thing to do. MRT did not rely upon a shrink factor, per se, in evaluating its projected job costs, but relied upon the contract’s borrow estimate, which incorporated that factor (FF 36U., 37, 39, 40.U., 41, 74.U., 75.U., 76, 79, 80.U., 82.U.).

Shrink is often a matter of judgment. There is no evidence that any bidder inquired of FC or BOR about it. Under the circumstances, we find that Hardrives did not have a duty to inquire and reasonably concluded that the cut/fill ratio was high. Indeed, had the correct ratio been used in the contract, but for the other erroneous specifications, borrow would have underrun the estimated quantity, just as Hardrives had anticipated (FF 76, 78).

However, unrevealed to bidders, and without notice to Hardrives even after it had notified FC about elevation inaccuracies, FC

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deliberately had overstated the cut/fill ratio and, thus, in its belief, the borrow estimate, 103 in a misguided attempt to protect itself against administrative difficulties should borrow be greater than it actually anticipated. In fact, despite this undisclosed manipulation, the contract's borrow estimate proved materially understated (FF 76, 78, 83.U.).¹³

FC exacerbated the borrow problem by providing Hardrives with exceedingly high revised borrow estimates during the job. Moreover, at the time, FC's own internal estimate, while then higher than the contract estimate, was considerably lower than the changing estimates given to Hardrives. FC never did supply Hardrives with an analysis of earthwork quantities using an accurate shrink factor. This affected evaluation of work performed, projection of additional work, payment, planning, selection and location of borrow areas, and anticipated haul routes. FC and BOR admitted the importance of an accurate shrink factor at hearing and BOR's then chief of APO's major claims branch conceded that the use of the high shrink factor resulted in FC's providing Hardrives with misleading information. We base our determinations not upon the shrink factor, itself, but upon the resulting, continuously misleading borrow figures given to Hardrives from the outset of the contract (FF 78, 81.U., 83.U., 84.U., 85).

Third, the contract states that "[p]ayment for earthwork items will be made to the neat line dimensions shown on the plans and the quantities in the bid schedule" (FF 11). FC, however, again without notice to bidders, and without notice to Hardrives even after it had notified FC about the ground profile inaccuracies, deliberately had lowered the elevation of existing ground in the specifications by a quarter of a foot at all locations. BOR could not recall any other project where this had been done. The lowering affected the accuracy of unit prices, pay quantities (particularly excavation for canal and compacted embankment) and job planning (FF 86.U., 87, 88.U.-90.U., 91).¹⁴

Other contract representations proved inaccurate: there were discrepancies in embankment slopes; Borrow Area C, due to the imposition of new conditions upon its use and FC's failure to resolve the problem, was not made available in the manner represented; and unforeseen, very hard, caliche was encountered subsurface, when the contract had indicated only partially, weakly, or moderately cemented materials (FF 7, 8, 92-94). We consider the slope discrepancies and borrow area problem to be part of the many contract changes. The caliche constituted a "Type I" differing site condition under section (a)(1) of the Differing Site Conditions clause (FF 30); *Stuyvesant*

¹³ Although the VEQ clause might provide redress under other circumstances, BOR did not use it in its quantum analysis at hearing or raise it in briefing and we find that it does not apply here, where the specifications clearly were defective.

¹⁴ BOR claimed in briefing, but did not prove, that the artificial lowering of existing ground benefitted Hardrives because it increased pay quantities for excavation for canal. Regardless, it was the fact that the contractor believed that it was working from neat lines based upon existing ground levels, and so bid and planned its job, that was detrimental.

Dredging Co. v. United States, 834 F.2d 1576, 1580-81 (Fed. Cir. 1987). These impediments occurred in combination with the contract errors addressed above and, under the applicable clauses, the measure of damages and delay is the same. Therefore, we have not segregated them in our quantum analysis.

BOR concedes that the contract's earthwork elevations were erroneous and that this resulted in increased costs. It disputes the impact of the errors and the amount of the costs (BOR's Brief at 1, 48). It is abundantly clear, however, that the earthwork specifications were so defective that they adversely affected Hardrives' and its subcontractors MRT's and Valley Ditch's bidding, planning, management, and conduct of the contract work in a major, material, delay-inducing, and costly manner.

When defective specifications cause extra work, extra costs, and delay, the contractor is entitled to recovery. Although its theories have changed from time to time, Hardrives now appears principally to invoke breach of contract. Defective specifications may be considered a breach of contract or a constructive change under the Changes clause. Boards typically rely upon the latter, continuing to apply the doctrine that developed pre-CDA, when Boards did not possess jurisdiction to consider breach claims, as we now do. See Rand L. Allen and Jeffrey M. Villet, "Implied Warranty of Specifications," Briefing Papers No. 91-8 (Federal Publications July 1991); *La Crosse Garment Manufacturing Co. v. United States*, 432 F.2d 1377, 1384 (Ct. Cl. 1970); *L.W. Foster Sportswear Co. v. United States*, 405 F.2d 1285, 1290 (Ct. Cl. 1969); *Pathman, supra*, 81-1 BCA ¶ 15,010 at 74,263. The Interior Board previously has applied the constructive change doctrine to defective specifications. *Gracon Corp.*, IBCA No. 2271, 89-1 BCA ¶ 21,232 at 107,100.

Indeed, the Federal Circuit recently stated that "contingencies contemplated by various contract clauses are remedial under those clauses * * * not as a breach of the contract." *Triax-Pacific v. Stone*, 958 F.2d 351, 354 (Fed. Cir. 1992). In *Triax-Pacific* the contractor had appealed from a Board decision denying its claims based upon the Government's delay in issuing a notice to proceed. The Board had determined that the delay was due to the contractor's delay under a predecessor contract and was not compensable under the second contract's Changes or Suspension of Work clauses or as a breach of contract. The court of appeals reasoned that because a delay, and not a change, was at issue, the Suspension of Work clause applied to bar the contractor's claims, due to its responsibility for the delay, and that the Board did not err in concluding that there was no breach of contract remedy.

The "constructive" change doctrine, however, recognizes that defective specifications are not covered explicitly by the Changes clause. Moreover, *Triax-Pacific* relied upon *Johnson & Sons Erectors Co. v. United States*, 231 Ct. Cl. 753, cert. denied, 459 U.S. 971 (1982), which involved a pre-CDA contract and appeals brought under the

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Wunderlich Act, 41 U.S.C. § 321, and the CDA. In *Johnson*, the court affirmed the long-standing pre-CDA principle, discussed by the ASBCA at length in the underlying appeal, *Johnson & Son Erectors, Co.*, ASBCA Nos. 23689, 24564, 81-1 BCA ¶ 14,880, *aff'd on recon.*, 81-1 BCA ¶ 15,082, that claims remedial under contract clauses are to be so adjudicated, and not as contract breaches. The court recognized, nonetheless, that defective specification, and other claims, could amount to breach claims under some circumstances (231 Ct. Cl. at 759).

Hardrives did not assert breach during performance and completed the work, including after MRT was forced to default (FF 143; see *Johnson*, 231 Ct. Cl. at 757 ("A contractor having a breach issue not so compensable [under the contract] may be obliged to declare the contract at an end and cease performance in order to avoid a waiver and save its rights.)) In any event, here, we conclude that the defective specifications constituted a constructive change and that the contract provides appropriate redress under the Changes clause, which entitles appellant to an equitable adjustment in money and time. Accordingly, we do not reach appellant's various breach claims.

In grounding our remedy in the Changes clause, we do not suggest that Hardrives was required to take the risky course of ceasing work in order to assert breach, or that it would have been warranted. The full extent of the defective earthwork specifications, the contract mismanagement, and their impact, was not known until work was complete (see 4A McBride & Wachtel, *Government Contracts*, § 31.20[1] ("Generally, the doctrine that election to perform waives a breach is limited to those instances in which a party continues performance in spite of a known excuse. If at the time of the supposed election the excuse was not known, the doctrine will not apply"). We do not reach those issues.

[2] In addition to the defective earthwork-related specifications, specifications affecting structures work also were defective, including those eventuating in PSR 19 (FF 239), resulting in constructive changes for which appellant is entitled to an equitable adjustment in money and time under the Changes clause (FF 177, 178.U., 179.U., 180, 181, 191.U., 199.U.).

[3] BOR admits that FC administered the contract poorly (FF 235). In fact, contract administration was egregious. FC, replete with inexperienced personnel with no authority to resolve problems, and burdened with conflicts of interest, did not do the job. BOR did not timely intercede, although it had the right to do so under its memorandum of understanding with the District and under the contract. It also had the duty to do so, as the entity which had contracted with Hardrives. Instead, BOR aggravated matters by failing to investigate problems when they occurred and by declining to

intervene (FF 2.U., 72.U., 113.U., 137, 144, 148, 150-51, 183.U.-185.U.).

The contract misadministration, in its multiple aspects, is delineated in our fact findings. Summarized:

(1) Despite notice of elevation accuracy problems from the aerial surveyor before the contract design was complete; additional notice from its own prior bad experience with aerial surveys and from its internal review before contract work began; and further notice from Hardrives immediately upon Hardrives' and MRT's discovery of problems in the field; FC allowed the contract to issue, allowed the work to commence, and directed that it continue. FC also did not arrange for an available, more accurate, aerial survey. It slowly conducted a resurvey itself and did not provide new information (still inaccurate) until months into the Project (FF 62.U., 65.U., 66, 67.U., 68, 106, 108.U., 109, 110.U., 111.U., 114.U.).

(2) Similarly, with respect to the discrepancies and defective specifications affecting structures, FC was painfully slow to respond, sometimes making resurveying necessary. Hardrives and MRT had to wait several days, or weeks, to obtain a solution from FC's home office, even for minor discrepancies that could have been handled in the field (FF 183.U., 186.U.).

(3) When Hardrives discovered that a structure, as designed, would have blocked part of an irrigation district's O & M road, it immediately proposed a no-cost solution, but FC instructed it to proceed as designed. Only when the irrigation district protested did FC issue a PSR. FC ultimately decided upon the solution Hardrives had proposed at the outset, but it took it at least 10 months to issue a change order to perform the work (FF 191.U.- 193.U., 195).

(4) Hardrives found a contract discrepancy, which BOR acknowledges was due to inadequate or defective specifications, and on July 29, 1986, FC transmitted PSR 19 replacing five broken back structures with check and pipe inlet structures. BOR admits that Hardrives did not receive clear direction on how to proceed until January 22, 1988, about 1 ½ years later, even though the contract's other structures were 95 percent complete at the end of September 1987, and FC knew that Hardrives was waiting for direction on the five check and pipe inlets (FF 196.U., 197.U., 199.U., 201.U., 202, 208.U., 212.U., 221.U., 223).

(5) FC and BOR issued 48 PSR's. Even when, as with PSR 19, FC and BOR eventually recognized the revisions as contract changes, and changes due to defective specifications, FC required Hardrives to submit proposals before it would issue change orders directing the work (FF 122, 184.U., 187.U., 189.U., 193.U., 199.U.). FC and BOR blame some Project delay upon Hardrives' alleged slow, or inadequate, proposals. Appellant asserts though, without challenge from BOR in briefing, that the Changes clause (FF 28) did not obligate it to respond to requests for proposals from BOR or FC.

The 1984 version of the Changes clause in this contract is derived from FAR 52.243-4 (APR 1984) (48 CFR 52.243-4) (1986). It mandates

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that, when a change causes an increase in a contractor's cost or time of performance, the contracting officer "shall make an equitable adjustment and modify the contract" (§ I.4.5(d) (italics added). Proposal submission is linked to the issuance of a change order or, when there has not been an acknowledged change, to a contractor's claim that one has occurred. The clause implies that the submission of a proposal is elective:

(e) The Contractor must submit *any* proposal under this clause within 30 days after (1) receipt of a written change order under paragraph (a) above or (2) the furnishing of a written notice under paragraph (b) above [that a change has occurred], by submitting to the Contracting Officer a written statement describing the general nature and amount of the proposal * * *. [Italics added.] [15]

§ I.4.5(e). Similarly, the contract's Change Order Accounting and Contractor Proposals clauses (FF 29) refer to the submission of "any" proposal.

Case law is to the same effect. In denying a contractor the costs of preparation of a proposal sought by the Government, which the contractor withdrew when the Government failed to take prompt action, the Armed Services Board of Contract Appeals (the ASBCA) noted:

The establishment of a price is not an essential part of the issuance of a unilateral order directing a change under the changes clause but may be a matter for subsequent agreement or resort to the disputes procedure.

On the facts it is evident that all the contracting officer did was invite or solicit an offer by appellant which, if accepted by the Government, would result in a bilateral supplemental agreement for performance of the proposed additional work for the offered price, rendering any action under the changes clause unnecessary. *Appellant, therefore, was not under any contract obligation to submit the requested proposal.* [Italics added.]

Greenhut Construction Co., ASBCA No. 14354, 70-1 BCA ¶ 8209 at 38,164. *Accord Campos Construction Co.*, VABCA No. 3019, 90-3 BCA ¶ 23,108 at 116,012; *George E. Jensen Contr., Inc.*, GSBICA No. 3260, 71-1 BCA ¶ 8850.

The ASBCA, in allowing a contractor to recover for Governmental delays in responding to a differing site condition design solution proposed by the contractor at the Government's request, addressed the issue of whether a contractor is obliged to respond to such requests:

Once the contractor notified the Government of the problem it had encountered the ball was in the Government's court and it had an obligation to tell appellant what the Government wanted done about the situation. The Government was not free, under this differing site conditions situation, to task the contractor with proposing a solution to the

¹⁵ The version of the Changes clause used in this contract was changed in 1987 to provide that:

"(e) The Contractor *must assert its right to an adjustment* under this clause within 30 days after (1) receipt of a written change order under paragraph (a) of this clause or (2) the furnishing of a written notice under paragraph (b) of this clause, by submitting to the Contracting Officer a written statement describing the general nature and amount of proposal, unless this period is extended by the Government. The statement of proposal for adjustment may be included in the notice under paragraph (b) above." (italics added). (FAR 52.243-4 (Aug. 1987)) (48 CFR 52.243-4) (1988). The submission of a proposal still is linked to receipt of a change order or to a claim that one has issued. We render no opinion about whether this clause obligates a contractor to respond to requests for proposals when an acknowledged change has occurred.

problem without issuing a proper directive under the authority of the Changes clause * * * the [Assistant Resident Officer in Charge of Construction] did not issue a directive under the Changes clause which the contractor would have been obliged to follow even if it did not agree with the order. * * * This was a request not a directive even though the words "proposal" and "change order" were used.

GB&E Electrical Contractors, ASBCA No. 34026, 87-3 BCA ¶ 20,119 at 101,874-75.

The ASBCA has not confined the reasoning expressed in *GB&E* to differing site condition situations. In *Pilcher, supra*, a case analogous to this one, an A/E had prepared specifications which proved defective and Governmental delays in remedying the problem ensued. The ASBCA found:

Much of the delay and expense experienced by the contractor as a result of inadequate and defective specifications could have been avoided if the Exchange representatives had recognized their responsibility for providing the contractor with correct and adequate specifications and taken prompt action to correct deficiencies in the specifications promptly after they had been reported by appellant. Instead, when appellant reported a problem the general practice of the COR and his inspection staff was to impose on appellant the burden of working out a proposed solution to the problem, submitting a shop drawing, showing the proposed solution, and getting it approved by the COR, which was time consuming *and was not the contractual responsibility of the contractor*. The Board has held many times that a contractor is entitled to a price adjustment under the Changes or Suspension of Work clauses for increased expense resulting from the failure and refusal of the Government to acknowledge specification deficiencies and take prompt action to correct them. [Emphasis added.]

70-1 BCA ¶ 8331 at 38,764.

In another analogous case, the contractor was waiting for a design solution from the Navy to defective specifications. The Navy instead requested proposals from the contractor and, like here, sought its signature on modifications which the contractor interpreted to require a release of its delay claims. Again like here, the Navy acknowledged that it could have issued a unilateral modification when negotiations for a bilateral one proved unfruitful. The Claims Court held:

Defendant asserts that any critical path delay attributable to the Navy because of the duct work delay does not extend beyond the date on which the Navy authorized plaintiff to proceed with the duct revision work * * *. Plaintiff contends that the delay attributable to the Navy continued until plaintiff received a change order for the work * * *. "[A] change authorization is not a change order * * *" *J.D. Hedin Constr. Co. v. United States*, * * * 347 F.2d 235, 252 (1965) (delay attributable to Government did not end until change order was issued). A contractor is not obligated to proceed until a change order is issued. *Id.* Therefore, delay attributable to the Navy continued until plaintiff received the change order for the work.

Wilner v. United States, 26 Cl. Ct. 260, 275 and n. 14 (1992), *aff'd*, F2d. (Fed. Cir. 5/24/93).

We conclude that, under the applicable 1984 Changes clause, and under the facts, when BOR recognized that contract changes had occurred, and admitted that it could have issued unilateral change orders directing that the work proceed, with cost and other negotiated matters to be resolved later, Hardrives had no contractual obligation to comply with FC's repeated requests for proposals (FF 223.U., 224).

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Hardrives, nevertheless, attempted at first to comply as promptly as possible. However, FC frequently rejected its proposals. If a proposal were unacceptable to FC, it would not act upon the underlying matter. If it were acceptable, FC and/or BOR continued to try to force Hardrives to execute, or to be subject to, modifications containing provisions that Hardrives already had explained it disputed (FF 122, 123.U., 124-26, 193.U.).

Hardrives had been able to negotiate modifications successfully with BOR on the Kleck Road Turnout portion of the contract, when FC was not involved. On the Canal portion of the job, BOR largely abdicated responsibility to FC. When matters were disputed, FC and BOR either left work undone or, even when the contractor had completed work described in several modifications, refrained from paying for it (FF 126-27, 224).

With multiple problems and growing impact that was impossible to quantify contemporaneously, Hardrives' concerns were legitimate and FC's and BOR's requirements and actions were unreasonable.

(6) For about a year, without providing the proper format, FC had Hardrives do the paperwork for the submission of monthly pay vouchers, which were FC's responsibility. Although, contrary to its assertion at hearing, Hardrives was responsible under the Administration of Payments clause for providing lien waivers for on site materials (FF 374, 375), waivers were required for only a few of the pay items. FC did not forward any portion of the vouchers, including items pertaining to the Kleck Road Turnout, until Hardrives had satisfied all of its requests for changes or additional information, although it could have arranged for a modified voucher, omitting disputed or pending items, or sent the vouchers to BOR, noting areas of disagreement (FF 385).

Additionally, aware of MRT's reasonable claim that it was doing considerable extra work, and that MRT was in dire need of cash flow, FC raised Hardrives' and MRT's expectations of payment, stating that it would occur soon, and that retainage would be reduced. Despite FC's representations, it continued to fail to process vouchers promptly; threatened to hold payments when Hardrives protested the use an inaccurate computer run for pay purposes; and affirmatively blocked retainage reduction (FF 117-19, 121, 133, 136, 137, 379.U., 380-89).

(7) FC delayed, and did not make an objective effort to evaluate Hardrives' and MRT's problems and claims during the job, and during the formal claims process, defying BOR's directions on more than one occasion. BOR acknowledges that the process of having FC evaluate claims was not objective (FF 130, 132.U., 133, 135.U., 137, 138, 140.U., 142-44, 147-51, 234.U., 236.U.).

The question arises as to whether the delays associated with correcting defective specifications, and otherwise identified above, are

remedial as contract breaches, or under the Changes clause, or under the Suspension of Work clause.

In *Chaney & James Construction Co. v. United States*, 421 F.2d 728 (Ct. Cl. 1970), a Wunderlich Act appeal from a board decision, when boards did not have breach jurisdiction, the court agreed with the contractor that delays due to defective specifications could be compensable under the Suspension of Work clause, as an administrative substitute for a breach claim. That clause (FF 31b.) provides for some recovery for certain delays attributable to the Government. The court of appeals in *Triax-Pacific, supra*, stated that “[i]n this case, the Suspension clause contemplates equitable adjustments for unreasonable delays in the performance of the contract.” 958 F.2d at 354. Although our review of cases reflects that the court is not alone in referring to “equitable adjustments” under the Suspension clause, in fact, in contrast to other remedial clauses, that clause literally refers only to an “adjustment” and excludes profit (see *The Government Contractor*, Vol. 34, No. 14, ¶ 210 at Note (4/8/92)).

In *Pilcher, supra*, in addition to converting the default termination of the contract to a termination for convenience, the ASBCA also awarded separate compensation for the Government’s unreasonable delays in rectifying design problems. The Board indicated that either the Changes or the Suspension of Work clause could cover the delay award, and it is unclear which of them it applied. More recently, the ASBCA appeared to except change order delays originating with defective specifications from coverage under the Suspension of Work clause: “*Except for delays resulting from defective specifications, however, delays preceding the issuance of a change order are not compensable under the Changes clause, but are instead under the Suspension of Work clause.*” *Vic Lane Construction, Inc.*, ASBCA No. 30305, 85-2 BCA ¶ 18,156 at 91,146 (italics added). Consistently, in *M. E. McGeary Co.*, ASBCA No. 31700, 86-3 BCA ¶ 19,038 at 96,156, the ASBCA allowed recovery for the “protracted period of time over which appellant was developing proposals in the absence of a change order” and appeared to do so under the Changes clause—both because that was the only clause discussed and because the Board allowed profit as part of the recovery.

Moreover, in *La Crosse, supra*, decided the same year as *Chaney & James*, the Court of Claims held a contractor entitled to recovery under the Changes clause for defective specifications and included in its analysis recovery for delays in curing the defects. In remanding the case to the Board to allow quantum proof, the court noted:

It is hard to believe that a contractor has not been “unduly delayed” when numerous substantial defects in the Government’s drawings go unresolved, despite constant efforts, for almost the life of the contract, because of a breakdown in communication among the elements of the procurement system charged with responsibility for correcting the defects.

432 F.2d at 1385.

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In contrast, although we are not bound by Claims Court rulings, as we are by those of the court of appeals, in a case where defective specifications were at issue, the Claims Court held that the Government's alleged unreasonable delays in issuing modifications under the Changes clause were covered by the Suspension of Work clause. *Beauchamp Construction Co. v. United States*, 14 Cl. Ct. 430 (1988).¹⁶

Here, BOR has not invoked the Suspension of Work clause, and has included profit in its delay quantum analyses presented to the Board. We find, in any event, that the combined effects of FC's and BOR's foregoing actions and failures to act amount to more than Government-caused delays under the Suspension clause. Instead, they constitute a breach of the duty to cooperate inherent in all contracts. We have articulated the standards for such a breach:

In the realm of Government contracts, in determining whether there has been any Governmental breach of [the duty to cooperate] the court of appeals, 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.

Blaze Construction Co., IBCA No. 2863, 91-3 BCA ¶ 24,071 at 120,504 (collecting cases.)

The tribunals have allowed contractors to recover for breach of the duty to cooperate either as a breach of contract (especially when a contractor is defending against a default termination—see *Malone v. United States*, 849 F.2d 1441, 1445 (Fed. Cir. 1988); *Kahaluu Construction Co.*, ASBCA No. 31187, 89-1 BCA ¶ 21,308 at 107,465), or as a constructive change under the Changes clause (*R&B Bewachungsgesellschaft mbH*, ASBCA Nos. 42213, *et al.*, 91-3 BCA ¶ 24,310 at 121,495; *Cinusa Constructors, Inc.*, ENG BCA No. 4637, 85-3 BCA ¶ 18,258; *Johnson & Son Erectors*, opinion below on reconsideration, *supra*, 81-1 BCA ¶ 15,082; see also *John C. Grimberg Co. v. United States*, 869 F.2d 1475 (Fed. Cir. 1989) (refusal to grant Buy American Act waiver was abuse of Government's administrative discretion under contract and amounted to a constructive change). As with defective specifications, in a previous case involving Government interference with the contractor's performance, the Interior Board fashioned its remedy under the contract (albeit via a constructive partial termination for convenience), rather than finding a contract

¹⁶ See also *Atlas Contractors, Inc.*, ASBCA Nos. 34545, 34761, 88-1 BCA ¶ 20,225 (A contractor alleged Governmental delay in providing direction after an omission in the contract drawings was discovered. Without addressing whether the specifications were defective, the Board held that the Suspension clause applied, found concurrent delay by the contractor, and denied recovery. In applying the Suspension clause, the Board cited *Vic Lane*, *supra*, but did not focus upon that panel's defective specifications distinction.) See also *Berrios Construction Co.*, VABCA No. 3152, 92-2 BCA ¶ 24,828 at 123,874 (Delays in remedying a differing site condition were deemed covered by the Suspension of Work clause. The Board found it significant that, if the contractor had prevailed in its contention that the Differing Site Condition clause governed its delay claim, a Supplemental Changes clause in its contract might have precluded any recovery.)

breach. *R & R Enterprises*, IBCA No. 2417, 89-2 BCA ¶ 21,708 at 109,156.

Here, we find that the constructive change doctrine is appropriate and that appellant is entitled to an equitable adjustment in money and time under the contract's Changes clause.

[4] To sustain the delay aspects of its claims, including those associated with the breach of the duty to cooperate, appellant must prove that (1) the specific delays were due to Governmental actions or inactions; (2) the overall completion of the Project was delayed as a result; and (3) appellant was not responsible for any delays that delayed overall contract completion concurrently with the Government-caused delays. *Commerce International Co. v. United States*, 338 F.2d 81 (Ct. Cl. 1964); *Rivera Construction Co.*, ASBCA Nos. 29391, 30207, 88-2 BCA ¶ 20,750 at 104,855-56; *Pathman, supra*, 81-1 BCA at 74,267.

"[A]ll delay due to defective or erroneous Government specifications are [sic] *per se* unreasonable and hence compensable." *Chaney & James*, 421 F.2d at 732. Appellant submitted ample, convincing, documentary evidence and credible testimony, including expert analysis, and proved by a preponderance of the evidence, that the Project was delayed due to the defective earthwork and structural specifications. It submitted the same sort of proof that the Project additionally was delayed unreasonably due to contract misadministration and the breach of the duty to cooperate.

Appellant has established that 370 days of the 373-day Project delay are attributable to BOR, and not to it or to its subcontractors. It showed that, of the 370 delay days, 149 were due to the earthwork problems resulting from the defective specifications and 221 to the balance of the Governmental-caused problems. (See detailed findings above and FF 166, 240.) We find appellant's proof to be specific enough under the facts of this appeal, where there were many concurrent, overlapping, continuous causes of delay attributable to BOR. As another Board noted, in awarding a contract time extension and equitable price adjustment for an extended performance period under similar circumstances:

Where so many delays occurred with concurrent or overlapping or consecutive time spans, all attributable to the Authority, the right to relief is not defeated merely because it is impossible neatly to separate the intertwined incidents and establish a specific critical impact for each. The present case is an appropriate one to be decided by the often disdained "total time" method.

Norair Engineering Corp., ENG BCA Nos. 3804, *et al.*, 90-1 BCA ¶ 22,327 at 112,209.

Appellant provided well-supported as-planned versus as-built evidence, including expert critical path analysis, in proving that it could have completed the Project essentially on time, but for the problems for which BOR is responsible. While Hardrives and its subcontractors did not utilize formal critical path method scheduling, they did start with a general, on-time schedule and work plan.

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Hardrives, though, was never able to follow the sequential operation it had planned in the timeframe it had scheduled due to the specification errors and severe administrative problems (FF 53-55, 56.U., 155-157, 159, 160, 161.U., 162, 166-72., 174.U., 175, 176, 177, 186.U., 188.U., 189.U., 190, 193.U., 196.U., 201.U., 204.U., 208.U., 211, 212.U., 221.U., 222.U., 224, 240). Any more precise schedules, thus, would have had to have been abandoned in any case. See *John Driggs Co.*, ENG BCA Nos. 4926, *et al.*, 87-2 BCA ¶ 19,833 at 100,388 ("The occurrence of a significant delay generally will affect related work, as the contractor's attention turns to overcoming the delay rather than slavishly following its now meaningless schedule.")

Once appellant met its burden, BOR, unlike the Government in *Chaney & James*, for example, did not provide persuasive countervailing proof. It did not establish that Hardrives could not have completed the job on time even if there had been no defective specifications or the other delaying factors chargeable to BOR. See *John Driggs, id.* It did not prove that equipment breakdowns, or other delays for which the contractor may have been responsible, were extraordinary; or caused overall Project delay; or that FC or BOR sought any remedial action during the contract on account of any such alleged delays. To the contrary, contemporaneously, BOR's and FC's field personnel recorded that Hardrives and its subcontractors were doing good work. BOR's inspector Canez and FC's inspector Stanley so testified at hearing. FC's project manager Hodges provided no testimony to the contrary. Mr. Canez was critical of FC, on the other hand (FF 166, 175).

Although, after the contract due date, BOR issued a show cause notice concerning sealant placement, that involved a disputed requirement. Hardrives, nonetheless, had purchased the sealant before the notice and had been prepared to place it when the Canal was ready for it. The delays in readiness were caused by FC and BOR, not by Hardrives or MRT (FF 357-59). The other cure notice was not issued until well after the contract due date, and long after structures work was 95 percent complete. Moreover, BOR issued it at a time when Hardrives still had not received authorization to proceed with the PSR 19 work, which included structures on the Project's critical path. The cure notice items either were attributable to FC or BOR-caused problems, or were incidental items planned for the end of the Project and quickly completed. BOR's contemporaneous evaluation of the situation is best reflected in the facts that it released retainage in full and did not assess liquidated damages (FF 171, 185.U., 208.U., 211, 212.U., 221.U., 222.U., 225, 227.U., 228, 229.U., 230.U., 232).

Further, BOR offered no explanation for the absence of certain significant witnesses and we draw some adverse inference that their testimony would not have been helpful. See *Brunner Bau GmbH*, ASBCA Nos. 35678, 37526, 91-3 BCA ¶ 24,051 at 120,410; *Warwick*

Construction, Inc., GSBCE No. 5070, *et al.*, 82-2 BCA ¶ 16,091 at 79,852-53. At a minimum, countervailing, credible, proof by key individuals involved in the Project was missing. Also, unlike appellant, BOR did not offer any expert testimony or analysis. Finally, we have resolved all relevant credibility issues in favor of appellant (FF 238).

For all of the foregoing reasons, appellant is entitled to a contract time extension of 370 days and associated delay damages.

[5] Hardrives has presented its proof of quantum on a modified total cost basis, segregating from its claimed costs for earthwork, structural work, and contract mismanagement, some costs for which it acknowledges responsibility. While not favored, total cost, or modified total cost, proof is acceptable under limited circumstances, as here, where there were concurrent, overlapping, and continuous problems and delays chargeable to the Government, for which it is virtually impossible, or highly impracticable, to segregate the costs and impact. *J. D. Hedin, supra*, 347 F.2d at 246-47. *Accord Tyroc Construction Corp.*, EBCA No. 210-3-82, 84-3 BCA ¶ 17,621 (total cost method applied when, like here, extra work was difficult to segregate from expected work); *Robert McMullan & Sons, Inc.*, ASBCA No. 19129, 76-2 BCA ¶ 12,072 at 57,962 (total cost method applied when, like here, there was no period of performance free of problems); *Sovereign Construction Co.*, ASBCA No. 17792, 75-1 BCA ¶ 11,251 at 53,606 (total cost method applied when, like here, there were Government-caused work inefficiencies and the Board found it impossible to make a direct measurement of inefficient work); *Concrete Placing Co. v. United States*, 25 Cl. Ct. 369, 377-78 (1992) (court allowed contractor to change proof at trial from actual costs previously claimed to total cost method because of difficulty, as here, in distinguishing between work caused by defective specifications and work covered by bid).

To recover under a total cost approach, after proving BOR's liability, Hardrives must show: "(1) the impracticability of proving actual losses directly; (2) the reasonableness of its bid; (3) the reasonableness of its actual costs; and (4) lack of responsibility for the added costs." *Servidone Construction Corp. v. United States*, 931 F.2d 860, 861 (Fed. Cir. 1991) (citation omitted). We have found that Hardrives has satisfied all four elements (*see, e.g.*, FF 249, 251-59, 261, 263, 275, and have discussed items (1) and (4) above. Regarding Hardrives' bid, in assessing reasonableness, we will consider such elements as the estimator's experience, comparison with other responsive bids, and whether the Government questioned the bid at the time of submission. *See J. D. Hedin*, 347 F.2d at 247; *Akcon, Inc.*, ENG BCA No. 5593, 90-3 BCA ¶ 23,250 at 116,662; *Hewitt Contracting Co.*, ENG BCA Nos. 4596, 4597, 83-2 BCA ¶ 16,816 at 83,643. Prepared by experienced estimators, Hardrives' bid was only 9.3 percent lower than the second lowest bid and was 3.3 percent higher than BOR's estimate. There is no evidence that BOR questioned the bid contemporaneously. Mr. Duin, who was recognized as an expert in estimating (FF 80.U.), also established that the bid was reasonable. BOR's attempt to refute that

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expert analysis was not persuasive in any respect. There is, thus, substantial evidence that Hardrives' bid was reasonable and we so found (FF 249).

Concerning the reasonableness of costs, BOR alleges that there is no presumption of reasonableness and that Hardrives has the burden of proof. BOR cites to FAR 31.201-3(a), which has so provided, effective May 27, 1987. Under the Pricing of Adjustments clause, however, the applicable FAR provisions are "those in effect on the date of this contract" (FF 29). In 1986, when this contract issued, the FAR, then 31.201-3 (48 CFR 31.201-3 (1986), did not state that there was no presumption of reasonableness. Rather, it stated that a cost was reasonable if it did not "exceed that which would be incurred by a prudent person in the conduct of competitive business." Case law at the time of the contract was that incurred costs were presumed to be reasonable:

The Board views actual costs incurred in the performance of changed work as the single, most reliable measure for the required price adjustment not only because the costs are "historical" but because, by their very incurrence, they raise the presumption of reasonableness. This presumption controls unless it is proved, by a preponderance of the evidence, that the costs were unreasonable.

Hewitt, id. (collecting cases).

Regardless, Hardrives provided a preponderance of evidence that its costs, and those of its subcontractors, were reasonable and we have so found (FF 261). BOR did not offer persuasive contradictory evidence. We have given the Interior Department's IG audits, and the auditors' testimony, little weight due to their questionable objectivity (FF 252), and have used them sparingly. *See Delco Electronics Corp. v. United States*, 17 Cl. Ct. 302, 323, 327-29 (1989) (Governmental audit evidence found flawed and of questionable objectivity because audits were prepared with express purpose of defending against claim and were contrary to earlier determinations that claim largely had merit. Claims Court found recovery allowable under either modified total cost approach or jury verdict.)

For the foregoing reasons, we have accepted appellant's modified total cost approach to its quantum proof.

[6] The parties dispute the proper manner of computing certain equipment ownership costs. The contract's Equipment Ownership and Operating Expense clause (FF 32) provides that those costs are to be calculated using the 1974 yellow book. That book provides that it is intended as a guide only, subject to adjustment for an individual contractor's experience. Expert testimony was that the book is outdated and that ownership rates derived from its tables are low, while its operating rates are high. BOR's witnesses for the most part corroborated that testimony and conceded, that, for settlement purposes, BOR "almost always" uses the 1986 AGC rates for ownership expenses.

In its quantum presentations at hearing, BOR used the yellow book to determine ownership expenses but the 1986 AGC rates for operating expenses. Expert testimony was that this is unbalanced and inequitable. Appellant used 1986 AGC rates for both ownership and operating expenses. Those rates were significantly lower than the rates charged by independent equipment rental companies in the area during 1986-87 (FF 402, 403).

Because the contract calls for the use of the yellow book, however, the identified problems with it would not persuade us to do otherwise but for the facts that: BOR instructed during the contract that the 1986 AGC rates were to be used; Hardrives changed its proposal method and adapted its computer system accordingly; FC prepared draft modifications accordingly; and BOR's contracting officers reviewed and approved modifications accordingly (FF 402). We thus deem BOR to have waived the contract's yellow book provision. The 1986 AGC rates, which the contracting officers, by their instructions and actions, previously had agreed were reasonable and should be used, are appropriate for our equitable adjustments. See *Southland Enterprises, Inc. v. United States*, 24 Cl. Ct. 596, 604 (1991).

[7] Appellant has used the now well-known formula set forth in *Eichleay Corp.*, ASBCA No. 5183, 60-2 BCA ¶ 2688, *aff'd on recon.*, 61-1 BCA ¶ 2894, to compute its unabsorbed home office overhead. Neither party briefed the *Eichleay* intricacies, although appellant addressed its factual underpinnings in its proposed findings. The Federal Circuit recently reviewed the genesis and offspring of *Eichleay*. In affirming the Claims Court's determination that the *Eichleay* formula should not be applied in a case where a contract modification provided for extra work and a time extension for a brief, known, period of time, the court concluded: "[C]omputation of extended home office overhead using an estimated daily rate is an extraordinary remedy which is specifically limited to contracts affected by government-caused suspensions, disruptions and delays of work." *C.B.C. Enterprises, Inc. v. United States*, 978 F.2d 669, 675 (Fed. Cir. 1992). In addressing the appropriate use of the *Eichleay* formula, the court focused upon the element of uncertainty engendered by disruption, suspension or delay of contract performance and cited with approval cases including ones where the Government's inaccurate estimate had caused delay that was unforeseeable and beyond the control of the contractor; the duration of delays was uncertain, so the contractor could not divert resources to other work; it was virtually impossible to trace the effect of each separate delay; and where changes continued throughout construction.

When a contractor meets its burden to prove that compensable delay occurred, and that it could not undertake other jobs during the contract period, the burden shifts to the Government to show that the contractor would suffer no loss by using a fixed percentage mark-up formula. *C.B.C.*, 978 F.2d at 673-74, *citing Capital Electric Co. v. United States*, 729 F.2d 743, 745-46 (Fed. Cir. 1984); *accord*

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Community Heating & Plumbing Co. v. Kelso, 987 F.2d 1575, 1582 (Fed. Cir. 1993).

Here, we have found Hardrives entitled to 370 days of compensable delay. Those delay days are all beyond the original contract performance period. We have found that the job changed repeatedly and unpredictably (FF 155, 157, 159, 247, 248.U.); that nonsegregable inefficiencies occurred (see FF 248.U., 263, 275); that Hardrives was not able to reduce its administrative staff as it generally does during the winter seasons and had to increase corporate staff to assist its civil division with the Project (FF 266.U., 267.U.); and that the civil division did not have any other jobs and was forced to close due to its Project losses (FF 268, 269.U.). An adjustment in claimed unabsorbed overhead has been made for the one period when Valley Ditch was able to assume other work (FF 274).

Appellant, therefore, has met its initial burden to show that uncompensated delay occurred and that it could not assume other jobs. BOR has not met its ensuing burden to prove that appellant would suffer no loss by using a fixed percentage mark-up formula. In fact, in post-hearing briefing, BOR did not challenge the use of the *Eichleay* formula. It argued only that Hardrives' civil and corporate division overheads should be combined. However, Hardrives has separate corporate and divisional overheads and accounts for them separately (FF 264.U., 265; and see n. 8). Also, BOR did not object to the use of a daily unabsorbed overhead rate and eventually used the same figure at hearing, \$847.76, that Hardrives originally had advanced and used in its quantum proof. Prior thereto, BOR had used the higher figure of \$1,434.85 (FF 270.U., 271).

Hardrives urged at hearing that the Board should apply a modified *Eichleay* formula to account for the seasonality of its business, and that its actual daily unabsorbed home office rate was \$1,273. Like the court in *Capital Electric Co.*, 729 F.2d. at 747, we have declined to modify the *Eichleay* formula. We have found that the \$847.76 daily home office overhead amount used by both parties at hearing is the appropriate one (FF 270.U., 271; n. 8).

[8] Appellant has applied a 10-percent profit rate to its claimed amounts. Although the auditors also used that rate (FF 256), BOR now alleges that the rate should be 8.85 percent, citing the Contractor Proposals clause (FF 29c.) and weighted profit guidelines in FAR 15.905 and in BOR and Departmental implementing regulations—RAD 15.905-80 and DIAR 1415.905.

The Contractor Proposals clause is not relevant. Apart from the contracting officer's intent to waive the clause in Hardrives' case (FF 255), it applies "in connection with any proposal [the contractor] makes for a contract modification" (FF 29c.) We are not considering a contractor proposal for a modification. (See *GB&E*, *supra*, where the ASBCA stressed the same fact in determining that a substantially

similar clause did not apply.) We have a constructive change under the Changes clause, which provides for an equitable adjustment. Aside from the need for the adjustment to be equitable, there is no limitation upon profit imposed by that clause.

As to regulations, the applicable 1986 FAR provision is 15.905-1 (48 CFR 15.905-1 (1986)). It merely provides that unless "clearly inappropriate or not applicable," agencies are to consider general factors in developing a structured approach or other profit analysis. RAD 15.905-80 (1986) and DIAR 1415.905 (1986), both under headings entitled "Contracting by Negotiation," apply to negotiations for construction services, including construction contract modifications, and are to the same effect. We find no applicable regulation limiting profit to any particular percentage. In a prior case where, unlike here, the contract provided that profit was to be in accordance with applicable BOR procurement regulations, the Interior Board noted that the proffered Departmental Manual, which seemed to be directed at negotiated resolutions (like the materials cited here), did not clearly apply. The Board added that, even if the BOR-espoused structural approach were that intended by the contract, the Board's own consideration of the various factors involved resulted in a higher profit rate than that urged by BOR. *Sanders Construction Co.*, IBCA No. 2309, 90-1 BCA ¶ 22,412 at 112,581.

Similarly, we have arrived at an equitable profit rate based upon our analysis of what is fair in this, and the following, appeals. Ten percent has been found to be a reasonable profit rate for Government construction contracts, even when a prime is seeking recovery for work largely performed by a subcontractor. *Design & Production, Inc. v. United States*, 18 Cl. Ct. 168, 210 (1989); *Delco, supra*, 17 Cl. Ct. at 334.

We have found the 10-percent profit rate applied by appellant for its work and that of its subcontractors to be fair and reasonable (FF 256).

[9] In our modified total cost award, we have deducted from the overall extra costs chargeable to BOR the cost of removing a slab apparently constructed after Hardrives' project manager had received PSR 19 changing the required work. The record is somewhat confusing on this point, but, absent clear proof that FC or BOR was responsible for the slab's placement, we have charged the contractor with the costs of removal (FF 196.U., 197, 198, 263, 275).

We also have deducted the cost of correcting turnouts to install two gates rather than one. Hardrives' concrete foreman had observed discrepancies in the drawings but had not sought clarification, and did not know what any shop drawings had shown. When he eventually raised the issue with FC, he was informed that two gates were required, although, to that point, neither FC nor BOR had protested the installation of one gate (FF 209.U., 210, 263, 275).

A contract is ambiguous if it is reasonably susceptible of more than one interpretation. *Edward R. Marden Corp. v. United States*, 803 F.2d 701, 705 (Fed. Cir. 1986). If an ambiguity is patent, the contractor has

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a duty to inquire of the contracting officer, pre-bid, about the meaning of the contract. Determining if an ambiguity is patent involves an objective judgment as to whether it is so glaring as to raise a duty to inquire. Only if the ambiguity is not patent, is the question reached of whether the contractor's particular interpretation is reasonable. If there is a latent ambiguity, and the contractor's interpretation is reasonable, the rule of *contra proferentem* may apply. *Newsom v. United States*, 676 F.2d 647, 649, 650 and note 11 (Ct. Cl. 1982). Even if the ambiguity is latent, however, the contractor still must prove that it relied upon its interpretation at the time of bidding. *Fruin-Colnon Corp. v. United States*, 912 F.2d 1426 (Fed. Cir. 1990); *Marden*, 803 F.2d at 705.

Here, assuming *arguendo* that the contract drawings were latently ambiguous and that the contractor's interpretation during performance was reasonable, Hardrives, nevertheless, has not established that it relied upon its one-gate interpretation at the time of bidding. What evidence there is, *i.e.* the unused gate or gates, suggests that the gate-supplier, or the contractor, at the time of bid, had interpreted the drawings to require two gates. That a contractor may have relied upon its own interpretation of an ambiguous portion of a Government contract during performance is immaterial. *Fruin-Colnon*, 912 F.2d at 1431; *ECI Construction, Inc.*, ASBCA No. 40097, 90-3 BCA ¶ 23,143, *aff'd on recon.*, 91-1 BCA ¶ 23,313.

Moreover, the contract called for notice and inquiry by the contractor concerning drawing discrepancies or questions of interpretation. The Drawings clause (FF 17) directed the contractor to check all drawings carefully and to advise the contracting officer of any errors or omissions. Under the Specifications and Drawings For Construction clause (FF 25a.), discrepancies in drawings were to be submitted promptly to the contracting officer for a written determination. Action by the contractor without such a determination was to be at its own risk.

Although the one-gate turnouts were installed under the oversight of inspectors, and remained in place for a considerable time, there is no evidence that the inspectors knew that construction had been contrary to FC's and BOR's interpretation of the drawings (FF 210). Further, the Inspection of Construction clause (FF 25c.) provided that inspections were for the sole benefit of the Government; they did not constitute or imply acceptance; the presence or absence of an inspector did not relieve the contractor from any contract requirement; and the inspector was not authorized to change any specification without the contracting officer's written authorization. The contractor, at no charge, was to replace or correct work that failed to conform to contract requirements unless, in the public interest, the Government consented to accept it with a price adjustment. Hardrives has not even alleged

that there was any attempt to convince BOR that one gate turnouts were acceptable.

Based upon all of the foregoing, we have found that appellant is entitled to recover \$3,488,260, plus interest under the CDA measured as of April 17, 1987 (FF 276, 277).

Although appellant used a modified total cost approach in establishing its excess costs in connection with IBCA 2375/2475, it asserts that it has applied that approach only to the costs associated with those appeals and that, except for delay costs, the costs claimed in the following appeals are not duplicative. Appellant's CFO also testified several times that duplication of claimed overhead has been scrupulously avoided. BOR has not directed us to any evidence establishing any duplicative costs and we have arrived at our awards accordingly.

IBCA 2518

[10] FC ordered Hardrives to report storm damage without compensation, alleging that the Site Drainage clause (FF 9) required the contractor to handle all flows from natural drainage channels intercepted by the contract work and that the storm damage would not have occurred if Hardrives had completed at least an irrigation V ditch prior to the storm.

BOR now appears to admit full liability and to dispute quantum only (GB at 53). In any case, appellant has established that natural drainage channels were not at issue; the Site Drainage clause did not apply; defective specifications caused the damage and impeded the construction of a V ditch; and that FC and BOR were responsible for any relevant work delays.

We have found that, excluding delay days and costs and burden accounted for in IBCA 2375/2475, appellant has proved, by persuasive, credible, evidence, that it is entitled to an equitable adjustment under the Changes clause of \$27,578, plus interest under the CDA as of February 8, 1988 (FF 295-96).

IBCA 2524

[11] Appellant incurred extra costs in lowering and extending a large siphon at the FCGC crossing, made necessary due to defective specifications. BOR admits a contract change, but contests quantum. Appellant's proposed quantum is based upon conservative cost estimates made by its knowledgeable on-site project manager in the absence of any cost-effective way of segregating extra costs.

We have found that, excluding delay days and costs and burden accounted for in IBCA 2375/2475, appellant has proved, by persuasive, credible, evidence, that it is entitled to an equitable adjustment under the Changes clause of \$25,063, plus CDA interest as of December 28, 1987 (FF 305).

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IBCA 2511

[12] We have found, as FC and BOR appear to concede, that the soil stabilization specifications were defective (FF 314.U., 315). BOR alleges, however, that FC waived both the contract's penetration requirement and the planned amount of soil stabilization solution; that Hardrives did more work than it had to do; that it has not supported its claimed extra costs adequately; and that they are not reasonable.

We need not reach the issue of FC's ability to waive a contract requirement because BOR issued a post-work proposed no-cost modification waiving only the penetration factor and directing use of the contract's planned quantity of solution (FF 321). This reinforces the testimony of Mr. Locke and of inspector Canez, and the record of contemporaneous inspection reports, that Hardrives was directed to apply the planned quantity, which it had on hand. We resolve all credibility issues in favor of appellant.

Hardrives tracked its costs associated with soil stabilization. We have found those costs to be reasonable and that, after crediting BOR with certain excess water truck rental costs, and with Hardrives' estimate of planned costs, and excluding delay days and costs and burden accounted for in IBCA 2375/2475, appellant has proved, by persuasive, credible, evidence, that it is entitled to an equitable adjustment under the Changes clause of \$21,780, plus CDA interest as of January 6, 1988 (FF 320.U., 323, 324).

IBCA 2510

[13] Appellant claims costs incurred in connection with the encasement of banded mitered pipe bends. It alleges, alternatively, that: the contract did not require encasement of banded mitered pipe bends; the contract was unclear; it was entitled to submit an alternative design for approval and FC approved the banded mitered pipe bends, estopping BOR from enforcing the encasement specifications; or, banding was "factory-made" encasement, equivalent to what Hardrives describes as the "field encasement" directed by FC.

Regarding the contract's requirements, the pertinent specification leads with the presumption that encasement or blocking will be required: "[m]iter bends *shall be encased or blocked with concrete* as shown on the drawings." (Italics added.) There are several additional references in the specification to encasement of mitered bends.

Appellant stresses that the drawings did not show any banded mitered pipe bends with encasement; BOR's standard manual does not show how to encase them; and BOR's spokesman had not seen any encased banded mitered bends on BOR projects. As BOR suggests, however, these "absences" likely simply reflect the fact that, when encasement is required, it is not contemplated that a contractor will go to the expense of using banded mitered pipe bends.

Every relevant drawing, that is, every drawing showing pipe bends for pipe 42 inches in diameter or larger—the only pipe at issue—showed the pipe bends as encased. Note 3 to Drawing V-5 provided: “Encase *all* pipe bends when [diameter is greater than or equal to 42 inches]” (FF 332). (Italics added.) We conclude that the contract plainly required encasement of the pipe bends.

Even if the contract were deemed to be ambiguous, as appellant suggests at one point, Hardrives has not satisfied the standards for recovery enunciated above for either a patent or latent ambiguity. It neither brought the alleged ambiguity to the attention of FC or BOR pre-bid, nor proved that it had relied upon its interpretation at the time of bidding, respectively. Moreover, as noted, the Drawings and the Specifications and Drawings For Construction clauses called for notice if the contractor found drawing discrepancies or had questions of interpretation. Specifically, the Fittings For Reinforced Concrete Pressure Pipe specification (FF 326) provided that any fabrication or procurement performed before approval of details was to be at the contractor’s risk.

Hardrives, though, alleges that BOR is estopped from enforcing the contract because the contractor submitted drawings for banded mitered bends as an alternative to encasement; they did not contain the rebar drawings that would have been necessary for encasement; and FC approved the submitted drawings. We have identified the prerequisites to a finding of estoppel:

(1) the party to be estopped must know the facts; (2) it must intend that its conduct be acted upon, 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. [Citation omitted.]

White & McNeil Excavating, Inc., IBCA No. 2448, 92-1 BCA ¶ 24,534 at 122,440.

At a minimum, Hardrives has not proved elements (1), (2), and (5). Although FC did not reject banded mitered pipe bend drawings and did not inquire about the lack of rebar drawings associated with encasement, this does not mean that FC or BOR was aware that Hardrives did not intend to encase the bends in the field when the time came. There is no evidence of any written approval by the contracting officer, or by FC, of a deviation from specification requirements, or of any written, or even oral, alert by Hardrives that its banded mitered pipe bend drawings were intended as alternate designs or that it did not plan to encase the banded mitered pipe bends. In contrast, there is affirmative evidence that FC had not intended to accept the banded bends as an alternative to encased ones. When Hardrives began placing the bends without encasement, FC promptly directed it to cease (FF 339).

Even if FC were deemed to have approved the drawings, the Fittings cause warned that approval by the Construction Engineer of

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the contractor's details did not relieve the contractor from specification requirements or from responsibility for the correctness of the drawing details. The Specifications and Drawings For Construction clause also stated that approval of shop drawings did not relieve the contractor from errors in them or from complying with contract requirements unless the contractor described any variations from the contract, in a writing separate from the drawings, at the time of submission, and the contracting officer approved of the variation.

Regarding approval of drawings and of variations, the exact process by which contract drawings were submitted and approved, and whether there was any BOR review following approval by FC, is not clear from the record. Per the Administration Of Specifications And Drawings For Construction clause (FF 25b.), if individuals other than the contracting officer were authorized to approve shop drawings, they, nonetheless, did not have authority to approve shop drawings or other technical data showing variations from the contract requirements that involved a change in price or in time of performance. Hardrives did not seek a contract price or time change when it elected to use banded mitered pipe bends. It expected to save money. However, even if FC had had full authority to approve shop drawings and variations, nothing in this clause relieved the contractor from its duty of notice if any contract variation were intended.

Case law is in accord. When there is no evidence that the Government was on notice, in a sufficiently clear way, that the contractor was deviating from contract requirements, the facts that it submitted drawings different from intended in the contract, and that those drawings were approved, do not establish waiver of a contract requirement. *Vogt Brothers Mfg. Co. v. United States*, 160 Ct. Cl. 687, 714 (1963); *A&A Insulation Contractors, Inc.*, VABCA No. 2766, 92-2 BCA ¶ 24,829 at 123,881; *Rivera, supra*, 88-2 BCA at 104,853. Thus, we find no waiver of any contract requirement, or approval of any alternative to encasement.

Hardrives also has alleged that there was no practical reason to require field encasement of banded mitered pipe bends, either because factory-made bands constituted encasement, or because banding served the same function. Although not articulated as such, we deem this to be an economic waste argument. It is well established that, absent economic waste, the Government is entitled to precisely what it specifies, even if that exceeds what is absolutely needed for a satisfactory result. *Ball, Ball, & Brosamer, Inc.*, IBCA No. 2103-N, 93-1 BCA ¶ 25,287 at 125,980 and cases cited. Economic waste findings are the exception to the rule, and the circumstances often are extraordinary. Appellant has not proved any such waste. BOR established at hearing that banding is not the same as encasing, which serves additional important functions (FF 335).

Accordingly, this appeal is denied.

IBCA 2319/2514

[14] Appellant seeks recovery for the cost of placing elastomeric sealant in transverse contraction joints. It vigorously asserts that sealant was not required in those joints, which it formed by tooling. Appellant acknowledges that the pertinent contract drawing depicts sealant in the joints and that this is how its bid estimator first interpreted the contract. It alleges that the estimator later determined, after reading the specifications, that the contract did not require the sealant; or that the contract was ambiguous because the specifications purportedly did not require it and since, in that case, they took precedence over the drawings, no pre-bid inquiry was necessary (FF 356.U.).

In addition to its discrepancy notification requirements, the Specifications and Drawings For Construction clause provided that anything mentioned in the specifications and not shown on the drawings, or vice versa, was deemed included in both. In case of differences, the specifications were to govern. Appellant directs us to *Hensel Phelps Construction Co. v. United States*, 886 F.2d 1296, 1299 (Fed. Cir. 1989), where, in considering the same clause, the court of appeals held that "an order of precedence clause may be relied on to resolve a discrepancy between the specifications and drawings even though the discrepancy is known to the contractor prior to bid or is patent." Here, however, there was no conflict or discrepancy between the drawings and the specifications. Both required sealant in the transverse contraction joints.

As we noted above, in order for a contract to be deemed ambiguous, it must be *reasonably* susceptible of more than one interpretation. *Marden, supra*. The contract is not reasonably susceptible of more than one interpretation regarding the sealant issue. The contraction joint specification, § 5.2.3 (FF 342), began with the direction that the joints be constructed as shown on the drawings. As Hardrives' estimator observed, the pertinent drawing depicted sealant in the joint (FF 344, 352.U.). The bulk of the specification was dedicated to the criteria for, and the mixing and placement of, joint sealant. Appellant rests its argument upon the one portion of the lengthy specification that provided: "Transverse contraction joints shall be terminated at the top of the side slopes and a 3/4-inch-minimum-depth groove shall be tooled across the concrete curb from the end of each transverse joint. No filler or sealant will be required for *these tooled grooves*" (FF 342 (italics added)). The antecedent reference for "these tooled grooves" clearly was to the 3/4-inch grooves to be tooled across the concrete curb. They are the only "tooled grooves" so described in that paragraph. Only those tooled curb grooves did not require sealant. In actual construction, as in the language of the specification, the curb grooves were treated separately from the portion of the contraction joint within the canal proper (FF 348). Appellant's contortions ignore the great remainder of the specification, the applicable contract drawing, and the basic tenets of contract interpretation:

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Contract interpretation begins with the plain language of the agreement. * * * “[P]rovisions of a contract must be so construed as to effectuate its spirit and purpose * * * an interpretation which gives a reasonable meaning to all of its parts will be preferred to one which leaves a portion of it useless, inexplicable, inoperative, void, insignificant, meaningless, superfluous, or achieves a weird and whimsical result.” [Citations omitted.]

Gould, Inc. v. United States, 935 F.2d 1271, 1274 (Fed. Cir. 1991).

Appellant’s arguments that its estimator observed some BOR canals that did not have sealant in transverse contraction joints are irrelevant. He also observed others containing sealant. The specifications in this contract control. Appellant made some effort, albeit not persuasive, to challenge the engineering reasons for requiring the sealant. That attempt similarly fails as irrelevant. Appellant has not directed us to any established engineering rule or industry practice that even arguably might render ambiguous, in the eye of a contractor experienced in the trade, what appear to be unambiguous contract provisions. See *Riley Stoker Corp.*, ASBCA No. 37019, 92-3 BCA ¶ 25,143 at 125,327, and cases cited. As established, BOR was entitled to receive that for which it contracted. There is no evidence that BOR’s direction to seal the contraction joints resulted in economic waste. Appellant was not entitled to second guess the engineering determinations underlying the specifications and to substitute its own judgment. *Harold J. Younger & Associates*, ASBCA No. 37523, 93-1 BCA ¶ 25,224, *aff’d on recon.*, 93-1 BCA ¶ 25,549.

Accordingly, this appeal is denied.

IBCA 2519

[15] FC and BOR have admitted from the outset that Hardrives and MRT, which incurred most of the costs, are due compensation for directed “sump and wells” work. Only quantum has been contested. Appellant has proved \$5,035 in extra costs and burden not accounted for elsewhere, and is entitled to that amount, plus interest under the CDA as of March 3, 1988 (FF 373).

IBCA 2516

[16] Appellant seeks PPA interest on account of delayed progress payments. BOR long has admitted that some interest is due, but it has disputed the number of delayed payments and the triggering date from which interest begins to run. BOR has declined to pay any amount, however, at one point asserting erroneously that it could not do so until appellant filed a CDA claim. There is no such restriction upon the contracting officer to the extent that underlying progress payments are not in dispute. A goal of the PPA was to reduce administrative payment delays. The PPA clause in the contract (FF 376) directed that determinations of interest due would be in accordance with the statute and OMB Circular A-125 (FF 377). The applicable OMB circular directed that “[a]gencies will pay interest without the need for business

concerns requesting them," unless the payment in question were delayed because of a disagreement over its amount or over contract compliance issues. Even after remand by this Board in early 1988 for a contracting officer's decision within 60 days, no decision issued (FF 394). This was prior to the September 1988, letter from a disgruntled employee alleging fraud and BOR's subsequent fraud referral (FF 154), so we ascertain no reason from the record why the contracting officer did not act. We have taken the mistreatment of payment matters into consideration in connection with IBCA 2375/2475, above, and elaborate no further here.

On the other hand, Hardrives' claim for interest was misguided in some respects. Pre-hearing, citing the PPA clause, Hardrives insisted that payment was due no later than the 30th day after the date of delivery of supplies or performance of contract services. Under the PPA clause, however, payments were not due until the *later of* the 35th day after receipt of a proper invoice or the date the supplies or services were accepted by the Government. That *acceptance* was deemed to occur on the 30th day after supplies or services were received. At hearing, again disregarding the contract, Hardrives alleged that the voucher cut-off date was the date from which interest should begin to run.

Despite the 35-day provision in the PPA clause, BOR's own policy was to process payment requests not more than 5 days after receipt (FF 387) and the Administration of Payments clause (FF 375) provided that payments were to be made as close to 30 days as possible after receipt of approved estimates. BOR has stipulated in this appeal to a 30-day payment period (FF 396).

BOR is correct, though, that, under the PPA clause and OMB Circular A-125, the 30-day payment period, after which PPA interest began to accrue, did not begin until a "proper" invoice had been received. Under the PPA clause, in order for an invoice to be "proper," it had to contain substantiating information as required by the contract. FC rejected some of Hardrives' estimates because they did not contain lien waivers for unincorporated on-site materials. Apparently relying upon the Payments clause (FF 374), which provided that the contracting officer "may" authorize materials delivered on site to be taken into consideration, Hardrives disputed the need for such waivers, although it eventually obtained them. Hardrives overlooked the Administration of Payments clause, which stated that material delivered on site could be included in payment estimates "only if" the contractor had furnished satisfactory evidence of title and that the material would be used to perform the contract. Again, acceptance of the materials for payment purposes was optional.

Although BOR agrees that some progress payments were late and that some interest is due, Hardrives has not met its burden to prove interest due in its claimed amount of \$17,216.38. We have found the IGE to be the best-supported calculation, and that Hardrives is entitled

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to \$3,868.13, plus interest under the CDA as of December 3, 1987 (FF 398).

IBCA 2414/2515

[17] Hardrives seeks \$14,893 for royalties it was required to pay for use of Borrow Area C. The contract plainly required that contractors include the borrow surcharge in their bids: "the Contractor will be charged \$0.15 for each cubic yard of material removed from Borrow Area C;" "Payment * * * for 'Excavation from Borrow' will be made at the unit price per cubic yard bid * * *. This price shall include the costs of excavating, hauling, placing embankment, moisture application, plus the \$0.15 per cubic yard cost of purchasing only borrow material from Borrow Area C * * *" (FF 14). It is evident that both Hardrives and MRT relied upon this clear contract language in bidding, as both included the royalty charge in their bid prices for borrow (FF 401).

There is no basis for this claim and the appeal is denied.

Decisions

Appeals IBCA 2375/2475 are sustained in the amount of \$3,488,260, plus CDA interest as of April 17, 1987; appeal IBCA 2518 is sustained in the amount of \$27,578 plus CDA interest as of February 8, 1988; appeal IBCA 2524 is sustained in the amount of \$25,063, plus CDA interest as of December 28, 1987; appeal IBCA 2511 is sustained in the amount of \$21,780, plus CDA interest as of January 6, 1988; appeal IBCA 2519 is sustained in the amount of \$5,035.37, plus CDA interest as of March 3, 1988; appeal IBCA 2516 is sustained in the amount of \$3,868.13, plus CDA interest as of December 3, 1987. Appeals IBCA 2510, 2319/2514, and 2414/2515 are denied.

CHERYL S. ROME
Administrative Judge

I CONCUR:

G. HERBERT PACKWOOD
Acting Chief Administrative Judge

**APPEAL OF BUSBY SCHOOL BOARD OF THE NORTHERN
CHEYENNE TRIBE**

IBCA-3007

Decided: August 25, 1993

**Contract Nos. C-50-C-1420-5510 and C-50-C-1420-5682, Bureau
of Indian Affairs.**

Summary Judgment for Appellant.

August 25, 1993

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IBCA-3007

Decided: August 25, 1993

**Contract Nos. C-50-C-1420-5510 and C-50-C-1420-5682, Bureau
of Indian Affairs.**

Summary Judgment for Appellant.

**1. Contracts: Contract Disputes Act of 1978: Jurisdiction—
Contracts: Disputes and Remedies: Jurisdiction—Contracts:
Indian Self-Determination and Education Assistance Act:
Governing Law—Indians: Contracts: Generally—Rules of
Practice: Appeals: Jurisdiction**

In an appeal alleging an agreement with the contracting officer settling a dispute under contracts issued pursuant to the Indian Self-Determination and Education Assistance Act, which provides that the CDA shall apply, the contracting officer's proclaimed final decision denying Busby's properly certified claim imbued the Board with jurisdiction under the CDA to determine whether the claim had been settled.

**2. Rules of Practice: Appeals: Burden of Proof—Rules of
Practice: Appeals: Motions**

When the parties sought summary judgment on the same issue; stated in a report to the Board that no significant facts were disputed; had an opportunity for discovery and to submit affidavits and documentary evidence; available BIA records had been produced; and the issue involved an unambiguous integrated written agreement, such that credibility assessments would be immaterial; the Board concluded that little would be gained by a hearing. Because the material facts upon which it relied were uncontroverted, summary judgment was appropriate.

**3. Contracts: Formation and Validity: Generally—Rules of
Practice: Appeals: Burden of Proof**

To prove an express contract with BIA, appellant had to establish mutual intent to be bound; the authority of BIA's representative; and consideration. Because compromise of a disputed claim was involved, accord and satisfaction principles were relevant: proper subject matter, competent parties, meeting of the minds, and consideration reflected by a bona fide dispute.

4. Contracts: Formation and Validity: Authority to Make

There was no genuine dispute that the settlement's subject matter was proper and that the officials executing the agreement were authorized.

5. Contracts: Formation and Validity: Formalities

BIA conceded that no format was required for the settlement agreement. Provisions of the FAR calling for the execution of a particular form for an agreement modifying a contract were irrelevant because the FAR does not apply to Self-Determination Act contracts such as those in question and contract modifications were not at issue in any case.

6. Contracts: Formation and Validity: Consideration

When appellant established that it believed that it had a legitimate claim for an amount in excess of the settlement amount, the settlement was supported by consideration.

**7. Contracts: Construction and Operation: Intent of Parties—
Contracts: Formation and Validity: Generally—Evidence: Parol**

Despite the parol evidence rule, and prior to contract interpretation, extrinsic evidence was admissible to establish that the settlement agreement was, or was not, completely integrated. The Board found appellant's several affidavits and declaration, which BIA did not controvert successfully, persuasive that the agreement was complete and final.

**8. Contracts: Construction and Operation: Intent of Parties—
Contracts: Formation and Validity: Generally**

In finding the parties' settlement agreement clear and unambiguous, the Board derived the parties' intent from its plain language, harmonizing and giving a reasonable meaning to all of its parts, without out of context analysis or regard to the contracting officer's

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alleged intent, which BIA did not establish to be anything other than subjective and unexpressed.

**9. Contracts: Construction and Operation: Intent of Parties—
Contracts: Formation and Validity: Generally**

Neither party could cast aside a valid settlement agreement without the most compelling of reasons, including proof of invalidity, either by fraud or mutual mistake. A unilateral mistake was not sufficient. The decision by an authorized contracting officer to settle a claim, with knowledge of the facts, was dispositive. The law assumes that the contracting officer's action in signing the agreement was proper.

APPEARANCES: Carol L. Barbero, Michael L. Roy, Christopher T. Stearns, Hobbs, Straus, Dean & Wilder, Washington, D.C., for Appellant; Gerald R. Moore, Department Counsel, U.S. Department of the Interior, Office of the Solicitor, Billings, Montana, for the Government.

OPINION BY ADMINISTRATIVE JUDGE ROME

INTERIOR BOARD OF CONTRACT APPEALS

This appeal concerns a dispute originating under contracts issued pursuant to the Indian Self-Determination and Education Assistance Act, P.L. No. 93-638, 88 Stat. 2203 (1975) (*codified as amended at 25 U.S.C. §§ 450-450n* (1993) (Self-Determination Act). The Self-Determination Act provides that the Contract Disputes Act (CDA) applies to self-determination contracts. 25 U.S.C. § 450m-1(d). As we elaborate upon below, we have jurisdiction under the CDA to entertain this appeal.

Appellant Busby School Board of the Northern Cheyenne Tribe (Busby) and the Bureau of Indian Affairs (BIA) have cross-moved for summary judgment, pre-hearing, on the question of whether BIA's contracting officer entered into a binding settlement agreement that Busby was entitled to be paid for part of its contract claim and rendering wrong his later decision denying entitlement. In the alternative, appellant has moved for summary judgment that, before reneging, the contracting officer issued what should be deemed a final decision in Busby's favor, not subject to rescission. Because we grant summary judgment for appellant on the first ground, we do not reach the second.

FACTS

I. Background

Effective October 1, 1982, Busby entered into contract No. C50-C-1420-5510 (contract 5510) with BIA to operate the Busby School. The contract, as amended, covered fiscal years (FY) 1983-85. Contracting officer Henry Graham signed it on behalf of the United States (Appeal File (AF) 12). Effective November 1, 1985, Busby and BIA entered into a similar contract, No. C50-C-1420-5682 (contract 5682) also signed

by Mr. Graham, and, as amended, covering FY 1986 and 1987 (AF 13). Both contracts provided for BIA's payment of negotiated indirect costs, also termed "contract support funds" (CSF) (AF 12, e.g., at 3/28/84 and 3/29/85 mods. and Gen. Prov. 24 "Negotiated Overhead Rates"; AF 13 at mods. 5, 7, 9 and Gen. Prov. 24). Appellant alleges that BIA underpaid CSF for FY 1985-87 by \$258,203 and that contracting officer Graham agreed to settle Busby's \$258,203 claim for \$114,719, plus CDA interest.

Procedures under Self-Determination Act contracts for negotiating and fixing CSF; the role of the Department of the Interior's Office of Inspector General (IG); and the fact that BIA's method for allowing indirect costs changed beginning with FY 1985, were described in *Alamo Navajo School Board, Inc.*, IBCA Nos. 2123, et al., 88-2 BCA ¶ 20,563. BIA's statements of procedures in effect for FY 1985-87 are contained in memoranda of record (AF 7, 8); in its responses to appellant's interrogatories (interrog. resp.) 2, 3, 16, 17; and in its response to appellant's document production request 6.

In brief, BIA states: it did not use IG-negotiated rates for payment of indirect costs in FY 1985-87; pursuant to direction from Congress, it changed the way it funded indirect costs for those years and lumped direct and indirect funds together in one payment to Tribal contractors; but, for education contracts, such as those at issue, Federal law still required program and support funds to be identified separately. For FY 1985-87, BIA states that it limited CSF payments to a percentage of the FY 1984 IG-audited rate, but that contractors could use program funds to cover CSF (interrog. resp. 16). The following sequence of IG review and BIA's payment of CSF to Busby for FY 1985-87 is undisputed.

II. IG-Approved CSF For FY 1985-86 And BIA's Payments

By letter of January 7, 1985, to Busby's chairman, the IG recorded its review of the school's revised lump sum indirect cost proposal for FY 1985 and presented adjustments to a direct cost base and to indirect costs. The letter concluded that the chairman could use the letter "in the negotiation of lump sum agreements for the reimbursement of indirect costs from the applicable program sources." The chairman signed his concurrence, noting Busby's view that, regarding certain lump sum indirect cost awards, it was free to negotiate with the contracting officer for the full amount allocated by the IG to a particular program, regardless of over or underrecoveries of indirect costs from prior years. The chairman mentioned Department of Education grants. It is not clear whether he also was referring to BIA contracts (AF 8).

Of an accepted \$189,537 in indirect costs for FY 1985 (based upon a proposal of \$226,769), the IG allocated \$72,782 to the school's "General Operations ISEP [Indian School Equalization Program] (BIA)" (AF 8, Exhs. A & B). Appellant alleges that modification 21 to

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contract 5510 adopted the IG's CSF allocation of \$72,782 and added \$61,865 of that amount to the contract, and that modification 23 added \$7,276, for a total of \$69,141. BIA has not disputed this and admits that it paid \$61,685 and \$7,276 in CSF (complaint and answer (c&a) ¶ 6; interrog. resp. 2 a.). The difference between the IG's \$72,782 CSF amount and the \$69,141 paid was \$3,641.¹

For FY 1986 and contract 5682, the IG reported its indirect cost findings in its May 16, 1986, letter to Busby's chairman (AF 8). Busby alleges, and BIA does not dispute, that the IG arrived at an indirect cost amount of \$136,188 (interrog. resp. 2 b.).² Of the \$136,188, effective June 18, 1986, BIA added \$45,750 in CSF under modification 3 to contract 5682; and added \$5,533, \$5,822, and \$1,609 under modifications 5, 7, and 9, respectively, effective October 6, for a total of \$58,714 (AF 13). BIA admits that it paid the \$58,714 (interrog. resp. 2 b.; Response to Requests for Admission (admiss.) 2 a.). The difference between the IG's \$136,188 CSF amount and the \$58,714 paid was \$77,474.

III. Modification 18 For FY 1987

BIA issued modification 18 to contract 5682, effective July 8, 1987, which, under "DESCRIPTION OF AMENDMENT/MODIFICATION," provided:

1. Increase Contract amount by \$2,100 for FY-87.
2. Attached revised budget is hereby incorporated into this contract. This adds [sic] Contract Support Funds for the Special Education Program per fund distribution document #0811 dated June 1, 1987.

(AF 13). A "CONTRACT SUPPORT BUDGET FY 1987" in the total amount of \$247,688 was attached to the modification. BIA admits that it approved the modification (admiss. 1). Busby alleges that modification 18 entitled it to \$247,688 in CSF for FY 1987. The contracting officer who signed modification 18 is deceased. Although contracting officer Graham, who signed and administered contract 5682, submitted an affidavit in support of BIA's cross-motion, he did not address the modification.

For guidance in assessing consideration for the alleged settlement, the Board issued a Call pursuant to Rule 4.114 (43 CFR § 4.114) and, among other things, requested a copy of fund distribution document #0811, but BIA was unable to find one. BIA's counsel speculated that the second sentence of paragraph 2 in the modification's description should have been placed at the end of paragraph 1, and that the

¹We do not find modifications 21 and 23 in the record. A Mar. 29, 1985, modification of record (AF 12) indicates that: (1) it applied to contract 5510 and to other of Busby's BIA contracts; (2) modification 21 had provided Busby with \$11,438 in CSF; and that (3) the \$72,782 IG-allocated amount and BIA provision for \$61,865 applied to a contract not at issue. It may be that the briefs and record merely contain insufficient information to clarify the situation. These and other confusing parts of the record do not represent disputed facts and are not material.

²We assume that this was \$129,168 in ISEP funding and \$7,020 in Special Education funding, which the IG apparently mistakenly described as a Department of Education program (AF 8 at 5/16/86 letter, Exh. 1).

modification added only \$2,100 in CSF. In so doing, he arbitrarily eliminated the separate paragraph numbering from his quotation to the Board of the description. His speculation is backed by plausible argument, however.

BIA urges that modification 18 was not intended to entitle Busby to \$247,688 in CSF, by analogizing to a fund distribution document 0812, also dated June 1, 1987, which granted \$2,000 in CSF to a different school under a different contract (and, in fact, as set forth below, BIA paid only \$2,100 in CSF for FY 1987 under modification 18). BIA also notes that the contract support budget attached to modification 18 does not refer to the Special Education program; the IG's FY 1987 lump sum allocation of indirect costs for all contract programs, including Special Education, was \$134,699; Busby's original budget submitted for CSF for Special Education was less than 10 percent of the total budget for all programs; total "estimated cost" of the contract, including direct and indirect costs for all contract programs, originally was \$372,078; it was increased by modification 11 to \$503,439; and modification 18, as interpreted by Busby, would have added, for Special Education, about one half of the total contract amount for CSF. BIA states that modifications 13, 14 and 16 decreased the contract amount from \$503,439 and that the revised budget incorporated by modification 18 might be explained by this reduction (BIA Call resp. at 2-4, 7-8; AF 8 at 11/30/87 letter, Exh. 1; AF 13 at § I ¶ 2 and mods.).

Appellant counters with arguments that are not frivolous. It agrees that modification 18 could not, in practicality, be directed at Special Education CSF, a relatively small part of Busby's programs. It urges that the modification covered the panoply of indirect costs identified in the attached Contract Support budget—costs funded through CSF. Busby disagrees with BIA's suggestion that modification 18's budget might be a reduction of modification 11's budget due to a reduced total contract cost. Busby notes that the two budgets covered different costs and alleges that the net effect of modifications 12-17 was to increase modification 11's \$503,439 contract amount to \$801,400 (Busby 3/19/93 Call resp. at 6-7; Busby 4/8/93 resp. to BIA 3/19/93 Call resp. at 4-5).

IV. IG-Approved CSF For FY 1987 And BIA's Payments

For FY 1987, the IG reported its indirect cost findings in its November 30, 1987, letter to Busby's chairman (AF 8), stating that Busby had proposed lump sum indirect costs of \$193,016. Appellant alleges, and BIA does not contest (interrog. resp. 2 c), that the IG arrived at an indirect cost amount of \$104,204.³ Of the \$104,204, BIA added \$65,600 in CSF under modification 14 to contract 5682, effective February 2, 1987, and \$2,900 by modification 15, effective March 17, 1987. Both modifications were prior to the disputed modification 18.

³ We ascertain this to be the total of various amounts for general operations, transportation, Special Education and costs under the Education of the Handicapped Act (AF 8 at 11/30/87 letter, Exh. 1).

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Regardless of its contentions about modification 18, appellant agrees that BIA paid only \$2,100 in CSF under it. BIA does not contest that the total CSF amount paid for FY 1987 was \$70,600 (admiss. 2 b.) The difference between the IG's \$104,204 CSF amount and the \$70,600 paid was \$33,604, and between modification 18's alleged CSF \$247,688 amount and the \$70,600, was \$177,088.

V. Busby's Claim

Appellant supplied Mr. Clifford Long Sioux's affidavit. Although not a Busby member when modification 18 issued in 1987, he was a member as of July 21, 1988, and Busby's chairman from January 17, 1989, to June 6, 1991. He stated that he and other members believed, after extensive review, including by Busby's accountant and its counsel, that Busby had not received all of the funding to which it was entitled under its BIA contracts. Regarding modification 18, they determined that Busby had a valid claim that it had allotted \$247,688 in CSF for FY 1987.

On May 17, 1991, contracting officer Graham received Busby's \$258,203 claim for CSF due for FY 1985-87, properly certified by Mr. Long Sioux. The letter opened with an unqualified request for a contracting officer's decision—an unqualified request repeated in the body of the letter (AF 1). The \$3,641 shortfall claimed for FY 1985 was the difference between what was stated to be the \$72,782 CSF amount approved—based upon “approval documents” cited as the IG Letter of January 7, 1985, and modification 21—and the \$69,141 received. (Mr. Long Sioux states in his affidavit that, for FY 1985, the IG-approved amount was approved by BIA through modification 21.) The \$77,474 shortfall claimed for FY 1986 was the difference between what was stated to be the \$136,188 CSF amount approved—based upon an “approval document” cited as the IG's May 16, 1986 letter—and the \$58,714 received. (Mr. Long Sioux states that, for FY 1986, there was no approving modification.) The \$177,088 shortfall claimed for FY 1987 was the difference between what was stated to be the \$247,688 CSF amount approved—based upon an “approval document” cited as modification 18—and the \$70,600 received.

The letter concluded that, if Busby's claim were denied in whole or in part, it requested a written decision from the contracting officer stating the reasons for the denial and providing CDA appeal rights (AF 1).

On August 29, 1991, Mr. Graham wrote to Busby that “[w]e are currently researching the files and will issue a decision by October 1, 1991” (AF 2). On September 30, 1991, Mr. Graham wrote to Busby that BIA's records agreed with the claimed \$3,641 CSF shortfall for FY 1985 and agreed that there was a \$77,474 shortfall for FY 1986 under the ISEP and Special Education programs but, if overall BIA-funded

programs and a lump sum agreement were considered, the FY 1986 shortfall was \$55,302 for all of the programs. For FY 1987, Mr. Graham stated:

3. The total amount of indirect costs allocated to [BIA] funded programs for FY 1987 was \$134,699, not \$247,688 as you stated. The amount allocated for the General Operations contract was \$104,204. A total of \$70,600 was provided by [BIA]. This left a shortfall of \$33,604.

(AF 3). He concluded: "I believe a shortfall of between \$92,547 and \$114,719 exists and your claim should be amended accordingly before a decision is made by this office" (AF 3).

VI. *The October 29, 1991 Meeting*

At Busby's request, on October 29, 1991, Mr. Graham met with then Busby chairman Jack Badhorse; Busby member Raymond Little Bear; school superintendent Ted Rowland; the school's business manager, Kitty Gillespie; and the school's accountant, Jon Donham (first and second Badhorse affids.; Rowland affid.; Donham decl.; Graham affid.). Messrs. Badhorse, Rowland, and Donham each proclaim, in their affidavits and declaration, respectively, that: (1) the meeting was to settle Busby's claim; (2) Mr. Graham stated that Busby was not entitled to the full amount claimed, but was entitled to \$114,719, which included the amounts claimed for FY 1985 and 1986 and the \$33,064 difference between the IG-approved CSF for FY 1987 and the amount BIA paid; (3) Mr. Graham stated that, if Busby did not accept the \$114,719, he would deny its claim; and (4) an agreement was reached to settle Busby's claim for \$114,719. Mr. Badhorse reported that, although Busby believed its full claim was valid, it agreed to the lower amount because Mr. Graham had stated that he would deny the higher claim; a decision might not issue for a long time; Busby needed more funds as soon as possible; to pursue the claim would require costly legal and other expenses; and the outcome on appeal could not be predicted.

Mr. Graham and appellant agree that, after the \$114,719 amount was reached, Mr. Donham and Mr. Graham telephoned Mr. Jim Thomas, a "Self Determination Analyst" in BIA's Central Office in Washington, D.C. Mr. Donham states that: Mr. Graham explained to Mr. Thomas that he had determined that Busby was entitled to \$114,719 but that BIA's Billings Area Office did not have sufficient funds to pay Busby; and Mr. Thomas explained that he could not act until Mr. Graham had responded to Busby's claim and forwarded his decision to Washington. Mr. Rowland states that Mr. Donham and Mr. Graham reported the foregoing to the others.

Mr. Graham states that: he explained "the claim we had received" to Mr. Thomas and that there were no funds in BIA's Billings office to pay a CSF claim for FY 1985-87; asked whether there were funds in the Washington office; and Mr. Thomas told him "to send the entire claim" there for his review. Mr. Graham alleges that he and Busby

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agreed only that the "proper amount of the claim" was \$114,000; it should be amended; and it would be sent to Washington to "see if it could be paid" (Graham affid. at ¶ 6, 7). BIA has not supplied any affidavit from Mr. Thomas.

VII. The Written Memorialization Of Settlement

By letter dated October 31, 1991, chairman Badhorse, who had full authority to act for Busby, set forth its understanding of the agreement reached on October 29 (AF 4; first Badhorse affid. at ¶ 5, 6). Because it is key to this appeal, we quote the letter virtually in full:

Re: Resolution Of Claim Under Contract Disputes Act

Dear Mr. Graham:

This is in further reference to the contract dispute initiated by [Busby's] letter of May 14, 1991 requesting a Contracting Officer's Decision under the [CDA] regarding our claim for contract support funds for [FY] 1985, 1986 and 1987. In your response dated September 30, 1991, you acknowledged that [Busby] is due at least \$92,547, and perhaps \$114,719, and recommended that we amend our claim accordingly.

On October 29, 1991 representatives of [Busby] met with you to negotiate this matter. At that negotiation, you and [Busby] agreed to resolve the claims for the three fiscal years for \$114,719. A comparison of the amount claimed and the settlement amount agreed to for each fiscal year follows:

Fiscal Year	Claimed Amount	Amount Agreed to at Negotiation
FY 1985	\$ 3,641	\$ 3,641
FY 1986	77,474	77,474
FY 1987	177,088	33,604
TOTALS	\$258,203	\$114,719

As you know, the [CDA] requires payment of interest on the amount paid calculated from the date on which the request for a contracting officer's decision was filed through date of payment. 41 U.S.C. § 611. Please assure that interest is paid on [Busby's] award in this case.

We enclose two copies of this letter, both bearing an original signature on behalf of [Busby]. To evidence your concurrence with this resolution of our claims we ask that you sign both copies. Please use one copy to process the award for payment and return the other copy to us.

* * * * *

AGREED:

HENRY GRAHAM
Contracting Officer

* * * * *

DATE: _____

(AF 4). The letter did not include any CDA claim certification.

Mr. Graham responded by letter of November 5, 1991, to Mr. Badhorse:

Reference is made to your letter dated October 31, 1991, regarding a claim for Contract Support Funds during Fiscal Years 1985, 1986, and 1987. Your claim has been revised per our discussions on October 29, 1991. By this letter and a signed copy of your letter (enclosed) acknowledging the claim, I concur with the amount claimed. However, no funds are available in the Billings Area Office to pay the claim. Therefore, it will be forwarded to the Self-Determination Services Division, Central Office for processing.

(AF 5). Mr. Graham signed the October 31, 1991, memorialization of agreement and dated it November 5, 1991, in the spaces provided under the caption "Agreed," without adding any qualification or modification by his signature or elsewhere on the agreement, and without any oral qualification or expression of disagreement to Busby (AF 4; first Badhorse affid. at ¶ 8).

VIII. Contracting Officer's February 18, 1992, Repudiation of Agreement

Over 3 months later, by letter dated February 18, 1992, stated to be his "final decision" and containing appeal information, Mr. Graham wrote to Mr. Badhorse that: a \$258,203 claim for CSF shortfall had been submitted; BIA had "reduced" the "claim" to between \$92,547 and \$114,719 due to "incorrect calculations" by Busby; at the October 29, 1991, meeting, the parties had agreed to "the amount of the claim or shortfall;" an "amended claim" for \$114,719 had been received; and all documents pertaining to the claim had been forwarded to Mr. Thomas for review and "possible resolution." Mr. Graham then reported: "My decision is to deny your claim as amended."

Mr. Graham cited various factors, including BIA's different treatment of CSF for FY 1985-87 for Tribal contractors; that indirect costs agreements (presumably with the IG) did not fix CSF to be awarded; and that, although BIA's method of fixing CSF "undoubtedly contributed to shortfalls in CSF funding," his office had no control because direct and indirect funds could not be separated and it could not be determined if there were an actual shortfall for a particular contract. He also considered Busby's claim untimely, stating that almost four fiscal years had passed since Busby "experienced a shortfall in CSF;" he "suspected" Busby used program funds to cover CSF shortfalls; and he questioned whether award of CSF funds would constitute a "windfall," rather than a replacement of program funds used to cover indirect costs. He concluded that it "probably cannot be determined" whether Busby actually suffered from the CSF shortfall and that "[t]he fact that there may have been a shortfall in CSF does not constitute a claim against the Government" (AF 6). Mr. Graham did not state that there were no funds available to pay the claim.

In response to appellant's interrogatory requesting clarification of the windfall suggestion, BIA stated that, at the end of each FY 1985, 1986, and 1987, there were unexpended program funds for direct costs;

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Busby carried them over to the next year; they were available to pay unfunded direct costs; and a windfall would occur if Busby received funds for indirect costs that already had been paid (interrog. resp. 14). The interrogatory had been directed to Mr. Graham, but BIA's interrogatory responses were signed only by BIA counsel. Mr. Graham did not mention any windfall in his affidavit and BIA did not supply any documentary or testimonial support for the allegation of potential windfall.

IX. Contracting Officer Graham's Full Authority

BIA concedes that Mr. Graham had full authority to enter into the type of binding settlement agreement Busby asserts; that there was no dollar limit or procedural or substantive limitation upon his authority; that there was no form or format prescribed by statute, regulation, or other pronouncement of policy (whether or not made available to the public) for a binding settlement agreement; and that Mr. Thomas held a staff position, was not a line officer, and had no superseding authority over the contracting officer regarding appellant's claim (Call and 3/19/93 BIA Call resp.; see also interrog. resps. 15, 24-26).

X. The Appeal

On March 26, 1992, Busby filed a notice of appeal with this Board from the contracting officer's February 18, 1992, proclaimed final decision. In the appeal notice appellant alleged that, after meeting with the contracting officer to resolve its claim, Busby filed "an amended claim" on October 31, 1991, on the contracting officer's advice and that, on November 5, 1991, the contracting officer wrote to Busby acknowledging the amended claim and awarding "the amount claimed" (AF 9 at 2). The complaint similarly alleges that, on October 31, 1991, Busby filed "an amended claim" for CSF "pursuant to its October 29, 1991 agreement with the contracting officer" and that, on November 5, 1991, the contracting officer issued his decision to award Busby \$114,719 in CSF for FY 1985-87 (AF 10 at ¶ 12, 13).

In its motion for summary judgment, appellant no longer alleges that it submitted an "amended claim" on October 31, 1991, and asserts that an agreement was reached on October 29, 1991, not subject to further negotiation or to a later contracting officer's decision; that Mr. Graham did not inform Busby at the time of the meeting that he intended anything other than a final enforceable settlement; and that the October 31 letter, upon which Mr. Graham executed his concurrence, memorialized the settlement agreement. It is now in the alternative that appellant alleges that Mr. Graham's November 5, 1991, letter constituted a decision awarding Busby \$114,719, which was final and nonrescindable, because the time to appeal from it expired.

DISCUSSION

[1] We first consider our jurisdiction to entertain this appeal. Appellant principally has asked us to find a binding settlement agreement. The CDA applies to certain types of procurement or property disposal contracts, 41 U.S.C. § 602(a), and, by virtue of the Self-Determination Act, to self-determination contracts, as cited above. The alleged settlement agreement, *per se*, does not satisfy those categories.

However, without reaching appellant's alternative contention that the contracting officer issued a final decision awarding Busby its reduced claim amount, it is clear, at a minimum, that Mr. Graham's February 18, 1992, proclaimed final decision denying Busby's properly certified claim under contracts 5510 and 5682, and Busby's appeal therefrom, imbued us with jurisdiction under the CDA. *See Paragon Energy Corp. v. United States*, 645 F.2d 966, 967 (Ct. Cl. 1981) (a contracting officer's decision is the linchpin for subsequent proceedings under the CDA).

As part of our analysis of the legitimacy of the contracting officer's decision, we may determine whether the claim at issue was settled previously. *See Texas Instruments, Inc. v. United States*, 922 F.2d 810 (Fed. Cir. 1990), where the court of appeals found a final binding agreement on a price for supplies, when an administrative contracting officer had signed her approval, on an internal memorandum, of her representative's oral agreement with the contractor, which had been confirmed in writing by the contractor. In so doing, the Federal Circuit reversed an underlying board decision, *Texas Instruments, Inc.*, ASBCA No. 27113, 90-1 BCA ¶ 22,537, and particularly the board's earlier decision on cross-motions for partial summary judgment, *Texas Instruments, Inc.*, ASBCA No. 27113, 87-1 BCA ¶ 19,394, *recon. denied*, 87-2 BCA ¶ 19,767, which had held that there had been no such binding agreement. A contracting officer's decision denying the agreement had triggered the board's jurisdiction and subsequent CDA review. *See also Kurz and Root Co.*, ASBCA No. 17146, 74-1 BCA ¶ 10,543 (successor contracting officer's final decision denying a claim provided jurisdictional context for board's review of, and sustaining, an oral settlement agreement between prior contracting officer and contractor resolving the claim, which had been confirmed by the prior contracting officer in an internal memorandum).

[2] The parties have cross-moved for summary judgment. We have noted previously:

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 * * *. 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. [Citations omitted.]

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Blaze Construction Co., IBCA No. 2863, 91-3 BCA ¶ 24,071 at 120,507. The fact that cross-motions have been made does not, in itself, mean that summary judgment is appropriate:

[S]ummary judgment in favor of either party is not proper if disputes remain as to material facts. * * *. Rather, the court must evaluate each party's motion on its own merits, taking care in each instance to draw all reasonable inferences against the party whose motion is under consideration.

Mingus Constructors, Inc. v. United States, 812 F.2d 1387, 1391 (Fed. Cir. 1987). When the parties seek summary judgment on the same issue, however, it strongly suggests that the material facts are undisputed. *Id.*

In their joint report to the Board of September 2, 1992, the parties agreed that resolution of the common issue advanced—whether the contracting officer entered into a binding settlement agreement—did not involve significant factual disputes. Also, while only appellant engaged in discovery, both parties had an opportunity to do so, and to submit affidavits and documentary evidence. BIA states that it has provided its available records. As we elucidate below, our conclusions are based upon what we have found to be an unambiguous, integrated written agreement, with respect to which credibility assessments would be immaterial. Thus, little would be gained by a hearing.

Because the material facts upon which we have relied are uncontroverted, we have found summary judgment appropriate.

[3] Appellant has alleged a compromise and written settlement agreement with BIA's contracting officer memorializing the parties' oral agreement. To prove an express contract with the Government, appellant must establish mutual intent to be bound, expressed by definite offer and unconditional acceptance; that the Government's representative had the requisite contracting authority; and consideration. *Fincke v. United States*, 675 F.2d 289, 295 (Ct. Cl. 1982); *Russell Corp. v. United States*, 537 F.2d 474, 481 (Ct. Cl. 1976), *cert. denied*, 429 U.S. 1073 (1977); *Penn-Ohio Steel Corp. v. United States*, 354 F.2d 254, 267 (Ct. Cl. 1965). Because we have found that there clearly was a written agreement, we do not reach the question of whether there was a prior oral agreement.

Since this appeal involves the compromise of a disputed claim, principles of accord and satisfaction are relevant:

In our digests * * * and treatises we find "compromise and settlement" and "accord and satisfaction" listed as two separate and apparently independent titles. In fact they are not separate and independent. * * * [A]n accord is an agreement for the settlement of some previously existing claim by a substituted performance. It will be found that this definition of accord also includes all compromises * * *. But the previous claim may be one that is in doubt or in dispute, or one that is certain, liquidated, and undisputed. It is only the former claims that are the subject of compromise. * * * From this it appears that a compromise is always an accord, but that an accord is not necessarily a compromise.

6 *Corbin on Contracts* § 1278 at 124 (1962). An accord is reached in the same manner as other contracts. Satisfaction is the performance of the accord, the giving and the taking of the agreed item or service. *Chesapeake & Potomac Telephone Co. of Virginia v. United States*, 654 F.2d 711, 716 (Ct. Cl. 1981).

The elements of accord and satisfaction are proper subject matter, competent parties, meeting of the minds, and consideration, typically involving satisfaction of a claim or demand in bona fide dispute. *Nevada Half Moon Mining Co. v. Combined Metals Reduction Co.*, 176 F.2d 73, 76 (10th Cir. 1949), cert. denied 338 U.S. 943 (1950); accord *Brock & Blevins Co. v. United States*, 343 F.2d 951, 955 (Ct. Cl. 1965). See also *Aviation Contractor Employees, Inc. v. United States*, 945 F.2d 1568, 1574 (Fed. Cir. 1991); *Penn-Ohio Steel Corp.*, 354 F.2d at 268.

[4] There is no genuine dispute that the settlement's subject matter was proper and that the officials executing the agreement on behalf of the parties were authorized. BIA has conceded that Mr. Graham had full authority.

Nevertheless, in support of its cross-motion, BIA alleged: "After having been informed by Mr. Thomas of the BIA Washington Office that there were no funds available from which the Tribe's claim could be paid, Mr. Graham issued his final decision denying the claim on February 18, 1992" (BIA's 11/10/92 Reply Br. at 4). BIA did not submit any affidavit from Mr. Thomas, or from any other knowledgeable official, or any other evidence, in support of its allegation. Contemporaneously, contracting officer Graham merely stated that there were no funds in the Billings office, he did not claim that no funds were available at all, and his affidavit in support of BIA's cross-motion does not so contend. As the court of appeals has stressed: "[T]he party opposing the motion [for summary judgment] must point to an evidentiary conflict created on the record at least by a counter statement of fact or facts set forth in detail in an affidavit by a knowledgeable affiant. Mere denials or conclusory statements are insufficient." *Barnag Barmer Maschinenfabrik AG v. Murata Machinery, Ltd.*, 731 F.2d 831, 836 (Fed. Cir. 1984).

In fact, Mr. Graham's decision purporting to deny Busby's claim did not allege lack of funds and, in its response to our Call inquiry as to whether Mr. Thomas had any superseding authority over contracting officer Graham, BIA confirmed that he did not.⁴

[5] Although BIA alleges that the settlement agreement was deficient because it did not contain a release, at the same time it has conceded that no format was required for the agreement. The Federal Acquisition Regulation (FAR), and predecessor regulations, requiring the execution of a particular form for an agreement modifying a

⁴BIA added:

"If the Board's question is whether the contracting officer could have entered into a contract in 1991 for which no funds were available and whether such a contract would be binding on the United States, the answer would be a legal opinion. Although Department Counsel knows of no cases on point, the issue could be researched and argued if the Board desires." (BIA 3/19/93 Call resp. at 11, 12). BIA has had ample opportunity to brief any alleged defenses to appellant's motion and all arguments in support of its own. We decline its invitation and do not reach any hypothetical funding question.

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contract to be finalized and funds to be obligated, as in *SCM Corp. v. United States*, 595 F.2d 595 (Ct. Cl. 1979) and *Mil-Spec Contractors, Inc. v. United States*, 835 F.2d 865 (Fed. Cir. 1987) (oral settlement agreements alleged unsuccessfully by the contractor and by the Government, respectively), are irrelevant. The FAR does not apply to Self-Determination Act contracts (except construction contracts). 25 U.S.C. § 450j.(a).

In any case, we are not considering an agreement to modify a contract. Appellant alleges that the claimed funds were due under the contract, including modifications already in place. See *Texas Instruments, supra* (contracting officer's signature of approval, on internal Government memorandum, was sufficient to create binding pricing agreement even though her assent had not been communicated to contractor; acquisition regulations requiring execution of standard modification form were inapplicable because a modification was not involved; even internal, albeit unpublished, Governmental monetary limits upon contracting officer's authority did not render agreement invalid.)

This leaves for examination the questions of consideration and mutual assent to contract.

[6] BIA alleged initially that the absence of a release in the October 31, 1991, agreement rendered it invalid due to lack of consideration. The agreement, however, referred to "settlement" amounts and stated that it was "in resolution of our claims." That resolution was as binding upon Busby as it was upon BIA.

Other statements by both parties, however, led us to question whether a bona fide dispute had been resolved or whether Busby had agreed with BIA that its claim had been calculated incorrectly. In its Statement of Uncontested Facts, appellant had declared that the claim sought "the difference between the indirect cost budget approved by the IG for [FY] 1985 to 1987 and the amount of contract support costs funded by BIA for those years" (Busby 10/9/92 Br. at 3, fact 5). BIA also had alleged that appellant's claim was for the difference between IG-reviewed CSF and the amount of CSF paid by BIA in FY 1985-87 (BIA 11/10/92 Br.). Because the settlement appeared to be precisely the difference between IG-determined CSF for FY 1985-87 and the amount paid, the Board's Call aimed to eliminate confusion. The Board noted that appellant's claim for FY 1987 actually appeared to be based upon modification 18 and its alleged addition of \$247,688 in CSF to the contract.

Both parties took their lead from the Board in responding. BIA reiterated that Busby had sought recovery of the total amount of IG-approved CSF, and now alleged that there was no consideration because the settlement was for the maximum amount that Busby could have received under that theory. Busby now contended that its claim for FY 1987 "was not based on the CSF budget negotiated with the

[IG], but on a CSF budget for that year expressly approved by the BIA contracting officer and incorporated in the contract by Modification 18" (Busby 3/19/93 Call. Resp. at 3-4).

In actuality, as we delineated in the Facts above, Busby's claim for FY 1987 did differ from its claims for FY 1985 and 1986 and was based upon modification 18. Busby has established, in its briefs and affidavits, that it believed that it had a legitimate claim for CSF for FY 1985-87 totalling \$258,203, and not merely for the \$114,719 settlement amount. The Court of Claims noted many years ago that: "[I]t is settled law that a compromise is supported by sufficient consideration when there is a bona fide claim which is * * * disputed or doubtful, the real consideration to each party being not the sacrifice of the right but the settlement of the dispute." (Citations omitted.) *Penn-Ohio Steel Corp.*, 354 F.2d at 268. Consideration would not be diminished even if BIA's position on the merits of Busby's claim were found to be correct. *Aviation Contractor Employees*, 945 F.2d at 1574. As long as there is a bona fide dispute, "once the parties enter into a valid settlement agreement, the merits of the compromised claims become inconsequential." *Cheyenne-Arapaho Tribes of Indians of Oklahoma, et al. v. United States*, 671 F.2d 1305, 1311 (Ct. Cl. 1982). The parties benefit from the settlement by avoiding the risks and expense of litigation. *Id.* at 1309. Forbearance of a legal right, "even a tenuous cause of action, is good consideration for a bargain." *Goltra v. United States*, 96 F. Supp. 618, 626 (Ct. Cl. 1951).

[7] Regarding the parties' mutual assent to the settlement agreement, "[w]hether a legally enforceable contract has been formed by a meeting of the minds depends upon the totality of the factual circumstances." *Texas Instruments*, 922 F.2d at 815. "For a contract to exist there does not have to be, and rarely is, a subjective 'meeting of the minds' all along the line." *WPC Enterprises, Inc. v. United States*, 323 F.2d 874, 879 (Ct. Cl. 1963). Thus, in determining whether a meeting of the minds occurred, we look not to subjective intent, but to the objective manifestation of the parties' intent, which can be found in their signed agreement. *Saturn Construction Co.*, VABCA No. 3229, 91-3 BCA ¶ 24,151 at 120,857.

The appellant in *Saturn* argued that agreements with the Government did not constitute accord and satisfaction. The appellant, like BIA here, urged that language used in the agreements did not reflect mutual assent or mean what it seemed to mean because items had yet to be determined, or it had intended to reserve them from the agreements. The appellant pointed to prior correspondence that certain issues would be addressed later, which it alleged should be read in conjunction with the agreements. The board noted that any intended exceptions to the written agreements should have been expressed in them and that the parol evidence rule precluded consideration, on a motion for summary judgment or otherwise, of evidence of prior dealings not included in the agreements when offered for the purpose of varying clear, unambiguous language. 91-3 BCA at 120,857-58.

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The Claims Court discussed the parol evidence rule at length in *Design and Production, Inc. v. United States*, 18 Cl. Ct. 168, 194-96 (1989). To summarize, the rule operates generally to disallow prior or contemporaneous extrinsic evidence, oral or written, when the parties have reduced their agreement to a final, integrated (complete) writing and the evidence offered would contradict or vary the unambiguous terms of the writing. The most reliable clue to the parties' intentions is the language of the contract.

Despite the parol evidence rule, and prior to considering questions of contract interpretation, extrinsic evidence is admissible to establish that a writing is, or is not, a completely integrated agreement. *Restatement (Second) of Contracts* § 214 (a) (1981).

Appellant has supplied affidavits and a declaration of individuals present during the October 29, 1991, meeting (including two affidavits from Busby's chairman, Mr. Badhorse), each of which is to the effect that the settlement agreement was complete and final. Contracting officer Graham executed an affidavit stating that the only agreement reached was that Busby would amend its claim to an agreed amount and he would forward it to BIA's Washington office to see if it could be paid. He did not state that he and appellant discussed that alleged interpretation. At a minimum, it is clear from the plain terms of the October 31, 1991, letter, which was captioned "Resolution Of Claim Under Contract Disputes Act"; referred several times to settlement and resolution of appellant's claim; contained a space for the contracting officer's written concurrence; and asked him to forward a signed copy to Washington as evidence of his decision to "process the *award* for payment" (italics added), that Busby did not so interpret the agreement.

Although both parties used the phrase "amended claim" at various times, including Busby in the October 31, 1991, letter and in its notice of appeal and complaint, we conclude, based upon the full text of the letter, upon all of the surrounding circumstances, and upon common sense, that the phrase was intended to mean "claim as reduced and resolved by agreement." There was no motivation for Busby to reduce its claim absent an agreement by the contracting officer that the reduced amount was acceptable for payment. Mr. Graham did not contest the statements in the affidavits and declaration of Busby's participants in the October 29 meeting that he would deny the claim if it were not reduced. It is apparent that they did not intend to abandon their higher claim only to leave the contracting officer the option to deny the reduced amount.

The contracting officer signed the bilateral October 31 agreement without any exception or reservation expressed in it. Citing his unilateral November 5 cover letter, he alleged in his affidavit that no agreement was reached about the validity of Busby's claim and that he simply was sending it to BIA's Washington office to see if it could be

paid. We examine the November 5 letter not as part of the settlement agreement, because only the contracting officer signed it, but as extrinsic evidence of whether the October 31 agreement was integrated.

The contracting officer's representations are inconsistent not only with the unambiguous terms of the October 31 letter, but also with his November 5 letter, in which he stated that he concurred with the amount claimed, but no funds were available in Billings, so he was forwarding appellant's "claim" to Washington for "processing". The Washington office did not have any decisional role. The only practical purpose of forwarding the "claim" was to reflect the contracting officer's decision allowing it and to get it paid, just as Busby had requested and the parties had agreed.

Further, the contracting officer's statements are illogical. He did not dispute the validity of Busby's reduced claim in his affidavit, or even claim that he notified Busby that he had not yet made a determination on the merits. Mr. Graham wrote that he concurred with "the amount claimed." This can only mean that he had determined that the reduced claim was valid, because the contracting officer has no role in determining the amount of a contractor's "claim" (nor can he control the nature of a claim, as attempted in his February 18 decision: "The fact that there may have been a shortfall in CSF does not constitute a claim against the Government"). He can only agree or disagree with it, or agree with it in some modified form after negotiations, as he did here.

Indeed, in his final decision denying the claim, Mr. Graham stated that, at the October 29, 1991, meeting, the parties had agreed to "the amount of the claim or shortfall," indicative both of his interpretation of the term "claim" and that, at a minimum, he had acknowledged the possibility of a CSF shortfall. As long as there was a good faith dispute, BIA had an interest in resolving the claim.

Thus, we find BIA's proffered extrinsic evidence unpersuasive and conclude that there was an integrated, final settlement agreement.

[8] We turn to interpretation of the agreement and derive the parties' intent from the plain language of the instrument as a whole, harmonizing and giving a reasonable meaning to all of its parts, without out of context analysis or regard to the subjective unexpressed intent of one of the parties. *Gould, Inc. v. United States*, 935 F.2d 1271, 1274 (Fed. Cir. 1991); *Thanet Corp. v. United States*, 591 F.2d 629, 633 (Ct. Cl. 1979); *ITT Arctic Services, Inc. v. United States*, 524 F.2d 680, 684 (Ct. Cl. 1975). When contract provisions are clear and unambiguous, they must be given their plain and ordinary meaning. *George Hyman Construction Co. v. United States*, 832 F.2d 574, 579 (Fed. Cir. 1987).

BIA did not establish that the contracting officer's alleged intent was anything other than subjective and unexpressed. Moreover, when we interpret all portions of the settlement agreement to find harmony, rather than conflict, and give its words—such as "negotiation",

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“settlement”, “resolution”, “settlement amount agreed to”, “[Busby’s] award”, “process the award for payment” and “agree”—their plain meaning, we find the agreement clear and unambiguous.

Appellant’s \$258,203 claim was compromised and resolved at \$114,719.

[9] The contracting officer’s reversal of position suggests that someone decided he had made a mistake in settling with Busby. Regardless, when a valid and binding settlement agreement has been created, neither party can cast it aside without the most compelling of reasons, including proof of invalidity, either by fraud or mutual mistake. A unilateral mistake is not sufficient to limit or avoid the effect of an otherwise valid settlement agreement. *Cheyenne-Arapaho*, 671 F.2d at 1309, 1311.

Although it has not been necessary for us to address appellant’s alternate argument that the contracting officer’s November 5, 1991, letter constituted a final CDA decision, it is, nonetheless, clear that he decided that Busby’s reduced claim was acceptable and settled it accordingly. As the Court of Claims emphasized in analogous circumstances, when the Army later determined not to fund a cost overrun after a contracting officer with full authority had agreed to do so:

We find * * * that [the contracting officer] was aware of the overrun situation and his indication of concurrence meant exactly what it said: that he, as contracting officer, approved the funding of the overrun and favored reimbursing plaintiff for its costs. Under the facts present here, we believe that when an authorized contracting officer expresses a definite opinion concerning the merits of the claim with knowledge of the relevant facts, a “decision” has been made.

As we have emphasized numerous times, it is the unfettered opinion of the person delegated as decision-maker by the parties to the contract that is determinative. * * * the decision of a duly authorized contracting officer could not be defeated by a funding official * * *. Nor, by implication, could the [contracting officer’s] finding be reversed by a successor contracting officer. [Citations omitted.]

General Electric Co. v. United States, 412 F.2d 1215, 1221 (Ct. Cl. 1969).

If, as a fully authorized contracting officer, Mr. Graham had applied his signature to the October 31 letter without considering its import and had sent a “claim” to Washington for processing which he did not consider to be valid, or worthy of settlement and payment, he would have been abusing his discretion, which we will not assume. Unless there is evidence to the contrary, the law presumes that official actions are properly taken. *Id.*

BIA has failed to invalidate the settlement agreement reached by its authorized contracting officer. All of the elements of an express contract, and of a compromise and accord, were met in the October 31, 1991, agreement, but there has been no satisfaction, because BIA has reneged.

DECISION

Summary judgment is granted for appellant in the amount of \$114,719, plus interest under the CDA computed as of May 17, 1991, the date the contracting officer received its certified claim.

CHERYL SCOTT ROME
Administrative Judge

I CONCUR:

G. HERBERT PACKWOOD
Acting Chief Administrative Judge

September 23, 1993

**APPLICATION OF WHITE & MCNEIL EXCAVATING, INC.
FOR FEES AND EXPENSES UNDER EAJA**

IBCA-3108-F

Decided: *September 23, 1993*

Contract No. 4-CC-60-00830, Bureau of Reclamation.

Granted in Part.

**1. Equal Access to Justice Act: Contract Disputes Act of 1978:
Prevailing Party**

In finding the applicant to be a prevailing party under EAJA, the Board noted that, under appropriate circumstances, a litigant may be a prevailing party for EAJA purposes even if it recovers as little as 10 percent of the total amount claimed, as with the applicant's appeal. BOR had alleged that the contractor was not a prevailing party because the issue upon which the contractor ultimately prevailed on remand whether there had been any deduction from payment quantities on account of a defective riprap specification—had been raised by the Board. The Board found, however, that the contractor's success arose out of, and was linked to, its overall claims and documentation that the defective specification had caused it monetary damage.

**2. Equal Access to Justice Act: Contract Disputes Act of 1978:
Substantially Justified**

In concluding that BOR had failed to establish a substantial justification defense under EAJA, the Board noted that BOR bore the burden of proof. Whether its position was substantially justified was to be determined based upon the administrative record as a whole. BOR had to prove substantial justification in the context of the litigation and its administrative actions. It failed to make the necessary proof that its position was justified to a degree that could satisfy a reasonable person, that is, justified in law and in fact.

**3. Equal Access to Justice Act: Contract Disputes Act of 1978:
Allowable Expenses**

In the exercise of the Board's discretion in determining the amount of an EAJA award, the degree of success obtained by a litigant is a critical factor. Tribunals have used various approaches when a litigant is not fully successful. Although not required, and not always appropriate, apportionment methods can be applied. One acceptable method is based upon the amount of time expended on the issue or issues upon which the litigant prevailed. Another, when warranted, is based upon the degree of recovery compared to the total recovery sought. The Board found the 10 percent-based award for pre-remand efforts advocated by the applicant to be reasonable based upon both methods. Regarding remand efforts, although the applicant eschewed the apportionment approach, it had prevailed on only one of its two contentions. The Board found the record insufficient to make a comparative analysis of the time expended on remand and based the remand-related part of its EAJA award upon the applicant's 56-percent relative recovery.

**4. Equal Access to Justice Act: Contract Disputes Act of 1978:
Allowable Expenses**

The Board noted that a successful EAJA applicant is entitled to fees and expenses incurred in prosecuting its application and, once the Government fails to prove its position substantially justified on the underlying merits, there is no additional substantial justification defense to the EAJA application.

5. Equal Access to Justice Act: Contract Disputes Act of 1978: Allowable Expenses

In reaching the amount of its EAJA award, the Board noted that the applicant had modified its application either to eliminate, to allocate correctly, or to support as proper, amounts contested by BOR. In the context of its proportionate recovery approach, the Board found the applicant's records to be sufficiently detailed. The applicant did not seek attorney fees in excess of EAJA's basic \$75-per-hour rate, although its actual rates were higher, and its claimed paralegal rates also were less than its normal billing rates. BOR did not object to claimed paralegal or law clerk rates. In allowing them, the Board found that the paralegal and law clerk expenses were reasonable and approximated the law firm's costs. On the applicant's claim for fees in connection with its EAJA application, the Board allowed fees supported by time sheets and disallowed those based upon counsel's unsupported estimate.

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

BACKGROUND

I. Fees and Expenses Sought

White & McNeil Excavating, Inc. (WME) has applied under the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504 (1988), for an award of a portion of its attorney fees and expenses incurred in three aspects of prosecuting its appeal, as follows: \$10,317.10 in connection with its success in *White & McNeil Excavating, Inc.*, IBCA No. 2448, 92-1 BCA ¶ 24,534 (*WME I*), in proving part of a riprap specification defective; \$3,937.50 related to a quantum remand issue decided in *White & McNeil Excavating, Inc.*, IBCA No. 2448, 93-1 BCA ¶ 25,286 (*WME II*);¹ and \$1,600 incurred for its EAJA application.

The *WME I*-related amount claimed is about 10 percent of WME's incurred fees and expenses (at allowable EAJA rates and with certain deductions) and is based upon the proportion of WME's ultimate recovery in *WME II* after remand, \$35,358.11, to the total it had sought in *WME I*, \$351,234. WME has not apportioned the amount it seeks based upon its efforts on remand, although it was not fully successful; it had sought \$63,442.11, based upon two contentions, and recovered only the \$35,358.11, as we elaborate upon below.²

II. The Appeal—WME I

WME appealed from the contracting officer's decision denying its claims in connection with riprap work performed under a dike repair contract with the Bureau of Reclamation (BOR). After reducing its claim at hearing, WME sought \$351,234, alleging that BOR wrongfully

¹ Both *WME I* and *WME II* were affirmed by the court of appeals: *White & McNeil Excavating, Inc. v. Secretary of the Interior*, Fed. Cir. No. 93-1013 (May 5, 1993) (*affirmed mem.*).

² In addition to the amounts stated, the *WME I* and *WME II* claimed and awarded amounts included interest under the Contract Disputes Act, 41 U.S.C. § 811.

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had precluded it from exploring alternatives to the contract-specified quarry; BOR had superior knowledge about alleged quarry deficiencies; there was a Type I or a Type II differing site condition; BOR's rejection of WME's riprap work and requirement for rework was untimely; and BOR's riprap specifications were defective and its rework requirement a contract change.

In *WME I* the Board denied WME's claims, except to the extent that it found a portion of the riprap specification to constitute a "bottleneck," as WME had alleged, and to be unreasonable in practice. WME and BOR had spent at least 10 percent of their litigative and hearing efforts on the defective specification issue.

Moreover, during contract performance, BOR never conceded officially that the specification was defective or unreasonable in any part. BOR's designer had changed the standard BOR specification for the riprap at issue but, although it could have been done at the time the design changes were being considered, BOR did not plot the "bottleneck" effect of the changes until after the contract had issued and after WME had accomplished its initial riprap placement. It was after WME had placed the riprap, and BOR had directed rework because the riprap failed to meet specifications, that BOR determined that the "bottleneck" portion of the specification was not necessary to design intent.

BOR did not notify WME about this determination, however. Indeed, BOR continued to stress to WME that all specification requirements remained in place and continued to enforce the specification for placement purposes. Although BOR ultimately relaxed the bottleneck portion of the specification for acceptance purposes, it never relaxed it for payment purposes, as it appeared from the record in *WME I*, and as WME confirmed on remand.

At hearing, BOR continued to defend its riprap specification, and to deny that it had caused WME damage, although its design expert admitted that the bottleneck was not reasonable. In fact, for a follow-on contract, BOR changed the specification to omit the bottleneck.

The Board found that WME had failed to meet riprap specification requirements, even if the defective portion were not considered, and that WME's own actions in delaying testing, rather than the bottleneck, had resulted in the need for rework. The case was a close one, however, and WME's efforts were effective in proving that the specification was defective in part.

In the overall context of its claims that the specification was defective and the rework requirement unjustified, WME presented documentation which suggested that BOR had taken payment deductions for placed riprap that did not satisfy the bottleneck portion of the specification. WME was seeking payment for all of its riprap placement and rework efforts, and, thus, had not isolated any particular payment deduction on account of the bottleneck portion of

the specification, but it was WME's efforts that led to the Board's quantum remand in *WME I*, issued on November 4, 1991, with the following direction:

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 * * * to deduct or refuse to pay for nonconforming work. If there was such a deduction, and there appears to have been [citation to fact findings], 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 * * *.

92-1 BCA at 122,443.

III. The Remand—WME II

On December 13, 1991, WME's counsel submitted documentation to BOR's counsel demonstrating that payment deductions had been taken based upon WME's failure to satisfy the unreasonable "bottleneck." WME sought \$63,442.11 in compensation for those deductions and in payment for 2,380 tons of hauled riprap that BOR had alleged was wasted in WME's grizzly operation and WME contended was placed properly. Alternatively, WME sought \$35,358.11 for the payment deductions based upon the defective portion of the specification alone. Upon subsequent inquiry by WME's counsel, BOR's counsel advised that WME's materials had been forwarded to the contracting officer.

When, after more than 90 days had passed from the date of *WME I* and WME had not received any response or proposal from BOR on the remand issue, on February 14, 1992, WME filed a motion to approve its damage calculations, supported by documentation. BOR responded on March 12, 1992, with a motion to dismiss denying any entitlement. BOR included a complete set of certain BOR notes upon which WME had relied, and offered the calculations and assumptions of BOR's counsel (albeit not in affidavit or declaration form). BOR did not provide any information or affidavit or declaration from the author of the notes, the contracting officer, or anyone else involved with the contract.

In *WME II*, the Board noted that BOR's primary focus during contract performance had been upon the elimination of rock that did not satisfy the bottleneck's strictures; that this had contributed greatly to BOR's requirement for removal of placed riprap, additional hauling and additional placement; and that the evidence demonstrated that BOR had aimed to eliminate bottleneck-related rock from its payment base. We found that WME had failed to prove that BOR's waste contentions were incorrect, but that it had established payment deductions improperly based upon the defective part of the riprap specification, in the claimed amount of \$35,358.11.

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IV. Procedural Course of WME's EAJA Application

On December 4, 1991, while the remand was in progress, WME filed an EAJA application for \$143,178.64 in attorney fees and expenses. By order of December 10, 1991, the Board directed the parties to attempt to resolve the fee application along with the remand issue. The Board granted the parties an additional 30 days to negotiate the fee matter, but stressed that nothing in the order was to serve as a basis for delay in paying WME any amount due pursuant to *WME I* and the remand. On February 19, 1992, after WME had filed its motion to approve its damage calculations, and it was apparent that the parties had failed to resolve any quantum issue through negotiation, the Board dismissed the EAJA application as premature.

After the Board issued *WME II* on July 24, 1992, deciding the remand issue, WME refiled and supplemented its EAJA application on August 12, 1992, substantially reducing its claimed fees and expenses. By letter of August 27, 1992, appellant advised that it would supplement its EAJA application to comply with the Board's rules and did so on September 2, 1992. However, on October 20, 1992, the Board received notice that WME had appealed to the Federal Circuit from the Board's decisions. We dismissed the re-filed EAJA application without prejudice to reinstatement within 30 days of final disposition of appellant's appeal. See 5 U.S.C. § 504(a)(2).

The Board's decisions were affirmed on May 5, 1993, and we reinstated WME's EAJA application by order of May 21, 1993, pursuant to its motion and its representation that it would not appeal further.

DISCUSSION

I. Prevailing Party

[1] EAJA provides that, in an adversary agency adjudication, fees and other expenses incurred by a qualifying prevailing party,³ other than the United States, in connection with the proceeding, are to be awarded to that party, unless the adjudicative officer finds that the position of the agency was substantially justified or that special circumstances make an award unjust. 5 U.S.C. § 504(a)(1). BOR has not alleged, and we do not find, any special circumstances that would make an award unjust. Hence, we consider only whether WME was a prevailing party and, if so, whether BOR's position nonetheless was substantially justified.

EAJA does not define the term "prevailing party" but its legislative history makes it clear that prior judicial interpretations of the term should be applied. *Austin v. Department of Commerce*, 742 F.2d 1417,

³To qualify for an EAJA award, a corporate entity must have a net worth of less than \$7,000,000 and employ 500 or fewer persons. 5 U.S.C. § 504(b)(1)(B). WME has averred that it meets these requirements and BOR does not dispute its qualifications.

1419 (Fed. Cir. 1984). The Supreme Court established in *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983), addressing the concept of prevailing party under the Civil Rights Attorney's Fees Award Act of 1976, 42 U.S.C. § 1988, that a litigant is deemed to be a prevailing party if it succeeds on any significant issue which achieves some of the benefit it sought in bringing suit. This definition has been applied repeatedly in EAJA cases, e.g., *Austin*.

Under appropriate circumstances, a contractor may be a prevailing party for EAJA purposes even if it recovers as little as 10 percent of the total amount claimed. *Delfour, Inc.*, VABCA Nos. 2049E, et al., 90-3 BCA ¶ 23,066 at 115,817; *Crown Laundry & Dry Cleaners, Inc.*, ASBCA Nos. 28889, et al., 87-3 BCA ¶ 20,034. See also *Jackson Engineering Co.*, ASBCA No. 36220, 91-3 BCA ¶ 24,178 (although denying an EAJA application because the Government proved its position substantially justified, the Armed Services Board of Contract Appeals first found the appellant to be a prevailing party based upon a pre-hearing settlement which gave it only 8.8 percent of the amount it claimed).

BOR states that WME was not a prevailing party in any sense because the Board, while partially accepting WME's defective specification theory, rejected the argument that the defective specification caused any of appellant's claimed costs. BOR asserts that the issue of whether there had been any deduction from payment quantities had not been raised by either party. However, WME had claimed strenuously during contract performance and at hearing that it was not being treated fairly regarding placed riprap and the re-work requirement; that the riprap specification was defective; and that it had not been paid properly for rock placed, and replaced. As noted, it was documentary evidence concerning placement and payment, relied upon by WME, that prompted the remand. In our judgment, the remand issue arose out of, and was linked to, WME's overall claims that the defective specification had caused it monetary damage.⁴

II. Substantial Justification

[2] Once a qualified litigant has been determined to be a prevailing party, the burden shifts to the Government to prove that its position was substantially justified. *Salisbury & Dietz, Inc.*, IBCA No. 2382-F, 89-3 BCA ¶ 21,981 at 110,559. Whether an agency's position was substantially justified is to be determined based upon the administrative record as a whole. 5 U.S.C. § 504(a)(1). The Government must establish substantial justification in the context of the litigation

⁴Moreover, the Interior Board has stated previously that an appellant can be a prevailing party even if the Board granted relief that was not based upon a theory proffered by the appellant. *R&R Enterprises*, IBCA No. 2664-F, 90-3 BCA ¶ 23,039 at 115,671. Some Boards have held differently in the context of deciding whether the Government was substantially justified in defending against an appellant's claims. See *Seaman Marine Co.*, ASBCA No. 36579, 91-1 BCA ¶ 23,653; *Murphy Brothers, Inc.*, DOT BCA No. 1836, 87-1 BCA ¶ 19,500 at 98,570-71. (In the relevant part of each case the appellant prevailed, but upon a contract provision that neither party considered or argued; the Boards found the Government substantially justified in opposing the appellants' claims). We do not expand upon this issue because we have found that WME's recovery was linked to its defective specification claims and presentations to the agency during contract performance and at hearing.

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and the administrative action or inaction upon which the adversary adjudication was based. *Devine v. National Treasury Employees Union*, 805 F.2d 384, 386 (Fed. Cir. 1986); *Kos Kam, Inc.*, ASBCA No. 34684, 88-3 BCA ¶ 21,049. The Government's position is substantially justified if it is justified to a degree that could satisfy a reasonable person, which is to say that it has a reasonable basis in law and in fact. *Pierce v. Underwood*, 487 U.S. 552, 565-66 (1988).

We find that BOR has not met its burden to prove substantial justification. BOR's actions in failing to plot the effect of its specification until after the contract issued and after initial placement by WME; in continuing to enforce its specification for placement purposes even after it had determined that the bottleneck portion was not necessary to design intent; in denying that its riprap specification was defective; and in denying that the bottleneck caused WME any monetary damage, including after remand by the Board, did not have a reasonable basis in fact and were not substantially justified.

III. Determining Award

A. Discretion and Apportionment

[3] The Supreme Court has stressed that, as with other fee awards, the trial forum has discretion in determining the amount of an EAJA award. *Immigration & Naturalization Service v. Jean*, 496 U.S. 154, 161, 165-66 (1990). See *Hensley v. Eckerhart*, *supra*, 461 U.S. at 437. "[T]he most critical factor is the degree of success obtained." *Id.* at 436.

When a prevailing litigant has less than complete success against the not-substantially-justified Government, the courts and Boards have used various approaches in determining the appropriate amount of an EAJA award. Although not required, and not always appropriate, apportionment methods can be applied. One acceptable method of apportionment is based upon the amount of time expended on the issue or issues upon which the litigant prevailed. *Community Heating & Plumbing Co. v. Secretary of the Navy*, Fed. Cir. No. 92-1362 (8/20/93)(1993 U.S. App. Lexis 21450). Another acceptable method of apportionment, when circumstances warrant, is based upon the degree of recovery compared to the total recovery sought. See *Sardis Contractors*, ENG BCA No. 5256-F, 90-3 BCA ¶ 23,010.

WME has advocated the latter pro rata approach for its efforts in *WME I*, seeking 10 percent of certain incurred fees and expenses otherwise allowable under EAJA. It has eschewed any pro-rata approach for its efforts in *WME II*, however.

We find a 10 percent-based award, set forth below, for allowable fees and expenses incurred by the applicant in *WME I* to be reasonable based both upon the proportionate amount of WME's ultimate recovery, \$35,358.11, to the amount sought, \$351,234, and upon the apparent amount of effort spent on the issue leading to its partial recovery after remand. See *Salisbury & Dietz*, *supra*, at 110,561.

For consistency, we also apply the pro rata approach to the fees sought on account of applicant's efforts expended in *WME II*. However, there is not enough in the record upon which to base a "time expended" allocation between WME's successful proof on remand that BOR wrongly deducted payment amounts on account of the failure to satisfy the defective portion of the riprap specification, and its unsuccessful claim that BOR incorrectly categorized properly placed riprap as waste. Accordingly, we base this part of our award, below, upon the proportion of the recovery in *WME II*, \$35,358.11, to that sought in *WME II*, \$63,442.11, which is 56 percent.

B. EAJA Application Fees

[4] The successful applicant also is entitled to fees incurred in the prosecution of the EAJA application. *Schuenemeyer v. United States*, 776 F.2d 329, 333 (Fed. Cir. 1985). Moreover, once the Government has failed to prove its position substantially justified on the underlying merits, there is no additional substantial justification defense to an EAJA application. *Immigration & Naturalization Service v. Jean*, *supra*.

C. Amount of Award

[5] BOR's October 13, 1992, opposition to WME's EAJA application included some valid objections, most significantly that the application requested fees and expenses pertaining to WME's efforts in advancing its claim prior to the contracting officer's decision. Such costs are not deemed to be part of the adversary adjudications covered by EAJA. *Levernier Construction, Inc. v. United States*, 947 F.2d 497 (Fed. Cir. 1991); *Northwest Piping, Inc.*, IBCA No. 2642-F, 90-1 BCA ¶ 22,446. WME replied to BOR's objections on October 29, 1992, modifying its application either to eliminate, to allocate correctly, or, in our estimation, to support as proper, amounts contested by BOR.

BOR urges that WME has not adequately segregated costs pertaining to the defective specification issue and that its time sheets specifically identify only a small portion of time allotted to the issue. However, as we have noted, it is apparent from the overall record that WME spent at least 10 percent of its time on the defective specification question and we have applied a prorata, rather than a segregated, approach. It is clear from WME's law firm's time records that much of its efforts, including discovery, trial preparation, exhibit review, briefing, correspondence, telephone calls, and the like, were intermingled and covered various matters pertaining to WME's appeal. We find them, nonetheless, to be specific as to date, time expended, general type of service and by whom it was performed, and to be sufficiently detailed to support an EAJA award. *See Gracon Corp.*, IBCA No. 2582-F, 90-1 BCA ¶ 22,550 at 113,186.

We note that WME has not sought attorney fees in excess of the statutorily authorized basic rate of \$75 per hour, *see* 5 U.S.C. § 504(b)(1)(A), although the normal billing rate of the two attorneys

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principally involved is \$125 per hour. Regarding paralegal and law clerk work, many Boards allow recovery only at the cost to the law firm and not at regular billing rates, as the Interior Board has held. *Gracon, supra* at 113,188; *Francis Paine Logging*, AGBCA No. 91-156-10, 92-3 BCA ¶ 25,043.

We do not elaborate upon the proper rates for paralegals and law clerks because here, while the paralegal's normal billing rate is \$50 per hour, WME only seeks compensation at the rate of \$35 per hour. It seeks compensation for its law clerks' time at \$30 per hour, although we have not located any reference to their normal billing rates. WME has not stated that the paralegal and law clerk amounts sought are their costs to the law firm, but BOR has not objected to the claimed rates; they are reasonable; we infer that they approximate the law firm's associated costs; and we accept them as allowable under EAJA.

Finally, as to WME's claim for fees in connection with its EAJA application, it seeks \$1,600, but only 5.2 attorney hours ($5.2 \times \$75 = \390) and 5.6 paralegal hours ($5.6 \times \$35 = \196), for a total of \$586 in costs, are presented as supported by time sheets. The balance represents the estimate of appellant's counsel, not contained in any affidavit or documentation submitted to the Board, and we reject it due to appellant's failure of proof.

DECISION

Accordingly, WME's EAJA application is granted in part, as follows: \$10,317 (rounded) for its successful efforts in *WME I*; \$2,205 (rounded) for its successful efforts in *WME II* ($\$3,938$ (rounded) \times 56 percent); and \$586 for its EAJA application efforts, for a total of \$13,108.

CHERYL S. ROME
Administrative Judge

I CONCUR:

G. HERBERT PACKWOOD
Acting Chief Administrative Judge

APPEALS OF MICHAEL-MARK LTD.

IBCA-2697 *et al.*

Decided: October 1, 1993

Contract No. OR952-CT8-1165, Bureau of Land Management.

Appeals Sustained in Part.

1. Contracts: Construction and Operation: Actions of Parties

In connection with BLM's unilateral price reduction on a contract for the construction of a fishway, due to the contractor's use of a temporary access spur, rather than highline access allegedly required by the contract, the Board noted that BLM's focus during the project had not been upon the spur, but upon its concern that in-stream fill would exceed

the amount specified in permits issued to BLM. In fact, the contract provided that the amount was an estimate and that BLM would modify the permits to conform to actual quantities; the permit issuers were not concerned; and the permits were amended rapidly.

2. Contracts: Construction and Operation: Generally

Reading all contract provisions in harmony, the Board found that the contract provided for the construction of temporary access roads.

3. Contracts: Construction and Operation: Actions of Parties—Contracts: Disputes and Remedies: Burden of Proof—Contracts: Performance or Default: Inspection—Contracts: Performance or Default: Waiver and Estoppel

The Board found that BLM impliedly had approved the contractor's temporary access spur plan, which it had presented to the COR well before construction began, and which was within the COR's contract authority to approve; for which the contractor had obtained necessary permits, which the COR had approved; and which the COR and BLM's inspector had observed in operation and allowed to continue until the spur was 90 percent complete. The Board also found that the contractor would not experience a windfall because its bid had not been based upon the use of highline access at the area in question; and that BLM had failed to prove its deduction justified.

4. Contracts: Construction and Operation: Changed Conditions (Differing Site Conditions)—Contracts: Disputes and Remedies: Burden of Proof—Contracts: Disputes and Remedies: Equitable Adjustments

When BLM acknowledged liability for site profile differences, and the contractor proved costs incurred in addition to those awarded by unilateral modification, the Board used a jury verdict approach to determine the appropriate amount of increased costs to be recovered. In so doing, the Board found clear proof of injury; that there was no more reliable method for computing damages; and that the evidence was sufficient to make a fair and reasonable approximation of the damages.

5. Contracts: Construction and Operation: Changed Conditions (Differing Site Conditions)—Contracts: Disputes and Remedies: Burden of Proof—Contracts: Disputes and Remedies: Equitable Adjustments

In resolving the parties' quantum dispute over a unilateral modification which increased the contract amount due to additional work, but reduced it due to the deletion of boulder work, for an overall net price reduction, the Board found that BLM had not met its burden to prove the full amount of the reduction justified, and that the contractor had not proved the full amount it sought due to the increased work warranted. The Board used a jury verdict method in arriving at the appropriate contract adjustment.

6. Contracts: Construction and Operation: Differing Site Conditions (Changed Conditions)—Contracts: Disputes and Remedies: Burden of Proof—Contracts: Disputes and Remedies: Equitable Adjustments

The Board found the contractor entitled to an equitable adjustment for "Type I" differing site conditions when the contractor established that it had encountered mud seams, rotten seams, or clay, while the contract, upon which the contractor reasonably had relied, and the contractor's site visit, had indicated only competent rock. The Board used a jury verdict method to determine the proper amount of the equitable adjustment.

7. Contracts: Construction and Operation: Actions of Parties—Contracts: Construction and Operation: Changed Conditions

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(Differing Site Conditions)—Contracts: Performance or Default: Excusable Delays

In denying the contractor's claims for acceleration and impact, the Board found that the contractor had been allowed to start work earlier, and finish it later, than the contract-specified dates; deleted work had netted more time for the contractor; a suspend work order had been issued due to the contractor's own actions in violating in-stream fill permits; the suspension had applied to only part of the contract work; delay in the grant of an extension for in-stream work due to differing site conditions had not been BLM's fault; and the contractor already had been compensated by the Board's jury verdict for extra time and costs due to the differing conditions.

8. Rules of Practice: Appeals: Dismissal

When the contractor had timely completed the contract; had described as moot its appeal from the contracting officer's decision denying it a 7-day extension due to a partial suspend work order; and had subsumed the acceleration and impact aspects of its appeal into its other, unsuccessful, acceleration and impact appeals, the Board dismissed the earlier appeal with prejudice.

APPEARANCES: J. William Bennett, Bennett, Yazbeck & O'Halloran, Portland, Oregon, for Appellant; Richard A. DeClerck, Department Counsel, Portland, Oregon, for the Government.

OPINION BY ADMINISTRATIVE JUDGE ROME

INTERIOR BOARD OF CONTRACT APPEALS

Michael Mark (MM) has appealed from the contracting officer's decisions under its above contract with the Bureau of Land Management (BLM), in the amount, after modification, of \$582,729.29, for the construction of a three-part fishway to facilitate the passage of anadromous salmonids¹ over Lake Creek Falls in Oregon. The fishway included a Lower Slide², Upper Slide and Lake Creek Falls Treatment (Falls). Post-hearing briefing was complete in March, 1993. MM's active appeals are as follows:

(1) IBCA 2890—entitlement and quantum dispute over unilateral modification 6's \$37,832.40 contract price reduction on account of MM's allegedly improper use of a temporary access spur. MM seeks the \$37,832.40.

(2) IBCA 2891—quantum dispute over unilateral modification 7's net contract price increase of \$12,497.50 for site profile differences. MM seeks an additional \$56,480.86.

(3) IBCA 2892—quantum dispute over unilateral modification 5, which increased the contract amount for certain work additions, but decreased it due to the deletion of boulder work, for a net decrease of \$4,681. MM seeks \$14,636.26.

(4) IBCA 2893—entitlement and quantum dispute over the denial of MM's claim for extra costs due to alleged differing site conditions in

¹ Anadromous fish are those which migrate upstream to spawn.

² "Slide is a local term for [an area] where water flows over a smooth slab of rock and does not indicate an area of slope instability" (AX 33 at 2).

the form of clay, mud seams or rotten seams at the Lower Slide and Falls. MM seeks \$74,287.59.

(5) IBCA 2894 and 2895—entitlement and quantum dispute over the denial of MM's claims for acceleration and impact associated with a partial suspend work order, the profile changes and the alleged differing site conditions. MM seeks \$10,782.47.

Findings of Fact

I. Background

In 1985, BLM contracted with Buell and Associates, Inc., to analyze feasibility and options for a fish passage (Government's Exhibit (GX) 61). Buell's April 1986 report (Buell Report) was a "reconnaissance level analysis intended to assist in preliminary design. *A more thorough analysis with more complete geological testing will be required to accompany any final design effort*" (AF 5 at 298 (italics added)). Concerning test blasting upstream from Lake Creek Falls, "there were no mud seams visible in the blasted pool or visible joints in rock that had been blasted from the pool * * * There is no evidence of potential problems with minor blasting for foundations or footings" (AF 5 at 303). The Buell Report apparently was not part of the contract solicitation, but the Golder Report, *infra*, which largely was included in the contract, refers to the Buell Report. It is not clear from the record whether the Buell Report was made available to bidders.

2. Neither BLM, nor its design consultants, conducted the further geological testing intended by Buell (Appellant's Exhibit (AX) 31; Tr. 144).

3. In 1987 BLM issued a Lake Creek Aquatic Habitat Management Plan, relying upon the Buell Report and proposing a fishway for the Falls constructed either with prefabricated modular aluminum counterflow "steep pass" fishway sections or with the fishway cast in place with steel or aluminum counterflow structures. Metal fish ladders were to be fabricated offsite, with components moved onsite for assembly. Materials were to be moved using cables off Oregon State Highway 36, with "no roads or trails needed" (AX 80 at 25). The Management Plan contained a \$45,000 estimate for an access road for Falls work, however, with a total Falls estimate of \$395,000 (AX 80 at 26).

4. In May, 1987, BLM completed an Environmental Assessment Report, which again referenced off-site fabrication of the fish ladder, the lack of need for roads or "new" trails, and the cable access system. However, the Falls cost estimate remained at the same \$395,000 that had included the access road (GX 52 at 17, 20, 24; GX 61).

5. After State approval of the fish passage plan, BLM contracted with Fish Pro, Inc., in September 1987, to develop the plans and specifications, following the off-site fabrication, portable ladder plan. Fish Pro's contract stated that its access to the work site, and that of the construction contractor, was to be limited to existing facilities and that "[no] new access roads shall be constructed on site without written

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authorization of the Contracting Officer." Based upon what it deemed to be excellent exposure of rock and soil materials, Fish Pro proposed, and BLM accepted, that borings along the fish passage alignment would not be necessary (GX 59, § C.5.3C. (italics added); GX 61).

6. Fish Pro hired Golder Associates for a geotechnical design study. Golder completed it in December, 1987 (Golder Report); most of it was included in MM's contract (AX 33; Tr. 443).

7. Fish Pro recommended changing the plan for a portable fish ladder built offsite and the design was modified to a cast in place concrete structure (AX 54, interrog. resp. G.1 and 2; AX 72 at 3). This design contemplated 582 c.y. of excavation, 186 c.y. of backfill, and 168 c.y. of concrete (AX 58; Tr. 15, 16, 461-66).

8. The Environmental Report had noted that, in 1971, the State had proposed a concrete, cast in place fish ladder that would have required an access road for construction. That plan had been rejected due to perceived major site impacts and over \$2 million in cost (GX 52 at 18). The concrete, cast in place design ultimately accepted by BLM was not the same as this earlier design (AX 54, interrog. resp. G.3.(a)).

9. BLM issued the solicitation on June 6, 1988, with bid opening scheduled for July 6 (Appeal File (AF) 2 at 34). On about June 7, in a combined application, BLM sought permits from the Corps of Engineers (Corps) and Oregon's Division of State Lands (State Lands). The application stated that about 87.5 c.y. of fill, which was largely concrete, and about 360 c.y. of removal (excavation), would be required for the project. Of the 360 c.y., 300 were estimated for the Falls. The application stated that "no roads are to be built;" the Lower and Upper slides were to be built using hand equipment; the Lower Slide involved placing five cement weirs on "*bedrock*" in the channel and excavating "*bedrock*" pools; and the "*channel is over 95% bedrock.*" The application included a map which labeled the Lower Slide as the "*Lower Bedrock Slide.*" The permit application was included as part of the contract documents (AF 2 at 51, 52, 53, 55 (italics added); Tr. 923).

10. On June 23, 1988, the Contracting Officer's Representative (COR), Mr. Bruce Runge, conducted a pre-bid site tour, attended by MM's project manager and vice president, Mr. Robert G. Thomas, and seven other prospective bidders (Tr. 101, 393-94, 871-72). Mr. Runge warned against tree injury during construction (Tr. 401). Mr. Thomas previously had reviewed the solicitation. Its provisions and the massively bedded sandstone he observed on site indicated sound, good rock to him (Tr. 411, 609). The only bidder concern that Mr. Runge recalled was whether the contract would contain the necessary permits, not yet in the solicitation (Tr. 405, 415-16, 609, 876, 885).

11. On June 29, 1988, bid opening was postponed indefinitely due to permit complications (AF 2 at 60).

12. On August 4, 1988, State Lands issued to BLM a fill/removal permit authorizing removal of up to 360 c.y. of material and the

placement of up to 87.5 c.y. for the fishway construction. The permit stated that violations could cause its revocation or an action for damages. The permit holder, *i.e.*, BLM, was responsible for the construction contractor's activities. State Lands retained authority to halt temporarily or to modify the project in the case of excessive turbidity or damage to natural resources. The permit was included as part of the contract documents (AF 2 at 48-49).

13. On August 11, 1988, the Corps issued its permit to BLM, authorizing the creation of a fish passage at the Lower Slide, Upper Slide and Falls, "by placing 87.5 [c.y.] of fill below ordinary high water." Of the 87.5 c.y., about 34 were designated for the Falls. The permit provided for the protection of vegetation; that "[c]are shall be taken to prevent any petroleum products, chemicals, or other deleterious materials from entering the water;" and that "[w]ork in the waterway shall be done so as to minimize turbidity increases in the water that tend to degrade water quality and damage aquatic life" (AF 2 at 40, 41). The permit was included as part of the contract documents.

14. On August 22, 1988, amendment 2 to the solicitation set a new bid opening for September 12, 1988, and added that the contractor was to perform administrative activities, such as schedule and other submittals, during the first stream closure period, about September 15, 1988, through July 1, 1989. Regarding the permits obtained, the amendment stated:

*The amount of fill material—87.5 [c.y.]—shown on the [two permits] was estimated for joint permit application purposes only. The contractor will be responsible for determining the actual quantities required for completion of the entire project. Should the quantities estimated by the Contractor differ from those quantities estimated for application purposes, a request for modification to the permit will be performed by the BLM. [Italics added.]*³

(AF 2 at 37). The amendment pointed out that State Lands and the Corps retained authority to suspend temporarily or to modify the project if the water quality, fish or wildlife were being adversely affected and that the contractor would have to comply with any mitigating measures directed by either agency.

15. On September 19, 1988, BLM awarded the contract to MM in its lump sum bid amount of \$308,000, covering the Upper and Lower

³ MM urges that the permits' fill and removal amounts erroneously were linked to the original, portable fish ladder, "steep pass" design (Tr. 710-12). It alleges that the ultimate design is not "steep pass," but COR Runge stated that the original design was an "Alaska steep pass" structure, and the design selected, a "Denil steep pass." The Corps permit covers a "Denil Steep-pass fishway" (AX 2 at 40).

The COR alleged that permit quantities did not pertain to all fill and excavation necessary for the project, but to permanent fill to be placed in the stream, and that the permits covered the correct quantities for the job as solicited (Tr. 923-34).

Fish Pro's president, Mr. Edward Donahue, stated that the highline access alternative in the contract was not based upon the earlier, portable ladder, design, but he did not have an explanation for the differences in Fish Pro's fill and excavation estimates and the permits' fill and removal figures. This was not explored with him at any length, however (Tr. 460, 462).

Mr. Thomas believed contemporaneously that the fill allotted was sufficient for his stream access plans. Upon close review at hearing, he stated that the permit amounts were not correct. He had not been particularly concerned about the amounts, given the contract provision that they were estimates and that BLM would modify them if necessary. See Tr. 418, 692-93.

In view of our resolution of IBCA 2890, and the confusion in the record, we do not make a finding on whether the permits were incorrectly based.

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Slides (AF 2 at 35). On October 6, 1988, BLM issued modification 1 to cover the Falls, in MM's lump sum bid amount of \$300,000, increasing the total contract amount to \$608,000 (AF 2 at 33, 61).

II. The Contract

A. Special and General Provisions

The contract, with a 370-day performance time (AF 2 at 61), included the following pertinent Special and General provisions:

16. The COR was authorized to clarify technical requirements, and to review and approve work clearly within the scope of work. He was not authorized to issue changes under the Changes clause or to modify the scope of work (AF 2 at 63, § 1).

17. Under the Suspension of Work clause, the contracting officer could order the contractor, in writing, to suspend, delay or interrupt all or part of the work for a period deemed appropriate by the contracting officer for the Government's convenience. If for an unreasonable period, the contractor might be entitled to a price adjustment, unless the disruption were due to its fault or negligence (AF 2 at 68).

18. If the contractor submitted cost or pricing data in connection with pricing modifications, the Government had audit rights (AF 2 at 68).

19. The Differing Site Conditions clause provided:

(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.

If there were a differing site condition, and if it caused an increase in the contractor's cost or work time, an equitable adjustment to the contract was to be made (AF 2 at 99).

20. The Site Investigation and Conditions Affecting the Work clause provided:

(a) The Contractor acknowledges that it has taken steps reasonably necessary to ascertain the nature * * * 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 * * * of materials; (2) the availability of * * * roads; * * * (4) the conformation and conditions of the ground * * * 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 100).

21. The contractor was to preserve and protect all vegetation, including trees (AF 2 at 101, § 52).

22. Under the Operations and Storage Areas clause, the contractor was to "use only established roadways, or *use temporary roadways constructed by the Contractor when and as authorized by the Contracting Officer*" (AF 2 at 102, § 53(c) (italics added)).

23. Under the Changes clause, the contracting officer, by written change order, could make changes in the work within the scope of the contract, including changes in the specifications; manner of work; Government-furnished site; or directing accelerated performance. Any other written or oral order of the contracting officer (including direction, instruction, interpretation or determination) that caused a change was to be treated as a change order upon the contractor's written notice. If a change caused an increase in contract cost or time, the contracting officer was to make an equitable adjustment (AF 2 at 106).

24. Under the Inspection of Construction clause, "[t]he 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" (AF 2 at 111, § 62(d)).

25. The contractor was subject to default under the Default clause if it refused or failed to prosecute the work or any part of it with the diligence to ensure its completion within the contract time period (AF 2 at 120).

B. Specifications

Division 1 of the specifications, General Requirements, contained the following pertinent specifications:

26. The Project/Site Conditions clause provided:

A. Access to the Work: The access to the site is via Oregon Highway 36.

1. At the [Falls] (upper Denil fishpass) access to the treatment area shall be by track equipment and high-line. *Figure 1 shows the potential points of access to the construction area * * ** Access to the construction area will be limited before July 1, and after September 15, depending on constraints of fill-removal permit acquired by BLM.

Once track equipment is located at the work area, it shall remain on south side of the creek until required work has been completed. Continual creek crossings with track equipment is not allowed and precautions shall be taken to avoid gas, oil and grease spills into the creek.

* * * * *

3. Boulder placement at the upper and lower slide shall be accomplished with an overhead high-line cable or by other means approved by the Contracting Officer.

4. Concrete required at each location should be pumped from Highway 36 (downhill) or mixed on site. If the contractor chooses to use pre-cast concrete, these concrete sections shall be high-lined to their placement locations.

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B. Seasonal Closure for In-Stream Construction Period: The preferred work period for in-water work recommended by the Oregon Department of Fish and Wildlife [ODFW] * * * is from July 1 to September 15. Extensions * * * may be obtained by [BLM] from [State Lands] * * * in consultation with [ODFW], depending on climatic conditions and stream flows. Construction work could continue after September 15 until Mid-October or before July 1 under low stream flow conditions, if and when extensions are granted.

* * * * *

C. Environmental Considerations: * * *

1. Care must be taken to minimize the impact of construction on this area * * *.

2. Construction activities shall minimize damage to the stream banks and stream beds. [Italics added.]

(AF 2 at 146-47).

27. "Figure 1" showed two potential alternative access roads, marked with dotted lines and described as "*Alternate Access (to be approved by BLM) for Tracked Equipment*" (AF 2 at 149 (italics added); Tr. 681, 874).

Division 2 of the specifications, Site Work, contained the following pertinent clauses:

28. The Project Conditions clause provided:

A. Work Limits: Areas to be cleared and grubbed shall be limited to only those areas to be excavated, *access locations*, and stock pile areas, *as shown on the drawings* and defined in the specifications.

* * * * *

C. Access Roads: Access roads shall not be constructed *unless indicated on the drawings or written approval is given by the Contracting Officer.* [Italics added.]

(AF 2 at 164).

29. Part 1.01 provided that section 02500, which consisted entirely of the Golder Report, was included: "to provide the technical data necessary for the contractor to properly plan for blasting and construction at the proposed treatment sites. The [Golder Report] should be carefully reviewed by the contractor and the blasting specialist when preparing bid documents and construction submittals" (AF 2 at 172).

30. Division 2, § 1.04D., provided that all blasting was to be in accordance with Golder Report recommendations (AF 2 at 167).

31. Blasting requirements were contained in § 3.01 as well. "Plan, sections and profiles" of areas where rock was to be removed were stated to be shown on the drawings (§ 3.01A.1.). Blasting for rock was to be completed only to the depth approved. Drilling and blasting was to be done under the direction of experienced, well qualified foremen (§ 3.01B.2.). The contractor was to employ an experienced blasting consultant to develop its blast plan (§ 3.01C.1). Individual shot plans were to be submitted to the contracting officer for review 24 hours in advance (§ 3.01C.2) (AF 2 at 167-68).

32. The Project Site Conditions clause provided:

A. Environmental Considerations:

1. *Stabilization and Closure of Construction Access Roads*: Upon completion of the project, access roads shall be barricaded, as specified herein.

a. *Barricade*: All access spurs ^[4] shall be barricaded upon completion of use or if work is suspended due to seasonal closure.

Barricades shall consist of digging a trench perpendicular to the centerline of the spur road * * *.

* * * * *

4. *Minimum Clearance of Vegetation*: The only vegetation that shall be cut or removed from stream banks is that which is growing on or immediately adjacent to designated sites of planned stream bank excavation or at designated stream crossings. This restriction is intended to provide efficient and safe operation of equipment without causing unnecessary damage to stream side vegetation. Any deviation from this procedure shall be approved in advance by the Contracting Officer.

(AF 2 at 169-70).

33. The Execution and Installation clauses referred the contractor to the drawings to determine the amount of streambed and stream bank excavation (AF 2 at 170-71).

34. The Site Preparation clause, under specifications Division 3, Concrete, provided:

All boulders and existing concrete surfaces that will be in contact with new concrete shall be cleaned of all dirt, moss and other foreign material by pressure washing with water. Pressure washer shall be capable of producing 2000 PSI at the nozzle.

(AF 2 at 198).

C. Drawings

The following drawings are of particular relevance:

35. Sheet 3 depicted boulder placement at the Lower Slide. At the lower boulder placement area, 16 boulders were to be relocated and pinned in place, and at the upper area, 36 boulders. Per Detail M on sheet 14, each boulder was to be pinned to a depth equal to 100 percent of the rock's thickness by drilling through the boulder into the rock below, and by using #10 rebar and epoxy to secure it. Alternate strength anchoring methods proposed by the contractor would be considered. Sheet 3 also depicted the construction of weirs. Notes to the drawing provided that the contracting officer was to determine all boulder placement and removal; the location of all weir notches; and the final dimensions and location of weirs (AF 2 at 217, 227).

36. Sheet 9, pertaining to the Falls, on Details D, E and F, depicted a tapered trench, with a concrete cover over the tapered area (AF 2 at 223). The concrete cover or "slab," as MM refers to it, is an attempt, after the Falls trench has been excavated and backfilled, to reestablish the former bedrock surface, albeit with concrete (Tr. 655). Drawing E stated that the contractor was to "use controlled blasting to maintain 1:4 sloped face and minimize overbreak." The drawings required backfilling the excavated tapered area with excavated materials (AF 2 at 223).

⁴MM refers to its access construction as a "spur" or "ramp," and objects to BLM's description of it as a "road." We use the terms interchangeably. It is clear from photographs that it was temporary and not what a layman would describe as a "road."

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D. The Golder Report

37. The Golder Report included a narrative, figures depicting sandstone and siltstone rock layers, and specifications for rock excavation and blasting. It described its geotechnical study as "a review of the [Buell Report], detailed geologic mapping at each of the proposed sites, engineering analysis, and preparation of final geotechnical design recommendations." It concluded that "the proposed fish passage structures appear feasible geotechnically as currently planned" (AX 33 at 57).

38. The Golder field work was limited to surficial geologic mapping and its analysis, conclusions, and recommendations were limited accordingly (AX 31).

39. Pertinent provisions of the Golder Report included in the contract were:

3. SITE CONDITIONS

3.1 Lake Creek

*** The gentler river bank slopes tend to be underlain by soil (colluvium, alluvium, or landslide debris) and *the steeper slopes are underlain by bedrock.*

At every proposed fish passageway location, *bedrock* of the Tye Formation, is at or near the surface. The *bedrock consists of massively bedded* (beds one and one-half to greater than five feet thick), *strong, fine sandstone* interlayered with *thinly bedded* (beds one to six inches thick) *medium strong, fine sandstone with occasional thin (one to three inches thick) siltstone beds.* The massively bedded sandstone tends to form layers more resistant to erosion while the thinly bedded sandstone and siltstone are less resistant to erosion. Where exposed on the sides of the creek, the massively bedded sandstone tends to form ledges and overhangs, while the thinly bedded sandstone forms recesses ***. *Lake Creek tends to flow directly on bedrock* and there is only a minor amount of alluvium within the active stream channel. In the creek-bed, the sandstone tends to sound hollow when struck with a hammer and appears to be detached, since the upper one-half to one inch breaks easily into flakes and plates parallel to the orientation of the bedding, generally less than six inches in maximum dimension. *The sandstone which directly underlies the flakes is usually hard and unweathered.* This suggests that the sandstone is somewhat susceptible to slaking.

*** *The bedrock tends to be unjointed to very poorly jointed, with bedding planes being the primary discontinuity. The bedding planes are tight, have moderate roughness, and contain no infilling. The Upper and Lower Slides are due to stream flow over resistant, massive sandstone beds* ***.

3.1.1 Lake Creek Falls

*** The upper part of the waterfall is *underlain by massively bedded sandstone* ***. Underlying the massive sandstone are *thin sandstone beds generally less than three inches thick* ***. *The thin sandstone beds overlie another series of massive sandstone beds* ***.

* * * * *

3.1.3 Lower Slide

*** *The side channel consists of* *** *a middle section that is underlain by boulders, an upper bedrock section* *** *and a boulder plug* ***. *The right bank of the side channel is underlain by ancient landslide debris which is composed of a chaotic mixture of silty sand and boulders. The landslide debris does not appear to be active* ***. *The*

*left bank of the side channel is a bedrock knob, which also forms the right bank of the main channel * * *. The bedrock that underlies the upper and lower bedrock sections of side channel was the same bed that forms the overhang on the right bank of the Upper Slide * * *.*

* * * * *

4.1 Lake Creek

Based on the preliminary design drawings and the site explorations, *the three Lake Creek solutions appear to be all founded on bedrock. The bedrock at the Lake Creek sites consists of strong, massively bedded, sandstone and moderately strong to strong, thinly bedded sandstone with occasional thin, weak, siltstone beds.* These materials should provide adequate foundation support.

Rock and soil excavation will be required for the three Lake Creek solutions. The majority of the excavation will be in rock with minor soil excavation above Lake Creek Falls in the upper solution.

* * * * *

*The majority of the rock consists of strong sandstone and will require blasting to excavate. The upper six inches to one foot of rock in the areas away from the stream channel is weathered and may be rippable, depending on the type of equipment used. A blasting test was performed by [Buell] and is described in their report. Based on this test, [Buell] determined that controlled blasting is feasible for rock excavation at the site * * *.*

The greatest amount of excavation will be required in the [Falls], where a cut up to 18 feet will be necessary for the second fishway. *This entire cut will be in rock * * *. The rock exposed in the water fall face is sound, but dips outward slightly, and care should be exercised during blasting in order to prevent weakening of the surrounding rock which could lead to instability.*

* * * * *

4.3 Other Considerations

Much of the excavations for the Lake Creek solutions will be below the level of Lake Creek. Surface water drainage provisions for the excavations should be made * * *.

While we did not observe significant groundwater flow within the intact rock, groundwater seepage may occur into the excavations. The groundwater seepage may be exacerbated by the blasting, which may fracture the rock and create additional avenues for water flow * * *.

Access to the Lake Creek sites by heavy equipment will be difficult due to the terrain.

We recommend that a qualified geotechnical engineer observe the critical aspects of the construction of the fishways * * *. [Italics added.]

(AF 2 at 175-81).

40. An appendix to the report, also included in the contract, defined the term "rock" as follows:

Rock is defined as sound and solid masses of mineral matter in place and of such hardness and texture that, when it is encountered, it cannot be excavated by three passes of a ripper tooth mounted on a hydraulic excavator with a bucket curling force of at least 25,700 pounds and a stick crowd force of at least 26,100 pounds, or two passes of a single-shank ripper mounted on a Caterpillar D-8 Crawler tractor (or equivalent). [Italics added.]

(AF 2 at 192).

41. Mr. Clifford C. Knitter, an engineering geologist with a master of science degree in geology, employed by Golder, was offered, and

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qualified by the Board, as an expert. He was a principal participant in the Golder Report and co-signed it (AX 33 at 11). He admits that it described the contract site as "primarily a rock site" (Tr. 476-78, 530-31).

42. BLM omitted the signature page of the Golder Report's introductory narrative from the contract. It provided:

There are possible variations in subsurface conditions based on surficial mapping and in the groundwater conditions with time. We recommend a contingency for unanticipated conditions be included in the construction schedule and budget. Further, we recommend that we be retained to perform monitoring and testing during construction to confirm the conditions indicated by the explorations and/or provide corrective recommendations adapted to the conditions revealed during the work. [Italics added.]

(AX 33 at 11).

43. On October 28, 1988, BLM held a pre-work conference and issued the Notice to Proceed, effective October 31. MM submitted a preliminary "Construction Value and Schedule" depicting its estimated schedule and the approximate contract dollars attributable to types of work (AF 5 at 521-27). The schedule referred to highway access to the project, ramps and roadways, and other mobilization work, in the total amount of \$60,000. The access discussion was inconclusive, as project start was more than 6 months away. The schedule also included log and boulder placement in the total amount of \$28,000 (AF 5 at 525-26; AX 95; Tr. 584-85, 878-79).

III. Additional Facts Particular to IBCA 2890

Access Road/Modification 6 Claim

44. Mr. Thomas, who prepared MM's bid, read the contract to provide that he could build a temporary access road at the Falls. He elected that method, rather than a highline method, after reviewing the site and the contract's environmental strictures. An access road appeared to him to be the only reasonable and logical way to access the Falls without adversely impacting the area. See Tr. 392, 401, 405-14, 422, 455, 458-59, 548-49, 586, 591-93, 714, 994-95.

45. Fish Pro's Mr. Donahue acknowledged that the contract provided for a temporary access road, as opposed to a permanent road (Tr. 460-61).

46. Prior to construction, MM applied, on January 31, 1989, to the Oregon Department of Transportation for two permits for construction of a temporary approach road to the Lower Slide and a temporary approach road off Highway 36 to the Falls. The permits were granted on February 15, 1989, with the approaches to be removed and the permits to expire on November 1, 1989. On February 20, 1989, MM submitted the permits to BLM and COR Runge approved them on March 20, 1989 (AF 4 at 124-26; Tr. 426-27, 429).

47. On June 7, 1989, MM and BLM met and addressed MM's wish to start construction before July 1, and Falls access.

48. Regarding access, the COR's notes of the June 7 meeting record that Project Manager Thomas "explained way of gaining access to [Falls]. Contractor not sure exactly how access is gained, using fills, culverts, filter clothes [*sic*], flat cars, ramps, and unknown yet" (AF 4 at 134).

49. At the meeting, MM provided Submittal No. 11, dated June 5, 1989, "Plan to Provide Equipment to the Work Sites." Its attachments showed: an access road across a privately owned embankment above the stream from Highway 36; a ramp and landing; use of native materials for fill required for the access ramp; a culvert placed in the stream to be covered with clean boulders and rock; a notation that the material would be removed upon completion of the work and the site restored per specifications; and a notation that MM intended to use an excavator and track drills at the Falls, with no limitation as to tracked equipment. The COR testified that "he had no idea exactly what [MM] was going to use." There is no evidence that he had any concern or inquired (AF 4 at 130-33; AX 70; Tr. 881-82).

50. The COR neither formally approved nor disapproved the submittal, but Mr. Thomas believed that MM had made its plan to use a temporary access spur with various types of equipment clear (Tr. 429-32, 590). The COR stated that he was acting upon his belief that MM did not seek a reply (which MM disputes) (Tr. 883, 995). We find that, in the absence of a reply or any disapproval, MM reasonably proceeded on the premise that its access and in-stream culvert plans were acceptable (Tr. 995).

51. The COR acknowledged that, in general terms, the culvert placement at the bottom of the access ramp was essentially what MM did during construction (Tr. 948).

52. Mr. Wayne Elliott, BLM's Area Manager, acknowledged that he had had a publicist attend the June 7, 1989, meeting "to be able to gather a news story from our meeting." After the meeting, the Lake Creek Basin News reported upon the construction plans. The report included a copy of a drawing showing a construction access road to the Falls and noting that there would be temporary fill and culverts. The drawing was a copy of one originally prepared by Buell. Its use is consistent with MM's claim that it notified BLM about its intended access to the Falls and its use of fill and a culvert in the stream (AF 4 at 137; GX 15; Tr. 119, 125-26).

53. Also on June 7, 1989, BLM secured approval from ODFW for MM to begin work then, 3 weeks before the contract's July 1, 1989, date for in-stream work (AF 5 at 514; Tr. 886).

54. MM obtained approval from private landowners adjacent to the project for its access plan (AF 1 at 26, 27; GX 68).

55. MM commenced its access spur by building an approach off Highway 36. The COR was fully aware of the access spur. Mr. Thomas had several conversations with him about it (Tr. 217-21).

56. Both BLM's inspector, Mr. David Evans (Tr. 728, 730), and COR Runge, kept detailed diaries. Commencing as early as June 22, 1989,

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the diaries contain notifications by MM and observations by the COR and the inspector that MM was planning to build, and was building, a temporary access road from Highway 36 to the streambed and that it had placed a 48-inch culvert into the stream (AF 3 at 236, 238, 468-69, 472, 480).

57. It was not until June 29, 1989, that the COR discussed any permit concerns with MM. The inspector's June 29, 1989, diary notes that MM was using dump trucks to haul rock for the access road; that rock had been placed to the culvert; that he had noticed an increase in turbidity in the water; that rock fill for the road had been pushed into the river; and that this was not within the Corps and State Lands permits. The COR's diary for that day records: "Discussed access road w/ Bob T., explained to Bob T. that action was not in [the Corps or State Lands permits] & they are on their own; watch out for turbidity problem @ culvert." Thus, the COR allowed work to continue and MM was not told that it could not use rubber-tired equipment (AF 3 at 234, 466-67).

58. Inspector Evans' diary notes that at 8:10 AM on June 30, 1989: "Access road for the [Falls] still being constructed. Rock has been placed approximately 15 feet into the river. There has been work done in the river to divert the water thru the culvert. Sandbags are currently being placed to force the entire flow of the river thru the culvert" (AF 3 at 462). Mr. Evans telephoned the COR about the stated activities. Later the same morning, after Mr. Evans noticed that a considerable amount of rock had been added to the access spur, he called the COR again (Tr. 731).

59. The COR acknowledged that he had been aware of the intended use of the culvert at least as of June 29, 1989, and that he had known of the in-stream activity by early morning on Friday, June 30 (Tr. 953). Nevertheless, it was not until 11:10 AM on Friday that he verbally instructed Mr. Thomas to stop the instream work (AF 3 at 228). The COR subsequently issued a written partial suspension of work order, on the ground that MM's in-stream operations violated BLM's permits (AF 3 at 226; Tr. 954-56). The order affected only work on the Falls access; other work could continue. Mr. Thomas informed the COR that MM would work the weekend and possibly the Fourth of July (AF 3 at 228, 231; Tr. 36).

60. By the time the COR issued the partial suspend work order, the access spur, with approach built to and across the culvert, was about 90 percent complete (Tr. 223).

61. After the COR issued the order, he took immediate steps to notify the Corps, State Lands, and ODFW. He also notified the contracting officer and questioned whether he had taken the proper action. She left the decision to him. The COR also told her that the access spur would yield substantial savings to MM. In his opinion the

job had not been bid considering such a spur (AF 3 at 228-31; AF 5 at 493-94; Tr. 39).

62. On Monday, July 3, 1989, ODFW told the COR that there was minimum impact upon fish from MM's actions; it did not say whether the State Lands permit had been violated. The COR proposed a change to the permits by adding 110 c.y. of clean rock, of which 80 were in place, and 40 c.y. of sandbags, of which 20 were in place, to the allowable fill amount. An ODFW biologist opined that BLM was "nitpicking" (AF 3 at 224-25).

63. On July 5, 1989, BLM was notified that the Corps and State Lands had approved permit modification. It was noted that the fill was temporary and the modification deemed small. The COR issued a Resume Work Order stating that BLM's permits had been amended to allow the 150 c.y. of clean rock and sandbags, to be removed when the work season concluded, on or before September 15, 1989 (AF 3 at 220, 222; GX 23, 24).

64. It is clear from the record that BLM was not concerned that MM had built a temporary spur. Rather, the focus of BLM's concern was its belief that the quantities of temporary fill or rock placed in the streambed violated the Corps and State Lands permits.

65. On July 7, 1989, State Lands confirmed the permit modification, opining that the earlier permit had not authorized a road, but concluding that MM's actions had resulted from "an apparent lack of communication between the contractor and BLM;" and that no fishery impacts were likely from temporary use of the road and temporary stream diversion. The revised permit authorized the removal of up to 360 c.y. of material and placement of 150 c.y. at the Falls. Of the 150 c.y., 110 could be used for the temporary access road (AF 5 at 490-91).

66. MM did not work over the weekend. It worked Monday, July 3, but did not work on the holiday (Tr. 36).

67. By letter of August 2, 1989, MM notified the contracting officer that the partial suspension order had disrupted the project's momentum and schedule, "requiring acceleration and/or additional time." MM sought a 7-day extension (AF 1 at 18). On August 28, 1989, the contracting officer issued a final decision denying MM's request (AF 1 at 3) (MM has abandoned the extension aspect of its claim, as we discuss below).

68. After the resume work order, MM proceeded to dump fill rock into the stream bed and to place sandbags (AF 3 at 454). It drove its equipment, including rubber-tired and tracked, down the access ramp, over the culvert and onto the streambed to construct the fish ladder (Tr. 277).

69. MM used highline methods, both helicopter and cable, and conveyor belting, to deliver and remove materials to and from the Upper and Lower Slides, but used the access road to transport concrete and supplies at the Falls (Tr. 52, 694-96).

70. On August 28, 1989, the contracting officer forwarded to MM a draft contract modification, stating that, due to MM's use of the access

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road, substantial savings should accrue to BLM. She asked for MM's savings estimate (AF 5 at 423; Tr. 39, 43-44).

71. Eventually BLM provided its own estimate of savings, based upon helicopter and other highline work methods (AF 4 at 255; Tr. 44-45). By letter of March 12, 1990, MM stressed: "Our bid for the [Falls] does not include the use of a highline. We are overwhelmed by your estimate and opposite approach to the access route chosen by the Contractor which was practical and environmentally acceptable" (AF 4 at 166).

72. By letters of April 2 and 23, 1990, MM declared that it had clearly and properly notified BLM of its planned access method; and that low-water stream crossing was a "common statewide practice" (AF 4 at 112). MM reiterated that its bid had not included highline access to the Falls, because "the highline concept was not workable" (AF 4 at 76).

73. With its April 23 letter, MM submitted a March 15, 1990, report by Dallas C. Hemphill, P.E., of Logging International, Inc., concerning access alternatives for the project (AF 4 at 80; AX 78). Mr. Hemphill concluded:

2. The highline, even if technically feasible (probable, although not proven), would have had an unacceptable and illegal environmental impact on riparian vegetation, would have been impractical to operate, could have had safety problems, and would have posed a greatly increased risk of failing to meet schedule.

3. The as-built access route was practical, permitted the best chance to meet project schedule, and produced environmentally acceptable results. It was approved by the Oregon State Department of Forestry and the landowner.

(AX 78 at 1).

74. On October 4, 1990, effective August 28, 1989, the contracting officer issued her final decision asserting BLM's claim for a contract price reduction of \$37,832.40 and implemented it by unilateral modification 6 (AF 1 at 62-90; AF 2 at 5-8).

75. The contracting officer arrived at modification 6 by applying her interpretation of the contract's Value Engineering clause and reducing by 45 percent an \$80,000 savings estimate by the COR (AF 1 at 80; AF 4 at 35; Tr. 45).

76. On December 6, 1990, MM appealed (AF 1 at 211).

77. In 1991, BLM asked the Forest Service (FS) to provide its estimate concerning various claims at issue. The FS' September 27, 1991, report estimates savings to MM on account of the temporary access spur at \$61,891 (GX 27, 71).

78. There is no evidence that MM caused any environmental damage. Indeed, upon the public dedication of the project, Congressman DeFazio and a BLM spokesman praised MM's work as exceptional—a "beautiful job" and "spectacular," offering a high return on dollars invested. The Congressman stated: "We got an enhancement without any loss. I wish that all natural resources we dealt with could come out this way." BLM's counsel acknowledged that BLM does not

have any complaint about project results and the COR confirmed that MM did excellent work under difficult conditions (AX 99 B; Tr. 555-59, 864, 986-87; and see below).

IV. Additional Facts Particular To IBCA 2891

Profile Differences Claim

A. General Facts

79. On June 23, 1989, MM notified BLM about profile differences, found by MM's surveyor, Mr. Jim Peterson, from those depicted in the contract. This affected excavation and concrete quantities (AF 1 at 100; AF 5 at 436). The parties have agreed to a total of 38 c.y. of extra excavation at the Lower and Upper Slides. They have not agreed upon price per c.y., however, or upon Falls excavation quantities and price, or upon extra concrete, and price, at all three areas (AF 1 at 107; GX 28; Tr. 54, 308-09).

80. Negotiations were protracted, with MM changing its quantities and price claims frequently (AF 1 at 96-114; AF 5 at 273).

81. On December 1, 1989, the contracting officer wrote to MM that, at the Falls, it had excavated 522.54 c.y., including 15 c.y. of taper omitted from the surveyor's figures. She stated that this was 8.97 c.y. less than the 531.51 of c.y., with taper, reflected on the contract profile. BLM did not seek a price deduction (AF 1 at 103-04). A taper is for safety purposes, to impede rock from falling over the top of an unstable trench. When rock breaks cleanly, there may be no safety reason for a taper. BLM accepted the trench in the manner built, because the trench was stable (Tr. 57, 60, 384, 767).

82. The parties disputed the role of taper. MM claimed that its bid price had not considered tapered excavation, because the contract documents had indicated to it that the area would break cleanly (AF 1 at 105). BLM asserted that the contract required a tapered trench at the Falls, and that MM's bid should have included the additional controlled blasting and excavation required to form it (AF 1 at 105; see AF 5 at 271; Tr. 54-55).

83. On February 21, 1990, MM responded that BLM's "interpretation on trench excavation requiring a one on four slope in 'solid rock' * * * agrees with neither good construction practices nor our interpretation" (AF 4 at 260).

84. In fact, Mr. Peterson had started to stake the Falls for a taper, which he believed the contract required. However, MM directed him to stake for a vertical cut to be drilled and blasted, stating that, because the taper was to be backfilled and covered with concrete anyway, a vertical cut would save time and money (Tr. 57, 313-14, 320, 354-55, 382-84, 764-65).

85. Mr. Jerry R. Wallace of Landworks Northwest, Inc. (Landworks), MM's blasting subcontractor, and Landworks' chief drill operator, Mr. David McGarr, confirmed that no blasting was aimed at constructing a 1:4 taper and that MM drilled vertical walls (GX 69; Tr. 845).

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86. Inspector Evans confirmed that MM did not construct the taper, but added that it "got fairly good breakage on the neat line, and there was no need to do it" (Tr. 764, 767). He also acknowledged that Mr. Peterson did an "excellent job" of laying out project neat lines; an "excellent job on his surveying;" and was "very good" about redefining the area after drilling operations (Tr. 757-58, 767).

87. However, some taper resulted naturally from blasting (backbreak) and excavation. From visual inspection, Mr. Peterson opined that more taper had resulted naturally, and MM had been required to remove more backbreak, than called for under the contract (Tr. 321, 382-84, 764).

88. Photographs show that some trench is not tapered; some is tapered at more than a 1:4 slope (GX 49; Tr. 355-62).

89. At MM's request, Mr. Peterson recomputed Falls excavation volumes, finding that actual excavation exceeded contract planned quantities by 61.5 c.y. (AF 4 at 172; Tr. 314-15, 603).

90. Mr. Peterson superimposed a 1:4 slope upon his initial vertical cross-section measurements; he did not measure actual taper resulting from MM's operations (AF 4 at 68; Tr. 321, 325-26).

91. On October 4, 1990, the contracting officer issued her final decision on MM's profile difference claim, and implemented it by unilateral modification 7. She allowed \$11,609 for the 38 c.y. excavation increase at the Lower and Upper Falls, at a price of \$305.50 per c.y.; found a net 8.97 c.y. excavation reduction at the Falls (even acknowledging 15 c.y. of backbreak) but took no price deduction; allowed \$467.50 for 1.87 c.y. of extra concrete at the Upper Slide, at \$250 per c.y.; allowed \$1,725 for 6.9 c.y. in extra concrete at the Falls, at \$250 per c.y.; and found a \$1,304 reduction due to a 3.26 c.y. decrease in concrete at the Lower Slide, at \$400 per c.y. The net effect was to increase the contract amount by \$12,497.50 (AF 1 at 94-115; GX 31; Tr. 57-64).

92. The contracting officer largely had relied upon the calculations of Dana Cork, a BLM engineer (GX 32; GX 74; Tr. 94).

93. MM appealed on December 6, 1990 (AF 1 at 211).

94. The FS' September 27, 1991, report found about \$1,300 more due than had BLM (GX 27, 71).

95. Post-hearing, MM claims (including direct costs and burden and net of amounts paid by modification 7): \$13,820.50 for the Lower Slide; \$10,114.57 for the Upper Slide; and \$30,667.15 for the Falls,⁵ for a total of \$54,602.22. MM's claim is not based upon a per c.y.

⁵This includes \$2,800 in alleged extra costs due to a 7 c.y. increase in concrete for the cover slab required by the contract (AX 89E; Tr. 655-57). This was not included in MM's claim to the contracting officer. The Contract Disputes Act of 1978 (CDA) requires that "[a]ll claims by a contractor against the government relating to a contract shall be in writing and shall be submitted to the contracting officer for a decision." 41 U.S.C. §605(a). This is a jurisdictional prerequisite to our consideration of the claim. *Paragon Energy Corp. v. United States*, 645 F.2d 966, 967 (Ct. Cl. 1981). We find the claim for the concrete slab to be factually distinct from the other concrete claims MM submitted to the contracting officer and, thus, do not consider it. See *Blaze Construction Co., IBCA 2863, 91-3 BCA ¶24,071 at 120,502-03*.

measurement, but upon alleged total extra costs. MM claims, nonetheless, that its c.y. bid price for Lower Slide work can be extrapolated from its bid record, and that direct costs as bid were \$818 per c.y., net of burden (AX 6, 88 at 11, 89, 94; Tr. 647-57; MM reply br. at 29).

96. MM alleges that changes in weir location due to Lower Slide profile differences increased rebar costs (As Built Plan, Sheet 3; Tr. 263-66). The weight of the evidence is that minor shifting in locations was to minimize excavation and that MM's problems were due partly to inexperienced labor (AF 3 at 203, 208, 212, 214, 222). Further, the contract authorized the contracting officer to determine final weir dimensions and locations (AF 2 at 217; Tr. 905).

97. MM's claim also includes the cost of: a second excavator at the Falls, because, due to profile changes, the one excavator planned no longer could maneuver as anticipated; 24 hours of survey layout and expenses for stream diversion and safety nets; blasting expenses; and additional labor to move material from the site (AX 89B; Tr. 604-06).

B. Special Cost Findings

The Defense Contract Audit Agency (DCAA) audited MM's claims and issued a report on May 28, 1992, made part of the record. We have thoroughly reviewed the audit, the parties' submissions in response, and all other relevant materials of record. Our findings in each appeal are based upon all information submitted.

98. MM disputes the contracting officer's estimates of \$250 and \$400 per c.y. for fill and structural concrete, respectively, but has not provided probative evidence to rebut those amounts nor her allowance of 1.87 c.y. in additional concrete at the Upper Slide and her 3.26 c.y. reduction at the Lower Slide.

99. MM has successfully controverted the contracting officer's per c.y. \$305.50 excavation cost (GX 29 at 5-7). (The FS estimate for the Lower Slide was \$346.50 per c.y. (GX 27, 71)). BLM's calculations, at \$13.25/hour (GX 9 at 2), underestimated labor costs (see BLM's estimate of \$17.00/hour for the access road claim (AF 1 at 81-84)); did not clearly include all applicable indirect costs; and did not address all relevant work (AX 89, 94; Tr. 640-45, 773-75).

100. We are not satisfied with MM's calculations either, however, which contain numerous inconsistencies. However, we find merit in its claim and allow a portion of it, below.

101. In determining the per c.y. direct cost for the 38 c.y. of extra excavation at the Upper and Lower Slides, we have considered the auditor's objections to MM's accounting system and attendant difficulties in segregating extra costs from costs of required work. However, we find that certain excess direct costs can be identified and traced to invoices, time cards, and the like. Labor is categorized by equipment use and equipment operators' hours. Based upon jury verdict, discussed below, we find that the reasonable direct cost per c.y. is \$550.

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102. The parties agree that MM's jobsite overhead (JSO) pool includes \$108,184 (MM's Audit Response at 6).

103. However, the audit report concluded that some costs were unallowable per the Federal Acquisition Regulation, and that others were classified improperly as JSO instead of home office overhead (HOO). Having reviewed the evidence, including a May 13, 1993, submission by DCAA's Branch Manager of its Western Region (BLM's Reply to Audit Report, Attech. 2), we find that, except for telephone expenses, MM has failed to rebut the audit findings. With respect to \$3,998 in telephone expenses, we find that \$3,400 reasonably can be allocated to JSO and we adjust upward the audit's accepted JSO pool accordingly, for allowable JSO pool costs of \$54,357.

104. BLM asserts that the JSO rate should be 9.46 percent, and MM, 12.79 percent (MM Audit Response, Ex. A at 2). We accept the auditor's computed direct JSO base of \$538,750 (MM Audit Response, Ex. A at 1) and find that the proper JSO rate is 10.08 percent (\$54,357 divided by \$538,750).

105. The parties have agreed, and we find, that MM's HOO rate is acceptable at 7.43 percent and its profit at 10 percent (MM's Audit Response, Ex. A at 3).

106. We thus find that MM is entitled to \$13,735.66 on its claims for overexcavation and extra concrete at the Upper and Lower Slides, as follows:

Lower Slide Direct Cost	
(25 c.y. x \$550 per c.y.)	\$13,750.00
JSO at 10.08%	1,386.00
Subtotal	\$15,136.00
HOO at 7.43%	1,124.60
Subtotal	\$16,260.60
Profit at 10%	1,626.06
Subtotal	\$17,886.66
Upper Slide Direct Cost	
(12.9 c.y. x \$550 per c.y.)	\$7,095.00
JSO at 10.08%	\$715.17
Subtotal	\$7,810.17
HOO at 7.43%	580.29
Subtotal	\$8,390.46
Profit at 10%	839.04

Subtotal	\$9,229.50
Subtotal Lower and Upper Slide (\$17,886.66 + \$9,229.50)	\$27,116.16
Less Adjustments Paid Mod. 7	(11,609.00)
Adjusted Total	\$15,507.16
Less Concrete Paid Mod. 7 Upper Slide Area	(467.50)
Subtotal	\$15,039.66
Less Concrete Reduction Mod 7 Lower Slide Area	(1,304.00)
TOTAL LOWER AND UPPER SLIDE QUANTUM	\$13,735.66

107. Regarding MM's claim for additional costs of excavation and concrete due to profile differences at the Falls, we find that the contracting officer's allowance of 15 c.y. for taper was reasonable and that her other cost calculations were reasonable and supported by the record. We have considered MM's arguments, but find them unpersuasive.

V. Additional Facts Particular To IBCA 2892 Claim Related to Increased Weir and Channel Excavation Work and Decreased Boulder Work

A. General Background

108. Commencing in June, 1989, the contracting officer sought five contract changes and proposed pricing from MM: (1) deletion of the relocation and pinning work covering 52 boulders depicted on drawing 3; (2) addition of a 12-foot concrete weir at the Lower Slide (3) excavation of an entrance channel at the Falls; (4) excavation of an exit channel at the Falls; and (5) excavation of an entrance channel downstream from the Upper Slide (AF 5 at 395-402, 510).

109. On August 8, 1989, MM submitted a cost proposal for items 1-4, including a reduction of \$4,706.13 for deletion of the boulder work; addition of \$15,348 for construction of the weir; and an addition of \$5,666.15 for excavation of the Falls entrance and exit channels. It did not price item 5 (AF 5 at 474).

110. On August 15, 1989, BLM questioned the proposed boulder price reduction on the ground that MM had included \$28,000 in its value schedule at job commencement for the boulder work and placement of a log weir. BLM also thought the proposed price for the additional weir work to be inordinately high. MM responded that it would like to settle the matter. By October 11, 1989, MM had completed all work and submitted an invoice for item 5 at \$1,756.03 (AF 5 at 360-63, 459-60).

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111. Ultimately BLM offered a \$7,800 reduction for the deleted boulders and a \$7,500 addition for items 2-5. MM proposed a \$5,400 deletion and a \$9,800 increase (AF 4 at 39, 51, 65-68).

112. It developed that the item 2 weir contained about 2.72 c.y. of concrete; item 3 excavation was designed at 1.71 c.y.; item 4 excavation at 2.02 c.y.; and item 5 excavation at 1.15 c.y. (AF 1 at 129-31; Tr. 48).

113. On July 24, 1990, the contracting officer issued unilateral modification 5, effective August 1, 1989: item 1, \$10,400 reduction; item 2, \$3,550 increase; item 3, \$1,380 increase; item 4, \$940 increase; and item 5, \$605 increase, *i.e.*, a \$6,475 increase for items 2-5, but a net price decrease of \$3,925, due to item 1 (AF 2 at 9-10).⁶

114. On August 6, 1990, MM objected to the unilateral modification, and to BLM's withholding of contract funds to offset MM's alleged savings due to its use of the temporary access spur and the deletion of the boulder work. MM requested a final decision and BLM's cost estimate backing modification 5 (AF-4 at 23).

115. The contracting officer issued her final decision on October 4, 1990, sustaining modification 5, and included BLM's estimate. MM appealed on December 6, 1990 (AF 1 at 120-38, 211).

116. The FS estimated a \$16,330 deduction for item 1, at \$314 per boulder, based upon 3 labor crew-hours per boulder and its conclusion that the work was labor-intensive; a \$3,820 increase for item 2; a \$1,940 increase for item 3; a \$1,335 increase for item 4; and a \$1,010 increase for item 5, netting a larger overall deduction, \$8,225, than that of modification 5 (GX 27).

B. Particular Findings Concerning Item 1

117. BLM estimated cost savings of \$266.60 per boulder, but reduced the contract price by only \$200 per boulder (AF 1 at 127-28, 134; AF 2 at 9-10; AF 5 at 320-21).

118. On January 2, 1990, MM submitted comparative costs to BLM showing \$40 and \$50 per boulder for projects it had performed for the State of Oregon (AF 5 at 291-92). Although that work was performed mechanically, with excavators and support items such as trucks and a loader, rather than by the hand labor called for under the instant contract, MM asserted that the cost per excavator was five times the cost of one laborer, and the cost for trucks and loaders double the cost of one laborer (AF 1 at 128; AF 4 at 259).

119. BLM relied upon MM's \$28,000 value schedule, above. BLM estimated the cost of the log weir at \$2,600 and asserted that the \$25,400 balance thus reflected MM's original boulder cost estimate. MM's value schedule for the boulder and log work, which it had

⁶Mod. 5 reflects an additional decrease of \$756 for work added, then deleted before performance. This no longer is in dispute.

planned to do early, had included "up front" money, not associated with the work, but to assist with cash flow (AF 1 at 128; Tr. 712-13).

120. The COR had prepared BLM's savings estimate. At hearing he stated that he relied upon his personal experience, on-job observations, and approximate sizes and weights of the boulders, but he appeared uncertain about the basis for his estimate (Tr. 906-07). Moreover, the contracting officer and the COR did not have much experience with estimating costs of boulder movement (AF 4 at 66).

121. On the job, with 2 laborers, MM had moved at least one boulder in less than an hour (AF 4 at 67; Tr. 993-94).

122. MM's post-hearing calculation of the proper deduction for the item 1 boulder work is \$6,616.08. This includes direct costs of \$2,196.56 for 2 man hours at \$20.04 per hour (104 hours) and the winch and supplies to move and place each boulder; \$1,867.18 for 57.2 hours of labor and the supplies and equipment to drill and subsurface the boulders; and \$856.05 for 13 hours of labor, plus material and supplies, to mix and place epoxy; plus burden. MM asserts that its estimate reflects its bid cost of labor and equipment. Because the contracting officer deducted \$10,400, MM seeks \$3,783.92 (AX 93-A; Tr. 993-94; MM's post-hearing br. at 51-52).

123. MM's estimate omits work (AF 4 at 67) and includes only 183.57 pounds of rebar, while the contract required considerably more (absent a contracting officer-approved alternative) (AF 2 at 227).

124. We find both BLM's and MM's estimates to be flawed. By jury verdict, we find that \$8,000 is a reasonable approximation of what the deleted boulder work would have cost MM to perform; and that MM, therefore, is entitled to \$2,400 (\$10,400-\$8,000) on account of BLM's excessive deduction.

C. Particular Findings Concerning Items 2-5

125. For item 2, MM now presents its costs and burden at \$8,168.56 and seeks \$4,618.56 in addition to the \$3,550 added by modification 5 (MM's post-hearing br. at 53).

126. For item 3, MM now claims \$3,462.52 in costs and burden and seeks \$2,082.52 in addition to the \$1,380.00 added by modification 5 (MM post-hearing br. at 54).

127. For item 4, MM now claims \$2,946.24 in costs and burden and seeks \$2,006.24 in addition to the \$940 added by modification 5 (MM post-hearing br. at 55).

128. For item 5, MM now claims \$1,994.02 in costs and burden and seeks \$1,389.02 in addition to the \$605 added by modification 5 (MM post-hearing br. at 56).

129. In reaching her cost estimate for items 2-5, the contracting officer relied chiefly upon the COR's and inspector's diaries (AF 4 at 67). BLM did not use information from MM's diaries. The parties' disparate labor hour figures are due in part to the fact that MM worked on weekends when neither the COR nor the inspector were present (AF 4 at 67).

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130. The DCAA audit reports that MM's claimed costs are insufficiently linked to its accounting system (which the auditor finds limited in any event), but are based, at least in part, upon individual checks, invoices and certified payrolls. MM has challenged the report. Because the audit was admitted post-hearing, we give it somewhat less weight than we otherwise might. Moreover, our review of the evidence persuades us that items 2-5 cost more than modification 5 allowed. By jury verdict, and based upon the data MM has presented, we find that \$8,300 is a reasonable approximation of the costs of the added work, and that MM is entitled to \$1,825 (\$8,300-\$6,475) in addition to that allowed by modification 5 for items 2-5.

In sum, MM is entitled to \$4,225 (\$2,400 + \$1,825) on its IBCA 2892 claims.

VI. Additional Facts Particular To IBCA 2893 Differing Site Conditions Claim

131. Mr. Knitter acknowledged that the omission of the warnings in the Golder Report's last page could have affected bidders' pricing and Mr. Thomas so testified (Tr. 499-500, 614).

132. Mr. Thomas had no geology training, but had considerable experience with rock excavation and blasting (Tr. 387).

133. It was not common practice for bidders to secure their own geotechnical evaluations, due to time constraints and the considerable expense involved (Tr. 612-13).

134. On July 13, 1989, MM changed its blasting pattern because it had encountered soft mud seams, which absorbed blast, dissipated it, and diminished its effectiveness. Many of the areas had to be reshot three times (AF 3 at 422; Tr. 623, 790, 854).

135. On July 20, 1989, MM encountered a large void, which slowed its production (AF 3 at 427).

136. The inspector recorded that blaster Wallace was having trouble securing materials from MM. This was only a temporary impediment, and when Mr. Wallace consulted Mr. Thomas, he responded immediately (AF 3 at 426-27; Tr. 831, 838). It is apparent that some perceived problems originated with personality conflicts among some of BLM's personnel and the blaster, on the one hand, and one or more of MM's supervisors, on the other. We find that alleged management problems were greatly overshadowed by the actual physical difficulties at the site.

137. Mr. Wallace developed a subdrilling blasting plan with which MM concurred. Subdrilling to achieve grade in rock is standard industry practice (GX 69; Tr. 687-88, 843).

138. The mud seams repeatedly caused drills to plug, requiring replacement or extra time (Tr. 240, 628).

139. On July 26, 1989, MM notified the contracting officer in writing that it had encountered differing site conditions in the form of "clay and/or mud seams and bottom" (AF 5 at 484-85; Tr. 27, 65).

140. On August 4, 1989, MM sought a 14-day extension, with excess costs to be determined, due to "mud, clay, rotten rock seams, and a soft clay bottom." MM enclosed Mr. Peterson's figures concerning the extent of mud seams and clay; an evaluation from Mr. Charles R. Lane, vice president of Northwest Testing Laboratories (Northwest), who had inspected the site on July 31 and reviewed the portions of the Golder Report contained in the contract; and a blasting report from Landworks (AF 5 at 477-81).

141. Mr. Lane is a registered, senior, civil engineer with over 44 years' experience, over 35 in geotechnical work in the study of soils and foundation conditions. He was offered, and qualified by the Board, as an expert (Tr. 178-81).

142. Mr. Lane's August 4, 1989, report noted:

The [Golder Report] implies that the contractor will encounter massive bedded sandstone underlain by thin sandstone beds. The bedding plains were expected to be tight and contained no infilling.

During our inspection of July 31, 1989, we observed a number of seams within trench excavation through the sandstone beds, which were very weathered soft and several feet in thickness * * *.

It is well established that soft seams within units presents special difficulties in blasting of this type of rock (?) formation, thus additional expenses.

(AF 5 at 480).

143. Landworks' report, dated July 31, 1989, stated:

* * * I am reiterating the *several problems* associated with blasting in the bedded sandstone layers * * *

Due to the uniqueness of this project and the restrictions placed upon it by the Owner (with regards to overbreak and environmental damage), *exceptional* solutions were required * * *

The geology of the rock itself was a critical factor. It included a massive, strong layer of sandstone underlain by softer layers of siltstone which contained stretches of a soft, almost mud-like layer. Finally, especially near the lower end, there is a void filled with water (see drill log).

* * * with this Lake Creek rock formation being *softer at the bottom than at the top and of dissimilar materials throughout*, these [blasting] shock waves are transmitted at different velocities. Because the softer materials transmit slower than do the harder rock, they have tendency to absorb the magnitude of the explosion--thereby creating a special blasting situation.

* * * * * * *

Additionally, the open air/water seams created another potential endangerment. Water is an excellent transmitter of shock waves along an uninterrupted layer. *These water seams ran close to horizontal* and when the first holes were detonated the [shock] wave was rapidly conveyed laterally down the trench line risking possible disruption of the powder column of the later delay charges * * *. [Italics added.]

(AF 5 at 481).

144. Mr. Wallace authored Landworks' report. He had no financial interest that would cause him to exaggerate because he worked on a time and materials basis (Tr. 829, 865).

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145. Mr. Wallace testified for BLM at hearing, whose personnel clearly held him in high regard. BLM described him and his chief driller, Mr. McGarr, as very experienced and very good (Tr. 792). He was not offered as an expert witness, however. BLM and Mr. Wallace attempted to diminish the import of his July 31, 1989, report, including his use of the phrase "almost mud-like" and other aspects (Tr. 829-38).

146. Mr. Wallace had visited the site in Spring, 1989, and had read the contract plans before undertaking his subcontract. He had not taken part in MM's bidding evaluation (Tr. 684-85, 827, 859). He testified at hearing, that "in general" the plans depicted what he had encountered (Tr. 859). Upon further questioning, he acknowledged:

I would be forced to admit that because of my experience in the industry that *I adopt a worse-case scenario*, and the conditions could have been worse, but they were—I will be straightforward in saying that *they were very bad conditions*. I felt that they were within the scope of the job. I felt that although as bad as they were, they were there. *By no means do I mean to minimize how tough a job it was. This was an extremely technical and tough job.* I didn't think that it was something that couldn't be handled though. [Italics added.]

(Tr. 864).

147. Mr. Wallace also acknowledged that it was not reasonable to expect the voids encountered at trench bottom (Tr. 850).

148. Mr. Wallace's testimony persuaded the Board that he was, indeed, exceptionally knowledgeable and experienced, but not that the site conditions were reflected in the contract.

149. Although he felt that MM should have anticipated the conditions, the COR also acknowledged that the job was difficult and that MM did excellent work:

It was a tough job. There's no doubt about that. But going into it up front, you should recognize that and make adjustments in your bid to accommodate that. I mean, it was no cakewalk to get down in there. It wasn't really the best working conditions, and it was a tough job. [MM] did an excellent job on the construction. In fact, you know, you really couldn't have expected a better project. They did excellent work * * *.

(Tr. 986-87).

150. The COR's weekly progress report dated June 16, 1989, noted a "slight" problem with a "mud lense" in test blasting. His daily report for June 16, however, stated that "a mud seam in the C-Weir absorbed much of the [blast] energy causing surface breakage to be null." The COR's August 1, 1989, diary recorded a soft area in the Falls trench for which no bedrock bottom had yet been found (AF 3 at 168; 283, 488).

151. On August 7, 1989, after MM had claimed differing site conditions, the inspector opined to the contracting officer that some of MM's extra excavation and costs resulted from inexperienced labor and poor crew and subcontractor supervision (AF 3 at 400). On August 9, 1989, the COR recorded hand-excavation below grade in an already overexcavated zone (AF 3 at 150-51).

152. The inspector said that he had informed MM that the blasting plan contained too much subdrilling. He attributed problems to that, or to inexperienced drillers who did not clean their boreholes often enough (Tr. 745, 752, 756, 791). At the same time, he highly praised blaster Wallace and his chief driller, Mr. McGarr, and stated that he did not have a concern during the project about grade control or drill hole depth (Tr. 819-20).

153. Landwork's crew, including Mr. McGarr, drilled at the Falls; MM's crew drilled at the Lower Slide (Tr. 686). In Mr. Wallace's experience, although he did not observe all drilling, only one of MM's operators had a problem due to inexperience, which he corrected upon instruction from Mr. Wallace. Mr. Wallace acknowledged that the problem had stemmed from the mud-like conditions as well as from inexperience (Tr. 855-56).

154. Mr. Wallace had no concern about grade control; the one problem he recalled was due to the "mud" (Tr. 842, 856).

155. Due to these apparent conflicts, and to inspector Evans' and the COR's sometimes equivocal manner of responding to questions at hearing, we give their criticisms of MM some, but not great, weight.

156. Inspector Evans admits that Mr. Peterson is an excellent surveyor. We found Mr. Peterson to be highly credible. He was on site during most of the project. After all of the excavation was completed, he profiled the trench bottom to record the overexcavation that he attributed to geological problems at the site. He identified the problems as soft seams that would break up and wash away, and that had to be eliminated before construction could begin. He measured the depth of the areas that "were obviously not solid consolidated rock" (Tr. 321-22). The maximum depth of such a seam was about 2 feet (GX 34; Tr. 66).

157. While the plans depicted only about 2.1 c.y. of backfill, 68.4 c.y. were required. Mr. Peterson and Mr. Thomas attributed the extra excavation to the soft seams, which rendered the area unstable (GX 34; Tr. 324, 372, 624-25).

158. In response to MM's request for a 14-day extension, BLM asked that geologist Kristie H. Ward from its Eugene District office visit the site. She had not been there previously during construction. She visited the site on August 10, 1989, and concluded that the Golder Report reflected the site conditions. She advised the contracting officer that "to further support our case" BLM should "bring Golder in". She submitted a declaration, but did not appear at hearing (AF 5 at 469-71; GX 73; Tr. 65-66).

159. On August 14, 1989, Golder Report signatory, Mr. Knitter, visited the site with Ms. Ward (GX 73; Tr. 478). By that time, excavation had been completed and the trench floor covered with concrete. The walls still were exposed. Mr. Knitter's August 30, 1989, report opined that the site conditions were consistent with the Golder Report (AF 5 at 413-17).

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160. At hearing, albeit describing it as a "slight deviation," Mr. Knitter acknowledged that: "some of the material exposed in the excavation was a little weaker than what I would have expected to have seen based on exposures on the face. The silty sandstone layers were a weaker rock than I would have expected to see there" (Tr. 481).

161. Mr. Knitter also admitted that he had expected weak rock that he had observed at the waterfall face to improve and become harder, further in, but that it had not improved (Tr. 521-22).

162. When Mr. Knitter had performed his studies for the Golder Report, in October, 1987, water volume in the stream had been low. He had never been at the site during the Spring, the time of year when the pre-bid tour occurred, and water levels were high (Tr. 509-10, 530, 546, 607-08).

163. We find that Mr. Knitter's testimony suffered from speculation (*see, e.g.*, Tr. 484-87, 511-12), and from his obvious bias as principal author of the Golder Report, and do not accord it great weight.

164. BLM attributes some of MM's problems to power washing, but the contract required that boulders, and existing concrete surfaces to be in contact with new concrete, be cleaned by a pressure washer capable of producing 2000 PSI at the nozzle (AF 2 at 198). MM used a 1½-inch hose to attempt to reduce the negative effect of high pressure water upon the soft-seamed rock (AX 99B).

165. Moreover, even after Mr. Thomas informed the COR that washing was causing trouble with the siltstone rock layers, the COR stressed that all rock was to be washed before concrete was poured (AF 3 at 121).

166. MM's supervisor was aware that boulders had to be power-washed, but the COR and the inspector directed him to power wash "everything" including the exposed cut areas and the excavated trench. This created a "slurry" when it hit the mud seams, weakened them, and contaminated the site. MM then was directed to re-wash (Tr. 300-01).

167. Mr. Thomas' August 24, 1989, letter to the contracting officer reported:

Seams of foreign (sic) material in the trench have caused extraordinary time, effort, and cost to clean up for placing concrete in the walls and resting areas.

The process is to shovel out rock and dirt, wash with fire hose, power wash, blow out with air, vacuum residue, and pump, the water out.

The seams of clay or rotten rock during this process will stay but generally will ravel off into the wall form zone requiring the contractor to do one or all of the above steps, generally more than twice. This date we have been required to stop placing forms and reclean three times today.

(AX 41).

168. On October 10, 1989, MM's supervisor recorded:

No matter how deep or what spacing the [drill holes for blasting] were, the shot went to and followed the same mud seam.

Near the end of digging, the Inspectors tested back into the rock seams and had us wash the debris and soft spots out with our 2000# pressure washer.

They would take rebar and poke it into cracks and on the sides and bottom and then have us wash again and again and again. Every time we pressure washed, it would make a slurry of a mud type which would contaminate the rest of the weirs and bottom of the slide area and then we had to wash again. I think we washed 6 or 7 times with high pressure and 6 or 7 with our 2" low pressure pumps.

(AX 26). The slurry forced MM to construct a sandbag dike and to pump the contaminated water to a disposal site so that it would not enter the stream (*Id.*; Tr. 261).

169. The Board viewed MM's video of the construction work, in conjunction with Mr. Thomas' testimony, and found the video to be a compelling demonstration of the "muddy" or unduly soft seams that caused MM so much difficulty (AX 99B; Tr. 534-53).

170. Testimony from one of MM's excavator operators, Mr. James J. Godfrey, confirmed extensive problems with mud layers. Had the Falls been a normal rock excavation job it would have taken a week or less to conclude but, due to the problems encountered, it took closer to a month (Tr. 564-70).

171. In 1989, during construction, MM continued to provide information as to the extent of the mud and rotten rock layers and associated time and costs and BLM continued to dispute its claim (AF 5 at 381, 425).

172. In March, 1990, expert Lane submitted another report to MM, concluding that a differing site condition had been encountered subsurface; the contract documents, including the Golder Report, would not lead a prudent contractor to suspect that highly weathered sandstone seams, "near mud in character," would be encountered; and the highly weathered seams would cause overbreak and poor blasting characteristics, increasing the time and cost of the work (AF 4 at 108-09).

173. At hearing, Mr. Lane stated that the mud seams would not have been predictable absent diamond core borings, which BLM should have conducted (Tr. 186-88). Mr. Knitter confirmed that, based upon what Golder considered to be "excellent exposures of the bedrock and other geological units," and due to difficult access problems, Golder had not conducted any subsurface borings (Tr. 479).

174. By final decision of October 4, 1990, the contracting officer denied MM's claim; it appealed on December 6, 1990 (AF 1 at 140-63, 211).

175. Mr. Herbert G. Schlicker, a consulting geologist with a master of science degree in geology and 42 years' experience with the geology of Northwest Oregon, was offered, and admitted by the Board, as an expert in pertinent local geology. He reviewed the Buell Report and the contract, including the Golder Report. Although he did not visit the site during construction (as he had not yet been retained), he had been at the site previously and had reviewed it as a geologist. He also viewed MM's construction video. Mr. Schlicker's April 3, 1991, report and his

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expert testimony concluded that there were Type I and Type II differing site conditions resulting in extra costs (AX 35; Tr. 138-78).

176. Mr. Schlicker's report stated:

No place within the [contract] documents was there a reference to a material other than rock. The material referred to as "hard sandstone", "soft sandstone", "moderately soft sandstone", "shale", "thin-bedded shale", and "thin-bedded sandstone" all refer to rock in the proper geologic terms. The mention of "hard massive layers of sandstone underlain by softer, erodible shale", still refers to competent rock.

(AX 35). In brief, Mr. Schlicker's testimony was that a "siltstone seam" was "fine-grained sedimentary rock composed of silt," which could have thin to very thin layers, but was nonetheless stone; a "mud seam" was "a layer of mud," probably surrounding fragments of harder rock, "a mixture of silt, sand and clay," but it was not stone; there was no reference to "mud" seams in the contract documents; yet "mud" or "clay" seams existed within the sandstone beds and affected three-fourths of the site, based upon his review of Mr. Peterson's survey profile (GX 34; Tr. 146, 154-55, 162).

177. Mr. Schlicker acknowledged that indentures in the site outcroppings, especially at the waterfall face, would indicate sandstone and siltstone layers, but normally such layers improve and get harder further into the rock (Tr. 150-51). Mr. Knitter's testimony to the same effect (above) confirmed this conclusion.

178. Mr. Schlicker was positive that it was not possible that what MM described as mud seams were actually sandstone or siltstone layers broken down or eroded as a result of drilling, blasting, fire hose washing, or excavation activities (Tr. 158).

179. Mr. Schlicker concluded that only subsurface, seismic or drilling investigations, which were not done by BLM, could have determined the adequacy of the subsurface material at the site (AX 35; Tr. 169, 175).

180. Although there were aspects of expert Schlicker's testimony that we did not find persuasive, as a whole, he was more persuasive than expert Knitter, and convinced the Board, in conjunction with expert Lane's report and testimony, and the other testimony and documents of record, that MM encountered, and was damaged by, Type I differing site conditions.

181. Mr. Thomas calculated that about 53.5 percent of the Lower Slide work, and about 19 percent of the excavation and 41.4 percent of the concrete structure work at the Falls, was extra work due to the differing site conditions (AX 94).

182. MM claims \$9,811.76 in extra direct costs at the Lower Slide, and \$45,429.28 in extra direct costs at the Falls; plus JSO at 14.9 percent, HOO at 6.4 percent, and profit at 10 percent, for each site; for a total differing site condition claim of \$74,287.59 (MM post-hearing br. at 49).

183. Based upon jury verdict, discussed below, we find that MM is entitled to \$47,427.68 on its differing site conditions claim, as follows:

Lower Slide Direct Cost	
(\$9,811.76 x 66%)	\$6,475.76
JSO at 10.08%	652.75
Subtotal	\$7,128.51
HOO at 7.43%	529.64
Subtotal	\$7,658.15
Profit at 10%	765.81
Total Lower Slide	\$8,423.96
Falls Direct Cost.	
Excav. (\$25,420.10 x 66%)	\$16,777.26
Conc. (\$20,009.18 x 66%)	13,206.05
Subtotal	\$29,983.31
JSO at 10.08%	3,022.31
Subtotal	\$33,005.62
HOO at 7.43%	2,452.31
Subtotal	\$35,457.93
Profit at 10%	3,545.79
Total Falls	\$39,003.72
Total Lower Slide	\$8,423.96
Total Falls	\$39,003.72
Grand total	\$47,427.68

VII. Additional Facts Particular to IBCA 2894 Acceleration Claim and IBCA 2895 Impact Claim

184. On July 26, 1989, MM notified the contracting officer of various problems which would result in "acceleration and/or additional time and cost." The contracting officer responded that she was unable to determine whether additional time was warranted until she was provided more specific information, and advised MM that its in-stream work had to be completed by September 15, 1989, the contract due date. Thereafter, MM requested a 14-day extension due to the mud seam problems. On August 8, 1989, MM notified the contracting officer that, pending a decision on its extension requests, it had added personnel, equipment, and work time (AF 5 at 475, 477-78, 482-85).

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185. On August 10, 1989, the contracting officer visited the site and inquired whether in-stream work would be completed by September 15. Mr. Thomas was pessimistic. On August 15, 1989, the contracting officer issued a cure notice, giving MM had 10 days to show substantial progress evidencing that in-stream work would be completed by September 15. She also requested a revised work schedule (AF 5 at 462-64).

186. By letter of August 15, 1989, MM again requested an extension to October 5, 1989, and stated that the changed conditions and suspension of work, without any time extension, had forced MM to accelerate (AF 5 at 457-58).

187. On August 24, 1989, MM notified the contracting officer that the mud seams had caused extraordinary time, effort, and cost (AF 5 at 437).

188. ODFW had chosen the period for in-stream work, from July 1 to September 15, to protect fish and wildlife. As noted, the contract provided that BLM might be able to obtain earlier entry or extensions, from State Lands, in consultation with ODFW, depending upon climatic conditions and stream flows (AF 2 at 146; GX 61; Tr. 25).

189. When MM sought to secure an extension directly, it was informed that it was BLM's responsibility. BLM could not let MM know until the State could evaluate climatic conditions. Because MM did not know whether an extension would be granted, and because BLM had issued the cure notice, MM worked overtime (Tr. 83-84, 128, 672, 696, 706).

190. MM's labor hours increased on about August 7; peaked on August 15; then declined (GX 42, 43). MM asserts that the decline was due to the conclusion of labor intensive tasks on the Upper and Lower Slides and notes that 683 overtime hours were reported for the weeks ending August 19 through September 15 (AX 84 at 9-11; MM reply br. at 49).

191. At 9 PM on September 13, 1989, ODFW notified BLM that MM's in-stream work could extend to September 22, 1989, and BLM so notified MM on September 14 (AF 5 at 378, 384).

192. On September 22 BLM notified MM that ODFW had granted an additional extension, to September 29 (AF 5 at 376; Tr. 128).

193. At project outset, MM had requested permission to enter the stream early. On June 7, 1989, ODFW approval was confirmed, but MM did not start in-stream work until June 15 (AF 5 at 514; Tr. 25, 26).

194. MM thus was granted additional time for in-stream work of 23 days before the July 1 contract date, and an additional 14 days after the contract's September 15, 1989, closure date, for a total of 37 extra days.

195. By letter of October 6, 1989, MM notified the contracting officer that in-stream work had been substantially complete as of September

14, with the exception of boulder placement and access removal, completed on September 22, and that all other work was completed on October 2, 1989 (AF 5 at 366).

196. On August 3, 1990, MM submitted a claim for constructive acceleration in the amount of \$22,541.78, due to "government actions" in failing timely to extend the contract schedule for excusable delays (AF 4 at 27-32).

197. In her October 4, 1990, final decision, the contracting officer denied MM's acceleration claim; MM appealed on December 6, 1990 (AF 1 at 165-78, 211).

198. At hearing, MM merged its acceleration claim with its impact claim (IBCA 2895), because the only definable alleged impact costs were overtime labor hours (See AX 91; Tr. 670).

Because we deny these claims upon legal grounds, below, we make no further findings regarding them.

Discussion

IBCA 2890

[1] The contracting officer found that MM had incurred \$37,832.40 in savings due to its purportedly unauthorized use at the Falls of a temporary access spur, rather than allegedly contract-required highline access methods. By unilateral modification 6, she adjusted the contract price downward accordingly. BLM bears the burden of proof that the price reduction was warranted. See *Nager Electric Co. v. United States* 442 F.2d. 936, 946 (Ct. Cl. 1971); *J. S. Alberici Construction Co.*, GSBICA No. 11024, 91-3 BCA ¶ 24,205 at 121,076.

In fact, BLM's focus during the project was not upon MM's construction and use of the temporary spur, but rather upon BLM's concern that fill to be placed in the stream would exceed the amount specified in BLM's State Lands and Corps permits (Finding of Fact (FF) 64). The record is unclear as to whether BLM properly calculated the original permit quantities, but it is clear that the contract provided that the amounts were estimates for permit application purposes only; that the contractor was to determine actual quantities; and that "modification to the permit *will* be performed by the BLM" (FF 14). It is also apparent that State Lands and the Corps were not particularly concerned about the change in permit amount; they rapidly authorized amendment (FF 62, 65).

[2] Regarding BLM's belated contention that the contract prohibited the construction and use of a temporary access road at the Falls, we noted recently in *Hardrives*, IBCA 2319, *et al.*, 1993 IBCA LEXIS 4 (August 4, 1993) that it is elementary that:

Contract interpretation begins with the plain language of the agreement. * * *
"[P]rovisions of a contract must be so construed as to effectuate its spirit and purpose * * * an interpretation which gives a reasonable meaning to all of its parts will be preferred to one which leaves a portion of it useless, inexplicable, inoperative, void, insignificant, meaningless, superfluous, or achieves a weird and whimsical result."
[Citations omitted.]

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See also *Gould, Inc. v. United States*, 935 F.2d 1271, 1274 (Fed. Cir. 1991). When we read the contract to harmonize, and give a reasonable meaning to all of its parts, it is apparent that its general provisions and specifications—and a figure included in the specifications—specifically provide for temporary access roads.

Under the Operations and Storage Areas clause, the contractor was to “use only established roadways, or use temporary roadways constructed by the Contractor when and as authorized by the Contracting Officer” (FF 22). The Project/Site Conditions clause provided that access to the Falls was to be by track equipment and highline and that “Figure 1 shows the potential points of access to the construction area” (FF 26).

“Figure 1” showed two potential alternative access roads, marked with dotted lines and described as “Alternate Access (to be approved by BLM) for Tracked Equipment” (FF 27). The Project Conditions clause provided that access locations, as shown on the drawings, were among areas that could be cleared and grubbed, and that access roads were not to be built *unless indicated on the drawings* or the contracting officer gave written approval (FF 28). The Project Site Conditions clause discussed the stabilization and closure of access roads upon project completion (FF 32).

Thus, it is clear that the contract unambiguously allowed for the construction and use of a temporary access spur. As we noted in *Hardrives, supra*, “in order for a contract to be ambiguous, it must be reasonably susceptible of more than one interpretation” (italics in original) (citing *Edward R. Marden Corp. v. United States*, 803 F.2d 701, 705 (Fed. Cir. 1986)). BLM’s interpretation of the contract as entirely disallowing construction and use of a temporary access road to the Falls is unreasonable.

BLM’s arguments rest in part upon its Management and Environmental Assessment Plans and its design contract with Fish Pro. Although the Plans provided that no roads or “new” trails would be needed, both included an estimate for the cost of an access road (FF 3, 4). Therefore, the reference to “no roads” logically could be interpreted to mean “no new permanent roads.” Indeed, the Fish Pro contract merely provided that no new access roads were to be constructed without the contracting officer’s authorization (FF 5). Regardless, neither the Plans nor the Fish Pro contract were part of MM’s contract with BLM.

BLM also cites its application for the State Lands and Corps permits, which, along with the permits, ultimately was included in the solicitation package. MM was not a party to those documents, and only the application states that “no roads are to be built” (FF 9). The contract’s specific provisions allowing for access roads, however, belie any interpretation other than that the reference, once more, logically was to permanent roads. In fact, the president of Fish Pro, which

drafted the specifications, acknowledged that the contract provided for a temporary access road, as opposed to a permanent road (FF 45).

[3] Further, we have found that MM reasonably concluded that BLM had approved its temporary access spur and in-stream work plans, based upon the following: MM had (1) informed the COR about its intent to construct the temporary road well in advance of construction; (2) sought appropriate State permits for approach roads for the Lower Slide and Falls, which were granted on condition that the approaches be removed upon completion; (3) secured the COR's approval of the permits in March, 1989; and (4) met with BLM on June 7, 1989, addressed Falls access, and delivered Submittal No. 11, dated June 5, 1989, "Plan to Provide Equipment to the Work Sites," with attachments showing: an access road across a privately owned embankment above the stream from Highway 36; a ramp and landing; use of native materials for fill required for the access ramp; a culvert placed in the stream to be covered with clean boulders and rock; a notation that the material would be removed upon completion of the work and the site restored per specifications; and a notation that MM intended to use an excavator and track drills at the Falls, with no limitation as to tracked equipment (FF 46-50).

MM's notice to BLM of its access and in-stream work plans was confirmed by a press report of the June 7 meeting, which included a copy of a drawing showing a construction access road to the Falls and noted that there would be temporary fill and culverts (FF 52). The COR acknowledged that, in general terms, the culvert placement at the bottom of the access ramp was essentially what MM did during construction (FF 51).

Moreover, BLM's inspector and the COR were present daily, communicating with MM about the access spur, and observing its construction, including use of rubber-tired, as well as tracked equipment. Even after the COR became concerned about some turbidity in the stream, he did not instruct MM to stop work. By the time the COR issued the partial suspend work order, the access spur, with approach built to and across the culvert, was about 90 percent complete. Even after MM was allowed to resume work, there is no evidence that the COR, the inspector, or the contracting officer, ever disallowed the use of the rubber-tired equipment (FF 54-60).

That an inspector is present during work, and does not object to it contemporaneously, is evidence that a contractor's position is reasonable. *White Buffalo Construction*, IBCA Nos. 2166, 2173, 91-1 BCA ¶ 23,540 at 118,048. Here, not only BLM's inspector, but its COR, were present while MM was constructing the temporary access spur. Further, the court of appeals has held, albeit in a different context, that "[w]hen an official of the contracting agency is not the contracting officer, but has been sent by the contracting officer for the express purpose of giving guidance in connection with the contract, the contractor is justified in relying on his representations." *Max Drill, Inc. v. United States*, 427 F.2d 1233, 1243 (Ct. Cl. 1970).

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In this case, the COR was authorized under the contract to clarify technical requirements, and to review and approve work clearly within the scope of work. He was not authorized to issue changes under the Changes clause or to modify the scope of work (FF 16), but approval of the temporary access spur, envisioned as a possibility by the contract, did not constitute such a change or modification. Indeed, the contracting officer delegated the matter of the access spur and in-stream permit requirements to the COR, even after he notified her about his concerns pertaining to permit violation (FF 61). When the contracting officer's authorized representative and inspector impliedly approve a contractor's interpretation of a contract, as here, the contractor is justified in relying upon that approval. *WRB Corp. v. United States*, 183 Ct. Cl. 409, 449-50 (1968).

We perceive no windfall to MM because its bid was not based upon use of a highline access method at the Falls (FF 71, 72) and BLM has failed to meet its burden to prove the reduction justified.

Decision

Accordingly, IBCA 2890 is sustained in the amount of \$37,832.40.

IBCA-2891

[4] In this quantum dispute, MM seeks costs, in addition to those awarded by unilateral modification 7, for extra excavation and concrete resulting from acknowledged site profile differences from those depicted in the contract. Our fact findings, including special cost findings, are set forth in detail above. As we noted, we used a jury verdict approach to arrive at a \$550 per c.y. direct cost amount for 38 c.y. of extra excavation at the Upper and Lower Slides.

A jury verdict approach may be used when (1) clear proof of injury exists; (2) there is no more reliable method for computing damages; and (3) the evidence is sufficient to make a fair and reasonable approximation of the damages. *Dawco Construction, Inc. v. United States*, 930 F.2d 872, 880 (Fed. Cir. 1991); *B&M Roofing & Painting Co.*, ASBCA No. 44323, 93-1 BCA ¶ 25,504 at 127,033.

BLM conceded "injury." We found that there was sufficient data in the record, from BLM and from MM, to permit us to make a fair judgment as to MM's resulting extra direct costs; and there was no more reliable method of doing so.

Decision

Accordingly, as presented in our fact findings, IBCA 2891 is sustained in the amount of \$13,735.66 and is otherwise denied.

IBCA 2892

[5] Again, for this quantum dispute over unilateral modification 5, which increased the contract amount due to additional excavation and

weir work, but reduced it due to the deletion of boulder work—for an overall net price reduction—our findings are detailed above.

As to the boulders, when a contracting officer issues a unilateral change order deleting work and reducing the contract price, the Government bears the burden to prove that the amount of the adjustment is reasonable. *Nager Electric, supra*; *Zurfluh Enterprises, Inc.*, VABCA No. 1941, 85-1 ¶ 17,789 at 88,908. As to the appropriate upward adjustment for the contract changes which added more work, MM bears the burden of proof. *Lemar Construction Co.*, ASBCA Nos. 31161, 31719, 88-1 BCA ¶ 20,429 at 103,332. With respect to the deductive change, and the additive changes, the measure of adjustment is the difference between the reasonable cost to the contractor of performing without the change and performing with it. *Id.*; *Zurfluh; Celesco Industries, Inc.*, ASBCA No. 22251, 79-1 BCA ¶ 13,604 at 66,683.

As we explained, BLM did not persuade us that the full amount of its deletion was reasonable and properly based. BLM's efforts at proof failed in part because they were speculative, or not adequately based upon the job at hand and MM's actual experience.

At the same time, MM did not persuade us that it was entitled to the full upward adjustment it sought. It is not required to prove the amount of its damages "with absolute certainty or mathematical exactitude * * * It is sufficient if [it] furnishes the court with a reasonable basis for computation, even though the result is only approximate." *Wunderlich Contracting Co. v. United States*, 351 F.2d 956, 968 (1965) (citations omitted). It must do more than offer conclusory evidence, or evidence based solely upon speculative estimates, though. *Id.*; *Lemar, supra*.

MM's quantum proof, including in this appeal and others, was far from ideal. That proof was hampered by a succession of changes in the amounts claimed. However, MM's proof eventually improved after it acquired counsel, and it was sufficiently grounded in actual time and costs, and in credible testimony, to form a basis for recovery.

Thus, once more, with respect to each adjustment, we resorted to a jury verdict, because liability was not at issue; there was adequate data in the record to enable us reach such a verdict; and there was no more reliable method.

Decision

Accordingly, as presented in our fact findings, IBCA 2892 is sustained in the total amount of \$4,225 and is otherwise denied.

IBCA 2893

[6] Among alternative arguments, MM seeks an equitable adjustment based upon paragraph (a)(1) of the contract's Differing Site Conditions clause, due to the presence of clay, mud seams, or rotten seams at the Lower Slide and Falls, contrary to contract indications.

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Because we find for MM on this ground, we do not reach its other theories.

The contract's Differing Site Conditions clause provides in pertinent part, that "(a) [t]he 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 [the] contract" (FF 19). If the contractor establishes such a "Type I" differing site condition, it may be entitled to an equitable adjustment. The Federal Circuit has summarized the proof required:

[T]he contractor must prove, by a preponderance of the evidence, "that the conditions 'indicated' in the contract differ materially from those it encounters during performance." * * * The conditions actually encountered must have been reasonably unforeseeable based on all the information available to the contractor at the time of bidding. * * * The contractor also must show that it reasonably relied upon its interpretation of the contract and contract-related documents and that it was damaged as a result of the material variation between the expected and the encountered conditions. * * *

"A contractor cannot be eligible for an equitable adjustment for changed conditions unless the contract indicated what those conditions would supposedly be." * * *. The bid documents or the contract must contain "reasonably plain or positive indications" that subsurface conditions were different from what was actually encountered. * * *.

Stuyvesant Dredging Co. v. United States, 834 F.2d 1576, 1581 (Fed. Cir. 1987); accord *White & McNeil Excavating, Inc.*, IBCA No. 2448, 92-1 BCA ¶ 24,534 at 122,439, *affirmed mem.*, *White & McNeil Excavating, Inc. v. Manuel Lujan, Secretary of the Interior*, No. 93-1013 (Fed. Cir. May 5, 1993).

It is apparent from the contract provisions, including the Golder Report, and from the testimony of experts Lane and Schlicker, that the contract indicated that MM would encounter competent rock, largely bedrock, including massively bedded sandstone. The thinner sandstone or siltstone layers that were mentioned still referred to competent rock. Bedding planes were described as "tight" and containing "no infilling." Even BLM's expert, Mr. Knitter, described the contract as indicating "primarily a rock site" (FF 9, 39-41, 143, 176-77).

Mr. Thomas relied upon the contract representations in bidding. He is an experienced contractor, but he is not a geologist. It is not standard for contractors in his industry to secure their own geotechnical reports. The contract indications of competent rock appeared to be confirmed by Mr. Thomas' site visit, where he observed massively bedded sandstone and sound, good rock (FF 10, 132-33).

Despite the contract's exculpatory Site Investigation and Conditions Affecting the Work clause, a bidder is not required to hire his own geologist, make extensive engineering efforts, or conduct tests which even the Government has not performed (here, borings) to verify the conditions he reasonably assumes he will encounter based upon the contract and his site visit. *Stock & Grove, Inc. v. United States*, 493

F.2d 629, 631 (Ct. Cl. 1974); *Richard P. Murray Co.*, AGBCA No. 77-152-4 A&B, 86-2 BCA ¶ 18,804 at 94,755-56 (collecting cases).

It is evident from the record, including testimony from MM's personnel, its construction video, and the expert testimony of Mr. Lane and Mr. Schlicker, which we have found persuasive, that the mud seams, rotten seams and clay-like material MM encountered at the Lower Slide and the Falls differed materially from the contract's indications, were not reasonably foreseeable, and caused MM substantial extra time and costs (FF 131-83).

As to quantum, once more we reached our determination by jury verdict, which we found to be the fairest and most reliable method under the circumstances, and adequately grounded in the record, and found that MM is entitled to recover \$47,427.68 on its differing site conditions claim.

Decision

Accordingly, IBCA 2893 is sustained in the amount of \$47,427.68 and is otherwise denied.

IBCA 2894 and IBCA 2895

[7] MM asserts that BLM subjected it to constructive acceleration under the Changes clause (FF 23) and it seeks impact costs, all overtime expenses. It contends that BLM's partial suspension of work, and the changed conditions encountered by MM, coupled with BLM's refusal to grant, or delay in granting, requested time extensions, forced MM to accelerate. To prove constructive acceleration under the circumstances alleged, the contractor must establish (1) a period of excusable delay; (2) adequately supported notice to the Government of the excusable delay and request for an extension of time (unless a Government order directs acceleration without regard to any such delay); (3) the Government's failure or refusal to grant the requested extension within a reasonable time; (4) the Government's order, express or implied, that the contractor take steps to overcome the excusable delay; or complete the work at the earliest possible date; or complete the work by a given date earlier than that to which the contractor otherwise would be entitled by virtue of the excusable delay; and (5) reasonable efforts by the contractor to accelerate, which resulted in added costs. *Vermont Division, Dynamics Corp. of America*, ASBCA No. 15806, 75-1 BCA ¶ 11,139 at 52,999-53,000, *aff'd*. 216 Ct. Cl. 448 (1978).

MM has not met its burden of proof. Its first, 7-day, extension request, due to BLM's 5-½-day partial suspend work order, arose out of MM's violation of the State Lands and Corps in-stream fill limits. BLM was bound to stop the work and to seek amendment of the permits because it was the responsible party as the permit holder. The amount of fill placed in the stream was clearly within MM's control, even if it had misunderstood, or misread, the permits. It had not asked BLM to modify the permits at any point.

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Further, the period of the partial suspend work order covered 3 days when MM did not work in any event—2 weekend days and the Fourth of July holiday. BLM acted with great dispatch to secure the necessary permit amendments. In any case, the partial nature of the suspend work order allowed MM to work in other parts of the project (FF 59, 61, 63, 66).

MM's request for a 14-day extension beyond the contract's September 15 in-stream work closure date, due to the differing site conditions encountered, was not in BLM's control either. ODFW had chosen the period for in-stream work. The contract provided that BLM might be able to obtain earlier entry or extensions, from State Lands, in consultation with ODFW, depending upon climatic conditions and stream flows, and BLM attempted to do so. It notified MM as soon as it received the requisite State approval (FF 188-89, 191-92).

Moreover, BLM was successful in securing extra work time for MM, although it was not required to do so under the contract. MM was granted 23 days' additional time for in-stream work before the contract's July 1 start date, and an additional 14 days after its September 15, 1989, closure date, for a total of 37 extra days. MM actually substantially completed in-stream work on September 14, 1989. It's overtime increased for a while, but its overall labor hours decreased during the operative period (FF 190-95). Also, we note that the deletion of the labor-intensive boulder work (which the record reflects more than offset the time necessary to perform the work added by modification No. 5) netted MM a savings in time that it otherwise would have had to expend. Finally, we consider that our jury verdict in MM's IBCA 2893 differing site conditions appeal amply compensates MM for the extra time, and resulting monies, it expended due to those conditions.

Decision

Accordingly, IBCA 2894 and IBCA 2895 are denied.

IBCA 2697

[8] In this early appeal MM challenged the denial of its claim during performance for a 7-day extension due to BLM's partial suspend work order. MM timely completed the contract; described its extension request as moot; and subsumed the acceleration and impact aspects of IBCA 2697 into its unsuccessful appeals, IBCA 2894 and 2895. Therefore, we dismiss IBCA 2697 with prejudice.

Summary

IBCA 2890 is sustained in the amount of \$37,832.40; IBCA 2891 is sustained in the amount of \$13,735.66; IBCA 2892 is sustained in the amount of \$4,225; IBCA 2893 is sustained in the amount of \$47,427.68;

IBCA 2894 and 2895 are denied. IBCA 2697 is dismissed with prejudice.

MM is thus entitled to a total of \$103,220.74, plus interest in accordance with the CDA, 41 U.S.C. § 611.

CHERYL S. ROME
Administrative Judge

I CONCUR:

G. HERBERT PACKWOOD
Acting Chief Administrative Judge

SOUTHERN UTAH WILDERNESS ALLIANCE, ET AL.

127 IBLA 331

Decided: *October 19, 1993*

Appeals from a decision of the Colorado State Director, Bureau of Land Management, upholding a decision of the San Juan Resource Area Manager approving application for permit to drill COC 26082, and separate appeals from the decision of the San Juan Resource Area Manager approving right-of-way COC 53315. SDR-CO-92-13 and SDR-CO-92-14.

Decision on APD set aside and remanded; decision on right-of-way reversed.

1. Environmental Quality: Environmental Statements—Federal Land Policy and Management Act of 1976: Wilderness—National Environmental Policy Act of 1969: Environmental Statements—National Environmental Policy Act of 1969: Finding of No Significant Impact

A determination that approval of an application for a permit to drill an exploratory well and the grant of an associated right-of-way will not have a significant impact on the quality of the human environment will be affirmed on appeal where the record establishes that a careful review of the environmental problems has been made, relevant areas of environmental concern have been identified, and the final determination is reasonable. The party challenging a FONSI has the burden of establishing by a preponderance of the evidence that the finding was based on a clear error of law, a demonstrable error of fact, or that the analysis failed to consider a substantial environmental question of material significance. Mere differences of opinion provide no basis for reversal if BLM's decision is reasonable and supported by the record on appeal.

2. Federal Land Policy and Management Act of 1976: Wilderness—Oil and Gas Leases: Unitization

While the authorized officer was clearly possessed of the authority under sec. 603(c) of FLPMA, 43 U.S.C. § 1782(c) (1988), to precondition approval of a unitization agreement involving a pre-FLPMA oil and gas lease upon acceptance of the application of the nonimpairment standard to lands within a WSA, where he failed to do so the Board will not retroactively impose this condition on leased lands within a WSA.

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3. Administrative Authority—Federal Land Policy and Management Act of 1976: Wilderness—Oil and Gas Leases: Suspensions

The Secretary of the Interior and those authorized to act on his behalf have the discretionary authority to suspend operations and production under any oil or gas lease for conservation purposes, including the prevention of environmental damage. Where the record indicates that an EA prepared for drilling operations on an oil and gas lease located within both a WSA and an area of critical environmental concern failed to consider this option in evaluating the proposal to drill, the decision approving drilling operations will be set aside and the case will be remanded to permit consideration of whether, under this discretionary authority, operations under the lease should be suspended.

4. Alaska National Interest Lands Conservation Act: Generally—Federal Land Policy and Management Act of 1976: Rights-of-Way—Oil and Gas Leases: Generally

The provisions of sec. 1323(b) of ANILCA, 16 U.S.C. § 3210(b) (1988), do not apply with respect to access to a Federal oil and gas lease since the leasehold estate does not constitute "nonfederally owned land" within the meaning of the statute.

5. Federal Land Policy and Management Act of 1976: Wilderness—Oil and Gas Leases: Generally

Issuance of a Federal oil and gas lease carries with it neither an express nor implied right of access to the leasehold. Thus, where a pre-FLPMA lease is surrounded by lands within a WSA, there is no valid existing right, within the meaning of sec. 701(h) of FLPMA, to obtain access to the lease boundaries across Federal land and, in the absence of grandfathered uses, access may not be granted if it would violate the nonimpairment standard mandated by sec. 603(c), 43 U.S.C. § 1782(c) (1988).

6. Administrative Authority—Federal Land Policy and Management Act of 1976: Wilderness—Oil and Gas Leases: Unitization

Since no express or implied rights of access arise upon issuance of a Federal oil and gas lease, the approval of the committal of a pre-FLPMA lease to a unit plan subsequent to the adoption of sec. 603(c) of FLPMA does not alter the application of the nonimpairment standard in determining whether access to the lease across other lands within the unit may be permitted.

***Utah Wilderness Association*, 80 IBLA 64, 91 I.D. 165 (1984), no longer to be cited.**

APPEARANCES: Stephen Koteff, Esq., Salt Lake City, Utah, for Southern Utah Wilderness Alliance and the Utah and Rocky Mountain Chapters of the Sierra Club; Paul Zogg, Esq., Boulder, Colorado, and Todd Robertson, Esq., Denver, Colorado, for the Colorado Environmental Coalition; Lyle K. Rising, Esq., Office of the Regional Solicitor, Denver, Colorado, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE BURSKI
INTERIOR BOARD OF LAND APPEALS

By record of decision dated August 28, 1992, the San Juan Resource Area (SJRA) Manager, Bureau of Land Management (BLM), pursuant to an Application for Permit to Drill (APD) filed by Ampolex Exploration (U.S.A.) Inc. (Ampolex), approved a finding of no significant impact (FONSI) and announced his intention to proceed with Alternative No. 2 of environmental analysis (EA) No. CO-030-SJ-92-24 authorizing the drilling of the Ruin Canyon No. 3 well in the SW $\frac{1}{4}$ SW $\frac{1}{4}$ sec. 20, T. 37 N., R. 19 W., New Mexico Principal Meridian, within the Cross Canyon Wilderness Study Area (WSA) on oil and gas lease COC 26082. By separate decision record of the same date, the Area Manager also determined to proceed with the issuance of an APD-related access right-of-way to Ampolex. On September 8, 1992, the APD was approved and right-of-way COC 53315 was issued to Ampolex.

On September 8, 1992, the Colorado Environmental Coalition (CEC) filed a request for State Director Review (SDR) of the decision of the Area Director to approve the APD and issue the right-of-way and further requested an immediate suspension of those decisions. On September 11, 1992, the Deputy State Director informed CEC that he was "granting a stay with regard to all approved operations related to the Ruin Canyon well #3 in the Cross Canyon Wilderness Study Area."¹ By decision dated September 25, 1992, the Deputy State Director upheld the decision to approve the APD. *See* SDR-CO-92-13. CEC subsequently appealed from this decision, which appeal was docketed as IBLA 93-15.

On September 28, 1992, the Southern Utah Wilderness Alliance (SUWA) and the Utah and Rocky Mountain Chapters of the Sierra Club (Sierra Club) also sought SDR from the decision approving the APD for the Ruin Canyon No. 3 well. By decision dated October 6, 1992, the Deputy State Director again upheld the decision to approve the APD. *See* SDR-CO-92-14. SUWA and the Sierra Club subsequently appealed from this decision, which appeal was docketed as IBLA 93-57.

While CEC had expressly challenged the decision to issue the associated right-of-way COC-53315 in its request for SDR, it is clear that SDR was not available for review of that decision. *See* 43 CFR 2804.1(b). Accordingly, on October 7, 1992, CEC filed a separate appeal from the decision issuing the right-of-way. On October 8, 1992, SUWA and the Sierra Club filed their own appeal from the issuance of the right-of-way. These appeals were docketed as IBLA 93-14.

Thereafter, appellants filed a request that the Board continue the stay imposed by the State Director pending Board resolution of the appeals. By order dated January 29, 1993, the Board granted the

¹This action also had the effect of staying any action under the right-of-way grant since the right-of-way grant, itself, expressly provided that "[t]his grant is not valid without an approved APD."

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requested stay, consolidated the appeals for adjudication and notified the parties that, in view of the importance of the issues presented, the Board would expedite consideration of the appeals consistent with its other responsibilities. Briefing on the issues presented was completed on May 17, 1993.² The matters raised are, thus, now ripe for adjudication.

As an initial matter, we note that appellants challenge BLM's actions on two broad bases. First, they argue that approval of the APD and the associated right-of-way without the prior preparation of an environmental impact statement (EIS) violated the provisions of the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 (1988). Second, they also argue that approval of the APD and the associated right-of-way violated the provisions of section 603 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1782 (1988). We will review these contentions seriatim.

The NEPA challenge revolves around the failure of BLM to prepare an EIS to assess the environmental consequences of the proposed APD and the associated right-of-way. Subsequent to the filing of the request for an APD and a right-of-way, the San Juan Resource Area commenced development of an EA to examine the proposed action, together with certain alternatives,³ in order to provide BLM with a basis for determining whether the proposal should be approved and whether the preparation of an EIS was warranted. In accordance with these goals, BLM prepared a Draft EA and distributed copies to those who had expressed an interest in commenting on the proposal. Thereafter, as noted above, a Final EA was issued on August 28, 1992. At the same time, the Area Manager signed a record of decision (ROD) approving Alternative No. 2 of the Final EA (*i.e.*, the Proposed Action subject to various conditions of approval (COA)) and, expressly relying on the various mitigation measures therein provided, approved the FONSI. On that same date, the Area Manager also approved issuance of the associated right-of-way. This latter decision was approved by the District Manager on September 8, 1992.

The Final EA examined, at some length, the impact of the Ampolex proposal on the environment existing within the Cross Canyon WSA. Physically, the EA described the area as consisting of "relatively flat-lying mesa tops ranging in elevation from 6200 feet to 6600 feet * * * dissected by deep broad canyons whose bottoms can be as much as 900

²We note that, in its response to appellants' reply brief, BLM filed a motion seeking to have the reply stricken as untimely under 43 CFR 4.414. Technically, this regulation, by its own terms, is applicable only to the submission of an answer to a statement of reasons and, even then, makes the acceptance of an untimely answer subject to the Board's discretion. The acceptance of all subsequent filings is similarly committed to the sound discretion of the Board. In the instant case, while the correct procedure would have been to file a request for leave to file a reply brief together with that brief, the failure of appellants to file such a request has not worked to BLM's detriment as it has timely responded to the matters raised therein. Accordingly, in the absence of any showing of prejudice, we deny BLM's motion to strike.

³The alternatives to Ampolex's proposal which were ultimately considered were Ampolex's original proposal with certain conditions of approval attached, two different site locations within the Cross Canyon WSA, one site location outside of the WSA, permitting only helicopter access to the proposed wellsite, and a no action alternative. See Final EA at 3.

feet from the canyon rims" (Final EA at 18). Additionally, the EA expressly referenced a number of previously issued environmental documents in describing the general nature of the area being affected.⁴

As the EA noted, the area of the proposed well and the associated right-of-way, besides being within a WSA, was also an area of significant cultural importance relating primarily to the Anasazi occupation. Indeed, it was located within the Anasazi Culture Multiple Use Area of Critical Environmental Concern (ACEC), established in 1986 and encompassing approximately 156,000 acres of land. Inasmuch as the effects of the proposed action on cultural resources is one of the chief bases of appellants' challenge to the FONSI, we deem it appropriate to set out the EA's discussion of the affected cultural environment at some length. The Final EA noted:

The vicinity of the proposed action (Cow Mesa) is one of the densest archaeological site areas in the Southwest. Sites recorded to date on Cow Mesa are primarily structural sites dating to the Anasazi occupation (300–1300 A.D.). A substantial portion of the mesa top has never been "chained". Chaining is a process whereby a large chain, attached to two tractors travelling parallel and about 60 feet apart, is dragged across a forested region in order to tear out by the roots pinon/juniper trees, shrubs, and sagebrush in preparation of the land for conversion to grassland. Cow Mesa is the only Mesa in the SJRA that has not been chained. Consequently, the mesa is, in terms of its pristine archaeological preservation, very sensitive to any surface disturbing activities. Smaller features and activity areas that establish important site associations remain preserved and are not scattered or destroyed by chaining activity and erosion, as in other areas. The significance of this area is advanced even further as these important associations cannot be found undisturbed at such magnitude elsewhere in Colorado. This, in addition to close proximity of this mesa top to Cross and Ruin Canyons which are known to be major drainage system transportation routes with related sites, makes "setting" an integral part of their significance and integrity as well (see criteria for site eligibility to the National Register of Historic Places in 36 CFR 60.4). Colorado University and Fort Lewis College are currently doing archaeological studies in the area to further define habitation and interrelationships, if any, among them.

A Class III (intensive) cultural resource inventory of the proposed action (Alternative No. 1) and Alternative No. 4 has been performed and approved. To date twelve (12) archaeological sites have been located and recorded. All are considered significant and potentially eligible to the National Register of Historic Places (NRHP). Additional sites recorded during inventory on the private surface access road and well relocation have been evaluated in a similar manner. Of the sites recorded to date, eight (8) are Anasazi habitation sites or pueblo/pit structures. The other four are limited activity or special activity areas likely associated with the overall intensive Anasazi use of the mesatop areas from about 300 AD to 1300 AD. In addition, four sites are multi-component sites, meaning that two or more occupations of the same site area occurred through time. In summary, the cultural resource inventory performed for this proposed project in conjunction with other recent surveys in this area, revealed an extremely high site density estimated as >210 sites per square mile, of stratified, significant Anasazi sites representative of a variety of functions during all prehistoric Anasazi periods with the exception of Pueblo I. Pueblo I components were not evident from surface observations, but could be present in buried deposits.

(Final EA at 24–25).

While the Final EA also briefly mentioned the wilderness values associated with the area of the proposed action, the primary discussion

⁴The EA referenced Chapter Two of the EIS prepared for the Resource Management Plan (RMP) in 1984, the Wilderness EIS prepared in 1990 at 3–11 through 3–15, and the Cross Canyon WSA Study Report at 243 through 248 (Final EA at 20).

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of these values was contained in the Final Wilderness Environmental Impact Statement (WEIS) which had been prepared to evaluate the various effects attendant to designating or not designating the eight WSA's located in the San Juan and San Miguel Planning Area as part of the National Wilderness System. The discussion in the WEIS was expressly referenced in the EA and, accordingly, we set forth the salient points relating to existing wilderness values as found therein.

In discussing the existing environment, the WEIS noted that Cross Canyon WSA was primarily natural in character with the only existing human imprints being three vehicle ways,⁵ none of which significantly impaired the area's naturalness (WEIS at 3-13). The WEIS expressly found that the WSA possessed "outstanding" opportunities for solitude and for primitive, unconfined types of recreation. Furthermore, the WEIS recognized the existence of archaeological, ecological, and educational supplemental values which further enhanced the wilderness qualities found within the WSA. *Id.* Balanced against these values, however, was the fact that, of the 12,588 acres within the Cross Canyon WSA, 8,875 acres (approximately 71 percent of the total acreage) were within 36 pre-FLPMA oil and gas leases which had issued without surface occupancy restrictions. *See* WEIS 2-14 through 2-17.

The Final EA also noted that various small mammals, reptiles and bird species were found in the area year round and others were seasonal visitors. Of particular importance in the confines of this appeal, the Final EA noted that a review of existing data showed the occasional presence or the potential for occurrence of a number of species listed as Threatened and Endangered (T & E), or proposed for listing or a candidate for such listing. Included in this discussion were the Bald Eagle, the Black-footed Ferret, and the Mexican Spotted Owl.⁶ *See* Final EA at 20-23.

Having described the existing environment, the Final EA then turned to a comparison of the effects which the proposed action and the other alternatives would have on these values. While the action under review (Proposed Action with COA) was listed as Alternative No. 2, the bulk of the discussion as to this alternative was subsumed under the discussion of Alternative No. 1 (Proposed Action). Accordingly, we will recount the relevant conclusions as to anticipated impacts as reported for that alternative.

Insofar as cultural values were concerned, the EA noted that allowing vehicular traffic into the area (which, as noted above, was

⁵ For purposes of wilderness designation, the word "roadless" referred to the absence of roads which had been improved and maintained by mechanical means. A "way" maintained solely by the passage of vehicles did not constitute a "road" for the purpose of determining whether or not an area was "roadless." *See* Wilderness Inventory Handbook, dated Sept. 27, 1978, at 5; *Idaho Trail Machine Association*, 75 IBLA 256, 258 (1983).

⁶ While the Final EA considered the Mexican Spotted Owl as a Federal Proposed Species, the Fish and Wildlife Service formally designated the Mexican Spotted Owl as a Threatened Species during the pendency of this appeal. *See* 58 FR 14248 (Mar. 16, 1993). The issues surrounding the Mexican Spotted Owl are examined in greater detail subsequently in this decision.

part of the Anasazi Culture Multiple Use ACEC) would increase the potential for vandalism of the numerous archaeological sites found in the general vicinity (Final EA at 26). The EA also noted that all of the 12 cultural sites located during the inventory had the potential for being adversely affected by surface disturbing operations. Further, the EA noted that:

Areas that are rich in cultural properties which have been virtually untouched for the last several centuries are rare in the Southwest and as such are extremely important for cultural and natural history enjoyment and study. This combination of cultural resource and natural values can be directly impacted by air pollutants, intrusions, and nonconformities to the landscape; and physically by levels of surface and vegetative disturbance, vibration, and erosion.

Id. at 27.

With respect to indirect impacts of the proposed development on cultural resources, the EA noted that 660 archaeological sites were estimated to be within a 1-mile radius of the area and would be subject to increased vandalism if long term access across the mesatop were provided and not controlled or monitored. Cumulatively, the EA noted that each new well which might be constructed within the Anasazi Culture Multiple Use ACEC would increase the danger of vandalism proportionately and result in the incremental loss of the archaeological setting not only on Cow Mesa but also on surrounding lands (Final EA at 27-28).

The EA also examined the effect of the proposal on the wilderness values of the area. While the EA noted that there would be some direct and indirect impairment of wilderness values by the proposed action, particularly during the construction phase, the EA concentrated its analysis on the cumulative impacts which would result from future drilling within the Cross Canyon WSA. See Final EA at 34-35. The EA reiterated the projection of the WEIS that five test wells would likely be drilled within the WSA and that, of these, two wells could be expected to produce 400 barrels of oil and 800 mcf of gas per day during the next 20 years. The estimated surface disturbance associated with full development of all 36 pre-FLPMA leases was 52 acres with impacts from the sights and sounds extending to an additional 480 acres. While the wilderness value of this acreage would be diminished, the EA repeated the conclusion of the WEIS that the wilderness values of the WSA, as a whole, "would remain largely unchanged." *Id.*, quoting the WEIS at S-4.

Insofar as the effects on listed, candidate, and proposed species under the Endangered Species Act, 16 U.S.C. § 1536 (1988), were concerned, the EA noted that the major impact would be expected to occur to migratory bird species such as the Bald Eagle if drilling were permitted during the winter when these birds would generally be present, since the associated noise and disturbances would cause them to avoid the area. See Final EA at 30-32. The EA had noted, however, that there were no known winter roost sites for the Bald Eagle within or near the proposed project site. See Final EA at 22. Any impacts to

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the Black-footed Ferret were generally discounted since there was no known population of this species in the area and, in the absence of any prairie dog population in proximity, the possibility of the ferret's presence in the vicinity was viewed as extremely slight (Final EA at 30-31). With respect to the Mexican Spotted Owl, the EA noted that its presence within the Cross Canyon WSA had not been confirmed, even though the area of the wellsite had been delineated as a potential habitat (Final EA at 22). However, the EA further noted that should the species occupy the area at some later date, they might leave the vicinity during construction and drilling operations but would be expected to reoccupy the area thereafter. Further indirect or cumulative impacts to this species by the proposal were considered "negligible to non-existent" (Final EA at 32).

The EA then discussed the numerous conditions of approval which became part of the approved alternative (Alternative No. 2). The most extensive part of the COA dealt with the anticipated impacts on cultural values. While recognizing that site avoidance is the usually preferred method for protection of cultural sites, the EA noted that this was not possible with respect to the existing way. Accordingly, the EA listed a number of alternative restrictions which could be applied where necessary. See Final EA at 43. The EA directed that where significant sites would unavoidably be impacted by operations, acceptable data recovery would be performed after consultation with the State Historic Preservation Officer (SHPO) and the Advisory Council on Historic Preservation. See also Final EA, Appendix F, COA No. 9. Furthermore, all operations were expressly limited to areas where cultural resource inventories had been completed and approved by BLM and Ampolex was required to have a licensed archaeologist present during the road construction phase to oversee padding of two sites and fencing of nine additional sites. Final EA, Appendix F, COA Nos. 8, 15, 16, 17, 18, and 19. Additionally, in order to control access to minimize the danger of vandalism, BLM also required that a guard be present at the entry point of the WSA during all periods of drilling activity and required the installation of a locked gate should the well be completed as a producer. Final EA, Appendix F, COA No. 7.

Additional conditions were attached to the proposal to alleviate some of the impacts on wilderness and wildlife values. Among these restrictions were a limitation on the commencement of drilling activities to the period from April 1 to November 1 unless a waiver was granted by BLM, direction that habitat features which might provide potential habitat to Threatened and Endangered Species were to be avoided, and a requirement that sound-muffling techniques were to be used on all noise generating equipment if noise was subsequently deemed to have become a problem. See Final EA at 42, 47, Appendix F, COA Nos. 4 and 12.

As noted above, based on the analysis of the proposed project set forth in the EA, together with the mitigating measures directed to be taken to alleviate the adverse impacts, the San Juan Resource Area Manager determined that the issuance of a FONSI was appropriate and approved the APD with the recommended COA (Alternative No. 2) and issuance of the associated right-of-way.

[1] In its appeal to the Board, appellant CEC challenges the determination not to prepare an EIS.⁷ CEC vigorously asserts that approval of the APD will have significant direct, indirect, and cumulative impacts on the area where development is authorized, which it categorizes as "extraordinarily sensitive" (CEC SOR at 4). Referring to the area's pristine nature, the wildlife habitat which it provided, its rare and extremely rich archaeological resources and its asserted "unique old growth vegetation," CEC argues that "even the most minimal of activity" would result in a significant impact on the environment. *Id.* In our view, however, while there is no gainsaying the area's significant environmental assets, a close scrutiny of the specifics of appellant's allegations fails to establish error in BLM's determination not to prepare an EIS for the subject proposal.

To the extent that the challenge to the FONSI is premised on possible effects upon the pristine nature of the area, anticipated impacts were closely examined in the WEIS which was prepared in 1990. It was, in fact, the nature of the conflicts between mineral development and wilderness preservation, clearly delineated in the WEIS, which led BLM to recommend that the Cross Canyon WSA not be included within the permanent wilderness system. Moreover, both the WEIS and the EA concluded that, even given full field development the foreseeable cumulative impact on wilderness values of the WSA, as a whole, "would remain substantially unchanged" (Final EA at 34). We can find no basis for overturning the FONSI insofar as impacts to wilderness values are concerned.⁸

Appellant CEC also criticizes the EA's analysis of the impacts of the proposed action on wildlife, particularly on the spectrum of T & E species (listed, proposed, candidate), complaining that "little has been done to document the presence of these species and the potential impacts of oil and gas development on these species" (CEC SOR at 5). In point of fact, however, the EA did examine potential impacts of development on the seven T & E species of wildlife.

With respect to four candidate species (Swainson's Hawk, the Southwestern Willow Flycatcher, the Loggerhead Shrike, and the Northern Goshawk), the EA expressly noted that the proposed wellsite

⁷We should point out, in this regard, that CEC admitted that it "does not generally fault the Environmental Assessment prepared by the San Juan Resource Area Manager," noting that, in its view, the EA had been prepared with greater care than usual (CEC SOR at 2-3).

⁸We recognize that the FONSI determination that full field development would not "substantially" change the wilderness values of the WSA might be seen as somewhat at odds with the recommendation that the Cross Canyon WSA not be included within the permanent wilderness system because of the conflict between mineral development and wilderness preservation. See WEIS 2-12 to 2-22. Be that as it may, any question as to whether the Cross Canyon WSA should be recommended for inclusion in the wilderness system is not only tangential to the instant appeal, it is also beyond the purview of this Board's jurisdiction in a direct appeal. See, e.g., *Colorado Open Space Council*, 109 IBLA 274, 281 (1989).

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was not in the species habitat of any of those species (Final EA at 22–23) and that any impact associated with elevated noise levels during exploration would be dependent upon whether construction activity occurred during the winter migratory period (Final EA at 31). Insofar as the Bald Eagle was concerned, the EA noted that, while there were no known or documented winter roost sites for the Bald Eagle within or near the proposed project site, the Bald Eagle was a seasonal visitor to the area (Final EA at 21–22). The EA concluded, however, that any direct and indirect impacts would be significantly reduced by scheduling construction and drilling operations outside of the wintering period (Final EA at 30–31). With regard to the Black-footed Ferret, as noted above, the absence of a prairie dog prey population made the likelihood of Black-footed Ferret occupation extremely remote.

Insofar as the Mexican Spotted Owl was concerned, a private survey of the Cross Canyon area had been previously commissioned to examine the area to ascertain whether any Mexican Spotted Owls were present, prior to allowing a proposed seismographic project. During this survey, “possible Mexican spotted owl responses similar to the agitation call of the female were elicited at one calling station” in the NW¼ sec. 30. While an owl was subsequently observed in the early morning darkness, positive identification was not possible “although its small size would seem to rule out its identity as a Mexican spotted owl.” The Golden, Colorado, Office of the Fish and Wildlife Service (F&WS) subsequently concurred in the study’s conclusion that there was no evidence of Mexican Spotted Owls in the Cross Canyon Area.⁹ See Final EA, Appendix C (Memorandum dated June 27, 1990, from Acting State Supervisor, Fish and Wildlife Enhancement, F&WS, to Area Manager, SJRA, BLM). This concurrence was reiterated on July 2, 1991, when F&WS concurred in a finding of no effect on the Mexican Spotted Owl with respect to notices of intent to conduct oil and gas exploration in Cross Canyon. *Id.* The FONSI with respect to this species seems eminently justifiable.

Insofar as the area’s undisputed archaeological values are concerned, a review of the EA and ROD shows that the decisionmakers were, indeed, most concerned with the effects of the proposed action on these values. As set forth above, numerous COA’s were devised to lessen the impacts, both short- and long-term, on cultural artifacts. Admittedly, not all of the sites could be totally avoided, particularly with respect

⁹ Indeed, the F&WS memorandum noted that a simultaneous Mexican Spotted Owl survey conducted by an expert with the Forest Service had also failed to discover any spotted owls in the Cross Canyon area. The memorandum noted that:

“Even though the pinyon-juniper habitat of the Cross Canyon area is superficially similar to that of Mesa Verde fifty miles to the east where Mexican spotted owls occur, the pinyon-juniper woodland at Cross Canyon is a lower elevation phase with a warmer climate. The higher elevation pinyon-woodland habitat at Mesa Verde contains steeper-walled canyons with small amounts of Douglas fir and receives more cold air drainage. It is suspected that the function of the vegetation types, primarily mixed conifer, required by the Mexican spotted owl, is one of thermal regulation. Thus, the warmer pinyon-juniper woodlands in the Cross Canyon area do not provide cool enough habitat for the Mexican spotted owl. We have no records ourselves, historical or current, of Mexican spotted owls being in the Cross Canyon area.” *Id.*

to the associated right-of-way. As a result, the COA provided for padding of two of these sites and protective fencing of nine others and expressly noted that “[a]ll project activity is confined to those areas covered by archaeological surveys and approved by BLM” (EA, Appendix F, COA No. 23).

It must be admitted, of course, that, even with the various safeguards provided by BLM, the mere construction of the road heightens the possibility of vandalism by making the immediate area of the well-pad more accessible than it had been heretofore. But, by the same token, it must also be recognized that the area is presently accessible by means of a way and that construction of the access road does not essentially alter the reality of access as it presently exists. Moreover, the controls on access which BLM requires Ampolex to implement can be expected to minimize any increased likelihood of vandalism occasioned by the improvement in access. In any event, we note that, having been apprised of the projected impacts and the mitigating measures which BLM was ordering, the SHPO, on May 12, 1992, concurred with BLM’s determination that the proposed road “will have no adverse effect” on any listed or eligible historic properties. Viewed in light of the mitigating measures BLM has directed, we cannot say that the impact on the cultural resources in the area (which, as noted above, is merely a minuscule part of an ACEC embracing a total of 156,000 acres) could be said to be one “significantly affecting the quality of the human environment.”

Finally, a word is in order with reference to what appellant CEC refers to as the “unique old-growth vegetation” which can be found on Cow Mesa. As noted above, the existence of this vegetation is the direct result of the fact that Cow Mesa had never been chained. Nothing in the proposed action, however, will change this condition. It is true, of course, that drilling activities in the immediate area of the well-site as well as construction of the access spur from the existing way would necessitate the removal of trees from approximately 1.9 acres of land. See Final EA at 13. While appellant might understandably find even this disturbance objectionable, allowance of the proposal simply would not result in the destruction of a significant amount of the previously undisturbed pinyon-juniper woodlands found on Cow Mesa. The overwhelming majority of the old-growth pinyon-juniper stand would remain untouched.

The Board has frequently noted that a FONSI will be affirmed if the record establishes that a careful review of environmental problems has been undertaken, relevant areas of environmental concern have been identified, and the final determination that no significant impact will occur is reasonable in light of the environmental analysis. See, e.g., *Hoosier Environmental Council*, 109 IBLA 160, 173 (1989); *Glacier-Two Medicine Alliance*, 88 IBLA 133, 141 (1985). A party challenging a FONSI determination must show it was premised on a clear error of law or demonstrable error of fact or that the analysis failed to consider a substantial environmental question of material significance to the

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action for which the analysis was prepared. *See, e.g., Powder River Basin Resource Council*, 124 IBLA 83, 91 (1992); *Hoosier Environmental Council, supra*.

In the instant case, as set forth above, appellant has simply failed to establish that significant impacts are likely to occur from the action as approved. Furthermore, the Board has also pointed out that where BLM has prepared an earlier EIS discussing impacts of proposed management decisions, subsequent analyses may briefly summarize the impacts more fully explored in the EIS, a process known as "tiering." *See, e.g., Southern Utah Wilderness Alliance*, 122 IBLA 6, 10 n.4 (1991); *Michael Gold (On Reconsideration)*, 115 IBLA 218, 225 n.2 (1990). The Final EA, herein, expressly referenced both the WEIS and the San Juan/San Miguel Resource Management Plan (RMP) EIS (December 1984), which both contain relevant discussions of environmental impacts likely to occur in the Cross Canyon Area as a result of the approval of Alternative 2, particularly as they relate to wilderness values. *See* WEIS at 2-12 to 2-22, 3-11 to 3-15, 4-9 to 4-16; SJ/SM RMP EIS at 2-54, 3-55 to 3-57, 5-21 to 5-23. We believe the Final EA was properly tiered into these two EIS¹⁰ and that they reinforce the determination that a FONSI was appropriate in the circumstances. In view of the foregoing, we must conclude that appellant CEC has failed to establish error in the failure of BLM to prepare an EIS with respect to the instant proposal.

[2] The second basis for challenging the decision below is advanced by all of the parties to this appeal. Noting that both the wellsite and the access road are located on land within a WSA, the parties argue that allowance of the APD and associated right-of-way violates the nonimpairment standard which governs WSA's and cannot be justified as either the exercise of "grandfathered" rights under section 603(c) of FLPMA, 43 U.S.C. § 1782(c) (1988), or as recognition of valid existing rights protected by section 701(h) of FLPMA, 90 Stat. 2786 (1976). Thus, quite apart from any question as to whether BLM complied with the dictates of NEPA, appellants assail the decision herein as constituting a violation of the provisions of FLPMA. We turn now to that question.

Initially, there is no substantial dispute that the proposed project, particularly the upgrading of the access road, violates the nonimpairment standard.¹¹ Nor does BLM suggest differently. It is

¹⁰ While we agree with BLM that these two EIS' contain relevant analyses with respect to the proposed action, we must also concur with CEC that it is difficult to see the relevance of the Colorado Oil and Gas Leasing and Development EIS (January 1991). While this EIS was directed toward oil and gas leasing and development, a review of the document shows that it was clearly aimed at evaluating actions undertaken pursuant to the SJ/SM RMP and determining whether the RMP should be amended. The RMP, however, was itself primarily concerned with future leasing actions and had determined that all future oil and gas leases in the general area would be impressed with a no-surface occupancy restriction. *See* RMP at 63. While the oil and gas EIS examined whether or not these COA's should continue, it did not really address the problems associated with pre-FLPMA leases such as the lease involved herein which had been issued without surface occupancy restrictions.

¹¹ It seems self-evident that, to the extent that BLM permits Ampolex to mechanically maintain the prior existing "way," BLM has, in effect, permitted Ampolex to upgrade the "way" to a "road." *See* n.5, *supra*. As we noted in

equally clear from the record that BLM's actions herein cannot be sustained under the "grandfathered uses" exception to the nonimpairment standard. See, e.g., *Rocky Mountain Oil and Gas Association v. Watt*, 696 F.2d 734 (10th Cir. 1982); *Southern Utah Wilderness Alliance*, 125 IBLA 175, 100 I.D. 15 (1993); *Richard C. Behnke*, 122 IBLA 131 (1992). BLM's actions herein must be affirmed, if they are to be affirmed at all, on the basis that the allowance of the violation of the nonimpairment standard implicit in the action approved can be justified as the recognition of valid existing rights. And, in examining this issue, it will be necessary, for reasons explained below, to differentiate between approval of the APD and issuance of the associated right-of-way.

With respect to the APD, while appellants admit that the subject lease issued prior to the adoption of FLPMA and did not contain any express provisions limiting the lessee's rights in the premises, they raise two discrete challenges to BLM's assertion that recognition of the lease rights requires that BLM permit on-site drilling. First, they argue that, even assuming arguendo that Ampolex may have, at one point in time, been vested with the absolute right to drill on the lease, this absolute right lapsed upon the failure of the lessee to successfully drill a well within the initial 10-year term of the lease. While they appreciate that Ampolex's lease was extended beyond its primary term by inclusion in the McElmo Dome Unit, they contend that, since this extension occurred subsequent to the adoption of FLPMA, Ampolex's lease rights were thereby conditioned by the management requirements of section 603(c) of FLPMA.

Alternatively, appellants argue that, even if the post-FLPMA extension of Ampolex's lease did not result in the imposition of a total prohibition of impairment of wilderness values, this does not mean that Ampolex has an absolute right to drill within the WSA. Rather, relying on the provisions of the Interim Management Policy and Guidelines for Lands Under Wilderness Review (IMP), 44 FR 72014 (Dec. 12, 1979), appellants contend that nonimpairment standards apply unless application of these standards would unreasonably interfere with the claimant's rights to use and enjoyment of its lease. Since, in appellants' view, directional drilling from an area outside of the WSA would be feasible, they argue that the nonimpairment standard should be applied herein and the APD denied. Before examining these issues, a brief review of the chronology involving this lease is in order.

Oil and gas lease C-21139, embracing, *inter alia*, the SW $\frac{1}{4}$ sec. 20, T. 38 N., R. 19 W., New Mexico Principal Meridian, issued effective July 1, 1974, to William R. Thurston for an initial term of 10 years and so long thereafter as oil or gas were produced in paying quantities. On October 8, 1976, 100 percent of the record title interest in the lease

Southern Utah Wilderness Alliance, 125 IBLA at 185, "[A]ll road construction within a WSA automatically constitutes a violation of the non-impairment standard," because, by definition, a WSA must be a "roadless" area. [Italics in original.]

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was assigned to Mobil Oil Corporation. By decision dated November 30, 1977, the State Office noted that certain lands within lease C-21139 had been committed to the Hovenweep Canyon Unit Agreement, effective May 26, 1977, which, pursuant to 43 CFR 3107.3-2, resulted in the segregation of the non-committed lands (including the SW $\frac{1}{4}$ sec. 20) into a new lease, which was assigned serial number C-26082. Inasmuch as more than 2 years remained in the original term of the base lease, the new lease would terminate, in the absence of production of oil or gas in paying quantities, at midnight on June 30, 1984, unless otherwise extended by law.

Lease C-26082 was committed to the Cow Canyon Unit effective April 27, 1978. Thereafter, on April 1, 1983, the lease was committed to the McElmo Dome Unit. The following day the Cow Canyon Unit was terminated. Production under the McElmo Dome Unit was achieved effective December 15, 1983, prior to the expiration date of the lease and, accordingly, pursuant to the provisions of 30 U.S.C. § 226(m) (1988), the lease was thereby extended. Appellants correctly note that, but for the lease's inclusion within the McElmo Dome Unit plan and the successful completion of a well under that plan, the instant lease would have expired under its own terms. Appellants argue that, under the applicable statutes the Secretary is vested with discretionary authority to approve or disapprove unit plans of development and, therefore, Ampolex had no "right" to insist on approval of the unit. Thus, appellants contend, extension of the term of the lease by its committal to a unit *after* the adoption of section 603 of FLPMA was not a "right" existing at the time of FLPMA's enactment and, thus, cannot be a valid existing right removed from the prescriptions of section 603(c).

Appellants are correct in their assertion that the approval of unit plans of development requires the exercise of discretion by the Secretary of the Interior or his delegate. The applicable regulation, 43 CFR 3183.3-1 (1984),¹² provided that "[a] unit agreement will be approved by the authorized officer upon a determination that such agreement is necessary or advisable in the public interest and is for the purpose of more properly conserving natural resources." This regulatory provision is echoed in section 2(b) of the standard lease terms, utilized herein, in which the lessee agrees:

Within 30 days of demand * * * to subscribe to and to operate under such reasonable cooperative or unit plan for the development and operation of the area, field, or pool or part thereof, embracing the lands included herein as the Secretary of the Interior may then determine to be practical and necessary or advisable, which plan shall adequately protect the rights of all parties in interest, including the United States.

Pursuant to the above provisions, this Board has affirmed decisions of BLM both requiring unitization of on-shore oil and gas leases (*see*

¹²This regulation was substantially revised and renumbered in 1988 and now appears at 43 CFR 3183.4(a). The language quoted in the text, however, appears in both versions of the regulation.

Chevron U.S.A., Inc., 111 IBLA 96 (1989)) as well as refusing to approve proposed unitization or communitization agreements (see *Kirkpatrick Oil Co.*, 32 IBLA 329 (1977), *aff'd*, 675 F.2d 1122 (10th Cir. 1982)). There is, in short, little question that the authorized officer could have refused to approve the commitment of the subject lease to the McElmo Dome Unit unless it was expressly accompanied by the acceptance of such surface use limitations as would result in observance of the nonimpairment standards for that part of the leased land located within the boundaries of the WSA. He clearly did not do so. The question which, in effect, appellants raise is whether, notwithstanding the failure of the authorized officer to precondition approval of the unit agreement on such provision, the lease is nonetheless impressed with such a condition.

We note that the relevant part of the text of section 603(c) of FLPMA provides that “[d]uring the period of review of such areas and until Congress has determined otherwise, the Secretary shall continue to manage such lands according to his authority under this Act and other applicable law in a manner so as not to impair the suitability of such areas for preservation as wilderness * * *.” Thus, under this provision, the Secretary is affirmatively directed to manage lands within a WSA so as not to result in impairment of their wilderness characteristics. In our view, had an interested party brought a direct challenge at the time of the authorized officer’s approval of the committal of the instant lease to the McElmo Dome Unit, committal would properly have been made contingent upon the application of the nonimpairment standard to so much of the lease as was within the Cross Canyon WSA. No such objection, however, was timely lodged. And, in the absence of any language in section 603(c) which could fairly be characterized as self-executing,¹³ we are unwilling at this late date to retroactively apply such a limitation to the lease herein involved.

Our conclusion in this regard is fortified by recognition of the fact that, as we have often had cause to note, voluntary unitization agreements are essentially contractual in nature. See, e.g., *Coors Energy Co.*, 110 IBLA 250, 257 (1989); *Colorado Open Space Council*, 109 IBLA 274, 287 (1989); *Shannon Oil Co.*, 62 I.D. 252, 255 (1955). In entering into such arrangements the various parties quite appropriately consider their individual interests in proceeding upon a course of unified field development. Thus, if at the time that the instant lease were committed to the McElmo Dome Unit the authorized officer had expressly preconditioned his approval on the application of

¹³ Thus, we would contrast the general precatory language of sec. 603(c) of FLPMA with the specific language of sec. 6 of the Federal Coal Leasing Amendments Act of 1976, 30 U.S.C. §207(a) (1988), which provided that the terms and conditions of federal coal leases would be subject to readjustment “at the end of its primary term of twenty years and at the end of each ten-year period thereafter if the lease is extended.” Prior to this amendment, leases were subject to readjustment at 20-year intervals. In *Franklin Real Estate Co.*, 93 IBLA 272 (1986), the Board noted that, while actual readjustment of the terms and conditions of the lease required affirmative action by BLM, the language of the statute, as explicated by implementing regulations, operated to shorten the period between readjustments to 10 years, even where BLM had failed to timely readjust the terms of the coal lease after its initial 20-year term. *Accord*, *General Electric Holdings, Inc.*, 103 IBLA 366 (1988), *aff’d sub nom. Trapper Mining Inc. v. Lujan*, 923 F.2d 774 (10th Cir. 1991). There is, however, nothing in the language of sec. 603(c) which could be construed to effectuate imposition of the condition outlined in the text in the absence of affirmative action by the authorized officer to effectuate such a result.

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the nonimpairment standards to the lands within the Cross Canyon WSA, it is possible that the lessee would have declined to join the unit and would have, instead, attempted to individually develop the lease during its remaining primary term. Retroactive application of conditions which might have affected the willingness of parties to enter into a joint undertaking in the first instance necessarily alters the basis upon which the parties had agreed to proceed.

This reality, in our view, militates strongly against appellants' contention that, even though it was clearly not within the contemplation of the parties signatory to the unit agreement, the agreement should now be interpreted as limiting the rights of pre-FLPMA lessees to develop all lands within their leases to actions which do not result in unnecessary or undue degradation of those lands. Accordingly, we must reject appellants' assertion that, to the extent the subject lease includes land now within a WSA, the extension of the lease beyond its primary term because of its committal to a post-FLPMA unit must be read as abrogating any valid existing rights to develop the land in a manner which might impair its suitability for inclusion in the permanent wilderness system.

[3] Notwithstanding the foregoing, however, we believe it appropriate, under the circumstances of this case, to set aside the decision below to the extent that it approved the APD filed by Ampolex. We note that an apparent inconsistency exists in the provisions of the IMP relating to oil and gas development on pre-FLPMA leases within WSA's. As originally promulgated in 1979, the relevant provisions of the IMP clearly provided that:

Activities on pre-FLPMA leases on which there were no pre-FLPMA impacts will be allowed if the BLM determines that the impacts satisfy the nonimpairment criteria. If proposed activities are denied because they cannot satisfy the nonimpairment criteria, the lessee has the right to request a suspension of operation. The policy on lease suspension is explained more fully in section (d) below.

(IMP at III.J.1.a., 44 FR 72029 (Dec. 12, 1979)). Section (d), referenced above, noted that:

For leases not encumbered with wilderness protection or no-surface-occupancy stipulations and on which an application for an otherwise acceptable plan of operation was denied for wilderness or endangered species considerations, the Secretary has established a policy of assenting to a suspension of operation or production for the time necessary to complete necessary studies and consultations and, if applicable, for a decision on wilderness status to be made.

(IMP at III.J.1.d., 44 FR 72029 (Dec. 12, 1979)).

In 1983, however, the provisions relating to application of the nonimpairment standard to pre-FLPMA leases were substantially revised. See 48 FR 31854-56 (July 12, 1983). In this revision, the language appearing at III.J.1.a., quoted above, was deleted and the following discussion substituted:

All pre-FLPMA leases represent valid existing rights, but the rights are dependent upon the specific terms and conditions of each lease, including any stipulations attached to the lease. Activities for the use and development of such leases must satisfy the nonimpairment criteria unless this would unreasonably interfere with rights of the lessee as set forth in the mineral lease. When it is determined that the rights conveyed can be exercised only through activities that will impair wilderness suitability, the activities will be regulated to prevent unnecessary or undue degradation. Nevertheless, even if such activities impair the area's wilderness suitability, they will be allowed to proceed.

(IMP at III.J.1.a., 48 FR 31855 (July 12, 1983)).

This amendment clearly resulted in a marked change in the treatment of pre-FLPMA leases since, under the 1979 IMP, impairing activities could not be allowed whereas under the 1983 amendments such activities would be authorized if necessary to the exercise of the rights conveyed by the lease. However, for reasons which are unclear, no change was made to the provisions of the 1979 IMP appearing at III.J.1.d. That section still provides that, where APD approval is denied for pre-FLPMA leases because of wilderness considerations, the Secretary has established the policy of granting a suspension of operations until a determination on the wilderness status has been made. Thus, on the one hand, section III.J.1.a. of the IMP presupposes that impairing activities will be allowed while section III.J.1.d. of the IMP proceeds on the assumption that, in some cases, these impairing activities will not be allowed.

A review of the *Federal Register* notice of the 1983 changes fails to disclose any explanation for this apparent conflict. Indeed, these changes were promulgated without *any* explanation of the intended results.¹⁴ We recognize, of course, that it is possible to interpret III.J.1.d. as applying to those situations in which a post-FLPMA lease issued without a wilderness protection stipulation. In fact, the Board has applied this provision to precisely such a situation. *See, e.g., Amoco Production Co. (On Reconsideration)*, 96 IBLA 260 (1987). The question is whether or not it is applicable *only* to situations involving post-FLPMA leases issued without a wilderness protection stipulation. We think not.

First of all, the language of section III.J.1.d., which was clearly applicable to pre-FLPMA leases under the 1979 version of the IMP, was not altered in any way by the 1983 revisions. This replication of the language lends some support to the conclusion that the scope of this provision was not being altered. More importantly, it must be recognized that, quite apart from the specific nonimpairment standard enunciated in section 603(c) of FLPMA, the Secretary has *always*, since at least the 1933 amendments to the Mineral Leasing Act, had the authority to suspend operation and production activities for conservation purposes. *See Act of Feb. 9, 1933, 47 Stat. 798, as*

¹⁴ It is, of course, likely that the animating rationale behind these changes was a desire to reflect the conclusions enunciated in Solicitor Coldiron's Opinion styled *The Bureau of Land Management Wilderness Review and Valid Existing Rights*, M-36910 (Supp.), 88 I.D. 909 (1981). However, while a review of that Opinion clearly delineates the concerns which led to the revision of sec. III.J.1.a. of the IMP, it sheds no light on the impact which these conclusions had, if any, on the residuary authority of the Secretary, under 30 U.S.C. §209 (1988), to suspend any lease for conservation purposes. In other words, this Opinion explains why sec. III.J.1.a. was changed; it does not explain the intent in leaving sec. III.J.1.d. unaltered.

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amended, 30 U.S.C. § 209 (1988). Conservation, as used in this provision, has been expressly interpreted to include the prevention of environmental damage. See *Copper Valley Machine Works, Inc. v. Andrus*, 653 F.2d 595 (D.C. Cir. 1981). It would be passing strange to suggest that, even though this lease issued under statutory provisions which expressly recognized the Secretary's authority to suspend operations thereunder for conservation purposes, such purposes may not include protection of wilderness qualities since section 603(c) of FLPMA was not enacted until after the lease issued.¹⁵ Nor can we discern any support for such a suggestion from the IMP.

On the contrary, section III.J.1.d. of the IMP expressly reiterates that "[t]he Secretary of the Interior has the discretionary authority to direct assent to a suspension of the operating and producing requirements of an oil and gas or geothermal resources lease if it is in the interest of conservation to do so and when the specific circumstances involved warrant such action." As we read the changes effected by the 1983 revisions to the IMP, the fact that a pre-FLPMA oil and gas lease embraces land within a WSA no longer automatically requires denial of an APD which would result in impairment of the land's wilderness characteristics (as it did under the 1979 version of the IMP), but neither does it prevent the suspension of operations under the lease in the appropriate circumstances, which circumstances may include consideration of the land's wilderness potential. That latter determination, of course, must be made on a case-by-case basis.

Clearly, the mere fact that land is included within a WSA cannot, in every situation, mandate a suspension since such an approach would effectively abrogate the 1983 amendments to the IMP. But certainly there can be situations in which the wilderness potential of the land, when considered either by itself or in conjunction with other factors such as, in the instant case, the existence of significant cultural resources, might provide adequate grounds for the exercise of discretion to suspend operations under the lease.

Obviously, as in all exercises of discretion, the decision to suspend or not to suspend requires the application of the authorized officer's informed judgment and, on appeal, the authorized officer's conclusions would normally command substantial deference on our part. See, e.g., *Oregon Natural Desert Association*, 125 IBLA 52, 60 (1993); *Hoosier Environmental Council*, *supra* at 172-73. The problem in the instant case resides in the fact that a review of the ROD and the EA makes it abundantly clear that *no* consideration was given to the possibility of suspending operations on that portion of the lease within the Cross Canyon WSA at least until such time as a final decision was made by Congress on the ultimate status of the land. It is self-evident that,

¹⁵ Indeed, such an interpretation would seem directly contrary to the Circuit Court's declaration in *Rocky Mountain Oil and Gas Association v. Watt*, *supra*, that "§603(c)'s nonimpairment standard 'remains the norm,' 1981 Opinion at 4, with respect to *all* mineral leases, *regardless* of their date of issuance." *Id.* at 746 n.17 (italics in original).

having failed to recognize the existence of discretionary authority to suspend operations, the authorized officer has failed to bring his informed judgment to bear on this question such as could justify the Board in deferring to his expertise. In such circumstances, it appears to us that the appropriate course of action is to set aside the decision approving the APD and remand the matter for consideration of whether, in the exercise of discretion, operations and production requirements within that portion of lease COC 26082 should be suspended pending ultimate resolution of the wilderness status of the land. Cf. *State of Wyoming Game and Fish Commission*, 91 IBLA 364 (1986) (EA failed to adequately consider appropriate alternative); *Sierra Club (On Judicial Remand)*, 80 IBLA 251 (1984) (EIS failed to adequately consider "no action" alternative).

We wish to make it clear, however, that we are not, at the present time, intimating any view on whether or not suspension of operations is warranted in the instant case. We merely hold that, insofar as oil and gas lease operations are concerned, where an APD will result in a violation of the nonimpairment standard on lands within a WSA, consideration should be given whether, in the exercise of discretion, operations under the lease should be suspended to await a final determination on the status of the lands.¹⁶

[4] The last issue presented for consideration involves the challenge to the issuance of the associated right-of-way to provide access from outside the WSA to the lease. Appellant CEC challenges BLM's assertion that "[i]mplicit in recognition of those pre-FLPMA rights [of oil and gas lessees] is reasonable access" (Deputy State Director's decision at 3). CEC argues that this assertion has no basis in fact and is contrary to the well-recognized rule that, as a general matter, issuance of a Federal oil and gas lease does *not* guarantee access to the leasehold, citing, *inter alia*, 2 *Law of Federal Oil and Gas Leases* 22.01 (1992), at 22-4 and the decision in *Coquina Oil Corp. v. Harry Kourlis Ranch*, 643 P.2d 519, 523 (Colo. 1982). Since access to the leasehold is not guaranteed, appellant argues that such access cannot constitute a valid existing right within the meaning of section 701(h) of FLPMA such as would permit violation of the nonimpairment standard established by section 603(c) of FLPMA.

In response, BLM notes that while appellant's assertion that issuance of an oil and gas lease does not guarantee access is *generally* correct, it is not a universal truth. BLM points out that in *Utah Wilderness Association*, 80 IBLA 64, 91 I.D. 165 (1984), the Board, relying on section 1323(b) of the Alaska National Interest Lands Conservation Act (ANILCA), 16 U.S.C. § 3210(b) (1988), held that BLM must grant access to privately owned land surrounded by public lands

¹⁶In light of this determination, we will not reach the additional issue raised by appellants concerning whether directional drilling from land outside of the WSA was adequately considered in the EA and ROD. See CEC SOR at 15-17; SUWA SOR at 19-21. While this question may impact on any determination as to whether the discretionary authority to suspend should be exercised, we believe it would be more appropriately reviewed if and when an appeal is filed from a determination of the authorized officer on the question of suspension. Furthermore, in light of our disposition of appellants' challenge to the right-of-way (see discussion *infra*), this issue may well be moot.

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even if such access results in violation of the nonimpairment standard applicable to WSA's. Arguing that an oil and gas lease constitutes an "interest in the land,"¹⁷ BLM argues that under the Board's *Utah Wilderness Association* decision, it was required to grant Ampolex access to the drilling site. For a number of reasons, we do not agree.

Initially, we must note that any reliance upon the decision in *Utah Wilderness Association*, *supra*, is misplaced. The pivotal holding in that split decision was that section 1323(b) of ANILCA was applicable to all BLM lands and not merely to BLM lands in Alaska. Subsequent to the issuance of that decision, however, a suit for judicial review was filed in the United States District Court for Utah. By Memorandum Opinion dated December 16, 1985, the suit was dismissed as moot. *See Utah Wilderness Association v. Clark*, C84-0472J. However, as a precondition to the dismissal for mootness, the Court also issued an order directing the Board to vacate its decision in *Utah Wilderness Association*, *supra*. By Order dated February 26, 1986, the Board, in compliance with the Court's decision, vacated that decision. Thus, there is no decision presently on point determining the applicability of section 1323(b) of ANILCA to BLM lands outside of Alaska, and that question must be deemed to remain open.¹⁸

But, notwithstanding the foregoing, we need not revisit the question of whether section 1323(b) of ANILCA is applicable to lands outside of Alaska since, for reasons which we will set forth, we conclude that even were it so applicable it would not affect the outcome of the instant case. We reach this conclusion based on two separate lines of analysis. The first involves interpretation of the statutory language involved. Section 1323(b) of ANILCA provides:

¹⁷ BLM readily admits, however, that whether an oil and gas lease is an interest in land is, itself, dependent upon the theory as to the nature of an estate in oil and gas, citing 1 Williams and Meyers, *Oil and Gas Law* § 202.1 (1990), and 1A Summers, *The Law of Oil and Gas* §§ 155-170 (Supp. 1985). Starting with the premise that "[p]ossession of the property interest in Federal oil and gas leases is governed by normal rules of State property law," BLM proceeds to suggest that, if an oil and gas lease were deemed to be an "interest in the land," under Colorado State law, it would be an "interest in the land" under sec. 1323(b) of ANILCA. We do not agree.

Regardless of how Colorado might treat the leasehold interest of a Federal oil and gas lessee as a general matter, the question herein relates to the interpretation of the scope of a Federal statute, and it is the Federal interpretation which must control. Indeed, carrying BLM's argument to its logical extent would result in a situation in which the provisions of sec. 1323(b) of ANILCA would apply to leases in some states but not in others, dependent upon whether the State deemed oil and gas leaseholds to constitute an "interest in the land."

In any event, as explained *infra* in the text of this decision, it is unnecessary to determine whether a Federal oil and gas lease constitutes an "interest in the land," since, for reasons subsequently explained, we conclude that sec. 1323(b) of ANILCA is not applicable to Federal oil and gas leases regardless of whether or not they are considered to be an "interest in the land."

¹⁸ As the Court related in its memorandum opinion, the purpose of requiring the Board to vacate its decision was to "wip[e] the slate clean." In retrospect, it is clear that the failure of the Board to issue a decision vacating its prior determination, as opposed to the unpublished order which it did issue, was a mistake, particularly since the Court's decision was also unpublished. Obviously, the parties to this appeal were not aware of the subsequent history of the *Utah Wilderness Association* case. Hopefully, the Board's decision herein will forestall further confusion on this question.

We also note that the BLM Manual asserts that sec. 1323(b) applies nationwide. *See* BLM Manual 2801.49A. No basis for this assertion, however, is provided in the Manual and it is possible that the authors were misled on this point by the failure of the Board to publicize the order vacating its *Utah Wilderness Association* decision. In any event, BLM Manual provisions are binding neither on this Board nor on the public at large. *See, e.g., Cities Service Oil and Gas Corp.*, 109 IBLA 322 (1989); *United States v. Kaycee Bentonite Corp.*, 64 IBLA 183, 89 I.D. 262 (1982). Thus, the Board views the question of the nationwide applicability of sec. 1323(b) of ANILCA as open, notwithstanding any implication to the contrary in the BLM Manual. *But see Amoco Production Co. v. Village of Gambell*, 480 U.S. 531, 546-55 (1987); *Village of Gambell v. Hodel*, 869 F.2d 1273, 1278-80 (9th Cir. 1989).

Notwithstanding any other provision of law, and subject to such terms and conditions as the Secretary of the Interior may prescribe, the Secretary shall provide such access to nonfederally owned land surrounded by public lands managed by the Secretary under [FLPMA] as the Secretary deems adequate to secure to the owner the reasonable use and enjoyment thereof: *Provided*, That such owner comply with rules and regulations applicable to access across public lands.

This statute, by its express terms, requires the provision of access to an "owner" seeking access to "nonfederally owned land." Regardless of whether or not a lessee could qualify as an "owner" of land within the meaning of this section, it is obvious that the land embraced by oil and gas lease COC 26082 could not be classified as "nonfederally owned land" under any theory. In the absence of any legislative history which might suggest a Congressional intent to include Federally owned land in which an individual held a leasehold interest within the scope of the term "nonfederally owned land," it is impossible to conclude that such land is covered by section 1323(b) of ANILCA.¹⁹

Moreover, quite apart from the problems of statutory construction, this section is irrelevant for a totally independent reason. The issue under review is whether or not a right of access to the leasehold existed such that it was protected under section 701(h) of FLPMA from application of the nonimpairment standards of section 603(c) of FLPMA. FLPMA was, of course, enacted in 1976. ANILCA, however, was not adopted until December 2, 1980. Thus, to the extent that FLPMA pre-dated the adoption of ANILCA, rights of access based on the latter Act could not, as a matter of chronology, be valid *existing* rights under the former. Thus, we must conclude that nothing in ANILCA supports BLM's contention that the right of access to the leasehold was protected as a valid existing right under section 701(h).

[5] Since the provisions of section 1323(b) of ANILCA are not relevant herein, the question then arises whether Ampolex had access rights to the leasehold boundary as an incident of the lease such as could constitute a valid existing right under section 701(h) of FLPMA. Nothing in the express terms of the lease purported to grant Ampolex such access and, we note, appellant's assertion that no implied right of access across unleased lands arises upon issuance of a Federal oil and gas lease is substantially correct. While an implied right of access to mineral locations under the General Mining Laws had, prior to FLPMA, long been recognized (*see, e.g., Alfred E. Koenig*, 4 IBLA 18, 78 I.D. 305 (1971); *Rights of Mining Claimants to Access Over Public Lands to Their Claims*, M-36584, 66 I.D. 361 (1959)), and was expressly protected in section 302(b) of FLPMA, 43 U.S.C. § 1732(b)

¹⁹The Court in *Montana Wilderness Association v. U.S. Forest Service*, 655 F.2d 951, 955 (9th Cir. 1981), noted that the legislative history on this section was "surprisingly sparse." The few references which were made to this provision invariably referred to "inholders" or "landowners," terms not normally associated with oil and gas lessees. *See, e.g., S.Rep. No. 96-413 at 310, reprinted in 1980 U.S. Code Cong. & Admin. News at 5254; 126 Cong. Rec. 24912 (1980) (statement of Representative Weaver); 126 Cong. Rec. 29262-63 (1980) (statement of Representative AuCoin); 126 Cong. Rec. 30369-70 (1980) (statement of Senator Melcher)*. Moreover, a comparison of the language of sec. 1323(b) with that of sec. 1110(b) of ANILCA, 16 U.S.C. § 3170(b) (1988), shows that where Congress intended to cover leaseholds in access provisions it took special care to make its intent clear. Thus, sec. 1110(b) provides that the Secretary shall provide "adequate and feasible access" to privately owned lands in conservation units, "including subsurface rights of such owners underlying public lands." No comparable language appears in either sec. 1323(a) or sec. 1323(b).

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(1988), the situation with respect to oil and gas leases has been much different. As the leading treatise on the subject has noted:

The Mineral Leasing Act of 1920 converted oil and gas from locatable minerals to leaseable minerals. Although section 29 of the Mineral Leasing Act gave the Secretary of the Interior the authority to grant rights-of-way, unlike the general mining laws, the Act provided no right of access to minerals subject to its provisions. Neither the courts nor the Department of Interior have since recognized an implied right of access across federal lands to leased federal oil and gas. The current Department of Interior policy on rights of access is set forth in a 1978 Instruction Memorandum of the Bureau of Land Management as follows:

The Bureau does not guarantee access to mineral lease areas, either through the construction of BLM roads or the acquisition of rights-of-way across private or non-BLM lands that may control access to BLM mineral lease areas. In effect, BLM mineral leases are issued on a caveat emptor basis, and the Bureau makes no claims that guaranteed access exists [BLM Instruction Memorandum 78-67].

Thus, an oil and gas developer, once having had absolute rights of access, now has no guarantees that it will be able to reach its leasehold. Therefore, a federal lessee must carefully evaluate its access problems and the possible solutions.

2 *Law of Federal Oil and Gas Leases*, 22-4 (1992) (footnotes omitted).

This limitation has been remarked upon by other commentators. Thus, in contrast to the access rights granted mineral locators, it has been noted that "[o]il and gas leases and all other entries not resting on the mining law enjoy no parallel right of access at all; access in such cases can be granted or denied at the discretion of the managing agency, and must be exercised pursuant to applicable statutory or regulatory requirements. * * * In short, present law provides broad authority to deny or significantly burden access to mineral leases previously issued by the federal government." C. Martz, R. Love, C. Kaiser, *Access to Mineral Interests by Right, Permit, Condemnation or Purchase*, 28 Rocky Mt. Min. L. Inst. 1075, 1080, 1095-96 (1983).²⁰ See also *Coquina Oil Corp. v. Harry Kourlis Ranch*, *supra* at 523 ("the federal oil and gas leases clearly notified Coquina that the federal government did not guarantee access to the leasehold").

Decisional law in the Department has followed a similar tack. Thus, in *Frances R. Reay*, 60 I.D. 366, 368 (1949), the Department held that a Federal oil and gas lease grants no rights in lands outside the subdivisions described in the lease. This holding was reaffirmed both in Solicitor's Opinion, *Right-of-way Requirements for Gathering Lines and Other Production Facilities Located Within Oil and Gas*

²⁰ Admittedly, it must be acknowledged that, prior to the adoption of FLPMA, some commentators had argued that, notwithstanding the Department's failure to recognize it, an implied right of access to oil and gas leaseholds could be derived from the provisions of the Mineral Leasing Act. See, e.g., J. Due, *Access Over Public Lands*, 17 Rocky Mt. Min. L. Inst. 171, 194 (1972). However, as another commentator noted subsequent to FLPMA's adoption, "[S]ection 302(b) [of FLPMA] does not support a continued implied right of access for oil and gas operators." L. Lewis, *Access Problems and Remedies for Oil and Gas Operators*, 26 Rocky Mt. Min. L. Inst. 311, 342-43 (1980). Indeed, since sec. 302(b), 43 U.S.C. § 1732 (1988), by its express terms, provides protection of the "rights of ingress and egress" of locators and claimants under the Mining Law of 1872, the failure of Congress to similarly provide such protection to mineral lessees would support the conclusion that Congress did not view these interests as being vested with any implied rights of "ingress and egress."

Leaseholds, M-36921, 87 I.D. 291, 302 (1980), and in *Gas Co. of New Mexico*, 88 IBLA 240, 242-43 (1985).

In view of the foregoing, it must be concluded that issuance of the oil and gas lease herein did not guarantee subsequent issuance of access rights thereto. Since no guaranteed access existed, the grant of the right-of-way to the lease premises in the instant case cannot be approved on a theory that Ampolex had a valid existing right with respect to access. Thus, in the absence of a showing of "grandfathered" uses, the nonimpairment standard would generally apply with respect to the granting of access to leases within a WSA. But, whether it applies herein requires analysis of one additional factor, *i.e.*, does the fact that the lease is now within a unit alter the application of the nonimpairment standard where the access road will cross lands outside of the original lease boundaries but now within the unit?

[6] In examining this question, we start with the recognized proposition that Federal lands committed to an approved unit agreement are treated as a single lease for various statutory requirements, not the least important of which is the determination that a lease has been extended beyond its primary term either by production under the unit plan or by the conduct of diligent drilling operations on committed lands over a lease's anniversary date. *See, e.g., Energy Trading Inc.*, 50 IBLA 9, 12 (1980); *General Petroleum Corp.*, 59 I.D. 383, 388 (1947). Consistent therewith, it has been noted that "[w]hen a federal unit has been approved and the unitized area is producing, rights-of-way are generally not required for production facilities and access roads within the unit area." 2 *Law of Federal Oil and Gas Leases* at 22-9.²¹ The question before the Board is whether, given the application of this principle within the factual construct of the present appeal, committing this lease to the McElmo Dome unit *subsequent to* the adoption of section 603(c) of FLPMA allows construction of an impairing road to gain access to the lease boundaries where the road to be constructed would be located on other lands committed to the unit. We do not believe that such is the case.

Critical to our conclusion is the fact that, save for grandfathered uses and valid *existing* rights (*i.e.*, rights in existence when FLPMA was enacted), the Secretary of the Interior was affirmatively charged with preventing impairment of wilderness values during the period of wilderness review. Given the discretionary nature of the authorized officer's authority to approve a unit agreement (*see discussion supra*), approval of a unit agreement which would permit impairment of an area by actions which were neither "grandfathered" uses nor valid *existing* rights as of the date of FLPMA's adoption would constitute an abuse of discretion.

This is a fundamentally different issue than that which we examined above concerning the authorized officer's failure to pre-condition

²¹The origin of the distinction between producing and drilling units is not clear. In any event, it is important to note that even in those situations in which a right-of-way is not required, the operator must still obtain BLM approval of the access road. As the BLM Manual notes, this can be done either as part of the APD approval process or in the processing of a notice of staking. *See BLM Manual 2801.32C2.*

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approval of the unit upon the imposition of nonimpairment restrictions to the leasehold. In the former situation, at the time of both FLPMA's enactment and the approval of the McElmo Dome unit, the lessee was clearly possessed of the right to impair the wilderness characteristics of the land within the lease, if application of the nonimpairment standard would unreasonably interfere with enjoyment of the lease. This right, therefore, constituted a valid existing right within the meaning of section 701(h) of FLPMA and the question was whether, as a condition of approving the unit agreement, the Department was required to obtain a waiver of this right.

The present question, by contradistinction, involves a totally different scenario. Insofar as off-lease rights of access were concerned, the lessee possessed none when FLPMA was passed and had none when committal to the unit was approved. To allow the approval of the lease's committal to the unit to serve as a basis for authorizing the construction of wilderness-impairing access to the lease across WSA lands beyond the original lease boundaries would be to recognize a right which was neither a "grandfathered" use nor a valid existing right. It would constitute the creation of a right to impair a WSA where none existed prior to FLPMA and, as such, is prohibited by section 603(c) of FLPMA.²²

We hold, therefore, that where a pre-FLPMA lease is surrounded by land within a WSA, the subsequent inclusion of that land within a producing unit does not serve to grant the lessee any rights to construct wilderness-impairing access from other parts of the unit to the lease. Thus, BLM's decision approving right-of-way COC 53315 must be reversed.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision approving the APD for COC 26082 is set aside, the decision issuing associated right-of-way COC 53315 is reversed, and the case files are remanded for further action consistent herewith.

JAMES L. BURSKI
Administrative Judge

I CONCUR:

GAIL M. FRAZIER
Administrative Judge

²² Of course, in those situations in which a pre-FLPMA lease had been committed to a producing unit prior to the adoption of FLPMA, the right of access across other leases committed to the unit *would* constitute a valid existing right within the meaning of sec. 701(h) of FLPMA.

January 14, 1993

**APPELLATE REVIEW OF THE DECISION OF THE
ENDANGERED SPECIES COMMITTEE: PORTLAND
AUDUBON SOCIETY ET AL. v. THE ENDANGERED SPECIES
COMMITTEE NO. 92-70436 (9th Cir.)***

M-36976

January 14, 1993

Endangered Species Act: Generally

The Department and Endangered Species Committee staff undertook substantial and effective procedures to safeguard the integrity of this novel process. The ESC's decision is well supported by the evidentiary record. This litigation will establish important legal principles that will govern all future ESC decisional processes under sec. 7 of the ESA.

Memorandum

To: The Secretary and Chairman, Endangered Species Committee

From: Solicitor and Counsel, Endangered Species Committee

Subject: Appellate Review of the Decision of the Endangered Species Committee: *Portland Audubon Society et al. v. The Endangered Species Committee*, No. 92-70436 (9th Cir)

You have asked for the views of the Office of the Solicitor and Counsel to the Endangered Species Committee (ESC or Committee) on the substantive arguments raised by the Portland Audubon Society and other environmental organizations (Petitioners) in their challenge to the Committee's May 15, 1992 decision on the application of the Bureau of Land Management (BLM) for exemption from the requirements of the Endangered Species Act (ESA), 16 U.S.C. § 1531 *et seq.* This opinion responds to issues raised by the petitioners in their closing brief to the Committee, their petition for review to the United States Court of Appeals for the Ninth Circuit, their docketing statement and the brief filed in support of their discovery motion pending before the Ninth Circuit. For the reasons discussed below, we believe that the Department and ESC staff undertook substantial and effective procedures to safeguard the integrity of this novel process, and that the ESC's decision is well supported by the evidentiary record. Pursuant to your request, we have filed a copy of this opinion with the Attorney General.

I. INTRODUCTION

On September 11, 1991, the BLM requested that the Secretary of the Interior (Secretary) convene the ESC to consider its application for exemption from the requirements of the ESA for 44 timber sales in western Oregon that had received jeopardy opinions in consultations with the Fish and Wildlife Service (FWS). The Secretary accepted the application, and determined on October 1, 1991, that the threshold criteria prescribed at section 7(g)(3) of the ESA had been met. The

*Not in chronological order.

Secretary then convened the ESC, appointed an Administrative Law Judge (ALJ), conducted an evidentiary hearing in Portland, Oregon from January 8-30, 1992, and submitted his report to the ESC on April 29, 1992. The ESC met on May 14, 1992, and voted to exempt 13 of the 44 timber sales from the requirements of the ESA.

On June 10, 1992, the Petitioners filed a petition for review of the decision of the ESC in the Ninth Circuit. Although the court initially issued a briefing schedule, the court suspended the schedule to allow the parties to submit briefs and present arguments concerning the Petitioners' emergency motion for the appointment of a special master and for leave to conduct discovery into alleged *ex parte* communications between members of the ESC and the President's staff during the ESC's final consideration of the exemption application. Arguments on the Petitioners' motion were heard on September 23, 1992. Although the court denied the Petitioners' request for the appointment of a special master, it has not yet issued an opinion on the request for discovery into alleged *ex parte* communications.

II. THE PETITION FOR REVIEW

In their docketing statement the Petitioners have identified five issues as the basis for their petition for review, along with their beliefs as to the appropriate standard of appellate review for each of the five issues.¹ The Petitioners' brief, submitted following the close of the evidentiary hearing, provides greater detail regarding their likely arguments before the Court of Appeals. The broad substantive issues and probable specific arguments will be addressed in turn below.²

III. ARGUMENT

A. All Appropriate Procedural Safeguards Were Enforced

1. Introduction

The Petitioners contend that inadequate safeguards were taken to ensure that the necessary procedural requirements required by the ESA and regulations were enforced. Their allegation is based on the

¹The following five issues were raised by Petitioners in their docketing statement of June 10, 1992:

1. "Was the ESC's exemption decision fatally flawed by procedural misconduct and irregularities, including improper *ex parte* communications with decisionmakers and violations of separation of function requirements?"
2. "Did the Secretary illegally convene the ESC and the exemption proceedings that led to the May 14, 1992, decision?"
3. "Is the ESC's exemption decision improper because BLM never prepared an adequate environmental impact statement addressing the northern spotted owl, as required by the National Environmental Policy Act and ESA §7(k), 16 U.S.C. § 1536(k)."
4. "Was the ESC's exemption decision improper because BLM never consulted with FSW regarding BLM's timber sale program, in violation of 16 U.S.C. § 1536(a)(2)?"
5. "Did the ESC improperly determine that the requirements of ESA § 7(h), 16 U.S.C. § 1536(h) [the exemption criteria], had been satisfied?"

²The Petitioners contend that the four procedural issues should be reviewed *de novo* by the court to determine whether the ESC acted "without observant of procedures required by law" pursuant to 5 U.S.C. § 706(2)(d). With respect to its challenge to the ESC's consideration of the substantive exemption criteria set forth at sec. 7(h) of the ESA, the Petitioners state that the review is based on the "substantial evidence" standard of 5 U.S.C. § 706(2)(E). Because the ESA requires judicial review by the court of appeals based on the record, we do not believe that the court should review any issues *de novo*. However, we defer to the Department of Justice regarding the appropriate standard of review.

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assumption that the Committee should have applied more rigorous criteria to enforce the separation of functions and protections against *ex parte* communications. The many flaws of this argument flow primarily from the Petitioners' attempt to categorize the exemption process as an adjudication based simply on the ESA's incorporation of certain provisions of the Administrative Procedure Act (APA), 5 U.S.C. § 551 *et seq.*

2. The Exemption Process Essentially is a Rule Making

The APA is based on a broad and logical dichotomy between rule making and adjudication.³ The APA's legislative history (79th Congress 1944-46), the Attorney General's Manual of 1947, and recent case law help resolve the question. It is universally accepted that the difference between rule making and adjudication is analogous to the difference between the legislative and judicial functions. See Attorney General's Manual of 1947. In *American Express Co. v. United States*, 472 F.2d 1050 (C.C.P.A. 1973), the court integrated the legislative history and the manual and held that:

Rule making is legislative in nature, is primarily concerned with policy considerations for the future rather than the evaluation of past conduct, and looks not to the evidentiary facts but to policy-making conclusions to be drawn from the facts. On the other hand, adjudication is judicial rather than legislative in nature, has an accusatory flavor and may result in some form of disciplinary action, and is concerned with issues of fact under stated law.

Id. at 1055 (citations omitted). See also *Association of National Advertisers, Inc. v. FTC*, 627 F.2d 1151, 1160-64 (D.C. Cir. 1979); *Hercules, Inc. v. EPA*, 598 F.2d 91, 118 (D.C. Cir. 1978).

While the ESA prescribes in general terms the method by which the Secretary and the Committee must arrive at a determination regarding the exemption application, Congress generally was silent as to the nature of the administrative process called for.⁴ In drafting section 7(g) of the ESA (the exemption process), Congress specifically incorporated sections 554, 555, and a portion of section 556 of the APA to the conduct of any hearing under this subsection. However, Congress also inserted the following qualifying language: "to the extent practicable within the time required" and "except to the extent inconsistent with the requirements" of section 7. This limiting language makes clear that the ESA does not contemplate complete incorporation of these portions

³The APA defines a "rule" as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy * * *" 5 U.S.C. § 551(4). "Rule making" is the "agency process for formulating, amending or repealing a rule." 5 U.S.C. § 551(5). An "order," which is the product of the agency procedure known as adjudication, is defined as "the whole or part of a final disposition, whether affirmative, negative, injunctive or declaratory in form, of an agency in a matter other than a rule making * * *" 5 U.S.C. § 551(6).

⁴It is noteworthy that 5 U.S.C. § 553(d), which covers publication of a rule prior to its effective date, clearly indicates that Congress contemplated that a rule making might include the granting or recognition of an "exemption."

of the APA to the consultation and exemption processes.⁵ The Court of Appeals for the D.C. Circuit has made it clear that the essential nature of an administrative process—whether rule making or adjudication—will not be altered by the additional requirement by Congress of procedures not traditionally associated with a strict rule making or adjudication. *See Association of National Advertisers, Inc. v. FTC, supra*. Applying the applicable cases and the Attorney General's Manual of 1947, discussed above, to the bifurcated process by which the Committee is to decide whether the exemption shall be granted, it is clear that the exemption process constitutes a rule making.⁶ The legislative history of the amendments to the ESA that created the Committee clearly indicates that the Committee is to take a broader view than even that which was the focus of the initial consultation. *See H.R. Conf. Rep. No. 1804, 95th Cong., 2nd Sess. 20 (1978), reprinted in 1978 U.S.C.A.N. 9487 (1978)*. The hearing process serves to develop a record of economic and scientific facts to provide a basis for policy determinations; it is not an adversary process to relitigate issues not before it, such as the wisdom of the underlying listing of the species under the ESA.⁷

Moreover, other obvious discrepancies between the exemption process required under the ESA and that contemplated under section 554 of the APA further demonstrate that Congress did not intend to create an adjudication process under the ESA. Section 7 of the ESA and the joint ESA regulations at 50 CFR Parts 450–453 require only that the ALJ conduct a hearing to develop the record; the ALJ does not provide any analysis of the record or otherwise participate in the decision process. This provision is in direct conflict with section 554(d) of the APA, which requires that the officer who presides over the reception of evidence must make the initial decision. Moreover, the Committee itself is authorized under section 7(e) of the ESA to seek additional information for inclusion into the record.

The ESA's qualified application of sections 554, 555, and part of section 556 of the APA to the exemption process merely constitute Congress's guidance as to the general model anticipated for the resolution of the exemption issue, and not as demonstrative of a clear congressional intention to fashion an adjudicatory scheme.

3. Separation of Functions

⁵The language of sec. 554 of the APA provides additional insight into the likely intent of Congress as to the nature of the consultation and exemption processes. By its terms, sec. 554 applies only "in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing * * *." Under the ESA, the determination is to be made by the Committee, after development of a record and an accompanying report by the Secretary. Under sec. 7(e) of the ESA, however, the Committee has the power and discretion to order additional written submissions and/or further hearings beyond those included in the record created by the ALJ. Accordingly, in the absence of Congress' application of sec. 554, hearing procedures to the exemption process, it is extremely doubtful that the section would be found to apply.

⁶Whether the consultation and exemption processes constitute "formal" rule making under sec. 553 of the APA need not be decided at this time.

⁷For examples of cases wherein courts found the administrative process at issue to constitute either adjudications or something other than rule making, see *American Express Co. v. U.S.*, 472 F.2d 1050, 1055, 60 C.C.P.A. 86 (1973); *Automotive Parts & Accessories Ass'n, Inc. v. Boyd*, 407 F.2d 330 (D.C. Cir. 1968).

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a. General

The Chairman of the Committee and the other Committee members require staff assistance as well as legal services and advice regarding the administration of the exemption process. The Secretary, who is Chairman of the Committee pursuant to 16 U.S.C. § 1536(e)(5)(C), is required by the ESA and regulations to perform specific duties as discussed above, including making preliminary and threshold determinations on the adequacy of the application, holding a hearing for the gathering of evidence, preparing a report based on the hearing record for consideration by the Committee, and chairing Committee meetings. The Chairman is authorized to assign technical staff to assist the ALJ. 50 CFR 452.05(a)(2). The Chairman assigned a staff that includes economists, researchers, and legal counsel. Because of the additional considerations of separation of function required by 50 CFR 452.07(a), particular care was taken in the selection of staff and legal counsel for the Chairman and the Committee, as discussed below.

b. APA Separation of Functions

Petitioners contend that the ESC *relaxed* procedures from some undefined yet required level of strictness to something less than acceptable. The requirements for separation of functions in a rule making are much less stringent than those required in an adjudication. Nevertheless, as the body of memoranda and guidance that issued from this Office and from the Secretary demonstrate, the Department took many additional steps to preserve the necessary separation of functions for purposes of the hearing to the greatest extent possible that also allowed the decision makers to have access to sufficient technical expertise for the interpretation of the evidence that was developed. *See, e.g.*, January 13, 1992 Memorandum by Counsel to the ESC filed in response to ALJ Order dated January 10, 1992. This goal is embodied in the regulations governing the Committee and the exemption process, 50 CFR Part 452.

50 CFR 452.07 requires that (1) the Administrative Law Judge conducting the hearing for the Secretary cannot be subject to the supervision or direction of anyone who participated in the section 7 consultation, and (2) the Secretary cannot allow anyone who participated in the consultation under section 7 of the ESA or a "factually related matter" to participate or advise in a determination related to the preparation of the Secretary's report, except as a witness or counsel in public proceedings. Each of these requirements will be discussed in turn.

The Attorney General noted in his 1947 Manual that in rule making actions, agency heads should not be separated from the expertise of their staff except for individual employees who have had such

extensive previous participation in an adversary capacity or a factually related matter that they may have lost “that dispassionate judgment which the Anglo-American tradition demands of officials who decide questions.” 1947 Manual at 56. Following this guidance, the Secretary should not be cut off from the expertise of his staff unless a determination is made that an individual staff member has participated in a matter so closely related to the endangered species consultation process at issue that it reasonably suggests that the employee already may have made up his or her mind on the outcome of the exemption application (see Counsel’s September 26, 1991 memorandum).

c. The ESC Correctly Applied a Stringent Standard of Impartiality in Appointing Its Staff

The standard a party challenging the impartiality of the decision maker in a rule making process must meet is: a clear and convincing showing that the decision maker has an unalterably closed mind. *Association of National Advertisers, Inc. v. FTC, supra*. The court noted that the “clear and convincing” standard is necessary to rebut the presumption of administrative regularity. See, e.g., *Withrow v. Larkin*, 421 U.S. 35 (1975); *Hercules, Inc. v. EPA, supra*. The court further explained that the “unalterably closed mind” standard is necessarily broad in order to permit the rule makers to carry out their proper policy-based functions while disqualifying those unable to consider meaningfully evidence presented at a hearing. *Association of National Advertisers, Inc.*, 627 F.2d at 1170. See also Attorney General’s Manual of 1947 at 57.

The court in *Association of National Advertisers* distinguished its holding in *Cinderella Career & Finishing Schools, Inc. v. FTC*, 425 F.2d 583 (D.C. Cir. 1970), as not applicable in view of the essentially legislative function of the administrative procedure at hand.⁸ Despite this important distinction, Petitioners would have the court apply the adjudication standard enunciated in *Cinderella*, which Petitioners interpret as calling for “the appearance of complete fairness.” The Petitioners’ argument renders the *Cinderella* opinion meaningless.

d. Petitioners Erroneously Characterize “Factually Related Matter”

The analysis of the scope of “factually related matter” turns on whether or not the ESA exemption process is considered a rule making or an adjudication. If the process is deemed a rule making, the requirements for separation of function are much less stringent. Indeed, the standard that a party challenging the impartiality of the decision maker must demonstrate is considerable in the context of a

⁸Citing the 1947 Attorney General’s Manual to buttress its distinction between adjudications and rule makings, the court stated that “[t]he *Cinderella* view of a neutral and detached adjudicator is simply an inapposite role model for an administrator who must translate broad statutory commands into concrete social policies.” *Association of National Advertisers, Inc. v. FTC*, 627 F.2d at 1168–69.

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rule making: a clear and convincing showing that the decision maker has an unalterably closed mind. *Association of National Advertisers, Inc. v. FTC, supra.*

As an example, the 1947 Attorney General's Manual states that employees involved in an investigation for a "cease and desist" proceeding against a particular party should not be allowed to participate in that proceeding or one for a revocation proceeding against the same party that is based on the same investigation.

The Court of Appeals for the D.C. Circuit has decided cases in which the nature of rule making was determinative with respect to the scope and extent of the application of section 554(d) to administrative procedures required by statute to incorporate some of the procedural requirements associated with adjudications under section 554. In *Association of National Advertisers, Inc. v. FTC, supra*, the court considered whether evidence that a member of the commission had prejudged aspects of the case disqualified him from deciding a matter before the commission. The court reasoned that the test to be applied in determining whether prejudgment had occurred was to be the test applied in normal rule making situations, even though section 18 of the Federal Trade Commission Act called for adjudication-like procedures in addition to the procedures of APA notice and comment rule making. Recognizing that rule making requires the decision makers to develop broad legislative facts which cannot always be severed from policy and opinion, the court found that the statutory requirement of section 18 that the rule making procedures incorporate aspects of section 554, or other processes associated under the APA with adjudications, did not defeat the essential nature of a rule making activity. Accordingly, the burden of showing that a decision maker is so tainted as to require separation was held to be quite high: a clear and convincing showing that the decision maker has an unalterably closed mind.

Additionally, in *Hercules, Inc. v. EPA*, 598 F.2d 91 (D.C. Cir. 1978), relied on heavily by the court in *Association of National Advertisers*, the court considered whether a decision was tainted by contacts between technical staff and the appointed judicial officer (no hearing was involved), and the officer's use of the staff's proposed findings and conclusions. There, the essential characterization of the process as rule making was determinative, and the court did not find the contacts disqualifying.⁹

Under these cases the definition of "factually related matters" is not as broad as Petitioners contend and is dictated by the legislative nature of the process. It follows that in the context of the exemption

⁹Specifically, the court found that the contacts were needed with "unusual and compelling force," in view of the rigid timelines imposed by statute on the agency and the complex issues and facts required to be analyzed. 598 F.2d at 126.

process, contrary to the Petitioners' assertions, the definition of "factually related matter" includes only matters that relate to the technical review of the biological data that surrounds the consultation, preparation of and decisions related to the initiation of the exemption application, as well as the implementation of the consultation process at issue.¹⁰ In this way, the Secretary and the Committee members can continue to rely on the expertise of their staff to the greatest extent possible. Indeed, it would be ironic to interpret "factually related matters" to include any matters relating to the subject of the consultation. In the present case, such an interpretation would include all matters relating either to the protection of the spotted owl or to timber harvesting. Such an interpretation would deprive the Secretary of the very expertise needed in the ESC decision making process and is inconsistent with Congress' desire to have informed participants in the exemption process.¹¹

The Petitioners incorrectly suggest that three cases, *Portland Audubon Society v. Lujan*, 712 F.Supp. 1456 (D. Or. 1989), *aff'd*, 884 F.2d 1233 (9th Cir. 1989); *Lane County Audubon Society v. Jamison*, No. 91-6123 HO (D. Or., Sept. 11, 1991); *Northern Spotted Owl v. Lujan*, Consol. Nos. C88-573Z, C90-1755Z (W. D. Wa.), deal with the same subject matter at issue in the exemption process. The narrow question at issue in the exemption process is whether or not to grant an exemption from the requirements of the ESA for the 44 sales referenced in the BLM's application. The three cases cited do not consider the issues raised in the exemption process. The Petitioners further suggested at the January 7 prehearing conference that even the Secretary of the Interior ought not to be involved in the exemption process because of his involvement in the above referenced litigation. This is a remarkable assertion in light of the statutory mandate that the Secretary not only be a member of the Committee, but also act as its Chairman. The statute makes clear that these functions may not be delegated. 16 U.S.C. §§ 1536(e)(3), (5)(B), (10).

e. The Hearing Was Not Tainted by Outside Litigation Strategies of the Parties.

In this case, both the applicant and the Federal agency are the BLM. Accordingly, both FWS and BLM separated their respective staff employees who are participating in the exemption process. Both of these bureaus require legal services and advice regarding the substantive and procedural aspects of the exemption process. In the normal course of business, the Office of the Solicitor provides legal services to both bureaus and the Secretary's office. The Solicitor is

¹⁰ As an example, the 1947 Attorney General's Manual states that employees involved in an investigation for a "cease and desist" proceeding against a particular party should not be allowed to participate in that proceeding or one for a revocation proceeding against the same party that is based on the same investigation.

¹¹ The Division of General Law conducted interviews of each potential Committee staff member, in order to determine whether they had participated in the sec. 7 consultations at issue or a "factually related matter" or otherwise demonstrated an unalterably closed mind (see Counsel's attached Sept. 26, 1991, memorandum). As a result of the interviews, not all of the individuals originally designated to be on the technical staff were selected.

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delegated all of the authority of the Secretary for the legal activities of the entire Department. See 43 Stat. 1455 (Act of June 26 1946); 109 Departmental Manual (DM) 3.1, 111 DM 2.2 *et seq.*; 209 DM 3.1. To read separation of functions in a restrictive manner would preclude the Solicitor from performing his statutory responsibilities. While the Solicitor has overall authority, the structural organization of the Solicitor's Office provides that the two bureaus involved in the exemption process are represented by attorneys in separate divisions. For purposes of the exemption process, these functional separations were extended and strengthened. Accordingly, "Chinese walls" were erected between the Solicitor's Division of Conservation and Wildlife, which represents FWS, and the Solicitor's Division of Energy and Natural Resources, representing BLM.

On matters relating specifically to their duties in the exemption process on behalf of the BLM and FWS, respectively, the Deputy Associate Solicitor for the Division of Energy and Resources¹² and the Associate Solicitor for the Division of Conservation and Wildlife did not report to, and were not supervised in the preparation of their position before the ESC by, the Solicitor and Deputy Solicitor because of their roles as Counsel and Deputy Counsel, respectively, to the Chairman and the Committee.

Petitioners' also allege impropriety with respect to the decision of counsel for FWS, acknowledged by the ALJ, to rescind a portion of its December 9 memorandum. See ALJ Order dated January 10, 1992. Petitioners have not yet identified any harm flowing from the decision, except to speculate that the Counsel to the ESC, who is also the Department's Solicitor, may have been involved somehow, possibly in violation of the separation of functions. The Counsel to the ESC, Mr. Thomas Sansonetti, in his January 13, 1992, memorandum in response to the ALJ's Order of January 10, 1992, stated in the clearest terms that

the withdrawal * * * was based on a mutual understanding between the FWS and the United States Department of Justice (DOJ) based on DOJ's concern that FWS not assert a position that may or may not contrast with the Administration's litigation posture in *Lane County Audubon Society v. Jamison*, No. 91-6123 JO (D. Or., Sept. 11, 1991). At no time did I suggest or recommend such a withdrawal * * *.

More generally, I want it to be clear that I and my Deputy Solicitor, Martin Suuberg, have been advising the Chairman on legal issues related to this ESC proceeding. We also have been assigned by the Secretary as staff to the Administrative Law Judge (See the Secretary's December 18, 1991 memorandum appointing the technical staff). Other than to address questions on how this proceeding might affect the mechanical operation of the Solicitor's Office as a whole (i.e., the workload of the involved attorneys, logistical concerns, etc.), I have not discussed the particulars of this proceeding with counsel for BLM or for FWS. In no circumstance have I discussed the merits of the issues in this

¹²The Associate Solicitor for Energy and Resources recused himself from representatives of the BLM in the exemption process due to his having previously held the position of Associate Solicitor for Conservation and Wildlife immediately preceding his current appointment.

proceeding with those counsel. Decisions on the presentation of their bureaus' positions are theirs alone.

FWS' decision clearly was not based on any *ex parte* or otherwise improper considerations.

Finally, Petitioners characterize as improper the withdrawal of the limited intervention of EPA's Office of Federal Activities (OFA), which was approved by the ALJ in his January 10 order. Transcript at 594. Petitioners had high hopes for the limited intervention because of OFA's delegated responsibilities to review Federal agencies' compliance with NEPA. They have suggested that the withdrawal constituted an improper blurring of decisional and prosecutorial staff in violation of the separation of function and "an attempt to insulate BLM in pending litigation." Post-Hearing Brief at 15.

In response to the ALJ's request for additional explanation of the withdrawal of OFA, Mr. Sansonetti stated in his memorandum of January 13, 1992:

[M]y letter dated January 3, 1992 responded to an inquiry from the Acting General Counsel of the Environmental Protection Agency (EPA). He suggested that EPA would be comfortable withdrawing from the hearing as a conditional limited intervenor if EPA received assurances that documents and testimony deemed significant would have the opportunity to be included in the record. In my letter to him I attempted to meet those concerns, as well as the concerns of other Committee members that the Committee receive a complete record, by restating the process established once the threshold determinations were made on October 1, 1991. The process described nothing more than has been available to the Committee members under the regulations or through an invitation by the Chairman to provide questions for the participants to answer.

These communications took place between myself and the Acting General Counsel, who is part of the decisional staff at EPA. At no time did I communicate with Tim Backstrom or Tom Marshall, who made the motion to withdraw, or any other person at EPA who represented EPA's Office of Federal Activities at the ESC hearing.

Counsel's Memorandum of January 13, 1992 at 2. The withdrawal process was fully documented for the record and there is no evidence of any connection with BLM's litigation position. In fact, the effectiveness of the administrative process was enhanced by the openness with which OFA withdrew, since the withdrawal removed a potentially serious issue of separation of function in the midst of an agency the head of which sits on the ESC itself. Oddly, only the *withdrawal* of OFA troubles Petitioners; it is doubtful that the Petitioners would have allowed the staff of another Federal representative on the ESC even to attempt to intervene in the process.

f. Ex Parte Communications

In their emergency motion filed with the court on July 24, 1992, Petitioners made specific allegations of improper *ex parte* communications. With the exception of the issues surrounding EPA's limited intervention and subsequent withdrawal as a party to the evidentiary hearing, no other allegations have been made. Accordingly, with respect to discussion of substantive issues regarding *ex parte*

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communications by ESC members, we defer to the Government's brief filed in response to the Petitioners' motion.

B. The Secretary Properly Convened the Committee to Consider BLM's Exemption Application

1. Introduction

The Petitioners have challenged the Secretary's decision that the threshold requirements set forth in section 7(g)(3) were met. Petitioners argue that the ESC's consideration of BLM's application was improper because BLM did not completely fulfill its consultation responsibilities imposed by the ESA; that the Secretary erred in his threshold finding that the parties carried out their consultation duties in good faith; and that any timber harvesting would violate international treaties. These arguments simply are without merit.

2. The Adequacy of BLM's Consultations Under Section 7(a) of the ESA Is Not Properly Before the Court

The court lacks jurisdiction to hear any challenges to the BLM's conduct of its consultation responsibilities with FWS under the ESA. The exemption provisions of the ESA do not provide the remedy sought by the Petitioners. Moreover, the scope of BLM's section 7 consultation responsibilities are the subject of separate, ongoing litigation, *Lane County Audubon Society v. Lujan*, No. 91-6123 HO (D. Or., Sept. 11, 1991). The inquiry is whether, under the appropriate standard of review, the Secretary's threshold determinations were proper. There are no explicit consultation prerequisites to the filing of an application; rather, with respect to consultation it is the responsibility of the Secretary as part of the threshold determinations required by section 7(g)(3) to determine only whether consultation has been conducted in good faith. The Secretary's threshold finding regarding consultation was, at the least, supported by substantial evidence. See Chairman's Letter to Director Jamison, dated October 1, 1991. Appropriately, the Administrative Law Judge properly declined to allow testimony relating to the scope *under section 7(a)* of BLM's consultation activities. See Prehearing Conference Order, December 11, 1991.

Petitioners' overwhelming reliance on the findings of the district court in *Lane County* may be too much of a good thing. Section 7(a)(2) essentially requires consultations with FWS regarding a proposed action to insure that the action is not likely to cause jeopardy to a listed species or adversely affect its habitat "unless such agency has been granted an exemption for such action by the Committee * * *." This statutory language clearly contemplates that such exemption may be obtained *prior* to undertaking the consultation. Since an exemption granted by the Committee is an exemption "from the requirements of

section (a)(2),” Petitioners cannot argue that the requirements of section (a)(2) somehow operate to defeat the exemption.

3. The Secretary Properly Determined That BLM and FWS Had Conducted Their Consultation Responsibilities in Good Faith

The only inquiry properly before the court of appeals is whether the Secretary’s determination that the parties “carried out the consultation responsibilities * * * in good faith and made a reasonable and responsible effort to develop and fairly consider modifications or reasonable and prudent alternatives to the proposed agency action * * *,” pursuant to 16 U.S.C. § 1536(g)(3)(A)(i), was arbitrary capricious. The court may not review the consultations and substitute its own judgment. Rather, because the threshold determinations involve the application of the joint regulations governing the exemption process, the Secretary’s interpretation is entitled to substantial deference. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 867, 843–44 (1984); *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971); *Udall v. Tallman*, 380 U.S. 1, 16 (1965); (“when the construction of an administrative regulation rather than a statute is in issue, deference is even more clearly in order”); *Montana Power Co. v. Environmental Protection Agency*, 608 F.2d 334, 344 (9th Cir. 1979). The “good faith” determination is left explicitly to the Secretary’s discretion. As discussed below, the Secretary’s October 1, 1991 threshold findings must be affirmed by the court.

a. What is “Good Faith”?

Although there appear to be no cases directly on point, courts generally interpret “good faith” to mean “honest” or “sincere.” A few illustrative cases are discussed below.

Many courts rely on the Uniform Commercial Code (UCC) or state codes that have adopted the UCC for their definition of good faith. The UCC’s definition of good faith is “honesty in fact in the conduct or transaction concerned.” For example, in *Bank of China v. Chan*, 937 F.2d 780, 788 (2nd Cir. 1991), the court used this UCC definition to determine if a banking transaction was taken in good faith.

Other courts have relied on the Black’s Law Dictionary definition of good faith. In *Flynn v. United States*, 902 F.2d 1524, 1529 (10th Cir. 1990), a wrongful death case, the court cited to a shortened version of the Black’s Law Dictionary definition of good faith, as “honesty of intention and the absence of malice.” BLACKS LAW DICTIONARY 623 (5th ed. 1979) describes good faith as “an intangible and abstract quality with no technical meaning or statutory definition, and it encompasses, among other things, an honest belief, the absence of malice and the absence of design to defraud or to seek an unconscionable advantage * * *.”

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Finally, discussions of good faith in labor negotiation cases may further illustrate the definition.¹³ In these cases, the courts typically determined whether the union or management was bargaining in good faith by examining their actions (locking employees out, wildcat strikes) rather than focusing on the definition of good faith itself. Courts often rely on the National Labor Relations Board standard for determining the lengths to which a party must go to bargain in good faith. In *Saunders House v. NLRB*, 719 F.2d 683 (3rd Cir. 1983), a labor negotiation case, the court found that if further good faith bargaining is viewed as futile, the parties can be seen as having reached an impasse and are not required to continue bargaining. The NLRB has noted that they will not be reluctant to find an impasse when further bargaining would be futile. *E.I. duPont de Nemours & Co.*, 268 NLRB 1075, 1076 (1984).

Notably, the courts appear reluctant to use hindsight to determine what constitutes good faith. Rather, the courts generally prefer to review the totality of the circumstances to determine if good faith existed.

Applying this analysis to the issue raised by Petitioners, it is clear that, notwithstanding the findings of the district court in *Lane County*, the Secretary properly concluded on October 1, 1991, that the BLM and FWS carried out the consultation responsibilities in good faith. The Secretary, in adopting the analysis of the threshold determinations provided by Counsel to the ESC, found that the BLM and FWS had engaged in active, lengthy consultation over its FY 1991 timber sales program. This determination is amply supported by the lengthy consultations, BLM's 3-year review process *prior* to initiating consultation, and the BLM's genuine difference of opinion with FWS regarding whether FWS' recommended alternatives were in fact reasonable and prudent. Accordingly, the Secretary properly accorded little weight to BLM's request that the draft opinions be made final shortly after their issuance. This request did not demonstrate bad faith *per se*, and was substantially outweighed by the other evidence regarding the quality and duration of the actual consultations. See October 1, 1991 Memorandum to Chairman from Counsel and Assistant Secretary—Policy, Management and Budget, attached to Chairman's Letter to Director Jamison, dated October 1, 1991.

The Petitioners' *post hoc* arguments based on the outcome of separate litigation brought under the ESA do not lessen the fact that, at the time the consultations took place, they were conducted in good faith. Further, because analysis of the consultation process is not part of the

¹³The National Labor Relations Board (NLRB) has extensive case law on good faith in bargaining. These cases, however, focus on situations where the parties are charged under collective bargaining agreements and applicable law with finding an acceptable middle ground. As such, these cases are so factually distinct from the nature of the consultation process under the ESA that we do not find them to be persuasive on the application of the good faith standard to the threshold determinations of the exemption application.

exemption criteria, the ESC properly did not address the issue. See April 28, 1992 memorandum by Counsel to the ESC discussing the five questions certified to the ESC by the ALJ.

4. The Secretary Properly Found that BLM Had Not Made Any Irreversible or Irretrievable Commitments of Resources

Although raised with respect to the exemption criteria rather than as a challenge to the Secretary's threshold determinations, Petitioners on page 102 of their brief following the evidentiary hearing argued that the BLM's failure to consult regarding the Jamison Strategy caused it to irreversibly and irretrievably commit its resources in violation of section 7(d). This argument is without merit.

Section 7(d) prohibits such irreversible commitments of resources after initiation of consultation that would have the "effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures." Petitioners contend that the failure to initiate consultations on the Jamison Strategy committed the BLM to a "doomed course of action" that in turn led to the expenditure of money relating to the preparation of timber sales. PAS Post Hearing Brief at 105. Petitioners fail to explain, however, how such "commitment of resources" (and we doubt that implementing the Jamison Strategy could be so considered) would have the effect of foreclosing the formulation or implementation of alternative measures. In this case, it is likely that only the actual sale and cutting of timber could reasonably be interpreted to constitute an irretrievable or irreversible commitment of resources foreclosing alternative measures. Since neither activity took place it cannot reasonably be argued that the mere *managing and administration* of the timber sale program pursuant to the Jamison Strategy, without some actual cutting of timber, can not be considered irreversible. Nor, moreover, can it have the effect of foreclosing the possibility that reasonable and prudent alternatives could be identified. This was demonstrated by the outcome of the consultation itself.

The Petitioners' interpretation ignores the provision's plain meaning to prohibit actions after consultations have been initiated that would make it impossible to fulfill the purpose of the consultations: to find whatever reasonable and prudent alternative might accomplish the action agency's goals while insuring that the actions will not likely jeopardize the continued existence of a listed species or destroy or adversely modify the species' habitat. 16 U.S.C. § 1536(b)(3).

5. The ESC Properly Relied on the Determination by the Acting Secretary of State That an Exemption Would Not Violate Any International Treaties

Finally, the Petitioners challenge the ESC's decision on the grounds that the exemption would result in the violation of the Convention

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Between the U.S. and Mexico for the Protection of Migratory Birds (Feb. 7, 1936, as supplemented by Agreement of March 10, 1972). This charge, raised by the Petitioners during the hearing and referred by the ALJ to the ESC, may be characterized as a challenge to the Committee's reliance on the November 13, 1991 determination of the Acting Secretary of State pursuant to section 7(i) of the ESA that no treaties would be violated by any exempted action. The Petitioners made no effort to challenge the determination directly, other than to seek to develop testimony during the evidentiary hearing. Because the ESA limits the scope of the evidentiary hearing only to those matters necessary to develop a factual record for determination whether the exemption criteria have been met, this issue properly was excluded from beyond the ALJ properly declined to allow the testimony. See ALJ Orders of January 10 and February 14, 1992.

The Secretary of State is required under section 7(i) of the ESA, prior to the Committee's review of the application, to determine whether the granting of an exemption would violate any international treaty or other obligation of the United States:

Notwithstanding any other provision of this Act, the Committee shall be prohibited from considering for exemption any application made to it, if the Secretary of State * * * certifies, in writing, to the Committee within 60 days of any application made under this section that the granting of any such exemption and the carrying out of such action would be in violation of an international treaty obligation or other international obligation of the United States.

16 U.S.C. § 1536(i). The ESA grants authority to make this determination only to the Secretary of State. In fact, if the Secretary of State were to find that an exemption would violate an international obligation of the United States, the Committee would never meet to consider the application, let alone review the Secretary of State's finding. Accordingly, the Acting Secretary of State's November 13, 1991 decision that the exemption would not violate an international obligation similarly properly was not reviewable by the Committee.

As with the threshold determinations, the Secretary of State's interpretation is entitled to substantial deference. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 867, 843-44 (1984); *Citizens to Preserve Overton Park v. Volpe, supra*, 401 U.S. 402 (1971); *Udall v. Tallman*, 380 U.S. 1, 16 (1965); *Montana Power Co. v. Environmental Protection Agency*, 608 F.2d 334, 344 (9th Cir. 1979). The interpretation of applicable treaties and other international obligations is left explicitly to the Secretary of State's discretion. Accordingly, the Acting Secretary of State's November 13, 1991 determination must be affirmed by the court.

C. The Committee Properly Declined to Review the Adequacy of BLM's Compliance with NEPA Because the Provisions of Section 7(k) of the ESA Were Met

1. Introduction

Relying on the section 7(k) of the ESA, the Petitioners contend that the rulings from outside litigation regarding the legal sufficiency of BLM's environmental documentation pursuant to NEPA precluded the Committee from considering the exemption application and thus render the Committee's decision invalid. The ALJ ordered the parties specifically to present arguments regarding how section 7(k) of the ESA should be interpreted.

The sole reference to NEPA in the ESA appears in section 7(k), which provides:

An exemption decision by the Committee under this section shall not be a major Federal action for purposes of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.): *Provided*, That an environmental impact statement which discusses the impacts upon endangered species or threatened species or their critical habitats shall have been previously prepared with respect to any agency action exempted by such order.

16 U.S.C. § 1536(k). The structure and organization of the ESA's exemption process provides the strongest support for the interpretation that the section 7(k) proviso does not require the Committee to evaluate the quality of BLM's environmental documentation under the provisions of NEPA. Because the BLM conducted EISs in 1982-83 that consider the effects of the decadal timber management plan on the northern spotted owl, the plain requirements of section 7(k) have been satisfied.¹⁴ The plain language of a statute should be given its ordinary meaning on the assumption that the words chosen reflect the intent of Congress, unless the result would foil the clearly understood legislative intent. *See Caminetti v. U.S.*, 242 U.S. 470, 490 (1917); *U.S. v. Missouri Pacific R.R.*, 278 U.S. 269 (1929); *Packard Motor Car Co. v. NLRB*, 330 U.S. 485, 492 (1947); *Train v. Colorado Public Interest Research Group*, 426 U.S. 1 (1976); *Church of Scientology v. U.S. Department of Justice*, 612 F.2d 417, 421 (9th Cir. 1979).

Review of an applicant's environmental documentation required under NEPA is not one of the specific criteria either for the Secretary's threshold determinations or the ultimate decision by the Committee on the exemption application. The exemption criteria are set forth in section 7(h), and include no reference to NEPA. It is not until section 7(k) that the NEPA exception appears. Moreover, there are very specific provisions requiring review of an exemption application by the Department of State and the Department of Defense, found in sections 7(i) and (j), respectively. This is in contrast to section 7(k), which does not provide for review by the Environmental Protection Agency (EPA)

¹⁴The Petitioners may attempt to challenge the ESC's determination that sec. 7(k) was satisfied based on an argument that the BLM applied for 44 separate exemptions, thereby requiring 44 separate EISs. The ESC determined that the exemption application was for a single exemption. ESC Decision at 1. This finding is supported by the nature of the consultations as well as the form in which the evidence was submitted by the parties.

Importantly, the EPA has stated that sec. 7(k) places no greater burden on agencies than does NEPA itself. NEPA encourages the consolidation of environmental documentation and does not require that separate EISs be prepared in this instance.

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of an applicant's environmental documentation before the application can be considered by the Committee.

The ESA clearly sets out the process to be followed in deciding an exemption request. While we are mindful of EPA's review authority under section 309 of the Clean Air Act, the omission of any reference to the EPA process suggests that the NEPA inquiry is more limited in the exemption context. The ESA does not require the Committee or the Administrator of EPA to make a finding regarding the adequacy of the environmental documentation under the requirements of NEPA.

In light of Congress' inclusion of specific exemption and review criteria, it is highly unlikely that a court would find that Congress also intended (without saying so) to require the Committee to review the applicant's environmental documentation under the requirements of NEPA. This likelihood is further diminished upon consideration of the fact that Congress addressed NEPA specifically by fashioning the exception in section 7(k).

2. Legislative History

While the plain language and meaning of the ESA is unambiguous with respect to the exemption process, the analysis is further amplified by the legislative history. The legislative history of the ESA demonstrates that the intention of section 7(k) was to grant an outright exclusion from the requirements of NEPA without preconditions. Virtually all of the proposed 1978 amendments to the ESA relating to the Committee began as blanket NEPA exceptions with no proviso or other qualification. The addition of the proviso specifically was intended to cover a small number of actions specifically involving wetlands for which it was conceivable that an EIS may not have been completed:

This amendment provides that an environmental impact statement would have to be filed before the committee acted. All other projects, actions other than 404 projects, will have an EIS for the committee to review. It is not an additional requirement * * * All this amendment does is require that any 404 project, for example, would have to have an EIS, just like any other project before it went to the committee. Under the law [citation omitted], 404 permits exempt from filing an EIS statement in certain circumstances. Amendment 3129 does not require all 404 projects to have an environmental impact statement but only those in which an endangered species was involved, and in which there was an appeal to the committee * * * So everybody, therefore, respecting endangered species involving Federal projects is treated exactly alike.

Statement of Senator Nelson in support of his amendment to S. 2899, in which the proviso was added to the proposed new section 7(k). 124 Cong. Rec. 21,388 (July 18, 1978).

Thus, it is clear that the intent of the proviso was to ensure only that an EIS was performed. The intent was not to require the Committee to make a finding as to the adequacy of the EIS. The adequacy of the

EIS under NEPA was not mentioned in either the floor debate or the bills introduced.¹⁵

3. Judicial Decisions

In the absence of statutory exclusions, courts still find that the requirements of NEPA may be obviated. The cases discussed below all involve facts wherein NEPA is applicable and not exempted by specific statutory language. In light of the language of section 7(k), these cases are particularly compelling.

a. Direct Statutory Conflict

In *Flint Ridge Development Co. v. Scenic Rivers Assoc.*, 426 U.S. 776 (1976), the Supreme Court held that section 102 of NEPA clearly allows that where statutes applicable to the agency's operations expressly prohibit or make impossible full compliance with NEPA, causing a clear and unavoidable conflict of statutory duty, then NEPA must give way. In this case, the Court found that a statute requiring the Department of Housing and Urban Development (HUD) to act on a subdivision filing statement within 30 days left no time for NEPA compliance. The Court rejected the possibility that the Secretary could suspend the effective date of the proposed statement in order to prepare an impact statement, finding that the statute in question allowed for no such discretion. The Court held that to infer the authority to suspend the decision for environmental review would contravene the purpose of the 30-day provision of the HUD statute. Reviewing the legislative history of NEPA and the plain language of both NEPA and the HUD statute, the Court relied on the language of section 102 of NEPA, which calls for compliance with the EIS requirement "to the fullest extent possible."

The holding in *Flint Ridge* applies to the exemption process under the ESA. The ESA imposes strict deadlines on the filing and review of exemption applications. An application must be filed within 90 days of the completion of consultation with the FWS. Thus, if BLM is held to completing EISs on each individual timber sale, they would have only 90 days in which to do so prior to filing an exemption application. 16 U.S.C. § 1536(g)(2)(A); 50 CFR 451.02(d). The contents of the application must be reviewed for preliminary threshold determinations within 20 days of its filing. 16 U.S.C. § 1536(g)(3); 50 CFR 452.03(a). A full evidentiary hearing must be conducted and a report filed with the Committee within 140 days of the filing of the application (subject to extension upon mutual agreement between the Secretary and applicant). 16 U.S.C. § 1536(g)(5); 50 CFR 452.08(b). Finally, from the receipt of the report and hearing record, the Committee has only 30 days to render a decision on the exemption application. 16 U.S.C. § 1536(h)(1); 50 CFR 453.03(a). There is no provision for an extension

¹⁵The amendment to exempt the Committee decision from NEPA was passed by voice vote without further remark or controversy.

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of this 30-day time limit. Thus, the ESA provides the same kind of direct conflict with NEPA as was presented to the Supreme Court in *Flint Ridge*. It would be impossible for the Committee to accommodate NEPA requirements under the statutory scheme and time frame established by Congress.

4. The Committee Properly Concluded That Only One EIS Need Be Conducted Rather than 44 Separate Ones

EPA has represented that section 7(k) does not impose any new EIS requirements beyond those required by NEPA itself. The issue of whether the listing of the owl by FWS merely is a change in legal status and not in the actual environment is a question currently in litigation in the Ninth Circuit. The United States has argued that the listing itself is not new information, thus NEPA does not require an EIS solely because of the listing. Any consideration of the issue by the Committee would be superfluous and could be rendered moot in the near future. See *Portland Audubon Society v. Lujan*, No. CV-87-1160-FR (D. Or., July 16, 1991).

BLM's practice of "tiering" environmental assessments (EAs) to the programmatic EISs is important to the court's review of Petitioners' arguments. This practice, permissible under NEPA and generally promoted both by CEQ and EPA, further highlights the complexity of any review of legal adequacy of the documentation under NEPA. Specifically called into question is the argument that the application for exemption for the 44 sales requires that 44 separate EISs be conducted in order to trigger the NEPA exception under section 7(k). Under EPA's interpretation, if the ESA does not impose additional environmental documentation requirements beyond those required by NEPA itself, and if tiering of EAs to EISs is appropriate, then section 7(k) of the ESA cannot be read to require 44 EISs where NEPA alone would not. See 40 CFR 1502.20.

The complex question of the relationship between the decision of the Committee and the jurisdiction of federal district courts reviewing separate NEPA actions against BLM timber sales further justifies the Committee's decision not to conduct an independent review of BLM's compliance with NEPA. To demonstrate this complexity, one need only hypothesize what the effect would be of conflicting findings by the Committee and courts regarding the quality of BLM's NEPA documentation. Moreover, it remains unclear whether this approach would require that the Committee delay its decision should the district court find that BLM's environmental impact documentation is inadequate.

Finally, an overly rigorous interpretation that section 7(k) requires the Committee to review environmental documentation would lead to the impractical result that a decision by the Committee to grant an

exemption would be a major Federal action requiring separate NEPA compliance. The logical extension of this argument is that under the prevailing interpretation of NEPA, the Committee itself would be required then to conduct the appropriate environmental analysis and complete an EA and EIS as necessary under NEPA. The exemption process was created to allow for the expeditious consideration of whether economic factors justify exemption from the requirements of the ESA for a given action. An interpretation of section 7(k) that would require the Committee to conduct a review of the adequacy of environmental documentation under the provisions of NEPA, or an interpretation that would require the Committee to conduct an EIS, clearly is inconsistent with this purpose.

D. The ESC Properly Evaluated the Exemption Criteria In Deciding to Exempt 13 of the 44 Proposed Sales From the Requirements of the ESA

1. Introduction

While the Petitioners have signalled their intention to challenge the substantive decision of the ESC on the exemption application, they have yet to specify the basis for their challenge. It is appropriate, therefore, to summarize the decisional process and address the areas that presented the greatest challenges in interpreting and applying the exemption criteria. Ultimately, the ESC adopted the recommendation of the Chairman, as modified by the amendment proposed by ESC member John Knauss, to exempt 13 of the 44 timber sales for which exemption was sought. The actual findings of the ESC under each of the exemption criteria are summarily set forth in the ESC's May 15, 1992 decision document.

2. The Agency Action: One Action or Forty-Four?

Whether the agency action for which exemption was sought constituted one action (the timber sale program) or 44 separate actions (each timber sale) may be a significant issue before the court of appeals. In general, the economic evidence submitted to the ESC tended to be aggregated by the parties in support of their individual views regarding the merits of granting or denying exemption to all of the sales. The ESC determined that "[b]ased on the complex nature of the timber sales program and the consultations under the ESA, as well as on the structure and complexion of the evidence received by the Committee, * * * the application seeks one exemption with 44 subparts." ESC Decision at 1.

Of particular significance is the question whether a judicial determination of the nature of the agency action will have any bearing on whether 44 separate EISs were required to satisfy section 7(k) of the ESA. Clearly this matter will be one of first impression.

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3. The Record

The court may not substitute its own judgment for that of the ESC with respect to the substantive findings under the exemption criteria. Rather, pursuant to the appropriate standard of review, the court must determine whether the decision is supported by the record. The ESA explicitly provides that the ESC's decision must be "on the record, based on the report of the Secretary, the record of the hearing * * *, and on such other testimony or evidence as it may receive * * *." 16 U.S.C. § 1536(h)(1)(A).

The record consists of over 47,000 pages. Because the ESC's decision necessarily encompasses analysis and balancing of economic considerations (and presumes the validity of the biological factors that led to the listing of the species and designation of critical habitat), the record is composed primarily of economic data and testimony. While a significant portion of the record includes biological data, this information obviously is not particularly relevant to the exemption criteria.

The economic evidence is extremely complex, and is likely to be challenged in some measure by the Petitioners. The evidence, as summarized by the Secretary in his April 29, 1992 Report to the ESC, includes the following economic information associated with the exemption criteria: Economic factors associated with the 44 sales, including stumpage value, silvicultural value, effects on employment, timber supply response and other market factors, sociological effects, harvest and production costs, and environmental and recreational costs. The evidence describes the effects at county and national levels of conducting the timber sales and not conducting the sales, and the projected effects of conducting the sales on a modified basis.

4. The Exemption Criteria

The ESA sets forth four criteria that, if met, require the granting of an exemption from the requirements of the Act. These criteria are:

- (i) there are no reasonable and prudent alternatives to the agency action;
- (ii) the benefits of such action clearly outweigh the benefits of alternative courses of action consistent with conserving the species or its critical habitat, and such action is in the public interest;
- (iii) the action is of regional or national significance; and
- (iv) neither the Federal agency concerned nor the exemption applicant made any irreversible or irretrievable commitment of resources prohibited by subsection (d) * * *.

16 U.S.C. § 1536(h)(1)(A). The ESC eliminated timber sale tracts that did not meet each criterion. Some tracts were eliminated under more than one criterion.

a. Reasonable and Prudent Alternatives

The record reflected that four types of reasonable and prudent alternatives were discussed in the evidentiary hearing: (1) delay the sales until an owl conservation plan is implemented; (2) substitute FY 1992 program sales for the FY 1991 sales for which exemption was sought; (3) reduce the volume of timber to a revised sustained yield level as per new spotted owl habitat restrictions; and (4) employ alternative harvesting techniques. The ESC ultimately considered only one category of alternative: substituting appropriate sales from BLM's FY 1992 timber sale program that had received "no jeopardy" opinions after consultation with FWS.

Accordingly, the ESC denied exemption to 11 of the proposed FY 1991 sales, since 12 tracts from the FY 1992 program were found to be adequate substitutions. The determinative factors for finding FY 1992 sales to be appropriate for substitution were: Proximity to the resource area in which the exemption sales were located; comparability of volume of board feet as well as of impact on timber related jobs; and location outside critical habitat units as well as outside any areas for which BLM was conducting informal conferencing under the ESA for the marbled murrelet.

b. Benefits of Exempted Sales Clearly Outweigh Benefits of Alternative Courses of Action Consistent With Conserving the Species or Its Critical Habitat, and the Sales Are In the Public Interest

The ESC compared the benefits of the 44 sales against those of the reasonable and prudent alternatives as well as other alternatives discussed in Tables 2.1, 2.2 and 3.1 of the Secretary's Report. The benefits of the 44 sales were found to "clearly outweigh" those of the alternatives based primarily on the timber production benefits, employment and sociological benefits that would result from conducting the sales. ESC Decision at 3. This test is one of comparison of economic and other non-biological benefits; the value associated with preserving the species is not factored into this comparison. See Congressional Research Service: Legislative History of the Endangered Species Act of 1973, as Amended * * *, at 1212 (February 1982).

The "in the public interest" test adds very little to the analysis. Presumably, the entire ESC process is premised on the assumption that it would be in the public interest, if the economic evidence supports such an outcome, to bypass the usual requirements of the ESA. The Senate committee report on the 1978 ESA amendments that created the exemption process states that, "[t]o be 'in the public interest,' an agency action must affect some interest, right or duty of the community at large in a way which they would perceive as positive." *Id.* The ESC found a timber sale not to be in the public interest if any portion of it fell within the boundaries of the critical habitat areas or designated conservation areas as set forth in the draft spotted owl Recovery Plan. Plainly, the ESC's findings that exemption of the remaining sales would be in the public interest "because they

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will provide important benefits in terms of county revenues and continued employment for the affected region" is well supported by the economic evidence of record. ESC Decision at 4. Under this criterion, the ESC denied exemption to an additional 12 timber sales not eliminated under the first criterion.

c. The Sales Are of Regional or National Significance

This criterion is one of the more vexing, if only because of the absence of guidance as to what should constitute a region. The economic data presented by the parties and relied on by the ESC was based primarily on county-wide statistics. Thus the ESC recognized that on a sale-by-sale basis, the economic "effects can be countywide, or may extend beyond the boundaries of any single county, depending on the location of and amount of timber in a given sale." The ESC based its analysis on a recognition that "county-wide impact constitutes regional significance." ESC Decision at 4.

The House Report which accompanied the 1978 amendments to the ESA, contained the following discussion of this test:

The term "regional significance" is not intended to refer merely to projects which affect more than one State. Rather, the * * * Committee should evaluate the nature, as well as the scope of the project, in their determination of whether an action is nationally or regionally significant. As an example, * * * an action affecting the Port of Sacramento * * * would be regionally significant.

H.R. Rep. No. 1625, 95th Cong., 2nd Sess. 23 (1978).¹⁶ Against this legislative background, the ESC evaluated the proposed sales and found tracts to be not of regional significance if they resulted in low county revenue sharing, low timber volume, or high impact on the owl or its habitat. The ESC also evaluated the economic impact on counties relative to one another. As a result, the ESC denied exemption to eight timber sales that were not already denied exemption under other criteria. Only timber sales in Douglas and Coos Counties were allowed exemption, based on the especially significant impact of the sales on these counties. ESC Decision at 5.

5. Mitigation: The Knauss Amendment

¹⁶The *Congressional Record* for the pertinent debate provides scant additional guidance regarding legislative intent. Congressman AuCoin and Bowen (the manager of the bill) engaged in the following colloquy on the House floor:

Mr. AuCoin: "The concern of many of these timber-dependent communities is that while an individual Federal timber sale may not cover a large geographical area, the elimination of that sale would have an effect on a much larger area. In effect, it would reduce the timber inventory, thus decreasing the allowable harvest from the area. This, in turn, would impact many more communities in the region and, thus, could be of regional significance * * *"

Mr. Bowen: "* * * the gentleman is absolutely correct. * * * I think a chain of economic development of vast importance to the country can be linked * * * It is very clear in the committee report that the concept of regional impact does not mean multistate and, in fact, one of the examples used in the committee report is, I believe, the port of Sacramento, one limited area of economic development * * *. It is our firm intent that this legislation be interpreted in the direction of consideration of regional impact as meaning one narrow geographic range, and that by putting this language in * * *, we are trying to get away from the idea that we have got to demonstrate a broad national impact. 'Regional' is to be interpreted clearly, in my opinion, as meaning a relatively limited area which could impact substantially upon lives and prosperity in the region affected."

124 Cong. Rec. 38126 (1978).

In order to prevent the BLM from filing exemption applications for each annual timber sale given a jeopardy opinion after consultation with FWS, the ESC voted as a measure of mitigation to require that BLM: (1) use the final spotted owl recovery plan as the basis for its next decadal timber plan; (2) withhold all timber sales based on that decadal plan until the decadal plan has gone through a 60-day comment period and has obtained final Departmental approval; and (3) submit its 1993 annual and decadal plans as a whole for consultation with FWS. None of these requirements directly affect any of the exempted sales; rather, they apply prospectively to future timber sale planning by BLM. See Transcript of May 14, 1992 ESC Meeting at 55.

IV. CONCLUSION

The Department and ESC staff undertook substantial and effective procedures to safeguard the integrity of this novel process. The ESC's decision is well supported by the evidentiary record. This litigation will establish important legal principles that will govern all future ESC decisional processes under section 7 of the ESA.

THOMAS L. SANSONETTI

Solicitor & Counsel to the Endangered Species Committee

I CONCUR: MANUAL LUJAN

Date: January 14, 1992

APPLICABILITY OF SEC. 10 OF THE OUTER CONTINENTAL SHELF LANDS ACT*

M-36977

January 15, 1993

Outer Continental Shelf Lands Act: Refunds

At the time that sec. 10 of the OCSLA, 43 U.S.C. § 1339, was enacted, Congress could not have contemplated that a routinized, automated process later would be established by rule under OCSLA's authority for adjusting transportation and processing allowances for relatively small amounts. Recoupments that result from adjustments to transportation and processing allowances under the procedure prescribed in the regulations are within the intent of Congress in enacting sec. 10, and this category of transactions should not be regarded as subject to sec. 10.

Memorandum

To: Secretary

From: Solicitor

Subject: Applicability of Section 10 of the Outer Continental Shelf Lands Act

On January 7, 1993, the Office of the Assistant Secretary—Land and Minerals Management requested an opinion on whether the provisions

*Not in chronological order.

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of section 10 of the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. § 1339 (1988), apply to eight types of transactions described in the request which are involved in royalty reporting for Federal oil and gas leases on the Outer Continental Shelf (OCS). Our response follows.

I. Background

The OCSLA authorizes the Secretary of the Interior to issue leases for exploration for and production of oil and gas on the submerged lands of the OCS. The OCSLA and the lease terms prescribe that royalty shall be paid to the United States in a specified percentage of the amount or value of the production saved, removed, or sold from the lease. 43 U.S.C. § 1337(a)(1)(A). The Minerals Management Service (MMS) collects and accounts for the royalties paid under these leases.

Section 10 of the OCSLA¹ allows lessees and other royalty payors on OCS leases to recover certain excess payments made in connection with their leases. Section 10 prescribes the procedure a lessee or payor must follow to recover its excess payment through refund or recoupment.² Specifically, it provides:

(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, or within ninety days after August 7, 1953. The Secretary shall certify the amounts of all such repayments to the Secretary of the Treasury, who is authorized and directed to make such repayments out of any moneys in the special account established under section 1338 of this title and to issue his warrant in settlement thereof.

(b) *No refund or credit of 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. (Italics added.)*

In summary, section 10(a) requires that the refund request be in writing and made within 2 years of the making of the excess payment. Section 10(b) provides that no refund or credit (*i.e.*, recoupment) may be made until the Secretary reports the refund request to both Houses

¹ 43 U.S.C. § 1339, hereinafter referred to as "section 10."

² A "refund" involves the Treasury actually issuing a check to the lessee. *E.g.*, MMS Oil and Gas Payor Handbook, Vol. II, sec. 4.4.1 (Sept. 30, 1986). Most lessees recover overpaid amounts by recouping the overpaid amount from the current month's royalties owed after receiving MMS authorization. A lessee effects a recoupment by amending the royalties reported in previous months which resulted in the overpayment to reflect a lesser amount owed at the same time it reports the current month's royalty, which reduces the total amount paid in the current month. As used in this opinion, the term "refund request" means both a request for refund and a request for authorization to recoup.

of Congress and waits 30 days. Since its enactment in 1953, section 10 has never been amended.

Solicitor Coldiron previously issued a comprehensive opinion interpreting section 10's requirements. *Refunds and Credits Under the Outer Continental Shelf Lands Act*, M-36942, 88 I.D. 1091 (December 15, 1981) (hereinafter referred to as the M-Opinion). The purpose of this opinion is not to revisit the M-Opinion's legal interpretations. Rather, it is to respond to your query whether certain specific royalty reporting transactions, some of which were addressed in the M-Opinion and others of which were not, are subject to section 10's requirements.³

Most of the issues involved in these transactions concern what constitutes an "excess payment" or a "credit" within the meaning of section 10, and what payments are made "in connection with any lease" under section 10's use of that term. The analysis below will review each of the those transactions individually, though not necessarily in the order presented in the request.

II. Section 10 Applicability

A. Excess payments made by an eligible refiner under a royalty-in-kind contract for offshore royalty oil.

This transaction was addressed in the M-Opinion, 88 I.D. at 1094-95. Solicitor Coldiron concluded that a royalty-in-kind payment is made in connection with a contract for the sale of royalty oil between the Government and the purchaser of the royalty oil, and not in connection with a lease obligation.

Pursuant to 43 U.S.C. § 1353, the Secretary may elect to take the United States' royalty in kind rather than in value, and then sell the oil on the market subject to the conditions the statute prescribes.⁴ The lessee's royalty obligation is satisfied once it makes the in-kind delivery. What follows is a sale between the United States and the purchaser of the oil, a transaction that is not related in any way to the lease between the United States and the lessee. Therefore, because section 10 applies only to payments made "in connection with any lease," it is inapplicable to the reporting, recoupment, or refund of any excess payment under a royalty-in-kind contract.

B. Royalty payment offsets between different lease products and sales months under a single lease if overpayments and underpayments subject to such offsets are discovered during the period of an audit by MMS or other delegated auditors or in the course of performing a restructured accounting.

³The M-Opinion continues in effect and has not been (nor is it here) overturned. This opinion will expand the analysis of the earlier M-Opinion in several respects.

⁴The Secretary may also elect to take gas in kind, but for various reasons, the Department has never elected to take gas in kind for subsequent sale on the market.

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In the M-Opinion (88 I.D. at 1102-04), Solicitor Coldiron explained the difference between "offsetting" overpayments and underpayments from past months within the same lease account and "crediting" within the meaning of section 10's limitations on making a credit for an excess payment. "Offsetting" overpayments and underpayments from past months involves crediting overpayments against *past* payments due. In contrast, "crediting" within the meaning of section 10 involves crediting overpayments against *future* payments due. After explaining why this distinction was consistent with the statutory terms and purpose, Solicitor Coldiron concluded that offsetting is not subject to section 10's requirements except to the extent of any net overpayment remaining after all offsets are exhausted. Solicitor Coldiron's construction is controlling, and section 10 does not apply to royalty payment offsets between different lease products and sales months under a single lease if overpayments and underpayments subject to such offsets are discovered during the period of an audit.

If auditors discover past overpayments and underpayments occurring during an audit period and then offset them with no reduction of current or future royalties due, there is no "credit" being extended from the United States to the lessee or royalty payor. Conversely, any net excess payment remaining after such offsetting would result in such a credit, and, hence, would be subject to section 10.

This principle applies regardless of whether the overpayment occurred more than 2 years before the royalty report effecting the offset against underpayments.⁵ If the offsetting of past overpayments and underpayments, resulting in no net overpayment which would result in a credit against current or future royalties due, is not a credit within the meaning of section 10, it follows that the 2-year period is irrelevant.⁶

Moreover, the Interior Board of Land Appeals (IBLA) concluded in *Shell Oil Co.*, 52 IBLA 74 (1981), that in situations involving MMS audits, if the overpayments occurred in the same audit period as the underpayments, then MMS is required to offset the overpayments even if they occurred more than 2 years before the offset was effected. The IBLA concluded:

[A] sense of fundamental fairness requires [the U.S. Geological] Survey [7] to recognize both a producer's underpayments and overpayments of royalty * * *. We do not believe that the 2-year period of limitations was established to give Survey a procedural advantage in computing royalty payments.

⁵This is a potential issue because of sec. 10's 2-year limit on requests for refund or recoupment.

⁶If offsetting does result in a net excess payment, a credit for the excess payment remaining after offsets would be barred under sec. 10 unless it occurred within 2 years of the date of the lessee's request for authorization to take the credit. See the discussion of example 3 in the M-Opinion, 88 I.D. at 1104.

⁷The Conservation Division of the U.S. Geological Survey was MMS' predecessor agency. The MMS was created by Secretarial Order No. 3071 on Jan. 19, 1982.

52 IBLA at 78. Additionally, Solicitor Coldiron expressly concurred with the IBLA's decision in *Shell* in the M-Opinion. 88 I.D. at 1103.

In short, the agency's longstanding and consistent interpretation has been that overpayments and underpayments discovered upon audit should be offset and that such offsetting does not constitute a credit within the meaning of section 10. For that reason, moreover, under established principles of judicial review, Federal courts would give great deference to this interpretation of section 10. *E.g., Udall v. Tallman*, 380 U.S. 1 (1965); *Watt v. Alaska*, 451 U.S. 259 (1981); *Chevron USA, Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984); *Amoco Production Co. v. Andrus*, 527 F. Supp. 790 (E.D. La. 1981).

Similarly, a lessee may uncover overpayments and underpayments within the same lease account in the course of performing a recomputation of royalties due pursuant to MMS order and instructions. MMS calls this procedure a "restructured accounting."⁸ If offsetting them results in no net excess payment to the United States, such offsetting does not result in a credit from the United States to the lessee and therefore is not subject to section 10.

C. Payment offsets across leases resulting from approval or revision of a unit agreement.

When MMS approves a unit agreement on the OCS, or approves a revision to a unit agreement, the affected lessees or payors are given 90 days to adjust their production and royalty reports for the leases for the period of time between the application for unitization (or amendment) and the date of approval. By way of illustration, assume that the lessee who holds Lease A, Lease B, and Lease C applies to MMS to unitize the leases in December 1991. The only producing well is on Lease A, and in the month of January 1991 the well produces 600 barrels of oil with a value of \$12,000. If Lease A has a 16 $\frac{2}{3}$ percent royalty rate,⁹ and the unit is not yet approved, then Lease A would report production of 600 barrels of oil and a royalty due of \$2,000 for January 1991. The unit thereafter is approved in June 1992, and Leases A, B and C are to share in unit production equally. The lessee for Lease A must then submit an amended report of sales and royalty (Form MMS-2014) for January 1991 showing only 200 barrels of oil produced with a royalty value of \$667. However, for Leases B and C, the lessee correspondingly would have to report 200 barrels of oil and \$667 in royalty due for each lease, for a collective royalty from Leases B and C of \$1333.

This offsetting between leases following approval or modification of a unit agreement does not require a request for refund or credit

⁸ MMS typically orders a lessee to perform a restructured accounting and pay the royalties due under the recomputation when an audit indicates that a royalty payment error may be "systemic" in nature, i.e., recurring as a pattern in other production months or under other leases.

⁹ A 16 $\frac{2}{3}$ -percent royalty rate is typical for OCS leases.

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pursuant to section 10. The legal consequence of unitization is that the unit effectively supersedes the participating lease instruments for certain purposes. *E.g.*, 43 CFR 3186.1, at paragraph 18 of the model unit agreement therein prescribed. In the example presented above, there is no net reduction in royalties due or paid. There is merely an accounting modification to reflect proper allocation of production and royalty payment among the three subparts of the unit. However, if as a result of the unitization there is a net reduction in royalty due, the request for refund or credit is subject to section 10 requirements and procedures.

D. Adjustments between leases within a unit within the same sales month by single payor.

As explained in the preceding section, upon creation of a unit the lease instrument is superseded for certain purposes. If the adjustments between leases within the same sales month result in no money owed from the United States to the payor, it is simply a reporting error correction and section 10 would not be applicable since no "person has made a payment to the United States in connection with any lease * * * in excess of the amount he was lawfully required to pay." (Italics added). Of course, to the extent that the adjustments result in a net overpayment, section 10 applies to a refund or recoupment of that amount.

E. Adjustments by a single payor between past sales months within a lease or unit to the extent the adjustments do not result in recoupment of a net overpayment or a credit against current month's royalties due.

As explained in the preceding sections, section 10 is not applicable to adjustments of amounts paid between past sales months within a lease or unit, referred to as "offsetting," because there is no excess payment on a lease. Section 10 contains no limitation restricting the term "excess payment" to a payment made in a specific month standing in isolation from all other payments made under the lease (or unit). To the extent the payor is "offsetting," with no effect on current or future royalties due, rather than "crediting" against current or future royalties, the M-Opinion concluded that section 10 is inapplicable, as described above. The M-Opinion gave an example:

First, consider a lessee who overpays \$1,000 in January and underpays \$300 in February. The errors are discovered in June. The lessee should apply for a refund or credit of \$700, and the request must be reported to Congress.

88 I.D. at 1104. Implicit in this example is offsetting \$300 of the January overpayment against the February underpayment. Since only \$700 of the refund request was subject to a refund request obligation, it follows that the \$300 offset was not subject to section 10. Therefore, if a lessee were to send in a number of adjustment lines for past sales

months on an amended royalty report (Form MMS-2014), and if the net result for each lease is a \$0 payment, section 10 would have no applicability.

A corollary issue must be addressed here. The conclusion in both section B of this opinion and this section is premised on the rationale that "offsetting" as defined herein is not subject to section 10 to the extent that there is no net overpayment on the lease. Insofar as section 10 is concerned, it would appear that such offsetting would be permitted no matter how old the overpayments and underpayments may be. However, there is a practical concern that unless offsetting is limited to overpayments and underpayments within an audit period or other period defined by a restructured accounting order or other MMS directive, the lessee or royalty payor could examine past periods and search only for overpayments, and not advise MMS of any underpayments that may exist in the same period. The issue then is whether the IBLA's construction of section 10 in *Shell* reasonably may be limited to overpayments occurring within an audit period or period defined by a restructured accounting order, or whether offsetting must be allowed for any identified and substantiated overpayment from any past period.

The Department's interpretation of section 10 expressed in both the *Shell* decision and the M-Opinion is to limit offsetting to overpayments and underpayments occurring within the audit period. By extension, this could also apply to a period covered by a restructured accounting order. I agree that it is reasonable to establish some cutoff lines to avoid the practical problem described above. There is nothing to indicate that doing so is somehow contrary to section 10's terms. Additionally, OCSLA also prescribes:

The Secretary shall administer the provisions of this subchapter relating to the leasing of the outer Continental Shelf, and shall prescribe such rules and regulations as may be necessary to carry out such provisions * * *.

43 U.S.C. § 1334(a). To ensure that the policy of limiting offsetting to the same audit period or restructured accounting period is implemented as law, the agency may use this grant of rulemaking authority to prescribe appropriate regulations.¹⁰

F. Amounts resulting from paying more than the total amount reported as due on the accompanying report of sales and royalty where all the reported amounts are correct.

Situations occasionally arise in which a royalty payor pays more than the total royalty due as reported on the accompanying report of sales and royalty (Form MMS-2014) where all the reported amounts are

¹⁰ There is also a concern that a lessee could offset overpayments against the most recent underpayments so as to leave older underpayments in place, for which MMS orders to pay or actions to collect may be time-barred under the statute of limitations at 28 U.S.C. § 2415. This question is beyond the scope of this opinion request. However, the agency could require that overpayments be used first against the earliest known underpayments to prevent disadvantage to the agency with respect to the statute of limitations. This matter also would be an appropriate subject of an agency directive.

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correct. An example will help in analyzing this category of cases. Assume that Payor A has payment responsibility for five leases. On the report of sales and royalty (Form MMS-2014), Payor A correctly reports the volumes and royalty owed for each lease. Assume further that the total royalty owed on the five leases for the report month is \$2000, but Payor A mistakenly adds a zero to his check and remits \$20,000. Upon discovering the error, Payor A wants a return of the \$18,000 mistakenly paid. In this situation, it is difficult to associate the excess \$18,000 as a payment made "in connection with any lease." If a total payment associated with a royalty report for a particular month exceeds the sum of correctly reported royalties due for each lease, there is no way to determine for which lease the difference was paid. The MMS therefore properly could construe section 10 as not applicable, and could refund or authorize recoupment of the \$18,000 without violating section 10's procedures or limitations.

This is consistent with what actually happens to such a payment within MMS' royalty accounting system. All royalty payments, when first received, are deposited to a general suspense account until payments can be identified and deposited or disbursed in accordance with the law applicable to the lease for which the payment was made. That identification occurs when the corresponding royalty reports are cleared through initial screening edits. At that time, amounts corresponding to the reported royalties are transferred from a payor's account in the general suspense account to the appropriate accounts for deposit or disbursement.¹¹ In the hypothetical posed above, the \$2,000 properly paid would be allocated to the five leases pursuant to the report lines which Payor A submitted, and that amount would be transferred to miscellaneous receipts. The remaining \$18,000 would remain in general suspense and would not be identified as corresponding to any lease. MMS personnel would then contact Payor A to ascertain Payor A's intent in making the payment. At that time, the error presumably would have been discovered.

Because the payment is not made "in connection with any lease" within the meaning of section 10, section 10's permanent indefinite appropriation of amounts necessary to pay refunds would not apply to the \$18,000 in the example. If the amount is to be refunded to Payor A, the necessary authority is found elsewhere, at 31 U.S.C. § 1322(b)(2), which appropriates necessary amounts to make payments from "the United States Government account 'Refund of Moneys Erroneously Received and Covered' and other collections erroneously deposited that are not properly chargeable to another appropriation."

¹¹ In the case of OCS leases, royalties, and other revenues generally are deposited to miscellaneous receipts (see OCSLA sec. 9, 43 U.S.C. § 1338). In the case of leases situated in whole or in part within 3 miles of the seaward boundary of a coastal State (the zone defined and governed by OCSLA sec. 8(g), 43 U.S.C. § 1337(g)), 27 percent of the royalties derived from the lease or portion of the lease within that zone and moved from general suspense would be transferred to the appropriate account for disbursement to the coastal State under that provision. The remainder would be transferred to miscellaneous receipts.

Payor A also could recoup the erroneously paid amount without violating section 10's strictures. In that event, there is no need for other authority to pay a refund.

There could be many different variations of the example given above. For instance, since many payors report both onshore and offshore leases on the same royalty report (Form MMS-2014), it is unclear that an excess amount paid over the sum of correctly reported royalties is even attributable to the OCS leases collectively, much less individually, at all. Consequently, section 10 should not apply to a refund or credit of the erroneously paid amount.

Admittedly, if the lessee or payor is reporting royalties for only one OCS lease and no other leases (onshore or offshore), and the payment exceeds the amount due, the excess payment must be associated with the lease for which the report is submitted. In that circumstance, section 10 would apply.

G. Downward adjustments to estimate balances.

Applicable regulations (30 CFR 218.50(a)) and lease terms generally require payors to report and pay royalties on OCS leases by the end of the month following the month of production. Many lessees and the MMS were concerned that since many payors did not have actual information to report by that deadline, the result would be either consistently late reports or reports that *always* would require later adjustment once actual data were available.

To mitigate this problem, MMS adopted a procedure whereby a lessee or royalty payor could establish an estimate balance that was intended to be an amount sufficient to cover royalties owed.¹² A separate estimate balance is required for each product produced from the lease. *MMS Oil and Gas Payor Handbook* at section 3.5.1. Upon establishment of a sufficient estimate, the payor may report the actual royalties owed for a production month, and pay that same amount, by the end of the second month following the production month. If the actual royalties owed are more than the amount established as the estimate, the payor would owe one month's interest on the difference. Upon the report of the actual royalties owed and the accompanying payment, the estimate balance rolls forward to allow the same procedure to be followed for the succeeding production month.

If prices or production volumes decline, the royalty payor may conclude that the amount of its estimate balance is too high. In that event, the lessee may seek to recoup or obtain a refund of some of the estimate balance, or to apply part of its estimate balance elsewhere.

Section 10 may properly be construed not to apply to the recoupment or refund resulting from the downward adjustment of the estimate balance. The estimate balance is not a "payment" made in connection

¹²The regulations at 30 CFR 218.51(e)(2) and 218.150(b) refer to this procedure for OCS leases.

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with a lease in the sense section 10 contemplates. From the perspective of section 10, an estimate is more in the nature of a prepayment. A hypothetical will best illustrate why this is so.

Assume that Lessee A produced gas from an OCS lease in the month of March, the royalty value of which was \$1,000. Further, at the end of April, pursuant to established MMS procedures, Lessee A established an estimate balance of \$1,200 for gas produced from that lease. In April, Lessee A produced the same volume of gas as in March, whose royalty value again was \$1,000. At the end of May, Lessee A would report \$1,000 due from the production month of March, and pay that amount. At the end of June, Lessee A would report \$1,000 due for the month of April and pay that amount. Lessee A would continue the same procedure each month, reporting amounts due for the second preceding production month and paying that amount.

Further assume that after several months, Lessee A decided it did not wish to utilize the estimated payment procedure any longer. Assume that Lessee A produced gas whose royalty value was \$1,200 in the production month of November, and decided in December to discontinue use of the estimate. Lessee A could use the \$1,200 estimate already paid as the actual payment for the November production month, simply by uncoding it as an estimate on its royalty report and recoding it as the royalty payment.

This does not result in a credit against current month's royalties due. Lessee A uses the original estimated payment which it previously submitted to pay the obligation, and thereafter would report and pay actual amounts due each month.

If Lessee A can do this using the entire amount of its estimated payment, there is no reason why it could not do so with some part of that payment rather than all of it. It follows that reduction in the amount of an estimated balance is not a credit under section 10. Allowing the payor to simply adjust the estimate balance downward to reflect changed market or production conditions—equivalent to a reduction in security—does not contradict section 10's purposes.¹³

Since the concept of and procedure for estimated payments was not in existence in 1953, and since the agency may use its rulemaking authority to address issues not contemplated by the statute's drafters and resolve them in a manner consistent with the statute, MMS may codify its interpretation of section 10 regarding estimate balances through a rulemaking.

¹³As the M-Opinion explains (citing to extracts from the legislative history), sec. 10's procedures serve the purposes of providing public scrutiny of and a potential congressional check on the Secretary's decision to repay, and alerts Congress to changes in current and future revenue from OCS leasing. 88 I.D. at 1097.

H. *Recoupment of overpayments resulting from underreporting of estimated transportation or processing allowances where appropriate forms reporting estimated data have been filed with MMS.*

In computing the value of production for royalty purposes, agency regulations and practice have provided for deductions of allowances for the costs of transporting production from offshore leases to distant markets since the decision in *Shell Oil Co.*, 70 I.D. 393 (1963) (adopting the precedent decided in the context of Federal onshore leases, *United States v. General Petroleum Corp. of California*, 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)). Current MMS regulations governing allowances for transportation costs adopted in 1988 (53 FR 1188 and 53 FR 1230 (Jan. 15, 1988), for oil and gas, respectively) are found at 30 CFR 206.104 - 206.105 (oil) and 206.156 - 206.157 (natural gas).

In the case of natural gas production, since the beginning of offshore leasing in 1954, regulations have provided for allowances for the reasonable costs (up to a specified maximum) of processing so-called "wet" gas¹⁴ to separate the liquid hydrocarbons from the "residue gas."¹⁵ See the former 30 CFR 206.152 (1987), previously codified at 30 CFR 250.67. The current regulations governing gas processing allowances, adopted in 1988 (53 FR 1230 (Jan. 15, 1988)), are found at 30 CFR 206.158 - 206.159.

Transportation and processing costs depend on a number of factors which vary from month-to-month, including labor, various expenses, pipeline throughput, etc. As a result, the costs incurred for these functions generally are not known until the end of the year. To avoid a situation where the lessee must pay royalties monthly without the deductions to which it is otherwise entitled, and then request large credits or refunds after the end of each year, the regulations establish a procedure for the lessee to submit forms which estimate the costs for transportation or processing which the lessee will apply as an allowance in reporting royalties monthly. The estimated allowances taken are adjusted later to reflect actual costs when actual costs are known. See 30 CFR 206.105(c) (1992) (oil transportation allowances); 30 CFR 206.157(c) (1992) (gas transportation allowances); 30 CFR 206.159(c) (1992) (gas processing allowances).

In summary, under all of these provisions, an estimated allowance form will be valid through the end of the calendar year in which the form is first submitted, or until the particular transportation or processing arrangement ends, whichever is earlier. Thereafter, the estimated cost form must be updated annually. During the time it is in effect, the lessee may deduct the reported allowances in submitting its monthly reports of sales and royalty.

¹⁴"Wet" gas contains heavier entrained liquid hydrocarbons such as ethane, butane, or propane.

¹⁵"Residue gas" is the dry methane remaining after the liquid hydrocarbons are extracted at a gas processing plant.

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In notices sent to all lessees, the agency has prescribed royalty reporting procedures for adjustments from estimated to actual allowances. When actual costs are known, the lessee then submits an adjustment to the costs previously deducted by reversing previous reported allowance entries and submitting new entries coded as adjusting from estimated to actual allowances.¹⁶

If the actual transportation or processing allowance is greater than the estimated amount reported on the allowance form and taken each month during the period the allowance form is in effect, then royalty has been overpaid. It follows that in that event, "the lessee shall be entitled to a credit without interest." 30 CFR 206.105(e)(1); 30 CFR 206.157(e)(1); 30 CFR 206.159(e)(1). The gas transportation allowance regulations go on to provide:

For lessees transporting gas production from leases on the OCS, if the lessee's estimated transportation allowance exceeds the allowance based on actual costs, the lessee must submit a corrected Form MMS-2014 [the monthly Report of Sales and Royalty] to reflect actual costs, together with its payment, in accordance with instructions provided by MMS. *If the lessee's estimated transportation allowance is less than the allowance based on actual costs, the refund procedure will be specified by MMS.*

30 CFR 206.157(e)(3) (italics added). A substantively identical provision is contained in the oil transportation regulations at 30 CFR 206.105(e)(3). Similarly, the processing allowance regulations also provide:

For lessees processing gas production from leases on the OCS, if the lessee's estimated processing allowance exceeds the allowance based on actual costs, the lessee must submit a corrected Form MMS-2014 to reflect actual costs, together with its payment, in accordance with instructions provided by MMS. *If the lessee's estimated costs were less than the actual costs, the refund procedure will be specified by MMS.*

30 CFR 206.159(e)(3) (italics added).

In the preamble to the gas transportation regulations (30 CFR 206.157(e)) in the 1988 rulemaking, MMS noted the comments of two producers to the effect that refunds of amounts paid in excess of actual costs should be considered "estimates" and not "actual" royalty payments and therefore not subject to section 10. MMS further noted the comment of one other producer suggesting that transportation allowance adjustments should be considered as exceptions to section 10. 53 FR at 1265. The agency responded as follows:

It would not be proper for these rules to prescribe the refund procedures. MMS is reviewing the issue and will provide guidance to the lessees. *Id.* Similar comments, with similar agency responses, were noted in the preamble with respect to the gas processing allowance provision (§ 206.159(e)) at 53 FR 1270, and the oil transportation allowance provision (§ 206.105(e)) at 53 FR 1215.

¹⁶The adjustment from the estimated allowance to the actual allowance is identified by an "adjustment reason code" established for that purpose. The various adjustment reason codes MMS uses identify the nature of any change to previously reported royalties. The payor enters the adjustment reason code on the report of sales and royalty (Form MMS-2014) together with the corrected royalty information. See *MMS Oil and Gas Payor Handbook*, Vol. II, sec. 4.3.

When the lessee reports actual transportation or processing costs greater than the estimated costs previously submitted, the result is that the lessee has paid more royalties than it owes in total and is entitled to recover or obtain a refund of the difference. Recoupment of the overpaid amount when the actual costs are reported does result in a credit against current months' royalties due. It is, therefore, a credit in the technical sense within the meaning of section 10.

However, while a recoupment results in a credit, it is not the type of credit with which Congress was concerned in enacting this provision. As explained above and in the M-Opinion (see note 13, *supra*), Congress was concerned with giving the Secretary essentially unlimited refund authority in the absence of some oversight and public scrutiny, and giving some notice to Congress of anticipated changes in revenues from offshore leases. Recoupments resulting from adjustments of estimated transportation and processing allowances to actual allowances are transactions which recur continuously within the framework of a specific regulatory procedure established under the OCSLA's rulemaking authority as it concerns OCS leases. In this situation, both the lessee and MMS are aware from the beginning, and plainly contemplate, that in the event the estimated costs are less than the actual costs permitted as an allowance, the lessee will seek to recover the excess royalty payment and is entitled to a credit for it as the regulations prescribe.

It is the mutuality of advance knowledge on the part of the Government and the lessee that distinguishes adjustments resulting from changes to processing or transportation allowances from other types of adjustments subject to section 10. Payors frequently will report royalty information that they know or expect may be subject to adjustment later. Payors sometimes argue that these figures are only "estimates." However, at the time the lessee files its royalty report, MMS does not know the figure may be tentative. Indeed, even if the Government simply assumed that it was tentative, the agency would have no indication when or for what reason an adjustment later might be made. Further, there is no established regulatory procedure, like the procedure that exists for adjusting estimated allowances to actuals, whereby routine adjustments are contemplated and, indeed, expected.

Moreover, the regulations quoted were promulgated after notice and comment under the Administrative Procedure Act, 5 U.S.C. § 553, and are published rules. Congress is aware of the procedures for estimated allowances and subsequent adjustments as much as the lessees and MMS are. The purposes of congressional oversight and congressional awareness of effects on revenues are fulfilled under the present procedure.

As the Supreme Court frequently has held:

It is a familiar rule that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit nor within the intention of its makers.

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Holy Trinity Church v. United States, 143 U.S. 457, 459 (1892), quoted in, e.g., *United Housing Foundation, Inc. v. Forman*, 421 U.S. 837, 849 (1975), *United Steelworkers of America, AFL-CIO-CLC v. Weber*, 443 U.S. 193, 201 (1979).

At the time section 10 was enacted, Congress could not have contemplated that a routinized, automated process later would be established by rule under OCSLA's authority for adjusting transportation and processing allowances for relatively small amounts.¹⁷ To require reporting of ongoing transactions which Congress, MMS, and the lessees know will occur under established regulatory procedures may be technically within the letter, but is not within the spirit, of the statute and results in substantial costs for both the lessees and the Government which serve no discernible statutory purpose.

Therefore, I do not believe that recoupments resulting from adjustments to transportation and processing allowances under the procedure prescribed in the regulations are within the intent of Congress in enacting section 10, and this category of transactions should not be regarded as subject to section 10.

III. Conclusion

The eight types of transactions described for response in the request have been analyzed individually. Subject to the limitations and exceptions explained with respect to each of them, section 10 does not apply to any of those categories of transactions.

THOMAS L. SANSONETTI
Solicitor

THE SCOPE OF FEDERAL RESPONSIBILITY FOR NATIVE HAWAIIANS UNDER THE HAWAIIAN HOMES COMMISSION ACT*

M-36978

January 19, 1993

Indians: Trust Responsibility

There is nothing in the legislative histories of the Hawaiian Homes Commission Act of 1920 (HHCA), 42 Stat. 108, as amended, or the Hawaiian Statehood, 73 Stat. 4 (1959), to indicate the creation of a trust relationship between the U.S. and native Hawaiians. This opinion concludes that the U.S. had no trust responsibilities to the native Hawaiians either before Statehood or after.

¹⁷ Additionally, sec. 10 is not a "congressional approval" or "legislative veto" provision. Congressional approval is not required for MMS to authorize a credit or effect a refund. To prevent MMS from authorizing any refund or recoupment reported to it, Congress must pass a law, which must be signed by the President, within the waiting period sec. 10 specifies.

*Not in chronological order.

Deputy Solicitor Ferguson's letter of Aug. 27, 1979, regarding the U.S. as trustee to Hawaiian natives for the years 1920 to 1959, is expressly overruled to the extent it is inconsistent with this memorandum.

Act of:

The HHCA, 42 Stat. 108, as amended, established neither a trust corpus nor a beneficial owner, both of which are essential elements of a common law trust. The HHCA simply made lands available for homesteading on a limited basis.

The HHCA did not create a fiduciary responsibility in any party, the U.S., the Territory of Hawaii, or the State of Hawaii.

The duties of the HHCA placed in the Secretary of the Interior and in the Territory of Hawaii are not those of a trustee. *Price v. Hawaii*, 921 F.2d 950, 955 (9th Cir. 1990). They are, rather, those of a government administrator.

Memorandum

To: Counselor to the Secretary and Secretary's Designated Officer,
Hawaiian Homes Commission Act

From: Solicitor

Subject: The Scope of Federal Responsibility for Native Hawaiians
Under the Hawaiian Homes Commission Act

I. Introduction and Summary

Following your testimony before the Senate Committee on Energy and Natural Resources on February 6, 1992, in an oversight hearing concerning the Hawaiian Homes Commission Act, 1920, 42 Stat. 108, as amended (HHCA), formerly codified as 48 U.S.C. § 691, you requested our opinion on the scope of Federal responsibilities under that Act.¹ At the time the HHCA was enacted on July 9, 1921, Hawaii was an incorporated territory of the United States. Hawaii became the fiftieth State of the Union on August 21, 1959, in accordance with the Hawaii Statehood Act (Statehood Act) of April 21, 1959, 73 Stat. 4, 48 U.S.C. Ch. 3. Section 4 of the Statehood Act transferred the Hawaiian Homes program from the Territory to the State of Hawaii.

The HHCA and the Statehood Act themselves are the firmest sources for understanding the responsibilities they create. Accordingly, in answering your question we have examined both these statutes with care. We summarize their pertinent provisions and we advert to their legislative histories.

We use the results of our statutory analysis to consider whether the United States has assumed the responsibilities of a common law trustee for the Hawaiian Homes program. Our analysis focuses on the case law developing the nature of the responsibilities of the United States towards the Indian tribes which has been portrayed as

¹ The Department has assumed the role of "lead Federal agency" with respect to the Hawaiian Homes program in accordance with the recommendations of a 1983 Federal-State Task Force on the HHCA. Under Part 514, sec. 1.3 of the Department of the Interior Manual (514 DM 1.3), the Secretary of the Interior is required to appoint an officer or employee of the Department as the "Secretary's Designated Officer for the Hawaiian Homes Commission Act." The Designated Officer is to serve as "the point of contact within the Department of the Interior with respect to matters concerning the Hawaiian Homes program that are the responsibility of the United States." On Apr. 17, 1989, the Secretary appointed to that position the Counselor to the Secretary.

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analogous to the relationship between the United States and the native Hawaiians.² From our research, we conclude that the United States does not have a trust responsibility. This conclusion applies to the periods both before and after Hawaii's Statehood.

A few discussions of the scope of Federal responsibility have tended to rush towards the Indian analogy and to give short shrift to the statutes themselves.³ For example, a former Deputy Solicitor of this Department, Mr. Frederick Ferguson, concluded in an August 27, 1979, letter to the Director, Regional Office, United States Commission on Civil Rights, that under the HHCA the United States was a trustee between 1920 and 1959 and that it retained this role after Statehood.

On every occasion other than the August 27, 1979 letter, the Department has taken the position that the United States is not a trustee for the Hawaiian Homes program.⁴ Deputy Solicitor Ferguson's opinion was rejected in the Department's October 17, 1989, letter to the Chairman, Senate Select Committee on Indian Affairs, written with the express concurrence of the then Solicitor, Mr. Martin L. Allday. The October 17, 1989, letter relied on the decision of the Ninth Circuit in *Keaukaha-Panaewa Community Ass'n v. Hawaiian Homes Commission*, 588 F.2d 1216 (9th Cir. 1978), which stated: "[t]he United States has only a somewhat tangential supervisory role under the Admission Act, rather than the role of trustee" *Id.* at 1224 n.7. Although that Ninth Circuit decision was cited in Mr. Ferguson's letter of August 27, 1979, he neither discussed nor distinguished it, and as we advised Senator Inouye, Mr. Ferguson's legal conclusion that followed was "at war"⁵ with the words of the court's decision. We adopted the position of the Court of Appeals. The Department reaffirmed the position adopted in the October 17, 1989 letter in a subsequent letter from the Department to Senator Daniel K. Inouye (dated January 23, 1992.)

²This usage ("native Hawaiians") parallels that of the HHCA, the Hawaii Statehood Act and the Ninth Circuit cases cited in this opinion.

³In Jan. 1992 the State of Hawaii prepared a lengthy "Report on the Hawaiian Home Lands Program" in response to a Nov. 12, 1991, letter from the Senate Committee on Energy and Natural Resources. The Report argues that the U.S. has a trust responsibility for the Hawaiian Home Lands and criticizes the U.S. for alleged deficiencies in meeting this claimed responsibility. The Senate Report of the Committee on Indian Affairs on Pub. L. No. 100-579, 102 Stat. 2916, the Native Hawaiian Health Care Act of 1988, includes a legal opinion, "Analysis of the Legal Relationship between the Federal Government and the Native Hawaiians" which concludes that "[t]he federal government has a trust relationship to Native Hawaiians," S. Rep. No. 580, 100th Cong., 2d Sess. 26 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3864, 3889 (1988). There are in addition two opinions from the Congressional Research Service, Library of Congress which address various components of the Federal-native Hawaiian legal relationship: a Nov. 2, 1983, Memorandum, "Definition of Native Hawaiians," and a July 12, 1991, Memorandum "Questions Relating to Legislation Regarding Native Hawaiians and Native Alaskans."

⁴Deputy Solicitor Ferguson's Oct. 17, 1979, letter did not allude to any prior Departmental practices or opinions in support of his conclusion. To the contrary, the Department has stated on the record on numerous occasions that there is no trust responsibility to Native Hawaiians. We are unaware of any prior departmental opinion in support of Deputy Solicitor Ferguson's letter. Within the last 3 years alone the Department has denied any trust responsibility to native Hawaiians in letters of Feb. 2, 1990, and October 15, 1990, to the Chairman, Senate Committee of Energy and Natural Resources. The Departmental representatives reiterated this position in testimony before the Senate Committee on Energy and Natural Resources on Mar. 8, 1990, July 23, 1991, and Feb. 6, 1992, as well as in testimony before the Senate Select Committee on Indian Affairs on Aug. 8, 1989.

⁵See letter of Oct. 17, 1992, at 2.

Deputy Solicitor Ferguson's conclusion of August 27, 1979 is expressly overruled. We conclude that the United States had no trust responsibilities to the native Hawaiians either before Statehood or thereafter.⁶

Our nation is based in part upon a pluralism that allows the broadest scope for cultural, ethnic, traditional, and religious diversity. The United States has been enriched immeasurably by its openness to and ability to accommodate different cultures. This openness has allowed each group to make its own unique contribution to our national life.

This pluralism and the invigoration it brings to American life rest in no small degree upon our commitment to our Federal system and to a single rule of law. Thus, we do not lightly presume that one group of Americans is, simply by virtue of a shared background, subject to legal burdens or benefits that do not apply to all of us. The native Hawaiians are descendants of peoples who lived in the Hawaiian Islands before the arrival of Europeans. This important component of their cultural heritage does not place the native Hawaiians under a legal relationship to the Federal Government different from the relationship the government has with its other citizens.

II. The United States Had No Trust Responsibility Under the HHCA Prior to Hawaii's Statehood

A. Background

Prior to Hawaii's 1959 admission to the Union, the HHCA was the only Federal legislation that identified native Hawaiians as a group to be treated separately from other inhabitants of the Territory of Hawaii.⁷ 42 Stat. 108, formerly codified as 48 U.S.C. § 691. In the HHCA, Congress established a limited homesteading program available only to individual native Hawaiians⁸ to be administered and funded by the Territory. The HHCA defined "native Hawaiian" as "any descendant of not less than one-half part blood of the races inhabiting the Hawaiian Islands previous to 1778." 42 Stat. 108.

Congress vested the administration of the HHCA in a five-member Commission composed of the Governor of Hawaii and four citizens of

⁶By Title II of Pub. L. No. 96-565 of Dec. 22, 1980, 94 Stat. 3324, Congress established the Native Hawaiians Study Commission and directed it to "conduct a study of the culture, needs and concerns of the Native Hawaiians." The Commission produced a 2-volume report on June 23, 1983, which includes a comprehensive study of the demographics, history, and current condition of the native Hawaiians. The Commission examined at length the Federal-Hawaiian relationship and the majority concluded that there was no trust relationship between the U.S. and the native Hawaiians and no sound basis for the claim that the U.S. owed compensation for the taking of Native aboriginal land rights (Report, Vol. I at 333-79). These issues are critical to the discussion in this memorandum. The three members of the Study Commission from Hawaii dissented. Our analysis in this opinion is in basic agreement with the conclusions of the Study Commission majority.

⁷Congress annexed Hawaii to the U.S. by the Joint Resolution of July 7, 1898, 30 Stat. 50. The Joint Resolution makes no mention of native Hawaiians. Congress provided a government for the territory of Hawaii by the Hawaii Organic Act of Apr. 30, 1900, 31 Stat. 141. The Organic Act granted U.S. citizenship to all citizens of the Republic of Hawaii. It established Hawaii as an "incorporated" territory in preparation for Statehood by extending to it the Constitution and laws of the U.S. The Organic Act makes no mention of native Hawaiians.

⁸At the time of its annexation, Hawaii was not a homogenous society but was composed of native Hawaiians, Americans, English, Chinese, Japanese, and other ethnic groups. Inter-marriage was common. See Vol. I of the Native Hawaiians Study Commission Report, Tables 3 and 4 at 68-69 and text at 35-44, 60-66.

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the Territory appointed by the Governor and confirmed by the Senate of the Territorial legislature. By Act of July 26, 1935, Congress amended the HHCA by removing the Governor from the Commission and by giving the Governor authority to appoint and to remove the members of the Commission with the advice and consent of the Senate of the Territory. 49 Stat. 504. By Act of July 9, 1952, Congress expanded the Commission to seven members. 66 Stat. 515.

In section 203 of the HHCA, Congress authorized the set-aside of various public lands, called "available lands," to be used for the purpose of native homesteading or for general leasing as authorized in the HHCA. 42 Stat. 109. Congress added to or deleted various acreage from the available lands by Acts of 1934, 1935, 1937, 1941, 1944, 1948 and 1952.⁹ The description of the lands set aside as available lands was less than precise because section 203 excluded certain categories of lands within their boundaries from the program and because the areas to be set aside were loosely described in terms of location and of acreage. In some instances, Congress required the Commission, subject to the approval of the Secretary of the Interior, to set aside the available lands from a larger acreage described in the HHCA. 42 Stat. 110. Congress initially established the homesteading program on a trial basis by allowing the Commission to use only a small, specifically identified portion of the available lands for the first 5 years of the Commission's life. Congress removed this restriction by Act of March 7, 1928, but it continued to take a cautious approach. 45 Stat. 246. The legislative history of the 1921 Act, and of its pertinent amendments, is not helpful in providing a rationale for this caution. Section 204(3) of the HHCA, as amended, provided that the "commission shall not lease, use, nor dispose of more than twenty thousand (20,000) acres of the areas of Hawaiian home lands for settlement by native Hawaiians in any calendar five-year period." This restriction remained in the HHCA through the effective date of the Statehood Act.

Section 206 of the HHCA provided that the powers and duties of the Governor, the Commissioner of Public Lands, and the Board of Public Lands "in respect to lands of the Territory" did not extend to the available lands. Section 207 of the HHCA retained title to the available lands in the United States and authorized the lease of the land to native Hawaiians for agricultural or pastoral purposes. Section 207 of the HHCA also gave the Commission discretion to determine whether an applicant was qualified to perform the conditions required under the lease.

Section 212 authorized the Commission to return any lands not leased to native Hawaiians to the Commissioner of Public Lands for

⁹ Respectively, 48 Stat. 777 (1934), 49 Stat. 966 (1935), 50 Stat. 497 (1937), 55 Stat. 782 (1941), 58 Stat. 260 (1944), 62 Stat. 295, 303 (1948), and 66 Stat. 511 (1952).

disposition under a general lease. Under section 213 of the Act, the funds derived from these general leases, together with 30 percent of the receipts derived from the leasing of sugar cane lands and water licenses, were to be placed in an account known as the "Hawaiian home loan fund" to be used to assist lessees under conditions specified in sections 214 through 218 of the HHCA and to meet the expenses of the Commission under section 222 of the HHCA. 42 Stat. 115. The amount that could be covered into the fund, however, was limited by section 213 to \$1,000,000. This amount was raised to \$2,000,000 by Act of May 7, 1928, and to \$5,000,000 by Act of July 9, 1952. 45 Stat. 246; 66 Stat. 514. Funds in excess of these sums were to be available for use by the Territory for other purposes.

Congress did not appropriate funds for the Hawaiian Homes program. The absence of Federal appropriations was consistent with the original congressional expectation. The House Committee Report accompanying H.R. 13500 that became the HHCA stated, "Moreover, not a dollar is required to be appropriated by the Federal Government" H.R. Rep. No. 839, 66th Cong., 2d Sess. 7 (1920). Instead, it provided that the program would be funded through the Hawaiian home loan fund described above. Congress also authorized, in section 220 of the HHCA, the legislature of the Territory to appropriate out of the Treasury of the Territory such funds as it deemed necessary to provide the Commission with funds sufficient to execute water and other development projects on the Hawaiian Home Lands. In section 222, Congress made the Commission accountable to the Territorial legislature by requiring it to submit a biennial report as well as any special reports the legislature might require.

Although vesting the administration of the HHCA in a Territorial Commission under the general oversight of the Territorial legislature, Congress gave the Secretary of the Interior various discrete responsibilities in the administration of the Act. These responsibilities, described below, concerned details pertaining to the use of land for homesteading. They had nothing to do with the nature of the relationship between the United States and native Hawaiians.

Section 204(1) of the original Act required the consent of both Congress and the Secretary of the Interior before additional lands could be opened to homesteading after the initial 5-year trial period. Secretarial approval was required under section 204(2) of the HHCA before available lands subject to a lease with a withdrawal clause were in fact withdrawn from the lease and made available for homesteading. Secretarial approval was required under section 204(3) for the Commission's selection of available lands from a larger area that Congress had designated. By Act of June 18, 1954, Congress added to section 204 of the HHCA by authorizing the Commission to engage in land exchanges in order to better effectuate the purposes of the HHCA or to consolidate its holdings. 62 Stat. 262. The approval of the Secretary, the Governor, the Commissioner of Public Lands, and two-

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thirds of the members of the Board of Public Lands were all required prior to an exchange. These lengthy approval requirements involving Territorial officials in addition to the Secretary suggest that the protection of the public lands of Hawaii not included within the available lands was at least as important to Congress as was making consolidated land holdings available to the Commission. Secretarial approval was required under section 212 of the HHCA before the Commission could secure the return of land, for homesteading purposes, that had been earlier transferred to the Commissioner of Public Lands and leased under a general lease. The statutory scheme appears to be directed toward protecting the interest of the Hawaii populace at large in the public lands, rather than in promoting the wholesale use of the available lands for homesteading.

The Secretary retained these basic responsibilities between the 1921 enactment of the HHCA and Statehood. The Secretary was given a small additional role by Act of July 26, 1935: to designate a sanitation and reclamation expert to reside in Hawaii and to work with the Commission at the Commission's expense in carrying out its duties. 49 Stat. 505. He did this during the mid-1930's.

The above discussion has summarized the major provisions of the HHCA. No provision of the HHCA makes explicit reference to a trust relationship, and in our opinion none can be read to do so implicitly. See the discussion in Section B, *infra*.

The major argument advanced by those who contend that the United States served as a trustee for native Hawaiians under the HHCA from 1921 to 1959 stems from a single sentence of testimony delivered in 1920 before the House Territories Committee by then-Secretary of the Interior Franklin Lane. In urging enactment of the HHCA, Secretary Lane stated that:

*** the natives of the islands *** are our wards *** for whom in a sense we are trustees ***

H.R. Rep. No. 839, 66th Cong., 2d Sess. 4 (1920). That sentence is, in our view, too weak a reed on which to construct a fiduciary relationship. There is nothing to suggest that Secretary Lane intended to offer a legal conclusion. In its report, the Committee itself did not interpret Secretary Lane's statement as suggesting a trust relationship nor did it hint at a trust relationship. Nothing on the point appears in the *Congressional Record* debates on the legislation. Although we find the statute to be clear on this point, we have also examined the history of the legislation that became the Hawaiian Homes Commission Act, 1920, and there is no suggestion from any source, other than Secretary Lane's off-hand remark, that the United States would serve as a trustee for the beneficiaries of the Act. We have, further, examined the legislative history of amendments to the HHCA

enacted between 1921 and 1959, and we find no hint or suggestion that the United States would serve as trustee.

The only case law on point is a decision of the Supreme Court of Hawaii in 1982, *Ahuna v. Department of Hawaiian Home Lands*, 64 Haw. 327 (1982); 640 P.2d 1161 (1982), in which the court by way of *dictum* stated a contrary view. It stated that before Statehood the United States had a "trust obligation" to native Hawaiians, basing its statement almost entirely on the sentence of Secretary Lane quoted above. The United States was not a party to the *Ahuna* litigation. In the circumstances, we do not find the decision helpful on this subject.

B. Analysis

In the following discussion, we conclude (1) the HHCA did not create a trust and (2) the United States did not have a trust responsibility in the administration of the Hawaiian Homes program during Hawaii's territorial period.

Those who argue in favor of a trusteeship role for the United States under the HHCA point to decisions pertaining to the Indians for support; therefore, we turn first to an examination of the law on that subject. We conclude Indian law is inapposite. As explained more fully below, native Hawaiians do not constitute a "tribe." See *Price v. State of Hawaii*, 764 F.2d 623, 627 (9th Cir. 1985), *cert. denied*, 474 U.S. 1055 (1986). Neither the Bureau of Indian Affairs (BIA) nor any other agency or department of the United States Government has accorded them tribal recognition. *Id.* at 626. Congress excluded native Hawaiians from organizing as Indian tribes by section 13 of the Indian Reorganization Act of June 18, 1934, 25 U.S.C. § 473 (IRA). The IRA does not apply to the territories or insular possessions of the United States, with the exception of Alaska. *Price, supra* at 626.

As to the Indian analogy, in *United States v. Mitchell*, 463 U.S. 206 (1983), (*Mitchell II*), the Supreme Court explained the circumstances under which the United States would be held to the duties of a common law trustee.¹⁰ In that decision, the Court found that various timber management statutes gave the BIA "comprehensive" and "pervasive" management authority and required the BIA to exercise "literally daily supervision over the harvesting of Indian timber." *Id.* at 222. The Court concluded that the statutory scheme created a fiduciary relationship and conferred jurisdiction in the Court of Claims to hear the claims of the Quinault Tribe and Quinault allottees for money damages for the mismanagement of their forest by the BIA. It held:

[A] fiduciary relationship necessarily arises when the Government assumes such elaborate control over forests and property belonging to Indians. All of the necessary elements of a common-law trust are present: a trustee (the United States), a beneficiary (the Indian allottee), and a trust corpus (the timber, lands, and funds). [W]here the Federal Government *takes or has control or supervision over tribal monies or properties,*

¹⁰This case earlier reached the Court in *U.S. v. Mitchell*, 435 U.S. 535 (1980) (*Mitchell I*).

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the fiduciary relationship normally exists with respect to such monies or properties (unless Congress has provided otherwise) even though nothing is said expressly in the authorizing or underlying statute (or other fundamental document) about a trust fund, or a trust or fiduciary connection.

Id. at 225. (Citations and footnotes omitted) (italics added).

The HHCA bears none of the earmarks that the Court identified in *Mitchell* as creating fiduciary responsibilities in the United States. In *Mitchell*, the Court relied in major part upon the "undisputed existence of a general trust relationship between the United States and the Indian people," in concluding that the United States had assumed a trust responsibility in managing the Quinault forest. *Id.* at 225. There is, however, no such relationship between the United States and the native Hawaiians under the HHCA, the Hawaii Organic Act of 1900, the Joint Resolution of July 7, 1898, or any other legal source. 31 Stat. 141; 30 Stat. 50. There is no special relationship between the United States and the native Hawaiians because, as the Ninth Circuit has held, the native Hawaiians do not constitute "a distinct sovereignty set apart by historical and ethnological boundaries." *Price v. State of Hawaii*, 764 F.2d 623, 627 (9th Cir. 1985), *cert. denied*, 474 U.S. 1055 (1986). This is at the heart of the unique government-to-government relationship between the United States and the Indian tribes that is the basis of the United States responsibilities towards Indians. See *e.g. Morton v. Mancari*, 417 U.S. 535 (1971). The United States has no relationship to the native Hawaiians different from the relationship pertaining between the United States and other United States citizens.

In addition to a lack of any general form of trust responsibility, the United States did not assume any of the "pervasive" and "comprehensive" responsibilities towards the Hawaiian Homes program that the *Mitchell II* Court found to be "necessary elements of a common-law trust" with respect to the government's management of Indian timber. 463 U.S. 206, 225. As we have seen, the Secretary of the Interior had certain limited administrative responsibilities under the HHCA related to the interest of the general public in the available lands. The responsibilities vested in the Secretary under the HHCA did not differ in character from his administrative responsibilities under any other statute. They are not the responsibilities of a trustee, as delineated by the Ninth Circuit. See *Price v. Hawaii*, 921 F.2d 950, 955.

The responsibilities of the Territory of Hawaii in administering the HHCA were likewise neither "comprehensive" nor "pervasive" within the terms of *Mitchell II*. In fact, the HHCA put severe limitations on the use of the available lands for homesteading, and these limitations by themselves negate any possible fiduciary responsibility in the Territory. Even extending into Statehood, the HHCA prohibited the Commission from leasing more than 20,000 acres for homesteading in

any 5-year period and, as discussed above, required the approval of the Secretary of the Interior before the Commission could make certain lands available for homesteading. Perhaps most importantly, the 1921 Act established a \$1,000,000 limitation on Commission funding from a revolving fund that included three sources of income, including the income derived from the general leasing of the available lands. This fund was increased to \$2,000,000 in 1928 and remained at that level until 1952 when it was raised to \$5,000,000. The funds in excess of this amount were to be made available to the Territory for other purposes. The HHCA left to the Territorial legislature the discretion to appropriate additional funding.

With the exception of the 5-year, 20,000-acre maximum homestead limitation, the HHCA gave the Commission broad discretion in implementing the homesteading program. There was no affirmative requirement on the Commission to grant a minimum, or any, number of homesteads, and nothing approaching a commitment to provide a significant proportion of the native Hawaiian population with a homestead lease. Congress directed the Commission to develop qualification standards for lessees to govern its issuance of homestead leases. As discussed earlier, the Commission was to return to the Public Lands Commission the lands it was unable to use so that general leases could be awarded. The Territory of Hawaii thus was not a trustee under the HHCA. Rather, the Commission and thus the Territory was simply the same as any other government agency, performing its statutory function. Without more, such duties cannot, by themselves, transform the government into a trustee.

In addition to the lack of a trustee, there is under the HHCA no beneficiary with equitable ownership of the property alleged to be subject to a trust. Trusteeship responsibilities require a beneficiary with equitable title to the property, *see, Mitchell II, supra*, 463 U.S. 206, 225. In *Mitchell II*, the Court found the 1855 Treaty of Olympia, an 1873 Executive Order, and the General Allotment Act, 25 U.S.C. § 348, established a trust corpus by giving to the Indians title in the Quinault Reservation. In 1924, the Supreme Court had ordered the BIA to allot the Reservation. *United States v. Payne*, 262 U.S. 446 (1924). The HHCA, in contrast, established neither a trust corpus nor beneficial owners. There was, and is, no title to the available lands in the native Hawaiians.¹¹

The fee title to the available lands under the HHCA remained in the United States. Congress retained the power to remove lands from the Hawaiian Homes program without violating any rights of the native Hawaiians. The United States also reserved the right under section 91 of the Hawaii Organic Act to take any of the public lands of Hawaii

¹¹The lands that became the available lands were included in the lands taken from the Republic of Hawaii by the 1898 Joint Resolution, and they were to be used for the benefit of all of the inhabitants of Hawaii, Joint Res. No. 5, 30 Stat. 750-51 (1898). Secs. 73 and 91 of the Hawaii Organic Act returned the beneficial use of these lands to the Territory of Hawaii. Thus, at the time the U.S. annexed Hawaii, it took legal title to lands held by the Republic. It did not take lands belonging to individuals.

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“for the uses and purposes of the United States.”¹² The Organic Act, specifically authorized Congress, the President or the Governor of Hawaii to exercise this authority. The provision applied to the public lands of Hawaii, including those set aside as available lands under the HHCA. Section 91 was not repealed by the HHCA or by any other law prior to Statehood.

The HHCA gave the Territory of Hawaii the right to use the available lands for the purposes set forth in the Act. These purposes included, subject to the acreage limitation, homestead leases; but the HHCA authorized general leases as well. The lands remained subject to the right of Congress to provide for their use for other purposes, and they also remained subject to the right of the President or the Governor to take them for purposes of the United States. In addition, the Attorney General of the Territory of Hawaii issued a series of opinions during the Territorial period giving a rather broad scope to permissible land withdrawals from the HHCA program. These opinions were not overturned until well after Statehood by the Attorney General of the State of Hawaii.

It would be inconsistent with the rights reserved to both the United States and the Territory, to use the available lands for a variety of purposes, to conclude that the HHCA created an equitable ownership interest in these lands in the native Hawaiians. The HHCA makes no provision for such an interest. Instead, it simply made qualified native Hawaiians eligible to apply for a homestead lease. The Territory was not required to award any homesteads, and its discretion was limited by the ceiling set on homestead leases in section 204(3) of the HHCA. Thus, an individual native Hawaiian could only receive a property interest in a lease that he in fact applied for and was granted. The HHCA did not create a beneficial interest in the available lands, a critical element in establishing a trust relationship. *Mitchell II*, 463 U.S. 206, 225.

In sum, the HHCA differs markedly from the comprehensive statutory scheme governing the BIA's management of Indian timber which, the Court held in *Mitchell II*, charged the United States with the duties of a common law trustee. Unlike the situation with the Indian tribes, the United States has never assumed a trust relationship of any kind with the native Hawaiians. The duties the HHCA placed in the Secretary of the Interior and in the Territory of Hawaii are not those of a trustee. *Price v. Hawaii*, 921 F.2d 950, 955. They are, rather, those of a government administrator. They differ in purpose from the

¹² Sec. 91 of the Hawaii Organic Act, as amended, formerly codified at 48 U.S.C. § 511, provided in pertinent part: [T]he public property ceded and transferred to the United States by the Republic of Hawaii, under the joint resolution of annexation, * * * shall remain in the possession, use and control of the government of the Territory of Hawaii and shall be maintained, managed, and cared for by it at its own expense, until otherwise provided for by Congress, or taken for the uses and purposes of the United States by direction of the President or of the Governor of Hawaii.

statutes at issue in *Mitchell II* because they are not directed exclusively toward advancing the interests of the native Hawaiians. They differ both in the nature and the scope of the duties they required the Secretary or the Territory to perform. Further, the HHCA established neither a trust corpus nor a beneficial owner, both of which are essential elements of a common law trust. It simply made lands available for homesteading on a limited basis. The United States clearly was not a trustee for the Hawaiian Homes program.

III. The United States Did Not Assume a Trust Responsibility For the Hawaiian Homes Program Upon Statehood

A. Background

Congress provided for the admission of Hawaii into the Union by the Hawaii Statehood Act of March 18, 1959. 73 Stat. 4.¹³ Sections 4 and 5 of the Statehood Act include provisions that specifically address native Hawaiians.

1. Section 4

Section 4 of the Statehood Act transferred administration of the HHCA from the Territory to the State of Hawaii. 73 Stat. 5. It provides “[a]s a compact with the United States relating to the management and disposition of the Hawaiian home lands, the Hawaiian Homes Commission Act, as amended, shall be adopted as a provision of the constitution of said State” and further requires that “all proceeds and income from the ‘available lands,’ as defined by * * * [the HHCA] shall be used only in carrying out the provisions of said Act.”

The sole responsibility that the United States reserved in section 4 is consent to certain amendments to the Hawaiian Homes Commission Act proposed by the State of Hawaii.¹⁴ Although section 4 of the Statehood Act allows the State to eliminate the remaining Secretarial responsibility, to approve land exchanges under section 204 of the HHCA, without seeking the consent of the United States, the State has not undertaken to do so. All other responsibilities of the Secretary of the Interior in the HHCA, as discussed above, were eliminated by the Hawaii Constitutional Convention of 1978.

2. Section 5

The other relevant section of the Statehood Act, section 5, addresses the transfer of Federal lands to the new State. 73 Stat. 5-6. Section 5(b) grants the State title to the public lands and property held by the United States at the time of Hawaii's admission to the Union, with the

¹³ Hawaii was actually admitted to the Union on Aug. 21, 1959, upon issuance of Presidential Proclamation 3309, 24 FR 6868 (1959).

¹⁴ Under sec. 4 of the Statehood Act, the State is entitled to amend secs. 202, 213, 219, 220, 222, 224, and 225 of the HHCA and other provisions related to administration. The State is also entitled unilaterally to amend those provisions of the HHCA regarding the powers and duties of officers other than those charged with the administration of the Act, including specifically, sec. 204, paragraph 2, sec. 206 and sec. 212.

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exception of Federal reservations. Later, in the Hawaii Omnibus Act of July 12, 1960, Congress amended section 5(b) to make explicit that the grant of title to the State included the Hawaiian Home Lands. 74 Stat. 411, 422.

Congress carried forward the requirement that Hawaii use these former Federal lands for public purposes in section 5(f) of the Statehood Act which, for the first time, impressed all the public lands (granted to the State under section 5(b)) with a public trust.

Section 5(f) of the Statehood Act reads in relevant part:

The lands granted to the State of Hawaii by subsection (b) of this section and public lands retained by the United States under subsections (c) and (d) and later conveyed to the State under subsection (e), together with the proceeds from the sale or other disposition of any such lands and the income therefrom, shall be held by said State as a *public trust* [1] for the support of the public schools and of the public educational institutions, [2] for the betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended, [3] for the development of farm and home ownership on as widespread a basis as possible [4] for the making of improvements, and [5] for the provision of lands for public use. Such lands, proceeds, and income shall be managed and disposed of for one or more of the foregoing purposes in such manner as the constitution and laws of said state may provide, and their use for any other object shall constitute a breach of trust for which suit may be brought by the United States.

(Italics added.) Congress is abundantly capable of making its intention known through clear statutory directives. As the Courts have noted, in the vast majority of legislation Congress does mean what it says; thus the statutory language is normally the best evidence of Congress' intent. *United States v. Missouri Pacific R.R.*, 278 U.S. 269 (1929). If clarity does not exist from the text of the statute, it should not be discerned from extrinsic evidence. *Pittston Coal Co. v. Sebben*, 488 U.S. 105 (1988).

Had Congress wished to establish a trust relationship between the United States and the Hawaiian people, it would have done so with unambiguous language. The absence of any such language in either the Statehood Act or the HHCA can only be interpreted to mean that Congress rejected such a result. Indeed, in section 5(f) of the Statehood Act, Congress explicitly established a public trust responsibility between the State and the people of Hawaii. Congress' use of explicit language in section 5(f) of the statute supports the view that the absence of specific language vis-a-vis the United States was intentional.

We also note the absence of anything in the long legislative history of Hawaii Statehood (or Admission) legislation to suggest that the United States was to serve after Statehood in the role of trustee. We have examined that legislative history with care, and it is entirely silent as to a trusteeship role for the United States under the Hawaiian Homes Commission Act, either before or after Statehood.

B. Analysis

The public trust doctrine is a derivative of the equal footing doctrine under which a State takes title to lands underlying navigable waters upon Statehood. It imposes a duty upon the State to use the lands formerly held by the Federal Government for the benefit of its citizens. The doctrine derives from the decision of the Supreme Court in *Illinois Central R.R. v. Illinois*, 146 U.S. 387 (1892), which held that Illinois held title to lands underlying Lake Michigan "in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein, freed from the obstruction or interference of private parties" *id.* at 452-53. The public trust differs from a fiduciary trust in that there is no individual or separate group with equitable ownership of the property. There is thus no duty in the State to manage the public trust assets for the sole benefit of one group; such a duty is, indeed, at odds with the concept of a public trust for all the inhabitants of a State. *See, Price v. State of Hawaii*, for the difference between a public trust and a fiduciary trust. 921 F.2d 950, 955-56 (9th Cir. 1990).

The Ninth Circuit has held that section 5(f) of the Statehood Act does not create a common law, or fiduciary trust and that Hawaii's management of the ceded lands is, therefore, not subject to the same strictures imposed upon private trustees. *Price v. State of Hawaii*, 921 F.2d 950 (9th Cir. 1990), (allegation that State failed to keep ceded lands and income from these lands separate from other State assets and income did not state a claim under section 5(f)). The Hawaii State courts have likewise been reluctant to second-guess the State's management of the public trust assets, at least where the section 4 Hawaiian homelands are not involved. *See, e.g., Trustees of the Office of Hawaiian Affairs v. Yamasaki*, 737 P.2d 446, *cert. denied*, 484 U.S. 698 (1987) (court will not set aside legislative apportionment of public trust assets to the Office of Hawaiian Affairs because there are no judicially discoverable and manageable standards under section 5(f) to determine the claims OHA may make to the revenues generated by the public trust corpus.)

Section 5(f) allows the State to use the public trust assets for five stated purposes: (1) support of public schools and public educational institutions, (2) the betterment of the condition of native Hawaiians, as defined in the HHCA, (3) the widespread development of farm and home ownership, (4) public improvements, and (5) the provision of land for public use. The choice among the five public trust purposes was reserved exclusively for Hawaii to make, with section 5(f) stating that "[s]uch lands, proceeds and income shall be managed and disposed of for one or more of the foregoing purposes as the constitution and laws of said State may provide."¹⁵

¹⁵These sec. 5(f) provisions allowing the use of the sec. 5(b) lands for five specified purposes do not apply to the Hawaiian Home Lands reserved for purposes of the HHCA in sec. 4 of the Statehood Act. *Price v. Akaka*, 928 F.2d 824, 826 n. 1 (9th Cir. 1990). Instead, sec. 5(f) allows the State to use other public lands for the variety of public

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Section 5(f) establishes a public trust between Hawaii and all the people of Hawaii. It also authorizes the United States to bring an enforcement action against the State if the State uses the public trust assets for purposes outside the scope of the statute. This right to sue the State is not exclusive to the United States and is similar to other enforcement actions brought by the United States to enforce myriad statutes. The enforcement power of the Federal Government does not by itself establish any special trust relationship. In *Price v. State of Hawaii*, the Ninth Circuit characterized this Federal responsibility as a "federal barrier beyond which the State cannot go in its administration of the ceded lands." 921 F.2d 950, 955. The court went on to note this "federal barrier" did not confer a common law trust responsibility on either the Federal Government or the State:

* * * it would be error to read the words "public trust" to require that the State adopt any particular method and form of management for the ceded lands. All property held by a state is held upon a "public trust." Those words alone do not demand that a state deal with its property in any particular manner even if, as a matter of prudence, the people usually require a close accounting by their officials. Those words betoken the State's duty to avoid deviating from section 5(f)'s purpose. They betoken nothing more.

921 F.2d 950, 955.¹⁶

Since attaining Statehood in 1959, Hawaii has had full control of the Hawaiian Homes program under section 4 of the Statehood Act, leaving the United States with what the Ninth Circuit has described as "only a somewhat tangential supervisory role under the Admission Act rather than the role of trustee," *Keaukaha-Panaewa Community Ass'n v. Hawaiian Homes Commission*, 588 F.2d 1216, 1224 n.7 (9th Cir. 1978), *cert. denied*, 444 U.S. 826 (1979). The court distinguished cases involving lands held in trust by the United States for Indian tribes:

The factual circumstances underlying the line of cases establishing this doctrine generally involve native Americans, as plaintiffs, suing a state or other entity to protect their rights in trust property, where the United States is trustee of the lands. In this case, however, the state is the trustee. The native Hawaiians are attempting to sue the state for breach of the state's trust obligations, and the United States has the opportunity to sue the state only on the basis of a right reserved by Congress in the state's Admission Act. The United States has only a somewhat tangential supervisory role under the Admission Act, rather than the role of trustee.

588 F.2d 1216, 1224 n.7.

Until Hawaii decides otherwise, the Secretary will continue to review land exchanges under section 204 of the HHCA. This is the only

purposes set forth in the Act. The State chose to implement the public trust in connection with the sec. 5(f) purpose of "the betterment of the condition of native Hawaiians" by establishing, during its constitutional convention of 1978, the Office of Hawaiian Affairs.

¹⁶In recent decisions, the Ninth Circuit has rejected jurisdictional arguments made by Hawaii in suits brought by native Hawaiians to secure prospective relief in the enforcement of sec. 5(f). See, e.g., *Keaukaha-Panaewa Community Ass'n v. Hawaiian Homes Commission*, 739 F.2d 1467 (9th Cir. 1984) (native Hawaiians may maintain an action under 42 U.S.C. § 1983, to enforce the Statehood Act); *Napeahi v. Paty*, 921 F.2d 827 (9th Cir. 1990), *cert. denied*, 60 U.S.L.W. 3265 (Oct. 8, 1991) (native Hawaiians, as potential beneficiaries of the public trust, have standing to enforce sec.5(f)).

remaining statutory duty of the Secretary of the Interior. In addition to the Secretary's one duty, the United States remains authorized under section 5(f) of the Statehood Act to bring an enforcement action against the State for breach of trust. In *Price v. State of Hawaii*, the Ninth Circuit held that Hawaii was not a fiduciary for the public land trust under section 5(f), and that the State had wide discretion in implementing the public land trust, 921 F.2d 950, 955-56 (9th Cir. 1991).¹⁷

Under the Act, the ceded lands are to be held upon a public trust, and under section 5(f) the United States can bring an action if that trust is violated. However, nothing in that statement indicates that the parties to the compact agreed that all provisions of the common law of trusts would manacle the State as it attempted to deal with the vast quantity of land conveyed to it for the rather broad, although not all-encompassing, list of public purposes set forth in section 5(f).

921 F.2d 950, 955.

Hawaii has made marked changes to the HHCA since achieving Statehood. As a result, the HHCA has assumed, as a matter of State law, a broader character than had been the case under the pre-statehood legislation.

Among other things, the State eliminated the funding ceilings and limitations on acreage to be opened to homesteading that were included in the Federal law. It adopted an accelerated leasing program and provided State appropriations to meet the administrative expenses of the Commission. The State has issued legal opinions with more restrictive conclusions regarding the permissible use of the available lands than had been the case in the opinions of the Attorney General of the Territory of Hawaii. The State Supreme Court has held that as a matter of State law, Hawaii has accepted a trust responsibility for the Hawaiian Homes program. See *Ahuna v. Department of Hawaiian Home Lands*, 64 Haw. 327, 640 P.2d 1161 (Haw. 1982).

With these changes, Hawaii has done more than the United States required it to do under its compact with the United States in section 4 of the Statehood Act. The changes the State chose to make to the HHCA cannot retroactively change the character of that statute or create responsibilities in the United States that Congress did not create in either the United States or the Territory of Hawaii. They are, instead, requirements created under State law which are within the sole responsibility of the State. For this reason, the State would not be in violation of a Federal obligation for purposes of section 5(f) unless it violated a responsibility imposed upon the Territory in the HHCA as that Act stood at the time of Statehood. The nature of these responsibilities has been discussed in earlier sections of this memorandum.

¹⁷ Although the Hawaiian Home Lands are not within the scope of the sec. 5(f) public trust, sec. 5(f) does not foreclose the United States from bringing suit against the State to implement sec. 4. *Price v. Akaha*, 928 F.2d 824, 826 n. 1 (9th Cir. 1990).

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Possible Federal legal action against the State would also need to take into account the enforcement remedies that are available to individuals. These remedies are important because the potential beneficiaries under the HHCA and the Statehood Act ordinarily would be in a better position to ascertain and evaluate the facts underlying a dispute than would the Federal Government. There is in fact significant legal recourse available in both Federal and State forums to individuals alleging a violation of section 5(f) of the Statehood Act.

Although the Ninth Circuit initially held that native Hawaiians could not bring suit directly to enforce section 5(f) of the Statehood Act, it has subsequently allowed native Hawaiians to bring suit to enforce the Act under the Civil Rights Act, 42 U.S.C. § 1983. *See, respectively, Keaukaha-Panaewa Community Ass'n v. Hawaiian Homes Commission*, 588 F.2d 1216 (9th Cir. 1978), *cert. denied*, 444 U.S. 826 (1979); (*Keaukaha I*); 739 F.2d 1467 (9th Cir. 1984) (*Keaukaha II*); *Price v. Hawaii*, 939 F.2d 702 (9th Cir. 1990), *cert. denied*, 60 U.S.L.W. 3265 (October 8, 1991). The Ninth Circuit has noted however, that while it has jurisdiction to hear prospective claims under the Statehood Act by native Hawaiians, it does not have jurisdiction to hear claims for retroactive relief. Such claims are barred by the Eleventh Amendment, *Ulaleo v. Paty*, 902 F.2d 1395 (9th Cir. 1990).

In addition to the Federal remedy provided by 42 U.S.C. § 1983, the Hawaii legislature has enacted legislation authorizing the award of both prospective and retroactive relief to native Hawaiians for claimed violations of the HHCA and the section 5(f) trust.¹⁸ These claims and the State processes under which they are heard are predicated upon State law and State implementation of the HHCA. They implicate no Federal responsibility either before Statehood or thereafter. Although Federal action remains available to enforce the HHCA, the increasing availability of Federal and State remedies to individuals, as well as the changed character the HHCA has assumed since Statehood, suggests that Federal action to enforce sections 4 and 5(f) of the Statehood Act would be appropriate only in rare instances.

IV. Conclusion

For the reasons discussed above, we conclude that the United States is not a trustee for native Hawaiians. We further conclude that the HHCA did not create a fiduciary responsibility in any party, the United States, the Territory of Hawaii, or the State of Hawaii. Deputy

¹⁸ Act 395, SLH 1988, authorizes native Hawaiians to sue in State court for prospective relief effective July 1, 1988. Act 323, SLH 1991, establishes a claims panel and process in State court for native Hawaiians to secure monetary damages for alleged breaches of trust that occurred between Statehood and the effective date of Act 395.

Solicitor Ferguson's opinion of August 27, 1979, is superseded and overruled to the extent that it is inconsistent with this memorandum.

THOMAS L. SANSONETTI
Solicitor

APPEALS OF FEDERAL INSURANCE CO.

IBCA-3236 *et al.*

Decided: December 22, 1993

Contract No. 4-CC-30-01480, Bureau of Reclamation.

Application To Conduct Discovery; Granted in Part.

1. Contracts: Rules of Practice: Generally—Rules of Practice: Appeals: Discovery

In applying its discovery rules, the Interior Board has adopted a flexible application of the term "good cause" and strongly encourages parties to engage in informal, cooperative, relevant, discovery to the extent practicable, without abusing the process.

2. Contracts: Rules of Practice: Generally—Rules of Practice: Appeals: Discovery

The Board held that, consistent with the amended Federal Rules of Civil Procedure, no later than 30 days before hearing, both parties were to identify their proposed lay hearing witnesses and exhibits, and to exchange those exhibits not already in the other's possession.

3. Contracts: Rules of Practice: Generally—Rules of Practice: Appeals: Discovery

Each party was to notify the other of any experts to be called at hearing as soon as those experts were identified and was to supply the other with a copy of any expert report or exhibit as soon as prepared. Without the need to request subpoenas from the Board, each party could depose the other's expert(s) upon the later of identification, or preparation of any expert report or exhibit. In any case, expert identification and production of any expert report or exhibit was to occur no later than 60 days before hearing.

4. Contracts: Rules of Practice: Generally—Rules of Practice: Appeals: Discovery

Without the need to request subpoenas from the Board, each party could notice and take the depositions of the other's knowledgeable personnel, based upon its own analysis, and/or upon the other's response to a Fed. R. Civ. P. 30(b)(6) notice. If a party deemed the number of depositions or particular individuals to be deposed to be unreasonable, it could seek a protective order.

5. Contracts: Rules of Practice: Generally—Rules of Practice: Appeals: Discovery

The Board issued rulings on interrogatories and requests for production of documents to which the Government had objected on the grounds that the requested information had been supplied through document production, or that the requests were overly broad or irrelevant. The Board agreed that some of appellant's interrogatories and document production requests were overly broad, but found others to be relevant, and directed various responses by the Government.

6. Contracts: Rules of Practice: Generally—Rules of Practice: Appeals: Discovery

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The Board found that disputed requests for admission were relevant and clear and directed responses.

APPEARANCES: Gregory L. Cashion, Manier, Herod, Hollabaugh & Smith, Nashville, Tennessee, for Appellant; Daniel L. Jackson, Department Counsel, Phoenix, Arizona, for the Government.

**ORDER BY ACTING CHIEF ADMINISTRATIVE JUDGE ROME
INTERIOR BOARD OF CONTRACT APPEALS**

In its November 30, 1993, "Application to Allow Federal Insurance Company [Federal] to Conduct Discovery," citing the Board's Rule 4.115, Federal requested an expedited order directing that the Bureau of Reclamation (BOR) respond to certain of Federal's discovery requests. The Board received BOR's Opposition on December 8, 1993, and Federal's Reply on December 20, 1993.

[1] Our Rules provide as follows, in pertinent part:

§ 4.115 Discovery-depositions.

(a) *General policy and protective orders.* The parties are encouraged to engage in voluntary discovery procedures. In connection with any deposition or other discovery procedure, the board may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, and those orders may include limitations on the scope, method, time and place for discovery, and provisions for protecting the secrecy of confidential information or documents.

(b) *When depositions permitted.* After an appeal has been docketed, the parties may mutually agree to, or the Board may, upon application of either party and *for good cause* shown, order the taking of testimony of any person by deposition upon oral examination or written interrogatories before any officer authorized to administer oaths at the place of examination, for use as evidence or for purpose of discovery. * * * [Italics added.]

* * * * *

§ 4.116 Interrogatories to parties: inspection of documents: admission of facts.

Under appropriate circumstances, but not as a matter of course, the Board will entertain applications for permission to serve written interrogatories upon the opposing party, applications for an order to produce and permit the inspection of designated documents, and applications for permission to serve upon the opposing party a request for the admission of specified facts. Such applications shall be reviewed and approved only to the extent and upon such terms as the Board in its discretion considers to be consistent with the objective of securing just and inexpensive determination of appeals without unnecessary delay, and essential to the proper pursuit of that objective in the particular case.

* * * * *

4.120 Subpoenas. * * *

* * * * *

(b) *Voluntary cooperation.* Each party is expected (1) to cooperate and make available witnesses and evidence under its control as requested by the other party, without issuance of a subpoena * * *.

As Federal notes, the Interior Board has adopted a flexible application of the term "good cause" in the discovery context:

It has been said that the term "good cause shown" in a rule regulating discovery is flexible and has no fixed or definite meaning; each application thereunder is to be evaluated upon the circumstances appearing from the pleadings and then determined by the sound discretion of the adjudicatory body before whom it is made [citation omitted].

Iversen Construction Co., IBCA No. 981-1-73, 73-1 BCA ¶ 10,019 at 47,027.

In keeping with that flexible approach, and despite the somewhat restrictive wording of part of our discovery Rules, in practice the Board strongly encourages parties to engage in informal, cooperative, and relevant discovery to the extent practicable, without abusing the process. Within the bounds of relevance and law, the Board encourages full disclosure. Normally, this results in the most efficient, speedy, and least expensive manner of proceeding.

Our policy is consistent with the recent amendments to the Federal Rules of Civil Procedure, effective December 1, 1993. Although we are not bound by those rules, like other boards, we often look to them for guidance and adopt their practices. See *Dawson Construction Co.*, VABCA No. 1967, 85-3 BCA ¶ 18,209 at 91,390. As amended, the rules impose a duty of voluntary disclosure of the identity and location of individuals with relevant knowledge, relevant documents, and other material, including trial witnesses and exhibits. See amended Rule 26, discussed below.

Our policy is also consistent with President Clinton's and Attorney General Reno's October 4, 1993, directives, adopted by the Interior Department, concerning "openness" in disclosure of Government documents under the Freedom of Information Act (FOIA), 5 U.S.C. § 552. Documents are presumed to be releasable, with limited exceptions.

Here, Federal issued interrogatories, requests for production of documents and for admissions, and sought to take depositions. Additionally, its consultant filed a FOIA request for documents. The matters in dispute, accompanied by the Board's ruling on each, follow.

[2] Hearing witnesses and exhibits. Federal requests that BOR identify the witnesses whom it will call at hearing. Federal then intends to conduct selected depositions. Federal also seeks the CPM schedule upon which BOR will rely at hearing.

This Judge has held in the past that she would not require the separate identification during discovery of hearing witnesses, other than experts when known, because her prehearing order provides for the exchange of witness and exhibit lists, and exhibits, 30 days in advance of hearing. *Appeals of Hardrives, Inc.*, IBCA Nos. 2319, *et al.*, September 13, 1991, Order Denying Motion to Compel, and Notice of Hearing (unpub.). *Accord Clifford La Tourelle*, AGBCA Nos. 93-132-

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1, et al., 93-3 BCA ¶ 26,125 at 129,874; *Hoffman Construction Co.*, DOT BCA No. 2030, 90-2 BCA ¶ 22,751 at 114,186; *Time Contractors, A Joint Venture*, DOTCAB No. 1400, 83-2 BCA ¶ 16,877 at 83,944.

This is consonant with the amended Federal Rules of Civil Procedure, which provide, at Rule 26(a)(3), that trial witness and exhibit identification be made "at least" 30 days before trial, unless otherwise directed by the court:

(3) Pretrial Disclosures. In addition to the disclosures required in the preceding paragraphs, a party shall provide to other parties the following information regarding the evidence that it may present at trial other than solely for impeachment purposes:

(A) the name and, if not previously provided, the address and telephone number of each witness, separately identifying those whom the party expects to present and those whom the party may call if the need arises;

* * * * *

(C) an appropriate identification of each document or other exhibit, including summaries of other evidence, separately identifying those which the party expects to offer and those which the party may offer if the need arises.

Unless otherwise directed by the court, these disclosures shall be made at least 30 days before trial.

Therefore, *no later than* 30 days before hearing, both parties are to identify their proposed lay hearing witnesses and exhibits, and to exchange those exhibits not already in the other's possession.

[3] Expert witnesses and reports. Concerning experts, Fed. R. Civ. P. 26(a)(2), as amended, provides:

(2) Disclosure of Expert Testimony.

(A) In addition to the disclosures required by paragraph (1), a party shall disclose to other parties the identity of any person who may be used at trial to present evidence under Rules 702, 703, or 705 of the Federal Rules of Evidence.

(B) Except as otherwise stipulated or directed by the court, this disclosure shall, with respect to a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony, be accompanied by a written report prepared and signed by the witness. The report shall contain a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

(C) These disclosures shall be made at the times and in the sequence directed by the court. In the absence of other directions from the court or stipulation by the parties, the disclosures shall be made at least 90 days before the trial date or the date the case is to be ready for trial or, if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under paragraph (2)(B), within 30 days after the disclosure made by the other party. The parties shall supplement these disclosures when required under subdivision (e)(1).

Further, concerning experts expected to testify at trial, Fed. R. Civ. P. 26(b)(4), as amended, provides:

(4) Trial Preparation: Experts.

(A) A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If a report from the expert is required under subdivision (a)(2)(B), the deposition shall not be conducted until after the report is provided.

BOR states that it has not yet determined which, if any, expert witnesses it may call at hearing. BOR has an obligation to supplement its discovery responses *as soon as this information is known to it*. See *Hoffman, supra* at 114,185. Indeed, Fed. R. Civ. P. 26(e)(1), as amended, notes:

A party is under a duty to supplement at appropriate intervals its disclosures under subdivision (a) if the party learns that in some material respect the information disclosed is incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing. With respect to testimony of an expert from whom a report is required under subdivision (a)(2)(B) the duty extends both to information contained in the report and to information provided through a deposition of the expert * * *.

This Board generally is less formal than the Federal courts and this Judge will not require a written report from experts, although such reports are advisable as they often help to elucidate matters. If a party does intend to offer such a report, or an exhibit prepared by an expert, at hearing, then that party is to so notify the other party and the report and/or exhibit(s) are to be produced promptly to the other party. Without the need to request subpoenas from the Board, Federal and BOR can depose each other's expert(s) upon the later of identification, or preparation of any expert report or exhibit. In any case, expert identification and production of any expert documents is to occur no later than 60 days before hearing.

[4] Depositions of lay witnesses. Responsive, relevant, nonprivileged documents, and identification of personnel with knowledge of the appeals, are to be exchanged during the normal course of discovery. Without the need to request subpoenas from the Board, each party can notice and take the depositions of the other's knowledgeable personnel.

To the extent that, from its own experience and the documents and information already produced, either party may not be able to identify the other's personnel with knowledge in relevant areas, without the need to request a subpoena from the Board, it can notice a Fed. R. Civ. P. 30(b)(6) deposition or depositions:

[D]escrib[ing] with reasonable particularity the matters on which examination is requested. In that event, [BOR] shall designate one or more * * * persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. * * * This * * * does not preclude taking a deposition by any other procedure authorized in these rules.

If a party deems the number of depositions, or particular individuals to be deposed, to be unreasonable, it then can move the Board for a protective order, citing its objections with specificity, and the other party can respond.

[5] Interrogatories and document production requests at issue not already addressed.

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Interrogatory No. 3:

Identify all persons who have personal knowledge of the issues and claims which are the subject of this appeal. The identification * * * shall not be limited to only employees of [BOR] but any and all persons who have become involved with the issues and claims which are the subject of this lawsuit.

As BOR contends, this interrogatory is overly broad. Not only does it seek information concerning the entire universe of people who might have knowledge about the appeals, regardless of whether BOR has any control over them, it also seeks duplicative information. BOR has supplied documents and information from which Federal itself can identify at least some BOR personnel with knowledge. To the extent that the individuals so identified may not satisfy Federal's needs for relevant information, it can notice a Rule 30(b)(6) deposition, as described above. BOR need not respond to this interrogatory.

Interrogatory No. 43: "Identify all persons who provided assistance to the Contracting Officer in preparation and determining * * * all facts and conclusions and the decision itself which is reflected in Modification No. 077."

BOR contends that, because this Board undertakes a *de novo* review of a contracting officer's decision, this interrogatory is irrelevant. It also alleges that the interrogatory is vague, overly broad and duplicative of Interrogatory No. 44, which it has agreed to answer. Interrogatory No. 44 provides:

Identify all individuals who were consulted, interviewed, provided opinions, or comments, in preparation, determination and rendering the conclusions and decisions reflected in Modification No. 077. In so doing, please provide the following:

- (a) The purpose of consulting, interviewing, obtaining any comments or opinions from each individual;
- (b) Statement as to the basis of any comments or opinions that may have been rendered;
- (c) The opinion or comment rendered by any such individuals.

Interrogatory No. 43 is relevant, and the Board's *de novo* review of a contracting officer's decision on appeal is irrelevant in this discovery context. The basis for, and participants in, the decision can be important in our own evaluation. Moreover, standing alone, we do not find the interrogatory to be vague or overly broad. It does appear to be duplicative of No. 44, however. Thus, BOR need not respond to No. 43.

Interrogatory No. 45: "Identify all documents which were generated or relate to any interviews, consultations, investigations, audits and opinions which were conducted or obtained, as referred to in the previous interrogatory."

BOR objects to this interrogatory as overly broad and states that it has provided the technical analyses involved in Modification No. 77 as well as the audits, along with hundreds of pages of other documents. One basis for BOR's objection is that Federal has defined the word

“identify” in its discovery requests in effect to require BOR to do organizational work for Federal. Appellant’s definition is:

“Identify” means (regardless of whether any claim of privilege is asserted), with respect to a document, to set forth the following information:

- (a) Its nature (e.g., letter, memorandum, report, etc.);
- (b) The date it bears or, if undated, the date it was written or created;
- (c) The identity of the person(s) who wrote or created it;
- (d) The identity of each signer, addressor and addressee of the document;
- (e) The identity of each person who received it or received copies of it;
- (f) Its file number or other identifying mark or code;
- (g) Its general subject matter;
- (h) Its present or last known location and the identity of the present custodian of the document and the present custodians of any copies of the document.

Appellant’s definition of the word “identify” as to persons includes a request for present or last known residence and business addresses, employer and job title and a statement of the individual’s employment history with BOR.

BOR is correct that Interrogatory No. 45, and Federal’s sweeping definitions of “identify,” are overly broad. Much of the information sought in the interrogatory can be gleaned by reading the document produced. This is not to say that BOR’s duty in discovery always will be satisfied simply by producing a document, or a mass of documents, without organizational clarity or explanations. The generator of a document perforce is likely to have information about it extending beyond the words on the page.

However, in its Reply to BOR’s Opposition, at 4, Federal states that it “is not asking [BOR] to collate, organize, and synthesize” documents for Federal’s review. On the other hand, Federal appears to have broadened its discovery requests and now seeks to review the entire project file.

BOR is to make available for Federal’s review all nonprivileged portions of the contract (not the entire Central Arizona Project) file, not already produced, which are relevant to these appeals. Relevance is to be broadly construed. If BOR should withhold any documents on the basis of privilege or that they are not relevant, it is to delineate each claimed privilege and to explain in detail the basis for its position on relevance.

If, from among the documents which already have been produced, or any to be produced, Federal has questions remaining that cannot be answered from the face of a document, it is to identify each document at issue and to pose specific, narrow questions in supplemental interrogatories or, at its election, at a deposition.

Interrogatory No. 46: “Identify all persons who participated in the preparation of the contract and plans for the project, specifically those individuals who participated with the discovery, formulation, analysis and consideration with regard to the geological information appearing in the project specifications.”

BOR objects to this interrogatory essentially on the grounds of (1) relevance, stating that it is immaterial who compiled the geologic

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information in question; and (2) prejudice due to the passage of several years from the time the information was gathered.

BOR's relevance objection is unfounded, as individuals who compiled the geologic information may have pertinent knowledge. As to the passage of time, BOR shall simply do its best to identify those involved individuals of whom it has knowledge, or whom it can identify with reasonable effort. The "identification," here and otherwise in this discovery, merely need be sufficient (without violating the Privacy Act), in the case of current Government employees, to enable Federal to notice their depositions if Federal deems it necessary and, in the case of other individuals, to enable Federal to attempt to locate them and/or notice their depositions if it so elects.

Interrogatory No. 51: "State with specificity the basis for the facts, conclusions and decisions of the Contracting Officer which appear in Modification No. 76."

BOR objects to this interrogatory on the ground that the 106 pages of the modification and accompanying exhibits speak for themselves and on the ground that Modification No. 77 and not No. 76 is the subject of these appeals. Federal urges that the differences between Modifications No. 76 and No. 77, and another modification, No. 73, are particularly relevant.

Nonetheless, in its Reply, Federal states that, if BOR will not rely upon Modification No. 76, or the CPM schedule it refers to, at hearing, then Federal will withdraw this discovery request.

If BOR does intend to rely upon Modification No. 76, or the associated CPM schedule at hearing, then interrogatory No. 51 is relevant. In that case, to the extent, if any, that there may be bases for the facts, conclusions and decisions of the contracting officer known to, or reasonably ascertainable by, BOR which are not apparent from the face of the decisions and their exhibits, BOR is to state them succinctly. Federal then can develop the information further through depositions if it so elects. Depositions also can be taken if BOR has nothing to add to the current written record.

Interrogatory No. 54: "Identify all documents and any other information relied upon by [BOR] in developing the CPM schedule referred to and relied upon in Modification No. 076."

BOR objects to this interrogatory on the ground that it already has supplied the technical analysis documents used in preparing the CPM schedule and on the previously stated, and accepted, ground that appellant's definition of "identify" is too burdensome.

Our ruling follows that issued with respect to interrogatory No. 51. BOR need not respond if it does not intend to rely upon the referenced CPM schedule. If it does intend to use it in any way in connection with its proof in these appeals, and if there are any documents or information responsive to the interrogatory not already provided by BOR, it is to do so. If BOR already has supplied documents or

information, but has not identified them in a manner by which it would be clear to Federal that they pertain to the CPM, BOR is to clarify the situation. Otherwise, BOR is free from further "identification" of documents or information.

Interrogatory No. 55: "State with specificity the basis of the critical points, critical paths and critical dates reflected on the CPM developed by [BOR] and used in rendering the Contracting Officer's decision reflected in Modification No. 076."

BOR objects to this interrogatory on the ground that it is overly broad and for the same reasons it cited in connection with No. 54. Our ruling is identical to that immediately above, with the additional comment that, even if BOR does intend to rely upon the CPM, the requested information may be available from a document. To the extent that it may not be apparent from the contents of a produced document, and if Federal does not elect to take a deposition or depositions on point—which would appear to be the most practical method of obtaining the information sought—then BOR is to provide, to the extent practicable, any missing responsive information.

In its requests for production of documents, Federal has sought copies of the documents identified in response to its various interrogatories. BOR has objected to the document requests associated with the interrogatories it has contested. The Board's rulings on those interrogatories apply here as well.

[6] Requests for admissions. BOR objects to the following four requests for admissions:

8. The analysis of the issues reflected in Modification No. 076 commencing on page 13 through to page 106 was used as a basis in formulating the facts, conclusions and decisions of the Contracting Officer appearing in Modification No. 077, dated August 5, 1993. * * *

* * * * *

23. Modification No. 076 is based upon the same facts, documents, recommendations and opinions that serve as the basis of Modification No. 077. * * *

* * * * *

25. The CPM schedule referred to in Modification No. 076 was developed and prepared by [BOR], after all construction activity on the project and all contract obligations had been completed. * * *

26. The CPM schedule referenced above was developed, prepared and used solely for the facts, conclusions and decisions of the Contracting Officer appearing in Modification No. 076.

These requests for admissions appear to be relevant and straightforward. BOR shall respond.

CHERYL SCOTT ROME
Acting Chief Administrative Judge