UNITED STATES DEPARTMENT OF THE INTERIOR

WASHINGTON, D.C. 20240

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

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

Office of the Solicitor - - - - - Thomas L. Sansonetti, 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, 1992. It includes the most important administrative decisions and legal opinions that were rendered by officials of the Department during this period.

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

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Herrick, Wallace H., 24 L.D. 23; overruled, 25 L.D. 113.

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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.

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Hull *v.* Ingle, 24 L.D. 214; overruled, 30 L.D. 258.

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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.

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Inman *v.* Northern Pacific R.R., 24 L.D. 318; overruled, 28 L.D. 95.

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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.

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.

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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.

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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.

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Lindberg, Anna C., 3 L.D. 95; modified, 4 L.D. 299.

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Little Pet Lode, 4 L.D. 17; overruled, 25 L.D. 550.

Lock Lode, 6 L.D. 105; overruled so far as in conflict, 26 L.D. 123.

Lockwood, Francis A., 20 L.D. 361; modified, 21 L.D. 200.

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

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.

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Lyman, Mary O., 24 L.D. 493; overruled so far as in conflict, 43 L.D. 221.

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Mable Lode, 26 L.D. 675; distinguished, 57 I.D. 63.

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Malone Land & Water Co., 41 L.D. 138; overruled in part, 43 L.D. 110.

Maney, John J., 35 L.D. 250; modified, 48 L.D. 153.

Maple, Frank, 37 L.D. 107; overruled, 43 L.D. 181.

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

Martin *v.* Patrick, 41 L.D. 284; overruled, 43 L.D. 36.

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

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Maughan, George W., 1 L.D. 25; overruled, 7 L.D. 94.

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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.

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McGee, Edward D., 17 L.D. 285; overruled, 29 L.D. 166.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Rialto No. 2 Placer Mining Claim, 34 I.D. 44; overruled, 37 L.D. 250.

Rico Town Site, 1 L.D. 556; modified, 5 L.D. 256.

Rio Verde Canal Co., 26 L.D. 381; vacated, 27 L.D. 421.

Roberts *v.* Oregon Central Military Road Co., 19 L.D. 591; overruled, 31 L.D. 174.

Robinson, Stella G., 12 L.D. 443; overruled, 13 L.D. 1.

Rogers *v.* Atlantic & Pacific R.R., 6 L.D. 565; overruled so far as in conflict, 8 L.D. 165.

Rogers, Fred B., 47 L.D. 325; vacated, 53 L.D. 649.

Rogers, Horace B., 10 L.D. 29; overruled, 14 L.D. 321.

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

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

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

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

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

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

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

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

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

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

Santa Fe Pacific R.R. *v.* Peterson, 39 L.D. 442; overruled, 41 L.D. 383.

Satisfaction Extension Mill Site, 14 L.D. 173 (See 32 L.D. 128).

Sayles, Henry P., 2 L.D. 88; modified, 6 L.D. 797 (See 37 L.D. 330).

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

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

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

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

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

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

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

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

Shineberger, Joseph, 8 L.D. 231; overruled, 9 L.D. 202.

Silver Queen Lode, 16 L.D. 186; overruled, 57 I.D. 63.

Simpson, Lawrence W., 35 L.D. 399; modified, 36 L.D. 205.

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

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

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

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

Snook, Noah A., 41 L.D. 428; overruled so far as in conflict, 43 L.D. 364.

Sorli *v.* Berg, 40 L.D. 259; overruled, 42 L.D. 557.

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

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

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

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

Southern Pacific R.R. *v.* Bruns, 31 L.D. 272; vacated, 37 L.D. 243.

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

South Star Lode, 17 L.D. 280; overruled, 20 L.D. 204; 48 L.D. 523.

Spaulding *v.* Northern Pacific R.R., 21 L.D. 57; overruled, 31 L.D. 151.

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

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

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

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

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

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

State of (see State name).

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

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

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

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

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

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

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

Stump, Alfred M., 39 L.D. 437; vacated, 42 L.D. 566.

Sumner *v.* Roberts, 23 L.D. 201; overruled so far as in conflict, 41 L.D. 173.

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

Sweeney *v.* Northern Pacific R.R., 20 L.D. 394; overruled, 28 L.D. 174.

Sweet, Eri P., 2 C.L.O. 18; overruled, 41 L.D. 129 (See 42 L.D. 313).

Sweeten *v.* Stevenson, 2 B.P.P. 42; overruled so far as in conflict, 3 L.D. 248.

Taft *v.* Chapin, 14 L.D. 593; overruled, 17 L.D. 414.

Taggart, William M., 41 L.D. 282; overruled, 47 L.D. 370.

Talkington, Heirs of *v.* Hempfling, 2 L.D. 46; overruled, 14 L.D. 200.

Tate, Sarah J., 10 L.D. 469; overruled, 21 L.D. 209.

Taylor, Josephine, A-21994 (June 17, 1939); overruled so far as in conflict, 59 I.D. 258.

Taylor *v.* Yates, 8 L.D. 279; *rev'd*, 10 L.D. 242.

Teller, John C., 26 L.D. 484; overruled, 36 L.D. 36 (See 37 L.D. 715).

T.E.T. Partnership, 84 IBLA 10; vacated & *rev'd*, 88 IBLA 13.

Thorstenson, Even, 45 L.D. 96; overruled, 36 L.D. 36 (See 37 L.D. 258).

Tibbetts, R. Gail, 43 IBLA 210, 86 I.D. 538; overruled in part, 86 IBLA 215.

Tieck *v.* McNeil, 48 L.D. 158; modified, 49 L.D. 260.

Toles *v.* Northern Pacific Ry., 39 L.D. 371; overruled so far as in conflict, 45 L.D. 92.

Tonkins, H.H., 41 L.D. 516; overruled, 51 L.D. 27.

Towl *v.* Kelly, 54 I.D. 455; overruled, 66 IBLA 374, 89 I.D. 415.

Traganza, Mertie C., 40 L.D. 300; overruled, 42 L.D. 611.

Traugh *v.* Ernst, 2 L.D. 212; overruled, 3 L.D. 98.

Tripp *v.* Dunphy, 28 L.D. 14; modified, 40 L.D. 128.

Tripp *v.* Stewart, 7 C.L.O. 39; modified, 6 L.D. 795.

Tucker *v.* Florida Ry. & Navigation Co., 19 L.D. 414; overruled, 25 L.D. 233.

Tupper *v.* Schwarz, 2 L.D. 623; overruled, 6 L.D. 624.

Turner *v.* Cartwright, 17 L.D. 414; modified, 21 L.D. 40.

Turner *v.* Lang, 1 C.L.O. 51; modified, 5 L.D. 256.

Tyler, Charles, 26 L.D. 699; overruled, 35 L.D. 411.

Ulin *v.* Colby, 24 L.D. 311; overruled, 35 L.D. 549.

Union Oil Co. of California (Supp.), 72 I.D. 313; overruled & rescinded in part, 74 IBLA 117.

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

U.S. Forest Service *v.* Milender, 86 IBLA 181, 95 I.D. 175; *rev'd* & modified in part, 104 IBLA 207, 95 I.D. 155.

United Indian of All Tribes Foundation *v.* Acting Deputy Ass't Secretary--Indian Affairs, 11 IBIA 226; vacated in part, 11 IBIA 276, 90 I.D. 376.

U.S. *v.* Aiken Builders Products, 95 IBLA 55; (On Recon.), 102 IBLA 70; vacated by memorandum decision of the Secy, 102 IBLA 85A.

U.S. *v.* Barngrover, 57 I.D. 533; overruled in part, 21 IBLA 363, 82 I.D. 414.

U.S. *v.* Bush, 13 L.D. 529; overruled, 18 L.D. 441.

U.S. *v.* Central Pacific Ry., 52 L.D. 81; modified, 52 L.D. 235.

U.S. *v.* Cohan, 70 I.D. 178; overruled in part, U.S. Forest Service *v.* Milender, 86 IBLA 181, 92 I.D. 175.

U.S. *v.* Dana, 18 L.D. 161; modified, 28 L.D. 45.

U.S. *v.* Edeline, 39 IBLA 236; overruled to extent inconsistent, 74 IBLA 56, 90 I.D. 262.

U.S. *v.* Feezor, 74 IBLA 56, 90 I.D. 262; vacated in part & remanded, 81 IBLA 94.

U.S. *v.* Kosanke Sand Corp., 3 IBLA 189, 78 I.D. 285; set aside & remanded, 12 IBLA 282, 80 I.D. 538.

U.S. *v.* Livingston Silver, Inc., 43 IBLA 84; overruled to extent inconsistent, 82 IBLA 344, 91 I.D. 271.

U.S. *v.* McClarty, 71 I.D. 331; vacated & remanded, 76 I.D. 193.

U.S. *v.* Melluzzo, 76 I.D. 181; 1 IBLA 37, 77 I.D. 172.

U.S. *v.* Mouat, 60 I.D. 473; modified, 61 L.D. 289.

U.S. *v.* O'Leary, 63 I.D. 341; distinguished, 64 I.D. 210.

U.S. *v.* Swanson, 34 IBLA 25; modified, 93 IBLA 1, 93 I.D. 288.

Utah, State of, 45 L.D. 551; overruled, 48 L.D. 97.

Utah Wilderness Ass'n (I), 72 IBLA 125; affirmed in part, *rev'd* in part, 86 IBLA 89.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Waterhouse, William W., 9 L.D. 131; overruled, 18 L.D. 586.

Watson, Thomas E., 4 L.D. 169; recalled, 6 L.D. 71.

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

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

Weber, Peter, 7 L.D. 476; overruled, 9 L.D. 150.

Weisenborn, Ernest, 42 L.D. 533; overruled, 43 L.D. 395.

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

Werden *v.* Schlecht, 20 L.D. 523; overruled so far as in conflict, 24 L.D. 45.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

NOTE--The abbreviations used in this title refer to the following publications: "B.L.P." to Brainard's Legal Precedents in Land and Mining Cases, Vols. 1 and 2; "C.L.L." to Copp's Public Land Laws, 1875 edition, 1 volume; 1882 edition, 2 volumes; 1890 edition, 2 volumes; "C.L.O." to Copp's Land Owner, Vols. 1-18; "L. and R." to records of the former Division of Lands and Railroads; "L.D." to the Land Decisions of the Department of the Interior, Vols. 1-52; and "I.D." to Decisions of the Department of the Interior, Vols. 53 to current volume.--Editor.

DEPARTMENT OF THE INTERIOR

APPEAL OF BALL, BALL, & BROSAMER, INC.

IBCA-2103-N Decided: *February 5, 1992*

Contract No. 1-07-3D-C7477, Bureau of Reclamation.

Motion to Dismiss Denied.

1. Appeals: Jurisdiction--Contracts: Contract Disputes Act of 1978: Jurisdiction--Contracts: Disputes and Remedies: Jurisdiction--Rules of Practice: Appeals: Dismissal--Rules of Practice: Appeals: Jurisdiction

In deciding a motion to dismiss, the Board will consider the uncontroverted facts alleged by the appellant to be correct and will construe its allegations favorably to it, but the appellant is required to establish jurisdiction. If the appellant has made a prima facie showing that jurisdiction exists, however, the Government must present some evidence to refute that showing. An unsubstantiated allegation will not suffice.

2. Appeals: Jurisdiction--Contracts: Contract Disputes Act of 1978: Jurisdiction--Contracts: Disputes and Remedies: Jurisdiction--Rules of Practice: Appeals: Dismissal--Rules of Practice: Appeals: Jurisdiction

When the certification requirements of the Contract Disputes Act are met, the Board has jurisdiction to entertain an appeal from a contracting officer's decision denying a claim brought and certified on behalf of a dissolved joint venture, and the appeal may be pursued in the name of the joint venture.

3. Appeals: Jurisdiction--Contracts: Contract Disputes Act of 1978: Jurisdiction--Contracts: Disputes and Remedies: Jurisdiction--Rules of Practice: Appeals: Dismissal--Rules of Practice: Appeals: Jurisdiction

The Board found that a corporation properly could be substituted as the appellant because it was the real party in interest in the appeal. The substitution did not violate the anti-assignment statutes, because they did not apply. The Board based its conclusion upon the facts that the appeal originally was filed correctly on behalf of the joint venture contracting entity; 3 months before the completion of the 2-½-year contract term the joint venture dissolved, but the corporate member of the venture, which was a contract signatory and the venture's managing party for the contract, remained intact, continued to perform, and attended to the completion of the contract work; before the appeal was filed, all of the venture's interests and obligations were merged into the corporation; and there was no prejudice to the Government.

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

Jurisdiction--Rules of Practice: Appeals: Dismissal--Rules of Practice: Appeals: Jurisdiction

The Board found that the corporate member of a joint venture contracting entity had the authority to certify a claim on behalf of the joint venture and, in any event, was the equivalent of the "general partner" of the venture with overall responsibility for the conduct of its affairs. The latter factor alone qualified the corporation under the contract's Disputes clause to certify the claim. The corporate president, in turn, clearly was authorized to sign for the corporation. Accordingly, his signature bound the joint venture. He also had implied authority to bind the joint venture because he signed the contract on behalf of both of its members. The certification otherwise met all of the requirements of the Disputes clause and the Board had jurisdiction to entertain the appeal.

APPEARANCES: John R. Little, Jr., John E. Lindskold, Attorneys-at-Law, Duncan, Weinberg, Miller & Pembroke, P.C., Denver, Colorado, for Appellant; Daniel L. Jackson, Department Counsel, Office of the Field Solicitor, Phoenix, Arizona, for the Government.

OPINION BY ADMINISTRATIVE JUDGE ROME

INTERIOR BOARD OF CONTRACT APPEALS

The Government has moved to dismiss this appeal on the ground that the Board lacks jurisdiction to decide it because (1) appellant is not a "contractor" entitled to appeal under the Contract Disputes Act of 1978 (CDA), 41 U.S.C. § 601, or (2) the contractor was a joint venture and the claim impermissibly was certified by only one party to the joint venture.

FACTS

On September 10, 1981, the Bureau of Reclamation (BOR) awarded Contract No. 1-07-3D-C7477 for the construction and completion of Reach 4, and the completion of Reach 3, Granite Reef Aqueduct, Central Arizona Project (the contract), to "Ball, Ball and Brosamer, Inc. and Ball and Brosamer (JV)" (hereafter "Joint Venture II," see *infra*). The contract, in the amount of $18,468,224, was signed on behalf of Ball, Ball and Brosamer, Inc. (hereafter "B3"), by Robert G. Brosamer as president and on behalf of Ball and Brosamer (JV) by Robert G. Brosamer as co-venturer (Appeal File (AF) 32).

B3 was incorporated in California on November 26, 1974. Robert G. Brosamer was its president and a director. Gordon N. Ball was one of two vice-presidents, treasurer, and a director. Messrs. Ball and Brosamer were majority shareholders. From 1979 to 1986, during the period of contract award and performance, Messrs. Ball and Brosamer were sole shareholders (Appellant's Exhibit (AX) 60, 61).

As of January 5, 1981, Messrs. Ball and Brosamer entered into a "Master Joint Venture Agreement of Ball and Brosamer," for the purpose of submitting bids on construction projects, entering into contracts, and engaging in related business activities (AX 60, 62). The parties' obligations were to be "joint and several." If awarded a contract, the parties were to perform it as a "sub-joint venture," to be named the same as the master: "Ball and Brosamer, a Joint Venture" (AX 62, ¶ 1). Like the Government, and appellant on occasion (see Government Exhibit (GX) 12), we refer to this agreement as Joint Venture I.

Each party to Joint Venture I was responsible for his proportionate share, originally 50 percent each, of any liability; each was to have a voice in management; and no party was to have authority to act for or to bind any other party, except as otherwise authorized in the agreement. If any party were to die or become incapacitated, subject to bankruptcy proceedings and the like, otherwise unable to discharge his obligations, or withdraw, the Joint Venture was not to terminate until completion of all contracts and wind up of the venture's affairs. The remaining party was to attend to the winding up, including collection of all monies due the venture and payment or discharge of its debts and liabilities. Any attempted assignment or transfer of any rights, interests, or duties, or of the agreement, without the prior written consent of the other party, was to be void. The terms of the master agreement were to govern any sub-joint venture, as modified by any supplemental agreement (AX 62, ¶¶ 2, 3, 5, 9, 11, 14).

Also as of January 5, 1981, Messrs. Ball and Brosamer, individually, and as members of the newly formed Joint Venture I, "jointly and severally," and collectively described as "B2 JV," entered into a joint venture agreement with B3, named "Ball, Ball & Brosamer, Inc. and Ball and Brosamer, J.V., a Joint Venture" (AX 63). Mr. Brosamer, as president, and Mr. D. A. Hughes, as secretary, signed the agreement on behalf of B3. Messrs. Ball and Brosamer signed the agreement as members of Joint Venture I, and, again, in their individual capacities. Like the Government, and occasionally appellant, we refer to the joint venture formed by this agreement as "Joint Venture II."[1]

The Joint Venture II agreement noted that B2 JV and B3 occupied the same home office in Danville, California, as their principal place of business and cited a desire to expand bonding capacity as one of its purposes. It stated that B2 JV would contribute working capital, initially in the amount of $10,000; personal guarantees of the individual members of B2 JV; and bonding capabilities. B3 would contribute working capital, initially in the amount of $90,000; construction equipment; management and office overhead; and all personnel necessary to prepare any joint bid and perform any construction contract undertaken to be performed by Joint Venture II.[2] Any new construction project awarded to Joint Venture II was to be

[1] Appellant sometimes refers to this as the "first joint venture" (AX 60) and sometimes as "Joint Venture II" (GX 12 at 338). Chronologically, it appears to be the third relevant association. Joint Venture I was the first; B2 JV, the second.

[2] B3 had experience in the Granite Reach program. On May 23, 1980, the Department of the Interior had awarded it Contract No. 0-07-DC-07417 for the construction of Reach 12 and the completion of Reaches 9 and 10, not at issue in this appeal. Under the Joint Venture II agreement, B3 was to assign that contract to Joint Venture II (AX 60, 63).

performed and completed by the parties as a joint venture, subject to the terms of the agreement (AX 63, introductory paragraphs and ¶¶ 5-7).

The Joint Venture II agreement provided that any party could terminate it upon 30-days' notice. Under the termination clause, any member of B2 JV was authorized to act for B2 JV. Otherwise under the agreement, "[E]ither Gordon N. Ball or Robert G. Brosamer, as officers of B3 INC. or as members of B2 JV is authorized to act for B3 INC. or B2 JV, respectively" (AX 63, # 4). "Subject to other provisions [of the agreement]," assignments by operation of law or otherwise, without the prior written consent of the other party, were to be void (AX 63, ¶ 14). Paragraph 15 provided:

> *If during the term of this Joint Venture any party hereto shall dissolve* or if any member of B3 JV [sic] [[3]] shall die, become incompetent or otherwise unable to perform the terms and conditions of this agreement or if any of them or if any party hereto shall become bankrupt or file a voluntary petition in the bankruptcy courts, *this Joint Venture shall not terminate but the estate of such disabled party, member or individual, as appropriate, shall succeed to its or his interests and liabilities in this Joint Venture.* [Italics added.]

This paragraph was not artfully drafted concerning the effects of a party's dissolution. Taken as a whole, the apparent intent was that dissolution of one member would not abrogate Joint Venture II.

On September 4, 1981, prior to formal contract award to Joint Venture II on September 10, 1981, Gordon Ball and Robert Brosamer, individually and as members of Joint Venture I, and B3, entered into a "3rd amendment" to the Joint Venture II agreement, by which they agreed to perform the contract pursuant to the terms of the agreement and of an "Election to Submit a Joint Bid," dated August 5, 1991. The signatories to the 3rd amendment were the same as those to the Joint Venture II agreement (AX 63).[4]

Mr. Brosamer has sworn by affidavit that Joint Venture II designated B3 as its "Managing Party" with respect to the contract (AX 60, ¶ 7). There is no other evidence of that particular designation in the record, but it is consistent with the joint venture agreement and the record reflects that B3 actually performed, or managed, the contract work. In fact, BOR's Daily Inspector's Reports refer to B3 as the contractor (see GX 2; AF 22, 23, 27-29).

In 1982, B3 placed sealant ultimately rejected by BOR. The initial rejection letter was dated November 30, 1982 (GX 2 at 86). During 1983, B3 and its supplier attempted various remedies. A new supply of sealant, applied without primer, was rejected by BOR in early December 1983. Thereafter, B3 determined to replace all installed sealant with a different type (Appellant's Post-Trial Memorandum at 51-53). Resealing, performed by a subcontractor, Conseal, Inc., started in January 1984 (GX 37 at 399). BOR accepted the contract as substantially complete as of an extended deadline, March 21, 1984 (AF 10).

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[3] "B3 JV" is not defined in the agreement. The reference likely was intended to be to "B2 JV."

[4] The first two amendments and the election are not part of the record.

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In the meantime, on November 19, 1982, Ball & Brosamer, Inc., was incorporated in California. Gordon Ball and Robert Brosamer were its sole shareholders. On June 1, 1983, Ball & Brosamer, Inc., and B3, entered into a joint venture agreement, named "Ball & Brosamer, Inc. and Ball, Ball & Brosamer, Inc., a Joint Venture" (hereafter "Joint Venture III"). Messrs. Brosamer and Hughes signed on behalf of each corporation, as president and secretary, respectively. All parties were identified as having their principal place of business at Alamo, California. The stated purpose of Joint Venture III was to submit bids, enter into construction contracts jointly, and to perform any contracts that either member of the venture might elect to bid individually and assign to it (AX 60, ¶ 8; AX 64, introductory paragraphs and ¶ 2; AX 66).

Either party could terminate Joint Venture III upon notice; the liabilities and obligations of the parties were to be joint and several; each party was to have a voice in management and in the delegation of management powers; and no party could act for or bind the other except as authorized by the agreement. The Managing Party for a contract undertaken to be performed by the venture was to be responsible for the supervision and management of all work and was delegated authority, including powers of attorney, to enable it to perform the work (AX 64, ¶¶ 3, 4).

With respect to any contract awarded to either party individually and assigned to Joint Venture III, the parties to the joint venture were to execute an amendment to their agreement identifying the contract and providing that its performance would be in accordance with the agreement, except as might be modified by any such amendment (AX 64, ¶ 5). Each party's contributions to the joint venture were to be identical (management and operating services, working capital, bonding capacity) and profits and losses were to be shared equally, subject to any different agreement. Again, assignments, whether by operation of law or otherwise, were to be void without the prior written consent of the other party. The agreement contained the same sort of awkward clause concerning the consequences of the dissolution or death of a member as did the Joint Venture II agreement (AX 64, ¶¶ 6, 7, 9, 14, 15).

Paragraph 19 of the Joint Venture III agreement identified five individuals, including Messrs. Ball, Brosamer, and Hughes, as officers of Ball & Brosamer, Inc., and of B3, and named each of them, "[A]n attorney in fact to act on behalf of this Joint Venture to sign any bid, contract, change order, * * * or other document necessary, convenient or desirable in performance of this Joint Venture Agreement. The signature of any one individual will suffice" (AX 64).

On December 31, 1983, Messrs. Ball and Brosamer and Ball & Brosamer, Inc., entered into an Assignment and Assumption Agreement. It was executed by Messrs. Ball and Brosamer, individually, and on behalf of Ball & Brosamer, Inc., by Robert G. Brosamer as president. The agreement provided that Messrs. Ball and Brosamer each assigned to Ball & Brosamer, Inc., his joint venture interest "in the joint venture known as 'Ball and Brosamer, a Joint Venture,' formed pursuant to that certain Master Joint Venture Agreement dated as of January 1, 1981 [sic]" (AX 65).[5] By the agreement, Messrs. Ball and Brosamer "without warranty" each assigned to Ball and Brosamer, Inc., his interest in Joint Venture I, and delegated to the corporation "all of his duties and obligations of performance with respect to the Liabilities." The "Liabilities" were to be "all of the liabilities and obligations of Ball and Brosamer, both known and unknown, arising out of or attributable to [Joint Venture I]." The corporation accepted the assignment and agreed,

> to assume and perform all duties and obligations to be performed by each of Ball and Brosamer with respect to the Liabilities to the same extent as if the Corporation had been originally liable therefor, and further agrees to indemnify and hold harmless each of Ball and Brosamer from any liability for performance or nonperformance of the Liabilities.

There is no evidence that BOR knew of this assignment and appellant does not so claim.

Also on December 31, 1983, according to appellant, Joint Venture I and Joint Venture II (the contracting entity here), dissolved and sold *all of their interests in the joint ventures' assets* to Joint Venture III. (See "Appellant's Motion To Substitute Party" (GX 12), filed in connection with its appeal to the United States Court of Appeals for the Federal Circuit (CAFC) of the Board's June 6, 1988, decision granting an earlier motion to dismiss filed by the Government, discussed below.)[6] Joint Venture III included B3, an original party to Joint Venture II. B3 was a contract signatory and a continuing entity. There is no evidence of any separate, specific assignment of the contract to Joint Venture III or how Joint Venture II's contract obligations were treated, except to the extent, as noted, that Messrs. Ball and Brosamer assigned their interests and liabilities under Joint Venture I (part of the B2 JV branch of Joint Venture II) to Ball and Brosamer, Inc., a member of Joint Venture III.

Again, there is no evidence that BOR knew of these dissolutions and appellant does not so claim. In fact, despite the December 31, 1983, dissolution of Joint Venture II, Mr. Don Meek wrote to BOR on February 6, 1984, notifying it of a potential claim for excess sealant-related costs. The letter was on Joint Venture II stationery with the letterhead: "Ball, Ball and Brosamer, Inc. and Ball and Brosamer, J.V., a Joint Venture," and a Danville, California, address. Mr. Meek signed under B3's signature block, as Chief Cost Engineer (AX 37).

[5] The January 1 date appears to be an error. The only Master Joint Venture Agreement of record is that which formed Joint Venture I, dated as of January 5, 1981. Also, Mr. Brosamer's affidavit indicates that the joint venture interests assigned were those of Messrs. Ball and Brosamer in Joint Venture I (AX 60, ¶¶ 3, 9).

[6] The dissolution of Joint Venture II is not explained or even mentioned in Mr. Brosamer's affidavit. If there was actual monetary consideration for the "sale" to Joint Venture III, it does not appear in the record.

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By letter dated February 27, 1984, BOR's Construction Engineer acknowledged "your letter dated February 6, 1984, in which you notify this office of a potential claim" (AX 38). He addressed the letter to "Ball, Ball and Brosamer, Inc. and Ball and Brosamer, *Inc.* (JV)" (italics added), the component parties of Joint Venture III, albeit to Joint Venture II's Danville, California, address and not Joint Venture III's Alamo, California, address. He addressed his March 21, 1984, notification that the work on the contract was substantially complete (GX 2 at 167) and a December 26, 1984, letter (AX 40) similarly. In a memorandum to BOR's Regional Director dated August 6, 1985, however, the Construction Engineer identifies the contractor as Joint Venture II (AX 49). The contracting officer then addressed a letter generated as a result of the memorandum solely to B3, in Danville. Appellant has not directed us to these letters and it appears unlikely that BOR's varying denominations of the addressees were anything more than clerical vagaries. There is no direct evidence that BOR was notified about or was aware of Joint Venture III, or even of Ball and Brosamer, Inc., and, again, appellant does not so claim.

On May 1, 1985, 17 months after it dissolved, Joint Venture II, on Joint Venture II stationery, submitted a certified claim to BOR for excess costs in the amount of $439,797. Mr. Meek signed the certification for Joint Venture II, under Joint Venture II's signature block. Additionally, he signed the claim letter, as "Chief Cost Engineer" (this time with no reference to B3) (AX 41). On July 18, 1985, in the same fashion, Joint Venture II submitted a revised certified claim, reduced to $339,797, due to settlement with the sealant supplier (AX 48). Joint Venture II had brought suit against the supplier on April 13, 1984, 4 months after the venture had dissolved (GX 67).

On August 20, 1985, on Joint Venture II stationery, with no particular signature block, Mr. Meek, as "Chief Cost Engineer" (with no reference to B3), notified the contracting officer that his July 18, 1985, letter had been in error and that there was no reduction in "our" claim. Pursuant to BOR's request, he enclosed a copy of the settlement agreement with the sealant supplier. That agreement was between the supplier and Joint Venture II, was signed by counsel as representing Joint Venture II, and was signed under Joint Venture II's signature block by Robert G. Brosamer (GX 61 at 998, 999, 1013).

On September 20, 1985, the contracting officer, by decision and cover letter addressed to Joint Venture II, denied its claim (AF 5). Joint Venture II appealed to this Board on November 14, 1985, and revised the amount slightly on November 20, 1985.[7]

[7] Joint Venture II was the captioned appellant and was referred to in the notice of appeal as the "Contractor" (AF 4). Counsel's cover letter forwarding the notice of appeal, however, referred to the appeal of "Ball & Brosamer, Inc. and Ball, Ball & Brosamer, Inc., a Joint Venture," (*id.*.), in other words, Joint Venture III. The same differences are true of the revised Nov. 20, 1985, notice of appeal and cover letter (AF 2). The notices of appeal control, here, however, and we will assume counsel's captions were inadvertent.

While the appeal was pending before the Board, on November 18, 1986, pursuant to an Agreement and Plan of Merger, described as a statutory merger, Ball & Brosamer, Inc., one half of Joint Venture III, merged into the other half, B3. Messrs. Ball and Brosamer, as sole shareholders, and as directors, of Ball & Brosamer, Inc., and as sole shareholders, and as directors, of B3 approved the merger. As authorized, the merger agreement was signed on behalf of B3 by Mr. Brosamer as president and Mr. Hughes as secretary and on behalf of Ball & Brosamer, Inc., by Mr. Brosamer as president and Mr. Hughes as secretary. The agreement was filed with the State of California (AX 66).[8]

On June 30, 1987, BOR issued a unilateral contract modification under the Funds Available for Earnings clause. In the block for "name and address of contractor" the modification referred only to B3. The Government asserts that this likely was merely clerical and does not reflect any knowledge about Joint Venture II's dissolution or substantive recognition of B3 as the contractor. Appellant does not claim that BOR knew of the dissolution, as noted.

Ultimately, based upon Joint Venture II's defective claim certification, which was signed by Mr. Meek and not by a representative of the joint venture meeting the requirements of the contract's Dispute's clause, on June 6, 1988, the Board dismissed the joint venture's appeal without prejudice, along with a consolidated appeal by B3 under another contract in which B3 had been the only contracting entity. *See Ball, Ball, & Brosamer, Inc.*, IBCA-2103 *et al.*, 25 IBCA 188, 95 I.D. 81, 88-3 BCA ¶ 20,844, *aff'd, Ball, Ball & Brosamer, Inc.* v. *United States*, 878 F.2d 1426 (Fed. Cir. 1989).

Although the Board had dismissed the two separate appeals, only Joint Venture II filed a notice of appeal to the CAFC and brief. The Government argued that, accordingly, B3's claim was not properly before the court of appeals.[9] The appellant then moved to substitute B3 as the real party in interest, representing that Joint Venture II had dissolved on December 31, 1983 (GX 12). The CAFC did not address the dissolution of Joint Venture II. Rather, despite the dissolution, the Court concluded summarily:

> Since we conclude that the Board correctly held that Mr. Meek was not entitled to certify the claims -- a conclusion that results in affirmance of the Board's decision dismissing the appeals -- we find it unnecessary to determine whether to allow the substitution. *There is no question that the joint venture is a proper appellant, and its presence here is enough to give us jurisdiction to decide the certification issue.* [Italics added.]

878 F.2d at 1427-28.

[8] Appellant has alleged that all of the transfers were recognized by the State of California. The only evidence of record is the filing of the merger agreement. There is no copy of any published notice of dissolution of the joint ventures and affidavit evidencing publication, as required for partnerships by California law (*see* Cal. Corp. Code § 15035 (West 1991)), but it is not entirely clear whether this aspect of partnership law extends to joint ventures. *See KDH Corp.* v. *United States*, 23 Cl. Ct. 34, 38 n.5 (1991). In any case, BOR has not challenged appellant's allegation.

[9] B3's claim under the other contract eventually was settled and is not before us.

Meanwhile, on May 24, 1988, before the Board rendered its June 6, 1988, decision, Joint Venture II sought to refile and recertify its claim. The new claim was submitted on B3 stationery, albeit with the caption "Appeal of Ball and Brosamer (JV) and Ball, Ball & Brosamer, Inc., a Joint Venture" [Joint Venture II] and certified as follows:

> *On behalf of the Joint Venture,* the undersigned hereby refiles and recertifies the following claim against the United States under the above identified contract:
> * * * [*Joint Venture II*] claims that it incurred substantial excess and additional costs * * *.
>
> * * * * * * *
>
> I hereby certify that the claim identified above in this recertification is made in good faith; that the supporting data are accurate and complete to the best of my knowledge and belief; and that the amount requested accurately reflects the contract adjustment for which the contractor believes that the government is liable. [Italics added.]
>
> BALL, BALL & BROSAMER, INC.
> BY:
> *Robert G. Brosamer*
> *President*

(AX 69).

On August 15, 1988, the contracting officer issued a decision to Joint Venture II denying the recertified claim (AX 61). On October 11, 1988, the Board received appellant's notice of the instant appeal. By order dated October 19, 1988, the Board docketed the appeal and dismissed it without prejudice to reinstatement after the CAFC rendered its decision. The CAFC issued its decision on July 7, 1989. On July 19, 1989, the Board received a motion from Joint Venture II to reinstate its appeal and to substitute B3, "the surviving entity after a series of internal mergers," as the appellant. By "Suggestion of Lack of Jurisdiction" received July 28, 1989, the Government alleged, among other things no longer relevant, that the Board lacked jurisdiction to entertain this appeal, on the above-stated grounds. Numerous pleadings and orders followed culminating in posthearing briefing, in which BOR addressed the jurisdictional issues again.[10]

Discussion

[1] BOR alleges that B3 is not a "contractor" within the ambit of the CDA and that the contractor, Joint Venture II, has attempted to effect an impermissible assignment without a requisite novation agreement. Appellant counters that B3, as an original part of Joint Venture II, is

[10] By order dated Aug. 4, 1989, the Board rejected the suggestion of lack of jurisdiction and allowed the substitution of B3 as appellant. In its Oct. 10, 1989, response to appellant's motion for a more definite statement of prehearing issues, BOR raised the jurisdictional issues again. By order dated Oct. 29, 1989, the Board ruled that no jurisdictional issues as to appellant's status were to be discussed at the hearing, but that the record could be supplemented by documentary evidence and BOR could address the issues by motion and/or in its posthearing brief. BOR continued to contest the Board's jurisdiction in its prehearing brief. By order dated Nov. 22, 1989, based upon representations in appellant's prehearing brief as to B3's status, the Board ruled that the substitution of B3 as appellant was proper and that it had jurisdiction over the appeal, unless BOR disproved the representations. BOR reitereated its jurisdiction challenge in its posthearing brief.

the successor in interest to Joint Venture II by virtue of various transactions not barred by the anti-assignment statutes and is the proper party to pursue this appeal.

In deciding a motion to dismiss, we consider the uncontroverted facts alleged by the appellant to be correct and construe its allegations favorably to it, *Blaze Construction Co.*, IBCA-2863, 27 IBCA 391, 98 I.D. 213, 91-3 BCA ¶ 24,071; *Al Johnson Construction Co.* v. *United States*, 19 Cl. Ct. 732, 733 (1990), but appellant is required to establish jurisdiction. *KDH*, 23 Cl. Ct. at 36. If appellant has made a prima facie showing that jurisdiction exists, however, the Government is required to present some evidence to refute it. An unsubstantiated allegation will not suffice. *See United States* v. *Newport News Shipbuilding & Dry Dock Co.*, 933 F.2d 996 (Fed. Cir. 1991); *Aleman Food Services, Inc.* v. *United States*, 24 Cl. Ct. 345 (1991).

[2] The Disputes clause notes that the 1981 contract is subject to the CDA (GX 65). The CDA provides for "claims by a 'contractor' against the government relating to a contract," 41 U.S.C. § 605(a), and allows the "contractor" to appeal a contracting officer's decision on the contractor's claim. 41 U.S.C. § 606. The Act defines "contractor" as "a party to a Government contract other than the Government." 41 U.S.C. § 601(4).

This appeal, from a contracting officer's decision directed to the contractor, Joint Venture II, on a claim filed in the name of the contractor, also was brought in the name of the contractor. As we elaborate upon below, the fact that the joint venture had dissolved by the time of the claim, contracting officer's decision, and resulting appeal, did not preclude legal action either by or against the venture. As noted, the CAFC held summarily that Joint Venture II was properly before it as an appellant, even though the Court had been advised of the contractor's dissolution. Because we find (*infra*) that the CDA's certification requirements were met, we have jurisdiction to entertain the appeal and it could be continued in the name of Joint Venture II.

[3] After refiling and recertifying its claim when the Board dismissed its original appeal due to improper certification, and again appealing to the Board, all on behalf of Joint Venture II, B3 later moved to substitute itself as the appellant. It initially sought substitution on the ground that, under the Federal Rules of Civil Procedure, actions are to be prosecuted in the name of the real party in interest. Fed. R. Civ. P. 17. Rule 17 applies when transfers or assignments occur prior to the commencement of litigation. The intent of the rule is that an action be prosecuted in the name of the party who, by substantive law, has the right sought to be enforced. It is a procedural and not a jurisdiction-conferring provision. An assignment cannot be used to manufacture jurisdiction and, with regard to contracts with and claims against the United States, would-be assignees are subject to the anti-assignment statutes, discussed below, unless excepted therefrom. *See* 3A and 3B Moore's Federal Practice, ¶¶ 17.03, 17.07, 17.09, 25.08 (2d

ed. 1987). The Board is not bound by the Federal rules, although we may turn to them for guidance.

In this appeal, although Messrs. Ball and Brosamer assigned to Ball and Brosamer, Inc., their interests in and obligations of performance with respect to the Joint Venture I branch of the Joint Venture II contracting entity, there is no direct evidence that the contracting parties specifically attempted to assign the contract to any other entity. B3 continued to perform the contract, consistently with the Joint Venture I agreement, as it had from the outset. Although the trail was tortuous, the end result of the transfers and mergers, according to appellant, was that all of Joint Venture II's interests and obligations were merged into B3. There is nothing in the record to contradict appellant's assertion. Moreover, there was no attempt to use any transfer or assignment to confer jurisdiction upon the Board.

In two cases in which the claims and appeals were filed by assignees, rather than on behalf of the contractor, the Armed Services Board of Contract Appeals, which ultimately dismissed the appeals, framed the issue: "For us to have jurisdiction * * * we must conclude that appellant was lawfully substituted as the 'contractor' [under the CDA] in place of [the contractor]." *CBI Services, Inc.*, ASBCA No. 34983, 88-1 BCA ¶ 20,430 at 103,337; *accord Morrison-Smith, Inc.*, ASBCA No. 38028, 90-1 BCA ¶ 22,308 at 112,026. We do not face the same circumstances and, hence, identify the issue before us somewhat differently.

As indicated, this appeal was filed in the name of Joint Venture II and we have jurisdiction over it. By the time of the motion to substitute, B3, as the eventual heir to Joint Venture I's interests and obligations, and as the only surviving member of Joint Venture II, was the real party in interest, entitled to pursue Joint Venture II's claim unless barred by substantive Federal law applicable to CDA claims. BOR considers the anti-assignment statutes such a bar. We do not agree. Even if the various transactions here were deemed to be assignments culminating in a final assignment of the contract and claim to B3, they would fall within a recognized exception to the anti-assignment statutes.

The contract contains an Assignment of Claims clause, pursuant to the Assignment of Claims Act of 1940, as amended. That Act had amended two prior anti-assignment statutes, now codified at 31 U.S.C. § 3727 and 41 U.S.C. § 15, to allow for certain authorized transfers to financial institutions of monies due under a Government contract. (*See* 2 McBride and Wachtel, *Government Contracts*, § 16.10). Otherwise, in general terms, assignments of unresolved and unliquidated claims against the United States, or interests therein, are prohibited (31 U.S.C. § 3727), as are transfers by the contractor of any Government contract or interest in it (41 U.S.C. § 15). The latter will nullify the contract if the Government elects to enforce its nullification right.

The goal of the anti-assignment statutes was to prevent fraud and, principally, the undesirable effects of the Government's "having to deal with several persons instead of one"; "the introduction of a party who was a stranger to the original transaction"; or improper influences engendered by the transfer to and prosecution of a claim by one or more persons "not originally interested in it." *Seaboard Air Line Railway* v. *United States*, 256 U.S. 655, 657 (1921) (citations omitted). Early on, the Supreme Court fashioned exceptions to the anti-assignment statutes, including, for example, transfers by operation of law, bankruptcy, will, corporate merger, restructure or consolidation, and assignments for the benefit of creditors -- some of which were involuntary and others which, while voluntary, were considered part of the orderly processes of law and not the instruments of "mischief" Congress was attempting to protect against. *Id.; Goodman* v. *Niblack*, 102 U.S. 556 (1880); *Mitchell Canneries, Inc.* v. *United States*, 111 Ct. Cl. 228, 252 (1948); *Yates & Patterson, Inc.*, IBCA-1382-8-80, 13 IBCA 289, 81-1 BCA ¶ 14,825 (1980).

Because the anti-assignment statutes were enacted for the benefit of the Government, the Government may consent to an assignment, whether or not otherwise barred, or waive the statutory protection by its witting conduct in dealing with a successor contractor. *See Tuftco Corp.* v. *United States*, 614 F.2d 740 (1980); *Rogers Construction, Inc./ Federal Insurance Co.*, IBCA-2777, 27 IBCA 462, 98 I.D. 281, 91- BCA ¶ (Oct. 15, 1991), 91 Westlaw 209423. Neither consent nor waiver applies here. BOR was not aware of Joint Venture II's dissolution, as established.

The Federal Procurement Regulations in effect in 1981 prescribe procedures for recognition, through a novation agreement at the Government's option, of a successor in interest to a Government contract when the interest was "acquired as the result of a transfer of all of the assets of a contractor or of such part * * * as may be involved in the performance of the contract." 41 CFR 1-26.400, 1-26.402 (1981). The regulations refer to transfer of assets to a third party and include as examples, not intended to be exclusive, a sale of assets with assumption of liabilities by the transferror; transfer of assets pursuant to corporate merger or consolidation; and incorporation or formation of a partnership. They state:

> The portion of [41 U.S.C. § 15] which prohibits the transfer of contracts is intended for the Government's protection, thus giving an agency discretion in acting to ensure that protection. *The Government is generally not so much interested in what assets are transferred or in what manner the transfer of property or interest therein is accomplished. When requested to concur in a novation agreement, the Government's main concerns are (1) whether the proposed transferee is, in fact, a successor in interest to the Government contract, and (2) whether it is consistent with the Government's interest to concur in the novation agreement.* Accordingly, the Government has the discretion to either (i) treat the contract as annulled by the assignment or (ii) recognize the assignment if it is in the Government's best interests * * *. [Italics added.]

41 CFR 1-26.402(a).

The regulations have been described as an after-the-fact means of "establishing formalized recognition by the Government of the successor in interest to a Government contractor." *Mancon Liquidating Corp., et al.*, ASBCA Nos. 18304, 18218, 74-1 BCA ¶ 10,470 at 49,512. However, although certainly advisable for the orderly transaction of business (as this time-consuming motion demonstrates), Governmental consent, by novation agreement or otherwise, is not required, either before or after the fact, for transfers or assignments that are not barred by the anti-assignment statutes. *Rogers Construction, Inc., supra*; *Radiatronics, Inc.*, ASBCA No. 15133, 75-2 BCA ¶ 11,349 at 54,069. Such excepted transfers include those we have mentioned above and the sale of an entire business. *Mancon*, 74-1 BCA at 49,513. Additional regulations recognize the exceptions:

> Transfers of an entire business, corporate mergers, and assignments by operation of law, each of which may affect the assignment of claims under a contract, are not prohibited by the Federal statutes and hence do not depend upon the Assignment of Claims Act of 1940, as amended, for their validity.

41 CFR 1-30.710 (1981).

The multiple transactions and information gaps in the record complicate this case. Nonetheless, the anti-assignment statutes consistently have been examined, and exceptions crafted, by focusing upon any prejudice to the Government from transfers in question. BOR never had to deal with a "stranger" to the contract. *See Seaboard, supra*. In the case of each successive transfer or dissolution of an entity, its entire "business"appears to have been transferred. In contrast to other cases which the Government has called to our attention, throughout, B3, a contract signatory, remained intact and its role as the entity in charge of contract performance did not alter. It actually performed, or managed subcontractor's performance of the contract. The contractor, Joint Venture II, remained in existence for all but the last 3 months of the 2-½-year contract.[11]

Before the current appeal was filed, all of Joint Venture II's interests and obligations under the contract had merged into B3. Even if the novation regulations had been applicable, there is no apparent reason why BOR would have declined to enter into a novation agreement. The regulations emphasize that the Government is not particularly concerned with the actual form of transfers, only with assuring that the transferee is a proper successor to the original contractor and that the Government's interests will not be jeopardized by the novation.

BOR has raised the specter of fraud or wrongdoing, but has not directed us to any. Although not mentioned by BOR, the timing of the

[11] The Joint Venture II union, expressly made for the sake of achieving greater bonding capacity, did not quite survive the term of the bonded contract. However, appellant has represented that B3 succeeded to all of the venture's liabilities, liquidated and potential. Messrs. Ball and Brosamer, at least during the pertinent performance period, each appear to have remained principals of B3. They were also principals of each other entity of record. In any case, the contract was performed fully and BOR has not raised any question about bond liability.

assumption by Ball and Brosamer, Inc., of Messrs. Ball's and Brosamer's interests and liabilities in Joint Venture I, "without warranty," and the dissolution of Joint Ventures I and II, both on December 31, 1983, shortly after it became apparent to appellant that re-work would be required on the contract, could have caused concern. However, there is no evidence in the record that this was other than coincidental and, as noted, BOR accepted the contract as substantially complete only 3 months later. We have not found any actual prejudice to BOR, as matters developed.

BOR relies upon *BLH Inc.* v. *United States*, 13 Cl. Ct. 265 (1987), and *Morrison-Smith, Inc., supra*. In *BLH*, the Government urged that the parent companies of a defunct corporation were contractors under the CDA and were liable for the Government's counterclaim in damages. In a predecessor case, *BLH, Inc.* v. *United States*, 2 Cl. Ct. 463 (1983) (*BLH I*), the plaintiff Delaware corporation had dissolved 4 years prior to adverse contracting officer's decisions asserting substantial Government claims against it. Delaware law provided for only a 3-year post-dissolution period for winding up the business affairs of the corporation and for prosecuting and defending suits. Regardless, BLH filed suit in the Claims Court under the CDA and defendant counterclaimed. The court found that, due to the expiration of the wind-up period, BLH lacked the capacity to sue or be sued in the Claims Court.[12]

Thereafter, the contracting officer issued two more adverse decisions against BLH, this time also purporting to hold BLH's parent corporations liable on the theory that BLH was acting as their agent. Consolidated appeals resulted. The court recognized the peculiarity, but apparent necessity from the parents' standpoint, of the treatment of BLH as an existing entity in the continuing litigation. Notwithstanding, it granted BLH's motion for summary judgment, dismissing it as a party to the lawsuits on the basis of the holding in *BLH I*.

The Government asserted that BLH's parent corporations were contractors within the meaning of the CDA, despite the fact that they had not been contract signatories, because they had corporate control over BLH and had continued performance of the contract on behalf of BLH after BLH's dissolution. The court found that the parent corporations were not in privity of contract with the Government. It noted that, under Delaware law, a subsidiary's post-dissolution contract modifications were construed as part of its own business activities rather than those of its parent, found no fraud or inequitable conduct, and no contract implied-in-fact between the Government and the parent corporations.

Here, the Government disavows a contracting relationship with appellant, attempting to thrust the petard with which it was hoisted in *BLH*. The situations are not comparable, however. If anything, the

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[12] Fed. R. Civ. P. 17(b) directs the courts to state law to determine capacity to sue or be sued. Claims Court Rule 17(b) does the same. The Board does not have any such rule.

BLH cases demonstrate that state law may provide for a considerable winding up and litigation period even after an entity has dissolved formally.

Although Federal law controls the resolution of this CDA case, we may look to state law for guidance if relevant. In connection with the status of a joint venture and its members upon dissolution, both parties have referred us to the California law of partnerships. That law controls a joint venture's capacity to sue and be sued. *KDH*, 23 Cl. Ct. at 38 n.5, 45. Like the joint venture agreements into which appellant entered, California law provides that, upon dissolution, a partnership is not terminated, but continues until the winding up of its affairs is completed. Dissolution does not terminate a partner's authority to wind up the partnership affairs or to complete transactions begun but not yet finished and to bind the partnership accordingly. Dissolution does not itself discharge the existing liability of any partner. Cal. Corp. Code §§ 15030, 15033, 15035, 15036, 15037 (West 1991). Indeed, on a Federally created claim, one member of a dissolved partnership may prosecute an action in the partnership name in Federal court. *Leh* v. *General Petroleum Corp.*, 165 F. Supp. 933 (D.C. S.D. Cal. 1958).[13]

In *Morrison-Smith, Inc.*, Poage-Morrison-Smith, Inc., was awarded a contract on August 6, 1984. *One month later*, on September 13, 1984, the shareholders, officers, and directors voted on a resolution to dissolve the corporation. At the meeting, Messrs. Morrison and Smith agreed that their company, Morrison-Smith, Inc. (MS), *not a contract signatory*, would assume all of the contractor's assets and liabilities. The only evidence of this cited by the Board was a copy of the minutes of the meeting. There was no novation agreement. When the Government eventually terminated the contract for default, MS appealed. Appellant alleged that it was the "operating element" under the contract. The Board found that appellant had not proved an assignment in accordance with Oklahoma law, or the anti-assignment statutes, or waiver. The case is distinguishable on its facts.

Although not the same "contractor" as the joint venture of which it was a part, *see KDH*, 23 Cl. Ct. at 43, B3 was the principal member of the venture from a financial standpoint. (It contributed $90,000 to the venture compared to Joint Venture I's $10,000.) It was also a contract signatory; the entity which actually performed the contract, with which BOR knowingly dealt in connection with the contract operations; and ultimately the entity into which the other member of the joint venture contracting party -- which had the same principals, Messrs. Ball and Brosamer, as B3 -- merged entirely. In sharp contrast to *Morrison-Smith*, the Joint Venture II contractor remained intact for most of the contract performance period and the appeal was

[13] The General Services Board of Contract Appeals (GSBCA) noted recently that under California law, a dissolved corporation may sue or be sued in perpetuity and that, although California has a 4-year statute of limitations on lawsuits based on contract, it is not applicable to Government claims arising out of Federal contracts. *P.A.L. Systems Co.*, GSBCA No. 10858, 91-3 BCA ¶ 24529.

filed in its name.[14] Thus, the anti-assignment statutes do not apply and B3, the legitimate successor to Joint Venture II, is entitled to be substituted as the appellant in this case as the real party in interest.

[4] We noted that this appeal could have been continued in the name of Joint Venture II, subject to proper certification. Regardless of our disposition of the assignment issue, BOR contends that the claim's certification did not meet the CDA's requirements.

The CAFC has construed the claim certification requirements of the CDA and implementing regulations strictly and, to date, has deemed compliance a jurisdictional prerequisite to CDA actions. *Ball, Ball, & Brosamer, Inc., supra.* See also Rock Point Community School Board, IBCA-2953, 27 IBCA 536, BCA ¶ (Oct. 29, 1991), 91 Westlaw 224943, *citing United States* v. *Grumman Aerospace Corp.*, 927 F.2d 575 (Fed. Cir. 1991), *cert. denied*, 112 S. Ct. 330 (1991), *et al.*

The CDA requires that:

> For claims of more than $50,000, the contractor shall certify that the claim is made in good faith, that the supporting data are accurate and complete to the best of his knowledge and belief, and that the amount requested accurately reflects the contract adjustment for which the contractor believes the government is liable.

41 U.S.C. § 605(c)(1). The contract's Disputes clause, derived from regulation, provides, in pertinent part:

> (d) * * * The certification shall be executed by the Contractor if an individual. When the contractor is not an individual, the certification shall be executed by a senior company official in charge at the contractor's plant or location involved, or *by an officer or general partner of the contractor having overall responsibility for the conduct of the contractor's affairs*. [Italics added.] [[15]]

(GX 65).

While we have allowed B3 to be substituted as the appellant, the claim was submitted, and certified, on behalf of the contractor, Joint Venture II, and not B3. It was certified for the joint venture by B3, through its president, Mr. Brosamer. The later substitution of B3 as appellant would not retroactively cure the certification if it were deficient as presented. The claim would have been a nullity from the outset. *Fidelity Construction Co.* v. *United States*, 700 F.2d 1379, 1384 (Fed. Cir. 1983); *J. C. Equipment Corp.*, IBCA-2885, 98 I.D. 253, 91-3 BCA ¶ 24,059; *The Triax Co.*, ASBCA No. 31974, 88-3 BCA ¶ 21,174 (*Triax I*); *Cox Construction Co.* v. *United States*, 21 Cl. Ct. 98, 100 (1990). BOR alleges that the certification was defective because it was signed by a representative of only one member of the joint venture.

[14] Contrast also *Triax Co.*, ASBCA Nos. 31976, *et al.*, 89-3 BCA ¶ 21,937 (*Triax II*), in which a joint venture, which was not the contractor corporation, purported to certify and file a claim and an appeal in the joint venture's name, without obtaining a novation agreement. The joint venture had been formed by the contractor, and an entity which had split-off from it due to irreconcilable management differences, to perform the contract. The Board dismissed the appeal because the joint venture "was not the contractor, nor a proper agent of the contractor for certification purposes." 89-3 BCA at 110,348. In our case, not only was the claim filed and certified, and the appeal filed, in the contractor's name, but, as we find below, B3 was the proper agent of the contractor for certification purposes.

[15] The contract was issued in 1981. The certification provisions in the Disputes clause, from the Additional Supplement to General Provisions (Standard Form 23-A, April 1975 Edition), predate section 33.207 of the Federal Acquisition Regulation (FAR) concerning certification quoted by the CAFC in *Ball, Ball & Brosamer, Inc.* v. *United States*, 878 F.2d at 1428. Regardless, the contract's certification language is virtually identical to that of the FAR.

The Claims Court in *KDH* presented the evolving criteria for evaluating the sufficiency of claim certification, from inquiry into the authority granted the signer to examination for strict compliance with the language of the Disputes clause and associated regulation. Judge Nettesheim concluded that the clause could not be applied literally in the case of joint ventures: "The joint venture usually acts by one of its co-venturers and may deputize an official of one co-venturer to manage the project or affairs of the venture. The concept of authority thus reenters the arena." 23 Cl. Ct. at 42.

Although we conclude that the language of the Disputes clause referring to a "general partner of the contractor having overall responsibility for the conduct of the contractor's affairs" may be applied to a joint venture if circumstances warrant, we will first explore the authority question. The Court of Claims has noted:

> In general a joint [venture] has many of the elements of the traditional partnership in that either of the venturers may bind the enterprise by contracts which are within the scope of the business enterprise, and within that scope anyone of the parties is authorized to act for the others.

Lentz v. *United States*, 346 F.2d 570, 575 (Ct. Cl. 1965). *See also Boeing Co.* (*Boeing II*), ASBCA No. 39314, 90-2 BCA ¶ 22,769 at 114,292.

Again, although Federal law controls, State law is helpful in our evaluation. California partnership law governs joint ventures regarding capacity to sue or be sued, but there is separate case law applicable to the authority of one venturer vis-a-vis another. *KDH*, 23 Cl. Ct. at 43. Under that law, "[A] joint venturer, in absence of special agreement, does not have the right to bind other joint venturers. * * * Nevertheless, the joint venturers may, by agreement, grant authority to one or more of their number to bind the whole. * * * This authority may be oral or implied from circumstances." *Cox*, 21 Cl. Ct. at 101 (citations omitted); *KDH*, 23 Cl. Ct. at 42, 43.

In *KDH*, the claim was submitted on behalf of a California-based joint venturer contractor and certified by the corporate member of the joint venture, by the corporation's president, as here. The Claims Court agreed with the Government that the issue was:

> [W]hether KDH Corporation was authorized to certify the claim on behalf of the joint venture, not whether Mr. Bates had authority as President of KDH Corporation to sign on behalf of the joint venture.
>
> In resolving this issue defendant does not challenge the propriety of Mr. Bates' signature. Indeed, FAR § 33.207(c)(2) stipulates that a partner can sign for a contractor. Nor does defendant question that Mr. Bates could bind KDH Corporation or the joint venture if KDH Corporation were authorized to bind the joint venture to a certification. When a joint venture is the contractor, one inquiry is whether the claim was certified properly on behalf of the contractor joint venture; the other is whether the individual certifying the claim is the proper party to do so. The former inquiry is crucial in this case.

23 Cl. Ct. at 42.

The court held in *KDH* that, although the corporation had never before signed for the joint venture during the course of contract dealings, the corporation had implied authority to bind the joint venture and the certification satisfied the CDA. *See also Cox, supra,* in which the corporate member of another California-based joint venture contractor submitted a claim, and its president certified it, without representing that it was filed or certified on behalf of the venture. The court, taking a somewhat different approach than the later *KDH* case, found that the corporate president had actual and implied authority to bind the joint venture and had overall responsibility for its affairs. It also found sufficient indicia from claim-related materials to satisfy it that the claim had been filed on behalf of the joint venture.

BOR refers us to *Boeing Co.*, ASBCA No. 36612, 89-1 BCA ¶ 21,421 (*Boeing I*), and *Pine Products Corp.* v. *United States*, 15 Cl. Ct. 11 (1988), which held certification by one joint venturer inadequate. Both of these cases were distinguished in *Cox* and *Boeing I* was distinguished in detail in *KDH*.[16] We also have reviewed *Al Johnson Construction Co., supra,* and *Universal Coatings* v. *United States*, 24 Cl. Ct. 241 (1991). In *Al Johnson* the Claims Court found that the individual Project Manager for a contract awarded a joint venture, who was not authorized to deal with change orders in excess of $50,000, was neither authorized by the joint venture to certify its claim nor a "senior company official" as contemplated by the Disputes clause and incorporated regulation. In *Universal Coatings*, the president of one corporate member of the joint venture executed a certification purportedly on behalf of the venture, although the monies sought were to be paid solely to his corporation and the authorized representative of the other corporate member of the venture specifically denied any interest in the claim. The joint venture agreement clearly stated that the two venturers were not partners and neither was to act as agent for the other. Moreover, the joint venture agreement did not expressly, or by implication, reflect either the equivalent of a "senior company official" or an "officer or general partner" having overall responsibility for the venture's affairs. Again, these cases are distinguishable on their facts.

Considering "authority" in the circumstances of this appeal, we follow *KDH's* approach and first examine B3's authority to bind Joint Venture II. Mr. Brosamer's status within each of the joint venture components does not immediately resolve the issue of *B3's* authority to act for the venture. *Holmes & Narver Services, Inc. Morrison Knudson Co.*, ASBCA No. 40111, 91-3 BCA ¶ 24,235. The only things that clearly emerge from the Joint Venture II agreement relevant to authority are that Messrs. Ball or Brosamer could act for either B2 JV or B3 and that B3 would be responsible for contract performance. The

[16] *KDH* followed *Pine Products* in holding that one joint venturer could not sue *in its own name* to enforce a liability owed the joint venture. *See* 23 Cl. Ct. at 38. Here, though, the appeal was filed in the name of the joint venture. Further, the issue of timely substitution for a departed venturer, the context in which *KDH* applied *Pine*, is not before us. We do not have a substitution rule, as does the Claims Court, and B3's motion to substitute was timely in any event, relative to the current appeal.

agreement did not contain the language potentially restricting either member's authority to act for the other that was contained in the Joint Venture I agreement. Even that potential restriction could be overridden by other language in the agreement, or by modifications to it. B3 also was designated "Managing Party" for the contract. The Joint Venture II agreement does not define "Managing Party," but we can infer from the definition contained in the Joint Venture III agreement, and appellant's uncontroverted representations, that the managing party was intended to have authority to act on Joint Venture II's behalf with respect to the contract.

Additionally, under California law, the fact that B3 signed the certification explicitly representing that it was doing so on behalf of the joint venture is itself evidence that the corporation was the authorized agent of the joint venture. *KDH*, 23 Cl. Ct. at 45; *Sunset Milling & Grain Co.* v. *Anderson*, 39 Cal.2d 773, 249 P.2d 24 (1952).

Finally, in deciding whether a claim is certified properly, we will focus upon the position of the certifier as of the time of certification. *See*, by analogy, *M. A. Mortenson Co.*, ASBCA No. 39978, 91-1 BCA ¶ 23,558 at 118,114. At the time of certification, B3 was the only surviving member of Joint Venture II and was the logical and appropriate certifying entity. We do not have any concern here that a separate party to a joint venture might be bound unwittingly by a certification. Mr. Brosamer was a principal member of both branches of Joint Venture II.

Based upon the foregoing, we find that B3 was authorized to certify the contract claim and to bind Joint Venture II thereby. In turn, as president, Mr. Brosamer clearly had authority to sign for B3, and thus, to bind the joint venture. That he also had authority to bind the B2 JV portion (including Joint Venture I) of Joint Venture II may be implied readily, because he, alone, signed the $18 million contract on its behalf. *See also KDH, id.*

Regardless of the authority issue, however, we concur with the reasoning of the GSBCA in *Hyman-White, Joint Venture*, GSBCA No. 9632, 90-3 BCA ¶ 23,124. There, a joint venture's project executive assigned to the project site had certified a claim filed on behalf of the joint venture. He was not among representatives authorized to bind the joint venture who were specifically listed in the joint venture agreement. Nevertheless, the Board stressed:

> Respondent makes much of the fact that there is no evidence here that the joint venture had ever expressly authorized the project executive to execute the certification. It also makes much of the fact that none of the four individuals named in paragraph nine of the joint venture agreement have signed any of the three certifications executed in this matter. These points are immaterial, however, given the clear language of the regulation. There is no requirement on the face of the pertinent FAR provision that an individual signing under subsection (c)(2)(ii) be independently authorized by a power of attorney, corporate delegation of authority, or otherwise, to sign a Disputes Act certificate * * *.

90-3 BCA at 116,094. Under the facts of this case, we find that B3 was the equivalent of the "general partner" of Joint Venture II, with overall responsibility for the conduct of the venture's affairs. Here, the venture was formed specifically to bid upon the contract and perform it if awarded. Performance of the contract constituted the venture's "affairs." B3 was responsible for both the bid and contract performance and had a 90-percent financial investment in the venture, compared to B2 JV's 10-percent interest. Further, upon the dissolution of B2 JV, B3 clearly was left with overall responsibility to wind up the venture's affairs. Thus, B3 satisfied the certification criteria of the Disputes clause.

In sum, like the GSBCA in *Hyman-White* and the Claims Court in *Cox* and *KDH*, we find that the claim certification in this case, by one joint venturer, was sufficient. The certification otherwise complied with the requirements of the CDA and the Disputes clause and we have jurisdiction to entertain this appeal. A decision on the merits will follow.

DECISION

The Government's motion to dismiss is denied.[17]

CHERYL S. ROME
Administrative Judge

I CONCUR:

RUSSELL C. LYNCH
Chief Administrative Judge

ENRON OIL & GAS CO.

122 IBLA 224 Decided *February 26, 1992*

Appeal from a decision of the Wyoming State Office, Bureau of Land Management, affirming the requirement that rights-of-way be secured by a Federal oil and gas lessee for the construction of lateral lines on Federal leases. WYW-48907, etc.

Set aside and remanded.

1. Oil and Gas: Pipelines: Rights-of-Way--Rights-of-Way: Act of February 25, 1920--Rights-of-Way: Oil and Gas Pipelines

The Mineral Leasing Act, as implemented by Departmental regulations, does not require rights-of-way for construction and operation of "production facilities." In the case of gas, under 43 CFR 2880.5(k), production facilities include a lessee's or lease operator's gathering lines which are located on lease upstream from the point of delivery to a transportation pipeline.

[17] Despite our conclusion, which is based upon the particular facts of this case, we do not commend appellant's manner of proceeding without notice to the Government and suggest that a contractor which proceeds similarly does so at its risk.

February 26, 1992

2. Oil and Gas: Pipelines: Rights-of-Way--Regulations: Force and Effect as Law--Rights-of-Way: Act of February 25, 1920--Rights-of-Way: Oil and Gas Pipelines

Where pipelines on a Federal oil and gas lease (described by the lessee as "lateral lines") move lease production to a central accumulation point on each lease; where each such line connects directly to a gas well and brings gas by separate individual lines to a central point where the gas is delivered into a single line; and where the primary function of the lines is gathering, they are properly considered "gathering lines" under 43 CFR 2880.0-5(k).

3. Oil and Gas: Pipelines: Rights-of-Way--Regulations: Force and Effect as Law--Rights-of-Way: Act of February 25, 1920--Rights-of-Way: Oil and Gas Pipelines

It is incumbent upon BLM to examine the facts and circumstances of individual cases to determine where the point of delivery from production facilities to the transportation pipeline actually is. A decision by BLM establishing the point of delivery as the "approved production accounting measurement point" at the wellhead will be set aside where the record does not establish that delivery took place at that point.

APPEARANCES: Dante L. Zarlengo, Esq., Phyllis M. Ain, Esq., and Marianne K. Lizza, Esq., Denver, Colorado, for Enron Oil & Gas Co.; M. Dennis Daugherty, Esq., Office of the Solicitor, Washington, D.C., for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HUGHES

INTERIOR BOARD OF LAND APPEALS

Enron Oil & Gas Co. (Enron) appeals from an August 31, 1989, decision of the Wyoming State Office, Bureau of Land Management (BLM), affirming an August 2, 1989, letter decision of the Pinedale, Wyoming, Resource Area Office, BLM, informing Enron that rights-of-way would be required for the construction of eight "lateral lines" on five Federal oil and gas leases situated in Sublette and Lincoln Counties, Wyoming.[1]

These leases were issued under authority of the Mineral Leasing Act of 1920 (MLA), *as amended*, 30 U.S.C. § 181-287 (1988). This appeal concerns whether Enron is required by section 28(a) of the MLA, *as amended*, 30 U.S.C. § 185(a) (1988), to obtain rights-of-way for the lateral lines.[2]

Enron filed eight Sundry Notices on July 31, 1989, proposing to construct lateral lines on eight gas leases.[3] By filing Sundry Notices, Enron effectively sought permission to construct these lateral lines under authority granted to it by the leases, rather than applying for separate rights-of-way under authority of section 28(a) of the MLA.

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[1] These leases are WYW-48907, WYE-09561-A, WYE-021741, WYW-041447, and WYE-08051-A.

[2] The present provisions of sec. 28(a) were enacted by sec. 101 of the Act of Nov. 16, 1973, P.L. 93-153, 87 Stat. 576.

[3] The eight wells are the North LaBarge 43-5, South Hogsback 12-4, South LaBarge 1-4, Green River Bend Unit 94-27, North LaBarge 55-17, South Hogsback 21-4, South LaBarge 4-33, and Green River Bend Unit 99-27.

In addition to the eight lateral lines from these wells, Enron represents that it has embarked upon a well expansion program that anticipates drilling approximately 200 wells on these leases.

The record indicates that the purpose of each lateral line is to transport wet, unprocessed gas from an individual wellhead to a "gathering system" interconnection on each lease. The gathering system is owned by Northwest Pipeline Corp. (Northwest).[4] The unprocessed gas is then to be transported to Northwest's "central trunk line" and, thence, to Northwest's gas processing plant in Opal, Wyoming.

The points of interconnection of the lateral lines to Northwest's gathering system are all located within the boundaries of the respective leases. Thus, the lateral lines from the individual wellheads to the Northwest gathering system are also located entirely within the boundaries of the respective leases. It is undisputed that Enron owns the lateral lines.

According to the Sundry Notices, the pipe for each line was to be 4-inch internal diameter, and the length of each line varied according to the lease on which it was to be built, from 200 feet to 3,200 feet in length. The Area Office returned these Sundry Notices to Enron unapproved along with a letter dated August 2, 1989, notifying Enron that the lateral lines would require separate rights-of-way. The Area Manager noted that all of the sales meters on the affected wells are at the wellhead, thus making each lateral line a "facility transporting gas downstream from the custody transfer station (sales meter)." The letter cited BLM Manual 2801.32.C.1.g.(2), which states that rights-of-way are required for "that portion of the facility which occurs downstream from the sales (custody transfer) point (whether on or off lease)," and concluded that the lateral lines would require rights-of-way.

Enron expressly declined to have its Sundry Notices treated as applications for rights-of-way, and instead subsequently notified the Area Office by telephone that the meters at the wellheads are not "purchase meters," but are instead merely to determine volume. Enron also advised BLM that the gas is not sold until after it is processed in Opal, Wyoming. The Area Office did not alter its decision not to accept the Sundry Notices, and Enron requested State Director review of the Area Office's action under 43 CFR 3165.3(b).

On review, Enron advised the State Director as follows:

> Enron had previously sold its gas at the wellhead to Northwest. The responsibility for installing lateral lines such as those at issue was Northwest's because Northwest was required to take delivery of the gas at the wellhead. Northwest applied for and obtained rights-of-way for this purpose. Under this arrangement, it was also clear that the point of sale and the point of transfer of custody of the gas in question was at the wellhead. However, effective February 1, 1989, Enron and Northwest renegotiated their agreements relative to the sale of gas from these fields, which covers [sic] the wells described above. [[5]] Under the renegotiated agreement, Enron installs and owns the lateral lines from the wellhead to a specified connection point on Northwest's existing gathering system. Northwest operates the facilities installed by Enron for the connection

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[4] By referring to Northwest's "gathering system," we do not hold or imply that the gathering system line is a "gathering line" within the meaning of the regulations.

[5] It is not clear whether there is more than one agreement between Enron and Northwest concerning transportation of production from these leases.

of the wells to Northwest's gathering system. The gas is delivered through Northwest's gathering and transportation facilities to Northwest's processing plant. Enron sells the gas at the plant tailgate. Enron pays Northwest a combined transportation and processing fee, and extracted liquids are divided between Northwest and Enron in a predetermined manner. Northwest never purchases this gas.

(Enron's Aug. 17, 1989, Letter to State Director at 2-3). Enron also indicated that the purpose of the wellhead meter is not to identify the point of sale, but "to determine the amount of production from each well so that plant output can be properly allocated for royalty purposes" and "to calculate the transportation portion of Northwest's fee." Enron stressed that it owns the lateral lines and "maintains the responsibility for them under BLM operating regulations." Enron concluded that "it owns the right to construct such laterals under the terms of its leases, subject only to the surface management responsibility of BLM," so that no rights-of-way are required for the lateral lines. *Id.* at 3.

However, Enron also stated that Northwest "accepts gas for delivery at the wellhead." *Id.* at 3. This statement (which Enron repeats on appeal) apparently conflicts with Enron's assertions that it owns the lateral lines, as it is not clear how a party other than the owner of a pipeline would be in a position to accept delivery of gas at the head of that pipeline. We further address this question below.

On August 31, 1989, the State Director, Wyoming State Office, BLM, issued his decision affirming the Area Office's rejection of the Sundry Notices and requiring Enron to secure rights-of-way for its lateral lines.[6] This decision characterized the issue as "whether the pipelines requested require rights-of-way or are permissible as 'production facilities' under the oil and gas lease terms" (Decision at 1). Although the decision cited nothing, it is evident that BLM was referring to 43 CFR 2880.0-5(i), which provides that the type of "pipeline" for which a right-of-way must be secured under section 28(a) of the MLA does not include "lessee's or lease operator's production facilities located on his lease." The regulations provide in turn, in the case of gas, that "production facilities" include storage tanks, processing equipment, and gathering lines upstream from the point of delivery. 43 CFR 2880.0-5(k).

BLM's decision characterized Enron's position as follows: "[Enron's] letter requesting the review argues that the rights-of-way are not required because they would be entirely within lease boundaries and are upstream of the production accounting measurement point" (Decision at 2). The decision further stated that "[t]he issue is the location of the approved production accounting measurement point," and went on to hold that, since BLM had not approved the renegotiated contract between Enron and Northwest providing

[6] The decision was signed by the Acting Deputy, Division of Mineral Resources, Wyoming State Office, BLM.

otherwise (as provided by the regulations),[7] the production accounting measurement point was still on the lease. *Id.* The decision suggested that "the pipelines would be approvable as 'production facilities' if [BLM] agreed to [a] change in production accounting measurement points to match the contract agreement." *Id.*

Thus, although it did not expressly so state, it appears that the basis for the State Director's decision to require rights-of-way for the lateral lines was as follows: The "approved production accounting measurement point" was at the wellhead, notwithstanding the renegotiation of the contract between Enron and Northwest, as BLM had not approved the use of any other point. This production accounting measurement point was also the "sales (custody transfer) point" under BLM Manual 2801.32.C.1.g.(2) or "point of delivery" within the meaning of 43 CFR 2880.0-5(k). The lateral lines are located downstream from the "approved production accounting measurement point" and, therefore, were not production facilities, so that rights-of-way were required to be secured for them under the BLM Manual.

On appeal, Enron relies on a Solicitor's opinion, issued in 1980 and endorsed by the Secretary of the Interior, entitled *Right-of-Way Requirements for Gathering Lines and Other Production Facilities Located Within Oil and Gas Leaseholds* (*Solicitor's Opinion*), M-36921, 87 I.D. 291 (1980), and the regulations at 43 CFR 2880.0-5 defining "pipeline" and "production facilities." Enron argues that it has already been granted the right to construct these lateral lines by holding Federal oil and gas leases, which grant to it the "right to occupy so much of the surface as is reasonably necessary to conduct its operations under the lease" (Statement of Reasons at 2).[8] It argues that it was not required to secure rights-of-way under the regulations because it owns the lateral lines, which are located within its lease boundaries and qualify as "production facilities." Further, Enron maintains that the lateral lines are upstream of the point of delivery under the regulations because Enron does not transfer custody of the gas until the interconnection with Northwest's gathering lines and does not sell the gas until the tailgate of the processing plant in Opal, Wyoming. Enron repeats that it maintains the responsibility for the lateral lines under BLM operating regulations and stresses that, until the gas connects to Northwest's gathering system, the entire risk of loss remains with Enron. Thus, Enron argues that, under Departmental regulations, BLM Manual 2801.32.C.1.g.(1) through (3), and *Solicitor's Opinion, supra*, no rights-of-way were required.

Relying essentially on the same authority as Enron, BLM contends that the issue whether a right-of-way is required on Enron's leases hinges upon the "point of delivery," which (it argues) is the point where the gas is measured for entry either into a transportation pipeline or for purchase (Answer at 8). Here, the meters for measuring quantity

[7] Again, the decision did not cite any regulations, but it is evident that BLM was referring to 43 CFR 3162.7-3.
[8] References are to Enron's Amendment to its Additional Statement of Reasons, filed on Nov. 28, 1989.

of gas are located at the wellhead rather than at the point where appellant's lines transfer the gas into a gathering system owned by Northwest. BLM concludes accordingly that the point of delivery is at the wellhead and that appellant's lateral lines, which extend downstream from the wellhead to the boundaries of its leaseholds, are transportation pipelines, rather than production facilities.

[1] Section 28(a) of the MLA, as amended, provides:

> Rights-of-way through any Federal lands may be granted by the Secretary of the Interior or appropriate agency head for pipeline purposes for the transportation of oil, natural gas, synthetic liquid or gaseous fuels, or any refined product produced therefrom to any applicant possessing the qualifications provided in section 181 of this title in accordance with the provisions of this section.

30 U.S.C. § 185(a) (1988).

The regulations implementing section 28, effective November 8, 1979, broadly defined the term "pipeline" to mean "a line of pipe traversing Federal lands for transportation of oil or gas." 44 FR 58130 (Oct. 9, 1979). This term included trunk lines, gathering lines, and related facilities. In response to comments on the regulation objecting to the inclusion of "gathering lines," BLM stated:

> Gathering lines were included in the definition because they are part of an oil and gas pipeline that section 28 of the Mineral Leasing Act gives the Secretary authority to include in the rights-of-way granted under the Act. Therefore, gathering lines have not been deleted from the definition of "pipeline." It is recognized that this new procedure is a departure from the past Departmental policy of including gathering lines on leases in the plan of operations on the lease.

44 FR 58126 (Oct. 9, 1979).

This interpretation did not remain in effect for long, however. On July 19, 1980, the Solicitor issued the opinion referred to above examining the legislative history and the Department's historical interpretation of section 28 and concluding that that section "does not apply to pipelines and other facilities located on-lease and used for the production--as opposed to the transportation--of oil and gas." *Solicitor's Opinion, supra* at 299. In thus concluding that such pipelines and other facilities were not subject to the section 28(a) right-of-way requirements, the Solicitor stated:

> Based on the foregoing analysis, we conclude that sec. 28 of the [MLA] does not apply to on-lease production facilities which are included in a surface use and operations plan, and which are authorized by the approval of an application to conduct leasehold operations or construction activities. We believe that a reasonable dividing point between "production" and "transportation" is the point at which the lease operator completes his final processing or storage of the product or, *in the case of gas, the point of delivery to the transportation pipeline*. Thus, "production facilities" include an operator's storage tanks and processing equipment, and oil and gas pipelines upstream from any of the operator's tanks and equipment or, in the case of gas, *upstream from the point of delivery*. [Italics supplied.]

Id. at 303. From this, it is clear that rights-of-way are required for on-lease oil and gas "transportation facilities." *Gas Company of New*

Mexico, 88 IBLA 240, 242-43 (1985);[9] *accord, Exxon Corp.*, 97 IBLA 45, 52-53, 94 I.D. 139, 143-44 (1987), *aff'd, Exxon Corp.* v. *Lujan*, 730 F. Supp. 1535 (D. Wyo. 1990). It is equally clear that rights-of-way are not required for on-lease "production facilities."

Based on the *Solicitor's Opinion, supra*, Departmental regulations were amended in 1980 as follows: "Pipeline means a line of [sic] traversing Federal lands for transportation of oil or gas. The term includes feeder lines, trunk lines, and related facilities, but does not include a lessee's or lease operator's production facilities located on his lease." 43 CFR 2880.0-5(i).[10] Thus, the type of "pipeline" for which a right-of-way must be secured under section 28(a) of the MLA does not include "lessee's or lease operator's production facilities located on his lease." These regulations remain in effect.

As indicated above, "production facilities" are defined as follows in the regulations:

> *Production facilities* means a lessee's or lease operator's pipes and equipment used on his lease solely to aid in his extraction, storage, and processing of oil and gas. *The term includes * * * gathering lines * * * upstream from the point of delivery*. The term also includes pipes and equipment, such as water and gas injection lines, used in the production process for purposes other than carrying oil and gas downstream from the wellhead. [Italics supplied.]

43 CFR 2880.0-5(k). Thus, "gathering lines" situated on-lease upstream from the point of delivery are, by definition, production facilities not requiring rights-of-way under section 28(a) of the MLA, *supra*.

[2] We conclude that Enron's lateral lines are properly considered to be gathering lines. Although the term "gathering line" is not defined in the regulations, "gathering" is defined in the royalty regulations as "the movement of lease production to a central accumulation or treatment point on the lease, unit, or communitized area, or to a central accumulation or treatment point off the lease, unit, or communitized area as approved by BLM or MMS OCS operations personnel for onshore and offshore leases, respectively.' 30 CFR 206.101; 206.151. The function served by Enron's lateral lines falls within this definition, as they move lease production to a central accumulation point on each lease. That point is the interconnection

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[9] In *Gas Co. of New Mexico, supra* at 244, we reviewed the *Solicitor's Opinion, supra*, holding that construction of pipelines either for transportation or gathering purposes on a Federal lease by an individual other than the lessee or operator is authorized only upon the acquisition of a right-of-way grant pursuant to sec. 28(a) of the MLA, *supra*. That is, the right to construct gathering lines within the leased premises is a right running only to the oil and gas lessee or the approved operator. *Id.* at 243-44.

[10] There is no reason to hold that Enron's lateral lines are "feeder lines" or "trunk lines" under that regulation. Although the regulations do not define those terms, commentators have discussed them, albeit in the context of oil pipelines:

"Types of oil pipelines include: lead lines, from pumping well to a storage tank; flow lines, from flowing well to a storage tank; lease lines, extending from the wells to lease tanks; gathering lines, extending from lease tanks to a central accumulation point; *feeder lines*, extending from leases to trunk lines; and *trunk lines*, extending from a producing area to refineries or terminals." 8 Williams and Meyers, *Oil and Gas Law*, Manual of Oil and Gas Terms 909 (1991) (italics supplied).

Williams and Meyers also states that a synonym of "trunk line" is "transmission line" and defines the latter term as a "pipe line extending from a producing area to a refinery or terminal." *Id.* at 1295, 1301.

The record indicates that Enron's lateral lines do not extend from the producing area to refineries or terminals and are thus not "trunk" lines under 43 CFR 2880.0-5(i). Nor do they extend from leases to trunk lines. Instead, they extend within each lease from the wellhead to the connection point with Northwest's gathering system, which in turn extends from the lease to Northwest's trunk lines. Thus, we cannot find that Enron's lateral lines are "feeder" lines under that regulation.

with Northwest's gathering system, where the lines meet other lateral lines from other wells on the lease.

Additionally, Federal courts have addressed what a "gathering line" is in several other contexts. In *Hamman* v. *Southwest Gas Pipeline, Inc.*, 721 F.2d 140 (5th Cir. 1983), the U.S. Court of Appeals for the Fifth Circuit examined whether a line was a gathering line for purposes of determining whether a pipeline was subject to the safety regulations promulgated under the Natural Gas Pipeline Safety Act (NGPSA), 49 U.S.C. §§ 1671-1687 (1988). The definition was pivotal, as gathering lines are exempt from the NGPSA. In *Hamman*, Southwest Gas contended that its line, called the "Worthington Lateral," was a gathering line and thus exempted from the NGPSA. Southwest's line did not transport gas from a gas well, but rather from a block valve, which, through a series of pipes, eventually leads to several wells. Southwest maintained that this indirect connection to wells satisfied the definition of "gathering line." The Fifth Circuit disagreed, holding that the gathering line exception to NGPSA was restricted to pipelines that connect a transmission line to a gas well. *Hamman* v. *Southwestern Gas Pipeline Inc., supra* at 143. Under the NGPSA, a gathering line is defined "as a pipeline that transports gas from a current production facility to a transmission line or main." 49 CFR 192.3 (1982). The court observed that although "current production facility" was not defined by regulation, "it appear[ed] to mean 'gas well.' " *Hamman* v. *Southwestern Gas Pipeline, Inc., supra* at 143.

Section 1(b) of the Natural Gas Act, 15 U.S.C. § 717(b) (1988), specifically exempts the "production" and "gathering" of natural gas from the Federal Energy Regulatory Commission's (FERC) jurisdiction over pipelines.[11] Addressing this exemption, the Fifth Circuit stated:

> In determining whether this statutory exemption applies, the Commission must make a factual determination whether a company's primary function consists of interstate transportation of gas or some other activity. *Ben Bolt Gathering Co.*, 26 F.P.C. 825, 827 (1961), *aff'd*, 323 F.2d 610 (5th Cir.1963). This "primary function test" involves a case by case consideration of all the facts and circumstances of the particular case rather than the application of any overarching bright line standards.

EP Operating Co. v. *FERC*, 876 F.2d 46, 48 (5th Cir. 1989). The court noted that FERC had identified several relevant considerations to aid in that determination, including the diameter and length of the pipeline, the location of compressors and processing plants, the extension of the facility beyond the central point in the field, the location of wells along all or part of the facility, and the geographical configuration of the system. The court held that "[t]he true test of

[11] Sec. 1(b) of the Natural Gas Act provides:

"The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial or any other use, and to natural gas companies engaged in such transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas."

primary function is whether, with reference to the specific facts and circumstances of [a] particular line, its primary function is gathering." *Id.* at 49.

In *Ben Bolt Gathering Co.* v. *Federal Power Commission*, 323 F.2d 610 (5th Cir. 1963), the Federal Power Commission (FPC), FERC's predecessor, rejected Ben Bolt's claim that it was a gatherer, relating that, "in the ordinary concept of the word[,] 'gathering' as used in the natural-gas industry * * * means * * * the collecting of gas from various wells and bringing it by separate and individual lines to a central point where it is delivered into a single line." *Id.* at 611. Examining Ben Bolt's operation, FPC concluded Ben Bolt

> cannot validly claim that it functions as a "gatherer"; it clearly is primarily engaged in the purchase of 'gathered' gas delivered into a 'single line' for transportation from the area of production to the point of sale to a major pipeline company, Natural [Gas Pipe Line Co.], for further transportation in interstate commerce.

Id.

We find these authorities instructive. Enron's lateral lines qualify as gathering lines under any of the various standards identified above. First, they move lease production to a central accumulation point on each lease. *See* 30 CFR 206.101; 206.151. Second, they connect to gas wells. *See Hamman, supra* at 143. Third, they bring gas "by separate and individual lines to a central point where it is delivered into a single line." *See Ben Bolt Gathering Co., supra* at 611. Finally, there is no evidence in the record that the primary function of the lateral lines is anything but gathering. *See EP Operating Co.* v. *FERC, supra* at 48-49. We conclude that Enron's lateral lines are "gathering lines" for purposes of the regulatory definition of "production facilities" in 43 CFR 2880.0-5(k).[12]

[3] The inquiry is not complete, as the regulatory definition of "production facilities" also requires, in the case of gas, that the gathering line be located "upstream from the point of delivery." 43 CFR 2880.0-5(k). Thus, Enron's lateral lines are exempt from right-of-way requirements as "production facilities" only if they are also located "upstream from the point of delivery."

In the decision under appeal, the State Office held, in effect, that the "production accounting measurement point," in this case deemed to be the meter at the wellhead of each well, was the "point of delivery." As Enron points out, neither the regulations, the *Solicitor's Opinion, supra*, nor the BLM Manual make any mention of using the production accounting measurement point as the point of delivery. On appeal, BLM appears to acknowledge that, as a general matter, the point of delivery and the production accounting measurement point are not the same, but asserts that, in this case, they do coincide (BLM Answer at 3 n.1). We agree with Enron that there is no legal basis for using the production accounting measurement point as the point of delivery for

[12] We neither hold nor imply that all of these tests must be met for a pipeline to be considered a gathering line.

purposes of determining whether a right-of-way must be secured. Accordingly, BLM's decision must be set aside.[13]

In its answer, BLM states that it

> interprets "point of delivery" as used in its regulations to refer to the point at which the quantity of gas in the first transfer of custody from the lessee to a transportation pipeline or a purchaser is measured. [BLM] presumes that the last meter before the juncture of the lessee's line and the facilities of a purchaser or carrier is the point of delivery, unless the lessee establishes otherwise.

(BLM Answer at 8). In support of its argument, BLM assumes that measurement of the volume of gas and delivery of the gas are closely related, such that where one is found, the other is found too. BLM reasons:

> We submit that no prudent businessman in the oil and gas industry or otherwise would contract to accept or make delivery of valuable property without a means of quantifying the amount delivered. Implicit in the concept of delivery is measurement of the quantity delivered, and in the absence of measurement there has been no delivery. Otherwise, no purchase price, transportation fee or failure to deliver argument could be established.

Id. at 9.

It does not necessarily follow from this that the point of measurement is the point of delivery. As Enron points out, there are other purposes of metering on the lease, including measuring production amounts for royalty purposes, so that production later commingled from several leases can be allocated back to the individual lease from which it was produced. Allocating production back to the specific lease from which it is produced is critical, as lessee must account for royalty on a lease basis. It appears here that Enron has placed meters at each wellhead on the various leases so that it can allocate production back not only to the individual lease, but also to each individual well on the various leases. Accurate measurement of production from an individual well may also be important in determining details of the geologic structure being drained.

More importantly, we find no support in the regulations for placing the point of delivery at the last meter before the juncture of a lessee's line and the facilities of the purchaser or carrier. Such policy might, as demonstrated in this case, move the delivery point substantially upstream, depending on where the meter is placed, or a lessee could presumably move the delivery point downstream by placing another meter downstream, thereby making the new meter "the last meter before the juncture of the lessee's line and the facilities of a purchaser or carrier." We see no justification for such a rule, which arbitrarily locates the point of delivery without reference to the facts of the particular case.

In closely related arguments, BLM asserts that there is a need for a "bright line" defining when on-lease facilities require a right-of-way,

[13] As it was improper to use the production accounting measurement point as the point of delivery, it is irrelevant that BLM might have agreed to a change in production accounting measurement points to match the contract agreement (Decision at 2). Use of such point, whether approved or not, would be improper.

and that its interpretation should be affirmed because it promotes administrative uniformity and order by providing a definitive point at which delivery takes place. The administrative convenience of such an approach notwithstanding, it cannot be affirmed here, as we find no justification for it in the regulations, and as the record does not support the conclusion that delivery actually took place at the wellhead.

Although 43 CFR 2880.0-5(k) refers to "point of delivery," the BLM Manual says that a right-of-way is required for facilities that are "downstream from the sales (custody transfer) point." BLM Manual 2801.32.C.1.g.2. To the extent that these points may be different, the regulation governs. *See Pamela S. Crocker-Davis*, 94 IBLA 328, 332 (1986).

On the record before us, we cannot determine where the point of delivery is. We note that the purchase "contract usually contains express provisions as to the place and conditions of delivery of the product bought and sold." Williams, *Oil and Gas* § 724.3 (1991). The record does not contain a copy of the contract between Enron and Northwest or excerpts relevant to determining the point of delivery. Without it, we are unable to reconcile what the record does indicate. For example, Enron asserts that it owns the lateral lines and maintains title, custody, and risk of loss for the gas until the gas is received at the interconnection with Northwest's gathering system, at which point custody and risk of loss for the production is transferred to Northwest. BLM does not dispute these facts, which suggest that the point of delivery was at the point of interconnection with the Northwest gathering system. However, Enron also states that "Northwest accepts gas for delivery at the wellhead," and that "Northwest operates the facilities installed by Enron for the connection of the wells to Northwest's gathering system" (Enron's Aug. 17, 1989, Letter to State Director at 2-3). If true, these facts could undercut Enron's position that the wellhead should not be regarded as the point of delivery.

As BLM's decision is not based on a thorough examination of the location of the point of delivery, it is set aside. It is incumbent upon BLM to examine the facts and circumstances of individual cases to determine where the point of delivery from production facilities to the transportation pipeline actually is. On remand, BLM should reexamine the controlling question of where the point of delivery is in light of the terms of the renegotiated agreement, allowing Enron an opportunity to supplement and clarify the record.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is set aside and remanded for further review.

DAVID L. HUGHES
Administrative Judge

March 24, 1992

I CONCUR:

WILL A. IRWIN
Administrative Judge

NORTHWEST ALASKAN PIPELINE CO. (ON RECONSIDERATION III)

9 OHA 143 Decided: *March 24, 1992*

Reconsideration pursuant to 43 CFR 4.5 by the Director, Office of Hearings and Appeals, of an April 11, 1989, order issued by the Interior Board of Land Appeals. (IBLA 85-434).

Reversed.

1. Alaska: Statehood Act--Alaska National Interest Lands Conservation Act: State Selections

Pursuant to sec. 906(c) of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1635(c) (1988), all right, title, and interest of the United States in and to selected lands is deemed to have vested in the State of Alaska as of the date of tentative approval. Subsequent to such a tentative approval, the Secretary of the Interior no longer retains jurisdiction over selected lands and a dispute concerning rights to such lands is not properly before this Department.

2. Alaska: Statehood Act--Alaska National Interest Lands Conservation Act: State Selections--Patents of Public Lands: Corrections

The authority to amend conveyancing documents described at 43 U.S.C. § 1746 (1988), and 43 CFR Subpart 1865 does not include authority to amend a tentative approval which legislatively conveyed selected land to the State of Alaska, unless the State requests the amendment or concurs.

APPEARANCES: William J. Grealis, Esq., Akin, Gump, Strauss, Hauer & Feld, Washington, D.C., and William J. Moses, Esq., Anchorage, Alaska, for Northwest Alaskan Pipeline Co. and Alaskan Northwest Natural Gas Transportation Co.; Elizabeth J. Barry, Esq., Office of the Attorney General, Anchorage, Alaska, for the State of Alaska; James R. Mothershead, Esq., Office of the Regional Solicitor, Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY ROGER E. MIDDLETON, DIRECTOR

OFFICE OF HEARINGS AND APPEALS

On January 18, 1985, the Alaska State Office, Bureau of Land Management (BLM), issued a document which stated:

> Patent to lands in T. 12 S., R. 13 E., Fairbanks Meridian, * * *, will be issued to the State in the near future. * * *

When patent is issued it will not contain a reservation for the Alaska Natural Gas Pipeline (F-24538) since the State's selection application predated the right-of-way application.

Northwest Alaskan Pipeline Co. (Northwest), as agent and operator for the Alaskan Northwest Natural Gas Transportation Co., appealed to the Interior Board of Land Appeals (IBLA). On October 13, 1987, IBLA issued a decision affirming as modified the result reached by BLM (*Northwest Alaskan Pipeline Co.*, 99 IBLA 201 (1987)). IBLA agreed with BLM that the right-of-way reservation should not be included in the patent; however, IBLA did not base its decision on the fact that the State selection predated the 1977 right-of-way application as BLM had done. Rather, IBLA's decision was based on the fact that the right-of-way was granted on December 1, 1980, which was after the tentative approval (TA) of the State selection, and the decision therefore contained the following express limitation:

Our decision deals only with the lands tentatively approved Oct. 16, 1963. BLM in its answer indicates that the right-of-way may traverse certain other lands in T. 12 S., R. 13 E., namely 72 acres formerly in trade and manufacturing site F-027801, which were selected by the State on Apr. 18, 1967, and tentatively approved on July 19, 1984, and 60 acres formerly included in the withdrawal under [Public Land Order] 386 (12 FR 5387 ([Aug. 8], 1947)), which were selected by the State on June 16, 1972, and tentatively approved on July 19, 1984.

99 IBLA at 212 n.5.

On December 15, 1987, Northwest filed a petition for reconsideration of the IBLA decision, stating that its pipeline right-of-way does indeed traverse the parcels excluded from the IBLA decision.[1] By order of June 16, 1988, IBLA granted Northwest's petition for reconsideration, *Northwest Alaskan Pipeline Co. (On Reconsideration)*, and distinguished the status of the right-of-way across the islands from the status of the right-of-way across the remainder of T. 12 S., R. 13 E. IBLA found the right-of-way must be considered a valid existing right to which TA of the State selection is subject pursuant to section 906(c) of the Alaska National Interest Lands Conservation Act (ANILCA), 43 U.S.C. § 1635(c) (1988). The order states:

Even though the land included in the July 1984 tentative approval of the State selection passed out of Federal ownership, subject to valid existing rights, pursuant to section 906(c)(4) of ANILCA, 43 U.S.C. § 1635(c)(4) (1982) (*see Jennie A. Wasey*, 92 IBLA 228 (1986))[,] that fact does not preclude BLM from reserving the right-of-way in the patent, since issuance of the patent is merely a ministerial act, and reservation represents recognition of the right which existed at the time of tentative approval. [Footnote omitted.]

(June 16, 1988, Order at 4).

On August 15, 1988, the State of Alaska filed with IBLA a motion for reconsideration, arguing, *inter alia*, that BLM is without authority to include the right-of-way reservation in the patent since it was not included in the TA. The State argued that TA's have the same force and effect as patents, and that the TA is therefore a document conveying legal title, the issuance of which precludes this Department

[1] For brevity, these parcels will hereafter be referred to as islands.

from further adjudication of conflicting claims. The State's motion for reconsideration was denied by order dated April 11, 1989, *Northwest Alaskan Pipeline (On Reconsideration II)*. In its order, IBLA recognized that BLM is precluded from unilaterally correcting the TA, but found it is authorized to issue a patent which is explicitly subject to the right-of-way.

By letter dated April 23, 1990, the Governor, State of Alaska, requested the Secretary take jurisdiction and review *Northwest Alaskan Pipeline (On Reconsideration II)*. On April 10, 1991, the Secretary requested the Director of the Office of Hearings and Appeals to reconsider the April 11, 1989, IBLA order.[2]

Both the State of Alaska and BLM have filed statements in favor of reversing *Northwest Alaskan Pipeline (On Reconsideration II)*, arguing the TA conveyed title, and disputes following conveyance must be resolved in the courts, rather than within this Department.

Northwest argues that the Department retains authority to make the patent explicitly subject to the right-of-way, even though it was not mentioned in the TA, citing 43 U.S.C. § 1746 (1988), which authorizes the Secretary to correct patents or documents of conveyance where necessary in order to eliminate errors, and 43 CFR 1865.0-5(b) which defines error to include omission of a requisite reservation. Northwest also argues equitable and legal considerations favor its position, and contends inclusion of the right-of-way in the patent is a purely ministerial act which is, therefore, authorized. In its reply, the State maintains it is well established that the Secretary of the Interior is without authority to correct conveyancing documents without either the holder's consent or court action.

While not waiving its argument that the Department is without jurisdiction to decide the validity of the right-of-way, the State argues the right-of-way is not a valid existing right. It contends section 28 of the Mineral Leasing Act (MLA), *as amended*, 30 U.S.C. § 185 (1988), which is the authority for issuance of the right-of-way, allows a grant only on Federal lands, and once the subject land was selected by the State it was no longer Federal land. Northwest argues that not only were the two parcels Federal lands pursuant to 30 U.S.C. § 185 (1988), but, in addition, authority to grant the right-of-way is found in the Alaska Natural Gas Transportation Act of 1976, 15 U.S.C. §§ 719-719o (1988), and in 43 U.S.C. §§ 1616(d)(3) and 1635 (1988). Furthermore, Northwest argues, Alaska's selection could not change the land status because the selection was not perfected.

The State argues the subject parcels were not susceptible to successful application for a right-of-way because they had been

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[2] In a memorandum dated Apr. 18, 1991, the Secretary indicated:

"I would like you to reconsider whether the Bureau of Land Management (BLM) has the legal authority to incorporate in the patent to the State of Alaska a reference to a right-of-way which was not expressly identified in the prior Tentative Approval of the same lands. In order to fully dispose of this matter, please consider and clarify related issues concerning whether the right-of-way was a valid existing right."

previously selected by the State, thereby segregating them from such application. In response, Northwest challenges the segregative effect of Alaska's selection. Specifically, Northwest argues that the State's failure to publish notice of its selection of the two parcels within 60 days caused any segregative effect of the selection to automatically terminate pursuant to 43 CFR 2627.4(b), and that because its right-of-way was not an appropriation, 43 CFR 2627.4(b) did not operate to segregate the land from the right-of-way application. Northwest also challenges the validity of Alaska's selection, contending that the subject lands were withdrawn from selection by the State pursuant to 43 U.S.C. §§ 1610 and 1616(d) (1988) from 1971 until 1983.

In its reply, the State contends that the subject parcels were selected by amendments to a previously filed and published selection and that therefore, pursuant to the BLM Manual, additional publications were not required. The State also disputes the argument that the segregative effect of 43 CFR 2627.4 does not apply to Northwest's right-of-way application. The State argues the parcels were not withdrawn from State selection at the time the selection amendments were filed with BLM.

Northwest contends that the State entered into a cooperative agreement with this Department which specifically provides for the validity of rights-of-way granted by this Department subsequent to selection. The State disputes this interpretation of the cooperative agreement.[3]

[1] In 1880, the Supreme Court found that "precisely when the last act in the series essential to the transfer of title has been performed," "the land has ceased to be the land of the government; or to speak in technical language, the legal title has passed from the government, and the power of these [Land Department] officers to deal with it has also passed away." *United States* v. *Schurz*, 102 U.S. 378, 402 (1880); *accord Armstrong* v. *Udall*, 435 F.2d 38, 41 (9th Cir. 1970). In 1929, the Supreme Court explicitly recognized that "if the granting act provides for other action by the Secretary equivalent to a patent, such as approval of a list of the lands, the approval ends the jurisdiction of the Department." *West* v. *Standard Oil Co.*, 278 U.S. 200, 212 (1929). Section 906(c) of ANILCA governs the date upon which title passes from Federal ownership under the Alaska Statehood Act. It states:

> (1) All tentative approvals of State of Alaska land selections pursuant to the Alaska Statehood Act are hereby confirmed, subject only to valid existing rights and Native selection rights under the Alaska Native Claims Settlement Act [43 U.S.C. § 1601 (1988)], and *the United States hereby confirms that all right, title, and interest of the United States in and to such lands is deemed to have vested in the State of Alaska as of the date of tentative approval*; * * *
>
> (2) Upon approval of a land survey by the Secretary, such lands shall be patented to the State of Alaska.
>
> * * * * * * *

[3] The cooperative agreement between the Department of the Interior and the State of Alaska was signed on Aug. 15, 1981, well after Northwest's right-of-way was granted. The purpose of the agreement was to establish a procedure to coordinate issuance of permits, easements, rights-of-way, and other authorizations necessary for construction of Northwest's pipeline. The agreement was not intended to affect existing law or the rights of third parties.

(4) *Future tentative approvals of State land selections, when issued, shall have the same force and effect as those existing tentative approvals which are confirmed by this subsection* and shall be processed for patent by the same administrative procedures as specified in paragraphs (2) and (3) of this subsection. [Brackets in original; italics added.]

43 U.S.C. § 1635(c) (1988).

This section has repeatedly been interpreted as legislatively conveying selected lands out of Federal ownership upon TA. 99 IBLA at 211-12; *Melvin N. Barry*, 97 IBLA 359 (1987); *Mary Lou Redmond*, 95 IBLA 379 (1987); *William J. Smith*, 94 IBLA 75 (1986); *Elizabeth S. Hjellen*, 93 IBLA 203 (1986); *Ed Bilderback*, 89 IBLA 263 (1985); *State of Alaska* v. *Marcia K. Thorson (On Reconsideration)*, 83 IBLA 237, 91 I.D. 331 (1984). Once legal title to land passes from Federal ownership, the Department loses jurisdiction over such lands and has no authority on its own to affect title thereto.

By reserving in the Secretary the authority to approve land surveys and issue patents after TA, ANILCA did not create the discretion to add a right-of-way. The Secretary's authority after TA is limited by ANILCA to approval of a survey and issuance of a patent, neither of which encompasses reservation of a right-of-way. Approval of a survey and issuance of a patent are ministerial acts which do not involve discretion or judgment. Since the right-of-way was not included in the TA, its addition to the patent would require a decision that the right-of-way is properly reserved, and would thus be outside the scope of a ministerial act.

In addition, Northwest cites *Marathon Oil Co.* v. *Lujan*, 937 F.2d 498 (10th Cir. 1991), for the proposition that "the Secretary has considerable discretion regarding the issuance of a patent" (Response at 19) and cites *Ira Wassillie (On Reconsideration)*, 111 IBLA 53 (1989), for the proposition that if a patent is about to issue and a fatal flaw in the proceeding is discovered, the Secretary can intervene to prevent patent issuance. This rule applies when a patent is the document which transfers title. The ANILCA language quoted above created an exception for TA's by causing title to pass with the TA, rather than with the patent. Indeed, in *Ira Wassillie (On Reconsideration)*, the Board explicitly recognized congressional authority to limit the Secretary's discretion in patent issuance. 111 IBLA at 57 n.1.

Northwest contends that 43 U.S.C. § 1746 (1988), authorizes the Secretary to change title documents to correct an error at any time if the error has been established and legal and equitable considerations dictate that relief be granted. Northwest states, "There is no requirement in either the statute or the regulations that the Secretary still hold title to the land" (Response at 16), and contends the factual, legal, and equitable circumstances necessary to apply the correction provision are present herein.

[2] By requiring either an application for correction by the landowner or the landowner's consent, the regulations at 43 CFR Subpart 1865

in effect require that the Secretary regain title to the land before processing of a correction. Efforts to administratively correct documents of conveyance without consent of the owners have been repeatedly rejected. *Lloyd Schade*, 116 IBLA 203 (1990); *Genaro M. Roybal, 107 IBLA 75 (1989); Lone Star Steel Co.*, 101 IBLA 369 (1988); *Rosander Mining Co.*, 84 IBLA 60 (1984).[4] This interpretation of the regulations is consistent with the conclusion that the Department's jurisdiction to resolve disputes ceases when title to land passes from Federal ownership.

In order to fully dispose of this matter, it is necessary to consider and clarify issues concerning whether the right-of-way was a valid existing right. Northwest contends that pursuant to sections 11 and 17(d) of ANCSA, 43 U.S.C. §§ 1610 and 1616(d) (1988), the islands were segregated from State selection. One of the subject parcels, the former trade and manufacturing site, was selected by the State prior to January 17, 1969, and therefore does not fall within ANCSA's definition of public lands. 43 U.S.C. § 1602(e) (1988). As the sections of ANCSA referred to by Northwest only affected public lands, they did not affect the status of the former trade and manufacturing site.

The Public Land Order (PLO) 386 site was selected after ANCSA and thus falls within its definition of public lands. However, neither of the ANCSA sections cited by Northwest prevented the State selection of the PLO 386 site.

Section 11 of ANCSA contains a legislative withdrawal of certain land in the vicinity of those Native villages listed at 43 U.S.C. § 1610(b) (1988), and authorizes the Secretary to withdraw additional land near villages in certain described circumstances. Northwest alleges the PLO 386 site was withdrawn legislatively because of its proximity "to Native Villages" (Response at 6). Counsel for the State asserts that none of the listed villages is close enough to the PLO 386 site to result in legislative withdrawal. Northwest has not identified which of the villages it believes are near the PLO 386 site and the record contains no suggestion of a legislative withdrawal other than the assertion in Northwest's response.

In issuing PLO 5242, the Secretary did utilize the authority found in section 11 of ANCSA to withdraw T. 12 S., R. 13 E., Fairbanks Meridian. 37 FR 15513 (Aug 3, 1972). Northwest argues that pursuant to PLO 5242 the subject sites "were withdrawn (and therefore not available for State selection) at the time the Secretary issued ROW Grant F-24538" (Response at 21). However, segregation of the sites from State selection at the time of the right-of-way grant would not affect the validity of the selection. The relevant issue is whether the sites were segregated from State selection at the time the State selected the land. The State selected the PLO 386 site prior to PLO 5242; thus, PLO 5242 does not defeat the State's selection.

[4] Although in some instances these cases refer to "patents," the regulations in 43 CFR Subpart 1865 treat patents and TA's as equals (43 CFR 1865.0-5(c)).

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Section 17 of ANCSA created a 90-day legislative withdrawal of "all unreserved public lands in Alaska" (43 U.S.C. § 1616(d)(1) (1988)) and authorized the Secretary to withdraw certain lands. 43 U.S.C. § 1616(d)(2) (1988). The legislative withdrawal terminated by congressional mandate prior to June 16, 1972, when the State selected the PLO 386 site and the record contains no indication that the PLO 386 site was withdrawn by the Secretary pursuant to 43 U.S.C. § 1616(d)(2) (1988).

The State argues Northwest's right-of-way is not a valid existing right because the State selection segregated the parcels from the right-of-way application. A regulatory provision entitled "Segregative effect of applications" states:

> Lands desired by the State under the regulations of this part will be segregated from all appropriations based upon application or settlement and location, including locations under the mining laws, when the state files its application for selection in the proper office properly describing the lands as provided in § 2627.3(c)(1)(iii), (iv), and (v). Such segregation will automatically terminate unless the State publishes first notice as provided by paragraph (c) of this section within 60 days of service of such notice by the appropriate officer of the Bureau of Land Management.

43 CFR 2627.4(b).

Northwest contends that the State did not publish notice of its selection of the islands, which caused the segregative effect to terminate automatically. The State responds that although separate publication was not made for each island, the selections were in the form of amendments to a 1961 selection for which publication was made. The State alleges that BLM policy has always been to let publication of the original selection suffice as notification for its amendments, and it quotes a current BLM handbook with instructions to that effect. Neither Northwest nor BLM responded to this argument.

The BLM handbook cited by the State was not effective until 1987. However, the contention that the Department did not require separate publication of amendments to a State selection during the relevant time period is supported by decisions. *See Udall* v. *Kalerak*, 396 F.2d 746 (9th Cir. 1968), *cert. denied*, 393 U.S. 1118; *Dell M. Husted*, A-30932 (Dec. 5, 1968); *John Gonzales*, A-30604 (Sept. 26, 1968). The notice published in 1961 specified the entire township and therefore granted the opportunity to file objections as required by the regulation.

Northwest also contends that the segregative effect did not extend to rights-of-way under MLA. "The purpose of 43 CFR 2627.4(b), which provides for the segregation of lands upon the filing of the State's application to select, is to *preserve the status quo, and to prevent the initiation of any new rights or claims* pending disposition of the State's application." *Andrew Petla*, 43 IBLA 186, 194 (1979) (italics added). This interpretation of the segregative effect of a State selection application is well supported. It has long been clear that the segregative effect of a selection precludes a withdrawal or reservation by the United States. 43 CFR 2311.3 (1970) and cases cited therein.

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It has also been held that selected land is not available for initiation of rights by others. *Stalker* v. *Oregon Short Line Railroad Co.*, 225 U.S. 142 (1912); *Weyerhaeuser* v. *Hoyt*, 219 U.S. 380 (1911); *Appeal of Seldovia Native Assn, Inc.*, 1 ANCAB 65, 83 I.D. 461 (1976).

Northwest argues that a right-of-way, which cannot ultimately result in a fee interest in the land, is not an appropriation[5] pursuant to 43 CFR 2627.4(b). It is generally accepted that withdrawals or reservations which occurred prior to 1987 did not segregate the subject land from leasing under MLA, unless the mineral leasing laws or the withdrawal or reservation specifically provided otherwise.[6] *TXO Production Corp.*, 87 IBLA 85 (1985); *Douglas H. Willson*, 86 IBLA 135, 92 I.D. 153 (1985); *TXO Production Corp.*, 79 IBLA 81 (1984); *Western Interstate Energy, Inc.*, 71 IBLA 19 (1983); *Douglas E. Smith*, 69 IBLA 343 (1982); *Esdras K. Hartley*, 54 IBLA 38, 88 I.D. 437 (1981); *Chevron U.S.A., Inc.*, 52 IBLA 278 (1981). *But see Kerr-McGee Corp.*, 46 IBLA 156 (1980); *Tom B. Boston*, 6 IBLA 269 (1972).

Although the language of 43 CFR 2627.4(b) does not contain a provision specifically segregating selected lands from MLA rights-of-way, the following regulatory language, which appears under the heading "Lands subject to selection; patents; minerals," is instructive:

> (1) The Act as amended * * * provides that any lease, permit, license, or contract issued under * * * *the mineral leasing acts*, shall have the effect of withdrawing the lands subject thereto from selection by the State. [Italics in original.]
>
> (2) Under the Act, the State may select any vacant, unappropriated, and unreserved public lands in Alaska, whether or not they are surveyed and whether or not they contain mineral deposits. For the purposes of selection, leases, permits, licenses, and contracts issued under the Mineral Leasing Acts of 1914 and 1920 will be considered an appropriation of lands. Where the preference provisions of § 2627.4(a) do not apply, *selections by the State of lands covered by an application filed prior to the State selection will be rejected to the extent of the conflict when and if such application is allowed. Conflicting applications and offers for mineral leases and permits, except for preference right applicants, filed pursuant to the Mineral Leasing Act, whether filed prior to, simultaneously with, or after the filing of a selection under this part will be rejected when and if the selection is tentatively approved* by the authorized officer of the Bureau of Land Management in accordance with paragraph (d) of this section. [Italics added.]

43 CFR 2627.3.

The portion of 43 CFR 2627.3 which is underlined above belies Northwest's argument that segregation does not apply to temporary rights such as leases and rights-of-way. Indeed, this language clearly indicates that applications for leases and permits under MLA which conflict with State selections are to be rejected upon TA, even if the MLA application predates the selection. *Weston B. Andrews*, 116 IBLA

[5] As an alternative, Northwest argues that if a right-of-way is an appropriation, its right-of-way should be considered an appropriation asserted by the Government, and therefore exempt from segregation due to State selection. Northwest argues, "Because the Secretary was acting pursuant to Congress' directive in ANGTA Section 9 when he issued ROW Grant F-24538, that grant could be considered an 'appropriation asserted by the Government' " (Response at 26). The fact that Congress authorized the Secretary to grant a right-of-way does not mean the right-of-way is asserted by the Government because Congress must authorize all right-of-way grants. The mere existence of a grant to Northwest belies the notion that the right-of-way is an appropriation asserted by the Government.

[6] Departmental regulations relating to this issue were amended in 1987, but the amendments have no effect on the present dispute. 52 FR 12175 (Apr. 15, 1987).

41 (1990); *Yolana Rockar*, 19 IBLA 204 (1975); *Lloyd W. Levi*, 19 IBLA 201 (1975).

Therefore, based upon the foregoing, the IBLA order of April 11, 1989, is reversed.

ROGER E. MIDDLETON
Director

STATE OF UTAH, BOARD OF INDIAN AFFAIRS & DIVISION OF INDIAN AFFAIRS *v.* NAVAJO AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

21 IBIA 282 Decided: *March 31, 1992*

Appeal from a determination that the State of Utah is not entitled to receive 37-1/2 percent of the owner's portion of proceeds under a Navajo tribal oil and gas operating agreement.

Affirmed.

1. Indians: Generally--Indians: Mineral Resources: Oil and Gas: Tribal Lands--Statutory Construction: Indians

In a case where the interests of an Indian tribe are arguably in conflict with the interests of some members of the tribe, the Board of Indian Appeals declines to invoke the canon regarding construction of statutory ambiguities in favor of Indians.

2. Indians: Generally--Indians: Mineral Resources: Oil and Gas: Tribal Lands--Statutory Construction: Indians

Where a statute concerning Indians manifests two competing purposes, an expansive reading of the statute should be avoided if that reading would disserve one of the two purposes.

3. Indians: Mineral Resources: Oil and Gas: Tribal Lands--Indians: Taxation--Statutory Construction: Indians

By analogy to the canon that a state may tax Indians only when congressional consent to such taxation is unmistakably clear, the Board of Indian Appeals finds that a state may share in the oil and gas royalties from tribal property only when Congress has given its unequivocal consent.

4. Indians: Leases and Permits: Generally--Indians: Mineral Resources: Oil and Gas: Tribal Lands--Statutory Construction: Indians

In determining whether an instrument is a tribal lease for purposes of a particular Federal statute, the critical inquiry is whether it has the characteristics Congress had in mind when employing the term "tribal lease" in the statute.

APPEARANCES: Paula K. Smith, Esq., Salt Lake City, Utah, for appellants; Thomas O'Hare, Esq., Window Rock, Arizona, for the Area Director; Herb Yazzie, Esq., Window Rock, Arizona, for the Navajo Nation; Alan L. Sullivan, Esq., and Phillip Wm. Lear,

Esq., Salt Lake City, Utah, and Daniel P. Neelon, Esq., San Antonio, Texas, for Chuska Energy Co.

OPINION BY ADMINISTRATIVE JUDGE VOGT

INTERIOR BOARD OF INDIAN APPEALS

Two agencies of the State of Utah, its Board of Indian Affairs and Division of Indian Affairs (appellants),[1] seek review of two decisions, dated January 15 and January 17, 1991, of the Navajo Area Director, Bureau of Indian Affairs (Area Director; BIA), holding that the State of Utah is not entitled, under a 1933 statute, to receive 37-1/2 percent of the owner's portion of proceeds from an operating agreement between the Navajo Nation (Nation) and Chuska Energy Co. (Chuska). Appellants state that they are appealing on their own behalf and on behalf of Navajos residing in San Juan County, Utah.

For the reasons discussed below, the Board affirms the Area Director's decisions.

Background

By the Act of March 1, 1933, 47 Stat. 1418, Congress added two tracts of land in Utah to the Navajo Indian Reservation. These were the "Paiute Strip," an area of approximately 500,000 acres, and the "Aneth Extension," an area of approximately 52,000 acres. The Act provided, *inter alia*:

> Should oil or gas be produced in paying quantities within the lands hereby added to the Navajo Reservation, 37 1/2 per centum of the net royalties accruing therefrom derived from tribal leases shall be paid to the State of Utah: *Provided*, That said 37 1/2 per centum of said royalties shall be expended by the State of Utah in the tuition of Indian children in white schools and/or in the building or maintenance of roads across the lands described in section 1 hereof, or for the benefit of the Indians residing therein.

Oil production began on the Aneth Extension during the 1950's. Apparently, at least until recently, Utah has received royalties on a regular basis. *See Sakezzie* v. *Utah Indian Affairs Commission* (*Sakezzie I*), 198 F. Supp. 218 (D. Utah 1961), and *Sakezzie* v. *Utah Indian Affairs Commission* (*Sakezzie II*), 215 F. Supp. 12 (D. Utah 1963), for the early history of the royalty provision and its administration.

In 1968, the above-quoted provision of the 1933 Act was amended to require Utah to expend its portion of royalties "for the health, education, and general welfare of the Navajo Indians residing in San Juan County." The amendment further provided:

> Planning for such expenditures shall be done in cooperation with the appropriate departments, bureaus, commissions, divisions, and agencies of the United States, the State of Utah, the county of San Juan in Utah, and the Navajo Tribe, insofar as it is reasonably practicable, to accomplish the objects and purposes of this Act. Contribution may be made to projects and facilities within said area that are not exclusively for the

[1] After this appeal was filed, the Utah Board of Indian Affairs was abolished and its duties assumed by the Utah Division of Indian Affairs and the newly created Utah Dineh Committee. *See* Appellants' June 3, 1991, notice to the Board. The term "appellants," as used in this opinion, refers to both the original appellants and their successors in interest.

benefit of the beneficiaries hereunder in proportion to the benefits to be received therefrom by said beneficiaries, as may be determined by the State of Utah through its duly authorized officers, commissions, or agencies. An annual report of its accounts, operations, and recommendations concerning the funds received hereunder shall be made by the State of Utah * * * to the Secretary of the Interior and to the Area Director of the Bureau of Indian Affairs for the information of said beneficiaries.

Act of May 17, 1968, 82 Stat. 121.

In 1982, Congress enacted the Indian Mineral Development Act (IMDA), 25 U.S.C. §§ 2101-2108 (1988),[2] which provides:

> Any Indian tribe, subject to the approval of the Secretary and any limitation or provision contained in its constitution or charter, may enter into any joint venture, operating, production sharing, service, managerial, lease or other agreement * * * providing for the exploration for, or extraction, processing, or other development of, oil, gas, uranium, coal, geothermal, or other energy or nonenergy mineral resources * * * in which such Indian tribe owns a beneficial or restricted interest, or providing for the sale or other disposition of the production or products of such mineral resources.

25 U.S.C. § 2102.

On February 18, 1987, the Nation entered into an oil and gas operating agreement with Chuska, under authority of IMDA.[3] The Area Director approved the agreement on July 20, 1987. Under the agreement, Chuska was authorized to conduct oil and gas operations on up to 50,000 acres of tribal land to be designated by Chuska from a total of 254,000 acres in Arizona, New Mexico, and Utah.

Oil is now being produced under the operating agreement. At least some of the production is from the Aneth Extension area. On November 6, 1990, the Director of the Utah Division of Indian Affairs (Utah Director) wrote to the Navajo Area Office, BIA, stating:

> Each quarter the Utah Division of Indian Affairs receives an oil royalty check from the BIA in an amount which exceeds $250,000. However, no accompanying statement is included to indicate how the oil royalty payment was calculated. I am requesting that your office include its calculations along with the check, so that I have an idea of how many barrels of oil [were] taken during that quarter. * * * I would like to receive copies of [Minerals Management Service] Forms 2014 and 3160 which will be used to calculate the next royalty payment.
>
> Secondly, I would like information on the oil production activities of [Chuska] on the Aneth Extension. * * * It is my understanding that the Tribe entered into leases with Chuska under the Indian Mineral Development Act of 1982 and has been making royalty payments to the Navajo Tribe [sic]. If that is the case, then I would think that the Utah Navajos are entitled to 37 1/2% of the royalty which Chuska pays to the Tribe.

Following a meeting with Area Office personnel, the Utah Director wrote to the Field Solicitor, Window Rock, demanding "a full accounting of the amount of oil and natural gas taken by [Chuska] from the Aneth Oil Field since the commencement of their operations" and also demanding payment of 37-1/2 percent of the royalties on that production (Utah Director's Nov. 27, 1990, Letter).

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

[3] The agreement is identified as No. NO-G-8707-1116 (Chuska III). The same parties entered into two prior operating agreements: one dated July 28, 1983, and approved on Aug. 26, 1983; the other dated Nov. 26, 1984, and approved on May 22, 1985. The latter agreement has expired.

On January 15 and 17, 1991,[4] the Area Director wrote to the Utah Director, stating:

> You have requested information from our office concerning the 37-1/2 percent oil royalty paid from Navajo Tribal leases to the State of Utah on behalf of Navajo Indians residing in the Aneth extension area of San Juan County, Utah.
>
> We do not receive copies of the Forms 2014 and 3160 that are filed by oil companies with the Minerals Management Service. The information contained on these forms is received via MMS funds distribution and production reports, which are received on a monthly basis (sample copies are enclosed).
>
> The 37-1/2 percent of oil royalties paid to the State of Utah is calculated on the income from identified leases, which MMS deposits into the U.S. Treasury on behalf of the Navajo Tribe of Indians.
>
> You have further requested information on Chuska Energy Company's oil production within the Aneth extension oil field, which are conducted under an Operating Agreement approved July 20, 1987. * * *
>
> We have reviewed the operating agreement to determine whether the [Utah Navajo Oil Royalty Trust] Fund is entitled to 37-1/2 percent of a royalty paid to the Navajo Nation by Chuska. In our opinion, the Agreement is an operating agreement under the provision of 25 U.S.C. 2102. We find that the Operating Agreement creates a principal-agent relationship between the Navajo Nation and Chuska * * *. A principal-agent relationship is not an element of a lessor-lessee relationship. The Operating Agreement is not a lease. It should be noted that 25 U.S.C. 2102 lists operating agreements and lease agreements as two distinct agreements among others that may be entered into by a tribe. The Navajo Nation chose an Operating Agreement, not a lease agreement.
>
> Based on the above findings, I have concluded that the Operating Agreement in question is not a lease. The statute in question specifically refers to tribal leases. Since the Chuska Operating Agreement is not a lease, 37-1/2 percent of the Tribe's royalty from the Operating Agreement need not be paid to the State of Utah for the benefit of the Fund.

The Area Director informed the Utah Director of Utah's right to appeal his conclusion to this Board. The Board received appellants' notice of appeal on February 19, 1991. Briefs have been filed by appellants, the Area Director, the Nation, and Chuska. In addition, numerous motions and other filings have been made by the parties.

Motion for Stay of Proceedings

On September 13, 1991, after briefing was completed in this appeal, appellants filed a claim in the United States Claims Court, seeking damages for its failure to receive royalties under, *inter alia*, the operating agreement at issue in this appeal. *State of Utah* v. *United States*, No. 91-1428L, U.S. Claims Court.[5] Subsequently, appellants moved for a stay of proceedings before this Board pending final resolution of their claim in the Claims Court. Appellants contend that the Board cannot grant it the relief it seeks and that a stay "will allow all issues surrounding three [Chuska/Nation] mineral agreements to be resolved in the Claims Court, a forum that is able to award

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[4] The two letters appear to be identical.

[5] Other pending proceedings have a peripheral relation to this appeal. In June 1991, the Nation filed suit against the State of Utah in Federal district court, challenging state taxation of oil and gas production from tribal land in San Juan County. *Navajo Nation* v. *State of Utah*, Civ. No. 91-C-670J (D. Utah). Chuska has filed a complaint in intervention in that litigation. In addition, state administrative proceedings have been initiated with respect to property and severance taxation of the same production. *Chuska Energy Co.*, Case Nos. 91-1235 and 91-1256, Utah State Tax Commission. Appellants state that they are seeking coordinated discovery in all these proceedings and believe that the Claims Court can provide for such coordination. Appellants have also filed a motion for discovery in this appeal and ask the Board to order coordinated discovery if it declines to stay proceedings.

[appellants] the monetary relief they have requested" (Appellants' Sept. 18, 1991, Motion at 2). They state that they seek "a stay and not dismissal in order to prevent starting over should the Claims Court deny jurisdiction over some aspect of the present appeal." *Id.* at 8.

The Area Director, the Nation, and Chuska oppose appellants' motion.

The Board sees no benefit in staying proceedings at this point. The parties' briefs have all been filed. If the Claims Court finds that it has jurisdiction over appellants' claim, its consideration of the matter will presumably benefit from a final agency decision on the underlying issue. Appellants' motion for a stay of proceedings is denied.

Discussion and Conclusions

Despite the voluminous filings in this appeal, the issues raised by appellants may be simply framed: (1) Does the 37-1/2-percent royalty provision in the 1933 Act apply to non-lease agreements? and (2) is the 1987 operating agreement actually a lease despite its title? The first issue is a matter of construction of the 1933 Act; the second a matter of construction of the operating agreement.

The 1933 Act provides that "37-1/2 per centum of the net royalties accruing [from oil and gas production] derived from tribal leases shall be paid to the State of Utah." Appellants contend that "tribal leases" must be construed to include non-lease agreements because the relevant rules of statutory construction require this result. Further, relying upon their analysis of the Act's legislative history, they contend that Congress intended Utah to receive 37-1/2 percent of *all* tribal oil and gas revenues from the lands subject to the 1933 Act.

This latter contention proposes an especially broad construction of the 1933 royalty provision--a construction which would apparently encompass, not only tribal proceeds derived from leases or other agreements, but also tribal oil and gas revenues derived in any other manner. In support of this construction, appellants point to a statement appearing in the House and Senate reports on the 1933 Act, in which it is indicated that "[p]rovision is made for disposition of *any revenue* arising from any oil and gas which might be discovered in the area." H.R. Rep. No. 1883, 72d Cong., 2d Sess. 2 (1933); S. Rep. No. 1199, 72d Cong., 2d Sess. 2 (1933) (italics added). Also in support of this construction, appellants contend that, in 1933, leasing was the only way in which oil and gas revenues could be produced from tribal lands. Therefore, appellants reason, Congress assumed that its statutory language would encompass all oil and gas revenues from tribal lands; *ergo*, Congress intended that 37-1/2 percent of *all* tribal oil and gas revenues from the subject lands would go to Utah.

The legislative history is not particularly helpful on this point. In fact, it is generally unhelpful with regard to the issues raised in this appeal. Appellants' reliance on the quoted statement is strained. At best, the statement is ambiguous. It simply declares that provision is made for disposition of "any revenue," not that appellants were to receive a portion of "any revenue."

There are also a number of other problems with appellants' broad interpretation. First, it renders the statutory phrase "derived from tribal leases" surplusage, a result generally looked upon with disfavor. *E.g., In re Surface Mining Regulation Litigation*, 627 F.2d 1346, 1362 (D.C. Cir. 1980); 2A N. Singer, *Sutherland Statutory Construction* § 46.06 (5th ed. 1992).

Second, under appellants' construction, Utah would apparently be entitled to receive 37-1/2 percent of the Nation's revenues from taxes it imposes on oil and gas production, as these surely fall within the scope of "any revenue" from such production. Further, if the Nation were to decide to become its own producer, appellants' reading would entitle Utah to 37-1/2 percent of the producer's portion of revenues as well as 37-1/2 percent of the owner's portion. Appellants do not address these seemingly indisputable consequences of their "any revenue" construction. Yet these consequences are so extreme that Congress should not be deemed to have intended them without at least some evidence of such an intent.

Third, it is not entirely accurate to state that leasing was the only vehicle available in 1933 for oil and gas development of tribal lands. Although there were undoubtedly many practical reasons why an Indian tribe would not have chosen to produce its own oil and gas, there was no legal reason why it could not have done so. Further, there existed in 1933 a statutory provision concerning service contracts relating to Indian lands. This provision derived from an 1871 statute and is presently codified at 25 U.S.C. § 81.[6] Although it was not employed as authority for oil and gas service contracts until the 1970's, *see* discussion below, it was on the statute books in 1933.

Especially in light of several well-established principles governing interpretation of Indian statutes, discussed below, the Board cannot attribute to Congress in 1933 an intent to assign to Utah 37-1/2 percent of *all* tribal oil and gas revenues from the lands subject to the Act. Even without the assistance of these principles, the Board would reject appellants' broad construction because it simply does too much violence to the plain language of the statute.

The remainder of appellants' statutory construction arguments appear aimed at a slightly narrower construction, *i.e.*, one in which the term "tribal leases" is read to include other kinds of agreements. This construction is narrower in the sense that tribal tax revenues and self-production revenues would presumably not be included.

[1] In support of this construction, appellants first contend that they, on behalf of the San Juan County Navajos, are entitled to the benefit

[6] 25 U.S.C. § 81 provides in part:

"No agreement shall be made by any person with any tribe of Indians * * * for the payment or delivery of any money or other thing of value * * * in consideration of services for said Indians relative to their lands * * * unless such contract be executed and approved as follows: * * * It shall bear the approval of the Secretary of the Interior and the Commissioner of Indian Affairs indorsed upon it."

of the canon which requires that statutes be construed liberally in favor of Indians and that ambiguities be resolved to the Indians' benefit. The canon must be invoked in their favor, appellants contend, because the 1933 Act requires that they administer the royalty fund for the benefit of the San Juan County Navajos.

Chuska argues that the canon, if applicable, must be invoked in favor of the Nation. The Nation argues that the canon is not applicable here because the dispute involves the interests of the Nation vis-a-vis the interests of some members of the Nation. In support of its position, the Nation cites *Northern Cheyenne Tribe* v. *Hollowbreast*, 425 U.S. 649, 655 n.7 (1976), in which the Supreme Court found that "this eminently sound and vital canon has no application [because] the contesting parties are an Indian tribe and a class of individuals consisting primarily of tribal members." Both Chuska and the Nation also argue that there is actually no need to call upon the canon at all because there is no ambiguity in the 1933 Act.

The Board considers whether the canon is properly invoked here and, if so, in whose favor.

On its face, the term "tribal leases" appears clear enough. Indeed, appellants appear to be seeking to create an ambiguity rather than to resolve one. The Supreme Court has stated that "[t]he canon * * * does not permit reliance on ambiguities that do not exist; nor does it permit disregard of the clearly expressed intent of Congress." *South Carolina* v. *Catawba Indian Tribe*, 476 U.S. 498, 506 (1986) (citation omitted).

More recently, however, the Court has indicated that a statutory term may be clear as to one effect and ambiguous as to another. In *County of Yakima* v. *Confederated Tribes and Bands of the Yakima Indian Nation*, 112 S. Ct. 683 (1992), the Court construed language in a 1906 amendment to the General Allotment Act, which provided that, after issuance of a fee patent for an allotment, "all restrictions as to sale, incumbrance, or taxation of said land shall be removed." 25 U.S.C. § 349. The Court held that this language manifested a clear intent to authorize real property taxation of fee patented land but was ambiguous with respect to excise taxation of the sale of land. The Court stated:

> When we are faced with these two possible constructions [*i.e.*, either authorizing or not authorizing excise taxation], our choice between them must be dictated by a principle deeply rooted in this Court's Indian jurisprudence: "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." * * *
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> * * * * * * *
>
> The short of the matter is that the General Allotment Act explicitly authorizes only "taxation of . . . land," not "taxation with respect to land," "taxation of transactions involving land," or "taxation based on the value of land." Because it is eminently reasonable to interpret that language as not including a tax upon the sale of real estate, our cases require us to apply that interpretation for the benefit of the Tribe. [Citations omitted.]

112 S. Ct. at 693-94.

The royalty provision in the 1933 Act is subject to a similar analysis. The provision is clear in that it unmistakably authorizes payment of 37-1/2 percent of royalties from tribal leases to the State of Utah. At the same time, it is arguably ambiguous as to whether other kinds of agreements may be encompassed within the term "tribal leases." If the term is ambiguous, however, a further determination must also be made. Are appellants, on behalf of the San Juan County Navajos, entitled to the benefit of the ambiguity? Is the Nation? Or, in light of *Hollowbreast*, should the canon be disregarded even if there is an ambiguity?

As noted above, appellants argue that the canon must be invoked on behalf of the San Juan County Navajos because the royalty provision was enacted for their benefit. The cases relied upon by appellants, *Sakezzie I* and *Sakezzie II, supra*, indicate that Aneth Extension Indians were entitled, vis-a-vis appellants, to the benefit of ambiguities in the 1933 Act.[7] However, the context in which appellants seek to apply the canon here is clearly not analogous to that in *Sakezzie*; the fact that the canon may be invoked against a state or other non-Indian party does not stand for the proposition that it may also be invoked against an Indian tribe.

Further, whatever benefits the San Juan County Navajos are entitled to receive under the 1933 Act, a Supreme Court decision subsequent to *Sakezzie* has made it clear, if there were any doubt, that the principal beneficiary of the Act is the Nation. In *United States* v. *Jim*, 409 U.S. 80 (1972), the Supreme Court addressed a challenge to the 1968 amendment brought by the Indian residents of the Aneth Extension. The Aneth residents claimed that the 1968 amendment deprived them of vested rights because it enlarged the class of Indians for whom expenditures could be made from the 37-1/2-percent royalty fund. The Court rejected their argument, stating:

> Congress in 1933 did not create constitutionally protected property rights in the appellees [*i.e.*, the Aneth residents]. The Aneth Extension was added to a tribal reservation, and the leases which give rise to mineral royalties are tribal leases. It is settled that "[w]hatever title the Indians have is in the tribe, and not in the individuals, although held by the tribe for common use and equal benefit of all the members." * * * To be sure, the 1933 Act established a pattern of distribution which benefited the appellees more than other Indians on the Navajo Reservation. But it was well within the power of Congress to alter that distribution scheme.[3]
>
> ---
>
> [3] We intimate no view as to the rights a *tribe* might have if Congress were to deprive *it* of the value of mineral royalties generated by tribal lands. [Citations and footnote omitted; italics in original.]

409 U.S. at 82.

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[7] *Sakezzie* was a suit brought against Utah by Navajos residing in the Aneth Extension area, concerning expenditures from the 37-1/2-percent royalty fund under the 1933 Act. The court found, *inter alia*, that the narrow construction of the term "tuition" urged by Utah, *i.e.*, enrollment charges only, should be rejected in favor of a construction which included transportation and room and board. In reaching this conclusion, the court relied in part on the canon requiring construction of ambiguous provisions in favor of Indians. *Sakezzie II*, 215 F. Supp. at 17.

Not only did the 1933 Act vest property rights in the Nation, it also enlarged the Nation's governmental jurisdiction. Accordingly, the Nation, both as property owner and sovereign, would clearly appear to be an appropriate beneficiary of the canon in this case. As evident in some of the many formulations of the canon, protection of tribal sovereignty is one of the reasons for its existence. *See, e.g., White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136, 143-44 (1980): "Ambiguities in federal law have been construed generously in order to comport with * * * traditional notions of sovereignty and with the federal policy of encouraging tribal independence."

The fact remains, however, that the San Juan County Navajos have an interest in the royalty provision. They are likely to lose some services if the funds go to the Nation, given the Nation's law and policy that revenues from tribal property are held in common for all tribal members.[8] *See* Nation's Brief at 2. In light of *Hollowbreast*, the Board will not apply the canon here.

Even though this often-cited canon will be set aside in this case, ample guidance is available from the body of Indian law developed in the Supreme Court's many decisions in the area. Indeed, the principles derived from those decisions must govern the outcome here.

[2] The Nation cites *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49 (1978). In that case, the Court construed the Indian Civil Rights Act of 1968 (ICRA). It observed: "Two distinct and competing purposes are manifest in the provisions of the ICRA: In addition to its objective of strengthening the position of individual tribal members vis-a-vis the tribe, Congress also intended to promote the well-established federal 'policy of furthering Indian self-government.' " 436 U.S. at 62. The Court found that reading Federal remedies for civil rights violations into the ICRA, while serving the first purpose, "plainly would be at odds with the congressional goal of protecting tribal self-government." *Id.* at 64. Stating further that "[w]here Congress seeks to promote dual objectives in a single statute, courts must be more than usually hesitant to infer from its silence a cause of action that, while serving one legislative purpose, will disserve the other," *id.*, the Court declined to read Federal remedies into the statute.

The 1933 Act presents a clear parallel to the ICRA in that it manifests two competing purposes: to enlarge the Nation's property and governmental base, thus promoting the Nation's self-government; and to give the San Juan County Navajos rights to special services from some of the income that would otherwise have gone to the Nation. Clearly, the interpretation urged by appellants will disserve the first purpose, although it will serve the second. *Martinez* teaches that, in such a case, the words of the statute should not be expanded beyond

[8] The 1987 operating agreement allocates 2 percent of the Nation's share of gross proceeds to the Nation's Chapters affected by operations under the agreement. Paragraph 15(a).

their clear meaning, particularly where to do so would result in an intrusion upon tribal self-government.

In *Martinez*, the Supreme Court recognized and gave effect to the longstanding Federal policy of fostering tribal self-government. Other authorities demonstrate that this policy is based upon, *inter alia*, a belief that tribal governments, rather than the Federal Government or state governments, are the entities best able to make governmental decisions affecting tribal members and best able to provide the services necessary to tribal members' well-being. *E.g.*, Indian Self-Determination Act of 1975, *as amended*, 25 U.S.C. §§ 450-450n; President Reagan's January 24, 1983, Statement on Indian Policy, 19 Weekly Comp. Pres. Doc. 98;[9] Indian Child Welfare Act, 25 U.S.C. §§ 1901-1963; *Mississippi Band of Choctaw Indians* v. *Holyfield*, 490 U.S. 30, 44-45 (1989). While this policy, in itself, cannot dictate the outcome here, it is a "backdrop" against which the issues must be addressed. *E.g., Bracker, supra*, 448 U.S. at 143: "[T]raditional notions of Indian self-government are so deeply engrained in our jurisprudence that they have provided an important 'backdrop' * * * against which vague or ambiguous federal enactments must always be measured." (Citation omitted.) *See also Martinez*, 436 U.S. at 60.

[3] A line of cases with clear parallels to the present appeal is the one dealing with state taxation of Indians. To be sure, state taxation, per se, is not involved here. Yet, the effect of the royalty provision is much the same as a tax--Utah is given the right to a portion of the revenues from the Nation's land, revenues which would otherwise go to the Nation.[10] Indeed, the high percentage of Utah's share makes the royalty provision a greater burden upon the Nation than most taxes would probably be.[11]

In *County of Yakima*, 112 S. Ct. at 688, the Supreme Court stated: "[O]ur cases reveal a consistent practice of declining to find that Congress has authorized state taxation unless it has 'made its intention to do so unmistakably clear.' *Montana* v. *Blackfeet Tribe*, 471 U.S. 759, 765 (1985); see also *California* v. *Cabazon Band of Mission Indians*, 480 U.S. 202, 215 n.17 (1987)." This line of cases favors narrow construction of any congressional authorization to tax and, by analogy, of any other statutory provision with a similar effect. With respect to the 1933 Act, these cases counsel rejection of

[9] President Reagan's policy statement was reaffirmed by President Bush on June 14, 1991, 27 Weekly Comp. Pres. Doc. 783.

[10] Historically, royalty-sharing provisions and taxing authorizations have been viewed as alternative methods of accomplishing the same thing--allowing the states to receive revenue from public or Indian lands. The 1920 Mineral Leasing Act, governing leasing on public lands, contained a provision assigning 37-1/2 percent of bonuses, royalties, and rentals to the affected states "to be used * * * for the construction and maintenance of public roads or for the support of public schools or other public educational institutions." Act of Feb. 25, 1920, § 35, 41 Stat. 437, 450. Similar provisions were considered for inclusion in a 1927 statute concerning Executive Order Indian reservations, Act of Mar. 3, 1927, 25 U.S.C. §§ 398a-398e, but were ultimately rejected in favor of a provision authorizing state taxation. *See Cotton Petroleum Corp.* v. *New Mexico*, 490 U.S. 163, 180-81 n.12 (1989). *See also* L. Kelly, *The Navajo Indians and Federal Indian Policy* 48-103 (1968) (Appendix A, Exhibit 2, to appellants' opening brief); J. R. Alley, *The 1933 Addition to the Navajo Reservation in Utah* (1989) (Exhibit B to the Nation's brief).

[11] *Cf. Cotton Petroleum Corp.*, 490 U.S. at 186-87 n.17, and accompanying text (distinguishing its holding--that states were not preempted from taxing oil producers operating on tribal lands--from the different result in *Montana* v. *Crow Tribe of Indians*, 484 U.S. 997 (1988), on the basis that the latter case involved unusually high taxes, *i.e.*, 32.9 percent).

appellants' expanded construction of the term "tribal leases" in favor of a construction limited to the clear and unmistakable meaning of the term.

Another factor that must be taken into account here, in order to arrive at the proper construction of the term "tribal leases," is the relation between the 1933 Act and IMDA. Appellants argue that IMDA could not have changed its right to receive royalties without an express statement to that effect. They argue further that the only way the 1933 Act and IMDA can be harmonized is to construe the royalty provision in the 1933 Act as applicable to any kind of agreement entered into under IMDA.

The Board cannot agree that this is the only way the two statutes may be read in harmony. The most obvious way to do so would be to recognize that the 1933 royalty provision continues to apply to leases, whether entered into under IMDA or under earlier statutory authority, but does not apply to agreements in other forms.[12] This construction does the least violence to the statutes. It recognizes that the 1933 royalty provision was not impliedly repealed by IMDA but also that its reach was not impliedly expanded by IMDA. Further, it recognizes that the term "lease" has the same meaning in both statutes. Clearly, in IMDA, where the term "lease" is included in a list of several forms of agreement, Congress did not intend that "lease" would incorporate all the other forms.

If any doubt remains as to the proper relation of these two statutes, the Supreme Court's decision in *Montana* v. *Blackfeet Tribe, supra*, is helpful in resolving it. In that case, the Court held that tribal royalties from leases entered into under the 1938 Indian Mineral Leasing Act, 25 U.S.C. §§ 396a-396f, could not be taxed by states, despite taxing permission given in a 1924 statute, 25 U.S.C. § 398. The 1938 Act was silent regarding taxation, just as IMDA is silent regarding the royalty provision in the 1933 Act.

In *Blackfeet Tribe*, Montana made arguments similar to those made by appellants here. The Court rejected them:

> [Montana] argues that nothing in the 1938 Act is inconsistent with the 1924 taxing provision and thus that the provision was not repealed by the 1938 Act. * * * The State also notes that there is a strong presumption against repeals by implication * * * especially an implied repeal of a specific statute by a general one. * * * Thus, in the State's view, sound principles of statutory construction lead to the conclusion that its taxing authority under the 1924 Act remains intact.

[12] IMDA authorizes tribes to enter into leases as well as many other forms of agreement.

Several statutes authorizing tribal mineral leasing were enacted prior to IMDA. The first general authorization was the Act of Feb. 28, 1891, 25 U.S.C. § 397, which authorized leasing of tribal lands for mining purposes for periods not to exceed 10 years. The 1891 Act was amended by the Act of May 29, 1924, 25 U.S.C. § 398, which authorized leasing of tribal lands "for oil and gas mining purposes for a period of not to exceed ten years, and as much longer as oil and gas shall be found in paying quantities." A 1927 statute authorized oil and gas leasing on Executive Order reservations, in accordance with 1924 Act. 25 U.S.C. §§ 398a-398e. In 1938, Congress enacted the comprehensive Indian Mineral Leasing Act, 25 U.S.C. §§ 396a-396f, authorizing mineral leasing of tribal lands "for terms not to exceed ten years and as long thereafter as minerals are produced in paying quantities."

> The State fails to appreciate, however, that the standard principles of statutory construction do not have their usual force in cases involving Indian law. As we said earlier this Term, "[t]he canons of construction applicable in Indian law are rooted in the unique trust relationship between the United States and the Indians." * * * Two such canons are directly applicable in this case: first, the States may tax Indians only when Congress has manifested clearly its consent to such taxation * * * second, statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit. [Citations omitted.]

471 U.S. at 765-66. Relying in part on the canons cited, the Court held that "if the tax proviso [in the 1924 Act] survives at all, it reaches only those leases executed under the 1891 Act [, 25 U.S.C. § 397,] or its 1924 amendment." 471 U.S. at 768. Here, the parties agree that the 1933 royalty provision was not repealed by IMDA and that it continues to apply to leases, even leases entered into under IMDA. *Blackfeet Tribe* teaches, however, that the provision should not be read into IMDA with the expanded application sought by appellants.[13]

The Board holds, for all the reasons discussed, that the royalty provision in the 1933 Act may not be expanded, beyond its clear language, to include non-lease agreements entered into under IMDA.

Appellants' second argument is that the 1987 operating agreement between the Nation and Chuska is actually a lease although not so termed. Appellants identify a number of elements which they contend are typical lease provisions and argue that, because the operating agreement contains such provisions, even though it also contains provisions typical of other kinds of agreements, it must be considered a lease. Appellants rely primarily on a California case, *Los Angeles County* v. *Continental Corp.*, 113 Cal. App. 2d 207, 248 P.2d 157 (1952), in which a "Drilling and Operating Agreement" was found to be a lease for purposes of California tax law. Appellants further contend that the Nation and Chuska have treated the operating agreement as a lease. Inorder to prove their allegations in this regard, they seek extensive discovery.

Chuska contends that various kinds of oil and gas agreements may well have similar provisions because they are intended to accomplish similar purposes. It contends, however, that the one fundamental distinction between a lease and an operating agreement is that "a mineral lease necessarily involves an actual *conveyance* of a working interest in minerals, whereas an operating agreement does not" (Chuska's Brief at 51) (italics in original). Chuska also identifies several provisions of the agreement which it contends distinguish the agreement from a lease.

The parties cite extensively from state and Federal law developed in a non-Indian context. While such sources are useful as guidance, it is Federal Indian law which controls where issues concerning Indian

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[13] *See also* 25 U.S.C. § 2105, which provides: "Nothing in [IMDA] shall affect, nor shall any Minerals Agreement approved pursuant to [IMDA] be subject to or limited by, [the 1938 Indian Mineral Leasing Act], or any other law authorizing the development or disposition of the mineral resources of an Indian or Indian tribe." While the 1933 Act does not authorize development of mineral resources, it clearly authorizes disposition of proceeds from development and therefore presumably falls within the scope of this provision. The sense of the provision is the same as the conclusion reached by the Board under the *Blackfeet Tribe* analysis--the 1933 royalty provision is not affected by IMDA but also does not limit non-lease agreements entered into under IMDA.

trust property are concerned. *See, e.g., Benson-Montin-Greer Drilling Corp.* v. *Acting Albuquerque Area Director*, 21 IBIA 88, 96, 98 I.D. 419, 423-24 (1991); *Mobil Oil Corp.* v. *Albuquerque Area Director*, 18 IBIA 315, 323-31, 97 I.D. 215, 219-23 (1990).

[4] The relevant Federal Indian law necessarily includes the 1933 Act. *Cf.* 1 H. Williams and C. Meyers, *Oil and Gas Law* § 207 (1991): "[W]hen the question in issue is whether an instrument is a 'lease' as such term is used in a particular statute * * * the question ultimately is whether the instrument in question has the characteristics which the legislature had in mind in employing the word 'lease' in the statute." Thus, the inquiry here bears some similarity to the one above, in the sense that congressional intent must be ascertained. Here, it must be determined whether the operating agreement is a lease of Indian land as Congress understood that term in 1933.

In 1933, leases of Indian lands had long been recognized as conveyances, having been explicitly so defined by Congress. *See* 25 U.S.C. § 177, derived from the Indian Non-Intercourse Act of 1834: "No purchase, grant, *lease, or other conveyance* of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution." (Italics added.) None of the statutes authorizing mineral leasing of tribal lands (see footnote 12, *supra*) expressed any intent to alter the Non-Intercourse Act concept of a lease as a conveyance. Further, as appellants concede, mineral leasing of Indian lands followed a traditional pattern in the 1930's; it was not until much later that creative kinds of mineral development agreements began to be employed. Thus, it seems beyond dispute that Congress had traditional tribal leases in mind, leases in which a conveyance was effected, when it employed the term "tribal leases" in the 1933 statute.

Appellants argue that IMDA blurs the distinction between leases and other mineral agreements. IMDA clearly does so for purposes of IMDA itself. For a few years prior to enactment of IMDA, the Department of the Interior reviewed and approved tribal non-lease mineral agreements under 25 U.S.C. § 81, while continuing to approve leases under the 1938 Indian Mineral Leasing Act. The Department supported enactment of IMDA, among other reasons, because it would remove the necessity for making a determination as to whether a particular agreement was a lease or a service agreement.[14] IMDA provides the same review and approval procedures for all agreements

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[14] The Department stated, *inter alia:*

"Since 1975, the Department has approved a number of non-lease ventures involving the development of mineral resources, pursuant to [25 U.S.C. § 81]. * * * [T]he approval procedure for non-lease ventures under section 81 requires a rather cumbersome case-by-case analysis to determine whether the document submitted for approval is a service agreement within the purview of section 81 and does not convey a leasehold interest within the purview of the 1938 Act, or an interest in land within the purview of the Indian Non-Intercourse Act (R.S. 2116; 25 U.S.C. 177). * * * [W]ith the proliferation and hybridization of non-lease ventures, it is increasingly difficult to make the determination described." S. Rep. No. 472, 97th Cong., 2d Sess. 10 (1982).

entered into under it, including leases. Recently published proposed regulations follow the example of the statute in providing a single review procedure for all IMDA agreements. Proposed 25 CFR Part 225, 56 FR 58734, 58748 (Nov. 21, 1991). A separate procedure is established under the proposed regulations for leasing of tribal lands under the 1938 Act. Proposed 25 CFR Part 211, 56 FR at 58737.[15]

The fact that IMDA removes the necessity for distinguishing between leases and other agreements, for purposes of approval under IMDA, however, is of little consequence here because, as noted above, the inquiry here is whether the operating agreement is a lease for purposes of the 1933 Act.

In a number of respects, the 1987 operating agreement is significantly different from the standard mineral lease of tribal land. For instance:

(1) No specific land is described as subject to the agreement. Rather, under Paragraph 5, Chuska is given the right to select up to 50,000 acres from among 254,000 identified acres. Even appellants concede that this provision goes beyond the typical oil and gas lease (Appellants' Opening Brief at 43-44).

(2) Rather than employing the standard lease conveyance language, the agreement provides in Paragraph 4 that the Nation "retains and appoints [Chuska] as the exclusive oil and gas operator for the land," and, in Paragraph 11, that the Nation appoints Chuska as its agent with respect to the sale of oil and gas produced.

(3) Under Paragraph 25, the Nation is vested with "the right to take and market all or any specified portion of the oil produced." Paragraph 26 vests the Nation with the right of first refusal with respect to gas produced. Under a standard lease, only the lessee would have the right to market oil.

(4) Under Paragraphs 18-20, an Operating Committee, initially established under the 1983 operating agreement, is given control over development and drilling decisions. For instance, Chuska must obtain prior approval from the committee for development of a drilling block or for drilling of a well. Chuska is also required to submit frequent and comprehensive reports to the Operating Committee. The Operating Committee consists of three members appointed by the Nation, of which one is to be chairman of the committee, and three members appointed by Chuska. *See* Paragraph 19 of the July 28, 1983, operating agreement.

(5) Under Paragraph 12, the agreement has a primary term of 8 years, at the end of which any drilling block which lacks a producing well must be surrendered. Paragraph 13 provides that the maximum

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[15] The Board confesses some puzzlement over the definition of "lease" in Part 211 of the proposed regulations, concerning tribal leasing under the 1938 Act. The definition, which is not discussed in the preamble, provides: "*Lease* means any contract, profit-sharing arrangement, joint venture, or other agreement approved by the United States under [the 1938 Act as amended] that authorizes exploration for, extraction of, or removal of any minerals." Proposed 25 CFR 211.3, 56 FR at 58738.

The Board assumes, given the Department's 1982 statement to Congress, that any agreements approved under the 1938 Act would first have been determined to be leases, even though otherwise titled. It is clear from the 1982 statement that, for purposes of the 1938 Act, the Department recognized a distinction between leases and other agreements, based upon whether or not they conveyed a leasehold interest or an interest in land.

term is 25 years. Standard Indian leases and typical leases in the industry provide for an indefinite secondary term which continues as long as oil or gas is produced in paying quantities. It is conceivable, of course, as appellants argue, that an oil and gas lease could have a finite secondary term, even though such a term is unusual. However, the tribal mineral leasing authority in use in 1933, *i.e.*, 25 U.S.C. § 398, explicitly provided for indefinite secondary terms, as did the later Indian Mineral Leasing Act. *See* footnote 12, *supra*.

It is clear that these provisions of the operating agreement vest a substantially greater degree of control in the Nation than is common under a lease, and especially under the standard form of tribal mineral lease. It is equally clear that the parties did not intend to enter into a traditional lease but, rather, intended to take advantage of the new forms of agreement authorized by IMDA.[16] Finally, there is no provision in the agreement which unambiguously effects a conveyance. For these reasons, the Board concludes that the 1987 operating agreement is not a lease within the meaning of the 1933 Act.

Appellants make one further argument--that the 1987 agreement should be construed as a lease because the parties have treated it as a lease. In support of this argument, appellants make allegations which they state they cannot prove at this time but seek to prove through discovery. Appellants allege: (1) the 1987 operating agreement is similar to a 1982 agreement which was rescinded by the Navajo Tribal Council because it was in effect a lease; (2) Chuska pays Navajo production taxes; and (3) the Operating Committee does not actually function as provided in the agreement.[17]

Appellants' first and third allegations are not only speculative but also essentially irrelevant to the issue in this appeal. Appellants have not seen the 1982 agreement and concede that their allegation regarding the agreement's contents is mere conjecture. In any event, the fact that the Tribal Council may have considered this earlier, apparently pre-IMDA, agreement to be a lease has no real bearing upon whether, as a matter of Federal law, the 1987 agreement is a lease. This is true even if, as appellants speculate, there are similarities between the 1982 and 1987 agreements. Appellants' third allegation, *i.e.*, that the Operating Committee does not function, even

[16] The agreement is one such as Congress envisioned in enacting IMDA. *See, e.g.*, H.R. Rep. No. 746, 97th Cong., 2d Sess. 4 (1982):

"The most serious problem with [the 1938 Act], is that it authorizes development of tribal oil and gas resources only by leasing. This requirement ignores the possibility of joint ventures, joint production agreements, risk service contracts, and other non-lease ventures which are commonly used in mineral development today. Such non-lease ventures can provide the vehicle by which tribes can become directly involved in management decisions. The normal lease arrangement merely turns over responsibility for all development decisions to the lessee."

[17] Appellants also alleged in their opening brief that the Nation's Resources Committee had not been involved in the approval of the 1987 agreement, in violation of tribal law. It is not clear what import this alleged violation of tribal law would have on the issue in this appeal, even if it were shown to have occurred. In any event, appellants' allegation is refuted by a Jan. 28, 1987, resolution of the Resources Committee, which recommended to the Tribal Council that the agreement be approved.

if proved, would show only that there is a compliance problem with the agreement, not that the agreement is in fact a lease.[18]

There appears to be no question as to the factual accuracy of appellants' second allegation. The Nation asserts in paragraph 25 of its complaint in *Navajo Nation* v. *State of Utah, supra*, that it imposes its possessory interest and severance taxes upon Chuska. Appellants contend that payment of the possessory interest tax, in particular, proves that Chuska is a lessee because the tax is imposed on possessory interests, which are defined as "the property rights under a lease granted by the Navajo Tribe, including the rights to the lease premises and underlying natural resources." 24 Navajo Trib. Code §§ 202, 204(1). It is true that 24 Navajo Trib. Code § 204(3) defines "lease" broadly, to include joint ventures and operating agreements. However, the fact that the Nation has defined "lease" to include operating agreements for tribal tax purposes does not show that the 1987 agreement is a lease for purposes of the 1933 Act.

For the reasons discussed, the Board concludes that the Area Director's decisions should be affirmed.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Navajo Area Director's January 15 and January 17, 1991, decisions are affirmed.[19]

ANITA VOGT
Administrative Judge

I CONCUR:

KATHRYN A. LYNN
Chief Administrative Judge

[18] *Cf.* 25 U.S.C. § 2104(a), concerning approval of agreements in existence at the time IMDA was enacted. This section provides in part: "Such review shall be limited to the terms of the agreement and shall not address questions of the parties' compliance therewith."

[19] All remaining motions are hereby denied.

April 29, 1992

DAVID J. BARTOLI

123 IBLA 27 Decided: *April 29, 1992*

Appeal from a decision of the Alaska State Office, Bureau of Land Management, that the record title interest in placer and lode mining claims AA-24982 *et al.* had been donated to the United States.

Vacated.

1. Administrative Authority: Generally--Conveyances: Interest Conveyed--Mining Claims: Title--National Park Service: Donations and Gifts

When unpatented mining claims have been donated to the National Park Service by quitclaim deed and the record before BLM discloses a dispute regarding the chain of title to the claims or the existence of encumbrances upon title to the claims, neither the regulations applicable to mining claim recordation nor the regulations governing acceptance of donated interests in real property authorizes BLM to adjudicate title to the claims and a decision purporting to do so is properly vacated.

APPEARANCES: David J. Bartoli, *pro se*.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

INTERIOR BOARD OF LAND APPEALS

David J. Bartoli (Bartoli) appeals from an October 20, 1989, decision of the Alaska State Office, Bureau of Land Management (BLM), holding that Bartoli has no interest in named placer and lode mining claims because all interest in those claims had been donated to the United States by Douglas D. Kirk (Kirk).

The mining claims involved in this case are the Kennecott Glacier Nos. 1 through 5, Hidden Creek Nos. 1 through 12, and the Donahoe Peak Nos. 1 through 30, AA-24982 through AA-24998 and AA-25449 through AA-25478. These claims are situated in the Wrangell-Saint Elias National Park and Preserve, designated by Congress on December 2, 1980, *see* 94 Stat. 2377, 2381 (1980), and are specifically described as being in secs. 25 and 36, T. 3 S., R. 13 E., secs. 30 and 31, T. 3 S., R. 14 E., secs. 1 and 5, T. 4 S., R. 13 E., and secs. 6, 28, 29, and 33, T. 4 S., R. 14 E., Copper River Meridian, Alaska.

In March and May 1979, copies of the notices of location for the claims were filed with BLM pursuant to section 314(b) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1744(b) (1988). The location notices stated that the claims had been located by C. Gordon Burdick, d.b.a. the Burdick Resources Co. (Burdick), in July 1973. Sheets attached to the location notices stated that the then-current owners of the claims also included Melvin N., Francis W., and Paul J. Barry, d.b.a. the Silver Star Mining Co.[1]

On September 6, 1984, BLM received a copy of a deed dated April 10, 1984, in which the Barrys, Richard R. Benson, and Helen Shannon, quitclaimed their interest in the claims to Douglas D. Kirk.[2] BLM subsequently received a copy of another deed dated April 13, 1984, in which Burdick also quitclaimed whatever interest he then had in the claims to Kirk.

Other than the 1985 affidavits of annual labor filed September 30, 1985, there is nothing in the record indicating that BLM would have been aware that Bartoli had any interest in the mining claims before May 21, 1986.[3] On that date, BLM received a notarized statement executed on May 19, 1986, by William O. Vallee (Vallee), a minerals title examiner and BLM-certified title abstracter. In his statement, Vallee states: "[I]n consideration of court testimony heard in the Alaska Superior Court, Case number 3AN-84[-]11463, *Gofur Mining and Development Company, Inc.* vs. *David J. Bartoli*, and pursuant to 30 U.S.C. 28 (1982), it is my opinion that David J. Bartoli is a valid Co-owner of [the] mining claims."[4] (Italics added.)

An assignment from Kirk, acting personally and on behalf of GoFur, to Bartoli (Assignment) was attached to Vallee's statement. The stated reason for entering into the Assignment was partial settlement of the GoFur-Bartoli lawsuit.[5] Paragraph 2 of the Assignment provides for payment of "five percent (5%) of any and all net profits realized from the sale of any of the [subject] mining claims, or sale of any ore or minerals produced from any ore extracted under said mining claims."[6] *Id.* In furtherance of this intent, Bartoli was granted the right to inspect the claims and to audit Kirk's books regarding the claims. At paragraph 7 the Assignment provides:

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[1] In response to a BLM request, Melvin N. Barry indicated that the Barrys had purchased the Kennecott Glacier claims from Burdick in 1973, and that the location notices had been posted by him, at their insistence, in July 1973. The location notices for the Kennecott Glacier claims also reflected a June 1963 location date, which was presumably the date Burdick originally located the claims.

[1] Kirk is named as the owner of the claims and president of the GoFur Mining and Development Co., Inc. (GoFur), on affidavits of annual labor, filed by Bartoli in 1984, and Bartoli is referred to as GoFur's "Alaska Operation Manager." In the 1985 affidavits filed by Bartoli, Kirk and Bartoli are listed as co-owners, and in the 1986 and subsequent affidavits and notices of intent Bartoli is named as the sole owner.

[3] On Nov. 29, 1984, BLM received a copy of a "Contract and Assignment" executed by Bartoli and Kirk in 1983. That document provided for assignment of "options" on the Donahoe Peak claims and other claims not involved here, from Bartoli to Kirk, and for Bartoli to assist Kirk in obtaining certain "mining rights." *Id.* at 1. The expressed purpose of the contract was to allow Kirk to conduct operations on the consolidated properties. Kirk agreed to pay 5 percent "of all operations pertaining to the mines" to a "designated trust account." *Id.* It is unclear whether Bartoli was the beneficiary, because the contract later says that no more than 5 percent "royalties" are to be paid to the "original claim holders." *Id.* at 3. At the time, the Donahoe claims were apparently owned by Burdick and the Barrys. Bartoli was to receive a salary and the reimbursement of all justified expenses. On Oct. 11, 1983, Bartoli submitted a copy of a June 17, 1983, handwritten "pre-contract agreement," in which Kirk agreed to give Bartoli 5 percent "of the total operation," but we are not sure what was meant by "total operation." In any case, the agreement provided that it would be replaced by a formal contract, which we assume to be the 1983 contract. Nothing in that contract indicates that Bartoli held an interest in the title to any of the claims.

[4] In his May 1986 statement Vallee incorrectly refers to the claims as "lode" claims. The Kennecott claims are placer claims.

[5] Paragraphs 1(H), 4, 8, and 11 of the assignment were evidently incorporated to comply with a Sept. 18, 1985, order by Superior Court Judge Milton M. Souter in *GoFur* v. *Bartoli, supra*, granting Bartoli's "Motion to Decide Assignment Language." A copy of the order was submitted to BLM on June 23, 1987.

[6] The assignment includes other named claims and mines, and any other mining claims in the Wrangell Mountains, Chitina Recording District, owned by Kirk.

April 29, 1992

In the event that Assignor shall determine that any interest they have in the above claims no longer ha[s] profitable value and it is their intention to forfeit any right or interest they may have in the above claims, they shall assign to Assignee any and all interest to the above claims that Assignor has, to the extent permitted by law.

Id. at 2. Paragraph 8 of the same document provides that Kirk is to file all required reports regarding the claims, including annual affidavits of labor, and is to notify Bartoli if he intends not to do so. Finally, paragraph 11 provides that

any conveyance or sale of said mining claims shall be made in good faith in exchange for legal tender of the United States, or, if said claims are bartered, shall be a good faith exchange for goods having marketable title, and Assignee shall be entitled to a security interest on his portion of the value of net profit.

Id. at 3. The Assignment was executed by Bartoli on October 7, 1985, but the document in the file was not executed by Kirk.[7]

Also attached to Vallee's statement is an October 22, 1985, letter in which Bartoli notified Kirk that October 22 was the last day to "honor the * * * settlement" of the lawsuit. In addition, Bartoli notified Kirk that he had "spent $141.00 saving the unpatent[ed] claims from loss by [the] timely and correct filing of assessment [work affidavits] which was to be done by Kirk."[8] Finally, Bartoli directed Kirk to notify him before November 1, 1985, whether Kirk intended to operate the claims in 1986, so that Bartoli could file timely operating plans if Kirk did not intend to do so. He also stated: "I will * * * assume that if you do not plan to operate in 1986 following no operations in 1985, you are abandoning your interest in the claims. As per Page 6 of the court transcript and Paragraph 7 of the Assignment, I assume this would be your intent to forfeit."

On June 4, 1986, Bartoli filed a petition with BLM seeking to have BLM declare him the sole owner of the claims. Bartoli asserted that he and Kirk had been co-owners of the claims (Petition at 1), and Kirk had forfeited his interest to Bartoli pursuant to 30 U.S.C. § 28 (1988), when Kirk had failed to contribute his share of the expense of assessment work performed by Bartoli during the 1985 assessment year, after having received notice to do so in the October 1985 letter. 30 U.S.C. § 28 (1988) provides in relevant part:

Upon the failure of any one of several co[-]owners to contribute his proportion of the expenditures required hereby [$100 worth of labor or improvements], the co[-]owners who have performed the labor or made the improvements may, at the expiration of the year, give such delinquent co-owner personal notice in writing * * * and if at the expiration of ninety days after such notice in writing * * * [he] should fail or refuse to contribute his proportion of the expenditure required by this section, his interest in the claim shall become the property of his co-owners who have made the required expenditures.

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[7] We are not sure that Kirk signed the "Assignment." However, in his Nov. 30, 1987, memorandum to the National Park Service (NPS), the Deputy Regional Solicitor stated that Kirk signed that document on May 20, 1986.

[8] Bartoli filed the 1985 assessment year affidavits of annual labor. All of the affidavits stated that not less than $100 per claim in assessment work had been performed by Kirk, Bartoli, and others.

By letter dated June 26, 1986, the Deputy Regional Solicitor responded to Bartoli's petition on behalf of BLM, stating that BLM has no jurisdiction to resolve private-party disputes regarding ownership of mining claims, and thus has no right to resolve a dispute between co-owners involving the forfeiture provisions of 30 U.S.C. § 28 (1988). The Deputy Regional Solicitor correctly noted that these disputes must be resolved by the parties, and, if necessary, the parties must resort to a local court of competent jurisdiction.

On December 17, 1986, BLM received donations in the form of quitclaim deeds signed by Kirk on September 12, 1986. Kirk donated all of his right, title, and interest in the claims, if any, to the United States. By notice dated May 26, 1987, BLM, on behalf of the United States, accepted the donation of Kirk's interest in the mining claims, stating: "However, the case files will not be closed in order to protect whatever interest, if any, Mr. Bartoli has in these claims." This notice was also served on Bartoli.

On June 23, 1987, Bartoli objected to BLM's acceptance of the donation, contending that Kirk had no interest in the claims to donate to the United States. He specifically stated that the donation was prohibited by paragraphs 7 and 11 of the Assignment and by Judge Souter's September 1985 order incorporating paragraph 11 in the Assignment. He also asserted that Kirk's co-ownership interest terminated under 30 U.S.C. § 28 (1988), effective January 1, 1986.

In a November 30, 1987, memorandum the Deputy Regional Solicitor gave NPS his opinion regarding whether Bartoli had a title interest in the claims when Kirk made his donation to the United States. He noted that, under the forfeiture provisions of 30 U.S.C. § 28 (1988), Bartoli must have been a co-owner of the claims in order to have acquired the full title interest. After reviewing all of the evidence then before him, including documents submitted by Bartoli, the Assignment and Judge Souter's September 1985 order, the Deputy Regional Solicitor stated:

> We cannot conclude from the available evidence that Bartoli is an owner of the claims under consideration. All that the documents prove is that he has a right to certain royalties. If that is his only interest, he was never a co-owner and Kirk's donation passed complete title to the United States.

(Memorandum to the Regional Director, Alaska Region, NPS, dated Nov. 30, 1987, at 3).

However, because of lingering doubts regarding Bartoli's interest in the claims on the date of donation, the Deputy Regional Solicitor outlined three possible courses of action NPS might take to resolve the matter: (1) a BLM show cause order, (2) a Government contest, or (3) a quiet title action.[9] He then recommended that BLM issue an

[9] The Deputy Regional Solicitor's apparent uncertainty stemmed from the following stated concerns:

"Bartoli does have a statement from a title abstracter concluding he is a co-owner. The statement does not set out the basis for the conclusion but does raise the possibility that there are title documents we have not seen which support Bartoli's claim of ownership. There is, for one thing, the statement on the 1985 affidavits of annual labor that Bartoli and Kirk are co-owners. These affidavits are, however, signed only by Bartoli and could be self-serving. Along the same line, while the State court litigation has not resulted in a determination that Bartoli is a co-owner, order to show cause requiring Bartoli to demonstrate that he had a title interest in the claims at the time of donation.

By memorandum dated December 10, 1987, NPS formally sought BLM action to resolve the question of ownership pursuant to the Deputy Regional Solicitor's recommendation. By order dated May 2, 1989, BLM directed Bartoli to show cause why the claims should not "remain as a donation to the United States," affording him 30 days from receipt of the order to submit evidence "that he has an actual title interest * * * in the * * * claims." BLM concluded: "Failure to respond within the time allowed will result in the mining claims being accepted as donated to the United States by the legal owner and the case files will be closed."[10]

Bartoli responded to BLM's show cause order on July 5, and again on October 11, 1989, voicing his opposition to BLM's acceptance of Kirk's donation of the mining claims.[11] He argued that Kirk was not an owner of any of the claims at the time of the donation, reiterating his contentions that Judge Souter's September 1985 order, the Assignment, and 30 U.S.C. § 28 (1988), precluded Kirk from conveying a title interest in the claims.

Relying on the Deputy Regional Solicitor's November 1987 memorandum and the fact that Bartoli had submitted no additional evidence, BLM issued its October 1989 decision that Bartoli had no interest in the claims and that the record title interest in the claims had been donated to the United States. Bartoli has appealed the October 1989 BLM decision.

At the outset, we note the nature of BLM's October 1989 adjudication. BLM did not undertake that adjudication to determine whether the claims are valid under the general mining laws. That duty is clearly committed to the Department. *See Best* v. *Humboldt Placer Mining Co.*, 371 U.S. 334, 336-38 (1963); *Ideal Basic Industries, Inc.* v. *Morton*, 542 F.2d 1364, 1367-68 (9th Cir. 1976). Absent record evidence clearly showing invalidity, the validity of mining claims can be determined only through a contest proceeding, after giving notice to and affording all of the claimants an opportunity for a hearing. *See Bruce W. Crawford*, 86 IBLA 350, 376, 92 I.D. 208, 222 (1985). As validity was not in issue, a contest was not called for.

[1] In this case BLM was considering the *ownership* of the claims. When attempting to determine what Kirk had donated to NPS, BLM undertook an adjudication of Bartoli's interest in the claims and held that Bartoli held no record title interest. Thus, the decision purported

it has also not yet resulted in a decision to the contrary." (Memorandum to the Regional Director, NPS, dated Nov. 30, 1987, at 4).

[10] The record indicates that the May 1989 show cause order was sent to Bartoli's last address of record and was signed for by another individual on May 15, 1989. It is deemed to have been received on that date. *See* 43 CFR 1810.2(b); *Lloyd M. Baldwin*, 75 IBLA 251, 252-53 (1983).

[11] Bartoli also informed a BLM employee in July 1989 that he "would go speak to Judge Milton M. Souter to see about getting proof of title" (Memorandum to the files from Robert D. Merrill at 2). There is no record of Bartoli submitting additional evidence regarding this litigation.

to determine that Bartoli held no "title" interest in the claims.[12] However when making this determination BLM also held that contractual rights held by Bartoli were not an encumbrance upon that title.[13]

Because the question adjudicated by BLM was one of the ownership acquired by NPS by and through a conveyance from Kirk, we will briefly describe the conveyance document. On September 12, 1986, Kirk executed a document titled "Donation," by which he donated or conveyed "all right, title, and interest, if any, in the [listed] mining claims" to the United States. This document is akin to a quitclaim deed, as no warrants are expressed, and the language of the document indicates that Kirk may not hold any interest in the claims. Kirk conveyed only what he had, and his conveyance was subject to any encumbrances that may have attached prior to conveyance.

No statutory basis for the donation or the acceptance of the donation was stated in either the donation document or the May 26, 1987, decision accepting Kirk's donation. However, we assume that the donation was made pursuant to the provisions of 16 U.S.C. § 6 (1988), which authorizes the Secretary of the Interior to accept property within various national parks. There are no regulations applicable to donation of land in 36 CFR Parts 1 through 199, the CFR parts applicable to the National Park Service, but the scope of the regulations found at 43 CFR Part 2110, and the actions of the parties clearly give support for the conclusion that those regulations are applicable to donations of real property under 16 U.S.C. § 6 (1988).

43 CFR Subpart 2110 addresses the Secretary's authority to accept gifts of property and Subpart 2111 sets out the procedures for offering and accepting a donation of real property. A common thread running through all sections of Subpart 2111 is the safeguards established to ensure that the offeror owns the property being donated free of any encumbrances or adverse claims by third parties. Under 43 CFR 2111.1, an offeror must submit a statement "showing that [he] is the record owner * * * of [the interest] so offered, free and clear of all encumbrances [, and] that there are no persons claiming the [interest] adversely to the offeror" when offering to convey an interest in land to the United States. BLM must then decide whether acceptance of the offer would be consistent with the public interest. *See* 43 CFR 2111.2. If BLM decides to accept, the offeror must submit a deed of conveyance of the interest offered, and an affidavit stating that he "has not conveyed or encumbered the [interest] *in any manner* from the time of making the offer up to and including the date of recordation of the deed." *Id.* (italics added). "Upon acceptance of the deed of conveyance,

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[12] Bartoli's claim of title is apparently based in part on his contention that he had acquired Kirk's co-ownership interest under the forfeiture provisions of 30 U.S.C. § 28 (1988). Bartoli points to no document constituting a conveyance of a title interest executed by Burdick, the Barrys, or Kirk placing him squarely in the chain of title. To be deemed the sole owner under that statute, one must first have been a "co-owner." *See Turner* v. *Sawyer*, 150 U.S. 578, 584-85 (1893); *Repeater & Other Lode Claims*, 35 L.D. 54, 56 (1906). We make no ruling on whether Bartoli held an interest under State law, State court action, or by an agreement.

[13] The "title" to real property includes encumbrances flowing with the land. Thus, if under state law some contractual right becomes an encumbrance flowing with the land, a party taking title by quitclaim deed will generally take title *subject to* that contractual encumbrance. *See* 4 *American Law of Property* §§ 18.78, 18.81 (1952).

the lands or *interests so conveyed* will become property of the United States." 43 CFR 2111.4 (italics added).

This case involves the donation of whatever interest Kirk had in the claims at the time of conveyance, if any. There is no evidence that either NPS or BLM ever sought or received either the initial or the closing statements attesting to ownership of the interest conveyed, free of any encumbrances or adverse claims by third parties.[14] The reason is clear. The conveyance document was so limiting that none was needed. Kirk conveyed only what he had, if anything, and whatever he conveyed remained subject to all outstanding encumbrances. BLM noted in its May 1987 notice accepting the donation that Kirk did not purport to convey his interest in the claims free of any encumbrances or adverse claims. It is also evident from the May 1987 notice that, when BLM accepted the donation of Kirk's interest in the claims, BLM was aware that Bartoli was exerting a claim against Kirk which may or may not affect Kirk's claim of title, that ownership of the claims was the subject of litigation in the state court, and that the title was encumbered by agreements. NPS had accepted Kirk's interest subject to encumbrances, contractual obligations, and outstanding court orders. The Department had been placed on notice of these facts by Bartoli's June 1986 petition claiming sole ownership under 30 U.S.C. § 28 (1988), and, more importantly, by Vallee's May 19, 1986, sworn statement regarding the proceedings in the Alaska Superior Court in *GoFur Mining & Development Co.* v. *Bartoli, supra.*

The conveyance did not preclude the possibility that Bartoli may have had an interest in the claims, the possibility that Bartoli might automatically acquire title to the claims by the terms of an outstanding agreement, or even the possibility that Bartoli was then the sole owner. Thus, we cannot say that appellant asserted, at the time of donation, a claim adverse to the interest actually conveyed by Kirk. Title to Kirk's interest together with any concomitant encumbrances upon Kirk's title became the property of the United States upon acceptance of the deed of conveyance.

BLM's May 1987 notice that it had accepted Kirk's donations expressly limited acceptance to "all right, title, and interest, if any, which [he] may have in the mining claims." Notwithstanding this fact, in 1989, at the insistence of NPS, BLM sought to adjudicate title (including the existence of encumbrances on the title) by issuing a show cause order and its October 1989 decision. BLM thus attempted to remove any cloud or encumbrance existing at the time of Kirk's donation by requiring Bartoli to prove to BLM's satisfaction that the Department did not have unencumbered title to the claims. After concluding that he had failed to do so, BLM declared (presumably under Federal law) that Bartoli had no interest in the claims at the time of donation or thereafter and, that "*all legal title* to the * * *

[14] The only documents submitted were the donation deeds executed by Kirk. *See* 43 CFR 2111.3.

claims was donated to the United States * * * by the existing owner of record, Douglas D. Kirk" (Decision at 2 (italics added)). Crucial to the determination that Kirk had donated the complete legal title was the conclusion that appellant had no title interest at the time of donation or thereafter.

BLM's decision declaring the donation free and clear of any claim of ownership on the part of Bartoli was clearly beyond the authority granted under the regulations found at 43 CFR Subpart 2110. Those provisions authorize acceptance of donations and provide the mechanism to ensure that a donated interest is free of any third party adverse claims *before* acceptance of the donation. If the Department knowingly accepts a donation of property with a clouded title it accepts title subject to any existing adverse claims and encumbrances. There was no grant of authority to declare adverse claims of ownership invalid. This is exactly what BLM attempted to do when it issued a decision that Bartoli had no interest in the claims because Bartoli had not satisfied BLM that the unencumbered title had not vested in the United States.

Under certain circumstances, the Department does have authority to determine mining claim ownership (as opposed to the status of Federal lands). For example it has this authority when two parties claim ownership of a mining claim and BLM must decide whether one of the parties, who is a patent applicant, is entitled to patent. When there is a dispute between two parties claiming a title interest in a mining claim and patent is being sought, the conflicting interests do not constitute "adverse claim[s]" under 30 U.S.C. § 30 (1988). *See Thomas* v. *Elling*, 25 L.D. 495, 498 (1897). The Department may consider evidence to determine whether the mineral patent applicant is entitled to a patent.[15] *See E. J. Ritter*, 37 L.D. 715, 717 (1909); *Coleman* v. *Homestake Mining Co.*, 30 L.D. 364, 367 (1900); *Thomas* v. *Elling (On Review)*, 26 L.D. 220, 221-22 (1898). This determination does not bar a subsequent action in the courts seeking title under the doctrine of constructive trust, however.

Notwithstanding this authority, the Department will, as a matter of policy, decline to intervene in private disputes, especially when a dispute requires interpretation of state law. *See, e.g., Pat Reed*, 119 IBLA 338, 342-43 (1991); *Charles H. Dorman*, 79 IBLA 209, 212 (1984); *Nick DiRe*, 55 IBLA 151, 154 (1981); *Silver Lake Power & Irrigation Co.* v. *City of Los Angeles*, 37 L.D. 152, 153 (1908). This policy extends to disputes between parties claiming ownership of a mining claim when a patent application has been filed if one of the parties has resorted to judicial action. *See Brown Land Co.*, 17 IBLA 368, 376-78, 81 I.D. 619, 622-23 (1974); *Coleman* v. *Homestake Mining*

[15] We can cite similar situations arising as a direct result of a pending patent application. *See John R. Meadows*, 43 IBLA 35 (1979); *United States* v. *Logomarcini*, 60 I.D. 371 (1949); *Alice Firth Clark*, 57 I.D. 244 (1941); *Henrietta C. Steele*, 53 I.D. 26 (1930); *A. P. Smith*, 3 L.D. 340 (1885). There is some question whether a co-owner need file an adverse claim, as he may later assert his equities in the patent title. *See Thomas* v. *Elling, supra*; *Turner* v. *Sawyer, supra*.

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Co., supra at 367; *Thomas* v. *Elling*, 25 L.D. at 498. As the Acting Secretary stated in *Coleman* v. *Homestake Mining Co., supra* at 367:

> [While not accepting] that this Department can not ascertain and determine for itself, in the absence of any judicial determination thereof, who among contending claimants under the same location is the owner of a mining claim for which a patent is being applied for, and therefore whether the applicant is entitled to a patent, it is deemed the better course for all concerned in a case like this, involving disputed claims under a local statute of limitations and questions of fraud due to a claimed secret understanding as to the effect of conveyances of undivided interests in a mining claim alleged to have been made without any consideration, that the parties be given an opportunity to litigate and settle the matter by appropriate judicial proceedings in the courts of the vicinity.

This policy of avoiding involvement in open disputes regarding ownership of a mining claim weighs even more heavily in favor of rejecting any responsibility for determining issues of title ownership when no patent application is pending. In this case the party claiming an interest as a co-tenant cannot assert his equities in the patent title, and the question of title clearly turns on the interpretation of State law, a matter which must ultimately be determined by a State court or by a Federal court applying State law.

We find no basis for concluding that the Department is somehow required to administratively resolve disputes regarding the ownership of an unpatented mining claim because one of the parties to the dispute has quitclaimed whatever interest he may have, if any, to NPS. NPS accepted whatever title the donor may have held at the time of conveyance and the Department should not use that conveyance as the basis for making an assertion it should not have made if NPS had not been the beneficiary. Nor do we find it necessary or appropriate to address whether NPS may or may not be bound to abide by the terms and conditions of any contract pertaining to the claims by reason of its acceptance of Kirk's interest in the title to those claims.

Either of the other two courses of action proposed by the Solicitor's office is appropriate. BLM should have again declined to address the question of title on the administrative level until a final determination regarding the validity of the claims or until it receives the result of the final disposition of that question in the context of a quiet title action.[16] Bartoli was given the proper response when BLM advised him that it would not issue the decision he sought. The same answer should have been given to NPS. Prior to conveyance to NPS, BLM had no authority to interpret State law and to issue a binding decision to resolve a dispute between rival owners of an unpatented mining claim.[17] It gained no additional authority by reason of the quitclaim conveyance to NPS. The BLM decision must be vacated in its entirety.

[16] Should NPS desire to determine whether Bartoli has an interest in the claims, it may seek to have the Justice Department institute a quiet title action on its behalf. The court could then decide the extent of the NPS title. Bartoli could also institute a quiet title action. *See Alice Firth Clark, supra* at 251. In addition, BLM may also initiate a mining claim validity contest.

[17] When holding that BLM should not have declared Bartoli's interest in the claims invalid, we are not finding that Bartoli holds an interest in the claims. We expressly eschew any such analysis.

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

R. W. MULLEN
Administrative Judge

I CONCUR:

C. RANDALL GRANT, JR.
Administrative Judge

WAYNE D. KLUMP *ET AL.*

123 IBLA 51 Decided: *May 11, 1992*

Appeal from decisions of the Arizona State Office, Bureau of Land Management, rejecting in part applications for conveyance of Federal mineral interests.

Affirmed.

1. Federal Land Policy and Management Act of 1976: Reservation and Conveyance of Mineral Interests

Under sec. 209(b) of FLPMA and implementing regulations, lands that do not have "known mineral values" may be conveyed to the owner of the surface estate. BLM's decision that the lands possess locatable and fluid leasable minerals that constitute "known mineral values" is properly affirmed on appeal where it is based on a thorough mineral report citing reliable sources, and where the applicants for conveyance fail to meet their burden of showing that it is inaccurate.

2. Federal Land Policy and Management Act of 1976: Reservation and Conveyance of Mineral Interests

Under 43 CFR 2720.0-5, land may be properly found to possess "known mineral values" for locatable minerals even if there is no exposure of mineralization at the surface. The presence of minerals under the surface may be established, subject to being disproved by the applicant, by inference from geologic conditions. Where BLM prepares a mineral report relying on authorities that have so established, its finding will be affirmed.

3. Federal Land Policy and Management Act of 1976: Reservation and Conveyance of Mineral Interests

An absence of proof of discoveries of valuable mineral deposits under the General Mining Law of 1872 in the vicinity of lands subject to applications for conveyance of Federal mineral interests is not relevant to whether those lands possess "known mineral values" for locatable minerals under 43 CFR 2720.0-5, which establishes an entirely different, and far less stringent, requirement than the "discovery" rule applicable to the validity of mining claims. Thus, the lack of valid claims in the area does not preclude a finding that the lands possess "known mineral values."

4. Federal Land Policy and Management Act of 1976: Reservation and Conveyance of Mineral Interests--Stock-Raising Homesteads

If lands possess "known mineral values," the mineral estate for such lands may nevertheless be conveyed to the record owner of the surface under sec. 209(b) of FLPMA if the reservation of mineral rights in the United States would interfere with appropriate "nonmineral development" of the land, provided that the nonmineral development is a more beneficial use of the land than mineral development. However, use of the surface of lands patented under the Stock-Raising Homestead Act for grazing is not "nonmineral development" under the meaning of the statute.

5. Federal Land Policy and Management Act of 1976: Reservation and Conveyance of Mineral Interests

Where applicants for conveyance of retained mineral interest under sec. 209(b) of FLPMA merely assert that there is a chance that homes and businesses will be built on the lands applied for, but submit no proof of imminent development, they have failed to establish that there has been nonmineral development. Allegation, hypothesis, or speculation that appropriate nonmineral development might take place at some future time is not a sufficient basis for conveyance. 43 CFR 2720.0-6.

6. Federal Land Policy and Management Act of 1976: Reservation and Conveyance of Mineral Interests

An applicant for conveyance of retained mineral interest is required to cover administrative costs of the application and to pay a deposit against which those costs may be charged. 43 U.S.C. § 209(b)(3) (1988); 43 CFR 2720.1-3(b)(1). Where applicants do not show that BLM's charges have been excessive, they will not be disturbed on appeal.

Wayne D. Klump, 104 IBLA 164 (1988), modified in part.

APPEARANCES: Wayne D. Klump, Bowie, Arizona, for appellants.

OPINION BY ADMINISTRATIVE JUDGE HUGHES

INTERIOR BOARD OF LAND APPEALS

Wayne D. Klump *et al.* (the Klumps), have appealed from decisions of the Arizona State Office, Bureau of Land Management (BLM), rejecting in part their applications for conveyance of retained Federal mineral interests in lands to which they own the surface estate.[1] The Klumps have sought to obtain the mineral estate to scattered lands located in southeastern Arizona, between Wilcox and the Arizona-New Mexico border.

The Klumps' applications date back to March 17, 1986, when they were filed pursuant to section 209(b) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1719(b) (1988). Under section 209(b)(1) and (2) of FLPMA, as implemented by Departmental regulations at 43 CFR Part 2720, the Department may convey mineral interests owned by the United States to the record owner of the surface where the surface is in non-Federal ownership if (1) there are no known mineral values in the land, or (2) the reservation of mineral rights in the United States is interfering with or precluding appropriate nonmineral development of the land and that such

[1] This case involves the following five appeals, concerning the applications indicated in parentheses: *Wayne D. Klump*, IBLA 91-128 (AZA-21817); *John D. Klump*, IBLA 91-129 (AZA-21818); *John L. Klump*, IBLA 91-130 (AZA-21820); *Karry K. Klump*, IBLA 91-131 (AZA-21821); and *Luther W. Klump*, IBLA 91-132 (AZA-21822).

development is a more beneficial use of the land than mineral development. 43 U.S.C. §§ 1719(b)(1) and (2) (1988); 43 CFR 2720.0-6.

BLM initially rejected the Klumps' applications, ruling that the lands applied for were "prospectively valuable for mineral deposits," based on a brief memorandum from BLM's Division of Resource Management. The Klumps appealed that rejection, and, by decision dated September 6, 1988, we set it aside and remanded the matter to BLM for readjudication, ruling that the record was inadequate to support a conclusion that the lands possessed "known mineral values" as defined by 43 CFR 2720.0-5(b). *Wayne D. Klump*, 104 IBLA 164 (1988).

After that decision, BLM met with Wayne Klump to estimate the costs of processing the Klumps' applications. On December 27, 1988, BLM notified them that it would conduct a preliminary field examination prior to estimating the total cost of processing the application. After that examination, BLM would determine which of the lands had obvious "known mineral values" and should be withdrawn from their applications and then provide the Klumps with an estimate of processing the remaining parcels. BLM prepared an estimate of the administrative costs up to that time and billed the Klumps those costs.

Following a delay, BLM published notice of receipt of the Klumps' applications in the *Federal Register*. 54 FR 49364 (Nov. 20, 1989).[2] On June 27, 1990, BLM approved a thorough mineral report concerning the lands applied for. BLM detailed the mineralization, including locatable, saleable, solid leasable, and fluid leasable minerals, as well as geothermal energy, both in the vicinity of the lands and on the specific lands applied for by the Klumps. The mineral report recommended that the U.S. Government should (1) retain the locatable mineral estate in most of the lands applied for; (2) convey the saleable mineral estate for all but one parcel; (3) retain the fluid leasable mineral estate only for those lands identified as prospectively valuable for petroleum; and (4) convey all geothermal interests. On December 13, 1990, BLM issued its decisions implementing the recommendations of the mineral report and the Klumps (appellants) appealed.

[1] Under the statute and implementing regulation, lands that do not have "known mineral values" may be conveyed to the owner of the surface estate. 43 U.S.C. § 1719(b)(1) (1988); 43 CFR 2720.0-6 and 2720.1-1(a)(2). BLM concluded that most of the lands applied for by the Klumps do have "known mineral values."

The lands that BLM's mineral report marked for retention of the locatable mineral estate make up most of the lands applied for by appellants and thus are at the center of the dispute here. Those lands

[2] Part of the delay resulted from the Klumps' failure to submit part of the deposit. It appears that BLM's letter to John L. Klump requesting payment may have been misplaced or destroyed in a house fire. The deposit for administrative costs for his application was filed on June 19, 1989. The remainder of the delay seems to have resulted from personnel changes at BLM.

are situated around the Dos Cabezas Mountains, and most of them lie to the northwest of the mountains.

BLM's decision that certain of the lands possess locatable minerals that constitute "known mineral values" is based on its mineral report, which states as follows concerning those locatable minerals:

Mineralization and Mining History

Dos Cabezas Mountains

The Dos Cabezas Mountains have traditionally been divided into two mining districts, the Teviston district along the northeast flank of the mountains and the Dos Cabezas district along the southwest flank * * *. Keith, et al. * * * divided the Dos Cabezas into four districts, the Teviston, Silver Camp, Mascot, and Apache Pass; and the U.S. Bureau of Mines (USBM) * * * treated the Dos Cabezas as a single district, the Mascot district. This report will treat the Dos Cabezas as two districts, the Teviston and Dos Cabezas as defined above. Both of these districts were known to contain gold as early as the 1860's although no significant mining activity began until the late 1870's because of Indian hostilities.

The Teviston district is characterized by numerous relatively small mines whereas the Dos Cabezas district is characterized by fewer, somewhat larger mines. Most of the production from these two districts occurred between 1910 through 1955. Mining activity virtually came to a halt in 1970 with the exception of the Gold Prince mine, located in the Dos Cabezas district, which is currently an active mine that has been the main source of gold in the two districts as well as a source of silica flux for copper smelters.

Production records for the two districts is incomplete and generally cover only a few mines during their last decades of activity. Combined production totals are approximately: 2,000 tons of copper, 700 tons of lead, 19 tons of zinc, 430,000 ounces of silver, 10,000 ounces of gold, and an unknown but probably small amount of [tungsten] and beryllium * * *.

The chief mines in the Dos Cabezas district are the Ivanhoe, Mascot, Dives, Gold Prince, Leroy, Elma, and Mineral Park. Those in the Teviston district are the Buckeye and Silverstrike. As mentioned, most of the workings in the Teviston district are small, unnamed, and long abandoned. These workings were developed primarily in the 1930's, during the depression, and most have been abandoned since the early 1940's. Keith * * * provides descriptions of the mines and prospects around the Dos Cabezas Mountains.

Keith * * * noted, "The known ore deposits of the Dos Cabezas and Teviston mining districts appear to be relatively small, spotty, and low grade veins and contact metamorphic bodies. However, the widely scattered and varied mineralization, and favorable geologic formations and structures [suggest] the possibilities still exist in the area for large, low grade, disseminated copper deposits." It was this second sentence on copper deposits that Loomis originally used to reject the Klumps' conveyance applications * * *. Zelton * * *, however, reported that the U.S. Borax and Chemical Corporation pursued an exploration program for such buried porphyry copper deposits from 1973 through 1975. The corporation drilled in the areas of the Dos Cabezas Peaks, the Mascot Mine, Cooper Peak, and the Elma Mine. No such copper deposits were found and exploration was discontinued.

*According to the USBM [Bureau of Mines, U.S. Department of the Interior] * * *, the entire region around the Dos Cabezas Mountains is "moderately favorable" for mineral potential and two relatively small areas within the mountains themselves have "high" mineral favorability. * * * McColly and Anderson * * * noted that these favorable areas "represent known deposits, occurrences, prospects, and areas with geologic features similar to those of known deposits.* A report by the U.S. Geological Survey (USGS) * * * concluded that the only area in the region of the Dos Cabezas with a high mineral potential is in the central portion of the Dos Cabezas, in the area of the volcano-plutonic complex * * *. Drewes, et al. * * * said that this complex "is interpreted to be the remnants of a stratovolcano, part of which collapsed to form a brecciated and permeable mass that is known to have acquired moderate concentrations of metals and is interpreted to be a potential target for more extensive mineralization at depth." [Italics supplied; references omitted.]

(Mineral Report at 6-7).

BLM delineated lands with mineral potential for locatable minerals as a band approximately 6 to 7 miles wide running from northwest to southeast across the Dos Cabezas Mountains (Mineral Report at 9 and at Fig. 1). That delineation is taken directly from a special report prepared by USBM, Robert A. McColly & Neal B. Anderson, *Availability of Federally Owned Minerals for Exploration and Development in Western States: Arizona, 1986*, Plate 1 (1987) (McColly & Anderson) (Mineral Report at 8). The lands applied for are within an area described by McColly & Anderson as "moderately favorable," that is, an area "with selected sub-marginal resources, mineral occurrences, and productive areas or deposits. * * * Moderately favorable areas were plotted from mine and prospect locations listed in the [USBM] MILS [Mineral Industry Location System] for selected metallic mineral commodities." *Id.* at 6.

McColly & Anderson states as follows concerning the methodology they used in reaching the conclusions announced in their report and later adopted by BLM:[3]

Assessment of Mineral Favorability

Those portions of Arizona considered favorable for mineral occurrences are identified and shown on plates 1 and 2. Favorable areas represent known deposits, occurrences, prospects, and areas with geologic features similar to those of known deposits. Criteria used for rating favorability include production data, geologic features, mining information, and professional judgment. Data sources include mining and geologic literature, mineral resource and mining district maps, the Bureau of Mines Mineral Industry Location System (MILS) and Mineral Availability System (MAS), various geologic maps, and input from the mineral industry.

The classification of areas as less favorable or unknown, moderately favorable, or highly favorable for the presence of mineral deposits, used in this report, is necessarily both generalized and subjective. However, every attempt was made to be as consistent and accurate as possible in defining these areas.

(McColly & Anderson at 3). The report also indicates as follows:

Designation of favorable areas is a subjective process, limited to the availability of data at the time of preparation. Boundaries are not exact and ratings may change with availability of new information. The map must not be construed as an appraisal of the mineral resources on a particular tract of land. Rather, the ratings are an indication of the likelihood that valuable or prospectively valuable mineral deposits may occur in the area.

Id. at Plate 1.

Based on the sources cited in its mineral report, particularly McColly & Anderson, quoted above, BLM found that most of the lands applied for by appellants have known mineral values for locatable minerals. The Department has defined "known mineral values" as "mineral

[3] Although McColly & Anderson is not in the record, we have taken official notice of its contents, as provided in 43 CFR 4.24(b).

values in lands with underlying geologic formations which are valuable for prospecting for, developing[,] or producing natural mineral deposits. The presence of such mineral deposits in the lands may be known, or geologic conditions may be such as to make the lands prospectively valuable for mineral occurrence." 43 CFR 2720.0-5. In considering whether this standard has been met, BLM is not required to do a mineral examination of the lands in question. *See Kenneth C. Pixley*, 88 IBLA 300, 301 (1985). A thorough mineral report that is made part of the record is sufficient. *Jerry R. Schuster*, 83 IBLA 326 (1984); *Denman Investment Corp.*, 78 IBLA 311 (1984).

Although not unequivocal, BLM's thorough mineral report adequately establishes that the lands here possess "known mineral values" for locatable minerals within the meaning of the regulations. The burden of proving that this finding is inaccurate rests with appellants. *Jean Hubbird Waters*, 89 IBLA 179, 182 (1985); *Robert Gattis*, 73 IBLA 92, 96 (1983); *Dean A. Clark*, 53 IBLA 362, 364 (1981), and cases cited. Although they state their disagreement with the finding that the lands possess known mineral values, appellants have not met that burden.

[2] Appellants point out that they accompanied a BLM geologist on a 2-day site visit and that no evidence of mineralization was seen at the surface of the lands examined. Under the governing regulation, it is not necessary that there be an exposure of mineralization at the surface. Instead, the presence of minerals under the surface may be established, subject to being disproved by the applicant, by inference from geologic conditions. That is what McColly & Anderson's report did, and BLM properly relied on that document.

[3] A mineral report prepared on appellants' behalf and submitted on appeal does not persuade us to reverse BLM. That report appears to rely on the absence of proof of discoveries of valuable mineral deposits in the area under the General Mining Law of 1872, *as amended*, 30 U.S.C. § 22 (1988).[4] It is enough to point out that the regulation in question, 43 CFR 2720.0-5, establishes an entirely different, and far less stringent, requirement than the "discovery" rule applicable to the validity of mining claims. Thus, the lack of valid claims in the area does not preclude a finding that the lands possess "known mineral values."[5]

It remains to determine whether BLM properly determined that some of the lands applied for possess "known mineral values" for fluid leasable minerals. BLM's determination was based on its Oil and Gas Prospectively Valuable Map, which had been revised in December

[4] Appellants cite only to 30 U.S.C. § 22 (1988).

[5] Although BLM's mineral report refers to mining claims in the area in question that were actively mined, the report does not rely on the presence or absence of a valid discovery under the General Mining Law of 1872, *supra*. Instead, the report refers to data collected from those mines as the basis for the geologic inference that the area has known mineral values. It is permissible for BLM to use geologic inference to establish known mineral values. *See* 43 CFR 2720.0-5(b).

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1987. Appellants made no effort to disprove BLM's determination, and it is therefore properly affirmed.

[4] BLM's determination that the lands possess "known mineral values" does not end the inquiry, as the mineral estate for such lands may nevertheless be conveyed to the record owner of the surface if the reservation of mineral rights in the United States would "interfere with appropriate nonmineral development of the land," provided that the "nonmineral development is a more beneficial use of the land than mineral development." 43 U.S.C. § 1719(b)(1) (1988); 43 CFR 2720.0-6.

BLM's decision states simply that grazing is not in the category of nonmineral development that may be interfered with by mining, and refers to 43 CFR 3814.1, providing that a mineral entryman on a stock-raising homestead is properly held liable for any damage caused to the value of the land for grazing by prospecting for or removal of minerals. Although it cited no authority for that conclusion, we hold that it is supported by the provisions of the statute as viewed in historical perspective and is therefore properly affirmed.[6]

A review of the Act of December 29, 1916, *as amended* (the Stock-Raising Homestead Act), 43 U.S.C. § 299 (1988), along with the section 5 of the Act of June 21, 1949 (the Open Pit Mining Act), 30 U.S.C. § 54 (1988), compels the conclusion that conflicts between grazing and mineral development have been fully considered by Congress, that these Acts were intended to provide relief for grazers whose grazing operations were negatively affected by mining, and that section 209 of FLPMA does not cover conflicts between mining and grazing.

In section 9 of the Stock-Raising Homestead Act, 43 U.S.C. § 299 (1988), Congress set out the terms of a compromise between development of the mineral estate and protection of the surface estate for grazing purposes. Under that compromise, lands believed to be suitable for mineral development were also opened to homesteading for grazing with the express proviso that the mineral interest would be retained and would remain subject to disposal by the United States. *See generally Watt* v. *Western Nuclear, Inc.*, 462 U.S. 36, 47-50 (1983). The right to develop the mineral estate was preserved, with an express proviso requiring any mineral developer to compensate the surface owner for "such damages to crops or tangible improvements of the entryman or owner." These damages were limited, and did not cover loss of use of the land.

In 1949, Congress, in the Open Pit Mining Act, 30 U.S.C. § 54 (1988), extended the liability of the mineral developer to include "any damage that may be caused to the value of the land for grazing by * * * prospecting for, mining, or removal of minerals." Damage to use for other purposes was not covered, however. The law has not been

[6] To the extent that our earlier decision in *Wayne D. Klump, supra* at 167, provided that appellants should be provided an opportunity to show "possible interference with existing uses," and to the extent that "existing uses" could be read to include grazing, it is hereby expressly modified.

subsequently amended.[7] Thus, where nonmineral use of the surface estate is no longer restricted to grazing, but entails (for example) development of lands for suburban housing, the owner of the surface estate is vulnerable, as his right to collect damages under the Stock-Raising Homestead Act and the Open Pit Mining Act is limited to damages to the value of the lands for grazing, which may be substantially less than its value for the nonmineral development. *See United States* v. *Browne-Tankersley Trust,* 98 IBLA 325, 337-41 (1987).

Passage of section 209(b) of FLPMA is reasonably viewed as providing the surface owner a means to protect himself by allowing him to purchase the mineral estate, where his nonmineral interest has developed beyond grazing. As the Supreme Court observed, "Congress' purpose [in the Stock-Raising Homestead Act] in severing the surface estate from the mineral estate was to encourage the concurrent development of both the surface and the subsurface of the [Stock-Raising Homestead Act] lands." *Watt* v. *Western Nuclear, Inc., supra* at 50, citing H.R. Rep. No. 35, 64th Cong., 1st Sess., 4, 18 (1916). To allow a homesteader to acquire a mineral interest under section 209 of FLPMA simply because it conflicts with grazing would defeat the demonstrated congressional desire to allow multiple use of the stock-raising homestead lands.

We do not see that section 209(b) of FLPMA changed the balance between grazing and mineral development struck in the Stock-Raising Homestead Act. The critical phrase in FLPMA is "nonmineral *development,*" which necessarily connotes a nonmineral use that is different than the use for which the surface of the lands were originally conveyed. Otherwise, the lands could not be rightly said to have been "developed." This interpretation is tacitly recognized in the regulations, which require that there must be some change in conditions for there to be qualifying nonmineral development. *See* 43 CFR 2720.0-6.[8]

[5] There has been no nonmineral development of the lands for which appellants seek the mineral estate. Although appellants assert that "[t]here is an 85-90 [percent] chance that homes and businesses will be built on this property," no proof of imminent development has been submitted. Allegation, hypothesis, or speculation that appropriate nonmineral development might take place at some future time is not a sufficient basis for conveyance. 43 CFR 2720.0-6. Thus, it is insufficient to rely on a mere possibility of qualifying nonmineral development.

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[7] It is significant that neither 43 U.S.C. § 299 (1988), nor 30 U.S.C. § 54 (1988), were repealed by FLPMA, thus indicating that Congress did not intend to upset the multiple-use concept established by the Stock-Raising Homestead Act.

[8] FLPMA preserves to the United States the option of allowing mineral development even where there has been nonmineral development of the surface by allowing disposition of the mineral estate only if the nonmineral development is "more beneficial" than mineral development. Thus, the Government retains the authority to refuse to sell its mineral estate even where there is nonmineral development, if doing so would be in the public interest. It is thus apparent that Congress intended that caution be observed in disposing of the mineral estates in lands such as those partially patented under the Stock-Raising Homestead Act.

Appellants present no persuasive argument that BLM's decision should be reversed. They assert that they have paid property taxes on the lands for over 50 years and that it is unreasonable to reserve the mineral estate forever, and they condemn the fact that permits granted by BLM to exploit the mineral estate would put clouds on their title. As discussed above, that decision was not made by BLM, but by the Congress of the United States. In the absence of a legislative amendment, the Department is without authority to alter the current ownership of the mineral estate, except as provided in section 209 of FLPMA. Appellants have not established that they are entitled to purchase the mineral estate under that authority.

Appellants argue that BLM has unduly delayed their application, and that its requests for money from them are "unreasonable, unnecessary, unjustified, excessive, and uncalled for." Even assuming that BLM's handling of their application was unreasonably delayed, it is established that the authority of the United States to enforce the public land laws is not lost by delays by its officers in performing their duties. 43 CFR 1810.3(c). Thus, both BLM and this Board are required to enforce the requirement of FLPMA even though appellants' application might have been more promptly adjudicated.

[6] As to BLM's demands for money from appellants, the statute and regulations expressly require that an applicant must cover administrative costs of the application and require payment of a deposit against which those costs may be charged. 43 U.S.C. § 209(b)(3) (1988); 43 CFR 2720.1-3(b)(1). Appellants have not shown that BLM's charges have been excessive.

Appellants point out that they have had experience with mineral exploration companies on their lands that left the land "in a mess," and that they could not stop them or collect damages either. BLM is required to take steps necessary to protect the interests of surface holders, including requiring developers to post adequate bond. *See, e.g., Soderberg Rawhide Ranch Co.*, 63 IBLA 260 (1982). However, mineral development of lands to which surface interests are held under the Stock-Raising Homestead Act is not illegal and may not be prevented simply because it may damage the surface estate.

Appellants request an evidentiary hearing, asserting that they are entitled to such under the due process protections of the Fifth Amendment. Appellants' right to due process is protected by their right to appeal to this Board, which is not a part of BLM, and which therefore provides full, objective review of the legality of its decision. Although the Board has the authority to refer a case to an Administrative Law Judge for an evidentiary hearing in cases where controlling questions of fact are in dispute (43 CFR 4.415), the present case is not appropriate for such action. Although appellants challenge the accuracy of BLM's factual determination that the lands have known mineral values, they have failed to present either any hard evidence or offer of proof on which we can base a holding that the accuracy of BLM's determination is substantially in question.

To the extent not expressly considered herein, appellants' 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 decision appealed from is affirmed.

DAVID L. HUGHES
Administrative Judge

I CONCUR:

JOHN H. KELLY
Administrative Judge

APPLICATION OF HARVEY C. JONES, INC., FOR FEES & EXPENSES UNDER EAJA

IBCA 2758-F Decided: *June 2, 1992*

Contract No. M00C14204022, Bureau of Indian Affairs.

Granted in Part.

1.Equal Access to Justice Act: Contract Disputes Act of 1978: Substantially Justified

The Government does not carry its burden to show substantial justification such as would bar recovery under the EAJA by merely reciting the great size of the quantum request; the great size of the quantum request may well counsel a vigorous litigatory defense by the Government, but it does not substitute for a showing that the position taken in that litigation was substantially justified. Similarly, the disparity between the amount requested and the decision's quantum amount does not substitute for a showing of substantial justification, especially where the great bulk of the difference is attributable to the contractor's failure to prevail on a legitimate issue which took a relatively small part of the entire litigatory effort in the case.

APPEARANCES: Bernard P. Metzgar, Lamb, Metzgar, Lines & Dahl, PA, Albuquerque, New Mexico, for Appellant; Barry K. Berkson, Department Counsel, Santa Fe, New Mexico, for the Government.

OPINION BY CHIEF ADMINISTRATIVE JUDGE LYNCH

INTERIOR BOARD OF CONTRACT APPEALS

This is a decision arising out of an application under the Equal Access to Justice Act (EAJA), P.L. 96-481, 5 U.S.C. § 504, by which applicant Harvey C. Jones, Inc. (HCJ), seeks reimbursement of fees and expenses incurred in prosecuting a contract dispute appeal before this Board.

To the extent not expressly considered herein, appellants' 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 decision appealed from is affirmed.

DAVID L. HUGHES
Administrative Judge

I CONCUR:

JOHN H. KELLY
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Background

On February 28, 1990, we issued our decision in *Harvey C. Jones, Inc.*, IBCA-2070, -2150, -2151, -2152, -2153, and -2467, 27 IBCA 89, 97 I.D. 78, 90-2 BCA ¶ 22,762. In that decision, we sustained HCJ's appeals, in part, in the total amount of $254,905.45. On March 30, 1990, we received an application for EAJA fees and expenses from HCJ, and 3 days later we dismissed it as premature, the principal decision's not having become final by that time. Before the decision did become final, the defendant Bureau of Indian Affairs (BIA) filed a motion for reconsideration, and in a decision dated September 10, 1990, we denied that motion. After that decision became final, HCJ, on February 12, 1991, resubmitted its application for EAJA fees and expenses. We docketed the application in the usual way, sending a docketing notice which contained our Special Rules of Practice Before the Interior Board of Contract Appeals Pertaining to Equal Access to Justice Act (EAJA) Claims for Fees and Expenses (hereinafter "Special EAJA Rules") to counsel for HCJ with a copy to BIA counsel.

BIA then submitted its response to the application in a package we received on March 15, 1991. Among a variety of positions it took in that response, BIA mentioned the application's failure to include affidavits BIA contended are required by 43 CFR 4.610. On April 11, 1991, we received from HCJ an amended application (along with a motion seeking leave to file the amendment) and a brief in support of its application. Our review of the amended application reveals that it is identical with the original application except that it includes a number of affidavits from HCJ and from certain service providers reimbursement for whose charges is sought, apparently in response to the BIA position on the applicability of 43 CFR Part 4.6 to this action.

On April 23, 1991, we received BIA's motion to strike both HCJ's amended application and HCJ's brief. HCJ's brief specifically denied the applicability of 43 CFR Part 4.6; however, BIA vigorously repeated its conclusion that those regulations are applicable announcing about it that "there is absolutely no doubt whatsoever that these proceedings are governed by" the regulations (BIA Motion to Strike at 3).

We consider the application using as our record the parties' various submissions just identified and the decisions and record in the principal case.

DISCUSSION

The EAJA Framework

Under the EAJA, an applicant shall be reimbursed for its reasonable litigation fees and expenses if (1) it is eligible under the Act; (2) it prevails in the underlying litigation; and (3) the Government's position in the underlying case was not "substantially justified" on the law and the facts.

Although, as mentioned, BIA contends that the procedural regulations starting at 43 CFR 4.600 apply to this case, it has not complained that HCJ's application is fatally defective by reference to the specific criteria of 43 CFR 4.608, which requires, *inter alia*, allegations that the applicant meets the eligibility criteria. There being no other reason in the case for us to question HCJ's eligibility, we therefore conclude that its application is legally sufficient under the applicable statutory authorities as well as under section 4.608 even if it were applicable.

In order to be a "prevailing party" under the EAJA, an applicant is not required to show that it was successful on the central issue in the underlying case nor on the majority of issues there. It need show only that it succeeded on any "significant issue in litigation which achieves some of the benefit" it sought in bringing the appeal. *Drillers, Inc.*, EBCA No. 451-10-90(E), 91-3 BCA ¶ 24,197, quoting the court in *Anthony* v. *Bowen*, 848 F.2d 1278 (D.C. Cir. 1988); *Ackon, Inc.*, ENG BCA No. J593-F, 91-3 BCA ¶ 24,147, quoting the Court in *Hensley* v. *Eckerhart*, 461 U.S. 424, 433, 103 S.Ct. 1933, 1939 (1983). Although HCJ's appeal requested a quantum payment of over $866,000 and our decision concluded that it was entitled to recover "only" approximately $255,000, it would be difficult to conclude that an entitlement in such an amount could reflect anything other than success on a "significant issue in litigation which achieves some of the benefit" HCJ sought in the appeal, regardless of the fact that the amount it sought as it filed its appeal was considerably higher. Moreover, regarding fact issues, we noted in the principal decision that our analysis resulted in findings in HCJ's favor in nearly every particular. Most of those findings had a direct effect on our ultimate decision in favor of recovery for HCJ. In these circumstances, we conclude that HCJ was a "prevailing party" for purposes of this EAJA application.

The burden of proving the lack of substantial justification is not the applicant's; rather, the Government must prove affirmatively the presence of substantial justification (or such special circumstances as would make an EAJA award unjust despite the absence of substantial justification.) Here, for reasons more fully developed later, we conclude that BIA did not carry its burden, and all of the substantive requisites for EAJA award are thus in place.

One further note on the basic framework for EAJA cases and decisions before we treat the parties' various points and arguments: There can be a conceptual overlap between certain sub-issues that appear to be common to both of the major issues of "prevailing party" and "substantial justification." We observe that that potential overlap is present here, principally arising out of BIA's contentions that given the size of HCJ's original quantum request, the underlying decision's "small" quantum amount established that (1) HCJ was not a "prevailing party" and (2) BIA's litigation posture was substantially justified. We have already herein rejected that argument as compromising HCJ's status as "prevailing party."

Although our pronouncement on that issue stands on its own, we were not unmindful as we stated it of the reasons for the initial request's being so much higher than the decision's quantum conclusion. Those reasons also figure in heavily in our decision on "substantial justification" and will appear in the discussion of that issue below.

Procedural Challenges

Section 610 of 43 CFR Part 4 requires the EAJA application to be accompanied by full documentation of the fees and expenses for which award is sought. Subsection (b) of section 610 provides that the documentation must include affidavits "from each professional firm or individual whose services are covered by the application," providing certain details about the charges therefor.

Section 611 of Part 4 requires the application to be filed no more than 30 days after final disposition of the principal proceeding, and section 615(a) provides that "[t]he adjudicative officer [as defined in section 4.602] may on motion and for good cause shown grant extensions of time *other than for filing an application for fees and expenses after final disposition in the adversary adjudication.*" (Italics supplied.)

Reading all of these provisions together, BIA argues that by submitting the affidavits in the amended application that were missing from the original, HCJ is attempting to perfect its application out of time (*i.e.*, after the 30 days from final disposition deadline under section 611 which may not be extended because of section 615(a)). The amended application, must be struck according to BIA (BIA Motion to Strike at 4-5). By inference, only the original application, sans affidavits, would remain before us if the BIA position is correct, and the BIA argument presented in its earlier response, that the original application was defective for the absence of affidavits, would apply so as to bar HCJ from any recovery.

It is unnecessary for us to answer questions BIA has raised regarding interpreting the 43 CFR Part 4.6 regulations because those regulations do not apply to the instant proceeding, despite BIA's pronouncements to the contrary. Section 4.603 defines the proceedings that are covered by Part 4.6. The regulations in question are intended to "apply to adversary adjudications required by statute to be conducted by the Secretary under 5 U.S.C. 554." 43 CFR 4.603(a). The term "adversary adjudication" is defined in section 4.602(b) by reference to the same statutory provision, 5 U.S.C. § 554.

Contract appeal cases come to this Board under the authority of the Contract Disputes Act of 1978 (CDA), P.L. 95-563, 92 Stat. 2383. The CDA does not require that those cases be heard under the procedural rules of 5 U.S.C. § 554, nor for that matter that they be heard by the Secretary (which is the norm for most of the rest of the cases heard by components of the Office of Hearings and Appeals of which this Board is organizationally a part). For those reasons alone, it is obvious that the regulations in 43 CFR Part 4.6, by their own terms, are not intended to cover EAJA actions arising out of CDA cases. There is further support for this position, however, in the statutory and regulatory history of the various authorities surveyed here. As mentioned, the CDA became effective in 1978, a product of the 95th Congress. The EAJA was enacted in 1980, a product of the 96th Congress, and the administrative part thereof was codified in 5 U.S.C. § 504. The Part 4.6 regulations became effective on April 25, 1983. At the time that the regulations became effective, the EAJA was not applicable to proceedings under the CDA, specifically *because* the former applied only to Administrative Procedure Act (APA), 5 U.S.C. § 554 principal procedures, and cases under the latter were *not* subject to the APA. It was not until passage of the amendment to the EAJA, P.L. 99-80, 99 Stat. 183, in 1985 that EAJA remedies were made available to CDA litigants. Thus, the procedural regulations under review were not applicable to EAJA applications after CDA cases when the regulations became effective because such applications were not permitted at that time. Those regulations still apply only to applications after APA actions, and do not apply to CDA cases. Also, the EAJA itself does not require cases brought under its authority to be conducted according to the APA. Further, the background information to the publication of the regulations and to section 4.601 of 43 CFR both make clear that it is the principal (underlying) case with which the APA qualifier is concerned. Thus

> [t]he Equal Access to Justice Act (Pub. L. 96-481, 5 U.S.C. 504 (Supp. IV 1980)) provides for the award of attorneys fees and other expenses to certain parties *who prevail over the Federal Government in administrative proceedings conducted under section 554 of the Administrative Procedure Act (5 U.S.C. 554)* in which the position of the United States is represented. [Italics supplied.]

48 FR 17595 (Apr. 25, 1983) and

> [t]hese rules are adopted by the Department of the Interior pursuant to section 504 of title 5, United States Code, as amended by section 203(a)(1) of the Equal Access to Justice Act, Pub. L. 96-481. Under the Act, an eligible party may receive an award for attorney fees and other expenses *when it prevails over the Department in an adversary adjudication under 5 U.S.C. 554 before the Office of Hearings and Appeals,* * * *. [Italics supplied.]

43 CFR 4.601. *See White Buffalo Construction, Inc.*, IBCA-2918-F and -2919-F, 27 IBCA 421, 91-3 BCA ¶ 24,221.

It was because there were no regulations applicable to EAJA applications after CDA appeals that we issued our Special EAJA Rules, referenced above.

BIA's Motion to Strike and all of its defenses and arguments based on the asserted applicability of the EAJA regulations are denied.

Substantial Justification

The next major question raised by BIA concerns substantial justification. Under the EAJA, an applicant may not prevail if the

Government's position in the underlying case was substantially justified, and the burden for showing such substantial justification lies with the Government. Here, apparently BIA believes that the burden is on HCJ to prove the opposite, for its contends that "the EAJA standards require proof that the Government position was not substantially justified" (BIA Response at 4; also, *see* BIA Response at page 6 where BIA contends that Department regulations are the authority for the proposition that HCJ has the burden of proving the absence of substantial justification). The authority for the former proposition, that the burden is BIA's, is old and formidable, *Gavette* v. *Office of Personnel Management*, 808 F.2d 1456 (Fed. Cir. 1986); *Schuenmeyer* v. *United States*, 776 F.2d 329 (Fed. Cir. 1985), and we have the proper assignment of the burden in mind as we measure the adequacy of the representation on substantial justification.

BIA has nevertheless made a presentation on substantial justification in its response under the heading *"The Government's Position Was Substantially Justified"* (BIA Response at 6-13). Here, BIA raises a number of points, to wit: (a) Although HCJ prevailed on most of the entitlement issues regarding Government-caused delays, it recovered a quantum amount well below that claimed, and, therefore, "[l]ooking at this dispute from the Government's eyes, the Government was more than justified in defending to the fullest extent possible" a claim for such a high amount (Response at 6); (b) HCJ filed a number of amended claims for ever-increasing amounts leading to long delays in processing the claim because two separate audits had to be ordered and performed, and the failure of the contracting officer (CO) to issue a decision before the Board had jurisdiction is directly related to the delay in receiving audit reports which delay ultimately was caused by HCJ's repeated filings of new claims (Response at 6-7); (c) BIA both was responsive to HCJ's claims and displayed good faith by offering to settle the action for $50,000 (Response at 7-8); and (d) the audit agency, Office of Inspector General, advised BIA to reject the various claims in their entirety, and BIA was reasonable in relying on that advice (Response at 8-9). BIA also cites authority for the proposition that the fact of BIA's failure to prevail does not give rise to a presumption that its position was not substantially justified, and we agree that no such presumption arises.

[1] First, we address the argument that the size of the claim, especially when compared to the size of the recovery, provided all of the substantial justification necessary to deny recovery in this EAJA action. As stated by BIA, "Looking at this dispute from the Government's eyes," the Government was more than justified in defending "against a claim of such size." BIA concentrates on the fact that the final claim was in an amount over $866,000 while the quantum amount of the Board's decision was only slightly less than $255,000.

The great size of a particular claim may well provide practical justification for the Government to litigate the case out of concern that without such an effort the contractor will be awarded a much higher amount than it would be if a vigorous defense were undertaken. However, this does not substitute for a showing that the Government's position was substantially justified. The size of a claim may provide a motivation for a vigorous defense but by itself it does not establish whether the defense actually undertaken was one presenting a substantially justified position. We can determine that only after examining the elements of the position and not just by noting the size of a claim. Even when, as here, the size of the recovery is much smaller than the size of the claim, that disparity by itself does not establish substantial justification. A disparity of great magnitude may counsel closer scrutiny of a particular EAJA application but it simply does not automatically substitute for a showing that the merits of the elements of the Government's position established substantial justification.

We also note that the last two of HCJ's amended claims resulted from perceived instructions from the CO and the auditors to use "blue book" rates for equipment usage. The "blue book" issue was found against HCJ, but both the original decision and the decision on the petition for reconsideration made very clear that that finding was based on a preponderance of the evidence, that there was substantial evidence to support the HCJ position, and, in effect, HCJ was simply mistaken about the instructions, not that it had advanced that position in bad faith. The significance of the finding is that the "blue book" issue took up a very small portion of the decision and of the litigatory effort and without it, the claim was sharply reduced in amount. It was an up-or-down issue. If HCJ prevailed on it, its recovery would have been much higher than the actual recovery; when it failed, the amount in issue became much closer to the actual recovery. The resolution of the issue was relatively simple, as we will discuss in more detail later, but it was a legitimate issue and its elimination as a basis for determining quantum meant that the disparity between actual recovery and the amount then in dispute was not particularly noteworthy at all. The large amount initially requested by HCJ resulted largely from its mistake on the alleged "blue book" instructions from the CO and the auditors. Once that issue was eliminated, the disparity between request and recovery was not so great. The great bulk of the litigatory effort in this case, however, was on issues other than the "blue book" rates issue, and BIA made a considerable effort on every other issue causing an equivalent effort to be expended by HCJ. Actually BIA managed to eliminate the "blue book" issue, legitimate though it was, fairly early in the proceedings without much effort. It contested the rest of the case with great effort nonetheless despite the fact that the actual disparity had narrowed considerably. This issue, though representing a high percentage of the amount requested, actually commanded a minor amount of effort and notice in the litigation of the case. We will make an adjustment in the amount of the recovery applied for herein for the "blue book" issue, as will be seen later, not because BIA has presented a substantial justification case on the issue but because HCJ failed to prevail on the issue. Meanwhile, in the major litigatory part of the case, HCJ, in BIA's words, "prevailed on most of the issues involving Government caused delays"(BIA Response at 6). In these circumstances, we cannot accept the argument that the great disparity between the amount requested and the amount recovered establishes substantial justification such as would bar HCJ from EAJA recovery. *See Levernier Construction* v. *United States*, 21 Cl. Ct. 683, 689 (1990) (parties settled for 36 percent of amount sought).

The second source of substantial justification advanced by BIA involves the delay in processing the claim at the CO level caused by the multiplicity of HCJ claims and amendments to claims. We question the relevance of the delays to the issue of substantial justification of BIA's position during the adversarial adjudication stage of the case. Except in the rare circumstance where an applicant makes the proper showing, there can be no recovery for legal and other fees incurred during the pre-appeal period, so any such expenses are not in question here. *Levernier Construction Inc.* v. *United States, supra*. BIA does not relate any confusion or complications it may have experienced as a result of HCJ's pre-appeal claims and amendments to BIA's performance during the litigation stage of the case; it does not contend for instance, that it was not fully aware of and prepared for the hearing or any other part of the litigation stage because of action by HCJ. Without explanation for how the delays cited affected the litigation or BIA's position, we reject this argument, too, as establishing substantial justification.

The third principal argument involves the showing of good faith BIA made when it advanced offers to settle the dispute for $50,000 when its audit agent had advised it that HCJ was entitled to nothing. In the context of the EAJA, the Government's good faith may be of no consequence. The EAJA attempts to remedy the situation where the United States Government puts a small, relatively impecunious contractor to a lot of trouble and expense unnecessarily. It is concerned with the necessity of litigating a particular case and uses the substantial justification standard to measure that necessity. The Government's subjective intent is normally of far lesser or no importance and it certainly does not substitute for substantial justification.

The final substantial justification argument concerns BIA's reliance on the auditors' advice. In the case BIA was wrong on the facts for some issues and the law on others. It can avoid EAJA liability if it shows that it was substantially justified in those positions, though wrong. It has presented little, if anything, to justify its position on the facts, and on the law issues, it contends it was justified in following the audit agency's advice that HCJ was entitled to nothing. From a quantum standpoint, the single largest issue in the principal case was the cost attributable to the idling of HCJ equipment caused by BIA delays. Consistently throughout the litigation stage, BIA contended that HCJ was entitled to no recovery for the ownership costs of the idled equipment because it had already been depreciated. (See the principal decision, 27 IBCA at 129-30 and the reconsideration application decision, 27 IBCA at 264.) In the principal decision, we referred to two different regulatory authorities as recognizing that there are ownership costs on fully depreciated equipment and we cited one case that applied that principle (27 IBCA at 129-30). In the decision on the reconsideration application, we re-cited that case and cited a second case standing for the same principle (27 IBCA at 264). We reiterate our understanding of the law that if the Government causes a delay to the contractor, the Government will be liable to the contractor for ownership costs of equipment idled by the delay even if that equipment has been fully depreciated. We charge BIA with knowledge of that statement of the law despite reliance on contrary advice from the auditors. The principle of cost recovery for depreciated equipment was raised at the hearing but BIA stuck to its no-allowance-for-depreciated-equipment position at the hearing and in the posthearing pleadings. We made salient mention of the principle in the principal decision, but BIA maintained its no-allowance position in its reconsideration application, complaining that we had ignored the auditor's evidence. After we reiterated in the reconsideration decision the flaw in the scope of the auditors' work and the failure of BIA to account for the equipment's ownership costs, BIA again raised in this proceeding the reasonableness of relying on the auditors' recommendations and never attempted to establish that it was substantially justified in taking its stance in light of the clear indication at the hearing and in two written decisions of what the law is on the subject.

To be sure, the BIA position was also grounded in the auditors' report that the HCJ records could not support its costs. If BIA in *this* proceeding could show that (a) its major concern was quantum; (b) that HCJ had failed to make any showing on its quantum until the hearing; and (c) that upon being presented with competent proof at the hearing, BIA had relaxed or abandoned its defense, it would establish substantial justification for its prior litigatory efforts. *See Drillers, Inc.*, EBCA No. 451-10-90, 91-3 BCA ¶ 24,197 (substantial justification not established despite appellant's failure to raise the ultimately successful theory of recovery until briefing "several weeks before the commencement of the hearing"); *Stephen J. Kenney*, IBCA-2132-F, 25 IBCA 7, 87-3 BCA ¶ 20,197; *Central Colorado Contractors, Inc.*, IBCA-2078-F, 24 IBCA 1, 87-1 BCA ¶ 19,460 (1986). Not only did BIA fail to attempt to make such an argument, but the facts would not support it in any event. As previously mentioned, BIA defended every facet of the HCJ complaint, including entitlement, despite our "analysis under the Entitlement section [which] resulted in findings in HCJ's favor in nearly every particular" (27 IBCA at 134) and our finding on the CO's awareness "of substantial Government deficiencies in the field" and his failure to rectify them (27 IBCA at 135). Further, we found that HCJ established its "in-house" rates for equipment usage as a reasonable measure of its costs therefor (27 IBCA at 130), but after hearing the evidence leading to that finding BIA did not relax or abandon its defense, and continued to insist that no costs were allowable for depreciated equipment. Thus BIA has failed to carry its substantial justification burden on any of the bases it raised.

Other Issues

Having eliminated the substantial justification issue as a bar to HCJ's recovery, we turn now to other issues, in which BIA does succeed in limiting HCJ's EAJA recovery. The first of these is the "blue book" rates issue mentioned previously. As noted, HCJ based at least two of its claim amount amendments on perceived instructions from the CO and later from the auditors to use "blue book" rates for purposes of recovering the costs of idled equipment. In the decision, we found against HCJ on this issue, concluding, however, that its mistake on this was honest enough. Where the "prevailing party" is not totally successful on every facet of the case, it may be appropriate to account for the unsuccessful facets as long as they are separable. What constitutes a separable portion of the litigation for purposes of EAJA award is left to our discretion. *Drillers, Inc.*, EBCA No. 451-10-90(E), 91-3 BCA ¶ 24,197 at 121,023; *Ackon, Inc.*, ENGBCA No. 5593-F, 91-3 BCA ¶ 24,147 at 120,833. The issue was discreet enough from the rest of the case that we should make a deduction from EAJA fees and expenses otherwise due because BIA prevailed on the issue. Though discreet and separable, it also was a minor issue, ultimately the subject of a relatively small amount of effort at the hearing and in the briefing. HCJ's submissions do not clearly attribute which of its expenses were incurred in connection with this issue; BIA likewise has made no presentation that would help in the allocation necessary to this enterprise, so in the exercise of our discretion on the issue, we have devised our own method. We note first that our decision used approximately 3 pages out of the decision's 49 to deal with the "blue book" rates issue, representing about 6 percent of our decision's space usage. Since that percentage roughly comports with our assessment of how much of the parties' litigatory efforts were consumed by the issue and since BIA prevailed on the issue, we will make a 6-percent reduction in the amount of attorneys' fees for the principal case we otherwise find to be due. (Because BIA so vehemently decried the difference between the amount requested by HCJ and the decision amount, it is inferable that BIA believes that there should be no EAJA award in an amount that exceeds the portion of total fees and expenses that is represented by the ratio of decision amount to requested amount. We reject that approach here as other tribunals have. *See, e.g., Total Maintenance, Inc.*, ASBCA No. 30450, 91-3 BCA ¶ 24,248 at 121,249; *Ackon, Inc., supra* at 20,834; *Wilkinson & Jenkins Construction Co.*, ENG BCA No. 5176-F, 88-2 BCA ¶ 20,669 at 104,4152; and *T. H. Taylor, Inc.*, ASBCA No. 2694-0(R), 86-3 BCA ¶ 19,257 at 97,931. We have already discussed the reasons that the claim amount was so high as compared to the decision amount. Where the monetary value of parts of the case is not a satisfactory measure of the litigatory effort involved in the prosecution of the respective parts, we will not use the relative values to aid in determining the proper EAJA amount.)

BIA also has correctly pointed out that the amount of attorneys' fees recoverable in an Interior EAJA action is limited (BIA Response at 13). We thus will reduce the recovery for all allowable attorneys' fees by an amount that will bring the total fees recovery in line with the $75/hour limit.

BIA further complains that there are "late charge" amounts included in litigation counsel's billings that are not allowable. We agree and will eliminate such charges from the recovery amount.

Another BIA argument is that many of the invoiced items of fees and expenses lack sufficient detail and specificity to allow recovery based thereon. In particular, BIA points to the billings of the attorneys and of the consultant/expert Mr. Edwards as well as those from certain clerical service companies. We agree that the billings from Mr. Edwards lack detail in describing the services performed, but we know from collateral sources that Mr. Edwards was the principal construction contract consultant for HCJ and for counsel throughout the case. In the circumstances we have little trouble concluding from what we have observed that the value of Mr. Edwards' consulting services over 2-½ years of performance was not any less than the $5,245 he charged.

Regarding the descriptions of the attorneys' services, we note first that there were two attorneys involved at different times during the proceedings. We find the descriptions of services of the first of these, Mr. Othmer, to be adequate. Some of the descriptions provided by the second attorney, Mr. Metzgar, are indeed rather sketchy (*e.g.*, "Return call to court reporter"; "Call from Ed Edwards"; and "Correspondence to Berkson"), but, for the most part, these less-detailed entries involved very limited amounts of time, usually one or two-tenths of an hour. In considering the total number of hours expended during the litigation as a whole, we find that number not to be inappropriate for a case of the complexity and other characteristics of this one; we also realize that a significant portion of a lawyer's time spent in such cases is taken up by short-term telephone calls to clients, witnesses, consultants, opposing counsel, and the Board and by short-term efforts at, for instance, "[r]eviewing incoming material." We believe that the total number of hours presented is not inappropriate, that the amount thereof which is described adequately by any reasonable standard represents the great bulk of the total, and that the amount thereof which is described in a less detailed way is not disproportionate to what would be expected in such a case in terms of the short-term involvements of the sort described above. In these circumstances, we will not apply an overly strict standard that will require an attorney to spend an amount of time *describing* a service that is inappropriate because of the brevity of the period actually taken up by the service being described, and viewing Mr. Metzgar's invoices as a whole with that in mind, we find that they describe the legal services performed adequately to allow recovery. (*See T. H. Taylor, supra* at 97,390.)

The other billings whose sketchiness was questioned by BIA, those for Cheri's Word Processing and Manpower Temporary Services for clerical services, present a different picture. There are two invoices for Cheri's presenting no more than dates, hours, and an hourly rate. We note, however, that on the first of these dated April 27, 1988, for a total bill of $104, the service dates are "04/26/88" and "04/27/88." We know that those are dates for two of the hearing days and that for the bulk, if not all, of the period of the hearing both parties and their counsels were involved in extensive overnight review of the current day's hearing occurrences and preparation for the following day's session. Knowing that, we can also conclude that HCJ would be justified in engaging clerical assistance in those endeavors and find the description of this charge to be adequate to allow recovery. We have no similar knowledge that would allow a favorable finding about the second of Cheri's invoices, dated May 12, 1988, and billing in the amount of $384 for work on four dates in May 1988, after the hearing concluded. Similarly, the Manpower invoices are not sufficiently connected to the litigation for us to find them allowable. There are 11 such invoices each covering a week's period from April to October of 1986 with an employee's name, hours, rate, and the description "Typist/Statistical"; the total billed is $2,244.21. Just as BIA had the burden of proving substantial justification, so HCJ, as an EAJA applicant, has the burden of satisfactorily showing what expenses it incurred in the litigation for which it requests reimbursement. The submission of the second Cheri's invoice and the various Manpower invoices, being characterized by such meager description, does not carry the burden of showing that these expenses were even connected to the case, and we will not allow recovery based upon them.

In reviewing the various clerical invoices as suggested by BIA's questioning, we note a December 27, 1986, bill from Executive Services in the amount of $403.68 for "Wordprocessing." The description used is less than ideal, but it is adequate with very little help to connect the service to the principal case. It appears that the charge is for transcribing a tape recording and notes from the "Meeting of March 30." We know that there was an important meeting between HCJ and BIA officials on March 30, 1984, prior to the opening of the second construction season, that there were HCJ notes taken and a tape recording made at that meeting and that ultimately those were transcribed. The description on the invoice is adequate for us to conclude that the charge is for the service connected with transcribing the records of that meeting. Recalling, however, (1) that that meeting and the records were important to the case because of the CO's alleged directions at the meeting to use "blue book" rates for equipment charges and (2) that we have found expenses related to the "blue book" issue to be unallowable for HCJ's failure to prevail thereon, we will not allow reimbursement for this expense, despite the adequacy of the description of the services.

One other item not raised by BIA is that a fair portion of the attorneys' fees charged by Mr. Othmer is for services rendered before the appeal was filed. Since the EAJA seeks to recompense otherwise qualifying applicants for fees incurred during "adversarial adjudication," ordinarily only those fees and expenses incurred after the issuance of the CO's decision, or, in this case, starting with the notice of appeal, are subject to reimbursement. That rule is not an absolute bar to recovery of earlier-incurred expenses, where, for instance, it is shown that they were incurred in anticipation of litigation and were necessary in the circumstances for a productive and effective litigatory effort. *Building Service Unlimited, Inc.*, ASBCA No. 33283, 88-3 BCA ¶ 20,941 (1988). In order for us to allow reimbursement for such early charges, however, it is necessary that the applicant make the showing that such is the case. HCJ has made no such showing so we will allow recovery only for those fees that were in respect of services not before February 4, 1986. On a related point, we note that the first two items on the second page of Mr. Othmer's invoice of April 29, 1986, appear not to be connected to the BIA case, so we will not allow reimbursement therefor, to the extent of seven-tenths of an hour, plus tax.

Summary

HCJ has requested a reimbursement of $78,392.02 in total. We find that $58,293.21 is due. It attached a recap of fees and expenses sought to its application and we will use the detail presented therein as a guide for our summary of the allowances totalling the latter amount, as follows:

Item	Amount Requested	Amount Allowed	Notes
Attorneys' fees.			
(principal case).			
Othmer	$ 9,133.87	$ 6,082.27	1*
Metzgar *et al.*	40,006.02	26,492.98	2*
Expenses.			
(principal case).			

Item	Amount Requested	Amount Allowed	Notes
Winter *et al.*.			
CPA	3,728.39	3,728.39	
Arthur Anderson.			
CPA	8,581.03	8,581.03	
Edwards.			
Contract Consultant	5,245.00	5,245.00	
Phillips.			
Expert	562.50	562.50	
Vokosovich.			
Surveyor	1,275.00	1,275.00	
Fox & Associates.			
Experts	2,094.48	2,094.48	
Clark-Hughes.			
Reporters	1,298.57	1,220.66	*
Executive Services.			
Transcription	723.26	300.40	3*
Cheri's.			
Wordprocessing	488.00	97.76	4*
Manpower.			
Typing	2,244.21	-----	5
Elliott.			
Court Reporters	1,317.73	1,238.67	*
Attorneys' fees.			
(reconsideration).			
Metzgar	1,363.96	1,044.07	6
Expenses.			
(reconsideration).			
Edwards.			
Consultant	330.00	330.00	
Total	$78,392.02	$58,293.21	

1Reimbursement for 65.6 hours of services at $75/hour, plus $268.29 in taxes as billed and $1,282.21 in expenses. The difference is attributable to services and related charges incurred prior to the filing of the notice of appeal, and to the 7/10 hour for apparently unconnected service, as discussed earlier in the text, and a $100 arithmetical error in the billing.

2The figure requested includes: (1) a total of $300.10 for out-of-pocket expenses, like witness fees, long distance calls, copies, etc., all of which is allowed; (2) $3,219.87 in late charges (or "Interest") charged to the client, all of which is disallowed; (3) $34,684 in professional fees which includes 327.1 hours for Mr. Metzgar's services at $100 per hour and 23.2 hours and 5.2 hours for Mr. Metzgar's associates' time at $75 per hour and $45/hour, respectively, the total of which is reduced by $8,177.50 to take account of the $75/hour cap on reimbursement of attorneys' fees per statute, and (4) $1,802.05 in gross receipts tax which is reduced by $424.63 to take account of the reduction in professional fees.

3Executive Services presented two invoices, one dated Nov. 17, 1986, in the amount of $319.58 and the other dated Dec. 27, 1986, in the amount of $403.68. The former is for "Typing Deposition" and is allowed. The latter is for "wordprocessing--Pre-work conference, Meeting of March 30" and is disallowed as being connected to the "blue book" rates issue, as discussed in the text.

4Cheri's presented two invoices, one dated Apr. 27, 1988, for $104 and the other dated May 12, 1988, for $384. Both are apparently for word processing services. The former is apparently for services performed in connection with hearing preparation and is allowed. The latter carries with it no explanation for how it is connected to the case and is not allowed, as discussed in the text.

5None of these expenses are reimbursable, because HCJ did not show how they were connected to the case, as discussed in the text.

6The figure requested consists of $1,210 in fees, $84.40 in out-of-pocket expenses, and $69.56 in tax. The figure allowed consists of $907.50 in fees (12.1 hours at $75/hour rather than the $100/hour billed), $84.40 in out-of-pockets, and $52.17 in taxes adjusted for the adjustment in attorneys' fees.

The items marked with an * are those that are generally enough associated with the litigation that we believe that the 6-percent reduction for the "blue book" rates issue should be taken. The figure in the "Amount Allowed" column reflects that reduction after other appropriate adjustments.

In conclusion, we grant, in part, applicant's request for attorneys' fees and expenses under the EAJA in the total amount of $58,293.21, as summarized above.

RUSSELL C. LYNCH
Chief Administrative Judge

I CONCUR:

G. HERBERT PACKWOOD
Administrative Judge

ALFRED G. HOYL

123 IBLA 169 Decided: *June 3, 1992*

Appeal from a decision of the Colorado State Director, Bureau of Land Management, denying application for a 5-year suspension of Federal coal leases C-0127832, C-0127833, and C-0127834.

Affirmed.

1. Coal Leases and Permits: Diligence--Coal Leases and Permits: Termination

Under sec. 7(a) of the Mineral Leasing Act, as amended, any Federal coal lease which is not producing in "commercial quantities" at the end of 10 years shall be terminated. Production of "commercial quantities" (defined as 1 percent of recoverable coal reserves) must be achieved by the end of the "diligent development period," which is 10 years after lease issuance.

2. Coal Leases and Permits: Suspension of Operations and Production--Mineral Leasing Act: Generally

Where a mine fire occurs on fee land adjoining a Federal lease, and where the fee land and Federal lease are not part of a logical mining unit, the fire is not a *force majeure* providing grounds for relief from the terms of the Federal lease. Further, where the lessee fails to prove that the alleged *force majeure* event was the proximate cause of his nonperformance; that a good faith effort was made to overcome the problem; and that the problem was beyond his reasonable control, he is not entitled to relief.

3. Coal Leases and Permits: Suspension of Operations and Production--Mineral Leasing Act: Generally

A Federal coal lease may not be suspended under sec. 7(b) of the Mineral Leasing Act, as amended, recognizing *force majeure* conditions, due to adverse market conditions.

4. Coal Leases and Permits: Diligence--Coal Leases and Permits: Suspension of Operations and Production--Mineral Leasing Act: Generally

Under sec. 7(b) of the Mineral Leasing Act, as amended, a Federal coal lease is subject to two requirements: diligent development and continued operation. The requirement for continued operation may be suspended under that section "where operations under the lease are interrupted by strikes, the elements, or casualties not attributable to the lessee," that is, by *force majeure* conditions. The requirement for diligent development, however, may *not* be suspended by the existence of *force majeure* conditions under sec. 7(b).

5. Coal Leases and Permits: Suspension of Operations and Production--Mineral Leasing Act: Generally

The only relief available under sec. 7(b) of the Mineral Leasing Act, as amended, where *force majeure* conditions exist is from the lease requirement that "continued operation" be maintained. In order to achieve "continued operation," a lessee must, *inter alia,* achieve the production of not less than commercial quantities of recoverable coal reserves in each of the first 2 continued operation years "following the achievement of diligent development." Thus, in order for there to be "continued operation," there must first be "diligent development." Where lessees have not commenced operations on a Federal leasehold, they have not achieved either "diligent development" or "continued operation," so that no relief is available to them under the *force majeure* provision.

6. Coal Leases and Permits: Diligence--Coal Leases and Permits: Suspension of Operations and Production--Mineral Leasing Act: Environment

A suspension granted under sec. 39 of the Mineral Leasing Act, as amended, "in the interest of conservation" suspends the requirement of sec. 7(a) and (b) of the Mineral Leasing Act, as amended, requiring diligent development within 10 years of the date of issuance of the coal lease.

7. Coal Leases and Permits: Suspension of Operations and Production--Mineral Leasing Act: Environment

Sec. 39 of the Mineral Leasing Act, as amended, provides for suspension of a Federal coal lease either (1) as a matter of right where, through some act, omission, or delay by a Federal agency, beneficial enjoyment of a lease has been precluded, such as where delays imposed upon the lessee due to administrative actions addressing environmental concerns have the effect of denying lessee's operator "timely access" to the property; or (2) as a matter of discretion, in the interest of conservation, *e.g.*, to prevent damage to the environment. Where there is no persuasive evidence either of undue delay imposed by administrative actions addressing environmental concerns or of environmental harm, an application for suspension under sec. 39 is properly denied. The fact that a substantial investment of funds was made in three Federal leases does not create any cognizable right to retain the leases indefinitely. To the contrary, in the Federal Coal Lease Amendments Act, Congress required timely development of the leases on pain of termination.

8. Coal Leases and Permits: Rentals--Coal Leases and Permits: Suspension of Operations and Production--Mineral Leasing Act: Rentals

A Federal coal lessee's obligation to pay rental may be suspended under sec. 39 of the Mineral Leasing Act, as amended, as interpreted by Departmental regulation 43 CFR 3485.2(c), if he submits detailed supporting information, including (among other things) facts indicating whether the mine can be successfully operated under the existing lease terms. A request for suspension that does not comply with that regulation is properly rejected.

APPEARANCES: Alfred G. Hoyl, Rollinsville, Colorado, *pro se*; Lyle K. Rising, Esq., Office of the Regional Solicitor, U.S.

June 3, 1992

Department of the Interior, Denver, Colorado, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HUGHES

INTERIOR BOARD OF LAND APPEALS

Alfred G. Hoyl has appealed from the August 21, 1990, decision of the Colorado State Office, Bureau of Land Management (BLM), denying an application for suspension of Federal coal leases C-0127832, C-0127833, and C-0127834. We affirm.

On October 1, 1966, Gerald T. Tresner became the holder of Federal coal prospecting permits C-0127832, C-0127833, and C-0127834. Following an extension of those permits, on September 30, 1970, Tresner filed three preference-right lease applications (PRLA's) for the lands included within the permits. As a condition of receiving preference-right leases, BLM requested Tresner to demonstrate, *inter alia*, "that coal [was] needed to maintain an existing mining operation * * * or * * * [was] needed as a reserve for production in the near future."

Responding to that request, Coal Fuels-Wilde (a partnership comprised of Alfred G. Hoyl and Donald E. Wilde), acting on Tresner's behalf, submitted an operating agreement between Tresner and Coal Fuels-Wilde. A June 30, 1976, transmittal letter accompanying that operating agreement explained that it "combin[ed] the Tresner Preference Right Lease Applications C-0127832, C-0127833, and C-0127834, with Coal Fuels-Wilde fee lands and Federal Coal Reserve Application C-222778."[1] According to that letter:

> [T]he Federal leases applied for, together with the fee land, combine to form a Logical Mining Unit [LMU]. The combination of the properties enhances their viability and strengthens their economic potential. * * * The data submitted shows that commercial quantities of coal have been discovered. The planned entry through the fee land proceeding into the Tresner lease application land presents a reasonable prospect of success in developing a valuable mine with revenues adequately exceeding costs.

The operating agreement designated Coal Fuels-Wilde as the manager of the envisioned LMU and named it the "Anchor Tresner Unit."

The fee land owned by Coal Fuels-Wilde was a 150-acre parcel located directly south of and adjacent to the lands covered by PRLA C-0127833. Those lands contained the Fruita No. 1 Mine, an underground coal mine. It appears that the holders of the PRLA's intended to show that the Federal coal covered by the PRLA's was being sought to allow expansion of that mine.

The record indicates that "the Fruita Mine No. 1 is located approximately 15 miles north of Fruita, Mesa County, Colorado, in the 17- to 26-foot thick Cameo coalbed of the Mesaverde Group Mount Garfield Formation" (BLM Report dated Mar. 2, 1983, at 2). According

[1] The connection with application C-222778 is not immediately clear from the record, but that application does not appear to have played a part in the present dispute.

to an investigative report by the Mine Safety and Health Administration (MSHA), U.S. Department of Labor, the mine

> had been developed by driving three entries from the surface through rock under the outcrop burned Cameo coal seam. The rock entries met the dipping coal seam about 900 feet in by the portals. The entries were advanced approximately 75 additional feet to where they were connected by crosscuts and left with a full face of coal.

(MSHA Report dated June 21, 1983, at 3).[2] Development of the Fruita No. 1 Mine was completed in late 1979 and it was left idle.

According to another MSHA investigative report, prepared in April 1983 and entitled "Investigation of Coal Heating [at] Fruita Mine," there was evidence as early as December 7, 1978, that coal in that mine was burning along the top of the Cameo bed.[3] That report refers to a map prepared by the mine operator on December 7, 1978, showing up to 12 feet of ash above the coalbed (MSHA Report dated April 1983 at 1). Additionally, it had been necessary to establish unusual ground control. The need for such indicated the presence of heat-deteriorated shales, suggesting that the coal had been burned. *Id.*

On December 16, 1980, BLM approved two assignments of the PRLA's, effective January 1, 1981. BLM stated that, as a result of these assignments, 100 percent of the record title was held by the Dorchester Coal Co. (Dorchester).

On June 29, 1981, BLM issued three noncompetitive preference right coal leases, C-0127832, C-0127833, and C-0127834, to Dorchester with an effective date of July 1, 1981. Contrary to the expectations of Hoyl, each lease was issued, by its express terms, as a separate LMU.[4] Although the regulations provide for the filing of an application to change the multiple LMU status, none was filed. *See* 43 CFR 3475.6(c).

In mid-1982, Dorchester instituted efforts to control the coal burning in the Cameo bed of the Fruita No. 1 Mine. According to a BLM inspection record dated March 2, 1983, Dorchester considered mining 100 to 150 feet across the lease border into lease C-0127833 to construct a barrier, and other techniques.[5] Those plans were evidently not carried out. Instead, it appears that Dorchester pumped water into

[2] As the MSHA report details events well into July 1983, it was obviously written after June 21, 1983, despite its caption.

[3] Although that report concludes that there was an "active heating," it deals with how best to contain the heating and does not offer any opinion on when the presence of the fire should have been detected.

[4] Sec. 12 of each of the leases provides:

"LOGICAL MINING UNIT (LMU) - This lease is automatically considered to be an LMU. This LMU may be enlarged, adjusted or diminished in accordance with the applicable regulations in Titles 10, 30 and 43 of the Code of Federal Regulations. The mining plan for the LMU shall require that the reserves of the LMU will be mined within a period of 40 years in accordance with 30 CFR 211 and 43 CFR 3400.0-5. The definition of LMU and LMU reserves and other applicable conditions are set forth in the regulations in 43 CFR 3400.0-5 and 3475, 30 CFR 211, and Title 10 of the Code of Federal Regulations."This lease provision was consistent with 43 FR 3475.5 (1981).

[5] According to BLM's report,

"Dorchester is considering obtaining approval to mine 100 to 150 feet into Lease C-0127833 to get ahead of the fire and construct a barrier. One idea is to mine a crosscut 20 feet wide, the full height of the coalbed, and extending a minimum distance of 150 feet on each side of the main entries. The barrier would then be filled with water, fly ash, or some other incombustible material. Bulkheads would be used to completely fill the barrier on each side. Between the three entries, the barrier would be filled halfway and bridges would be constructed at the intersections.

"Two other ideas under consideration are to install backfilled tunnel liners through the area of the fire or to seal the entries and drive new rock tunnels from the underlying Anchor bed and intersect the coal beyond the fire." (BLM Report dated Mar. 2, 1983, at 1).

the coalbed and attempted to cut off air to the fire using a chemical grout (BLM Report dated Mar. 2, 1983, at 1). Those efforts to isolate, control, and extinguish the coal evidently failed, and on June 23, 1983, flames and smoke were being emitted from the return air entry. That more active fire was subsequently controlled and extinguished only by an extensive and concentrated effort, during which entries were flooded and sealed (MSHA Report dated June 21, 1983, at 3-5). There has been no further activity at the mine since then.

Despite the fire, Dorchester continued its plans to develop the Federal leases. On October 11, 1983, Dorchester filed a letter with BLM requesting modification of the two interior boundaries between the three leases. Dorchester indicated that it had been conducting exploration and feasibility studies since 1981 and was initiating the permitting process "for the entire project," that is, for mining the three leases. Significantly, it expressly acknowledged that "[e]ach lease was designated as a separate [LMU] in the terms of the lease as issued" and presented a lengthy explanation of why it felt each lease should be developed as an independent operation. The following quotation from the October 11, 1983, letter is representative:

> We feel the modified boundaries proposed in this submission will result in leases which are considerably more consistent with the definition of a logical mining unit as defined in [43 CFR 3480.0-5(a)(19)]. The changes will allow each lease to be developed in a more "efficient, economical, orderly manner as a unit," as anticipated by the regulation. This proposed modification will improve the development potential of each lease without foreclosing the option of later consolidation of the leases into a larger LMU as a result of additional technical and commercial considerations.

By decision dated December 19, 1983, BLM approved the requested modification of the interior boundaries between the three leases. The leases were never consolidated into a larger LMU.

In 1983 and 1984, Dorchester evidently submitted mine permit applications with the Office of Surface Mining Reclamation and Enforcement, U.S. Department of the Interior, as required by the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. §§ 1201-1328 (1988). The record contains little information concerning those applications, but it appears from statements in the record that Dorchester did not actively pursue them and that, after almost 4 years, Dorchester was sold. On November 16, 1987, BLM approved a name change acknowledging that Dorchester had changed its name to American Shield Coal Co. (American Shield).[6]

On June 30, 1988, American Shield advised BLM that, "[a]fter careful evaluation of the plans outlined in the pending permit applications for the [three] leases[,] we have determined that the development of the coal resources as proposed is not feasible under current market conditions. By this letter, American Shield * * * hereby withdraws these old mine permit applications."

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[6] The record indicates that, on Feb. 7, 1986, the Arabian Shield Development Co. purchased all of the outstanding stock of Dorchester and then changed its name to American Shield.

On January 9, 1989, American Shield filed a request for approval of assignment of the leases back to Hoyl and Wilde. This request was not handled immediately, as BLM had not received performance bonds for the leases as required by the regulations.[7]

On April 6, 1989, Hoyl and Wilde filed an application seeking a 5-year suspension of the leases, citing the mine fire in the Fruita No. 1 Mine.[8] BLM's denial of that request is the subject of this appeal. They stated in the request that, since issuance, the leases had been extensively drilled, and that three entry mains had been started in the Cameo and Anchor seams. They asserted that over $5 million had been spent on what they described as "the LMU," and that over $400,000 in fees and rentals had been paid to BLM. Hoyl and Wilde described the mine fire, stating that "[e]arly in 1983 entries in the Cameo seam approximately 975 feet from the portal began to heat up, and continuation of entries ceased." Hoyl and Wilde requested the "suspension of rentals, minimum production, continued operation production requirements, commercial quantities production, forty year mine-out requirement, and due diligence requirement."

BLM treated the application as seeking a suspension under the so-called "*force majeure*" provisions of section 7(b) of the Mineral Leasing Act (MLA) (*as amended by* section 6 of the Federal Coal Lease Amendments Act (FCLAA)), 30 U.S.C. § 207(b) (1988). Alternatively, BLM treated the application as seeking a suspension in the interest of conservation under section 39 of MLA (*as amended by* section 14 of FCLAA), 30 U.S.C. § 209 (1988).[9]

On January 11, 1990, following the filing of acceptable performance bonds by Hoyl and Wilde (lessees), BLM approved assignment of the three coal leases to them from American Shield, effective January 1, 1990.[10] BLM then proceeded to consider the pending application for suspension.

The record contains a March 13, 1990, memorandum from the Grand Junction, Colorado, District Manager, BLM, to the Deputy State Director, Mineral Resources, Colorado State Office, BLM, concerning the mine fire and its relationship to the request for suspension:

> The [lessees'] application for suspension and the record provide only one possible basis for exclusion from the authorization to mine/commencement of mine development criteria, this being the occurrence of the mine fire during the development of fee coal

[7] After issuing two extensions, on Dec. 22, 1988, BLM issued an order to show cause why American Shield should not be found in default for failure to comply with applicable bonding requirements. This situation remained unresolved at the time of the assignment from American Shield to Hoyl and Wilde. On Sept. 13, 1989, BLM notified Hoyl and Wilde that, as prospective lessees, they would be required to post bonds. Following requests by Hoyl and Wilde, BLM twice extended the time for posting those bonds. On Dec. 20, 1989, acceptable bonds were filed, and on Jan. 11, 1990, BLM approved the assignments.

[8] The application for suspension was filed on letterhead of Coal Fuels Corp. and was not signed by Wilde. By letter dated July 7, 1990, BLM notified Hoyl and Wilde that it required both of their signatures, as prospective holders of record title. BLM also advised that it could not recognize any interest held by Coal Fuels Corp., which was not a prospective record title holder. In response, on July 12, 1990, Wilde endorsed the application for suspension.

[9] The request stated simply that "[t]he type of suspension requested is a Force Majeure suspension and/or conservation, (suspension of operations and production)." No legal authority was cited. It appears that BLM properly interpreted the request as we have described it.

[10] *See* note 7, *supra*.

As of BLM's Jan. 11, 1990, decision, an assignment of Wilde's interests in the leases to Hoyl was also pending before BLM.

adjacent to the leases. Several facts conspire against the consideration of the fire as a basis for exclusion from the basic regulating criteria. The existence of the problem has been known since 1982. [[11]] However costly and regrettable the necessity of having to flood and seal the original entries, the mine plan and permitting pursued by a previous lessee, Dorchester Coal, after the fire had occurred, reveals that it was far from insurmountable as far as restricting lease development. The existing sealed entry locations are only one of many possible entry locations by which the subject lease might be developed. Development of the leases through alternate locations is in line with maximizing extraction of the coal resource and mitigatable in terms of minimizing damage to other resources. The failure on the part of present and previous lessees, to take advantage of the reasonable alternatives in developing these leases can only be construed as an indication that other considerations, outside of what regulations allow for granting a suspension, control the [lessees'] decisions not to develop.

It was recommended that suspensions not be granted.

On May 11, 1990, the Colorado State Office placed in the record an internal memorandum also recommending denial of the application:

In order for an application for a suspension of operations and production to conform to the ["conservation"] requirements of section 39 [of the MLA] and the regulations, the lessee must have received authorization to mine and onsite mine development must have commenced. No authorization to mine has been obtained for any of the three leases and no mine development has ever occurred on the leases. Permitting and commencement of mine development was limited to 150 acres of fee land adjacent to lease C-0127833 on which operations and production ceased in 1979, three years before the subject leases were issued. No production has occurred on or adjacent to leases C-0127832 or C-0127834. The mine permit applications submitted by Dorchester in 1983 and 1984 for the three leases were never pursued to completion and were formally withdrawn by American Shield by letter dated June 29, 1988.

No information is presented by [lessees] to show that a loss of federal coal would occur in the absence of a suspension, or that the sealed portal is the only possible location by which lease C-0127833 might be developed. Analysis by [BLM] mining engineers indicates that the sealed portal site is only one of many possible locations by which C-0127833 might be developed. Development of the leases through alternate portal locations is in line with maximizing extraction of the coal resource and mitigatable in terms of minimizing damage to other resources.

BLM's May 11, 1990, memorandum also concluded that the mine fire was not a *force majeure*, concluding that it was not unexpected prior to the issuance of the lease, but had been known since 1982. BLM also noted that the fire was not uncontrollable, in that it did not restrict development of the Federal leases, as shown by the fact that Dorchester had submitted a mine plan and mining permit application to develop those leases after the fire occurred. Also, BLM concluded that that plan showed that the spontaneous combustion problem was far from uncontrollable as to restricting lease development.

On May 2, 1990, lessees advised BLM that they would not pay rental while their application for suspension was pending.

At a meeting on June 1, 1990, BLM provided lessees an opportunity to respond to its May 11, 1990, memorandum. They filed documents in support of their application on June 18, 1990. The documents

[11] Additional evidence in the record indicates that the fire was known in December 1978, even before the issuance of the lease.

indicated that, in addition to the mine fire, "the difficult market conditions, and the leveraged buyout of Dorchester Gas by Damson Oil delayed the project." These documents did little to refute BLM's recitation of the facts, but stressed instead that the coal in the leases could be commercially developed if an extension of time was granted. No allegations of administrative delay were raised.

In a memorandum dated August 20, 1990, BLM pointed out several misconceptions evident in lessees' comments. In particular, BLM noted that lessees did not understand that the granting of a section 39 "conservation" suspension that would suspend the obligation to pay rent and the diligent development period would also suspend their rights to use the lease. Secondly, although the section 7(b) "*force majeure*" suspension would allow production up to the pre-suspension level, there could be no production here, as the pre-suspension level was zero. Thus, it would not be possible for lessees to continue to develop the lease during any suspension, even if granted. That is, lessees could not use either suspension to gain more time to meet the diligent development period. Further, BLM stated, the *force majeure* suspension does not suspend the obligation to pay rental, and lessees had already indicated that they believed a suspension would relieve them of that duty.

On August 21, 1990, BLM issued its decision rejecting the application for suspension. BLM rejected the request under section 39 of MLA, holding that such suspension could conform to that provision only if the lessee both previously received authorization to mine and commenced onsite mine development. As no authorization had been obtained (other than for exploratory drilling), and no mine development had occurred on these leases, BLM denied the application.

BLM also rejected the request for suspension under section 7(b) of MLA, ruling that the mine fire did not meet the definition of "*force majeure*" because it was neither "unexpected" or "uncontrollable." The existence of the fire, BLM held, had been known since 1982. Further, the mining permit application, which was filed by the then lessee of record Dorchester after the fire occurred, indicated that the spontaneous combustion problem was controllable and would not restrict lease development. Hoyl (appellant) appealed.

[1] Section 7(a) of MLA (*as amended by* section 6 of FCLAA), 30 U.S.C. § 207(a) (1988), provides in part:

(a) *Term of lease, annual rentals; royalties; readjustment of conditions*

A coal lease shall be for a term of twenty years and for so long thereafter as coal is produced annually in commercial quantities from that lease. *Any lease which is not producing in commercial quantities at the end of ten years shall be terminated.* [Italics supplied.]

The leases here were issued effective July 1, 1981. Thus, the deadline for lessees to establish production in commercial quantities from the leases was July 1, 1991.[12] *See also* 30 U.S.C. § 207(b) (1988)

[12] As BLM acknowledges in its answer, the deadline is not July 1, 1990, as stated in its Aug. 21, 1990, decision.

(requiring "diligent development," that is production of "commercial quantities," defined as 1 percent of recoverable coal reserves, by the end of the "diligent development period," July 1, 1991).[13] It is clear from information submitted by appellant that it would be 4 years after mining began that the production requirement could be met. Thus, it is equally clear that these leases would have been terminated if BLM did not extend the diligent development deadline.[14]

Against this background, it is evident that the purpose of lessees' request for suspension is to gain an extension of the diligent development deadline. *Compare Mountain States Resources Corp.*, 92 IBLA 184, 185, 93 I.D. 239, 240 (1986). That is, what lessees are really after is more time to commence operations and achieve enough production that their leases will not be terminated for failure to meet that deadline. Further, in view of financial difficulties, they desire a rental-free extension of their lease.

[2] We first address the request for suspension under the *force majeure* provisions. We are not persuaded that the mine fire is properly treated as a basis for relief under section 7(b). First, it occurred on fee land. In order to be regarded as affecting operations on these leases, they would have to have been consolidated in a single LMU along with the fee lands. *See* 30 U.S.C. § 202a(3) (1988); 43 CFR 3483.3(a)(1). As discussed above, although Hoyl anticipated that consolidation would occur, it never did. In fact, Dorchester expressly confirmed that its technical studies indicated that the leases should be treated as separate LMU's. As they were not included in a single LMU with the Federal lands, any conditions present on the fee lands are not grounds for relief from the terms of the Federal leases.

Second, we agree with BLM that the circumstances of the mine fire did not amount to a *force majeure* in this case. The language of section 7(b), acknowledging that the continued operation requirement could be suspended if operations under the Federal lease were "interrupted by strikes, the elements, or casualties not attributable to the operator/ lessee," is a *force majeure* provision. In order to invoke a *force majeure* provision, a lessee must prove that the *force majeure* event was the proximate cause of his nonperformance; that a good faith effort was made to overcome the problem; and that the problem was beyond his reasonable control. The Rocky Mountain Mineral Law Foundation, 12 *American Law of Mining* § 131.12[4]. As shown by Dorchester's filing of separate mining plans for the development of each lease after the mine fire, it was not believed that the mine fire would prevent the

[13] "Diligent development" is defined at 43 CFR 3480.0-5(a)(12) to mean "the production of recoverable coal reserves in commercial quantities prior to the end of the diligent development period." For the leases at issue, the diligent development period is the 10-year period commencing July 1, 1981, the effective date of the most recent Federal lease issuance. 43 CFR 3480.0-5(a)(13)(B). "Commercial quantities" is 1 percent of recoverable coal reserves. 43 CFR 3480.0-5(a)(6). The term "recoverable coal reserves" is defined as "the minable reserve base excluding all coal that will be left, such as pillars, fenders, and property barriers." 43 CFR 3480.0-5(a)(32).

[14] For simplicity, we shall refer to the deadline imposed by 30 U.S.C. § 207(a) and (b) (1988) as the "diligent development deadline."

development of the Federal coal. We are not persuaded that the fire caused the nonperformance. Further, the record strongly suggests that Dorchester failed to take all possible steps to extinguish the fire short of flooding the existing entries.

The concept of *force majeure* involves relief from onerous conditions beyond a lessee's control that arise during the term of a lease. The record strongly suggests that Dorchester entered into the Federal leases in 1981 with knowledge that coal was burning in the Fruita No. 1 Mine. We deem it inappropriate to invoke conditions existing at the time of issuance of a Federal lease as *force majeure.*

[3] It is established that a Federal coal lease may not be suspended under section 7(b) due to adverse market conditions. *Mountain States Resources Corp.*, 92 IBLA at 193, 93 I.D. at 244-45; *accord Solicitor's Opinion*, M-36958, 96 I.D. 15, 29 (1988). Thus, to the extent that lessees' application for suspension was based on economic hardship, the *force majeure* provision affords no relief.

[4] Even assuming *arguendo* that the mine fire amounted to a *force majeure* condition, it could not provide lessees the relief that they seek here, that is, an extension of the diligent development deadline.

First, we have held that the language of FCLAA, its legislative history, and the Department's regulations all foreclose a suspension of the deadline for meeting the diligent development requirement, where such suspension is based on *force majeure* conditions. *Mountain States Resources Corp.*, 92 IBLA at 189-91, 93 I.D. at 242-44. Under section 7(b) of MLA, each coal lease is subject to two conditions, diligent development and continued operation. The requirement for continued operation may be suspended "where operations under the lease are interrupted by strikes, the elements, or casualties not attributable to the lessee," that is, by *force majeure* conditions. The requirement for diligent development, however, may *not* be suspended by the existence of *force majeure* conditions under section 7(b): "Nothing in this subsection shall be construed to affect the requirement contained in the second sentence of subsection (a) of this section relating to the commencement of production at the end of ten years." 30 U.S.C. § 207(b) (1988).[15]

[5] Second, the only relief available under section 7(b) where *force majeure* conditions exist is from the lease requirement that "continued operation" be maintained. That term is a precisely defined term of art:

[15] As discussed in more detail in *Mountain States Resources Corp.*, 92 IBLA at 189-90, 93 I.D. at 242-43, the purpose of enacting this condition was to prevent the holding of Federal coal interests for long periods of time for speculative purposes without development.

We are aware that, in December 1988, the Department amended its regulations to provide that, if a suspension were granted under sec. 39 of MLA in the interest of conservation, the deadline for establishing diligent development would be extended. 43 CFR 3483.3(b)(1) (53 FR 49985 (Dec. 13, 1988). This question is considered below. However, the Preamble to that rulemaking makes it clear that the rulemaking did not affect suspensions issued under section 7(b) of MLA in recognition of *force majeure* conditions:

"[A] second area of concern related to whether the effects on the 10-year diligent development period for a *force majeure* suspension pursuant to section 7(b) of MLA and a suspension of operations and production pursuant to section 39 of MLA are identical. *Force majeure* suspensions are not the subject of this final rulemaking. However, this question will be considered during the review of the 43 CFR Group 3400 regulations."

We are not aware that that review has been completed.

Continued operation means the production of not less than commercial quantities of recoverable coal reserves in each of the first 2 continued operation years *following the achievement of diligent development* and average amount of not less than commercial quantities of recoverable coal reserves per continued operation year thereafter * * *. [Italics supplied.]

43 CFR 3480.0-5(a)(8). It follows that, in order for there to be "continued operation," there must first be "diligent development." 43 CFR 3483.1(a)(2); *Mountain States Resources Corp.*, 92 IBLA at 193, 93 I.D. at 244. That is, in order to receive relief, lessees would have had to show timely production of at least 1 percent of the recoverable coal reserves on each lease.[16] Not only have lessees not achieved diligent development, they have not commenced operations on any of the three Federal leaseholds. No relief is available to them under the *force majeure* provision.

BLM properly declined to grant a suspension under section 7(b) of MLA.

It remains to determine whether BLM also properly denied lessees' requests under section 39 of MLA (*as amended by* section 14 of FCLAA), which provides:

The Secretary of the Interior, for the purpose of encouraging the greatest ultimate recovery of coal, * * * and in the interest of conservation of natural resources, is authorized to waive, suspend, or reduce the rental * * * on an entire leasehold, or on any tract or portion thereof segregated for royalty purposes, whenever in his judgment it is necessary to do so in order to promote development, or whenever in his judgment the leases cannot be successfully operated under the terms provided therein. * * * In the event the Secretary of the Interior, in the interest of conservation, shall direct or assent to the suspension of operations and production under any lease granted under the terms of this chapter, any payment of acreage rental * * * prescribed by such lease likewise shall be suspended during such period of suspension of operations and production; and the term of such lease shall be extended by adding any such suspension period thereto.

30 U.S.C. § 209 (1988).

Two distinct forms of relief are authorized by that provision: (1) waiver, suspension, or reduction of lease rental, which is authorized for the purpose of encouraging the greatest ultimate recovery of coal, and in the interest of conservation of natural resources; and (2) suspension of operations and production (which includes a suspension of rental and extension of the lease term), which is authorized in the interest of conservation. *Accord Solicitor's Opinion*, M-36958, *supra* at 20. Lessees have requested both suspension and waiver of rental, and we shall consider each request separately.

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[16] As noted below, each lease was a separate LMU, so that a separate diligent development requirement applied to each lease. Even if the three leases and the fee lands could be treated as a single LMU, the record indicates that, at most, only 30,000 tons were produced from the fee lands (Coal Fuel Corp.'s Notes on June 1, 1990, meeting with H. Robert Moore at 1). BLM filed information indicating that production was much less (BLM Answer, Exh. 1 at 2). Even if all of the production cited by appellant occurred after issuance of the Federal leases, it fell vastly short of 1 percent, the required amount to achieve diligent development of such single LMU, as the record discloses that the recoverable coal reserves on the three Federal leases and fee lands is 150 million tons (BLM July 18, 1980, Environmental Assessment at 2-9).

[6] Unlike section 7(b), section 39 does not state that a suspension issued under its authority will not extend the diligent development deadline. Under 43 CFR 3483.3(b), which implements section 39, BLM is authorized,

in the interest of conservation, * * * to act on applications for suspension of operations and production, * * * direct suspension of operations and production, and terminate such suspension which have been or may be granted. Applications by an operator/lessee for relief from any operations and production requirements of a Federal lease shall contain justification for the suspension.

As provided in 43 CFR 3483.3(b)(1), such suspension

suspends all other terms and conditions of the Federal coal lease or LMU, for the entire period of such a suspension. Rental and royalty payments will be suspended during the period of such suspension of all operations and production, beginning with the first day of the Federal lease month in which operations or production becomes effective.

Finally, under 43 CFR 3483.3(b)(3), the "term, *including the diligent development period*, of any Federal lease shall be extended by adding to it any period of suspension in accordance with paragraph (b) of this section, of operations and production." (Italics supplied.) *See Consolidation Coal Co.*, 111 IBLA 381, 390 (1989); *Solicitor's Opinion*, M-36958, *supra* at 30. Thus, if a lessee is entitled to a section 39 suspension, he may successfully avert the cancellation of his lease for failure to meet the diligent development requirement of section 7(a) and (b).

[7] The Department has promulgated no regulations setting out guidelines for determining when granting a section 39 suspension is appropriate. We have construed section 39 in the context of Federal oil and gas leases to provide for suspension either (1) as a matter of right where, through some act, omission, or delay by a Federal agency, beneficial enjoyment of a lease has been precluded, or (2) as a matter of discretion, in the interest of conservation, that is, to prevent damage to the environment. *Bronco Oil & Gas Co.*, 105 IBLA 84, 87 (1988); *NevDak Oil & Exploration, Inc.*, 104 IBLA 133, 137-38 (1988) (applying *Sierra Club (On Judicial Remand)*, 80 IBLA 251 (1984), *aff'd sub nom. 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)); and *Copper Valley Machine Works* v. *Andrus*, 653 F.2d 595 (D.C. Cir. 1981)); *see also Stephen G. Moore*, 111 IBLA 326, 329 (1989); and *John March*, 98 IBLA 143, 147 (1987). In other words, 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 (*Getty Oil Co.* v. *Clark, supra* at 911)[17] and may be granted where activity must be suspended

[17] For example, where coal mining operations on a primary lease were precluded until the preparation of an environmental impact statement addressing the environmental consequences of mining both the leased land and an adjacent tract being considered for a preference-right lease, BLM properly granted a sec. 39 suspension. *Consolidation Coal Co., supra* at 383.

on a lease to prevent environmental damage (*Copper Valley Machine Works* v. *Andrus, supra* at 600).[18]

None of those circumstances has been demonstrated in the present case. There is no evidence of undue delay imposed by administrative actions addressing environmental concerns. It appears that separate applications for leave to mine the leases were timely filed and considered, but that the development plans were abandoned by Dorchester, the then lessee of record. Although there was evidently insufficient time left when appellant once again became the lessee of record to meet the diligent development deadline, we see nothing that could place the blame for those circumstances on BLM or any other administrative agency. In these circumstances, a request for suspension is properly denied. *See NevDak Oil & Exploration, Inc., supra* at 137-38.

Appellant relies on the fact that a substantial investment has been made in bringing these leases to their current state of development. He also asserts that development of the leases individually will result in unnecessary environmental damage, such as from construction of other roads to the three sites, and that "[c]onsiderable loss of federal coal would occur if the present entries were ignored and the opportunity of gaining the knowledge to ensure that spontaneous combustion could be controlled and eliminated were lost." He alleges that environmental harm will occur if the leases are not suspended so that they can be developed together.

We note that a suspension of the lease under section 39 for conservation purposes terminates immediately upon commencement of operations on the lease. *See Ruby Drilling Co.*, 119 IBLA 210, 214 (1991). Thus, even if a suspension could have been granted in April 1989, appellant would still not have had adequate time prior to the July 1991 deadline to meet the diligent development requirement, as his suspension would have terminated as soon as he began his attempt to achieve production.

Further, appellant continues his presumption that the three leases and the fee lands are a single LMU. As discussed above, they are not. In order to prevail, appellant must show that suspension of each lease would be in the interest of conservation. He has failed to do so.

In any event, appellant has not proven his allegation that the Fruita No. 1 Mine entries must be used in order to avoid or control spontaneous combustion in the coal on the Federal leases. Further, in view of the inoperative state of the Fruita No. 1 Mine and the likely environmental cost of reopening that mine following the fire and flooding of the entries, appellant's assertions that developing new

[18] As discussed above, no operations have commenced here. It was stressed in the preamble to the 1988 rulemaking amending 43 CFR 3483.3(b)(1) that suspensions would generally be warranted only "where operations have commenced and production has occurred." Nevertheless, the preamble admitted of the possibility that there might be situations where a lease would qualify for a suspension of operations even though operations have not commenced. The circumstances considered by the courts in *Copper Valley* and *Getty* were cited. 53 FR 49985.

mines would be more environmentally damaging than using that mine are highly speculative and fail to convince us that his proposal is in the interest of conservation.

We are not unmindful that a substantial investment of funds in the three Federal leases was made. However, we do not regard that fact as creating any cognizable equitable or legal right to retain the leases indefinitely, especially in view of Congress' evident policy of requiring development by directing that leases that are not actually developed be terminated. *See Mountain States Resources Corp.*, 92 IBLA at 189-90, 93 I.D. at 242-43.

BLM properly denied lessees' request for suspension here.

[8] Appellant has also requested that lessees' obligation to pay rental be suspended. Such relief is available under section 39, as interpreted by Department regulations. 43 CFR 3485.2(c)(1); *Mountain States Resources Corp.*, 92 IBLA at 193-95, 93 I.D. at 244-45. However, Departmental regulation 43 CFR 3485.2(c)(2) requires detailed information that must be presented to support such an application, including (among other things) facts indicating whether the mine can be successfully operated under the existing lease terms. The request for suspension filed by lessees did not comply, and it was therefore properly rejected. *Id.; see Sheridan-Wyoming Coal Co.*, A-25845 (June 27, 1950).

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

DAVID L. HUGHES
Administrative Judge

I CONCUR:

JOHN H. KELLY
Administrative Judge

ROBERT L. CLEWELL *ET AL.*

123 IBLA 253 Decided: *June 18, 1992*

Appeal from a decision of the Deputy Director, Office of Surface Mining Reclamation and Enforcement, refusing to order Federal enforcement action. TDN 90-07-191-6.

Reversed and remanded.

1. Surface Mining Control and Reclamation Act of 1977: Generally--Surface Mining Control and Reclamation Act of 1977: Variances: Generally

An operation is exempt from SMCRA if extraction of coal is incidental to extraction of other materials and constitutes less than 16-2/3 percent of the tonnage of minerals removed for purposes of commercial use and sale. If an operation is not exempt, mining without a valid permit would constitute a violation.

2. Surface Mining Control and Reclamation Act of 1977: Citizen Complaints: Generally--Surface Mining Control and Reclamation Act of 1977: Enforcement Procedures: Generally--Surface Mining Control and Reclamation Act of 1977: Inspections: 10-Day Notice to State

Under 30 CFR 842.11(b)(2), OSM has reason to believe that a violation, condition, or practice exists if the facts alleged by an informant would, if true, constitute a condition, practice, or violation of SMCRA, Departmental regulations at 30 CFR ch. VII, the applicable state program, or any condition of a permit or exploration approval. Once a citizen's complaint gives OSM reason to believe that a violation of the Act has occurred,OSM is required by 30 U.S.C. § 1271(a)(1) (1988) to notify the state regulatory authority thereof.

3. Surface Mining Control and Reclamation Act of 1977: Citizen Complaints: Generally--Surface Mining Control and Reclamation Act of 1977: Enforcement Procedures: Generally--Surface Mining Control and Reclamation Act of 1977: Inspections: 10-Day Notice to State

Under 30 CFR 842.11(b)(1)(iii)(A), OSM is required to immediately notify the state regulatory authority in writing when in response to a 10-day notice the state regulatory authority fails to take appropriate action to cause a violation to be corrected or to show good cause for such failure. If the state regulatory authority disagrees with the authorized representative's written determination, it may file a request in writing for informal review of that determination by the Deputy Director within 5 days from receipt of OSM's written determination. While a final determination as to whether a state agency has failed to take appropriate action or shown good cause may be delayed until the review process is exhausted, nothing in the language of the regulation authorizes OSM to withhold its initial determination.

4. Surface Mining Control and Reclamation Act of 1977: Citizen Complaints: Generally--Surface Mining Control and Reclamation Act of 1977: Enforcement Procedures: Generally--Surface Mining Control and Reclamation Act of 1977: Inspections: 10-Day Notice to State

The 10-day notification period in 30 U.S.C. § 1271(a)(1) (1988), and 30 CFR 842.11(b)(1)(iii)(A) establishes the response time for state regulatory authorities. The allowance of additional time beyond the 10-day period for the state agency to take appropriate action or show good cause would not only violate the regulation but the plain language of the statute as well.

5. Surface Mining Control and Reclamation Act of 1977: Bonds: Generally--Surface Mining Control and Reclamation Act of 1977: Citizen Complaints: Generally--Surface Mining Control and Reclamation Act of 1977: Enforcement Procedures: Generally--Surface Mining Control and Reclamation Act of 1977: Inspections: Generally--Surface Mining Control and Reclamation Act of 1977: Performance Bond or Deposit: Forfeiture

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Where reclamation costs exceed the amounts forfeited under a bond, the Board will not affirm an OSM decision that a state agency has taken appropriate action under 30 U.S.C. § 1271(a)(1) (1988), simply because a bond was ordered forfeited.

6. Surface Mining Control and Reclamation Act of 1977: Citizen Complaints: Generally--Surface Mining Control and Reclamation Act of 1977: Enforcement Procedures: Generally--Surface Mining Control and Reclamation Act of 1977: Environmental Harm: Generally--Surface Mining Control and Reclamation Act of 1977: Inspections: 10-Day Notice to State

If outstanding violations remain on a minesite, the operator is bankrupt, and forfeited reclamation bonds are insufficient to abate the violations, a state will not ordinarily be considered to have taken appropriate action or shown good cause for failure to do so under 30 U.S.C. § 1271(a)(1) (1988), unless it is diligently pursuing or has exhausted all appropriate enforcement provisions of the state program and is taking action to ensure that the operator and its owners and principals will be precluded from receiving future permits while violations continue at the site.

7. Surface Mining Control and Reclamation Act of 1977: Environmental Harm: Generally

Under 30 CFR 843.11(a)(2), surface mining operations conducted without a valid permit constitute a condition or practice that causes or can reasonably be expected to cause significant, imminent environmental harm.

8. Surface Mining Control and Reclamation Act of 1977: Citizen Complaints: Generally--Surface Mining Control and Reclamation Act of 1977: Enforcement Procedures: Generally--Surface Mining Control and Reclamation Act of 1977: Environmental Harm: Generally--Surface Mining Control and Reclamation Act of 1977: Inspections: 10-Day Notice to State--Surface Mining Control and Reclamation Act of 1977: Public Health and Safety: Imminent Danger

Under 30 U.S.C. § 1271(a)(1) (1988), and 30 CFR 842.11(b)(1)(i) and (ii)(C), OSM is required to conduct an immediate inspection when the person informing OSM provides adequate proof that an imminent danger of significant environmental harm exists and that the state has failed to take appropriate action. If OSM receives adequate proof, an immediate inspection is mandatory; the statute gives OSM no discretion to defer an inspection when an imminent danger is involved.

9. Surface Mining Control and Reclamation Act of 1977: Citizen Complaints: Generally--Surface Mining Control and Reclamation Act of 1977: Enforcement Procedures: Generally--Surface Mining Control and Reclamation Act of 1977: Environmental Harm: Generally--Surface Mining Control and Reclamation Act of 1977: Inspections: 10-Day Notice to State--Surface Mining Control and Reclamation Act of 1977: Public Health and Safety: Imminent Danger

Where a particular violation constitutes a significant, imminent environmental harm by definition, a signed statement setting forth the violation may constitute adequate proof of the existence of such a harm under 30 U.S.C. § 1271(a)(1) (1988), and 30 CFR 842.11(b)(1)(i) and (ii)(C). A signed statement showing that the state had improperly licensed the operation as exempt from SMCRA reclamation requirements is adequate proof that the state had failed to take appropriate action as of the date the inspection request was filed.

June 18, 1992

APPEARANCES: Robert L. Clewell, Tom Pike, Joseph A. Mattevi, Donald R. Sell, Sandra Arter, and Jim Ewing, Lisbon, Ohio, *pro sese.*

OPINION BY ADMINISTRATIVE JUDGE ARNESS

INTERIOR BOARD OF LAND APPEALS

This is an appeal from a February 22, 1991, decision of the Deputy Director, Operations and Technical Services, Office of Surface Mining Reclamation and Enforcement (OSM), denying a request for inspection pursuant to section 521(a) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. § 1271(a) (1988). Appellants contend they filed a complaint but that no Federal inspection was conducted, despite repeated findings by OSM that action taken by the Division of Reclamation (DOR) of Ohio's Department of Natural Resources (DNR) was inadequate.

On March 28, 1990, OSM received this confidential citizens complaint:[1]

> It concerns a Coal Strip-Mining Operation which was conducted from 1986 to 1989 on 60 acres in Center Township of Columbiana County. The operation was licensed under IM-0959 to Lisbon Coal Crushers, Inc., 37544 Hunters Camp Road, Lisbon, Ohio 44432 (now bankrupt). * * * There remains a very hazardous open pit which has yet to be fully reclaimed.
>
> We report that virtually no aggregate or related materials, other than coal, was mined * * *. This was clearly a coal mine. We find it incomprehensible that anyone could report or certify that nearly ONE MILLION TONS of materials were removed or sold from this mine, or that the mine inspector of the Ohio Division of Reclamation would be involved in a separate property transaction with a principal of the particular company. We are aggrieved that reclamation has not continued. This was clearly a coal mine. It should be designated as such, protected, and reclaimed as such.

Because 30 U.S.C. § 1256(a) (1988), provides "no person shall engage in or carry out on lands within a State any surface coal mining operations unless such person has first obtained a permit issued by such State pursuant to an approved State program," mining coal without a permit violates SMCRA. Had this area been mined pursuant to a SMCRA permit, the permittee would have been required to restore

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[1] Appellants originally requested that OSM keep confidential their identity. Pertinently, Departmental regulation 30 CFR 842.12(b) provides that:

"The identity of any person supplying information to the Office relating to a possible violation or imminent danger or harm shall remain confidential with the Office, if requested by that person, unless the person elects to accompany the inspector on the inspection, or unless disclosure is required under the Freedom of Information Act (5 U.S.C. 552) or other Federal law."

When implementation of SMCRA began, the Department established that confidentiality for a citizen complainant was a necessary part of the enforcement program. If, therefore, a citizen requests inspection of a surface mining operation and also requests that his identity be kept confidential as provided by 30 CFR 842.12(b), his identity may not be revealed, even to other parties to a case, unless and until a competent official acting in response to a formal request filed under 5 U.S.C. § 552 (1988), or other Federal law has determined that his identity must be made public because it does not fall within the scope of 5 U.S.C. § 552(b)(7) (1988), or any other exemption from disclosure provided by law. *See* 42 FR 62665-66 (Dec. 13, 1977). Nonetheless, appellants disclosed their identities to the coal company affected by their complaint when they filed their statement of reasons on appeal. Consequently, since they have themselves revealed their identities, the effort to keep the case record confidential has been discontinued.

the site to its approximate original contour. 30 U.S.C. § 1265(b)(3) (1988).

[1] Nonetheless, under 30 U.S.C. § 1291(28)(A) (1988), an operation is exempt from the Act if extraction of coal is incidental to the extraction of other materials and constitutes less than 16-2/3 percent of the tonnage of minerals removed for purposes of commercial use and sale. Ohio licensed the mine as an exempt operation. If the operation was not exempt, mining without a valid permit would constitute a violation. *Cumberland Reclamation Co.* v. *Secretary, Department of the Interior*, 925 F.2d 164, 168 (6th Cir. 1991); *JDG, Inc.* v. *OSM*, 107 IBLA 210 (1989); *McNabb Coal Co.* v. *OSM*, 101 IBLA 282, 289 (1988), *aff'd, McNabb Coal Co.* v. *Lujan*, No. 88-C-281 (N.D. Okla. Sept. 29, 1989), *appeal filed*, No. 89-5187 (10th Cir. Nov. 3, 1989). Consequently, the citizen complaint alleges a violation by challenging the exemption allowed.

In 30 U.S.C. § 1271(a)(1) (1988), Congress described OSM's duties when it receives such a complaint as this one:

> Whenever, on the basis of any information available to him, including receipt of information from any person, the Secretary has reason to believe that any person is in violation of any requirement of this chapter or any permit condition required by this chapter, the Secretary shall notify the State regulatory authority, if one exists, in the State in which such violation exists. If * * * the State regulatory authority fails within ten days after notification to take appropriate action to cause said violation to be corrected or to show good cause for such failure and transmit notification of its action to the Secretary, the Secretary shall immediately order Federal inspection of the surface coal mining operation at which the alleged violation is occurring * * *. The ten-day notification period shall be waived when the person informing the Secretary provides adequate proof that an imminent danger of significant environmental harm exists and that the State has failed to take appropriate action.

[2] The first question OSM had to consider was whether appellants' complaint gave it "reason to believe that any person is in violation of any requirement of [SMCRA]." Under 30 CFR 842.11(b)(2), OSM has reason to believe that a violation, condition, or practice exists if the facts alleged by an informant would, if true, constitute a condition, practice, or violation of SMCRA, Departmental regulations at 30 CFR ch. VII, the applicable State program, or any condition of a permit or exploration approval. Once a citizen's complaint gives OSM reason to believe that a violation of the Act has occurred, OSM is required by the provision quoted above to notify the State regulatory authority, which in this case is the DOR, DNR. 30 CFR 935.10.

When the citizens complaint was received, OSM prepared a "minesite evaluation inspection report" with an attachment indicating that OSM understood the complaint to allege that Lisbon Coal Crushers was operating a coal mining operation without a permit in violation of Ohio Revised Code (ORC) section 1513.17(A), and that the operation exceeded the ratio of coal allowed to be produced by an incidental coal operation as defined in ORC section 1501:13-1-02(S)(1)(a). On March 28, 1990, OSM issued a 10-day notice (TDN) to the State of Ohio identifying Lisbon Coal Crushers and the following violation: "Conducting a surface coal mining operation without a permit by producing coal in excess of 1/6 of all minerals produced; applies to entire area of IM-959," citing ORC 1513.17(A).

Unlike the typical violation, the one in this case could not be identified simply by an inspection of the site. For an active mine, production records at the site could be inspected for the purpose of determining whether the incidental mining exception was being violated. *See generally Tennessee Consolidated Coal Co.* v. *Andrus*, 690 F.2d 588 (6th Cir. 1982); *Andrus* v. *P-Burg Coal Co.*, 644 F.2d 1231 (7th Cir. 1981). However, the mine in this appeal was inactive, and although some inspection of the site may have been necessary to identify the volume of material removed and to determine the degree of reclamation, OSM believed it needed additional evidence before concluding that the removal of coal was not incidental to the Lisbon mining operation and therefore required a permit.

OSM considered that the only effective way to investigate the alleged violation would be an audit of the mineral production of Lisbon Coal Crushers, but concluded that the State lacked authority to conduct such an audit. Anticipating that the State would respond to the TDN by requesting an audit by OSM, OSM's Columbus Field Office (CFO) requested an audit from OSM's Branch of Fee Compliance on April 6, before the end of the 10-day period. Despite awareness that the operator had declared bankruptcy, OSM did not then consider further enforcement action to be pointless, but stated in the April 6 request for audit that

> we believe it is worthwhile to pursue collection of unpaid fees and/or enforcement action, *in order to apply the permit block sanction against the principals of the company*. Also, if it [be] determined that the operation should not have been exempt, supplemental bond pool monies are available to help reclaim the site. [Italics added.]

Shortly after this request was made, the Branch of Fee Compliance began work to gain access to the company's records, which were in the custody of a court-appointed trustee.[2]

The State DNR replied to OSM on April 12 but did not request the audit as anticipated by OSM. DNR simply reviewed existing records of Lisbon Coal Crushers permit IM-959 for reports indicating that the total amount of coal removed for the 2 years of operations was 149,162 tons and that 1,108,472 tons of other material were mined, so that only 13.5 percent of the material mined was coal. OSM first informed the State of the inadequacy of this response in an April 27 telephone conversation between Randall Pair of OSM and Pat Mayes of DOR. Pair expressed OSM's view that DOR should not have relied on the reported tonnages in view of the allegations that those amounts were

[2] Both OSM and DOR have overestimated the amount of evidence needed to sustain a violation in this case. The record confirms that information from the surface and mineral owners was readily available. If no royalty was paid them for minerals other than coal, such evidence would be sufficient to sustain the violation alleged, if the operator failed to provide contrary evidence. In *Cumberland Reclamation Co.* v. *Secretary, supra*, the court expressly adopted this Board's view that an operator's failure to produce such evidence "speaks volumes." *Id.* at 168. Both the decision by OSM to wait 10 days and the State decision to take no further action because of lack of evidence are unacceptable.

incorrect or falsified. OSM pointed out that landholders could have been contacted to check out lease provisions and DOR could have requested a production audit from OSM.

On May 14, 1990, the CFO Director issued a letter finding the DOR investigation insufficient and the response to the TDN "to be capricious and thereby inappropriate." Copies of this finding were sent to appellants. DOR responded on May 23, 1990, requesting 'an extension of time for providing a final response to this TDN until it can obtain the results from a production audit to be conducted by OSM fee compliance personnel."

A summary of a telephone discussion between Pair and John Schalip of DOR confirmed that the IM permit issued to Lisbon Coal Crushers had been forfeited and that a bond forfeiture order was made on January 22, 1990 (Chiefs Order 0640-IM). On May 23, 1990, DOR received a check for the current value of two certificates of deposit filed for the bond, $9,150.03. On May 31, 1990, Pair called Dave Anna of the OSM Branch of Fee Compliance to cancel the April 6 audit request because of difficulty perceived in obtaining information and legal complications in converting a forfeited IM permit to a coal permit.

By letter dated June 8, 1990, OSM responded to DOR's letter of May 22, 1990. In the letter, OSM deferred final determination on the appropriateness of DOR's response until DOR had determined what other methods of investigating the complaint it would pursue. DOR was informed of the OSM decision not to pursue an audit while OSM had a pending claim before the bankruptcy court for nonpayment of reclamation fees by Lisbon Coal Crushers. OSM stated that surface and mineral owners had been contacted and would be willing to provide records for information to DOR. OSM informed appellants of the actions with respect to the TDN by letter dated June 11, 1990. By letter dated August 10, 1990, OSM reported to appellants concerning the DOR investigation, stating that the investigation was expected to be completed by September 13, 1990. On September 21, 1990, however, DOR proposed that there be no further action taken, citing the forfeiture of the permit and finding "no substantial evidence to prove that the operator exceeded the coal tonnage requirements."

In a letter dated November 2, 1990, OSM concluded that the DOR investigation "has been incomplete, and [its] conclusion that 'no substantial evidence' indicates the operation to be in violation is arbitrary and capricious." Nonetheless, OSM found there was no further action to be taken on the matter because DOR was pursuing reclamation under the bond forfeiture provisions.

Appellants were informed of this determination by letter dated November 8, 1990, from CFO stating that:

> In normal circumstances, a determination by this Office that the Division has not appropriately responded to a Ten-Day Notice would result in a second investigation by this Office, with subsequent Federal enforcement taken if warranted. In this instance, however, the Division has already forfeited the performance bond filed under the Ohio Industrial Minerals law, and has initiated plans to achieve at least some reclamation using these forfeited funds. Also, the responsible party (the permittee) is under Chapter

7 bankruptcy. In this situation no effective enforcement action could be taken against the permittee. Therefore, there is no further action that this Office can take. [[3]]

Pursuant to 30 CFR 842.15, appellants sought review of the CFO decision and on February 22, 1991, the Deputy Director, Operations and Technical Services, OSM, issued the decision from which this appeal is taken. Determining that CFO's response was "appropriate," he stated:

> The Federal regulations at [30] CFR 842.11(b)(1)(ii)(B)(4) allow a State regulatory authority (SRA) not to take enforcement action in response to a TDN if the SRA has forfeited a performance bond. In this case, DOR forfeited the performance bond on this site on January 22, 1990. Both Lisbon Coal Crushers and William Lewis (president of the corporation) are in bankruptcy. There are practically no attainable assets according to the Assistant Ohio Attorney General representing DOR in this case. Further enforcement would offer little or no likelihood of securing abatement or, in this case, obtaining conversion of the operation to a permitted surface coal mining operation.

(Decision at 2).[4]

In their notice of appeal, appellants describe the current condition of the site as follows:

> The mining operation has terminated. No reclamation activities are in progress. The spoil, topsoil, and sharply cut, deep, open, watery pit are dangerous, without adequate protection, and constitute a significant hazard to human health and environment. [The pit is located in the] Vicinity, Guilford Lake State Park, Section 7, Center Township, Columbiana County, Ohio and proposed routing North Country National Trail, and above headwaters, Beaver Creek National Wild and Scenic River Area. [It o]verlooks principal (sole) pumping station for Salem City Reservoir as well as some 300 acres of prime Wetlands.

Our concern in this appeal is not only with OSM's ultimate disposition of appellants' complaint, but about the way it was handled from the moment it was filed. The applicable statute, 30 U.S.C. § 1271(a)(1) (1988), established the time for evaluating a state agency response:

> If * * * the State regulatory authority fails *within ten days after notification to take appropriate action* to cause said violation to be corrected *or to show good cause* for such failure and transmit notification of its action to the Secretary, the Secretary *shall immediately* order Federal inspection of the surface coal mining operation at which the alleged violation is occurring * * *. [Italics added.]

The most noticeable features of this provision are its mandatory nature and the lack of any ambiguity with respect to the time allowed for action. The State has 10 days, no more, in which to take appropriate action or to show good cause why it should not act. This 10-day period

[3] The letter also referred to new Federal regulations, 54 FR 52092 (Apr. 1, 1990), and Ohio's proposal to incorporate these new, more stringent rules into the State program. While these regulations will help to prevent future abuse of the incidental mining exception by requiring operators to formally apply for an exemption before operations occur, they do nothing to abate the violation that is the subject of this appeal.

[4] The Deputy Director's decision indicates that a copy of his decision was sent to Lisbon Coal Crushers as required by 30 CFR 842.15(b), but OSM did not identify Lisbon Coal Crushers as a party. Neither Lisbon Coal Crushers nor its principals participated in this appeal. We note that Departmental regulation 43 CFR 4.1105 identifies proper parties to surface coal mining proceedings before the Office of Hearings and Appeals, but appeals such as this one arising under 43 CFR 4.1280 through 4.1286 are not listed under 43 CFR 4.1105(a) which designates "statutory parties" for certain proceedings.

runs from the date of notification, not from any other date. If the State makes neither of the required responses within 10 days, the statute contains no language giving the Secretary discretionary authority to prolong the matter; it appears that he must order an inspection and do so immediately. The only terms flexible enough to allow room for interpretation are "appropriate action" and "good cause," but the response filed by DOR on April 12 was correctly found to show neither. No language in the statute authorizes OSM to defer making an immediate inspection simply by withholding its determination of the appropriateness of state action. Under the foregoing interpretation of the statute, OSM was obliged to take some action on April 12. Nevertheless, no written determination was made until May 14.

In responding to comments submitted in response to proposed amendments to regulations implementing this statutory provision, OSM offered the following construction of the statutory provision:

> As an initial matter, the commenters misinterpret the time limits imposed by the Act. Two time directives are set forth in section 521(a)(1) of the Act, which states if "the state regulatory authority fails within ten days after notification" to take appropriate action or show good cause, then the Secretary shall immediately order federal inspection. The "ten days" requirement establishes the response time for state regulatory authorities but creates no duty upon the Secretary.
>
> The Secretary's responsibility is "immediately" to order a federal inspection when he determines that the state did not take appropriate action or show good cause for such failure. Until such a determination is made, no obligation exists to conduct a federal inspection. Given the statutory goal of protecting the environment, the Secretary's determination must be made expeditiously. The statute does not specify, however, that the determination of the adequacy of the state response, or that the follow-up inspection, must occur on the eleventh day following notification to the state.

53 FR 26742 (July 14, 1988).

[3] Accordingly, OSM published a regulation establishing the following procedure:

> The authorized representative *shall immediately* notify the state regulatory authority *in writing* when in response to a ten-day notice the state regulatory authority fails to take appropriate action to cause a violation to be corrected or to show good cause for such failure. If the State regulatory authority disagrees with the authorized representative's written determination, it may file a request in writing, for informal review of that determination by the Deputy Director. Such a request for informal review may be submitted to the appropriate OSMRE field office or to the office of the Deputy Director in Washington, DC. The request must be received by OSMRE within 5 days from receipt of OSMRE's written determination. [Italics added.]

30 CFR 842.11(b)(1)(iii)(A). Subparagraph (B) of this rule delays a Federal inspection until the end of the period in which a state may seek review or until the completion of such review if it is requested, unless a cessation order is required under 30 CFR 843.11.[5] Thus, when we look to the language of the regulation rather than the statute, we find that although a *final* determination as to whether a state agency has failed to take appropriate action or shown good cause may be delayed under subparagraph (B) until the review process is exhausted, nothing in the language of the regulation authorizes OSM

[5] We note that a cessation order is not required under 30 CFR 843.11 unless an inspection has already been held.

to withhold an *initial* written determination that the State had not taken appropriate action or shown good cause. This construction is fully consistent with OSM's explicit promise to ensure that its final decision is expeditiously made, a goal which would be impossible to meet if the initial determination could be indefinitely deferred, as the facts of this case irrefutably demonstrate.

Although OSM's field office had already requested an audit by its Branch of Fee Compliance, OSM did not "immediately notify the state regulatory authority in writing" when DOR failed to take appropriate action or show good cause in response to OSM's TDN as required by the above-quoted regulation. For reasons that are not explained, OSM withheld issuance of the required notice until May 14. OSM's untimely notice found DOR's response to the TDN to be insufficient and stated that a Federal inspection would be ordered unless informal review was requested.

[4] DOR filed no request for informal review by the Deputy Director of the May 14 decision. Under 30 CFR 842.11(b)(1)(iii)(A) and (B), a request for informal review is the only mechanism by which a state agency can seek deferral of a Federal inspection. Inasmuch as OSM has recognized that "[t]he 'ten days' requirement establishes the response time for state regulatory authorities," 53 FR 26742 (July 14, 1988), the allowance of additional time beyond the 10-day period to take appropriate action or show good cause would not only violate the regulation but the plain language of the statute as well. Nevertheless, DOR requested an extension of time until OSM's production audit was completed, but shortly thereafter, OSM cancelled the request for that audit. Although OSM continued to prod DOR to do something, DOR proposed that no further action be taken on September 21, more than 4 months after the May 14 OSM determination and almost 6 months after appellants filed their inspection request. OSM withheld a decision for another month and a half, finally finding on November 2 that DOR's action was inappropriate but deciding that OSM would take no further action.

Although the Deputy Director found the action by OSM's CFO to be "appropriate," the relevant issue under the applicable statute and its implementing regulations was whether the action taken *by DOR* was appropriate. Although OSM had repeatedly prodded DOR to take further action, the Deputy Director concluded this matter by finding that the action initiated by the State *before* appellants filed their complaint made further action by OSM unnecessary. The Deputy Director did not adopt or reject the repeated findings by OSM's CFO that Ohio's DOR had failed to take appropriate action, and he did not base his conclusion on a finding that DOR had taken "appropriate action" or that it had shown "good cause" for failure to do so.

The governing statutory provision, 30 U.S.C. § 1271(a)(1) (1988), is implemented by Departmental regulation 30 CFR 842.11(b)(1), which was amended in 1988 to provide in pertinent part as follows:

An authorized representative of the Secretary shall *immediately* conduct a Federal inspection:

(i) *When the authorized representative has reason to believe* on the basis of information available to him or her (other than information resulting from a previous Federal inspection) *that there exists a violation* of the Act, this chapter, the applicable program, or any condition of a permit or exploration approval, *or that there exists any condition,* practice, or violation which creates an *imminent danger* to the health and safety of the public or is causing or could reasonably be expected to cause a*significant, imminent environmental harm* to land, air, or water resources *and*--

(ii)(A) There is no State regulatory authority or the Office is enforcing the State program * * *; *or*

(B) (*1*) The authorized representative has notified the state regulatory authority of the possible violation and more than ten days have passed since notification and the State regulatory authority has failed to take appropriate action to cause the violation to be corrected or to show good cause for such failure and to inform the authorized representative of its response. * * *;

(*2*) For purposes of this subchapter, an action or response by a State regulatory authority that is not arbitrary, capricious, or an abuse of discretion under the state program shall be considered "appropriate action" to cause a violation to be corrected or "good cause" for failure to do so.

(*3*) Appropriate action includes enforcement or other action authorized under the State program to cause the violation to be corrected.

(*4*) Good cause includes: * * * (*v*) with regard to abandoned sites as defined in § 840.11(g) of this chapter, the State regulatory authority is diligently pursuing or has exhausted all appropriate enforcement provisions of the State program[; or [6]]

(C) The person supplying the information supplies adequate proof that an imminent danger to the public health and safety or a significant, imminent environmental harm to land, air, and water resources exists and that the State regulatory authority has failed to take appropriate action. [Emphasis supplied.]

[5] Departmental regulation 30 CFR 842.11(b)(1)(ii)(B)(*2*) provides that "an action or response by a State regulatory authority that is not arbitrary, capricious, or an abuse of discretion under the state program shall be considered 'appropriate action' to cause a violation to be corrected or 'good cause' for failure to do so." In *Mario L. Marcon*, 109 IBLA 213 (1989), the Board affirmed a determination that a state agency had taken appropriate action by issuing cessation orders and commencing a bond forfeiture proceeding in the absence of a showing by the appellant that reclamation costs would exceed the amount available for reclamation. In the instant case, however, the reclamation costs undoubtedly exceed the amounts forfeited, so we will not affirm

[6] Prior to the 1988 revision of this regulation, *see* 53 FR 26728 (July 14, 1988), subparagraph (B) was much shorter and ended with a semicolon followed by the word "or" which connected subparagraphs (B) and (C). *See* 30 CFR 842.11. In a case involving the application of this regulation prior to its amendment in 1988, *M & J Coal Co.* v. *OSM*, 115 IBLA 8, 16-17 (1990), we held that the TDN period provided in subparagraph (B) did not prevent OSM from taking enforcement action when faced with imminent danger under subparagraph (C) when the prior regulations were in effect. In that decision, we observed that the 1988 revisions resulted in subparagraph (C) no longer being connected to subparagraph (B) by the disjunctive "or," *id.* at 17 n.9, but we now find that OSM's omission of the disjunctive "or" was inadvertent, not only because it would be difficult to make sense of the provision otherwise, but also because OSM's preamble to the 1988 amendments made clear that no modification of the regulatory requirements for imminent danger situations was intended, citing subparagraph (C) repeatedly as a separate basis for action unaffected by the amendment of subparagraph (B). 53 FR 26729, 26730, 26731, 26732, 26737, 26742-43 (July 14, 1988). Were we to interpret the elimination of the word "or" as making 10-day notification period in subparagraph (B) applicable to subparagraph (C), such an interpretation would place the regulation in clear conflict with the mandatory waiver of that time period required by the statute.

OSM's decision that forfeiture alone constituted appropriate action. Furthermore, bankruptcy proceedings do not bar the exercise of OSM's regulatory power. *Cherry Hill Development* v. *OSM*, 108 IBLA 92 (1989).

In his decision here under review, the Deputy Director referred to a different regulation, 30 CFR 842.11(b)(1)(ii)(B)(*4*) which pertains to good cause for *failure* to take appropriate action. By doing so, he implicitly determined that DOR's action was not appropriate. In so doing, he also implicitly rejected any suggestion that the conditions on the site pose "a significant, imminent environmental harm" within the meaning of subparagraph (C) of the above-quoted regulation, an issue we will address later. The regulation cited by the Deputy Director, however, does not support his view that a state regulatory authority is not required to take enforcement action in response to a TDN if the performance bond has been forfeited. None of the situations in the five subparagraphs of the cited regulatory subsection refers to bond forfeiture. Subparagraph (*v*), however, does refer to situations where "the State regulatory authority is diligently pursuing or has exhausted all appropriate enforcement provisions of the State program," but this language refers to abandoned sites as defined in 30 CFR 840.11(g), where the State regulatory authority has made a written finding that it "[i]s taking action to ensure that the permittee and operator, and owners and operators of the permittee and operator, will be *precluded from receiving future permits* while violations continue at the site." 30 CFR 840.11(g)(3)(i) (italics added). No such written finding by the State regulatory authority appears in the record of this appeal. We therefore conclude that the Deputy Director's reliance on the cited regulation was misplaced. Indeed, if a state's failure to seek a permit block can preclude a finding of "good cause," we find it difficult to see how anything short of a permit block could constitute "appropriate action."

Departmental regulation 30 CFR 842.11(b)(1)(ii)(B)(*4*) is not the only reason for concluding that a state's failure to obtain a permit block for a site with unreclaimed violations may preclude a finding of appropriate action or good cause. Under 30 U.S.C. § 1260(c) (1988), OSM and state regulatory authorities are required to deny surface coal mining permits to applicants who own or control operations in violation of the Act. This Department has been required to implement section 1260(c) by establishing a computer system to determine whether there are ownership or control links between applicants for new permits and operators with uncorrected violations. *Save Our Cumberland Mountains, Inc.* v. *Clark*, No. 81-2134 (*SOCM*) (D.D.C. Jan. 31, 1985).[7]

[7] While this appeal was under active consideration, the court-approved settlement in *SOCM* was vacated because the District Court was found to lack jurisdiction. *Save Our Cumberland Mountains* v. *Lujan*, No. 90-5374 (D.C. Cir. May 22, 1992). Nonetheless, the court observed, that because the Secretary viewed the settlement agreement as "fair, reasonable, and consistent with the law, that nothing in this opinion precludes OSM's maintenance and improvement of the AVS [applicant violator system], and adherence to the agreement's terms, as a matter of official policy." *Id.*

Continued

Because operators may attempt to avoid reclamation costs by dissolving one corporation that has violated SMCRA and using a new corporate entity to apply for a new permit, the effectiveness of this system would be limited if we were to hold that bankruptcy and dissolution of a corporate permittee prevent future action against the bankrupt or its principals for a violation. Because there would then be no record of any violation, they could avoid reclaiming the site while they reentered the coal mining business. The administrative permit block affords some possibility that reclamation will be made if an offending operator seeks to return to the coal mining business. When OSM's CFO requested an audit on April 6, 1990, the request mentioned the importance of further enforcement action to apply the permit block sanction against the principals of the company. This observation was correct, although it was later overlooked.

[6] We recognize that there may be circumstances in which it would not be arbitrary and capricious for a state to decline to seek a permit block, even though an outstanding violation might remain on a minesite, notwithstanding our discussion concerning 30 CFR 842.11(b)(1)(ii)(B)(*4*)(*v*) above. Nevertheless, the responsibility of OSM and the state regulatory authorities to implement 30 U.S.C. § 1260(c) (1988), impels the conclusion that such circumstances will be very rare. Thus, even though an operator is bankrupt and has forfeited his reclamation bonds, if outstanding violations remain on a minesite and the proceeds of the bonds are insufficient to abate the violations, a state will not ordinarily be considered to have taken appropriate action or shown good cause for failure to do so under 30 U.S.C. § 1271(a)(1) (1988), unless it is diligently pursuing or has exhausted all appropriate enforcement provisions of the State program and is taking action to ensure that the operator and its owners and principals will be precluded from receiving future permits while violations continue at the site. Although the OSM field office suggested that a permit block might be a proper objective of enforcement action, the decision on appeal contains no finding why the permit block was not pursued.

[7] Although we have shown that OSM's processing of appellant's complaint failed to meet the requirements of 30 CFR 842.11(b)(1)(ii)(B), OSM made a more fundamental error when it received appellants' complaint that Lisbon had mined without the required permit. Although mining without a permit was not, in and of itself, considered to cause significant, imminent environmental harm when enforcement of SMCRA began, *see, e.g.*, *Claypool Construction Co.* v. *OSM*, 2 IBSMA 81, 87 I.D. 168 (1980), OSM considered it necessary to be able to issue cessation orders to operators mining without a permit and amended Departmental regulation 30 CFR 843.11(a)(2) so that surface mining operations conducted without a valid permit would "constitute a condition or practice which causes or

slip op. at 22. A reexamination of our disposition of this appeal would be warranted only if OSM were to abandon the AVS.

can reasonably be expected to cause significant, imminent environmental harm." 47 FR 18555, 18558 (Apr. 29, 1982).

[8] Under 30 U.S.C. § 1271(a)(1) (1988), and 30 CFR 842.11(b)(1)(i) and (ii)(C), OSM is required to waive the 10-day period and conduct an immediate inspection when the person informing OSM provides adequate proof that an imminent danger or a significant imminent environmental harm exists and that the State has failed to take appropriate action. When OSM first proposed regulations to implement the inspection provision, it received comments suggesting a requirement that OSM consult with a state and give the state an opportunity to act in a situation involving imminent danger or harm. OSM emphatically rejected this suggestion: "While the Federal inspector would naturally try to contact the State to determine whether the State had acted, to require this as a prerequisite to a Federal inspection would be contrary to Section 521(a)(1)." 44 FR 15299 (Mar. 13, 1979). Thus, if OSM receives "adequate proof," an immediate inspection is mandatory; the statute gives OSM no discretion to defer an inspection even 10 days when an imminent danger or significant, imminent environmental harm is involved. OSM adhered to this position when amending its regulations in 1988, stating that the amended rule would not affect a decision to inspect based on § 842.11(b)(1)(ii)(C) when adequate proof is supplied that an imminent danger to the public health and safety or significant, imminent environmental harm exists. 53 FR 26731 (July 14, 1988).

[9] In *M & J Coal Co.* v. *OSM*, 115 IBLA 8, 19 (1990), we observed: "Although the regulations require that the person providing information to OSMRE supply 'adequate proof' of the existence of an imminent danger and that the State regulatory authority had failed to take appropriate action, that standard must be a flexible one which deals with the realities of the situation." OSM has recognized that to impose strong evidentiary requirements on citizen complaints would unduly diminish the effectiveness of enforcement. In promulgating the interim regulations, OSM stated:

> [A] rigid rule regarding necessity of documentary proof in every case seems totally contrary to the intent of Congress. Such documentary evidence as photographs, while desirable and preferable, obviously cannot always be available if for no other reason than [that] citizens would have no legal right of access onto mine property to photograph violations.

42 FR 62665 (Dec. 13, 1977). When OSM published the permanent program regulations, this issue was considered again when defining "adequate proof:" "In many instances a signed statement will suffice. A high standard of proof should not be required. It would be tragic if another Buffalo Creek disaster occurred because an oral complaint followed by a signed statement was not accepted as 'adequate proof.' " 44 FR 15299 (Mar. 13, 1979). The Board, too, has recognized that prior to an inspection, a citizen cannot reasonably be required to

produce evidence of such a character that it "is doubtful that the citizen * * * could lawfully obtain the needed information" or where an inspection would be required to yield that information. *Thomas J. FitzGerald*, 88 IBLA 24, 28 (1985). In this case, appellants had submitted a signed statement, and because the violation set forth therein would constitute a "significant, imminent environmental harm" by definition, no further evidence of harm or danger was required. By showing that the State had improperly licensed the operation as exempt from SMCRA reclamation requirements and those requirements had not been met, appellants provided adequate proof that the State had failed to take appropriate action as of the date their complaint was filed.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is reversed and the case is remanded for further action and inspection consistent with this opinion.

FRANKLIN D. ARNESS
Administrative Judge

I CONCUR:

DAVID L. HUGHES
Administrative Judge

July 15, 1992

BENSON-MONTIN-GREER DRILLING CORP.

123 IBLA 341 Decided *July 15, 1992*

Appeal from a decision by the Deputy State Director, Mineral Resources, New Mexico State Office, Bureau of Land Management, affirming proposed assessments of compensatory royalty. NM SDR 89-17.

Reversed in part; vacated and remanded in part.

1. Oil and Gas Leases: Compensatory Royalty--Oil and Gas Leases: Drainage

An operator who obtains a lease that is being drained by his offending well becomes a common lessee and is presumed to have knowledge of the drainage. This knowledge is presumed from the date that the party becomes the common lessee. Any duty to drill an offset well or pay compensatory royalty would arise a reasonable time thereafter.

2. Oil and Gas Leases: Compensatory Royalty--Oil and Gas Leases: Drainage

Once BLM has established that a tract is being drained by a common lessee, the ultimate burden of proof that a protective well would be uneconomic rests with the common lessee. If the cost of drilling and operating an offset well, based on the conditions at the time this duty is acquired, is greater than the value of the recovered oil and gas, there is no breach of the lessee's duty to prevent drainage.

3. Oil and Gas Leases: Compensatory Royalty--Oil and GasLeases: Drainage

In order for BLM to assess an operator/lessee compensatory royalty for a period of time when the operator/ lessee was a stranger to the lease, BLM must show, for example, that it had provided written notice to the operator/lessee's predecessor in interest and that the operator/lessee could be considered to have taken the leases subject to that notice or that it had been made a condition of Departmental approval of the assignment.

4. Administrative Authority: Generally--Appeals: Jurisdiction--Board of Land Appeals--Judicial Review--Oil and Gas Leases: Royalties: Generally

A statute establishing time limitations for commencement of judicial actions for damages on behalf of the United States does not limit administrative proceedings within the Department of the Interior.

APPEARANCES: Michael G. Maloney, Esq., Austin, Texas, for appellant; Arthur Arguedas, Esq., Office of the Solicitor, U.S. Department of the Interior, Santa Fe, New Mexico, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE BYRNES

INTERIOR BOARD OF LAND APPEALS

Benson-Montin-Greer Drilling Corp. (BMG) has appealed from an April 13, 1989, decision by the Deputy State Director, Mineral Resources, New Mexico State Office, Bureau of Land Management

(BLM), affirming a determination by BLM's Albuquerque District Office to assess compensatory royalty for drainage from certain Indian leases (Jicarilla Contracts (JC) 403, 404, and 408). JC 403 and 404 were effective on January 12, 1968. JC 408 was effective on December 18, 1967. BMG became the lessee of record on JC 403 and 404 on September 9, 1977, when it was assigned these leases from Tom Bolack. BMG became lessee of record on JC 408 on July 31, 1971 (Statement of Reasons (SOR) at 3). The royalty rate on these three leases is 16-2/3 percent.

According to the record, the offending well, D-21 Well No. 1, located on JC 200, began production on November 17, 1966. It is located in the NW¼ of sec. 21, T. 27 N., R. 1 W., New Mexico Principal Meridian, Rio Arriba County, New Mexico, and its royalty rate is 12-½ percent. JC 403 embraces secs. 7, 8, 17, and 18. JC 404 embraces secs. 9, 10, 15, and 16. JC 408 embraces secs. 19, 20, and portions of secs. 29 and 30. Protective wells drilled on JC 403, 404, and 408 began production on January 17, 1978, December 29, 1977, and November 12, 1977, respectively.

On March 23 and 24, 1989, BLM's Albuquerque District Office issued individual letters advising BMG that each of the three leases was subject to drainage between the onset of production from the offending well (November 17, 1966) and the onset of production of the three protective wells (November 12, December 29, 1977, and January 17, 1978), and that an economic protective well could have been drilled "between November 17, 1966" and the date of onset of production from each of the protective wells, some 11 years later.[1] BLM notified BMG that assessment of compensatory royalties would be based on a percentage of the offending well's production attributable to each of the drained leases.

On March 28, 1989, BMG requested a technical and procedural review by the State Director. BMG alleged that the Albuquerque District Office had failed to identify the date on which a commercial well could have been drilled in each instance, and it had not provided well costs and income to substantiate its determinations.

In his April 13, 1989, decision, the Deputy State Director stated in part:

> BMG asserts that economic protective wells could not have been drilled prior to the time they were actually drilled. The BLM, however, determined that an economic well could have been drilled in 1968. A discounted cash flow analysis was performed by the BLM, using drilling and operating costs submitted by BMG, and actual production figures from the offending well. Taxes were estimated to be 25%. A rate of return of 8%, which is considered reasonable for the time period, was used. Using these figures, a well drilled in 1968, the first year in which all three leases were effective, would have been economic. [[2]]

[1] The record for JC 408 contains a letter dated June 17, 1980, from the District Oil and Gas Supervisor, Geological Survey (GS) to BMG informing it that JC 408 was subject to drainage from the No. 1 well in sec. 21 and that a protective well was necessary.

[2] JC 408 was effective as of Dec. 18, 1967.

The DM has correctly determined that drainage has occurred from lands covered by Jicarilla Contracts 403, 404 and 408, and that an economic well could have been drilled on each lease in 1968.

As BMG correctly asserts, the March 23 and 24, 1989, letters by the Albuquerque District Office did not identify a date specific on which an economic protective well could have been drilled on each lease. Rather, they stated that such wells could have been drilled any time within the decade beginning on November 17, 1966, and ending between November 12, 1977, and January 17, 1978, depending on the lease involved. Consequently, the Deputy State Director is inaccurate in attributing to the District Manager the conclusion that such wells could have been drilled in 1968.

BMG argues on appeal that BLM has failed to prove drainage occurred. In its SOR at page 22, BMG asserts that the only documentation offered to show drainage occurred during the proposed assessment period was a single document, a computer printout entitled "Drain Results." BMG contends that BLM has failed to satisfy that burden. BLM asserts in its answer that the fact of drainage is well established in the record, and that BMG never disputed that drainage was occurring until it filed its SOR.

BMG contends also that BLM's proposed assessment of compensatory royalty ignores the fact that BMG did not become a common lessee until 1971 with respect to JC 408 and until 1977 with respect to JC 403 and 404. BMG argues that, having been a stranger to the drained leases prior to those dates, it could have had no obligation to protect them from drainage. Additionally, BMG argues that it never received notice from BLM that drainage was occurring until after protective wells were drilled, that the offset wells would not have been economic before late 1977 or early 1978, and that the attempt to assess compensatory royalty is barred by a statute of limitations.

We agree with BLM that the fact of drainage is well established. The file contains a number of geologic, engineering, and financial compilations generated by BLM which leave little doubt that drainage occurred. BLM analyzed geology and reservoir characteristics in 1983, and again in 1988, to determine if the reservoir under JC 403, 404, and 408 was the same quality as that under the offending well. BLM considered and evaluated financial and well production data supplied by BMG. BLM found that production from the offending as well as the protective wells was from the same West Puerto Chiquito Mancos Pool, and that all four wells "drilled to, tested, and produce from the same part of the El Vado member of the Mancos Shale." In order to show continuity of the sand produced from the offending well to the protective wells, a well log correlation was constructed. Using well log correlation and a net pay map it was determined that the interval produced from in the offending well is present throughout the offended portions of the three leases. Additionally, BLM determined from water saturation and net pay maps that reservoir quality under the offended lease portions "is similar to that in the offending well." As a result of its study, BLM concluded that "the lower production rates of the protective wells are due to drainage of the offended portions of the subject leases during the 11-year interim period between producing dates of the offending well and the protective wells" (Geology Report by R. W. Wilson dated Oct. 20, 1988).

Moreover, throughout its correspondence with BLM preceding this appeal, BMG never disputed that drainage was occurring. Indeed, in a July 2, 1980, letter responding to notice that drainage was occurring, BMG stated that "wells completed on all leases produce from a common source of supply, a low quality reservoir in the Niobrara member of the Mancos formation."[3] The file on JC 408 contains a portion of an attachment BMG submitted with its July 2, 1980, letter.[4] Therein, BMG advised that a protective well had already been drilled on JC 408 and that it was producing, and argued that because of well-spacing and the principle of "compensatory drainage" no royalties were lost to the Jicarilla lease holders.

By letter of September 17, 1984, BLM notified BMG that JC 403 and 404 were also subject to drainage by the Jicarilla 200 (D-21) Well No. 1 during the period 1966-77. BLM requested BMG to submit engineering or geologic data indicating that drainage did not or could not have occurred.

In an October 4, 1984, letter to BLM, BMG argued, based on *Nola Grace Ptasynski*, 63 IBLA 240, 89 I.D. 208 (1982), that as to all three adjacent leases, it was not liable for compensatory royalty until a reasonable period after it first received notice that drainage from these leases was occurring. With respect to JC 403 and 404, BMG contended that any obligation to pay compensatory royalties did not arise until a reasonable time after September 19, 1984, the date on which it first received notice of drainage from those two leases. In ensuing correspondence, BMG and BLM debated the issue of whether economic protective wells could have been drilled earlier than they were drilled. However, the record contains no geologic data submitted by BMG challenging the fact of drainage.

Even on appeal, BMG does not offer any geologic data to refute BLM's conclusion that drainage occurred on the leases in question. Rather, BMG's argument is, not that drainage did not occur but that BLM failed to prove that it did. We disagree. As our discussion above indicates, overwhelmingly, the record establishes the fact of drainage.

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[3] BMG's July 2, 1980, letter has not been included in the file. The quote is from BLM's Jan. 5, 1984, letter which again notified BMG of drainage from JC 408 and of BLM's position that compensatory royalties were owing from 1966 to 1977, when the protective well on JC 408 was completed.

[4] The portion, consisting of one page, is captioned:

"*ATTACHMENT NO.II TO LETTER OF JULY 2, 1980, TO U.S.G.S. RE JICARILLA LEASE CONTRACTS NOS.200, 403, 404, 408*

"While the case file for JC 408 contains a June 17, 1980, letter from U.S.G.S. informing BMG of drainage from JC 408 (*see* note 1, *supra*), the July 2, 1980, letter apparently was in response to more than one letter, since the attachment states '[r]esponse to each of the three situations described in your letters follows * * *.' " Only one of those "situations" is involved in this case, drainage from JC 408.

[1] BMG concedes the fact that it became the common lessee of JC 403 and 404 on September 9, 1977, and JC 408 on July 31, 1971. This Board has held that in a common lessee/operator situation, the lessee who drills the offending well is in the best position to know that drainage is occurring, and that the common lessee/operator will be presumed to have knowledge of drainage from the time of first production from its offending well. *Petroleum, Inc.*, 115 IBLA 188, 191-92 (1990); *NGC Energy Co.*, 114 IBLA 141, 152, 97 I.D. 159, 165 (1990); *Atlantic Richfield Co. (On Reconsideration)*, 110 IBLA 200, 96 I.D. 363 (1989); *Atlantic Richfield Co.*, 105 IBLA 218, 226, 95 I.D. 235, 240 (1988). In the cited cases, the common ownership or control situation existed at the time the offending well was drilled. Thus, the presumption of knowledge from the time of first production is logical. In this case, common ownership did not develop until a number of years following the drilling of the offending well, and BMG had no right or obligation to drill an offset well until it acquired the drained acreage. BMG must be presumed to have had knowledge of drainage from JC 403, 404, and 408 when it acquired those leases.

The knowledge of drainage does not alone create an obligation to pay compensatory royalty. That obligation arises only after the passage of a reasonable time following the date of the lessee's knowledge. *CSX Oil & Gas Corp.*, 104 IBLA 188, 198, 95 I.D. 148, 154 (1988); *see Nola Grace Ptasynski*, 63 IBLA at 253, 89 I.D. at 215. This is so because a lessee may relieve itself of the obligation to pay compensatory royalty by completing an offset well, and it has a reasonable time after notice or knowledge of drainage to do so. If an offset well can be drilled, and at the expiration of a reasonable time no well has been drilled, compensatory royalty becomes a continuing obligation until completion of the offset well.

In this case, BMG is presumed to have knowledge of drainage from JC 403 on September 9, 1977, the date of lease acquisition. Thereafter, it completed a well on JC 403 on January 17, 1978, just over 4 months later. We expressly find that BMG acted within a reasonable time following knowledge of drainage to drill an offset well on JC 403. Therefore, BMG is not responsible for the payment of compensatory royalty for drainage from JC 403. It follows that no compensatory royalty is due for drainage from JC 404 either, since that lease was acquired on the same date, and a well was completed by BMG thereon even more quickly, on December 29, 1977, a period of less than 4 months from acquisition. We must, therefore, reverse BLM's decision as it applies to these two leases for this period of time.

[2] The only lease for which BMG may be responsible for compensatory royalty is JC 408. BMG acquired that lease on July 31, 1971. It did not complete an offset well thereon until over 6 years later. Accordingly, the obligation to pay compensatory royalty might have begun a reasonable time after July 31, 1971, and continued until the

completion of the well on JC 408. However, since BLM's determination that a prudent operator would have drilled a well on JC 408 was based on its production calculations from 1966 until 1977, it must reexamine its determination based on our conclusion that the critical time period should have been from a reasonable time after July 31, 1971, until BMG drilled the well in 1977.[5] The cost and production figures utilized should be those existing at a reasonable time after July 31, 1971. *CSX Oil & Gas Corp.*, 104 IBLA at 200 n.11, 95 I.D. at 154 n.11.

Thus, we must vacate BLM's decision regarding JC 408 and remand the case to allow BLM to make a prudent operator determination utilizing the dates set forth herein. As in *Atlantic Richfield Co.*, 105 IBLA at 229, 95 I.D. at 242, BLM should decide what was a reasonable time from the date of acquisition of JC 408 for completion of an offset well. If BLM concludes that a prudent operator would have drilled a well, it should calculate the amount owed as compensatory royalty and inform BMG of its preliminary findings. If BMG believes that a prudent operator would not have drilled a well, it should submit all pertinent data supporting its position to BLM. BMG bears the ultimate burden of proof on this issue. BLM should then make its final determination of whether compensatory royalties are due for JC 408.

Based on the present case records, BMG would not owe compensatory royalty for any of the leases for any period prior to a reasonable time following acquisition of the leases. In *CSX Oil & Gas Corp.*, 104 IBLA at 199, 95 I.D. at 154, we held that where BLM sought to assess compensatory royalty for any period of time prior to providing formal notice of drainage, it has the burden of proving that a lessee knew or that a reasonably prudent operator would have known of drainage. However, in this case even assuming that BLM could establish that BMG knew of drainage or a reasonably prudent operator would have known prior to the dates BMG obtained the three leases, BMG is not responsible for compensatory royalty. The reason is simple. BMG was not the lessee or operator of the leases during those periods of time. Thus, it is clear that if BMG had never acquired JC 403, 404, and 408, it could not have been in a compensatory royalty situation with regard to any of those leases.

[3] A notice of drainage issued by BLM typically informs the recipient that drainage is occurring on certain described Federal lands; that action to protect those lands by drilling a well is necessary, unless it can be shown that no drainage is occurring or that a prudent operator would not drill a well; and that in the absence of such a showing compensatory royalty will be assessed. *See, e.g., Chevron U.S.A. Inc.*, 107 IBLA at 127. Absent control of the drained acreage, however, it would be impossible to drill a protective well. As a stranger to the leases until acquisition, BMG could not have drilled a well prior to acquisition to curb drainage. Since compensatory royalty is designed to compensate the lessor for drainage occurring because of a failure to

[5] In no event can BMG's obligation to pay compensatory royalties be for a time greater than that particular period.

complete a protective well, there is no rationale for requiring BMG, as a stranger to the leases, to pay compensatory royalty for a period of time during which it could have had no obligation to drill, unless BLM, for example, could establish that BMG's predecessor in interest was liable for payment of compensatory royalties, and that BMG knew of this liability and accepted it as a part of the assignment, or that acceptance of the liability was a specific condition of Departmental approval of the assignment. There is no evidence of either acceptance or imposition of liability in this case.[6]

[4] We reject BMG's assertion that the statute of limitations contained in 28 U.S.C. § 2415 (1988), bars BLM's administrative efforts to access compensatory royalties. This Board has previously held statutes of limitations may apply to judicial enforcement of administrative actions, but not to the underlying administrative actions. *See Anadarko Petroleum Corp.*, 122 IBLA 141, 147 (1992); *Marathon Oil Co.*, 119 IBLA 345, 352 (1991); *Mobil Exploration & Producing U.S., Inc.*, 119 IBLA 76, 81, 98 I.D. 207, 210 (1991).

Our disposition of this case makes it unnecessary to rule on BLM's motion for a hearing in this matter.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is reversed, in part, and vacated and the case remanded, in part, to BLM.

JAMES L. BYRNES
Administrative Judge

I CONCUR:

BRUCE R. HARRIS
Deputy Chief Administrative Judge

APPEAL OF WHITE & MCNEIL EXCAVATING, INC.

IBCA-2448 Decided: *July 24, 1992*

Contract No. 4-CC-60-00830, Bureau of Reclamation.

Appeal as Remanded Granted in Part.

1. Contracts: Contract Disputes Act of 1978: Jurisdiction

Under the Contract Disputes Act, 41 U.S.C. §§ 605(a) and (b), the Board reviews the contracting officer's decision *de novo* and his quantum findings are not binding.

2. Rules of Practice: Appeals: Generally

[6] In *CSX*, 104 IBLA at 199, 95 I.D. at 154, we vacated and remanded a BLM decision assessing compensatory royalties and suggested that any subsequent decision assessing compensatory royalties against a person for a period when that person was a stranger to the lease should set forth the legal basis for doing so.

Under the Board's Rule 4.114(a), it may call upon the parties for evidence deemed by it to be relevant and material. When the contractor, pursuant to the Board's remand decision, offered quantum evidence from the Government's files obtained during discovery; the Government apparently conceded the document at issue was prepared by BOR and, at a minimum, offered no specific challenge to its authenticity, although it had ample time to do so; and the document was consistent with evidence already in the record, relevant, and material, the Board admitted it in supplementation of the record.

3. 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

When the Government incorrectly based a payment deduction upon a portion of its riprap specification which the Board found unreasonable, the contractor was entitled to be recompensed for the improper deduction.

APPEARANCES: L. H. Vance, Jr., Attorney At Law, Winston & Cashatt, Spokane, Washington, for Appellants; Gerald R. Moore, Department Counsel, Billings, Montana, for the Government.

OPINION BY ADMINISTRATIVE JUDGE ROME

INTERIOR BOARD OF CONTRACT APPEALS

The facts and issues in this appeal from the contracting officer's decision denying the claim of White & McNeil Excavating, Inc. (WME), in connection with riprap work performed under a dike repair contract with the Bureau of Reclamation (BOR), are discussed in our opinion of November 4, 1991, *White & McNeil Excavating, Inc.* IBCA-2448, 92-1 BCA ¶ 24534 (*White & McNeil I*), with which familiarity is presumed. Because it appeared from the record that BOR had taken a payment deduction for riprap that did not satisfy a size restriction the Board found to be unreasonable, we remanded the appeal to the contracting officer to allow the parties to calculate any appropriate upward adjustment due WME. If BOR did not agree that such a deduction had been taken, it was to move to dismiss the appeal with prejudice, which it has done. Appellant opposes the dismissal and has filed a motion to approve its quantum calculations. Based upon our review of the record, and evidence submitted by appellant on remand, we grant its motion in part.

[1] BOR suggests the quantum issue remanded is not within our purview, because WME allegedly did not appeal from the contracting officer's quantum determinations. In fact, WME appealed from the entire decision, with uncompensated costs due to allegedly defective specifications and rework required by BOR at the heart of one of its claims. Moreover, under the Contract Disputes Act, once appealed, we review the contracting officer's decision *de novo*, and his findings are not binding. 41 U.S.C. § 605(a) and (b); *Assurance Co.* v. *United States*, 813 F.2d 1202, 1206 (Fed. Cir. 1987).

[2] The Government also contests appellant's right to rely upon documentary evidence submitted for the first time in connection with

its motion for approval of its quantum calculations. Pursuant to our Rule 4.114(a) (43 CFR 4.114(a)), "[t]he Board upon its own initiative may call upon either party, with appropriate notice to the other, for evidence deemed by it to be relevant and material." We issued the equivalent of such a call of the Board when we remanded this case for resolution of a quantum question which appeared, from evidence already in the record, to require additional payment to WME. *See White & McNeil I*, 92-1 BCA at 122,443 and Findings of Fact (FF) 148-50 at 122,436, and evidence cited.

Moreover, appellant represents that the notes in question were obtained from BOR's files during discovery. The Government does not dispute this, seems to concede that the notes were "apparently prepared by Fred Hunt or other BOR personnel" in connection with a May 15, 1985, meeting with WME to discuss the payment to which it was entitled (Government brief in support of motion to dismiss, at 11), and offers more pages from the notes in support of its position. BOR has had months to supply any substantive challenge to the notes and has not done so.

Finally, as we discuss below, calculations on the notes are consistent with the 36-inch riprap payment amount reflected on the Government's pay voucher, already in evidence (FF 150, appellant's exhibit (AX 98)), which supports their authenticity and renders them relevant and material to our decision.

For the foregoing reasons, we have admitted all five pages of the May 15, 1985, notes as a supplement to the record.

[3] The burden to prove its damages is, of course, upon the contractor. We find that the clearest, most persuasive, evidence is that offered by appellant, which indicates BOR did deduct from contract payments on account of "minus-100-lb rock" in excess of the 5 percent allowed by BOR's unreasonable specification, rather than paying for 150-lb. rock up to 20 percent, as allowed another contractor under BOR's subsequently relaxed riprap specification for the remaining dike repairs (FF 155).

The Government alleges in briefing that the contracting officer has determined that no deduction in contract payments was made based upon the defective specification, although it offers no affidavit from the contracting officer. Moreover, as appellant notes, the Government's position is linked to its contention that deductions which were taken were not from placed quantities, but from hauled quantities.

To the extent that our prior decision can be read as limited to an inquiry concerning quantities placed after rework only, we hereby modify it. Our intent was to ensure that no deductions were taken based upon the unreasonable portion of the specification. As appellant notes, it had hauled and placed rock which would have been within the relaxed specification but was ordered to remove *that* rock and told that it could be disposed of at the toe of the dike slope. What WME describes as BOR's rework order of January 28, 1985, provides in part:

> The basic items discussed and the solution to them was: *the rock that has already been placed is out of specifications by the two tests taken*; most of the rock is now hauled, so something has to be done to correct the gradation and bring it within the specifications.
>
> * * * * * * *
>
> Item No. 2 - *We will deduct 18.35 percent for the rock that is already hauled to the 3-foot riprap areas; this is based on the two tests* showing that 23 plus percent had been out on both tests so it is running quite uniform. *Five percent is allowed so we will try to eliminate all of this minus 100 lb. sized rock to get back within the specifications gradation.*
>
> * * * * * * *
>
> Item No. 4 - *All of the existing placed rock will be processed to eliminate the undersized* with a grizzly or some type of a mechanical separator. Incorporate the heavier rock that we bring from the quarry to make up for the undersize * * *.
>
> Item No. 5 - The disposal of the undersized rock will not require weighing. We agreed on a percentage and *that rock* can be disposed of if the processing is at the toe of the slope by just blading and dozing the undersized into the toe of the riprap but not leaving it in piles * * *.
>
> * * * * * * *
>
> Item No. 7- The January estimate will be for $100,000 plus or minus. This progress payment is based on the amount of 24-inch rock that has been hauled, the ditch and embankment that has been prepared, the total amount of 36-inch rock *less the fines that have been hauled*, less something for processing and replacing the existing rock on the slope.
>
> * * * * * * *
>
> Item No. 10 - All usable waste or undersized rock from the 36-inch riprap can be utilized if it meets gradation for the 24-inch rock but it will have to be weighed. [Italics added.]

(AX 62; FF 118). By the time of this letter, WME *had already placed* most of the 36-inch riprap (FF 118).

Further, final payment to be made to the contractor clearly was evaluated in terms of payment only for minus-100-lb. rock that met the unreasonable specification. As we found, in July and August 1985, it was agreed:

1. 11,319.78 tons were hauled in specification and face no reduction in quantity *due to excessive fines*.

2. 22,643.96 tons were hauled with *the in place gradation tests revealing excessive fines*.

3. gradation tests revealed the average percentage of fines was 20.46%. *Specification 3.3.4-2 allows 5% fines*, so the percentage of excess fines was 15.46%. [Italics added.]

(AX 97, 98; FF 148).

As we also found, based upon the foregoing, and without benefit of the relaxed gradation, WME computed acceptable 36-inch riprap hauled at 30,024.51 tons (FF 149). BOR agreed to pay for only 27,592.26 tons, however, stating not all acceptable material had been placed (FF 150). This is the amount stated in its letter to WME of

August 9, 1985, and included on the pay voucher which accompanied it (AX 98; FF 150).

We now know, from BOR's notes prepared in connection with its May 15, 1985, meeting with WME to discuss payment, with which we have supplemented the record, that BOR calculated the pay quantities by taking three deductions from the total 36-inch riprap hauled: (1) 995.03 tons of 36-inch riprap that was reprocessed and used for 24-inch riprap, for which appellant does not seek payment; (2) 3965.55 tons for the *20.46 percent average minus-100-lb.* rock BOR found based upon *6 in-place tests* (see FF 133, 108-09, 115, 135, 139-40); and (3) 2,380 tons for what BOR described as additional waste from WME's grizzly operations. BOR then *credited WME only with the 5 percent of minus-100-lb. rock allowed by the restrictive specification*, a 969.10-ton credit, leaving a total deduction related to the minus-100-lb. rock of 2,996.45 tons. Under the relaxed specification, *20 percent of rock smaller than 150 lbs.* would have been acceptable (FF 155).

Although the Government argues in briefing that WME actually was overpaid for placed rock, we are not persuaded of the overpayment or that, if it occurred, it had anything to do with allowing payment for minus-100-lb. rock in excess of the amount allowed under the unreasonable portion of the specification. Indeed, the evidence demonstrates that BOR strove to eliminate that rock from its payment base. Further, in the context of the entire contract, the record reflects that WME has not been overpaid for the work it performed.

We found in *White & McNeil I* that the extent of the rework was due principally to WME's own testing delays, and that its work did not comply with specifications for reasons in addition to the specification's unreasonable "bottleneck" (involving the minus-100-lb. rock and 150-lb. rock restrictions). We are influenced in weighing the quantum proof presented, however, by the fact that it is apparent from the entire record that BOR's primary focus was upon the elimination of rock that did not satisfy the bottleneck portion of the specification we found to be unreasonable. This contributed greatly to the required removal of placed riprap, additional hauling, and additional placement required by BOR. An equitable price adjustment based upon a defective drawing or specification supplied by the Government is intended to be just that -- "equitable in nature." *Froeschle Sons, Inc.* v. *United States*, 891 F.2d 270, 272 (Fed. Cir. 1989).

We find that appellant has met its burden and proved that BOR wrongly deducted 2,996.45 tons of 36-inch riprap from contract pay quantities. At the contract unit price of $11.80 per ton, the amount owed WME for that riprap is $35,358.11, plus interest. WME has not met its burden to prove that the additional deduction taken by BOR for alleged additional waste from grizzly operations was improper.

DECISION

Accordingly, the appeal is granted in the amount of $35,358.11, plus interest computed in accordance with the Contract Disputes Act, 41 U.S.C. § 611, measured from the date the contracting officer received the certified claim sent May 27, 1987.

CHERYL S. ROME
Administrative Judge

WE CONCUR:

RUSSELL C. LYNCH
Chief Administrative Judge

BERNARD V. PARRETTE
Administrative Judge

APPEAL OF BALL, BALL, & BROSAMER, INC.

IBCA-2103-N Decided: *July 27, 1992*

Contract No. 1-07-3D-7477, Bureau of Reclamation.

Appeal Denied.

1. Contracts: Construction and Operation: Drawings and Specifications

When canal joint sealant did not cure to a homogeneous compound, it did not meet contract specifications.

2. Contracts: Construction and Operation: Actions of Parties--Contracts: Construction and Operation: Changes and Extras

When, pursuant to the Inspection and Acceptance clause, BOR evaluated whether nonconforming sealant could remain in place, allowed repairs, did not direct a new sealant, but declined to set acceptable bubbling in advance of inspection, its actions were not arbitrary or economically wasteful.

3. Contracts: Construction and Operation: Actions of Parties--Contracts: Construction and Operation: Changes and Extras

In determining that rejected sealant had to be repaired or replaced, BOR did not use improper testing.

4. Contracts: Construction and Operation: Changes and Extras--Contracts: Construction and Operation: Drawings and Specifications

In failing to prove that its products and their application complied with specifications, appellant did not carry its threshold burden to prove BOR's design specifications defective.

5. Contracts: Construction and Operation: Actions of Parties--Contracts: Construction and Operation: Changes and Extras

BOR did not withhold superior knowledge about problems with the contractor's sealant.

July 27, 1992

APPEARANCES: John R. Little, Jr., John E. Lindskold,Duncan, Weinberg, Miller & Pembroke, Denver, Colorado, for Appellant; Daniel L. Jackson, Department Counsel, Phoenix, Arizona, for the Government.

OPINION BY ADMINISTRATIVE JUDGE ROME

INTERIOR BOARD OF CONTRACT APPEALS

Ball, Ball & Brosamer, Inc. (B3 or appellant), the surviving member of the dissolved joint venture contractor, pursues the venture's appeal under the Contract Disputes Act, 41 U.S.C. § 601 *et seq.*, from the contracting officer's decision denying its $439,797 claim for costs to repair and replace canal joint sealant rejected by the Bureau of Reclamation (BOR). For the complex procedural history, see *Ball, Ball & Brosamer, Inc.*, IBCA-2103-N, 92-2 BCA ¶ 24,797 (*Ball II*).

Appellant claims: (1) its sealant complied with specifications; (2) BOR wrongfully rejected it and directed a substitute; (3) BOR relied upon extra-contractual testing; (4) the specifications were design in nature and defective; and (5) BOR withheld superior knowledge about problems with B3's sealant. BOR denies the claims and asserts they are barred by accord and satisfaction or judicial estoppel, based upon appellant's action against, and settlement with, the sealant supplier.[1]

FINDINGS OF FACT

Background

1. On September 10, 1981, BOR awarded the above contract, in the amount of $18,468,224, for the construction and completion of Reach 4, and the completion of Reach 3, Granite Reef Aqueduct, Central Arizona Project (CAP), to the joint venture of B3 and Ball and Brosamer (JV), which received notice to proceed on September 14, 1981. The contract was to be completed by September 14, 1983 (AF 5 at 1, AF 32, GX 65 (specification (spec.) 1.2.3)). B3 was responsible for contract performance (*Ball II*).

2. The contract included construction of about 16 miles of unreinforced concrete canal lining, with contraction joints, which provide for shrinkage of or movement between concrete units (GX 1 at 3, GX 65 (specs. 1.2.2 a., 6.4.1(b))).

3. For contraction joints in hand-placed concrete canal lining, at issue, the contract requires Class R, Type II, or Class O elastomeric sealant, to conform to BOR's standard Specifications for Elastomeric Canal Joint Sealer, dated August 1, 1977 (M-41). Class R, Type II, is two-component, non-sag, rapid set, and machine mixed; Class O is

[1] Our abbreviations include: Appeal file (AF); hearing transcripts (Tr.); affidavit of Thomas Zuppa (Zuppa Aff.); Government's exhibits (GX); appellant's exhibits (AX); appellant's factual appendix (AFA); appellant's posthearing brief (AB); and our fact-findings (FF).

one-component, non-sag, slow set, and ready mixed. The joints are a minimum of 1-¼ inches deep, with a minimum of one-half inch of sealant to be placed at the bottom, which tapers to a broad, not quite V-shape (GX 1 at 17-18 (spec. 6.2.3 a. and c.(1)); AX 4 at 1-2, AX 8; Tr. 405).

4. Specification 6.2.3 first allowed only Class R, Type II, sealants. BOR modified it, pre-bid, to provide a single-component option. Contractors, including several times B3, performing similar work under similar requirements on the CAP, numerous times had sought to use Class O sealants, claiming equal performance, and BOR had acceded. Class O sealants, including Vulchem 203, had been used successfully. Some Vulchem 203 initially found acceptable by BOR later had to be replaced due to hardness; some had bubbling problems (AX 5 at 1-2, AX 6 at 2, AX 7 at 8; GX 1 at 1, 18, GX 6-10; second amended complaint (complaint), answer to first amended complaint, ¶¶ 8, 11;[2] Tr. 8-9, 19, 68, 450).

5. Prior to including Class O in its specifications, BOR had successes and failures with both one- and two-component sealants. Often sealant had to be removed as unsatisfactory, with no particular difference between one component and two components. With one component, there had been some bubbling, adhesion, and other problems. Most of BOR's experience had been with sealants that did not require primer (Tr. 448-51, 768).

6. B3 had had many bad canal sealing experiences, in Arizona and elsewhere. Usually it did not have good results with two-component sealants, which involve very technical mixing and application, normally with untrained personnel, equipment that must be precision-manufactured and maintained, and constant monitoring. Any variation in the material's temperature or equipment pressure affects the final product (Tr. 11-12, 156-58, 167, 240, 447-48, 603-04).

7. B3 always attempted to use a one-component sealer. Its project engineer, Mr. Hal Stober, who has a bachelor of science degree in civil engineering, and had more experience with elastomeric canal joint sealing than anyone else at B3, was responsible for sealant selection. He had completed four similar projects for BOR or others; never used a single component sealant that did not work; and never experienced the bubbling that occurred on this job (Tr. 155-60, 240).

8. B3 and Mr. Stober had used Vulchem 203 Class O sealant successfully on Reach 12 of the Granite Reef Aqueduct, the BOR project with which he was involved prior to this job (Tr. 240).

9. B3 originally planned to use Vulchem 203 on this job and based its bid price accordingly (Tr. 16, 159, 217).

Contract Provisions

10. The M-41 specifications provide in part:

[2] This answer served as the answer to the second amended complaint. We cite pleadings, and verified interrogatory responses (int. res.) included in the record as exhibits, when they allege admitted or uncontroverted facts and are supported by other evidence.

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1. *SCOPE*

These specifications cover a cold-applied, chemically set polysulfide or polyurethane base material suitable for sealing contraction joint grooves and random cracks in concrete canal lining.

* * * * * * *

3. *MATERIAL REQUIREMENTS*

a. *General requirements.* -

(1) The sealer for Classes R and S shall consist of two components * * * which when intermixed will cure to a homogeneous, rubberlike mass. Each component shall be clearly and thoroughly identified on the material containers. Class O sealer will be furnished ready mixed as a single component which will cure to a homogeneous rubberlike mass. Identification on material containers shall include material designation, generic type, class, rheological type, component, date of manufacture, and batch number * * *. The components shall exhibit a shelf life of at least 12 months.

(2) The sealer shall bond effectively when applied to dry concrete surfaces at least 7 days' old.

(3) The material shall form an effective seal during repeated cycles of joint opening and closing both in atmospheric exposure and in water immersion exposure under hydrostatic heads up to 60 feet.

b. *Detail requirements.* - The sealer shall comply with the detail requirements listed in Table I when tested as hereinafter specified. * * *.

4. *TEST METHODS*

a. *General.* - The sealer shall be tested in accordance with the California Department of Water Resources Test Method CL-2, "Methods of Test for Cold Applied, Two Component, Modified Polysulfide Polymer Type Joint Sealing Compound," dated October 1, 1965, hereinafter referred to as CL-2, except as otherwise specified herein.

(AX 4 at 2-3). The section includes several tests, with modifications for Class O sealants.

11. The referenced Table I is entitled "Test method and requirement" and contains numerous test factors, including:

Property	Test Method	Minimum	Maximum
Primer	As recommended by the manufacturer		
Condition in containers	Upon opening, the sealer shall not exhibit more than a slight degree of skinning		

(AX 4 at 7).

12. The CL-2 testing is at standard conditions, 77 plus/minus 2 degrees F. and 500 plus/minus 5-percent relative humidity, with exceptions. Penetration, resilience, non-immersed bond, weight loss, and tensile adhesion involve testing at 158 plus/minus 2 degrees F. Flow involves testing at 200 degrees F. Water-immersed bond includes testing at -20 degrees F. (AX 1 §§ 4.1, 5.1.2, 5.2.2, 5.2.3, 5.3.3, 5.5, 5.9).

13. Specification 6.2.3, Contraction Joints for Unreinforced Concrete Canal Lining, provides in part:

a. General. - * * *.

* * * * * * *

The contractor shall drill 6-inch-diameter cores at times and locations designated by the contracting officer for inspection to determine the effectiveness of the contractor's contraction joint installation procedures. * * *.

If inspection reveals that the joint does not meet these specifications, the contractor shall promptly modify equipment and installation procedures to insure compliance with these specifications, and in addition shall correct the defective work at his expense as required by the contracting officer.

* * * * * * *

d. Sampling, testing, and certification. -

(1) Elastomeric sealer. - The Government will test or require certification of each batch of elastomeric sealer prior to use.

However, acceptance of the joint sealer materials under clause No. 10 of the General Provisions will not be made until the materials have been satisfactorily applied at the jobsite.

* * * * * * *

Samples if required shall be taken by the manufacturer during the canning operation and shall consist of * * * a 1-quart sample from each batch or lot of class O sealer. Included with each sample shall be a certification that the sample is from the actual batch to be furnished. Each sample and certification shall be identified with the material, batch, and quantity it represents, and the Bureau of Reclamation specifications number.

Certifications if required shall identify the materials as above and shall provide detailed test results of laboratory tests and covering all of the applicable specifications requirements and a general statement that the materials comply with the requirements of the specifications.

Joint sealer in storage for more than 6 months after the original tests shall be rejected. Joint sealers shall be subject to resampling and retesting at any time. The costs and delays from additional testing required as a result of rejection of materials submitted shall be the responsibility of the contractor.

* * * * * * *

e. Placing. -

* * * * * * *

(2) Use of class O sealant. - Because of their slower curing rate, use of class O sealants shall be restricted to locations where applied material will not be subjected to construction traffic or to immersion in water until properly cured. Curing of class O sealants requires substantial humidity. Curing is promoted by increasing temperatures and humidities, and is retarded by increasing thickness of the section applied. The sealant should develop to an elastomeric solid in 14 days under average conditions.

(3) Placing elastomeric sealer. - The canal lining concrete shall be cured at least 7 days before the elastomeric sealer is placed in the grooves. * * * At the time of placing the joint sealer, the joint groove shall be clean and surface dry and the temperature of the concrete and the ambient temperature shall be not less than 50F.

The sealer 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 sealer which does not cure to a homogeneous, rubberlike compound, or 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 sealer placed therein by the contractor at no additional cost to the Government.

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Sealer pulled out of joints or damaged by the contractor's operations or otherwise damaged during the contract period shall be replaced in accordance with the applicable provisions of these specifications at no cost to the Government.

(GX 1 at 17-21).

14. The specifications also provide:

1.1.6 INSPECTION AND TESTS BY GOVERNMENT

In addition to tests specifically outlined in these specifications, the Government reserves the right to inspect and test materials, equipment, and workmanship during the life of the contract in accordance with clause No. 10 of the General Provisions.

(GX 65).

15. Clause 10, Inspection and Acceptance, provides in part:

(a) All work (which term includes but is not restricted to materials, workmanship, and manufacture and fabrication of components) shall be subject to inspection and test by the Government at all reasonable times and at all places prior to acceptance. Any such inspection and test is for the sole benefit of the Government and shall not relieve the Contractor of the responsibility of providing quality control measures to assure that the work strictly complies with the contract requirements. No inspection or test by the Government shall be construed as constituting or implying acceptance. Inspection or test shall not relieve the Contractor of responsibility for damage to or loss of the material prior to acceptance, nor in any way affect the continuing rights of the Government after acceptance of the completed work * * *.

(b) The Contractor shall, without charge, replace any material or correct any workmanship found by the Government not to conform to the contract requirements, unless in the public interest the Government consents to accept such materials or workmanship with an appropriate adjustment in contract price. The Contractor shall promptly segregate and remove rejected material from the premises.

* * * * * * *

(e) Should it be considered necessary or advisable by the Government at any time before acceptance of the entire work to make an examination of work already completed, by removing or tearing out same, the Contractor shall, on request, promptly furnish all necessary facilities, labor, and material. If such work is found to be defective or nonconforming in any material respect, due to the fault of the Contractor or his subcontractors, he shall defray all the expenses of such examination and of satisfactory reconstruction.

(GX 65).

16. Clause 9, Material and Workmanship, provides in part:

(a) Unless otherwise specifically provided in this contract, all equipment, material, and articles incorporated in the work covered by this contract are to be new and of the most suitable grade for the purpose intended. * * * When required by this contract * * *, the Contractor shall furnish the Contracting Officer for approval full information concerning the material * * * which he contemplates incorporating in the work. When so directed, samples shall be submitted for approval at the Contractor's expense * * *. [M]aterial * * * installed or used without required approval shall be at the risk of subsequent rejection.

(GX 65).

17. The quality control tests required by M-41 and core tests to determine performance in the field are not the same and cannot properly be correlated (Tr. 559-63, 670-72).

Decision To Use Sikaflex 1a and Primer 429

18. At some time prior to January 29, 1982, Sika Corporation, U.S.A. (Sika), conversed with B3 about using Sikaflex 1a, a single-component polyurethane-based joint sealant first manufactured in Europe over 20 years ago and introduced in the United States 4 to 6 years before this job. Local and European versions are substantially similar, although raw materials and curing time differ somewhat (GX 52 at 489, 504 (int. res. 6, 38); Tr. 160, 249-50, 313; Zuppa Aff. at 3).

19. Sikaflex 1a's literature describes it as a unique Sika formulation used in construction applications, including canals; designed for joints with a maximum depth of one-half inch, not to be installed at greater thickness without specific instructions from Sika; moisture-cured, needing sufficient exposure to moisture; and normally bonding without primer. For maximum performance, where the substrate is suspect, or where the joint is to be submerged, Sikaflex primer 429 is to be used, with a single uniform coat brush-applied and allowed to dry 45 minutes to an hour, and sealant installed within 8 hours. Air entrapment is to be avoided during sealant application. Recommended application temperatures are 40 to 100 degrees F.; service range extends from -40 to 150 degrees. Packaging is by case of 24 11-fl/oz. moisture-proof aluminum cartridges, with a 9-month shelf life when stored at 70 degrees F., or 1.8- and 4.5-gallon pails, with 50-gallon drums available on special order; opened cartridges are to be used the same day. The literature demonstrates graphically that higher temperatures accelerate curing (AX 12).

20. Most Sikaflex 1a applications do not involve water immersion. One of its selling points is that it is made for use without primer. Primer 429, likely not developed in the United States, is polyurethane-based, with the polyurethane dissolved in a solvent. It was created to enhance the sealant's bond under all conditions. Sika strongly recommends it when joints sealed with Sikaflex 1a are to be immersed or there is some reason to question bond (Tr. 91-93, 118, 250-51, 313-14).

21. Polyurethanes cure through humidity and temperature. Lower humidity, as in Arizona, slows cure. Although humidity is more important, Sika's Mr. Joe Stefanik, who has bachelor and master of science degrees in chemistry and was manager of Sika's research and development laboratory during the period at issue, confirmed higher temperatures accelerate cure (Tr. 91-92, 310, 311, 313, 316, 318; Zuppa Aff. at 3).

22. Sika represented to B3 that it had been working with the Government for years; was fully aware of its procedures and requirements for acceptance of concrete joints sealed with an elastomeric product; its sealant would conform to or exceed BOR's requirements; and it was familiar with the job and BOR's testing methods (GX 52 at 489, 499, 501 (int. res. 6, 26, 32); Tr. 213, 230).

23. B3 advised that samples had to be submitted to BOR's Engineering and Research Center in Denver (E&R) for testing; and

informed Sika that, upon successful testing, it would use Sikaflex 1a. It gave Sika the option to contact E&R directly (Tr. 161-62).

24. Sika visited the site prior to sale, observed climatic conditions, the concrete, and joints; was supplied with the specifications and joint drawings; and knew which equipment was to be used (GX 52 at 489, 506 (int. res. 6, 41); Tr. 161, 163, 211-12, 219-20).

25. On January 29, 1982, Sika spoke to E&R about furnishing Sikaflex 1a for this contract. By letter dated February 4, 1982, to E&R, Sika indicated BOR had approved Sikaflex 1a for the "Gilia [sic] Project, Reach 3"; the Quincy Columbia Irrigation District in Washington; and a Utah tunnel. It stated no product formulation changes had been made and it was sending samples. It did not mention primer (GX 2 at 108, GX 56 at 525).

26. BOR's prior experience with Sikaflex 1a on the CAP was on the Salt-Gila Aqueduct, Reach 3, with pipe overchutes, and with secondary seals in pipe joints at Hassayampa River and Centennial Wash Siphons. Each time, Sika had recommended primer. B3 performed at least the pipe overchute work. BOR also had prior successful experience with Sikaflex 1a on its Riverton, Wyoming, and Columbia Basin Projects. It often was used with a primer (AX 30, 45; GX 2 at 82; Tr. 79-80).

27. E&R was fairly confident in Sikaflex 1a. Among other sealants, it had tested it with and without primer for the Department of Transportation in connection with concrete tunnel liners. Sikaflex 1a was one of five top-rated sealants. Primer had a beneficial effect (AX 40; GX 2 at 82, GX 60 at 636, 703-06, 721, 723, 761-67; Tr. 395, 521-22).

28. BOR had not experienced the bubbling that occurred on this job in prior testing or experiences with Sikaflex 1a (AX 40; GX 2 at 82).

29. On February 10, 1982, E&R received a case of 24 11-oz. tubes of Sikaflex 1a, lot 1262, without primer, and started evaluation tests (AX 10 at 2; GX 2 at 104, GX 56 at 525; Tr. 392, 581-82, 702-03).

30. On April 7, 1982, B3 placed an oral order for Sikaflex 1a, subject to its meeting specifications (GX 53 at 513; Tr. 163, 220-21).

31. On April 9, 1982, BOR formally notified B3 that a July 21, 1981, conditional approval of Vulchem 203 Class O sealant on the Salt-Gila Aqueduct, Reach 3, was revoked and B3 was to use Class R, Type II, pursuant to that contract's specifications. Although used successfully before, this time, as B3 was aware, Vulchem 203 failed to meet specifications and had unsatisfactory field application (GX 9-11).

32. On April 21, 1982, Mr. Henry Johns of E&R told B3's Mr. Stober informally that Sikaflex 1a, lot 1262, met specifications. Mr. Johns had advised him earlier that final approval rested with BOR (GX 56 at 525).

33. Mr. Johns has a bachelor of science degree in civil engineering. Until his retirement at the end of 1982, he had 41 years' experience

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at BOR -- 30 with testing joint sealing materials for concrete structures. His testimony was particularly persuasive (Tr. 335, 401).

34. By memorandum to Sika dated May 5, 1982, referring to this contract, with a copy to B3, E&R reported that Sikaflex 1a, lot 1262, met M-41's Class O requirements. E&R informed BOR that it recommended acceptance of the sealant represented by that lot (AX 10 at 4).[3]

35. Lot 1262 was not used on the job. There is no evidence that B3 or Sika informed E&R or BOR that it would not be used (GX 2 at 79, GX 5 at 258; AFA at 20).

36. Except as modified, M-41 test values were based upon two-component polysulfide sealers. E&R was still trying to establish limits for polyurethanes. The values may not have been exactly right in all circumstances for polyurethanes, but E&R sought only a "fingerprint" for product comparison and allowed leeway in testing (Tr. 346-48).

37. B3 has not identified any relevant test conducted by E&R that was inappropriate for the polyurethane Sikaflex 1a.

38. Unknown to B3, Sika, or BOR's field personnel, E&R accepted the Sikaflex 1a although its maximum test value for tensile adhesion at 150 percent exceeded that of the specification, resulting in a tougher material with more stress on the bond line. This did not concern E&R because bond did not fail, indicating the material was good.
Mr. Stober did not claim he would not have purchased Sikaflex 1a had he known. He "probably" would have called BOR and "guessed" he would have talked to Sika. There is no evidence that the variation was relevant to BOR's ultimate sealant rejection (AX 10 at 3; Tr. 166, 274-75, 348-50, 394).[4]

39. Tensile adhesion involves strength and elongation. A sealant's ability to withstand movement and remain intact is key. Acceptable bond involves adhesion to the joint, cohesion and lack of bubbles (Tr. 458, 512, 524, 528, 535, 544-47, 556-57).

40. On about April 21, 1982, Sika placed a 15-50 linear foot (l.f.) test section of Sikaflex 1a and discussed joint design, primer, and backer rod with B3. Some rod was installed,[5] but no primer. Sika was unable to bring it due to airline regulations. BOR was not present (GX 42 at 445, GX 56 at 525, GX 57 at 550; Tr. 166-67, 232).

41. On May 4, 1982, B3 sent a purchase order for 3,135 gallons of Sikaflex 1a conforming to M-41. It was a "standing order" giving notice that B3 intended to purchase that quantity in the future. B3 first requested release of only 500 gallons to ensure the sealant worked

[3] For different reasons, both parties now allege that the Feb. 4, 1982, letter from Sika, and lot 1262, were not submitted for this contract. However, Sika's initial communication with E&R and E&R's approval letter cite this contract. Although the Feb. 10, 1982, test sheet used refers to Salt-Gila Aqueduct, Reach 3, this likely is an error originating with Sika's citation to Salt-Gila in the caption of its letter as one of three prior Sikaflex 1a applications. Even if used for another contract, the weight of the evidence is that the testing was initiated for this one.

[4] Sika later tested Sikaflex 1a, also finding tensile adhesion exceeding the specified range. It opined that variations it found, including the adhesion factor, were not a basis for rejecting Sikaflex 1a (Tr. 150-51, 332). Indeed, lot 1262 would have been within the specified tensile adhesion range under 1983 revisions to M-41. See FF 107.

[5] Backer rod is normally a foam-like rod placed in the joint bottom upon which sealant rests, such that it is not bonded at the bottom or top of the joint, only at the sides. It appears backer rod was not used on the job, but the record does not identify the reason. Sika later decided to propose backer rod for another CAP job (GX 40 at 405, GX 45; Tr. 103).

properly (AX 11; GX 2 at 106, GX 57 at 550, GX 59 at 564-66, 578 (int. res. 61, 81); Tr. 165, 173, 221, 223).

42. The purchase order purported to impose a warranty by Sika that the sealant conformed to specifications and would be free of defects for the later of 18 months after delivery or 12 months after BOR's acceptance. It provided that B3 could recover damages for nonconforming goods, the warranty and other protections ran in favor of BOR, and Sika was to indemnify and hold B3 harmless (AX 11 at 3).

43. On May 17, 1982, B3 sent E&R the certification by Mr. Steven Fidler of Sika that Sikaflex 1a, batches 20079-82, 165 gallons each, met BOR's specifications. It did not mention primer and there is no evidence that any test results accompanied it. Mr. Fidler has a bachelor of science degree in civil engineering and was head of Sika's customer and technical services. He did not recall signing the certification because he signs " million of these." On July 6, 1982, E&R approved the batches (AX 13; Tr. 246, 249, 252).

44. Before retiring in 1987 from BOR, after 29 years' experience, Mr. Glenn DeGroot was chief of the Canals Construction Branch, or Field Engineer. He has a bachelor of science degree in civil engineering and a master of science degree in civil engineering and water resource options. At the time of his testimony, he worked in private industry (Tr. 4-5).

45. On May 18, 1982, B3, BOR and Sika examined the test section. There was an insignificant amount of entrapped air. With a screwdriver or other instrument, Mr. DeGroot stretched the sealant to see if it remained cohesive and adhered to the joint. This test, not severe, was developed by E&R's Mr. Johns. If bond is extremely weak, there will be separation between concrete and sealer or within the sealer. The sealer was poorly bonded in some areas, well bonded in others. Where poorly bonded, it pulled entirely loose from the joint. BOR inquired what could be done to improve bond. Sika's salesman, Mr. Haug, records that "Hal Stober and I had a moment aside and it was decided to suggest improving adhesion by the use of a primer." He informed BOR that Sika recommended primer (GX 42 at 445, 449, GX 57 at 535-36; Tr. 21-26, 80-81, 166-69, 205, 208, 250, 437; see also GX 40 at 406).

46. Mr. DeGroot reported to E&R that bond was questionable, the sealant seemed too hard, and inquired about primer. E&R consulted with Sika, which recommended primer 429 (GX-56 at 525-26).

47. After the test, BOR's inspector Atkins asked Mr. Stober if B3 intended to use primer, stating B3 was to follow manufacturer's recommendations. Mr. Stober originally had not intended to use it, stating Sika's salesman had not informed him about its importance, and Stober had not included it in his Sikaflex 1a cost analysis. He had been aware, though, that Sika recommended primer for joints to be

submerged and had interpreted BOR's specifications to require following manufacturer's recommendations. To avoid lag time in case he had to use it, he had already directed Sika to deliver some with the Sikaflex 1a. B3 did not object to BOR about following the manufacturer's recommendation (GX 57 at 550; Tr. 26, 170-73, 222, 732, 744, 756-57, 828-29).

48. Sika informed B3 that it would not guarantee Sikaflex 1a unless primer were used (GX 56 at 529-30).

Initial Sealing Period

49. On June 2, 1982, B3 began sealing. Sika was to have been notified when B3 was ready to begin, but it was not. B3 placed the sealant without Sika's supervision, using the first 500 gallons, and applying primer with a brush, which did not completely cover the concrete surface. B3 had difficulty pumping the sealant due to its thickness. It is not a self-leveling compound and, once applied, must be tooled into the joint. Heat lamps were ordered to warm the material for early morning use. By afternoon it thinned and spread more evenly. B3 recorded that the primer took only 10-15 minutes to cure to the state where sealant could be applied. Operations stopped on June 11, 1982, due to lack of material. About 20,000 l.f. had been sealed (AF 5 ¶ 9; GX 2 at 93-94, GX 22, GX 37 at 398, GX 42 at 445, GX 57 at 537; Tr. 27, 173, 222).

50. During June, the temperature exceeded 100 degrees F. on 3 of the 5 sealing days -- the highest being at 105 degrees. Sealing began as early as 5:30 to 6:30 a.m., when temperatures were lowest. B3 and BOR instructed that sealing occur at under 100 degrees; there are no known violations. B3 did not measure temperature; BOR frequently measured it outside the canal and compared it with that inside. It found temperatures in the canal were no more than 10 degrees higher (GX 2 at 93, GX 66; Tr. 174-75, 200, 715-16, 720).[6]

51. B3 was waiting for more sealant when, from June 17 to October 11, 1982, it was shut down due to a strike (AF 5 ¶ 10; AX 15; Tr. 173-74).

52. Under release orders of June 3 and 8, 1982, on June 28, Sika shipped 2,650 gallons of Sikaflex 1a and 10 cartons of primer 429 to B3. It could not deliver them due to the strike and stored them in its warehouse (GX 38, 39).

53. On July 2, 1982, Sika's Mr. Fidler "remind[ed]" B3 that "Sikaflex 1a in this special packaging has a shelf life of 3 months" from manufacture, stated to be June 21-23, 1982. B3 had special-ordered 55-gallon drums, each containing 50 gallons, not Sika's normal cartridge packaging. Sika initially failed to comply and had to repackage the sealant. Shelf life depends upon packaging, not product. Sika confirmed at hearing that the sealant supplied to B3 had a 3-

[6] E&R's Mr. Bernard Jones speculated in 1983 that concrete surface temperature could be as high as 130 degrees at the time of primer application, creating a "frying pan" phenomenon, but testified that the theory subsequently "didn't hold water" (GX 26; Tr. 518).

month shelf life, and the primer, 6 months. Sika since has changed its packaging methods for 55-gallon drums or 50-gallon units of Sikaflex 1a (GX 38, GX 40 at 405, GX 59 at 564-65 (int. res. 61); Tr. 132, 252-53, 282, 284, 315-17).

54. Evidence conflicts as to when the Sikaflex 1a was manufactured. In litigation with B3, B3 alleged and Sika affirmed that it produced all 3,135 gallons B3 thought it would need for the job in late April/early May 1982, upon receiving B3's oral order in April. At hearing Sika stated some sealant was produced in late April 1982, and some in June 1982 (GX 39, GX 59 at 564-65; Tr. 90-91, 133-34, 253).

55. B3 consulted Sika after receiving its warning. Sika would only guarantee 3 months, but advised orally that Arizona's low humidity would yield a longer, unspecified, shelf life (Tr. 92, 229, 277, 283-86).

56. On June 29, 1982, B3 sent to E&R Sika's certification that batches 20136-53 of Sikaflex 1a, 150 gallons each, met specifications. Primer and any test results were not mentioned. On August 3, 1982, E&R approved the batches (AX 14).

57. B3 admits that BOR accepted all lots of sealant actually used on the job based upon Sika's certifications (GX 5 at 259).

58. All of E&R's approvals were of Sikaflex 1a without primer. Unlike CAP contractors later who submitted Sikaflex 1a with primer, B3 and Sika never submitted a sealant/primer system for testing on this job. E&R had no objection to primer because Sika recommended it strongly; E&R had found generally that primers affect joint sealant favorably; and B3 was agreeable to using it (AX 26; Tr. 395-96, 702-03).

59. Approvals by E&R, which serves in a support role, do not constitute BOR acceptance, which is based upon finished product in place, as determined by BOR's field personnel. B3 advised Sika that BOR could disapprove of sealant in the field regardless of laboratory approval (GX 59 at 588 (int. res. 98); Tr. 82-83, 233-34, 439, 462, 547-48, 694).

60. On about July 26, 1982, Guy F. Atkinson Co. (Atkinson) sent E&R samples of batch 20165 of Sikaflex 1a and of lot 20004 of primer 429 for testing for another CAP, Granite Reef Division, contract (AX 18 at 1).

61. In September 1982, the sealant and primer Sika had been unable to deliver to B3 were delivered to the jobsite, although the strike was still in process (GX 37 at 398, GX 57 at 550).

62. On about September 9, 1982, Boecon Corp. (Boecon) sent E&R samples of batch 20166 of Sikaflex 1a and of lot 20004 of primer for testing for another CAP, Granite Reef Division, contract (AX 23).

63. On September 23, 1982, BOR's Mr. DeGroot examined sealant placed over primer in June and found it had not cured to a homogeneous mass. There was fine foaming at its contact point with the concrete and considerable bubbling, up to one-eighth-inch-

diameter, causing large voids. The material appeared to be layered, with little adhesion between layers. He cut some sealant and was able to pull it from the joint "like a rope." It smelled like diesel fuel or kerosene and seemed unusually hard (GX 2 at 113, GX 15 at 354, GX 56 at 526-27; Tr. 27-29, 83-84).

64. Mr. DeGroot informed Mr. Stober that he was concerned about bond and the bubbles. Mr. Stober saw multitudes of bubbles on the surface and varying amounts within the sealant and sought Sika's analysis (GX 40 at 408, GX 57 at 550; Tr. 29, 177, 181).

65. E&R received samples of sealant lots 20079-81 used on the job from BOR in early October 1982. Samples also were sent to Sika (GX 2 at 117, GX 15 at 354, GX 42 at 445, GX 56 at 527).

66. On October 8, 1982, E&R informed Atkinson that its samples of Sikaflex 1a, lot 20165, with lot 20004 of primer 429, had failed to conform to M-41's tensile adhesion, modulus extension and durability requirements, and materials represented by those lots were not approved for their contract. Sika knew of the failure; BOR did not inform B3. Mr. Stober would have consulted BOR and Sika had he known, but did not claim he would have discontinued Sikaflex 1a. Mr. DeGroot does not recall if he knew, but would not have accorded it great significance. E&R reports on a batch basis. The failure of a lot does not mean another will not be acceptable. Different lots can vary greatly. Each contract is considered individually (AX 18; GX 42 at 446; Tr. 41-43, 85-86, 202-03, 576-79).

67. Sika's Mr. Zuppa examined sealant samples from B3's job, noticed solvent odor and bubbling, and believed there might be a problem with the primer. The solvent smell also was evident to Sika's Mr. Fidler, who had earlier advised E&R that the problems might be due to surface contamination, a primer reaction, or that the primer was not dry (GX 56 at 527; Zuppa Aff. at 5; Tr. 255).

68. Sealing recommenced in mid-October 1982. Sika, B3, and BOR met to observe it. Ambient temperature was from 85 degrees F. to over 100 degrees. Sika had expected the low humidity level it found and was familiar with Arizona desert temperatures. Before sealing began, Sika assured B3 that it was impossible for its product to "gas" in the absence of moisture. A moisture test was performed; none was found (GX 15 at 354, GX 40 at 405, GX 42 at 448, GX 57 at 550; Tr. 122-24, 256).

69. The record does not reflect whether the moisture test conflicts with a "vapor gradient" theory Sika asserted at hearing. It defined "gassing" as a build-up of gaseous material within sealant due to a chemical reaction, with bubbles not traceable to the substrate, and "vapor gradient" as the tendency of moisture vapor to travel from high concentration to low. Although it did not measure, Sika believed the concrete canal lining temperature to be considerably higher than that of the air, causing moisture in the concrete to expand to a gaseous state. With a vapor barrier, such as a urethane sealant or epoxy coating, the moisture cannot escape. It hits and penetrates the barrier,

if the barrier is not fully cured, causing voids and bubbles traceable to the substrate. The more porous the concrete, the more moisture can escape from it (Tr. 93-96, 123-24, 136-37, 140, 259-61, 264, 279-82).

70. At the site, many bubbles and some voids in the sealant placed in June were observed. It did not adhere in one area. In his November 3, 1982, internal report, Sika's Mr. Zuppa attributed the problems to entrapped air released from the porous concrete substrate due to high canal temperatures, compounded by air incorporated with improper sealant application methods, and air caused by a solvent release from primer which had not been allowed to dry properly. Sika advised sealing when temperatures were lowest and continued to recommend primer, stressing it was to dry a minimum of 45 minutes, or the sealant would pull from the joint like a rope. Sika's Mr. Haug now stated primer was not intended as a bonding agent, but to retard moisture when the canal was in use. Sika expressed concern about BOR's joint; provided a new nozzle design, which was implemented; and demonstrated application procedures, later reporting its own test patch had minimal to no "air." Sika also tested retention samples of sealant and found no air.[7] According to Sika's Mr. Fidler, a vapor gradient was possible, but there was no evidence of it. Also, B3's Mr. Stober could not personally ascertain that the bubbling traced to the substrate. In all, Sika largely blamed improper sealant application and primer which had not been allowed to dry thoroughly (GX 2 at 89-90, GX 15 at 354, GX 40 at 405-07, GX 42 at 448-50, GX 55, GX 57 at 550-51; Tr. 30, 96, 122-23, 126, 129, 178-79, 182, 256-58, 260; Zuppa Aff. at 6-8).

71. BOR did not agree that application methods were to blame and inquired about a reaction between primer and sealant. Sika assured that no such reaction was possible with proper application (GX 15 at 354).

72. Sika told B3 there currently was no problem with the sealant's age (GX 57 at 551; Tr. 90, 153; Zuppa Aff. at 9-10).

73. At least one unit of primer had started to jell and was at the end of its shelf life. The further beyond shelf life, the more primer hardens. It becomes difficult to apply; eventually will not bond to concrete or sealant; and curing takes much longer than 45 minutes. Over-aged primer can block its solvent from release prior to sealant application and cause entrapment. Once a container of primer is unsealed, deterioration is fast. High temperatures accelerate deterioration. Sika warned B3 not to apply primer if it looked too thick. To Mr. Stober's knowledge, the instructions were followed (Tr. 87-90, 181; Zuppa Aff. at 10-11).

74. B3 found the primer a very "hot" material. Vapors emerged from it. B3's workers wore protective masks and clothing. When B3 got to

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[7] Retention samples are kept in Sika's laboratory from manufactured batches, typically for the life of the material. Sika had no record of the batches involved (Tr. 126).

within 2 inches of the bottom of the can, the primer would begin to streak and harden when applied and could not be used. About 20 percent of each can had to be wasted. B3 had to buy brushes by the gross. A brush lasted only 15 to 20 minutes before disposal was necessary because the primer would solidify, making the brush stick-like. B3 waited 45 minutes to an hour before applying sealant over the primer although it found the primer dried within 5 minutes (Tr. 180, 182-83).

75. BOR and B3 chose test areas. Due to Class O sealant's set time, it takes 2 to 3 weeks before it can be examined. BOR suspected a primer/sealant reaction, so sealant was placed without primer in some 100 l.f. test sections (GX 2 at 118, GX 15 at 354, GX 22 at 362; Tr. 84-85).

76. On October 26, 1982, Sika confirmed that it recommended primer 429 for water-immersed joints, stating it would insure adhesion (GX 58).

Second Sealing Period

77. From October 18 to November 2, 1982, B3 placed about 61,000 l.f. of Sikaflex 1a, working overtime to finish the canal invert before the rainy season. Temperatures exceeded 90 degrees F. only three of 12 times, with 94 degrees the high (AF 5 ¶ 13; GX 37 at 398, GX 57 at 551, GX 66).

78. On November 1 and 2, 1982, BOR took sealant samples. Where primer was used, there were many bubbles along the joint contact surfaces. In samples from primerless test areas, there were none; the sealant appeared homogeneous. This was consistent with experiments by BOR's Maintenance Branch (GX 15 at 354, GX 57 at 542-43, 551; Tr. 32-33).

Rejection of Placed Sealant

79. Beginning orally on November 3, 1982, BOR directed B3 to stop sealing as it had been until problems could be resolved, and sought a correction proposal. Sika's Mr. Haug said Sika had never experienced the bubbling encountered (GX 15 at 355, GX 17, GX 57 at 543, 545, 551; Tr. 33, 77, 84, 183-84, 231-32).

80. B3 believed Sika liable and sought a solution (GX 57 at 551).

81. Sika began testing different primers on site (GX 2 at 119, GX 17, 22, GX 42 at 446, GX 57 at 544, 551, 552; Tr. 186, 192, 201).

82. Sika recommended Sikagard 62, a vapor barrier epoxy coating, which it felt could ameliorate vapor gradient. B3 saw no bubbling with No. 62 and only a trace with another primer. BOR recorded some fine bubbles with No. 62 but that it seemed well-bonded (AX 28 at 3; GX 16, GX 22 at 362, GX 56 at 529, GX 57 at 548, 552; Tr. 98, 143).

83. On November 16, 1982, BOR questioned the need for primer. B3 was interested in placing sealant without it, but Sika continued to advocate it, suggesting no sealant, polyurethane or polysulfide, should be placed without it. Sika's Mr. Haug again stated the primer was to

isolate sealant from a saturated concrete surface and said the primer might have been applied too thickly (GX 17).

84. On November 22, 1982, E&R's Mr. Johns spoke to Sika's Mr. Zuppa, who stated: Sikaflex 1a does not need protection from water or water vapor, but primer 429 enhances bond and smoothes concrete; primer 429 used at the CAP, identified as lot 20004, was near the end of its shelf life; and samples indicated primer emissions were causing the foaming. Mr. Johns records that Mr. Zuppa seemed to concur that primer 429 was causing the problems, but only because of its old age. Sika would not yield on its recommendation to use primer (GX 56 at 529).

85. On November 24, 1982, E&R recorded tensile adhesion test results on Sikaflex 1a, with and without primer 429, lot 20004. There was no evidence of tensile strength benefit from the primer. Of 11 sealant samples placed in June 1982, all showed bubbling. One emitted a kerosene odor. Five bonded poorly, five well, and one was fair. Bond and extensibility were affected adversely by the primer (AX 20; GX 2 at 65).

86. On November 30, 1982, BOR notified B3 in writing that sealant placed to date was unacceptable because many samples had bubbles, particularly at the sealant's contact point with the concrete; payment would not be made; a correction proposal was sought; and random sampling had been initiated to evaluate performance of the in-place sealant (GX 2 at 86).

87. BOR found the placed sealant did not comply with specifications. With primer, there always was bubbling, usually extensive. Without, there was occasional bubbling at contact with the concrete, but the number and size were considerably less. When the sealant was rejected, only a small amount had been placed without primer. The sealant, with or without primer, was rejected because it failed to cure to a homogeneous compound. It was not homogeneous, because it was not uniform in texture, consistency and appearance throughout. The bubbling caused BOR concern about the sealant's bond and cohesive strength, which it felt were not guaranteed under the circumstances (GX 2 at 61, 87-88, GX 158; Tr. 24, 45, 46, 57-58, 66-67, 73-76, 196, 402, 404, 409-10).

88. Sika's Mr. Fidler opined at hearing that the sealant with bubbles would have performed adequately. He added, though, that it likely would perform better without them. There would be a greater cross-sectional area and bond face (Tr. 295-97).

89. Sika's Mr. Zuppa acknowledged at hearing that the sealant had not cured to a solid mass because of its voids (Tr. 115).

Evaluation of Sealant for Serviceability

90. BOR asked E&R to determine the effectiveness of Sikagard 62, the other test areas, and the sealant that had not been accepted. The

purpose, pursuant to the contract's Inspection and Acceptance clause, was to evaluate whether the sealant was serviceable enough to be left in place, with a contract price reduction (GX 2 at 86-88, GX 16, GX 22 at 363, GX 56 at 530-31; Tr. 43-47, 62-65, 68).

91. On about December 10, 1982, E&R informed Boecon that samples of Sikaflex 1a, batch 20166, and 429 primer, lot 20004, failed to conform to M-41 and were not recommended for use (AX 23; GX 56 at 532).

92. On December 13 and 14, 1982, in Mr. Zuppa's presence, E&R conducted tensile tests on nine core samples from areas where primer had been used. It used a rating chart from a system developed in 1970 based upon polysulfide canal sealant. Only in unusual circumstances do canal joints open wider than one-eighth inch. The suitability of material that would not remain bonded at that width or less was deemed questionable (AX 24 at 2; GX 35, GX 56 at 531-32; Tr. 96, 363-64).

93. The rating system was not expressed in the contract. BOR considered the testing to derive from specification 6.2.3, providing for inspection of cores, and that the testing method was its option. Taking core samples to evaluate sealed joints has been standard with BOR for years (Tr. 355-56, 363-67).

94. The tests were very simple pull tests, with uncomplicated procedures and machinery (AB 66-67). There is no evidence that B3 or Sika objected to BOR about them.

95. The samples did not fail in adhesion, but cohesion results were extremely variable, some failing. Sika thought the material tested well (AX 25, 28; Tr. 99-101, 104-05, 188-91, 293-94, 361, 379).

96. To E&R and BOR, the sealant tested poorly. Four of nine samples were within the "questionable" zone. A fifth, the one with No. 62 epoxy, likely would have been questionable if it had cured sufficiently, and the area between it and the sealer had foamed with small bubbles. E&R concluded primer was not beneficial; voids increased significantly when it was used; and unprimed specimens reflected slightly higher bond strengths. Based upon the tests, and the two recently failed Sikaflex 1a/primer 429 systems, E&R recommended that no more Sikaflex 1a be used on current contracts. It found its properties to be very different from the samples tested in early 1982. Manufacturing methods had changed since then, but not product formulation. E&R also found the cores to be very different from one another, possibly due in part to different states of cure. That the sealant was so inconsistent troubled E&R. Concerning whether it could be left in place, E&R reserved judgment and sought more cores for tensile testing after a curing period of at least 2 months (AX 24, 25, 27; GX 24 at 367, GX 26, 35, 36; Tr. 63, 110-11, 191-92, 396-97).

97. On December 15, 1982, B3 cancelled an order for Sikaflex 1a and considered its sealing "on hold" (AX 25 at 2; GX 57 at 556).

98. On December 30, 1982, B3 took 4-inch cores from No. 62 and primerless areas. E&R received them in January 1983. Mr. Johns had

retired on December 28, 1982. Evaluation had to wait to obtain equivalent cure times. Believing primer a culprit, BOR also sought fresh primer and sealant for study. Problems ensued because the cores were smaller than contract specified. The testing was not completed for that reason and due to the loss of Mr. Johns' expertise. At B3's request, it was pursued later (AX 30, 40, 47; GX 2 at 67, GX 22 at 363, GX 31; Tr. 335).

99. On February 15, 1983, B3 proposed to sandblast the tops of the canal joints and to place a cap seal of Sikaflex 1a without primer over existing sealant, rather than to remove it (GX 19; Tr. 48-50).

100. BOR agreed, with modifications. It noted use of Sikaflex 1a without primer was contrary to Sika's previous recommendations, and inquired whether its recommendation had changed (GX 18; Tr. 49-51).

101. On March 18, 1983, Sika wrote to B3:

> The use of Sikaflex 1a on a concrete surface without a primer is perfectly acceptable. A primer is normally recommended by Sika * * * when 1a is to be used in submerged conditions or when the joint is questionable, simply for added security. The use of the 429 primer on the concrete does improve the bond of the Sikaflex 1a, however, this improvement is only in the neighborhood of 10 to 15%. On projects such as the Granite Reef Aqueduct where unusually [sic] conditions exist the benefits derive [sic] from the use of the primer may well be outweighed by other factors.

(GX 20).

102. On May 3, 1983, Sika reported upon testing it had performed on Sikaflex 1a, with and without primer 429:

> Our test results show that Sikaflex 1a meets the cold flow, tack-free time, Shore A hardness, weight loss, pressure resistance, modulus extension and durability requirements of the M-41 specification. Sikaflex 1a met the bond requirements for tensile adhesion, however, the numerical values exceeded the 60 psi limit at 150% extension. The sealant did not pass the viscosity, penetration, resilience tests, or 200 [degrees] flow tests.

(GX 44 at 464).

103. Sika's results varied significantly from E&R's on the samples provided it in early 1982. Mr. Johns might have passed sealant reflecting Sika's results in E&R's initial "fingerprint" testing, subject to field application and performance (Tr. 344-47, 388-89, 391-92).

104. Sika's Mr. Stefanik acknowledged at hearing that the sealant it tested did not meet specifications and described a correlation with the bubbling. It was easier to penetrate Sikaflex 1a than called for, so moisture vapor could more readily enter it. The samples from lot 1262 tested by E&R in 1982 had not varied from M-41 in that manner (AX 10 at 2; Tr. 327, 330).

105. On June 21, 1983, for resealing, B3 sought to use Sikaflex la about 10 months old, but each sample from a test section contained air pockets and small voids. BOR informed B3: the sealant could not be accepted until tested by E&R; B3 should get Sika's certification that its age would not affect it; and continued sealing would be done at B3's risk. B3 placed another test section, using new Sikaflex 1a, but it did

not test satisfactorily. It is not clear whether primer was used. B3 elected to cease operations until a course of action could be determined. To date, 86,000 l.f. had been sealed with Sikaflex 1a (AX 32; GX 2 at 159, 162, 163).

106. On July 27, 1983, B3 asked if BOR would prevent it from placing Sikaflex 1a. BOR replied that it would not prevent placement in accordance with specifications, but if there were bubbling at the concrete contact point, the joints and cap seals would be rejected (AX 34).

107. In revised M-41, dated August 1, 1983, one-part polyurethane sealers are called Class "B," apparently a clarification only. The record does not reflect any significance to this appeal. Table 1, "Test method and requirement," does not mention primer and there are some changes in test values, including tensile adhesion. The Sikaflex 1a lot 1262 tested for this job would have met that revised value. If any other changes are relevant, appellant has not identified them. Class B sealant is still to "cure to a homogeneous rubberlike mass." "Part" is used instead of "component," but parts are still to exhibit a shelf life of at least 12 months (AX 10 at 3, AX 35; Tr. 587-89).

108. On September 23, 1983, after considering B3's problems, the rejection of Sikaflex 1a elsewhere, the failure of a competing product, alleged improper joint design, and high seasonal temperatures, Sika still decided to bid to reseal canal joints in Reaches 1-12 of the Granite Reef Aqueduct, and to propose Sikaflex 1a with primer and backer rod (GX 45).

109. On November 17, 1983, B3 placed a 50-l.f. section of new Sikaflex 1a without primer over partly removed, rejected sealant. A 2,500-l.f. section of new Sikaflex 1a also was placed without primer in a previously unsealed area. The bubbles were not nearly as extensive or large as with primer 429, but bubbling occurred in at least 30 percent of the samples, unsatisfactory to BOR. BOR agreed B3 could continue to try capping (AX 36; GX 24, 49, 50, 51, GX 56 at 533; Tr. 484).

110. On November 29, 1983, BOR and B3 agreed that new sealing would be done with Allied two-component polysulfide sealant and resealing could be done with cap seals of approved batches of Sikaflex 1a, which seemed to bubble less as a cap seal (AX 36).

111. On December 1, 1983, BOR informed B3 and Sika that the sealant on the job was unacceptable and it wanted a joint essentially free of gassing or bubbles. Sika opined that the bubbles were not due to gassing, but to vapor gradient, and/or air entrapment due to concrete porosity; sealant could be applied satisfactorily during certain times of the day, mainly late, after air had stabilized; and whether the day was cloudy or clear might make a difference. To BOR, this confirmed its findings that the material varied from good to bad and could not be relied upon to do the job consistently. BOR also questioned long-term durability because some sealant had become hard and cracked, which Sika attributed to B3's tooling. Sika stated that a

sample of newly placed sealant, in which bubbling at the joint interface was less than 5 percent of the surface area, was as good as could be obtained from Sikaflex 1a on the project and asked that BOR accept that level. Then and subsequently, BOR declined to set a percentage of acceptable bubbling, but indicated a small amount would be permitted (GX 24, 25, 49, 50, 51; Tr. 54-55, 58-59, 264).

112. It was not feasible for BOR to walk the miles of canal and judge at each point what might be acceptable bubbling. The amount did not control. It was their placement and effect upon the sealant's ability to sustain movement without failure that was important (Tr. 410, 563-64).

113. B3 attempted to follow the authorized repair/capping procedures but, although Sika urged continued capping with Sikaflex 1a, B3 determined, after a time and cost analysis, to remove the Sikaflex 1a and reseal the joints with the two-part Allied product (GX 25; Tr. 199-200, 488).

114. Sika noted it was important to resolve any payment disagreements early "since we are dealing with a product fairly limited in shelf life" (GX 50 at 481).

115. GX 158 A-F are samples from Reaches 3 and 4 typical of sealant BOR evaluated when it determined it did not meet specifications. We find that one sample where primer had been applied, and another without, cured to an essentially homogeneous compound. The others, all with primer, are fraught with bubbles and voids. The photographic evidence also shows sealant which cracked and bubbled extensively (GX 62 at 1048-51, 1053-59, 1061, 1063). BOR accepted that it is impossible not to trap air between sealer and concrete occasionally, but what it found was too much, and the bubbles were not uniformly dispersed. Mr. Lloyd Timblin, chief of E&R's Applied Sciences Branch, a registered professional engineer with a bachelor of science degree in engineering physics and a master of science degree, who had taken special studies in polymer materials, noted there was a high population of bubbles close to the bonding surface and a low population throughout. Sealant with such a large population of voids in one plane would be unlikely to sustain the kind of movement a contraction joint needed or to perform its function as a sealant (Tr. 71-76, 368, 402-03, 418, 583, 663-64, 675-76).

116. E&R's subsequent controlled tests of movement confirmed the concerns of BOR's field personnel (Tr. 564-65).

117. BOR does not want to take risks with sealant. Among other reasons, the sealant is to prevent water from running out the bottom of the canal at the joint crack. Once the canal is in service, dewatering it to make corrections is difficult (Tr. 470, 474).

118. The bubbles were in the most critical place in the sealing system. Most testing failures occurred in the bubbled areas. To Mr. Bernard Jones, head of E&R's Material Science Section, a

registered professional engineer with a bachelor of science degree in mathematics and 33 years' experience in laboratory work on polymeric materials for construction, such as Sikaflex 1a, the bubbles or voids in concentrated areas were causing a weakened zone, reducing the sealer's cohesion, like stamp perforations, which allow them to separate. Even if adhesion were not reduced, the reduced cohesion had the same result: the sealant would separate (Tr. 404, 414, 428, 434, 534-35, 565-66).

119. To BOR's Construction Engineer, Andrew Dolyniuk, who had a degree in civil engineering, over 40 years' experience in engineering construction work -- 20 with canal lining -- and was an authorized representative of the contracting officer, it was apparent that the sealant as installed was not homogeneous, did not meet specifications, and would have to be replaced (Tr. 441-42, 467-68, 474, 477).

120. Sealing started again on January 13, 1984. B3 removed the existing sealant. It subcontracted with Conseal, Inc., to perform the new sealing and most of the resealing (GX 2 at 164; Tr. 488-91).

121. On February 6, 1984, B3 notified BOR of a potential claim for excess costs for the sealant's removal and replacement (AX 37).

122. At some point in 1983-84, after the current dispute arose, a Class O sealer (PRC 7000, or similar number) was used successfully in centerline canal joints on the CAP and performed very well (Tr. 67).

123. BOR accepted the contract as substantially complete on March 21, 1984, when sealing was complete. It had extended the contract completion date by 188 days to that date (GX 2 at 78, 165, 167).

124. There were four sealing periods during the contract: pre-strike, June 2-10, 1982, and post-strike, October 18-December 7, 1982, -- including priming; June 21 - July 12, 1983, and January 13 - March 21, 1984 -- no priming. A total of 237,421 l.f. of canal was sealed in a total of 61 days, including the 86,000 l.f. which were rejected and resealed. Of the total, 112,906 l.f. were sealed with Sikaflex 1a and 127,475 with Allied Jet Seal II (GX 2 at 159, 164-65).

B3's Claim Against Sika

125. April 13, 1984, B3 filed a verified complaint against Sika in United States district court alleging that Sika had supplied defective sealer and primer which bubbled and failed shortly after installation and did not conform to BOR's specifications or to B3's purchase order (GX 67).

126. Sika's answer and counterclaim alleged B3 was negligent in sealing and priming and improperly used Sika's products (GX 3).

127. B3 contended "the problems had to stem from the products themselves" (GX 52 at 510 (int. res. 46).

128. Sika asserted that B3 had notice from the outset that Sikaflex 1a had a shelf life of less than 6 months, but B3 used it past its shelf life, possibly causing the bubbling in whole or part (GX 59 at 569-70, 573-74 (int. res. 68, 69, 73, 74)).

129. Sika's Mr. Fidler confirmed at hearing that Sikaflex 1a used by B3 had exceeded its shelf life. Although he discounted it, he conceded this could have contributed to the bubbling problem (Tr. 299).

130. Sika had not notified B3 of primer 429's shelf life (GX 59 at 571-72, 595-96, 619 (int. res. 70, 71, 104, 105, 138)).

131. Sika contended the bubbles or gassing were caused by tooling and application deficiencies and problems, including climatic and surface conditions; some was due to a primer solvent release; and the primer had not been allowed to dry properly (GX 59 at 575-76, 591-92, 604, 615-20 (int. res. 75, 76, 100, 101, 120, 138); Tr. 298).

132. Contrary to an earlier assertion, Sika admitted that, prior to B3's job, it had other experiences with Sikaflex 1a gassing or bubbling as it did here (GX 57 at 551, GX 59 at 585-86 (int. res. 94 and 95)).

BOR's Post-Rejection Actions and B3's Claim Against BOR

133. In 1984-85, BOR revised its specifications to provide sealer was to be used as supplied by the manufacturer, without materials not approved for use; the Government would analyze field samples to verify consistency with the original approval submittal and to detect any adulteration at the site; sealer would be unacceptable if gassing, foaming, bubbling or blistering occurred due to high ambient temperatures, high concrete temperatures, or other causes. The "homogeneous, rubberlike compound," bonding, and other requirements remained (AX 57; Tr. 555).

134. On March 20, 1985, B3 requested that E&R pursue testing and E&R hired the retired Mr. Johns (AX 42, 43, 47).

135. On May 1, 1985, B3 submitted its $439,797 claim (AX 41).[8]

136. Mr. Johns' July 16, 1985, report analyzed sealer installed in 1982 and 1983: Bond was significantly weakened when primer 429 was used; it usually was improved with No. 62 epoxy. Bubbling always occurred with primer 429, only occasionally with No. 62, but often enough to be risky, because it reduced bond strength significantly. There were some bubbles in primerless applications, but they seemed due to air trapped during application, lack of surface tooling, roughness of the concrete surface or to solvent released from the sealer which did not escape. Primerless sealant was essentially homogeneous since the bubbles were dispersed. Sikaflex 1a bonds satisfactorily to concrete surfaces without primers, generally better than with them. Sikaflex 1a without primer could continue on the CAP, subject to acceptance testing for conformity to specifications. Installations of Sikaflex 1a with primer 429 were not satisfactory and did not conform to M-41. Average bond strengths were below minimum values established for canal sealers, and the sealer did not cure to a homogeneous compound.

[8] In *Ball, Ball & Brosamer, Inc.*, IBCA-2103 *et al.*, 88-3 BCA ¶ 20,844, *aff'd, Ball, Ball & Brosamer, Inc.* v. *United States*, 878 F.2d 1426 (Fed. Cir. 1989) (*Ball I*), the Board found this claim inadequately certified.

Joints where primer 429 was used, encompassing nearly all of the sealing, clearly required resealing (GX 2 at 60-76).

137. E&R reported to BOR that the testing supported the decision to repair or replace the Sikaflex 1a and primer was the most significant cause of the unsatisfactory sealant. Two cores, from an area without primer, tested adequately. However, only 50 feet had been installed in one area without primer and only a few hundred feet elsewhere (GX 2 at 60-61).

138. On August 19, 1985, B3 and Sika signed a mutual release and settlement. Sika paid B3 $175,000 and dismissed its $35,460 counterclaim, for a total benefit to B3 of $210,460. Sika agreed to assist with B3's claim against BOR. If B3 were to recover over $50,000, it agreed to pay Sika 25 percent (GX 2 at 45-59, GX 3 at 181; Tr. 660).

139. On September 20, 1985, the contracting officer denied B3's claim (GX 2 at 38-43). *Ball II* describes the procedural course thereafter.

140. Consultant Johns conducted additional tests in the fall of 1985. For this study a new lot of primer 429, No. 50006L, was used. Although it did not usually improve Sikaflex 1a's sealing properties, results were consistently higher than with lot 20004. Mr. Johns found: high temperatures, whether during primer and sealer application or cure, were the main influences on Sikaflex 1a's sealing properties; temperatures at 158F. were deleterious; expansion of the sealer during curing showed possible weak points from gas generation; and the tests tended to confirm lot 20004 of primer 429 was faulty (GX 41 at 409-11, 414-16).

141. E&R did not recall who supplied the primer 429 from lot 20004 used for testing, but the weight of the evidence is that lot 20004, the same lot submitted by Sika for two other CAP jobs, was used on B3's job. Contemporaneously, Sika indicated that lot 20004 was used by B3 and attributed the bubbling problems to that lot, because it was at the end of its shelf life and subject to being faulty. Also E&R had recorded that "the same batch of primer was common to all of the field installations and to laboratory acceptance tests." There is no countervailing evidence (AX 18 at 1, AX 23; GX 2 at 65, GX 41 at 415, GX 56 at 529; Tr. 353-54, 369, 513-14).

142. While Sika did not think BOR's V-shaped canal joint was designed properly for the even distribution of stress and the sealer's expansion and contraction, it did not attribute the bubbling problem to joint design (Tr. 101-04, 116-17, 257-58, 294; Zuppa Aff. at 9).

143. The V-shape is ideal for canal centerline contraction joints and has been BOR's standard for at least 20 years. It is easy to form in canals and works very well (GX 2 at 66; Tr. 405, 475, 567-72, 668-70).

144. At hearing, Mr. Zuppa attributed Sikaflex 1a's bubbling problems to the various causes he had identified from the outset, including primer that had not been allowed to dry sufficiently and application problems, but principally to vapor gradient. He said primer

429 was designed as an adhesion promoter, not a vapor barrier. Sika's Mr. Stefanik considered the bubbling caused by wet primer or insufficient humidity for the products to cure. Vapor gradient was a possibility if the sealant had not cured. He had observed bubbling with a similar product in Houston, Texas, and had traced it to vapor gradient (Tr. 98, 135-37, 310-11, 322-23).

145. Sika had had prior problems with vapor gradient conditions with its epoxy coatings (Tr. 259-60).

146. A vapor gradient condition depends upon climatic conditions and time of day, and can be controlled by taking temperature and moisture balance into account and making adjustments (Tr. 260-61).

147. E&R's Mr. Jones had experience with vapor gradient in other contexts. He opined it was inconceivable that the desert-based concrete could contain the requisite amount of water enough of the time to cause the persistent problems that occurred (Tr. 506, 542, 556, 572-75, 592).

148. E&R's Mr. Timblin had studied the vapor gradient concept. He believed it inapplicable due to B3's use of primer which became dense upon cure. It was unlikely moisture vapor could penetrate through it and the sealer. Even if the primer were permeable, any vapor would move towards the cooler soil and not into the sealant (Tr. 664-68, 678-81).

149. Mr. Johns noted Sikaflex 1a is intended to be cured by absorption of moisture and that if absorption of a little moisture due to an alleged vapor gradient condition causes bubbling, there is something wrong with the product's formulation (Tr. 382-83).

150. Repackaged sealant beyond its specified shelf life, some application errors and difficulties, and climatic conditions (whether or not resulting in a vapor gradient condition) likely contributed to B3's difficulties with Sikaflex 1a. Faulty primer from lot 20004, beyond its shelf life, however, was the predominant cause of the exceptional amount of bubbling and voids which triggered BOR's reasonable rejection of the placed sealant (see above and AX 30; GX 2 at 64-65, GX 25, 26, GX 41 at 410, 415, GX 158 A-F; Tr. 380, 409-10, 536-40, 549-50, 575, 689-90).

151. Appellant admits that it does not know whether the sealer and primer supplied to B3 by Sika conformed to BOR's specifications, stating "no party has fully tested the sealer and primer used in performance of this contract" for conformity (GX 5 at 258, 268).

DISCUSSION

[1]Appellant alleges, in the alternative, that its installed sealant complied with specifications; BOR applied the homogeneous requirement arbitrarily; and wrongfully rejected the sealant and directed a substitute, using improper, extra-contractual testing

methods, all thereby changing the contract. Because the claim of compliance, if correct, would dispose of the appeal, we address it first.

The contract requires sealant to conform to BOR's M-41 specifications (FF 3), which require that it "cure to a homogeneous rubberlike mass" and "bond effectively" (FF 10). Contract specification 6.2.3 (e) requires the sealant be tooled as necessary into "intimate contact with the bonding surfaces without entrapping air bubbles" and that "[e]lastomeric sealer which does not cure to a homogeneous, rubberlike compound, or which does not bond to the joint groove faces, or which does not comply with any other requirements of this paragraph shall be removed" (FF 13).

Although most of the record involves bubbling and primer issues, appellant urges in posthearing briefing that they are irrelevant, because BOR purportedly rejected its sealant where no primer was applied, no bubbling occurred, and where it bonded to the joint face. We disagree.

When BOR rejected the sealant in November 1982, only a small amount had been placed without primer. The first 15 to 50 l.f. test section, placed in April 1982 without primer, had little or no bubbling, but was poorly bonded in some areas, pulling entirely loose from the joint face as a result of a simple screwdriver test, which was not severe. Sika and B3 "had a moment aside and it was decided to suggest improving adhesion by the use of a primer." BOR had not rejected any sealant at this point (FF 40, 45, 79, 86).

M-41 provides only for the testing of primer "[a]s recommended by the manufacturer." Otherwise the contract is silent about primer. Whether primer is used is left to the recommendation of the sealant manufacturer chosen by the contractor. B3's Project Engineer Stober testified he had not factored primer into his costs because Sika's salesman had not informed him about the importance its technicians ascribed to it. However, Mr. Stober knew Sika recommended primer, was prepared to use it, and had ordered Sika to deliver it with the Sikaflex 1a (FF 47). According to Sika's salesman, the test section had been placed without primer because he had not been able to bring it with him due to airline restrictions (FF 40). We need not explore the issue of who is responsible for the primer's use, though, because, in some contrast to its complaint, appellant now asserts that primer is irrelevant, as noted. Resolution of the issue would not affect our decision, in any case. There obviously was no direction by the contract or BOR to use over-aged primer (or sealant). Rather, the contract requires that all material incorporated into the work be new (FF 19).

The only other sealant placed without primer prior to BOR's rejection was in some 100-l.f. test sections initiated by BOR in October 1982, sampled on November 1 and 2. In cores from the primerless test areas, sealant appeared homogeneous. In all, there occasionally were bubbles in primerless sealant, but the size and number were considerably less than with primer. On November 3, 1982, BOR directed B3 to stop sealing in the manner it had been (which was with primer), until problems could be resolved, and sought a correction proposal (FF 75, 79, 87).

On November 16 and November 22, 1982, BOR questioned the need for primer, but Sika continued to advocate it and would not yield. On November 30, 1982, BOR formally rejected the sealant placed to date because many samples contained bubbles, particularly at contact with the concrete (FF 83, 84, 86).

Although the contract language specifically prohibiting bubbles is phrased in terms of avoiding entrapment of air bubbles during sealant application (which Sika accused B3 of doing (FF 70, 126, 131)), the intent is clear -- bubbles are to be avoided. Moreover, the contract elsewhere makes it evident that bubbles are not acceptable in any context. The requirement that the sealant be homogeneous precludes them.

B3 contends that "homogeneous" means, with two-component sealers, the components are to be mixed thoroughly. BOR's specifications M-41 do not limit the homogeneous requirement to two-component sealers, however. They state: "Class O sealer will be furnished ready mixed as a single component which will cure to a homogeneous rubberlike mass" (FF 12). Further, specification 6.2.3 (e) provides that sealer which does not cure to a "homogeneous, rubberlike compound" is to be removed (FF 13).[9] "Homogeneous," by common definition, means of a similar kind or nature; having no discordant elements; of uniform structure or composition throughout; of a single type, showing no variation (*Webster's Third International Dictionary*, G. & C. Merriam Co. (unabridged, 1971).

BOR rejected the sealant because it failed to cure to a homogeneous, rubberlike compound. The bubbling where primer had been applied, involving the great majority of the sealing, was obvious and extensive. Sika acknowledged that the sealant had not cured to a solid mass product because of its voids (FF 89). Even with primerless areas interspersed with no or less bubbling, the sealant was not uniform in texture, consistency, and appearance throughout. It was not homogeneous internally or in total. All of the bubbling caused BOR concern about the sealant's bond, which it felt could not be guaranteed under the circumstances. The "effective" bond required by M-41 involves not just adhesion to the sides of the joint, but cohesion and lack of bubbles (FF 39, 83, 84, 87, 89, 115, 118, 119).

It is apparent to the Board from representative samples and photographic evidence, as it was apparent to BOR's Field Engineer and its Construction Engineer (who was the authorized representative of the contracting officer), that the sealant was not homogeneous.

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[9] When BOR amended M-41 in August 1983, the need for one-part sealers to "cure to a homogeneous rubberlike mass" did not change (FF 107). Similarly, spec. 6.2.3(e)'s requirement for a "homogeneous, rubberlike compound" did not change when BOR amended its contract sealant specifications in 1984-85. Indeed, although they became more detailed in describing that bubbling was unacceptable, they added nothing material that could not already be derived from this contract's specifications (FF 133).

Rejection on that basis was not arbitrary, but in accordance with BOR's rights under the contract. The placed sealant plainly did not comply with specifications.

[2] Although appellant does not advance them as such, its "wrongful rejection" and "direction of new sealant" arguments appear most logically to fall within the ambit of economic waste considerations. The Government is entitled to insist upon strict compliance with its specifications even if that exceeds what is absolutely needed for a satisfactory result. *R. B. Wright Construction Co.* v. *United States*, 919 F.2d 1569, 1573 (Fed. Cir. 1990); *White & McNeil Excavating, Inc.*, IBCA-2448, 92-1 BCA ¶ 24,534 at 122,441-42. However, it cannot direct replacement of work when the cost of correction is economically wasteful and the work is adequate for its intended purpose. Instead, its remedy is a contract price adjustment. *Granite Construction Co.* v. *United States*, 962 F.2d 998 (Fed. Cir. 1992), *reh. denied*, May 29, 1992. In *Granite*, the court of appeals found that the Government had insisted upon removal of a joint waterstop without any evaluation of the technical necessity for the rework and did not exercise the discretion vested it under the contract's Inspection and Acceptance clause (GP 10). Unrebutted expert testimony was that the waterstop considerably exceeded required performance standards, would have been more than adequate for its purpose, and that a repair proposed by the contractor would have been equally adequate.

Here, pursuant to GP 10, BOR initiated random sampling and testing to evaluate the sealant's performance to determine whether, even though it did not meet specifications, it was serviceable enough to remain in place, at a contract price reduction (FF 15, 86, 90). In pre- and post-rejection testing, E&R found poor bonding in several cases (FF 85, 92, 95, 96). Appellant stresses that some bonding failures in laboratory tests were in cohesion, rather than in adhesion to the joint walls. However, in the field, there clearly were significant failures of installed sealant to adhere to the joint, both initially, without primer, and later with primer, when BOR was able to pull the sealant from the joint, each time with simple, nonsevere tests (FF 45, 63). Moreover, as established, acceptable bond requires adhesion, cohesion, and lack of bubbles.

Additionally, the tests, with and without primer, demonstrated that the sealant's properties varied greatly from core to core and that samples tested during contract performance were very different from those tested by E&R in 1982. The lack of consistency reasonably concerned BOR and E&R (FF 95-96, 103, 111).

E&R served as support to BOR, which was charged with contract administration. Under specification section 6.2.3 d., acceptability of sealant ultimately is determined by field examination, as the contractor was aware (FF 13, 59). The weight of the evidence is that the sealant with its bubbles and voids was risky and inadequate. Given its purpose, among other things, to protect against leakage from the bottom of the canal, and the difficulties in correction if leakage occurs when the canal is in use, BOR cannot take risks with it. Sealant with such a large population of voids in one plane would be unlikely to sustain the kind of movement a contraction joint needs or to perform its function as a sealant, which E&R's tests confirmed. The bubbles were in the most critical place in the sealing system. Most testing failures occurred in the bubbled areas (FF 115-18). Based upon its observations that the sealant clearly was not homogeneous, and given the location of most of the bubbling and the results of the testing done to date by E&R, BOR reasonably required repair or replacement of the sealant.

E&R planned additional testing. However, B3 had submitted 4-inch cores, smaller than the 6-inch cores called for by specification 6.2.3.a., causing technical difficulties; E&R's expert, Mr. Johns, retired at the end of 1982, and the testing was not completed (FF 98). While not obligated to do so, E&R ultimately hired Mr. Johns as a consultant and renewed testing in 1985 at B3's request. The testing supported BOR's repair and replacement decision (FF 134, 136-37).

Neither B3, nor Sika, with its own testing capabilities, offered substantive or persuasive evidence that the rejected sealant would have been adequate for its intended purpose. In fact, Sika's own post-rejection testing of Sikaflex 1a demonstrated that it did not comply with M-41, including in one area that could have contributed to the bubbling problem (FF 102, 104, discussed further below).

Even after rejection of the sealant installed through November 1982, BOR did not direct use of a sealant other than Sikaflex 1a. It allowed B3 to elect to continue to place that product, albeit at B3's risk and subject to testing by E&R. A 2500 l.f. test section of new sealant placed without primer in November 1983, a year after BOR rejected the installed sealant, bubbled in at least 30 percent of the samples, although the bubbles were not nearly as extensive or as large as when the primer 429 had been used. By this time, BOR had determined it wanted a joint essentially free of bubbles. Although it stated some small amount might be acceptable, it reasonably declined to agree in advance of inspection and testing to a guaranteed allowable percentage, and warned B3 that if there were bubbling at the concrete contact point, the sealant would be rejected. B3 decided to use Allied two-component polysulfide sealant for the remainder of the sealing (FF 105-06, 109-12).

In further contrast to *Granite*, BOR authorized proposed repairs of sealant in place, including cap-sealing with Sikaflex 1a. Although Sika urged continued capping with Sikaflex 1a, B3 itself determined, for cost reasons, to remove the Sikaflex 1a and to perform the resealing with the Allied product as well (FF 99, 100, 109, 110, 113).

Again, we find nothing arbitrary in BOR's actions. It was entitled to homogeneous sealant under the contract, but nonetheless cooperated with B3 and Sika in serviceability testing, experimentation, and repairs. It had enough legitimate, proven concerns about bubbles in sealant to want to avoid bubbling in the new sealing upon which B3 was about to embark.

[3]Appellant also claims that BOR used extra-contractual testing in rejecting the installed Sikaflex 1a. As we discuss further below, the contract does not require pre-sealing testing by BOR. It can merely require certification of the sealant prior to use for conformity to specifications. Pre-sealing tests, or certifications, are for product comparison and quality control (FF 13 (spec. 6.2.3 d.(1)), FF 17, 36). B3's "extra-contractual" test allegations focus upon BOR's acceptance testing.

First, we find no testing was necessary to observe objectively that the installed sealant was not homogeneous, and for that reason alone, did not comply with specifications.[10] Second, the testing that BOR did perform was standard, reasonable, authorized by, and not more stringent than, the contract's terms.

The contract provides that acceptance will not occur until sealant has been satisfactorily applied at the jobsite (FF 13 (spec. 6.2.3 d.(1)). The contractor is to drill 6-inch cores when requested by the Government to determine the effectiveness of its joint installation procedures (FF 13 (spec. 6.2.3 a.)). Core tests to evaluate field performance are not the same as the pre-sealing tests and cannot properly be correlated (FF 17).

Appellant reads the field testing provisions as pertinent only to the contractor's installation and application procedures, and not to the condition of the installed sealant. We find that interpretation unreasonable. Installation and application procedures can be observed in process, but not in after-the-fact core testing, for example. B3's interpretation is also inconsistent with BOR's known practice of taking core samples to evaluate sealed joints, standard with it for years (FF 93). Prior to its agreement with B3, Sika expressed familiarity with BOR's testing methods (FF 22), and we infer, based upon its prior experience with canal joint sealing on the CAP, that B3 also was familiar with them. It has not contended otherwise.

In any case, the contract adds that, in addition to tests outlined in the specifications, the Government can test the materials at any time during contract performance for contract compliance (FF 14 (spec. 1.1.6), FF 15; GP 10). The manner of testing is not specified. "In the absence of a specified test method, any reasonable method may be applied so long as the test method reasonably determines compliance with specifications and does not impose a more stringent standard. * * * Appellant has the burden of proving the unreasonableness of the test method." *Interstate Foresters, supra*, 89-1 BCA ¶ 21,375 at 107,728.

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[10] Appellant urges that the "homogeneous" standard is subjective and improper. We have found the sealant upon which BOR based its rejection to be patently nonhomogeneous. Determining whether a small level of bubbling might be acceptable at any given point, as BOR suggested concerning renewed sealing, could be somewhat subjective. That a test or evaluation involves some degree of subjectivity does not alone render it unreasonable. *See Interstate Reforesters, Dale Whitley*, AGBCA Nos. 87-374-3, 88-152-3, 89-1 BCA ¶ 21,375 at 107,728, discussed below.

B3 has not identified any relevant test that was inappropriate for Sikaflex 1a (FF 37). In fact, it stresses that E&R's core testing involved very simple pull tests, with uncomplicated procedures and machinery, and there is no evidence that B3 or Sika objected to BOR about its testing methods (FF 94). The cases appellant cites involving tests that did not comply with, were more stringent than, or were inconsistent with, contract-specified standards, do not apply.[11]

[4]B3's main contention is that BOR's specifications were design in nature and defective. Absent economic waste, the Government is entitled to insist upon strict compliance with its specifications, as we have noted. The general rule is that "[w]here one agrees to do, for a fixed sum, a thing possible to be performed, he will not be excused or become entitled to additional compensation because unforseen difficulties are encountered." *United States* v. *Spearin*, 248 U.S. 132, 136 (1918). However, when the Government provides design specifications, it is deemed to warrant their adequacy for the job, and if the contractor complies with them, it will not be responsible for consequences of defects in them. *Spearin*, 248 U.S. at 136-37. The initial burden of proof is upon the contractor to demonstrate that it substantially complied with the specifications, and properly used and installed the requisite materials, but that an unsatisfactory product or performance resulted. If the contractor carries that burden, the burden then shifts to the Government to prove that defective materials, workmanship, or some other cause produced the unacceptable outcome. *Ordnance Research, Inc.* v. *United States*, 609 F.2d 462, 479-80 (Ct. Cl. 1979); *R.E.D.M. Corp.* v. *United States*, 428 F.2d 1304, 1309 (Ct. Cl. 1970); *R. C. Hedreen Co.*, ASBCA No. 20599, 77-1 BCA ¶ 12,328 at 59,554; *Southland Enterprises, Inc.* v. *United States*, 24 Cl. Ct. 596, 600 (1991).[12]

In some cases, joint sealant specifications have been found to be design, and defective. *Metal Building Specialities Co.*, ASBCA No. 8651, 1963 BCA ¶ 3943 at 19,528; *Concrete Placing Co.* v. *United States*, 25 Cl. Ct. 369, 374 (1992); *Haehn Management Co.* v. *United States*, 15 Cl. Ct. 50, 56-57 (1988), *aff'd unpub.*, 878 F.2d 1445 (Fed. Cir. 1989). BOR's specifications are not as constrictive as in those cases. On balance, though, due to M-41's detailed tests, we find them to be more design than performance specifications in nature. Appellant has not proved them defective, however.

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[11] B3 suggests BOR's testing was ill defined, citing testimony by E&R's Mr. Jones. Mr. Jones was referring to BOR's desire to test additional cores, thwarted temporarily by B3's failure to submit cores of contract-specified size and by Mr. Johns' retirement (FF 98). He described testing at that point as a "very ill-defined, if you will, or not definitely defined program" (Tr. 538, referring to AX 30). We find both E&R's earlier testing and the subsequent tests performed by Mr. Johns as a consultant to have been thorough and well defined (FF 136, 140, and referenced reports).

[12] The burden does not shift when a product is damaged before acceptance. The Permits and Responsibilities clause is deemed to control and to place that risk upon the contractor, which retains a heavy burden to prove both defective specifications and that the defect caused the damage. *Joseph Becks & Associates, Inc.*, ASBCA No. 31126, 88-1 BCA ¶ 20,428 at 103,326; *Maitland Brothers Construction Co.*, ASBCA No. 24476, 86-3 BCA ¶ 19,172 at 96,958; *Santa Fe Engineers, Inc.*, ASBCA Nos. 27933, 28682, 85-2 BCA ¶ 18,001 at 90,247. The parties have not characterized the sealant's problems as resulting from post-installation damage. Given our resolution of the appeal, we need not examine that issue.

In *Metal Building*, sealant for an Air Force aircraft parking apron, supplied under an interim specification covering a two-component compound for which developmental work was still in process, passed the specification's tests and was accepted. Unknown to the contractor, but known to the Government, one of its components had a polyurethane base, later considered likely inappropriate for the high humidity, high moisture worksite. The Armed Services Board of Contract Appeals (ASBCA) found that, although the Government had considered stopping the contractor's work when bubbling developed, it did not do so, unlike here. Also unlike here, the contractor used sealant lots that had been tested and approved by the Government, and the sealant was found to have been properly applied. It progressively deteriorated, with various inadequacies. The supplier withdrew its product from the market pending resolution of the problems, the precise cause of which were not determined. The ASBCA found the specification incomplete and inadequate to produce the desired result. It was influenced greatly by what it found to be the Government's superior knowledge about the sealant product and field conditions.[13]

In *Haehn*, the Claims Court found a successor to *Metal Building's* two-component sealant defective. Again, the sealant used by the contractor had been tested and accepted in advance and had been properly applied at a naval airfield, but bubbling and various other problems developed for unknown reasons.[14] The court also found it "crucial" that the Navy did not halt the contractor's work to retest the sealant before completion -- once more, unlike here. 15 Cl. Ct. at 61 n.5.

The specifications in *Concrete Placing*, for the repair of an aircraft parking apron, were found defective for reasons irrelevant to this appeal. They did not reflect the condition of the joints to be sealed, which were irregular and in great disrepair; did not provide for proper pre-sealing preparations or adequate removal of existing sealant; and the V-shape of some joints caused the sealant to extrude in warm weather.[15]

In this case, appellant has not cleared its first hurdle to prove that its product complied with BOR's specifications and was properly used and installed. Indeed, in its verified complaint in its lawsuit against Sika, B3 contended that Sika had supplied defective sealer and primer which did not conform to BOR's specifications (FF 125). In response to the Government's requests for admissions in this appeal, B3 now states that it does not know whether the sealer and primer supplied to it by

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[13] The ASBCA subsequently treated *Metal Building* as a superior knowledge case. *See Kollsman Instrument Corp.*, ASBCA Nos. 8633, 8635, 65-1 BCA ¶ 4531 at 21,741.

[14] The parties in *Haehn* asserted that outdoor temperature contributed to the sealant's defective performance. The court noted it had been applied during varying temperatures and there was no proof of correlation with its problems. 15 Cl. Ct. at 57 n.3. The same is true here, where sealant was applied in the spring and fall, commencing in the very early morning hours. Although E&R, in 1985 post-sealing testing, found temperatures at 158 [degrees] F. in the laboratory to be detrimental to Sikaflex 1a with primer, the evidence from both parties is that sealant was placed when the temperature was below 100 [degrees] F. The maximum recorded difference between canal and outdoor temperatures was 10 degrees, and there is no evidence that temperatures in the canal approached 158 degrees while the sealant and primer were curing (FF 50, 68, 77, 140).

[15] Sika criticized BOR's joint design, but the evidence established it was proper for canals. Also, Sika acknowledged that the alleged design deficiency was not linked to the sealant's bubbling problem (FF 142-43).

Sika conformed to BOR's specifications because "no party has fully tested the sealer and primer used in performance of this contract" for conformity (FF 151). Further, from the outset of contract performance, reiterated as late as December 1983, and later in its defense against B3's lawsuit, and at hearing, Sika claimed that B3 had misused and misapplied its products (FF 70, 111, 126, 131, 144).

Although counterproductive to its need to prove compliance with specifications, appellant blames E&R for alleged testing inadequacies, stating it passed the submitted sealant from lot 1262 even though its tensile adhesion factor exceeded that of M-41; lot 1262 was not used on the contract; and E&R did not test sealant with primer. In fact, as established, lot 1262 substantially complied with M-41 and appellant has not presented any evidence that the tensile adhesion variation had any connection with BOR's ultimate rejection of the installed Sikaflex 1a; there is no evidence that Sika or B3 ever advised E&R that lot 1262 was not intended for the contract; and neither B3 nor Sika ever submitted a sealant/primer system for testing. If, as appellant alleges, primer was a requirement under M-41 because Sika recommended it, then, *ipso facto*, B3 failed to satisfy specifications when it neither submitted a sealant/primer 429 system for testing nor certified to its compliance (FF 10, 11, 13, 29, 35-38, 43, 56-58). These were B3's failures, not E&R's, particularly here, when B3 must prove contract compliance before it can establish defective specifications.

In addition to the facts that the approved sealant from lot 1262 was approved without primer, and was not used on the contract, the following circumstances thwart B3's need to prove that the products it supplied conformed to BOR's specifications:

(1) B3 admits that all of E&R's approvals of the batches of Sikaflex 1a actually used on the contract were based upon Sika's certifications of specification compliance, tendered by B3. At least Sika's first certification was executed by rote. The certifier had no recollection of signing it because "he signs a million of these" Appellant did not offer any evidence that any examination attended the second certification (FF 43, 57). [16]

(2) Batches of sealant can vary considerably. Although what Sika described as Sikaflex 1a's "unique" product formulation did not change after E&R's initial tests, its manufacturing methods did (FF 19, 66, 96).

(3) The tested properties of lot 1262 differed greatly from those of the Sikaflex 1a, with and without primer, later tested by E&R (FF 96).

(4) Sika's own subsequent tests upon an unidentified batch of Sikaflex 1a, with and without primer 429, showed it did not pass M-41's viscosity, penetration, resilience or 200 degree flow tests. Its test

[16] BOR was entitled to rely upon the certifications and is not estopped by its acceptance of them from claiming that B3 did not comply with specifications. *Granite, supra; Panhandle Grading & Paving, Inc.*, ASBCA No. 38539, 90-1 BCA ¶ 22,561 at 113,225.

results also varied significantly from those of E&R on lot 1262 (FF 102-03). [17]

(5) Sika acknowledged at hearing that the sealant it tested did not meet specifications and described one correlation with the bubbling problem. Lot 1262's test values accepted by E&R did not vary from M-41's requirements in that pertinent manner (FF 104).

(6) M-41 called for sealant with components exhibiting a shelf life of at least 12 months (FF 10).

(7) The Sikaflex 1a samples of lot 1262 tested by E&R were in its standard packaging, with a 9-month shelf life. The sealant actually used by B3 was from 55-gallon drums, with a specified shelf life of only 3 months, and had been repackaged after Sika initially failed to comply with B3's special order. After its problems on B3's job, Sika changed its packaging methods (FF 19, 29, 53, 114).

(8) BOR's specifications require joints a minimum of 1 ¼ inches deep, with a minimum of ½ inch sealant to be placed at the bottom. Sikaflex 1a was designed for joints with a maximum depth of ½ inch (FF 3, 19). [18]

(9) Contract clause 9, Material and Workmanship, requires that materials supplied are to be new and of the most suitable grade for the purpose intended (FF 16).

(10) A 4-month-long strike intervened between sealant manufacture and B3's commencement of the major portion of sealing with Sikaflex 1a, which extended at least 5 months after manufacture. Sika asserted in its litigation with B3, and testified at hearing, that B3 used Sikaflex 1a past its shelf life, possibly causing the bubbling in whole or in part (FF 49, 51-55, 124, 126, 128-29).

(11) Sika observed and asserted to E&R that lot 20004 of primer 429 used with the Sikaflex 1a was beyond its shelf life and faulty; E&R's post-installation testing tended to confirm the primer was faulty; and we have found the primer to have been faulty, by the weight of the evidence (FF 73, 84, 136-37, 140-41, 150).

(12) Contrary to its claims during the job, Sika admitted at hearing that, prior to B3's job, it had had other experiences with Sikaflex 1a gassing or bubbling as it did here (FF 79, 132).

(13) When, unlike B3, other contractors later submitted a Sikaflex 1a/lot 20004 primer 429 system for testing in advance of performance, the sealant with primer did not meet BOR's specifications (FF 66, 91).

Although we have found faulty primer to be the primary cause of the extensive bubbling in the field that justifiably led BOR to reject the placed sealant, other causes, including repackaged sealant used after its specified shelf life; application errors and difficulties; and climatic conditions, could have contributed (FF 150). That all potential causes of the sealant's failure cannot be identified with absolute certainty does not make the specifications defective.

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[17] That E&R's Mr. Johns might have passed sealant with the test values encountered by Sika (FF 103), is speculative and irrelevant to what actually happened.

[18] The parties have not addressed this issue, and we have not accorded it great weight. However, it remains an unanswered question.

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For example, in *Lyburn Construction Co.*, ASBCA No. 9576, 65-1 BCA ¶ 4645, decided after *Metal Building*, the ASBCA found that the contractor did not prove joint sealant specifications for the repair of an Air Force airport defective. The contractor had alleged either defective specifications or faulty testing by the Government, which had approved the sealant product. The board faulted application procedures by inexperienced operators and improper sealant storage, although it noted it was impossible to determine with certainty the cause of the sealant's failure. In contrast to the board in *Metal Building*, which apparently was not influenced by prior successful use of the sealant under the specifications in question, the ASBCA in *Lyburn* found it significant that, on prior projects, properly stored material manufactured, tested, and placed in accordance with specifications produced a satisfactory end product.

We agree with ASBCA's reasoning in *Lyburn* and find it material that, although there were some failures, BOR had successes with one-component sealants under its specifications both prior to and after B3's project. In fact, B3's Mr. Stober testified B3 always preferred a one-component over a two-component sealant and that, immediately prior to this job, he and B3 had successfully completed a sealing job for BOR on the CAP using a one-component sealant (FF 4, 5, 7, 8, 122).[19]

Because B3 has not met its threshold burden to prove that it complied with BOR's specifications, BOR need not prove that something other than defective specifications caused the problems with the installed sealant, and B3's various theories about defects in the specifications -- including, allegedly, that they erroneously stated that high temperatures accelerate sealant cure; allowed polyurethanes in a low humidity environment; resulted in vapor gradient; and utilized an improper joint design -- become irrelevant. The evidence counters them, or puts them into doubt, in any case, as our findings reflect (see, for example, FF 4-8, 19, 21, 22, 26-28, 50, 68, 77, 122, 132, 142-43, 146-49).[20]

When B3 elected to continue sealing with Sikaflex 1a and primer 429 in October 1982, despite the bubbling already encountered, it had placed only 20,000 l.f. of sealant. In practicality, the principal causes of added expense to B3 were that it continued to use Sikaflex 1a, and

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[19] The successful completion of entire jobs under BOR's specifications is much more telling than successful completion of only portions of the same job as, for example, with the troubled armament production in *R.E.D.M.*, *supra*, 428 F.2d at 1308.

[20] We note that, in the cases discussed above, sealant deficiencies were attributed, variously, to temperatures that were too high, or too low, or to humidity that was too high (with *Metal Building's* polyurethane-based sealant -- the opposite of B3's contention), or too low. As to vapor gradient, Sika testified it could be controlled. Like its advice about primer, its testimony about vapor gradient, and whether or not Sikaflex 1a needed protection from water vapor, was inconsistent. During the job, after it considered vapor gradient a possibility, it recommended its epoxy coating No. 62 to ameliorate that alleged condition. At hearing, however, Sika testified that epoxies and polyurethanes, like Sikaflex 1a, were vapor barriers, that such barriers contributed to the alleged vapor gradient bubbling, and that it had had prior problems with vapor gradient using its epoxy coatings. Sika also planned to bid a Sikaflex 1a/primer 429 combination for a CAP project after it was aware of B3's problems. All of this counters the impact of the vapor gradient theory and the contention that the specifications were defective. It is apparent that joint sealing, whether with one-component or two-component products, is, by nature, difficult (FF 5, 6, 69, 70, 82-84, 100, 101, 104, 108, 144-46).

Sika continued to insist upon primer 429, long after problems developed (and even though Sika knew that the primer was over-aged). B3 and Sika also took risks by using sealant that they knew had exceeded its shelf life. Although Sika stated orally that it was still usable, this was in contrast to its written warnings. Even orally, Sika would only "guarantee" the sealant for its specified 3-month shelf life. Ultimately, Sika compensated B3 (FF 49, 53, 55, 114, 128-29, 138).

[5]Appellant also alleges that BOR withheld superior knowledge, hindering contract performance and breaching its duty of cooperation. Among other requisite elements, to establish superior knowledge, B3 must prove that it undertook to perform without vital knowledge of a fact that affects performance costs or duration, and that the Government was aware it had no knowledge of, and no reason to obtain, the information. Normally, the Government is not under a duty to volunteer information if the contractor can reasonably be expected to obtain it elsewhere. *GAF Corp.* v. *United States*, 932 F.2d 947, 949 (Fed. Cir. 1991); *White & McNeil*, 92-1 BCA ¶ 24,534 at 122,438.

B3 points to the fact that it did not know that E&R had passed the Sikaflex 1a from lot 1262 even though its tensile adhesion factor varied somewhat from that of M-41. However, apart from the facts that the lot was not used on the contract, BOR's field personnel also were unaware of the variation, and there is no evidence B3 inquired about the test results, this was not "vital" knowledge. E&R still found the sealant's bond to be very good. B3 has not proven any link with BOR's ultimate rejection of the placed sealant, or even claimed that it would not otherwise have proceeded to use Sikaflex 1a. Moreover, although appellant suggests that changes in M-41 test values in 1983 were indicative of problems with the specification, it has not identified any change relevant to the rejection of its product. As noted, the Sikaflex 1a from lot 1262 tested for its contract would have met the new tensile adhesion values (FF 38, 107).

B3 criticizes BOR for not informing it that two Sikaflex 1a/primer 429 sealant systems were rejected by E&R. The rejections were in October and December 1982, after B3's contract performance had begun. BOR's Field Engineer did not recall if he knew about them, but did not consider the information "vital" because sealant lots vary greatly and contracts are administered on an individual basis. In any event, Sika did possess the information, and it would have been reasonable to expect that Sika would have conveyed it to B3 (FF 66).

Under the controlling criteria, we do not find evidence of any superior knowledge withheld by the Government.

In view of our decision, we do not reach the accord and satisfaction, judicial estoppel, and other issues raised by the Government.

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DECISION

The appeal is denied.

CHERYL S. ROME
Administrative Judge

I CONCUR:

RUSSELL C. LYNCH
Chief Administrative Judge

I CONCUR IN THE RESULT:

BERNARD V. PARRETTE
Administrative Judge

August 14, 1992

APPEAL OF KARPAK DATA AND DESIGN

IBCA-2944, -2945, -2946 Decided: *August 14, 1992*

Bureau of Reclamation, Contract No. 1-CS-10-10710.

Denied.

1. Contracts: Disputes and Remedies: Burden of Proof--Contracts: Disputes and Remedies: Termination for Default: Generally

When a contract to provide electrical drawings for the Bureau of Reclamation's Grand Coulee Dam Project was terminated for default, the Government met its burden to prove the default justified when the contractor stipulated that 62 of the drawings it submitted failed to meet contractual standards and the Bureau of Reclamation properly rejected them; and the contractor did not deliver any set of drawings, with the minimum 99 percent accuracy required by the contract, within required, or extended, performance periods.

2. Contracts: Construction and Operation: Actions of Parties--Contracts: Disputes and Remedies: Burden of Proof--Contracts: Disputes and Remedies: Termination for Default: Generally

When it was within a contractor's control to reject or accept a workload beyond a potential maximum, and the contractor did not reject it in accordance with the contract's provisions; when the contractor failed to prove that any action, or nonpayment, by the Government caused the contractor's default; and when its work was replete with errors, and was of poor quality, the contractor failed to carry its burden to prove that its performance failures were excusable as beyond its control and without its fault or negligence.

3. Contracts: Construction and Operation: Actions of Parties--Contracts: Disputes and Remedies: Burden of Proof--Contracts: Disputes and Remedies: Termination for Default: Generally

The fact that contract compliance was more difficult than the contractor had anticipated did not render the contracting officer's default decision arbitrary or capricious, or an abuse of his discretion.

4. Contracts: Construction and Operation: Actions of Parties--Contracts: Disputes and Remedies: Burden of Proof--Contracts: Disputes and Remedies: Termination for Default: Generally

When the Board found no evidence to support the contractor's allegation that the Bureau of Reclamation acted in bad faith in its administration of the contract, the contractor failed to meet its exceedingly high burden to overcome the presumption that public officials act in good faith.

APPEARANCES: Jerome F. Goch, *pro se*, Vice President, KARPAK Data and Design, Richardson, Texas, for Appellant; John J. Hockberger, Jr., Department Counsel, Boise, Idaho, for the Government.

OPINION BY ADMINISTRATIVE JUDGE ROME

INTERIOR BOARD OF CONTRACT APPEALS

KARPAK Data and Design (KARPAK, or appellant), pursuant to the Contract Disputes Act (CDA), 41 U.S.C. § 606, timely appeals the contracting officer's June 17, 1991, decision terminating its above contract with the United States Department of the Interior, Bureau of Reclamation (BOR), for default. KARPAK does not seek to continue the contract. Rather, it urges that the contract should have been terminated for the convenience of the Government and that it should be paid for its work.

The Board's order of September 5, 1991, dismissed appellant's monetary claim without prejudice, as not ripe for consideration. Only the issue of the propriety of the default termination is before us. Accordingly, we do not address BOR's contention that KARPAK did not submit a claim that satisfies the requirements of the CDA. Neither party requested a hearing and we have decided the appeal on the record pursuant to our Rule 4.112 (43 CFR 4.112).[1]

FINDINGS OF FACT

Solicitation and Contract

1. On November 9, 1989, BOR issued a solicitation requesting proposals for an indefinite delivery, indefinite quantity contract for engineering drafting services to revise, redraw, or create new drawings for the Grand Coulee Dam, the majority of which were electrical drawings. The contract was to cover a "basic year" from the contractor's receipt of the award documents through September 30, 1991, with 4 potential annual extensions, at BOR's option, at the basic year price (subject to Department of Labor wage determinations). BOR's Grand Coulee Project Office (GCPO) and Contracting Officer's Technical Representative (COTR) were located in Grand Coulee, Washington, and the contract administrator, in Boise, Idaho (AF-1; AF-3 at 2 and at contract §§ F.2, G.1., G.2., I.2.4, I.2.5, I.2.6; KAF-A).

2. The Grand Coulee Dam was built in the late 1930s and early 1940s, with many subsequent structural changes. Many of the dam's electrical drawings date from its original construction or otherwise do not reflect its current state. Technical personnel responsible for dam maintenance rely heavily upon the electrical drawings. The contract was to correct deficiencies in them. BOR had awarded two prior contracts for the same type of work, which had been completed. Despite KARPAK's mistaken impression to the contrary, it had never cancelled a prior drafting contract for this work. GCPO had a substantial, immediate need for the services sought. It eagerly awaited contract award. Accuracy in the new and revised drawings was imperative, as critical equipment could be affected (AF-1; 3/11/91

[1] The following illustrates our manner of citing to portions of the record: Karpak's July 8, 1991, appeal document, Tab A (KAF-A); BOR's Sept. 30, 1991, Appeal File, Tab 1 (AF-1). We refer to our findings of fact as "FF."

memorandum from contract specialist and administrator Donna Whitmire (3/11/91 mem.); 3/11/91 telefax from COTR Gaylene Green (3/11/91 fax).

3. Under the contract, BOR would issue a yearly delivery order pursuant to which the COTR could make individual "Calls" for required services. There were 4 categories of drawings: (1) Light density, less than 20 revisions per drawing; (2) Medium density, 20 to 50 revisions per drawing; (3) Heavy density, 50 to 100 revisions per drawing; and (4) Redrawn or newly created drawings. The estimated annual quantities in each category were 625, 188, 187 and 250, respectively. Drawings which required revisions or changes would be furnished with a color-coded marked print. Red markings indicated information to be added, and green, information to be deleted. All new or redrafted drawings (*i.e.*, category 4) were to be produced on computer-aided drafting systems. (The systems of record are described as "AutoCad," "ACAD," or "CAD") (AF-1; AF-3, contract §§ B, C.3.f. and j, C.4.a.).

4. Additional relevant contract terms (all at AF-3) follow:

C.1SCOPE

a. Drafting Services. — Provide engineering drafting services utilizing Leroy-type lettering on mylar, vellum, photo mylar and sepia materials. The work to be performed falls into two major categories: (1) preparation of new engineering drawings from rough or finished sketches, marked prints, etc., and (2) revisions to existing original drawings from marked prints to reflect changes or to show "as built" status of a feature or portion of a feature. Instructions will be issued with each group of drawings given to the Contractor and will contain guidelines to be followed in performing the work. All drafting performed by the Contractor shall be in accordance with the instructions provided and the latest edition of the Bureau of Reclamation's Drafting Standards * * *. The majority of the drafting will involve electrical drawings. The quantity of drawings to be redrawn, revised, and created is estimated at 1,250 per year. Approximately 15-20 percent of the drawings each year will be redrawn or newly created type drawing work.

* * * * * * *

C.3REQUIREMENTS

* * * * * * *

g.Instructions will be issued with each group of drawings given the Contractor and will include the following:

* * * * * * *

(4) Any explanation or instruction required for completion of drawings.

* * * * * * *

h.The Contractor shall have the minimum capability of handling 35 drawings—revised, new, or redrawn—in an expedited turn around time of seven (7) working days. The required normal turn around time is 10 working days.

(1) Normally, a maximum quantity of 75 drawings may be released to the Contractor at any one time, however, in the event that a particular group of drawings require minimal drafting changes, additional drawings may be given to the Contractor. This quantity will not exceed that which can logically (*sic*) accomplished in the time frames

cited in paragraph 3.h. above. The completed drawings shall be hand-carried to the COTR by a representative directly from the office accomplishing the work before a new set is taken. Following a review of the completed work, drawings containing errors or omissions shall be returned to the Contractor for correction. Payment in full for the drawing group will not be made until the corrections are made and the drawings approved by the COTR.

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C.4.STANDARDS

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e. The quality of the drawing work performed must be equal to that shown on sample Drawings 222-117-16045 and -16048 * * *.

C.5. PERFORMANCE OF THE WORK

* * * * * * *

e. The drafting performed shall be a minimum of 99 percent accurate. All drafting work shall be done independently without Government assistance except where situations dictate the need.

E.1. 52.246-4 INSPECTION OF SERVICES -- FIXED-PRICE (APR. 1984)

(a) Definitions. "Services," as used in this clause, includes services performed, workmanship, and material furnished or utilized in the performance of services.

* * * * * * *

(d) If any of the services do not conform with contract requirements, the Government may require the Contractor to perform the services again in conformity with contract requirements, at no increase in contract amount. When the defects in services cannot be corrected by reperformance, the Government may (1) require the Contractor to take necessary action to ensure that future performance conforms to contract requirements and (2) reduce the contract price to reflect the reduced value of the services performed.

(e) If the Contractor fails to promptly perform the services again or to take the necessary action to ensure future performance in conformity with contract requirements, the Government may (1) by contract or otherwise, perform the services and charge to the Contractor any cost incurred by the Government that is directly related to the performance of such service or (2) terminate the contract for default.

F.11. PLACE OF PERFORMANCE

a. At the Contractor's option, the drafting services may be performed at the Contractor's own facility or the Government will provide space at the Grand Coulee Project for a portable office adjacent to the Project Office.

* * * * * * *

F.2. PERIOD OF PERFORMANCE

All work shall be completed within the time frames for accomplishing individual segments of work as specified in Paragraph C.3.h. of this contract.

* * * * * * *

I.2.3. 52.216-19 DELIVERY-ORDER LIMITATIONS

* * * * * * *

(b) Maximum order. The contractor is not obligated to honor—

(1) Any order for a single item in excess of 100 drawings;

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(2) Any order for a combination of items in excess of 100 drawings; or
(3) A series of orders from the same ordering office within 20 days that together call for quantities exceeding the limitation in subparagraph (1) or (2) above.

* * * * * * *

(d) Notwithstanding [paragraph (b)] above, the Contractor shall honor any order exceeding the maximum order limitations in paragraph (b) unless that order (or orders) is returned to the ordering office within 10 days after issuance, with written notice stating the Contractor's intent not to ship the item (or items) called for and the reasons. Upon receiving this notice, the Government may acquire the supplies or services from another source.

I.2.11. 52.249-8 DEFAULT (FIXED-PRICE SUPPLY AND SERVICE) (APR. 1984)

(a) (1) The Government may, subject to [paragraph c] * * * below, by written notice of default to the Contractor, terminate this contract in whole or in part if the Contractor fails to—
(i) Deliver the supplies or to perform the services within the time specified in this contract or any extension;

* * * * * * *

(b) If the Government terminates this contract in whole or in part, it may acquire, under the terms and in the manner the Contracting Officer considers appropriate, supplies or services similar to those terminated, and the Contractor will be liable to the Government for any excess costs for those supplies or services * * *.
(c) * * *[T]he Contractor shall not be liable for any excess costs if the failure to perform the contract arises from causes beyond the control and without the fault or negligence of the Contractor. Examples of such causes include (1) acts of God or of the public enemy, (2) acts of the Government in either its sovereign or contractual capacity, (3) fires, (4) floods, (5) epidemics, (6) quarantine restrictions (7) strikes, (8) freight embargoes, and (9) unusually severe weather. In each instance the failure to perform must be beyond the control and without the fault or negligence of the Contractor.

* * * * * * *

(f) The Government shall pay contract price for completed supplies delivered and accepted * * *.
(g) If, after termination, it is determined that the Contractor was not in default, or that the default was excusable, the rights and obligations of the parties shall be the same as if the termination had been issued for the convenience of the Government.
(h) The rights and remedies of the Government under this clause are in addition to any other rights and remedies provided by law or under this contract.

I.3.1. 52.246-20 WARRANTY OF SERVICES (APR. 1984)

* * * * * * *

(c) If the Contractor is required to correct or reperform, it shall be at no cost to the Government, and any services corrected or reperformed by the Contractor shall be subject to this clause to the same extent as work initially performed. If the Contractor fails or refuses to correct or reperform, the Contracting Officer may, by contract or otherwise, correct or replace with similar services and charge to the Contractor the cost occasioned to the Government thereby, or make an equitable adjustment in the contract price.

I.4.6 TECHNICAL DIRECTION--RECLAMATION (MAR 1988)

(a) The performance of work hereunder will be subject to the technical direction of [the COTR], who will be appointed, in writing, by the Contracting Officer. The COTR and the Contractor shall work together closely to ensure that all contractual requirements are being met. The term "technical direction" is defined to include, without limitation, the following:

(1) Provision of information to the Contractor which assists in the interpretation of drawings, specifications, or technical portions of the work description.

(2) Review and, where required by the contract, approval of technical reports, drawings, specifications, and technical information to be delivered by the Contractor under the contract.

(b) Technical direction must be within the general scope of work stated in the contract. The COTR does not have the authority to issue any technical direction which (1) constitutes an assignment of additional work outside the scope of the contract; (2) constitutes a change as defined in the contract clause entitled "Changes;" (3) in any manner causes an increase or decrease in the total contract price or the time required for contract performance; or (4) changes any of the expressed terms, conditions, or specifications of the contract. The COTR shall notify the Contracting Officer well in advance of the anticipated issuance of any technical directions which the COTR feels may fall within categories (1) through (4) above to receive guidance on how to proceed with issuance of such direction. All technical direction of a significant nature shall be issued, in writing, by the COTR or shall be confirmed, in writing, within five (5) working days after issuance.

(c) The Contractor shall proceed promptly with the performance of technical directions duly issued by the COTR. If, in the opinion of the Contractor, an instruction or direction issued by the COTR is within one of the categories listed in (b)(1) through (4) above, the Contractor shall not proceed, but shall notify the Contracting Officer in writing within five (5) working days after the receipt of any such instruction or direction. Upon receiving such notification from the Contractor, the Contracting Officer shall issue an appropriate contract modification or advise the Contractor, in writing, that, in his or her opinion, the technical direction is within the scope of this clause and does not constitute a change under the "Changes" clause of the contract. The Contractor shall thereupon proceed immediately with the directions given. A failure of the parties to agree upon the nature of the instruction or direction, or upon the contract action to be taken with respect thereto shall be subject to the provisions of the "Disputes" clause of the contract.

The contract incorporates by reference the "Payments (APR 1984)" clause found at Federal Acquisition Regulation (FAR) 52.232-1 (AF-3, § I.5.10).[2]

The Payments clause provides:

The Government shall pay the Contractor, upon the submission of proper invoices or vouchers, the prices stipulated in this contract for supplies delivered and accepted or services rendered and accepted, less any deductions provided in this contract. Unless otherwise specified in this contract, payment shall be made on partial deliveries accepted by the Government if—

(a) The amount due on the deliveries warrants it; or

(b) The Contractor requests it and the amount due on the deliveries is at least $1000 or 50 percent of the total contract price.

5. KARPAK, a small business concern, located in Texas, submitted a proposal dated December 1, 1989, which included an estimated number of persons required to produce 35 drawings in 7 or 10 working days (AF-3 at 2 and at contract § K.7; KAF-D; KAF-G at 4).

[2] The "Disputes (APR 1984)" and "Changes—Fixed Price (AUG 1987)" clauses mentioned in the Technical Direction clause, and found at FAR 52.233-1 and 52.243-1, respectively, also are incorporated by reference (AF-3, §§ I.1.8, I.4.4).

6. By letter dated March 2, 1990, the contracting officer requested clarification because:

> 1.The amount of equipment listed in your proposal appears to be marginally adequate for accomplishing the work required by the statement of work. Request you further describe how your company anticipates performing the work and meeting the required timeframes with the proposed equipment.
> 2.The number of individuals as well as the number of estimated man-hours proposed do not appear adequate to perform the amount of work required or meet the time frames required by the statement of work. Please revise or clarify your proposal to fully describe how you shall perform the required work and that you fully understand the amount of work involved in performing these services.
> 3.Since your company is newly organized and has very little corporate experience, request you clarify how you will manage the project to meet all of the requirements and accomplish the required work.

(Attachment to KARPAK 10/7/91 narrative (narr.)).

7.In a March 10, 1990, modification to its proposal, KARPAK acknowledged that the 35 drawing amount "was an example of the minimum capabilities required." It estimated that approximately 300 working hours would be required for a Call to complete 75 drawings in 10 working days and that the work force it proposed would yield 320 working hours in that time frame. To manage any Call for more drawings, KARPAK proposed to hire a consulting engineer and estimated that available working hours would then increase to 400. KARPAK's Vice President of Engineering, Mr. Jerome F. Goch, who submitted the proposal, stated that he had been the head of engineering departments for two companies for 7 years, had assisted in the start-up of three companies, and had accomplished many projects with "the fewest of personnel." In addition to the anticipated services by the consulting engineer, the proposal included Mr. Goch as "Chief Engineer," who would generate new drawings using AUTOCAD and conduct the final check of all drawings in all categories; a draftsman to generate new drawings using AUTOCAD, make corrections to drawings in all categories, and check drawings from all categories; another draftsman to generate "redrawings" using AUTOCAD and make corrections to drawings in all categories; another draftsman to make changes to drawings in categories 1, 2 and 3; and a clerk to plot all drawings on AUTOCAD. The proposal stated that the structure was not firm and that "[d]rawings under a certain category could be performed by a draftsperson outside the [indicated] classification" (KAF-G).

8.After a delay due to a protest, best and final offers were to be received on August 30, 1990 (AF-3, 8/28/90 modification; KAF-F; KAF-G).

9. By letter of August 16, 1990, the contracting Officer warned Mr. Goch:

> I still believe that the number of estimated manhours you have proposed may prove to be inadequate to perform these services. I am again asking that you verify your proposed manhours. If you find a change is in order, request you amend your proposal accordingly.

If you are awarded a contract and find you have underestimated the work, you will not be entitled to an adjustment under the contract for additional manhours.

(KAF-F).

10. On August 21, 1990, KARPAK submitted a revised proposal, adjusting its costs, and increasing its estimated manhours to perform what it described as a "maximum" of 75 drawings in 10 working days from 300 to 362.812, not including the additional hours to be provided by its consulting engineer for larger Calls. KARPAK's estimated number of manhours per revision was based upon what it described as "the highest number of changes with the most extreme unforeseen complexity", and the number per redraw was based upon "the most unforeseen complexity" (KAF-F).

11. By letter dated September 28, 1990, the contracting officer informed KARPAK that, due to a need for clarification of some of the proposals in the competitive range, he was calling for a second round of best and final offers. He had no more questions regarding KARPAK's proposal, but sought a response, even if KARPAK had no changes. There is no evidence that KARPAK further modified its proposal and we infer that it did not (attachment to KARPAK 1/2/92 narr.).

12. The information KARPAK had supplied indicated it had very limited capital. The contracting officer estimated that a contractor would need approximately $30,000 to operate for the first two months of the contract prior to receipt of payment from the Government. Because he determined that KARPAK appeared to lack the financial responsibility necessary to perform the contract, the contracting officer referred the matter to the Small Business Administration (SBA) pursuant to FAR 19.602-1 (AF-1).

13. By letter dated November 28, 1990, the SBA informed KARPAK that the contracting officer planned to reject its proposal, even though KARPAK had offered the lowest price. The SBA noted: "The procuring agency has made this determination because there appears to be sufficient reason to question your firm's ability to perform in a satisfactory manner." The SBA advised that its Certificate of Competency (COC) Program allowed Karpak to appeal BOR's proposed action to it; that it would perform an independent review of KARPAK's technical and financial capabilities; and that, if a decision favorable to KARPAK were reached, a COC would be issued, binding BOR to award the contract to KARPAK (KAF-B).

14. KARPAK appealed to the SBA and, by telefax dated December 14, 1990, the SBA certified to BOR that KARPAK was responsible and could perform. It noted that BOR was required to award the contract to KARPAK "without requiring it to meet any other requirement of responsibility or eligibility" (KAF-C).

15. KARPAK had obtained a $30,000 line of credit based upon an assignment of contract payments. Its personnel had been hired specifically to perform the contract (KARPAK 11/22/91 narr.).

August 14, 1992

16. On January 22, 1991, BOR awarded the contract to KARPAK in the estimated amount of $129,789.74, covering the first, basic year (AF-3).

Call No. 1 -- IBCA 2944

17. At a meeting on February 6, 1991, BOR issued to KARPAK Call No. 1 for 107 drawings, as follows: 65 drawings with light density changes—most with only 1 or 2 minor revisions; 23 with medium density changes; 4 with heavy density changes; and 15 drawings to be redrawn. BOR issued Call No. 1, like subsequent Calls, after the COTR and the contractor had evaluated each drawing and agreed upon the amount of changes and the category to which the drawing belonged. BOR informed Mr. Goch that, due to the backlog that had prompted the contract, GCPO wanted as many drawings as possible in the first Call. KARPAK did not express any objection. Rather, Mr. Goch stated that the number was "great" and the more drawings sent, the more money the contractor would make.[3] In calculating the return date for the Call, the COTR forgot to exclude the President's Day holiday, resulting in only 9 working days to perform the Call, instead of the 10 allowed by the contract. KARPAK did not object or request an additional day (AF-2, KARPAK's 4/23/91 letter; AF-2, 6/7/91 Termination for Default Memorandum (def. mem.); AF-4, 2/27/91 telefax from COTR (2/27/91 fax); AF-4, 4/3/91 memorandum by contract administrator; KAF, narr. at 3; KAF-E, BOR's 2/6/91 letter; KAF-H; 2/28/92 declaration of Donna Whitmire (Whitmire dec.); declaration of Gaylene Green (Green dec.)).

18. At the February 6, 1991, meeting, BOR gave to Mr. Goch two electrical symbol templates, two sets of its Drafting Standards, two copies of its sample drawings and one set of 5¼-inch diskettes containing an AutoCad symbol library, drawing blocks, and fontware (text) for ACAD 10 systems. The fonts were the number and lettering specifications for all aspects of a drawing. BOR informed Mr. Goch that the diskettes containing the fonts might not have been copied correctly and that its AutoCad expert was not available to assure that the fonts could be retrieved from them. BOR provided him with the diskettes anyway because it was confident KARPAK could retrieve needed symbols from them. KARPAK soon advised BOR that it could retrieve the symbols, but not the fonts. The 15 drawings to be redrawn were affected. BOR informed KARPAK that it could leave those drawings for the next Call. KARPAK, however, elected to proceed with different fonts and to convert the drawings to AutoCad when it received the appropriate fonts (AF-2, KARPAK's 4/23/91 letter; AF-2, def. mem.; AF-

[3] We have accepted this alleged statement as fact because it is recorded in the COTR's relatively contemporaneous memorandum of Feb. 27, 1991; the contract administrator's memorandum of Apr. 3, 1991, records that Mr. Goch acknowledged the statement in her presence; and Karpak has not disputed it in this appeal, despite ample opportunity to do so. Our acceptance of other recorded statements, below, is grounded similarly.

4, 2/27/91 fax; KAF, narr. at 3-4; KAF-E, BOR's 2/6/91 letter; KARPAK's 10/4/91 narr. at 2).

19. For Call No. 1, KARPAK claims that BOR did not provide written or oral instructions at the February 6, 1991, meeting. BOR claims that it discussed with Mr.Goch orally the red and green markings on the prints designating required revisions; that he was inattentive and did not take notes; that he had indicated he would rely upon a master computer draftsman; and that he had been provided with the templates, BOR's Drafting Standards, sample drawings and instructions in the contract (AF-2, KARPAK 4/23/91 response to show cause notice (show cause res.); AF-2, def. mem.; AF-4, 2/27/91 fax). Whether or not oral instructions were given, we find that Karpak did not object to BOR at this time that it lacked instructions and did not request written instructions.

20. On February 20, 1991, Mr. Goch delivered to BOR the drawings from Call No. 1, stating that the 15 redraws had not been checked by KARPAK pending incorporation of the correct fontware and completion of the drawings. BOR provided KARPAK with the correct fontware and stated that no invoice would be accepted until all of the drawings under Call No. 1 had been checked and corrections made. It rejected an invoice for 92 drawings (excluding the 15 requiring completion) (AF-2, show cause res.; KAF narr. at 5-6; KAF-H).

21. KARPAK urges, based upon its proposal documents, that Call No. 1 required 393.75 hours of work in 9 working days, or only 360 hours. It then deducts an additional day for a flight layover, stating that it had to complete the Call in 8 working days. KARPAK's proposal estimates were based upon the highest number of possible drawing changes with the "most extreme unforseen complexity" (above). KARPAK has not supplied evidence of the actual manpower it applied to the Call or of the actual hours it expended upon Call No. 1. BOR asserts that the drawings did not contain the maximum number of changes allowed and that the majority were not extremely complex. Using a median figure for the estimated number of changes per drawing, BOR calculates the estimated number of hours required to perform Call No. 1 at 214.27 (KAF narr. at 4; Whitmire dec.; Green dec.). We find BOR's estimate to be reasonable and more based upon actual circumstances than KARPAK has been able to establish with its estimate.

22. BOR found errors in the majority of KARPAK's drawings from Call No. 1 and found them of poor quality. On February 22, 1991, the COTR telephoned Mr. Goch about the errors, referring him to section C of the contract for the requirements and acceptable standards. Fifty-two percent of the light-density drawings were correct. The remainder in that category, and all drawings in the other 3 categories, were not acceptable. This included the 15 drawings KARPAK had noted were not yet complete. Excluding those drawings, 60 of 92 drawings were unacceptable under Call No. 1 (AF-4, chart of Call No. 1; AF-4, Whitmire dec.; KAF, narr. at 6).

23. By letter to the contract administrator dated February 23, 1991, Mr. Goch stated that the errors had been caused by the known software problem, with regard to the 15 redraws, and by an excessive workload. He complained of alleged threats from BOR of contract cancellation, beginning at the inception of the contract, of unfair treatment, and that Call No. 2 exceeded KARPAK's capacity to perform. He stated that KARPAK was not claiming that errors would not be corrected, and that it was still very interested in performing if the workload were not excessive (KAF-H).

24. By letter to the SBA dated February 23, 1991, Mr. Goch alleged that BOR had altered the contract terms and was using intimidation tactics to drive KARPAK out of business. He stated that, because BOR had set the workload so far beyond KARPAK's original proposal, KARPAK was one month behind to date; that it did not expect any payment for two months; by March 6, 1991, the return date for its second Call (below), KARPAK would be 3 months behind; and that, with the actions BOR had taken against it, KARPAK would go out of business within 90 days. Mr. Goch stated that fulfilling the contract as written would be no problem for KARPAK; that the complexity of the work was well within KARPAK's abilities; and that it would like to continue to perform on a fair basis (KAF-I).

25. At a February 25, 1991, meeting, BOR returned 75 drawings from Call No. 1 to Mr. Goch for correction, including the 15 redraws. It reviewed the errors with him (AF-4, 2/27/91 fax; KAF, narr. at 7).

26. KARPAK concedes that:

> Because of the quantity of drawings in Call #1 and the limited time allowed to perform this task, KARPAK made an attempt to complete the task at hand. In our haste accuracy suffered and an error and quality problem came to the surface. KARPAK does not question the errors and/or quality of the work on Categories 001, 002 and 003.

(KARPAK 10/4/91 narr. at 1).

Call No. 2 -- IBCA 2945

27. At the February 20, 1991, meeting, BOR released 88 drawings under Call No. 2 [4] and reviewed them with Mr. Goch. BOR claims that it attempted to demonstrate to him what was required. Mr. Goch states that no oral or written instructions were provided. Again, we find that KARPAK did not object to BOR at this time about any lack of instructions and did not request written instructions (AF-2, def. mem.; AF-2, show cause res.; AF-4, 2/27/91 fax; AF-4, charts for Call No. 2; KAF, narr. at 5; KAF-E; KARPAK 10/4/91 narr.).

28. The drawings included 14 with low density changes, 25 with medium density, 30 with high density and 19 redraws or new drawings. The return date for Call No. 2 was March 6, 1991. KARPAK

[4] BOR's letter of Feb. 20, 1991 (KAF-E) states that 87 drawings were being released. All other evidence is that 88 drawings were released. This discrepancy, and other similar insignificant numerical inconsistencies in the record, are not material to our decision.

did not begin work on Call No. 2, and worked only upon the Call No. 1 corrections (AF-2, def. mem. at 3; AF-2, show cause res.; KAF, narr. at 5; KARPAK 10/4/91 narr.).

29. Based upon its proposal estimates, KARPAK claims that Call No. 2 required 575.25 hours of work in 10 working days. It also asserts that one category 3 heavy density drawing contained 171 more revisions than the 100 designated in the contract for that category. As above, using a median figure for the estimated number of changes per drawing, BOR calculates the estimated number of hours required to perform Call No. 2 at 224.66. BOR, however, included only 75 drawings in its estimate of the time necessary to perform Call No. 2, rather than the 88 drawings released under that Call. It apparently omitted 13 of the 19 redraws or new drawings from its calculations (KAF narr. at 5; KARPAK 10/4/91 narr.; KARPAK 3/3/92 letter; Whitmire dec.; Green dec.). Thus, we do not rely upon BOR's estimate for this Call. We find, though, that KARPAK has not supplied evidence of the actual hours it expended in performing Call No. 2 or that it objected contemporaneously to the amount of alleged changes in the category 3 drawing it cites.

30. On March 4, 1991, BOR notified the SBA about a scheduled March 6, 1991, meeting with KARPAK and stated that BOR had no discussions about terminating the contract and had no plans at this point to do so. The contract administrator travelled to GCPO for the March 6 meeting specifically to allay KARPAK's concerns about contract cancellation and to attempt to assist it in continuing with contract performance. At the meeting, Mr. Goch delivered the 75 drawings from Call No. 1 that BOR had returned to him. He told BOR that, due to the work required to correct the 75 drawings, and what he deemed to be an excessive workload for Call No. 2, he had not brought the Call No. 2 drawings because it had been impossible to complete them. Mr. Goch demonstrated that one returned drawing from Call No. 1 had areas circled that had not been included in BOR's original change requests. BOR stated that KARPAK would not be responsible for any additions that were not on BOR's original red and green markups and that BOR's checkers would be alerted to avoid making additions. BOR also agreed that all future drawing instructions would be in writing. BOR reminded Mr. Goch that KARPAK's employees should be familiar with the drafting standards, BOR's drawing samples, and section C of the contract describing the work required, and that KARPAK should check the drawings thoroughly before they were returned to BOR. Although the contract administrator expressed concern over the contract schedule, she allowed KARPAK 10 more days to complete Call No. 2. Additionally, although Call No. 3 was ready for release, BOR agreed to refrain from issuing it until KARPAK returned the drawings due under Call No. 2. The contract administrator warned that, thereafter, Calls were to be performed within the contract-specified time. She assured Mr. Goch, that, to date, BOR had not considered or discussed contract termination (AF-2, def.

mem. at 3; AF-2, show cause res.; AF-4, 3/11/91 mem.; AF-4, 2/27/91 fax; AF-4, 3/11/91 fax; KAF narr. at 8-10; 10/4/91 KARPAK narr.).

31. At a March 20, 1991, meeting, the extended return date for Call No. 2, KARPAK did not return about 16 drawings of the 88 issued from Call No. 2, because Mr. Goch had discovered errors in them upon his departure for the meeting. BOR returned to KARPAK 32 drawings from Call No. 1 that were still incorrect, including at least 14 of the 15 drawings that had been affected at first by the software problem (AF-4, 4/3/91 mem.; AF-4, Call No. 1 chart, trip No. 2; AF-4, Call No. 2 chart, trip No. 1; 10/4/91 KARPAK narr.).

Call No. 3 -- IBCA No. 2946

32. At the March 20, 1991, meeting, BOR also issued Call No. 3, containing 57 drawings, of which 26 were low density, 12 were medium density, 11 were high density and 8 were redraws or new drawings (KAF narr. at 10; KARPAK 10/4/91 mem.).

33. On March 27, 1991, the COTR notified the contract administrator that 53 of the drawings checked from Call No. 2 were incorrect. Including the 16 drawings that had not been returned to BOR from Call No. 2, because Mr. Goch had discovered errors in them, BOR calculated the error rate at 78 percent. The contract administrator informed Mr. Goch that there was a serious quality problem with the drawings from Call No. 2 (AF-4, 4/3/91 mem.).

34. The return date for Call No. 3 was April 3, 1991. BOR informed an SBA representative about its concerns with the contractor's performance and invited him to a meeting with KARPAK on that date but he was unable to attend (AF-4, 4/3/91 mem.; KAF, narr. at 11; KAF-E).

35. At the April 3, 1991, meeting, KARPAK submitted 32 drawings from Call No. 1, the 16 drawings previously unreturned from Call No. 2, and 54 to 55 of the 57 drawings issued from Call No. 3. KARPAK had been unable to complete at least two of the drawings. In response to Mr. Goch's claim of "nitpicking," five previously uninvolved "checkers" from BOR reviewed 15 of the 16 drawings just returned from Call No. 2. Of the 15, 14 still contained errors and were unacceptable. Mr. Goch stated that he was not a professional draftsman, but indicated that he had been doing most of the work, with no one else from KARPAK checking it. Mr. Goch acknowledged that, to date, the majority of drawings BOR had issued were of the light density category. BOR stated that there could be times when only category 4 drawings were issued and that BOR had all new drawings in one Call.[5] Mr. Goch conceded that KARPAK did not possess the minimum capability to produce 35 category 4 drawings in 7 working

[5] KARPAK now interprets this statement to mean that Call No. 4 would contain all new drawings. There is no evidence that Call No. 4 contained all new drawings, however, and BOR appears to deny that it did. Because BOR did not release Call No. 4, this issue is immaterial.

days, which BOR deemed to be a contract requirement. He disputed BOR's contract interpretation, however, alleging that KARPAK need have only the minimum capability to produce a mixture of 35 drawings (from low to high density, new or redraws) in 7 days. BOR's principal focus was not upon the minimum capability required, however, but upon KARPAK's repeated statements that it could not perform the work that BOR had requested. Call No. 4, for 51 drawings, was ready for the contractor, although the contract administrator determined not to issue it, due to the need to check Call No. 3 and for Call No. 2 corrections. Also, Mr. Goch stated "I cannot take Call No. 4 because as of Friday [April 5, 1991] I will not have any employees to perform the work."[6] In all, about 69 drawings from Call No. 2 had to be corrected. BOR and Mr. Goch agreed that KARPAK would perform the corrections for Call No. 2 and any corrections necessary for Call No. 3. BOR agreed that Mr. Goch could take the original red and green markups back with him when he was performing corrections to ensure that no excess changes were being added by the checkers. Mr. Goch had not requested previously that the red and green drawings be returned to him. If he had, the COTR would have provided them (AF-1; AF-2, def. mem. at 3-5; AF-2, show cause res.; AF-4, Call No. 2 charts; AF-4, Call No. 3 chart; AF-4, 4/3/91 mem.; KAF, narr. at 11-12; KARPAK 11/22/91 narr; KARPAK 1/22/92 narr.).

36. BOR found that 39 of the 57 drawings requested under Call No. 3 were unacceptable (including the drawings that KARPAK did not return) (AF-2, def. termination decision; AF-4, Call No. 3 chart).

Contract Termination

37. On April 12, 1991, the contracting officer issued a show cause notice to KARPAK stating that KARPAK had failed to complete Calls 1, 2, and 3 within the time required by the contract and that it was considering terminating the contract for default, and giving KARPAK the opportunity to demonstrate that its failure was excusable (AF-2, show cause notice).

38. On April 17, 1991, KARPAK returned drawings from Call No. 2 to BOR. BOR determined not to give KARPAK the Call No. 3 drawings that required correction (KARPAK 11/22/91 narr. at 20).

39. Mr. Goch responded to the show cause notice by letter of April 23, 1991. He made no statement that KARPAK would attempt to improve performance. He reiterated past complaints about work overload, with no start-up period; lack of instruction; faulty software for the first 15 category 4 ACAD drawings; excess or superfluous changes made by BOR checkers; and intimidation by alleged threats of contract cancellation from the outset. Mr. Goch concluded that, if the contract were designed to require 35 category 4 ACAD drawings in 7

[6] KARPAK apparently does not dispute this statement (or does not do so convincingly), but suggests that it cannot be taken literally, because Mr. Goch accepted drawings to be corrected and would not have done so if KARPAK were losing its employees. Since we conclude that the default termination was justified on grounds other than anticipatory repudiation, and do not need to reach that issue, Mr. Goch's intent is not material. His statement is relevant, though, to our conclusions about KARPAK's financial capacity (*see* Discussion, below).

days, then its requirements exceeded KARPAK's ability to perform, and BOR should terminate the contract for convenience and pay KARPAK for work performed (AF-2, show cause res.).

40. KARPAK's invoices of February 19, 1991, March 20, 1991, and April 2, 1991, sought payment for Calls No. 1, 2 and 3, in the amounts of $8,454.10, $12,189.75, and $5,088.54, respectively, for a total of $25,732.39. BOR did not pay any portion of the invoices.

41. On June 17, 1991, the contracting officer terminated the contract in part for default for failure to complete Calls 1, 2, and 3. The termination excluded only drawings already delivered and accepted by the Government. The contracting officer found that, after 3 attempts, 6 of the 107 drawings under Call No. 1 were still unacceptable; after 2 attempts, 17 of the 88 drawings under Call No. 2 were still unacceptable; and, after 1 attempt, 39 of the 57 drawings under Call No. 3 were unacceptable. He found that the default was not excusable (AF-2).

42. The contracting officer was most influenced in his decision by the overall poor quality of the drawings submitted, rather than the precise number of errors they contained, and by the contractor's conceded inability to perform the work required (AF-1).

Post-Termination

43. On October 22 and 23, 1991, Government counsel informed Mr. Goch that the reprocurement contract was at a price of $729,025, including the potential 5-year term, compared to KARPAK's contract price, for that term, of $689,202.48—an increase of $39,822.52. BOR estimated that KARPAK had completed a total of $18,357.34 in acceptable work, "leaving a projected maximum deficiency of $21,465.18 potentially owed by your firm to the United States" (Government counsel's 10/23/91 telefax to Mr. Goch). There is no evidence of record that BOR has assessed reprocurement costs against KARPAK.[7]

44. KARPAK and the Government stipulated, as of November 22, 1991, that 6 drawings from Call No. 1, 17 drawings from Call No. 2, and 39 drawings from Call No. 3 "failed to meet contractual standards and were on that basis properly rejected by [BOR]."

DISCUSSION

[1] It is well-established that "a default-termination is a drastic sanction * * * which should be imposed (or sustained) only for good grounds and on solid evidence." *J. D. Hedin Construction Co.* v. *United States*, 408 F.2d 424, 431 (Ct. Cl. 1969) (citation omitted). The

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[7] It is not clear how these prices were derived and whether Department of Labor wage escalations were included. Multiplying KARPAK's basic year contract price of $129,789.74 by 5 yields $648,948.70. Moreover, we note that, in its estimate of potential excess reprocurement costs, BOR has included all four potential option years, in addition to the basic year. In its final analysis of whether KARPAK is owed any money, BOR should consider whether it legitimately can charge KARPAK for those option years.

Government bears the burden to prove a default termination justified. *Lisbon Contractors, Inc.* v. *United States*, 828 F.2d 759, 765 (Fed. Cir. 1987). If the Government establishes facts that, *prima facie*, justify the default termination, the burden shifts to the appellant to show that the failure was beyond its control and without its fault or negligence. *Appeal of Arthur L. Cruz d.b.a. Cruz & Associates*, IBCA-2098, 87-3 BCA ¶ 20,142, at 101,947; *accord H. Roth GmbH*, ASBCA Nos. 39496 and 39497, 92-2 BCA ¶ 24,794 at 123,675. Alternatively, appellant must show that the contracting officer's default decision was arbitrary or capricious or an abuse of his discretion. *Darwin Construction Co.* v. *United States*, 811 F.2d 593, 598 (Fed. Cir. 1987); *Engineered Systems, Inc.*, ASBCA No. 42949 (April 8, 1992), slip op. at 6.

As we have noted, KARPAK does not seek to continue with the contract (KAF narr. at 13). Although not entirely clear, KARPAK does not appear to dispute that it defaulted. Instead, it urges that its actions were excusable.

Even if KARPAK were deemed to contend otherwise, the facts demonstrate, *prima facie*, that it defaulted. The contract requires drawings of quality equal to that shown on BOR's samples and that the drafting be "a minimum of 99 percent accurate." Accuracy is imperative because critical equipment for the Grand Coulee Dam can be affected. Each segment of work is to be completed within 10 working days (unless an expedited turnaround time of 7 working days is requested, which never occurred). If the drawings do not conform to contract requirements, the Government can require the contractor to perform them again. If the contractor fails to perform them again, the Government can terminate the contract for default (FF 2; contract §§ C.4.e., C.5.e, E.1).

The record reflects that the majority of the drawings returned by KARPAK on their original due dates (or extended due date, with respect to Call No. 2) contained a significant amount of errors and were of poor quality. Indeed, with regard to Call No. 1, albeit blaming the problem upon its haste to complete an excessive workload, KARPAK concedes the errors in, and poor quality of, the drawings it returned in categories 1 through 3 (FF 26).

In fact, KARPAK stipulates that 62 of its drawings, some from each of the Calls it attempted to perform, "failed to meet contractual standards and were on that basis properly rejected by [BOR]" (FF 44). With regard to Calls No. 1 and 2, the stipulation covered only drawings that remained unacceptable after BOR gave KARPAK extended opportunities to correct them. Failures persisted despite 3 opportunities, ranging from February 6, 1991, through April 3, 1991, to complete Call no. 1, and three opportunities, from February 20, 1991, through April 3, 1991, to complete Call No. 2. Of the 57 Call No. 3 drawings—even though BOR had delayed the issue date to accommodate KARPAK—39 were unacceptable (including 2 that were not returned at all) (FF 17, 22, 25, 27-36).

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KARPAK's response to the contracting officer's show cause notice contained no statement that it would attempt to improve its performance. Instead, KARPAK stated that it did not have the ability to perform the contract as interpreted by BOR, and that the contract should be terminated for convenience (FF 39).

BOR has met its initial burden to prove the default termination justified.

[2]The question remains whether KARPAK's default was excusable, as it contends. Accordingly, we examine whether KARPAK's failure was beyond its control, and not due to its fault or negligence, or whether the contracting officer acted arbitrarily or capriciously or abused his discretion in terminating the contract.

The contract's Default clause gives examples of causes of failure beyond the contractor's control. Most involve extraordinary events. The only potentially relevant example is "acts of the Government in * * * its * * * contractual capacity" (§ I.2.11.(c)). In that regard, KARPAK asserts in defense of its default that BOR did not allow it a start-up time; that Call return dates did not take travel time into consideration; and that BOR imposed an excessive workload, making contract performance virtually impossible.

The contract does not provide for a start-up time or allow extra performance time to compensate for travel. Contractors have the option to perform the work on-site (§ F.11). KARPAK elected not to do so.

Regarding workload, the Requirements section of the contract provides that normally no more than 75 drawings will be released to the contractor at any one time, but if a particular group of drawings require minimal drafting changes, more drawings may be given to the contractor (§ C.3.h.(1)). The Delivery Order Limitations clause imposes a potential, but not binding, maximum of 100 drawings. Under that clause, the contractor is not obligated to honor any order, or series of orders from the same ordering office within 20 days, that exceed 100 drawings. However, the Contractor must honor any order or orders exceeding the 100 drawing limit if it does not return the order or orders to the ordering office within 10 days after issuance, with written notice stating its intent not to deliver the drawings (§ I.2.3).

The 107 drawings BOR issued in Call No. 1 exceeded the 75 drawings amount by 32, but 65 of them contained only light density changes—most with only one or two minor revisions, thus allowing BOR to give the contractor additional drawings. Call No. 1 exceeded the potential 100 drawings maximum order by 7. Moreover, although neither party has addressed this factor, BOR issued Call No. 1 on February 6, 1991, and Call No. 2, for 88 drawings, 14 days later, on February 20, 1991, thus issuing more than 100 drawings within a 20-day period (FF 17, 27).

KARPAK, though, did not begin work on Call No. 2 when it was issued, because it was still working on Call No. 1. The return date for

Call No. 2 was extended three times, in effect—first and officially, by 10 days; second when BOR allowed KARPAK to continue to work on the Call No. 2 drawings it had failed to return on the extended due date; and, third, when BOR allowed KARPAK to continue to attempt to correct some of the drawings that were still unacceptable as of the second extended date (FF 30, 31, 35). The first extension mooted the fact that BOR issued Call No. 2 within 20 days of Call No. 1.

More importantly, the ability to stem what it perceived to be a work overload was within KARPAK's control. KARPAK never returned any Call that was issued, with a written statement that it would not honor it, as it could have done. Accordingly, it was obligated to honor the Calls. Indeed, Mr. Goch expressed pleasure at the number of drawings in Call No. 1, and elected to proceed with the 15 category 4 drawings included in the Call, for which BOR had provided a partially inadequate computer diskette, even though BOR had given him the option to leave them until the next Call. KARPAK did not point out, or object, to BOR's inadvertent failure to exclude the President's Day holiday when it calculated KARPAK's return date (FF 17, 18). The subsequent extensions BOR granted to KARPAK to complete the Call render the one-day error ultimately immaterial in any case.

KARPAK complains that the COTR issued technical directions beyond the general scope of work stated in the contract. We do not find evidence of any technical direction issued by the COTR in the ordinary meaning of the phrase. Even if the issuance of Call No. 1 for 107 drawings were deemed to be a technical direction, it was not beyond the scope of work potentially allowable under the Delivery Order Limitations clause, absent specific rejection in writing by the contractor within 10 days of issuance (§ I.2.3.(d)). Moreover, under the Technical Directions clause, if KARPAK considered that the COTR had issued a technical direction calling for work beyond the scope of the contract, it was to refrain from proceeding with the work, and was to notify the contracting officer, in writing, within 5 working days after it received the direction, that it disputed the direction (§ I.4.6.(c)).

After it received Call No. 2 on February 20, 1991, KARPAK did write to the contract administrator (albeit not the contracting officer) on February 23, 1991, largely complaining about problems with Call No. 1 and perceived intimidation from BOR, but also stating that Call No. 2 imposed an excessive workload. KARPAK did not start Call No. 2 when it was issued, electing to complete Call No. 1 first. KARPAK did not mention its failure to start Call No. 2 in its letter, however, and apparently did not inform BOR about it until the March 6, 1991, return date for Call No. 2 (FF 23, 30). BOR extended the return date for Call No. 2, as noted, and KARPAK proceeded to perform it. It never notified the contracting officer in writing that it deemed an improper technical direction, or a contract change, to have occurred, and never filed a claim seeking a contracting officer's decision pursuant to the Disputes clause, although it was within its control to do so.

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KARPAK claims that BOR failed to give it written instructions. Section C of the contract describes the work required. Sections C.1. and C.3.g. provide that instructions will be issued as performance guidelines. The contract does not state that the instructions must be written. BOR gave KARPAK its Drafting Standards and sample drawings. The red and green marked prints depicted the changes required. The COTR gave oral instructions with Calls One and Two. The contract did not require anything more. KARPAK did not complain about any lack of instruction until its March 6, 1991, meeting at the GCPO. BOR agreed to provide written instructions thereafter (FF 30).

KARPAK also alleges that, when BOR checked the drawings returned by KARPAK, it added changes that BOR had not marked originally. Appellant established only one such occurrence, however, which it identified at the March 6, 1991, meeting. BOR informed the contractor that it was not obligated to make any new changes and to ignore them if they happened in the future. Furthermore, KARPAK did not request that BOR return the original red and green markups to it, along with drawings that were returned to it for correction, until its April 3, 1991, meeting with BOR. BOR obliged, and would have provided them earlier if Mr. Goch had asked for them (FF 30, 35).

Appellant also contends that BOR wrongfully withheld payment from it. A contractor is responsible for having sufficient financial resources to perform its contract. *Local Contractors, Inc.*, ASBCA No. 37108, 92-1 BCA ¶ 24,491 at 122,235-36. Financial incapacity usually is not regarded as beyond the control of the contractor. Although any wrongful refusal, or failure, by the Government to make payments due could constitute a defense against a default termination if the refusal of failure caused the default, a contractor's inability to finance a project, alone, does not excuse failure to perform and default. *See Southeastern Airways Corp.* v. *United States*, 673 F.2d 368, 378 (Ct. Cl. 1982); *Mahon, Inc.*, ASBCA No. 34942, 36386, 90-2 BCA ¶ 22,724 at 114,078.

Although, in its preliminary statement of excess reprocurement costs potentially due, BOR credited KARPAK with its evaluation of the amount due for accepted drawings (but see n.7), BOR did not pay KARPAK contemporaneously for the work it performed (FF 40, 43). The Payments clause provides that BOR is to pay for supplies delivered and accepted, or services rendered and accepted, less any deductions provided in the contract. Unless otherwise specified in the contract, payment is to be made on partial deliveries accepted by the Government if the amount due warrants payment, or the contractor requests it and the amount due is at least $1000 or 50 percent of the total contract price (§ I.5.10).

The contract otherwise provides that drawings containing errors shall be returned to the contractor for correction and that "payment in full for the drawing group will not be made until the corrections are made and the drawings approved by the COTR" (§ C.3.(h)(1)). BOR interprets this to mean that no payment for a Call can be made until all of the drawings in it are approved by the COTR. The language is ambiguous. BOR's interpretation is not unreasonable, however, in view of the contract's 99 percent drafting accuracy requirement (albeit, this requirement itself is somewhat ambiguous as to whether it applies on a per drawing or per Call basis). BOR's decision to refrain from paying KARPAK until it completed a Call acceptably also was not unreasonable. From the outset of performance, BOR had every reason to be concerned over the error rate in, and quality and timeliness of, KARPAK's attempted deliveries of completed work. On each of the three Calls, despite generous time extensions, and opportunities to correct errors, KARPAK repeatedly failed to meet the contractually mandated 99 percent accuracy rate (however it is construed). It is understandable that BOR was reluctant to make partial payments before the contractor demonstrated marked improvement in its performance.

We need not, and do not, construe the ambiguous payment and accuracy provisions of the contract, however, because even if BOR should have paid KARPAK in part, KARPAK still would be required, under the Default clause, to prove that the failure to pay caused the contractor's default and that its own fault or negligence did not contribute. KARPAK has not provided any proof that the lack of payment from BOR caused the errors and quality problems in its work, or even that it was financially incapacitated. Allegations and arguments are not converted into proven facts no matter how vigorously they are asserted. *Harvex Trading Co., et al.*, ASBCA Nos. 38279, *et al.* (April 22, 1992), slip op. at 20 (citation omitted).

The contracting officer warned prior to contract award that a contractor would need about $30,000 to operate for the first two months of the contract prior to receipt of payment from the Government (presumably for normal administrative processing reasons, although this has not been explained). KARPAK obtained a line of credit in that amount. KARPAK itself discounts Mr. Goch's statement on April 3, 1991, that the contractor would not have employees as of April 5, 1991 (FF 12, 35, n. 6).

In sum, the Government did not cause a default beyond KARPAK's control, and, in any event, KARPAK has not proved that its default was without its fault or negligence. As established, KARPAK's work was replete with errors and of poor quality (FF 22, 25, 26, 31, 33, 35, 36).

[3] Appellant's principal contention is that it did not have the personnel to perform the work imposed by BOR and that BOR knew this, based upon KARPAK's proposal. Because there is nothing in the contract requiring BOR to tailor its requirements and Calls to KARPAK's proposal, we examine this issue in connection with our evaluation of whether the contracting officer acted arbitrarily or

capriciously or abused its discretion in terminating KARPAK's contract for default, rather than for convenience.

KARPAK was responsible for obtaining and retaining sufficient personnel to perform the contract. *Carolina Security Patrol, Inc.*, GSBCA No. 5602, 81-1 BCA ¶ 15,040 at 74,418. In addition to Mr. Goch, who was not a professional draftsman, the contractor proposed to use 3 draftsmen and one clerk to perform a maximum of 75 drawings of mixed categories in 10 working days. Additionally, it planned to hire a consulting engineer to manage any Call for more drawings (thereby evidencing its understanding that BOR could call for more than 75 drawings at a time). It estimated that a Call for 75 mixed drawings would require about 363 manhours of time, not including an additional 40 hours it expected to obtain from its consulting engineer for the larger Calls. Karpak stated that its estimated manhours per drawing revision were based upon "the highest number of changes with the most extreme unforeseen complexity" and, the number per redraw, upon "the most unforeseen complexity." Mr. Goch assured that he had considerable experience with start-up companies and that he knew how to accomplish work with "the fewest of personnel" (FF 7, 10, 35). In the end, KARPAK's attempt to perform the contract with a limited number of personnel proved ill-advised.

When we examine KARPAK's failure to perform Call No. 1, we conclude that its repeated need to spend time correcting deficiencies, rather than an excessive workload, led to its default. Based upon the labor and time estimates contained in its proposal, appellant alleges that Call No. 1 required 393.75 hours of work in 9 working days, or 360 hours. It asserts that, because of its travel schedule, it had only 8 working days to perform the Call. BOR cannot be held responsible for KARPAK's travel schedule. Moreover, KARPAK did not provide any evidence of the actual manpower it applied to the Call or of the actual number of hours it expended. BOR has submitted the contract administrator's sworn declaration that the majority of drawings given to KARPAK were not extremely complex. Using a median figure for the estimated number of changes per drawing, and KARPAK's own proposal of the number of hours required per drawing per category, BOR estimates that the Call should have required 214.27 hours of work. We have found BOR's estimate to be reasonable and more based upon actual circumstances than appellant has been able to establish (FF 21).

Excluding the 15 category 4 drawings for which BOR provided inadequate diskettes during the first turnaround period—but which KARPAK, nonetheless, elected to attempt, subject to modification when it received the correct software—60 of 92 drawings KARPAK submitted under the first Call were unacceptable as of the February 20, 1991, return date. BOR supplied correct fontware for the 15 category 4 drawings on that date. When KARPAK re-delivered the 15 drawings on March 6, 1991, along with the other drawings from Call No. 1 that BOR had returned to it for correction, at least 14 of the 15 category 4 drawings were still incorrect and 18 drawings from other categories were still incorrect. KARPAK did not work on Call No. 2 during the period between February 20 and March 6, 1991. Therefore, it had from February 6, 1991, to March 6, 1991, to complete Call No. 1 alone. When KARPAK returned the Call No. 1 drawings for the third time, on April 3, 1991, 56 days after BOR had issued the Call, 6 of the drawings remained unacceptable (FF 20, 22, 25, 31, 35, 41).

As of March 6, 1991, KARPAK had Call No. 2 to perform as well, but BOR already had extended the return date for Call No. 2 by 10 working days, and it did not act unreasonably in expecting KARPAK to perform Call No. 2. Also, it gave KARPAK several opportunities to perform that Call, and the contractor never completed it acceptably. Call No. 3 contained only 57 drawings, 26 of low density, and only 8 of which were category No. 4 drawings, as we have noted. KARPAK failed to complete acceptably 39 of the 57 drawings in that Call (FF 30, 31, 33, 35, 36, 41).

Tangential to its excessive workload claim, KARPAK asserts that its inability to meet the contract's minimum requirements necessitates a termination for convenience, rather than for default, because the contracting officer allegedly abused his discretion in awarding it the contract. The contract required that KARPAK "have the minimum capability of handling 35 drawings—revised, new, *or* redrawn—in an expedited turn around time of [7] working days" (§ C.3.h.) (emphasis added). We find that the language is unambiguous and plainly requires that a contractor be able to complete 35 category 4 drawings in 7 working days upon request.

After submitting its first proposal, which the contracting officer questioned, KARPAK indicated that it understood that 35 drawings was a minimum requirement (FF 7). It asserted to BOR on April 3, 1991, for the first time of record, that it, and the SBA, interpreted the clause to require only that a contractor have the ability to complete drawings of mixed categories in 7 working days. It has not provided evidence of the SBA's alleged interpretation.

Regardless, BOR never required KARPAK to handle 35 category 4 drawings in 7 work days. BOR's principal focus in its April 3, 1991, meeting with the contractor was upon KARPAK's repeated statements that it did not have the ability to do the work that had been requested, despite its concession that the majority of the drawings in the three Calls issued to it were of the light density variety (FF 35).

KARPAK's claim that BOR should not have awarded it the contract is baseless. The contracting officer twice warned KARPAK, prior to award, that its estimate of the manhours necessary to perform the contract appeared inadequate. The contracting officer also determined that KARPAK lacked financial responsibility and referred the matter to the SBA. The SBA notified KARPAK that the contracting officer planned to reject its proposal. KARPAK appealed to the SBA, which certified to BOR that KARPAK was responsible and could perform, binding BOR to award the contract to KARPAK. *See* the Small Business Act, 15 U.S.C. § 637(b)(7)(C) (1992 Supp.) (FF 6, 9, 13, 14).

[4] KARPAK claims that BOR intimidated it by threatening contract cancellation from the outset and suggests that BOR may have deliberately sabotaged its performance because it was dissatisfied that it was compelled to award the contract to KARPAK. Public officials are presumed to act in good faith. *Morgan Business Associates, Inc.* v. *United States*, 619 F.2d 892 (Ct. Cl. 1980). The burden is upon appellant to prove to the contrary, and it is an exceedingly heavy one. The familiar axiom is that the proof must be "well-nigh irrefragable." *Kalvar Corp.* v. *United States*, 543 F.2d 1298 at 1301-02 (Ct. Cl. 1976) (citation omitted), *cert. denied*, 434 U.S. 830 (1977).

We find no evidence that BOR threatened contract cancellation from the outset of the contract or attempted to intimidate KARPAK. The evidence, including sworn declarations from the COTR and the contract administrator, and contemporaneous documents, is that BOR had immediate requirements for the backlogged electrical drawings; that it eagerly awaited contract award, which had been delayed by a protest; that it did not begin with any intention to cancel KARPAK's contract; that it met with the contractor on March 6, 1991, specifically to allay its concerns; and that it allowed KARPAK extended periods of time to attempt to complete Calls (FF 2, 8, 30, *et al.*). BOR's contract administration was not perfect, but we do not find the proverbial scintilla of bad faith on its part.

KARPAK undertook a difficult requirements contract with insufficient resources to meet those requirements. "A Government contractor, regardless of its size, locality or experience, is bound to understand the complexities and consequences of its undertaking." *Tony Downs Food Co.* v. *United States*, 530 F.2d 367, 374 (Ct. Cl. 1976) (citation omitted). KARPAK's default may be understandable, but it is not legally excusable.

DECISION

The appeals are denied.

CHERYL S. ROME
Administrative Judge

I CONCUR:

RUSSELL C. LYNCH
Chief Administrative Judge

ESTATE OF LOIS MARIE (FRANCIS) PETE (SANCHEZ)

22 IBIA 249 Decided: *August 28, 1992*

Appeal from orders issued by Administrative Law Judge S.N. Willett in Indian Probate IP PH 187I 90 and IP PH 123I 91 (Rehearing).

Affirmed; 9 IBIA 94, 88 I.D. 993, and 14 IBIA 106 modified in part.

1. Indian Probate: State Law: Pretermitted Heir--Indian Probate: Wills: Failure to Mention Child--Indian Probate: Wills: Failure to Mention Spouse--Indian Probate: Wills: Revocation by Subsequent Marriage

In the absence of substantive law or regulations on the issue of pretermitted heirs, the Department of the Interior should give effect to the stated wishes of an Indian testator, as expressed in a valid will, rather than create substantive rules governing pretermission within the limited context of individual probate cases.

APPEARANCES: John C. Shevlin, Esq., Palm Springs, California, for appellant; Ernest G. Noia, Esq., Palm Springs, California, for Liza Marie Pete; Manuel Monguia, Esq., Escondido, California, for Monica Mendez and Maria Mendez.

OPINION BY CHIEF ADMINISTRATIVE JUDGE LYNN

INTERIOR BOARD OF INDIAN APPEALS

Appellant Thomas G. Sanchez seeks review of a December 27, 1990, order approving the will of decedent Lois Marie (Francis) Pete (Sanchez), Palm Springs Allottee PS-79, and of a September 18, 1991, order granting petition for rehearing in part and denying rehearing in part. Both orders were issued by Administrative Law Judge S.N. Willett. For the reasons discussed below, the Board of Indian Appeals (Board) affirms those orders.

Because appellant's arguments raise only legal issues, the Board will recite only those facts which are necessary to an understanding of the legal arguments. Decedent executed a will on April 28, 1971. That will devised decedent's trust or restricted property to her daughter, Liza Marie Pete, and to her two sisters, Monica Mendez and Maria Mendez. Decedent and appellant were subsequently married. Decedent did not execute a new will after her marriage to appellant, and apparently made no other provision for him. In this appeal, appellant alleges that he should take part of decedent's estate either as a pretermitted heir or under a doctrine of changed circumstances. He asks the Board to overrule several prior decisions, in particular, *Estate of Howard Little Charley*, 18 IBIA 335 (1990); *Estate of Winona June Little Hawk Garcia*, 14 IBIA 106 (1986); and *Estate of Ronald Richard Saubel*, 9 IBIA 94, 88 I.D. 993 (1981). In *Little Hawk* and *Saubel* the Board declined to invalidate wills for the benefit of pretermitted heirs.[1]

On appeal appellant argues: (1) the decision in *Tooahnipah* v. *Hickel*, 397 U.S. 598 (1970), upon which the Board relied in *Saubel*, does not hold that regulations on pretermitted heirs are necessary for the Secretary to exercise the discretion conferred upon him by 25 U.S.C. § 373 (1988),[2] to disapprove an Indian will on the grounds of pretermission or changed circumstances; (2) prior to the decision in *Tooahnipah*, and the Board's erroneous interpretation of the Court's holding, the Department had a policy of disapproving Indian wills based upon pretermission, or, in the alternative, did not have a policy of not disapproving wills on that ground; (3) by holding that she was bound by prior erroneous Board decisions, the Administrative Law Judge applied, to appellant's detriment, an erroneous standard of law to his objections to admission of the will to probate; (4) the Administrative Law Judge's orders in the present estate, coupled with the Secretary's failure to promulgate regulations concerning pretermission, constitute a failure to exercise the discretion conferred upon the Secretary by 25 U.S.C. § 373, which, in the context of this case, constitutes a violation of 5 U.S.C. § 706; and (5) the Secretary is obligated to exercise the discretion conferred upon him by 25 U.S.C. § 373 to decide appellant's appeal on its merits.

[1] Appellant first argues that the decision in *Tooahnipah* does not prohibit the Department from disapproving an Indian will based upon pretermission or changed circumstances. The Board has carefully considered Judge Willett's exhaustive analysis of the case law developments leading up to the present state of Departmental law. Upon mature reflection, the Board agrees that its cases in the area of pretermission citing *Tooahnipah* have "stretched" the Court's actual holding. Despite that agreement, it declines to reverse the result it has reached in previous cases and continues to hold, as discussed further *infra*, that, in the absence of substantive law or regulations on the issue of pretermitted heirs, the Department should give effect to the stated wishes of an Indian testator, as expressed within a valid will, rather than fill this "gap" through the adjudicative process. The Board, therefore, declines appellant's invitation to overrule the result in *Little Hawk* and *Saubel*.

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[1] The Board's actual holding in the *Little Charley* case was procedural in nature. The Board affirmed the Administrative Law Judge's holding that the appellant was barred from later attacking the decedent's will when she was given notice of the probate hearing, but failed to appear at the hearing and present her arguments at that time. No determination was made as to whether the appellant was, in fact, the decedent's daughter or a pretermitted heir.

[2] Sec. 373 provides in pertinent part:

"Any persons of the age of eighteen years or older having any right, title, or interest in any allotment held under trust or other patent containing restrictions on alienation or individual Indian moneys or other property held in trust by the United States shall have the right prior to the expiration of the trust or restricted period, and before the issuance of a fee simple patent or the removal of restrictions, to dispose of such property by will, in accordance with regulations to be prescribed by the Secretary of the Interior: *Provided, however*, That no will so executed shall be valid or have any force or effect unless and until it shall have been approved by the Secretary of the Interior."

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

Appellant contends that the failure to provide rules concerning pretermission through the adjudicatory process constitutes a failure to exercise the discretion given to the Secretary under 25 U.S.C. § 373. The Board disagrees. The Board has determined that it would be inappropriate for the Secretary to exercise the discretion granted under section 373 to fill in this particular "gap" through the adjudicative process. Although appellant, as well as other disappointed individuals, will disagree with this conclusion, the Board considers it to be an informed decision, based upon its expertise in Indian probate matters and made in order to avoid the greater harm that could result from making potentially far-reaching determinations concerning the way in which all pretermitted heirs should be treated within the limited context of individual probate cases. A decision on the treatment of pretermitted heirs, or regarding changed circumstances, will have extensive and unique ramifications within the Indian community, the people to whom the Department, and the Federal government, owe a trust responsibility. If such a decision is made by the Department, it is more properly made in the context of a rulemaking proceeding, during which all of the people affected would have the opportunity to voice their opinions.[3]

Appellant goes a step further in arguing that because the Department has not exercised its discretion under 25 U.S.C. § 373 through rulemaking, it must do so through adjudication, and that the failure to provide rules constitutes a violation of 5 U.S.C. § 706. He argues that "the obligation to exercise discretion conferred by statute upon an administrative agency is imposed by 5 [U.S.C.] § 706, not by the legislation which creates the agency or delineates the scope of its authority" (Opening Brief at 25). Although appellant does not state to which section of 5 U.S.C. § 706 he is referring, presumably it is subsection 1, which provides that a reviewing court shall "compel agency action unlawfully withheld or unreasonably delayed."

Assuming *arguendo* that appellant is correct in his statement of law, the application of 5 U.S.C. § 706(1) has been examined by the Federal courts on numerous occasions. In *Environmental Defense Fund* v. *Costle*, 657 F.2d 275, 283-84 (D.C. Cir. 1981), the United States Court of Appeals for the District of Columbia Circuit stated that the standard of review for agency inaction might "consist of either of two issues: (1) whether the agency has violated its statutory mandate by failing to act * * *, or (2) whether the agency's delay in acting has been unreasonable * * *." *See also* additional case citations therein. The court's analysis makes it clear that the failure of an agency to take an action which an outside person believes to be necessary or proper does not automatically require a reviewing court to use section 706(1)

[3] As discussed more fully *infra*, the Indian Land Consolidation Act, 25 U.S.C. § 2206(c), grants individual Indian tribes authority to promulgate their own probate codes, which the Department would then apply. Consideration of the plight of genuinely pretermitted heirs might better be addressed within this context. The enactment of a tribal probate code, or development of a Model Uniform Indian Probate Code, would allow for the full participation which the Board considers essential in this and other areas of substantive Indian probate law. It would also allow for tribal self-determination, which is, as Judge Willett notes, the guiding principle of current Indian policy.

to order the agency to take the action. Rather, the court will analyze the statutory requirement in light of the particular circumstances facing the agency.

The Board of Indian Appeals became the appellate body for Indian probate decisions in 1970, when the Office of Hearings and Appeals was created within the Department. The Board's first analysis of the question of pretermitted heirs occurred in *Saubel*, which was decided in October 1981. The issue has come before the Board on three subsequent occasions, including the present appeal. On January 4, 1975, prior to the Board's consideration of *Saubel*, the Indian Self-Determination Act, 25 U.S.C. §§ 450-450n, became law. This act embodied a new era of relations between the Indian people and the Federal Government, with an emphasis upon tribal sovereignty and self-determination. Under this policy, the Department has attempted to move away from what has been seen as a paternalistic attitude toward the Indian people and toward greater recognition of the rights of Indian people to determine their own destinies as members of dependent sovereign nations. Although not expressed in the *Saubel* decision, this new direction was a major part of the background against which that decision was made.

As briefly mentioned in note 3, *supra*, the Indian Land Consolidation Act, 25 U.S.C. § 2206(c), provides:

> Notwithstanding the provisions of subsection (a) of this section [concerning escheat of certain small fractional interests in Indian trust or restricted property], any Indian tribe may, subject to the approval of the Secretary, adopt its own code of laws to govern the disposition of interests that are escheatable under this section, and such codes or laws shall take precedence over the escheat provisions of subsection (a) of this section, provided, the Secretary shall not approve any code or law that fails to accomplish the purpose of preventing further descent or fractionation of such escheatable interests.

This section became law on October 30, 1984. The Department has interpreted the section to allow the enactment of comprehensive, substantive probate codes by individual tribes. Although to date, few tribal probate codes have been enacted, in an era of tribal self-determination and with its expertise in Indian probate—and consequent knowledge that there are many unique problems in this area of the law—the Department has refrained from promulgating regulations in a matter in which Congress has expressly stated that the tribes have authority to act. The Board does not believe that, in making this informed decision, either it or the Department has committed error.[4]

Appellant contends that, prior to the Board's erroneous holding in *Saubel*, there was a Departmental policy to invalidate Indian wills for the benefit of pretermitted heirs, or on grounds of changed circumstances. The Board adopts Judge Willett's analysis of this issue:

[4] The fact that regulations or adjudicatory standards were not created prior to the enactment of the Indian Self-Determination Act and the Indian Land Consolidation Act is now a moot issue. The matter must be addressed in terms of the present situation, which includes those acts.

The *Estates of Lucy Holy* or *Chubby Holy*, RS No. 410-1/2, Probate No. 66078-31 (1932); *Estate of Julia Thompson, Unallotted Nez Perce*, 59174-37 (1937); *Estate of Jesse Paul, Nez Perce No. 778*, Probate No. 23590-26 (1938) * * *; *Estate of Mary Halooks*, Flathead, No. 1719-4173-38 (1938); *Estate of Kosope (Richard) Maynahonah*, IA-141 (1954); *Estate of Oliver Maynahonah*, IA-T-1 (1966) and *Estate of Reuben English*, IA-T-18 (1969) are advanced for the proposition that the Secretary had a pre-*Tooahnipah vs. Hickel* policy, a regularly exercised one, of invalidating wills on the grounds of pretermission. * * *

I have examined these cases and their circumstances as well as the language of 25 U.S.C. Section 373 and conclude that there is no official or formal policy regarding pretermission or regular practice of Secretarial invalidation of wills on the grounds of pretermission.

25 U.S.C. Section 373 was enacted in 1910. In the eighty-one-year period since its enactment two clusters of pretermission (changed circumstances) cases are evident. The first occurred in the north-northwest sector of the United States. One may properly take official notice of the location of the Nez Perce and Flathead Indian Reservations as being in the same immediate region of the country. The Nez Perce/Flathead cases were decided during a discrete two-year period: 1937-1938. The "RS" designation in the *Estate of Lucy Holy* or *Chubby Holy* is Rosebud Sioux. It is also a northern reservation located in the State of South Dakota. It was decided five years prior to the preceding group. It could reasonably be assumed, without purporting to decide the matter, given the existence of specific probate jurisdictions, that they were the product of the same regional Examiner of Inheritance, as deciding officials in Indian probate were then called.

The second group of cases, both *Maynahonahs* and the *Estate of Reuben English*, cited above, are the product of the same office and the same deciding official who produced the decision overturned in *Tooahnipah vs. Hickel*. In fact, the Regional Solicitor applied the same "just and equitable" standard in the *Estate of Oliver Maynahonah, supra*, as was applied in *Tooahnipah*. The authoritativeness of the latter group of cases suffers because the particular deciding official viewed his discretionary authority, as *Tooahnipah* reveals, as very broad and as permitting the substitution of his personal opinion concerning proper testamentary dispositions for that of Indian testators.

At best, one sees during an eighty-one-year period two pockets of cases, the latest of which are of questionable authoritative value, and the preceding pocket, 30 years earlier, as an isolated component. I cannot by any objective standard view this circumstance as embodying or reflecting a formal or official pretermission policy or a regular practice on the part of the Secretary of the Interior. [Footnote omitted.]

(Sept. 18, 1991, Order at 18-20).

In the alternative, appellant argues that prior to *Tooahnipah* there was no Departmental policy of withholding protection for pretermitted heirs. The Board assumes that this argument implies that, but for the Board's erroneous interpretation of *Tooahnipah*, it would not have held that an Indian will should not be disapproved on the grounds of pretermission. As is evidenced by this decision, the Board could have reached the same result by other reasoning.

Appellant next argues that Judge Willett applied an erroneous standard of law to his objections to admission of the will to probate. Appellant contends that the erroneous standard of law, which worked to his detriment, was based upon the Board's erroneous prior decisions. Appellant's argument is, in essence, an attack upon the administrative law process in that he contends an Administrative Law Judge is not bound by the decisions of an administrative appellate tribunal if those decisions are erroneous. Again, the Board adopts Judge Willett's response to this argument:

It is not an abuse of discretion for an adjudicator to adhere to principles of *stare decisis*. An administrative agency has an obligation to follow, distinguish or overrule precedent. *Chisholm v. Defense Logistics Agency*, [656 F.2d 42 (3rd Cir. 1981)]. It is not arbitrary for an agency to be guided by its own prior exercise of judgment as reflected in recent decisions or to make successive rulings upon a matter exhibit continuity and consistency. *Panhandle Eastern Pipeline Company vs. Federal Power Commission*, 236 F.2d 606, 609 (3rd Cir. 1950). * * *

It is correspondingly not a failure to exercise a full range of discretion* to recognize the binding authority of one's appellate body or to accept authoritative determinations of that body as binding upon the lower tribunal.

[Appellant's] real point is that he favors the analysis of the progression and development of the cases contained in the December 27, 1990 order and seeks application here of the intuitive reasoning of the Administrative Law Judge without regard for the fact that administrative discretion, in an adjudicative context, contains a "proper mix of rule and discretion." *Koch*, 1 *Administrative Practice and Procedure*, Section 1.25, p. 46 and 47. This desire ignores the fact that standard principles of administrative adjudication include adherence to precedent and the application of authoritative decisions of duly constituted appellate bodies.

*"So far as inferior courts [tribunals] are concerned it is their duty to follow the latest decisions of the appellate [tribunal], regardless of whether or not there is harmony with earlier decisions of the court [tribunal] [footnote omitted]." 21 C.J.S. Courts Section 145, p. 173. [Bracketed material in original.]

(Sept. 18, 1991, Order at 9-10).

Appellant has not demonstrated that the results in *Little Hawk* and *Saubel* should be overruled. Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, Judge Willett's December 27, 1990, and September 18, 1991, orders are affirmed.

KATHRYN A. LYNN
Chief Administrative Judge

I CONCUR:

ANITA VOGT
Administrative Judge

EXXON CO., U.S.A., CHEVRON U.S.A., INC.

121 IBLA 252A *October 2, 1992*

MMS 87-0335-OCS; MMS 87-0321-OCS; Petition for Reconsideration Granted.

Decision Reaffirmed as Modified.

ORDER

On November 15, 1991, we issued our decision in the above-captioned matter, *Exxon Co., U.S.A.*, 121 IBLA 234, 98 I.D. 409 (1991), affirming decisions of the Director, Minerals Management

Service (MMS), disallowing deductions from the royalty basis for certain costs of treating gas produced from Federal offshore oil and gas leases. The details of the dispute are set out in that decision and need not be repeated here.

On January 14, 1992, Chevron U.S.A., Inc. (Chevron), filed a petition for reconsideration of that decision. By letter also filed on January 14, Exxon Co., U.S.A. (Exxon) notified the Board that it was requesting reconsideration, adopting the reasons set forth by Chevron in its petition.

Chevron contends that the decision is in error by distinguishing between whether or not a gas plant product is a hydrocarbon or non-hydrocarbon for purposes of deducting a processing allowance (also known as a "manufacturing allowance") from Federal royalty payments under 30 CFR 206.152(a)(2) (1987). Chevron contends that the appropriate distinction regarding deduction of processing allowances is whether or not the particular gas plant product is extracted from the wet gas stream and marketed commercially, thereby producing a substance on which royalty is due. Chevron indicates that MMS has traditionally allowed a manufacturing allowance of up to two-thirds of the value of sulfur manufactured from wet gas, presumably if and when the manufactured sulfur is sold. It voices concern that our decision in *Exxon, U.S.A., Inc., supra*, will result in abandonment by MMS of that practice, and that MMS will now attempt to collect additional royalties on sulfur and accompanying late payment charges.

Referring to various authorities, we concluded in the decision in question that "processing," as it was used in the pre-1988 regulations (including 30 CFR 206.152(a)(2) (1987)), embraced only the removal of hydrocarbon liquids from the natural gas stream. *Exxon Co., U.S.A.*, 121 IBLA at 244, 98 I.D. at 413.[1] The clear import of that discussion is, as Chevron points out, that no "processing allowance" could be allowed under 30 CFR 206.152(a)(2) (1987), for the extraction of elemental sulfur from the gas, as sulfur is not a hydrocarbon, as it is not composed of "only hydrogen and carbon." *See A Dictionary of Mining, Mineral & Related Terms*, 562 (1968); *Exxon Co., U.S.A.*, 121 IBLA at 246, 98 I.D. at 415.

In its answer, MMS acknowledges that it "does not distinguish between hydrocarbons and non-hydrocarbons in determining whether to grant a processing allowance." Rather, MMS explains, it "determines if the gas plant product was 'manufactured' and if an allowance is necessary to arrive at the value of the product." In conclusion, MMS admits that, "when processing * * * results in the recovery of a manufactured product such as sulfur * * *, its value for royalty purposes is reduced by the costs of manufacture in the form of

[1] The discussion in question was that summarized in the third sentence of Headnote 1 of the decision: "The sulphur contaminants are not liquid hydrocarbons, so that their removal is not 'processing' under 30 CFR 206.152 (1987)." Also, we stated as follows in note 6 of the decision:

"The Director held that what distinguishes treatment and processing is the creation of 'a new, chemically distinct product.' While MMS' assertion may be correct in the post-1988 regulations, we can find no support for this interpretation in regulations in effect in 1987, the Conservation Division Manual, or Board precedent." *Exxon Co., U.S.A.*, 121 IBLA at 243 n.6, 98 I.D. at 414 n.6.

a processing allowance" (MMS Answer at 2). MMS does not specify the amount of the "processing allowance" or any legal authority therefor, but it is likely that it refers to the "reasonable allowance" of up to "two-thirds of the value of the substances extracted" provided for by 30 CFR 206.152(a)(2) (1987).

In view of Chevron's demonstration that MMS has in the past followed a policy at variance from that described in *dictum* in *Exxon Co., U.S.A., supra*, and MMS' apparent agreement with that showing, we deem it appropriate to strike those portions of the decision stating or implying that the processing allowance of 30 CFR 206.152(a)(2) (1987) applies only to extraction and sale of liquid hydrocarbons.[2]

However, we adhere to our holding that MMS properly disallowed the 12-percent adjustment made by Exxon and Chevron for costs associated with removal of H2S gas, as those costs were "costs of treatment" and, as such, not deductible from royalty basis under 30 CFR 250.42 (1987). *Exxon Co., U.S.A.*, 121 IBLA at 247, 98 I.D. at 416. Even if a "processing allowance" might properly be granted under 30 CFR 206.152(a)(2) (1987), for extracting non-hydrocarbons from the gas, Chevron does not allege that the costs represented in that factor were incurred as a result of "processing" the gas for recovery of constituent products.[3] *See Exxon Co., U.S.A.*, 121 IBLA at 246, 98 I.D. at 416. The fact that a portion of the costs of extracting sulfur from the gas stream might, in circumstances not presented here, be regarded as a cost of processing entitling a lessee to a limited deduction (up to two-thirds of the value of any sulfur extracted) in no way alters our holding that MMS properly found those costs in this case to be costs of "treatment" and, as such, not deductible.

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 in *Exxon Co., U.S.A., supra*, is reaffirmed as modified by this order.

DAVID L. HUGHES
Administrative Judge

I CONCUR:

JAMES L. BYRNES
Chief Administrative Judge

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[2] Although we do not repudiate that statement, we agree that the question of the applicability of 30 CFR 206.152(a)(2) (1987) to the extraction of liquid hydrocarbons from the gas stream may be properly dealt with only in the context of an appeal directly challenging the granting or denial of such allowance where sulfur or other non-hydrocarbon is being extracted and sold. Such was not the case here. Chevron acknowledges in its petition that the hydrogen sulfide (H2S) gas was not processed into sulfur and sold, but was instead treated as a waste product and disposed of (Petition at 4).

[3] As noted above, it expressly acknowledges that the gas was not processed for the recovery of sulfur.

APPEAL OF DAMES & MOORE

IBCA-2553 Decided: *October 7, 1992*

Contract No. 68-01-3878, Environmental Protection Agency.

Appeal Sustained.

1. Contracts: Construction and Operation: Actions of Parties--Contracts: Construction and Operation: Allowable Costs--Contracts: Construction and Operation: Contract Clauses--Contracts: Construction and Operation: Notices

When, despite an adequate accounting system, a contractor did not foresee an overrun in indirect costs prior to completion of its work under its cost-plus-fixed-fee contract with EPA for a wastewater facilities survey, and so was unable to provide advance notice of the overrun under the contract's Limitation of Funds or Limitation of Cost clauses, those clauses did not preclude recovery of the overrun. The contractor's awareness that its fringe benefit rate exceeded the contract's provisional rate did not constitute foreknowledge of the overrun. In fact, it had projected during performance that it would remain on budget. It established that the increase in fringe benefit costs amounted only to about 44 percent of the total contract overrun, and about 55 percent of the overrun in indirect costs claimed, which was due in large part to resolution by DCAA, at the end of the contract work, of substantial cost issues in the contractor's favor, and to increased overhead resulting from unexpected conflict in Iran that disrupted its business.

2. Contracts: Construction and Operation: Actions of Parties--Contracts: Construction and Operation: Allowable Costs--Contracts: Construction and Operation: Contract Clauses--Contracts: Construction and Operation: Notices

The Board found that EPA was not prejudiced. The contractor reported the overrun within a reasonable time after completion of the work, before the contract's actual completion date. By the apparent time of the overrun, the contract already had been fully funded, so there was no meaningful funding, or work cessation, election for the contracting officer or the contractor, respectively, to make under the contract's fund and cost limitation clauses. Moreover, the Board found no evidence that EPA was displeased with the contractor's work, or would have refrained from funding the overrun, or would have terminated the work, if the contractor had been able to report the overrun earlier. Rather, EPA considered the work, necessary for a biennial report to Congress, to be high priority and subject to a strict completion schedule. There was no question that the overrun, undisputed in amount, consisted of allowable costs under the contract's Allowable Cost, Fixed Fee, and Payment clause, and the contractor was entitled to be paid for it.

APPEARANCES: Alan Dickson, Epstein Becker & Green, Los Angeles, California, for Appellant; Thomas J. Doherty, Avital J. Zemel, Government Counsel, Washington, D.C., for the Government.

OPINION BY ADMINISTRATIVE JUDGE ROME

INTERIOR BOARD OF CONTRACT APPEALS

Dames and Moore (D&M) appeals, pursuant to the Disputes clause of its above 1977 cost-plus-fixed-fee (CPFF) contract with the Environmental Protection Agency (EPA), from the contracting officer's August 4, 1988, decision denying its October 16, 1987, $133,636 cost overrun claim.[1] The contracting officer denied the claim on the ground that the contractor had not provided advance notice of the overrun under the contract's Limitation of Cost (LOC) clause. We dismissed the appeal without prejudice to enable the parties to attempt settlement. We reinstated it in September 1990, when settlement did not ensue. The parties submitted the appeal on the record, pursuant to Board Rules 4.112 and 4.114, and completed all briefing on September 15, 1992. Except for certain alleged facts presented in declarations, most material facts are uncontested, as is quantum. For the reasons set forth below, we sustain the appeal.

FINDINGS OF FACT

Background

On June 10, 1977, EPA issued a Request for Proposals for sanitary engineering technical services in connection with a 1978 cost estimate, pursuant to the Federal Water Pollution Control Act Amendments of 1972 (P.L. 92-500, § 2, 86 Stat. 895, codified, after amendments not material here, at 33 U.S.C. § 1375, for the construction of wastewater treatment facilities throughout the United States (1978 Needs Survey). EPA was required to provide such estimates every 2 years to Congress, which allocated Federal construction grants accordingly (Appeal File (AF) 3 at 16, 23, 55; 8/24/90 Declaration of C. Keith Ramsey, D&M's Manager of Government Contracts and Assistant Controller (Ramsey Dec.) ¶ 2; Complaint and Answer ¶ 3).

2. D&M, a partnership with 102 partners as of the date of its proposal, and offices throughout the United States and worldwide, primarily performs professional engineering and analytical services in environmental and earth sciences areas, for private and public customers (Complaint and Answer, ¶ 2; AF 4 at 67, 80).

3. D&M's fiscal year (FY) runs from the last Friday in March to April 1 (AF 4 at 75; Ramsey Dec. ¶ 4).

4. Most of D&M's Federal contracts are CPFF, with a Negotiated Overhead Rates clause (below), requiring it to negotiate provisional indirect cost rates, with final rates based upon actual costs negotiated later, after audit. The Federal Emergency Management Agency (FEMA) serves as its cognizant contracting agency, with which cost negotiations technically occur. The Defense Contract Audit Agency (DCAA) performs the audits for the Government. It takes about 3 months from the end of D&M's fiscal year for costs to be collected and audited by D&M's outside auditors. Thereafter, D&M submits its proposed indirect cost rates for DCAA audit and negotiation. Then, formal negotiation is held with FEMA. The rates must be approved

[1] D&M did not elect to pursue its appeal under the Contract Disputes Act of 1978, 41 U.S.C. § 601. See the Board's "Order Confirming that Appeal is a Pre-Contract Disputes Act Appeal," dated Sept. 22, 1992.

ultimately by the agency involved with the particular contract at issue, here, EPA (AF 4 at 71; Ramsey Dec. ¶ 4).

5. Prior to its proposal on this contract, D&M had a Job Reporting System to assist in billing. It did not gather indirect costs. Before FY 1975-76, D&M had only three cost-reimbursable contracts subject to DCAA audit and was able timely to report cumulative costs by contract. However, by FY 1975-76, D&M had 15-20 such contracts. DCAA found D&M's accounting system unacceptable for Government cost-type contracts. On November 4, 1976, D&M met with DCAA, which explained its exceptions to the system, and D&M agreed to implement one that would meet DCAA's requirements (AF 1 at 11-12, AF 64, No. 1).

6. On July 11, 1977, D&M submitted its initial proposal for the 1978 Needs Survey. EPA had awarded D&M a $2.2 million CPFF contract in connection with its 1976 Needs Survey. D&M had performed that contract, and was performing at least its two other largest CPFF Government contracts with other agencies, with no cost overruns or underruns as of its proposal. At the time, about 21 percent of its business involved Federal Government contracts (AF 4 at 68, 72, 77-78).

7. D&M's indirect cost rates for FY 1975-76 were regular staff overhead (Labor A), 118 percent; field overhead for staff hired and trained for a job, 69.3 percent (Labor B); and fringe benefit, 29 percent. DCAA had audited and accepted the rates and had approved D&M's estimating system. DCAA's last pre-award audit review had occurred in April 1977. D&M had not been successful in negotiating a Forward Pricing Agreement with DCAA. The most recently approved FY 1975-76 rates were the only ones DCAA would accept for use in negotiating a new contract. Thus, for the 1978 Needs Survey contract, D&M proposed provisional indirect rates of 118 percent, 69.3 percent, and 29 percent, respectively (AF 2, AF 4 at 75-76, 92, AF 64, No. 8; Ramsey Dec. ¶ 8).

8. The costs included in D&M's relevant indirect cost pool for fringe benefits, allocated based upon direct labor dollars, consisted of vacation, holiday, and sick pay; payroll taxes; group insurance; retirement costs and profit sharing; and allowances and termination benefits. The overhead expense pool, to which costs were allocated based upon direct labor and fringe benefit dollars, contained all indirect expenses (AF 28 at 323, AF 64, No. 9).

9. In the summer of 1977, at about the time of D&M's proposal, it began using a computerized "Government Accounting System" (GAS), which reported the actual direct labor hours of each direct labor employee and allocated them to particular jobs. It also reported and allocated "other direct costs," such as equipment and travel expenses. GAS' reports, issued every 4 weeks, served as an audit trail and a basis for periodic billing on cost-reimbursable contracts. However, D&M's GAS system was not designed to capture, allocate, or report actual indirect costs as they were incurred during each period. Rather,

those costs were gathered and analyzed on an annual basis following the close of D&M's fiscal year and were reported as "burden" upon D&M's direct labor hours. The GAS could be upgraded to report actual indirect costs monthly, but D&M's Government business during 1977-79 dropped to less than 10 percent of its total business. D&M determined, therefor, that the expense of upgrading the GAS was not justified. In 1980-81, after work was complete on this contract, when D&M believed its Government business was expanding, it attempted to measure its periodic indirect costs in some circumstances, but the effort was not particularly successful. As a geotechnical firm concerned with soils conditions, D&M's work is seasonal. Because its indirect cost rates fluctuate inversely to business activity, its monthly indirect cost rates tended to be distorted depending upon the season and the weather in widely varying areas of the world (AF 64, No. 1; Ramsey Dec. ¶ 5).

10. During FY 1976-77, based upon a study by an outside accounting firm, D&M refined its fringe rate computations and sought to calculate indirect cost rates for Government contracts on a firmwide—meaning worldwide—basis. Prior to FY 1976-77, they were not calculated firmwide. In about June 1977, D&M first calculated its firmwide indirect cost rates for FY 1976-77 at fringe, 42.7 percent, and regular overhead, 110.5 percent. The FY 1975-76 fringe rate, which D&M had been required to use in its proposal, was lower than it would have been with a firmwide pool, because a considerable amount of overseas fringe expense had been excluded. DCAA eventually allowed D&M to use firmwide fringe and overhead costs for all Government contracts, including those already in place, effective FY 1976-77, but it did not accede to this approach until late May 1979, several days after the contract was substantially complete (AF 64, Nos. 10, 13; Supplemental Appeal File (SAF) 60; Ramsey Dec. ¶¶ 10, 13).

11. On September 30, 1977, EPA awarded the contract to D&M, in the amount of $1,776,975, including estimated cost of $1,653,000 and fixed fee of $123,975. The original performance period was 19 months, ending April 30, 1979. EPA issued five modifications, culminating in the extension of the contract completion date to October 31, 1979, and increasing the total estimated CPFF to $2,150,000, including estimated cost of $2,000,000 and fixed fee of $150,000. The contract period included D&M's FY 1977-78, 1978-79, and 1979-80 (AF 7 at 122, 124, AF 15, AF 24; Ramsey Dec. ¶ 2).

Contract Provisions

12. Under Article IV of the contract, Reports of Work, D&M was to submit a monthly financial report in graph form relating costs incurred to costs initially projected; depicting actual cumulative costs to date by month; and reflecting D&M's current estimate of cost to contract completion. Copies were to be submitted to EPA's Project Officer, the

contracting officer, and EPA's Cost Review and Policy Branch. Article IV provided:

> 3. This Financial Management Report in no way changes the notification requirements of the [LOC] clause * * *, nor does submission of the report constitute notice as required by the [LOC] clause. The Notice to the Contracting Officer required by the [LOC] clause is required as a separate notice in accordance with the provisions of said clause.

(AF 7 at 125-26).

13. Article X, Negotiated Overhead Rates, provided:

> Notwithstanding the [Allowable Cost, Fixed Fee and Payment clause], the allowable indirect costs under this contract shall be obtained by applying negotiated overhead rates to bases agreed upon by the parties, as specified below:
>
> Negotiation of final overhead rates shall be in accordance with Paragraph (b), Clause 40, General Provisions.
>
> * * * * * * *
>
> Pending establishment of final indirect cost rates for any period, the Contractor will be reimbursed for allowable indirect cost, not claimed elsewhere, at the provisional rates listed below [118 percent, regular overhead; 69.3 percent, field overhead]. Such provisional rate(s) may, at the request of either party, be revised by mutual consent.

(AF 7 at 128-29).

14. General Provisions, Clause 3, Allowable Cost, Fixed Fee, and Payment (Payment clause), provided that the Government was to pay the cost of contract performance determined by the contracting officer to be allowable under 41 CFR 1-15.2 and the contract's terms, plus fixed fee. The term "costs" included direct costs and "properly allocable and allowable indirect costs." Costs were subject to audit (AF 7 at 149-51).

15. General Provisions, Clause 25, Audit, provided, *inter alia*, that the contracting officer or his representatives had the right to examine the contractor's books and records "and accounting procedures and practices" at all reasonable times in connection with all direct and indirect costs incurred or anticipated during contract performance (AF 7 at 171-72).[2]

16. General Provisions, Clause 40, Negotiated Overhead Rates, provided:

> (a) Notwithstanding the [Payment clause], the allowable indirect costs under this contract shall be obtained by applying negotiated overhead rates to bases agreed upon by the parties, as specified below.
>
> (b) The Contractor, as soon as possible but not later than [90] days after the expiration of his fiscal year, or such other period as may be specified in the contract, shall submit to the Contracting Officer, with a copy to the cognizant audit activity, a proposed final overhead rate or rates for that period based on the Contractor's actual cost experience during that period, together with supporting cost data. Negotiation of overhead rates by the Contractor and the Contracting Officer shall be undertaken as promptly as practicable after receipt of the Contractor's proposal.
>
> * * * * * * *
>
> (e) Pending establishment of final overhead rates for any period, the Contractor shall be reimbursed either at negotiated provisional rates as provided in the contract, or at

[2] The contract also contained a Cost Accounting Standards (CAS) clause (AF 7 at 186-87). D&M 's proposal, however, indicates that it was exempt from CAS' regulatory disclosure requirements (AF 4 at 75, 86-87).

billing rates acceptable to the Contracting Officer, subject to appropriate adjustment when the final rates for that period are established. To prevent substantial over or under payment, and to apply either retroactively or prospectively: (1) Provisional rates may, at the request of either party, be revised by mutual agreement, and (2) billing rates may be adjusted at any time by the Contracting Officer.

(AF 7 at 190)

17. Article XXI, Incremental Funding, provided that, pursuant to the contract's Limitations of Funds (Incrementally Funded) (LOF) clause, $772,093 for costs and $57,907 for fee were available for the period ending March 31, 1978 (AF 7 at 133).

18. The LOC clause provided:

(a) It is estimated that the total cost to the Government for the performance of this contract, exclusive of any fee, will not exceed the estimated cost set forth in the Schedule, and the Contractor agrees to use his best efforts to perform the work specified in the Schedule and all obligations under this contract within such estimated cost. If, at any time, the Contractor has reason to believe that the costs which he expects to incur in the performance of this contract in the next succeeding 60 days, when added to all costs previously incurred, will exceed 75 percent of the estimated cost then set forth in the Schedule, or if, at any time, the Contractor has reason to believe that the total cost to the Government for the performance of this contract, exclusive of any fee, will be greater or substantially less than the then estimated cost hereof, the Contractor shall notify the Contracting Officer in writing to that effect giving the revised estimate of such total cost for the performance of this contract.

(b) Except as required by other provisions of this contract specifically citing and stated to be an exception from this clause, the Government shall not be obligated to reimburse the Contractor for costs incurred in excess of the estimated cost set forth in the Schedule, and the Contractor shall not be obligated to continue performance under the contract (including actions under the Termination clause) or otherwise to incur costs in excess of the estimated cost set forth in the Schedule, unless and until the Contracting Officer shall have notified the Contractor in writing that such estimated cost has been increased and shall have specified in such notice a revised estimated cost which shall thereupon constitute the estimated cost of performance of this contract. No notice, communication, or representation in any other form or from any person other than the Contracting Officer shall affect the estimated cost of this contract. In the absence of the specified notice, the Government shall not be obligated to reimburse the Contractor for any costs in excess of the estimated cost set forth in the Schedule, whether those excess costs were incurred during the course of the contract or as a result of termination. When and to the extent that the estimated cost set forth in the Schedule has been increased, any costs incurred by the Contractor in excess of the estimated cost prior to such increase shall be allowable to the same extent as if such costs had been incurred after the increase; unless the Contracting Officer issues a termination or other notice and directs that the increase is solely for the purpose of covering termination or other specified expenses.

(c) Change orders issued pursuant to the Changes clause of this contract shall not be considered an authorization to the Contractor to exceed the estimated cost set forth in the Schedule in the absence of a statement in the change order, or other contract modification, increasing the estimated cost.

(d) In the event that this contract is terminated or the estimated cost not increased, the Government and the contractor shall negotiate an equitable distribution of all property produced or purchased under the contract based upon the share of costs incurred by each.

(AF 7 at 148-49).

19.The LOF clause, as amended, provided:

(a) It is estimated that the cost to the Government for the performance of this contract will not exceed the estimated cost set forth in the Schedule, and the Contractor agrees to use his best efforts to perform the work specified in the Schedule and all obligations under this contract within such estimated cost.

(b) The amount presently available for payment and allotted to this contract, the items covered thereby, the period of performance which it is estimated the allotted amount will cover, are specified in the Schedule. It is contemplated that from time to time additional funds will be allotted to this contract up to the full estimated cost set forth in the Schedule, exclusive of any fee. The Contractor agrees to perform or have performed work on this contract up to the point at which the total amount paid and payable by the Government pursuant to the terms of this contract approximates but does not exceed the total amount actually allotted to the contract.

(c) If at any time the Contractor has reason to believe that the costs which he expects to incur in the performance of this contract in the next succeeding 60 days, when added to all costs previously incurred, will exceed 75 percent of the total amount then allotted to the contract, the Contractor shall notify the Contracting Officer in writing to that effect. The notice shall state the estimated amount of additional funds required to continue performance for the period set forth in the Schedule. Sixty days prior to end of the period specified in the Schedule the Contractor will advise the Contracting Officer in writing as to the estimated amount of additional funds, if any, that will be required for the timely performance of the work under the contract or for such further period as may be specified in the Schedule or otherwise agreed to by the parties. If, after such notification, additional funds are not allotted by the end of the period set forth in the Schedule or an agreed date substituted therefor, the Contracting Officer will, upon written request by the Contractor, terminate this contract pursuant to the provisions of the Termination clause on such date. If the Contractor, in the exercise of his reasonable judgment, estimates that the funds available will allow him to continue to discharge his obligations hereunder for a period extending beyond such date, he shall specify the later date in his request and the Contracting Officer, in his discretion, may terminate this contract on that later date.

(d) Except as required by other provisions of this contract specifically citing and stated to be an exception from this clause, the Government shall not be obligated to reimburse the Contractor for costs incurred in excess of the total amount from time to time allotted to the contract, and the Contractor shall not be obligated to continue performance under the contract (including actions under the Termination clause) or otherwise to incur costs in excess of the amount allotted to the contract, unless and until the Contracting Officer has notified the Contractor in writing that such allotted amount has been increased and has specified in such notice an increased amount constituting the total amount then allotted to the contract. To the extent the amount allotted exceeds the estimated cost set forth in the Schedule, such estimated cost shall be correspondingly increased. No notice, communication, or representation in any other form or from any person other than the Contracting Officer shall affect the amount allotted to this contract. In the absence of the specified notice, the Government shall not be obligated to reimburse the Contractor for any costs in excess of the total amount then allotted to the contract, whether those excess costs were incurred during the course of the contract or as a result of termination. When and to the extent that the amount allotted to the contract has been increased, any costs incurred by the Contractor in excess of the amount previously allotted shall be allowable to the same extent as if such costs had been incurred after such increase in the amount allotted; unless the Contracting Officer issues a termination or other notice and directs that the increase is solely for the purpose of covering termination or other specified expenses.

(e) Change orders issued pursuant to the Changes clause of this contract shall not be considered an authorization to the Contractor to exceed the estimated cost set forth in the Schedule in the absence of a statement in the change order, or other contract modification, increasing the amount allotted.

(f) Nothing in this clause shall affect the right of the Government to terminate this contract. In the event this contract is terminated, the Government and the Contractor shall negotiate an equitable distribution of all property produced or purchased under the contract based upon the share of costs incurred by each.

(g) In the event that sufficient funds are not allotted to this contract to allow completion of the work contemplated by this contract, the Contractor shall be entitled to that percentage of the fee set forth in the Schedule equivalent to the percentage of completion of the work contemplated by this contract.

(h) This clause shall be applicable and the [LOC] clause inapplicable until such time as an amount equal to the total estimated cost and fee set forth in the schedule is allotted to this contract, and thereafter the [LOC] clause shall be applicable and this clause inapplicable.

(AF 7 at 201-03).

20. The contract also contained Changes, Disputes, and Payment of Interest on Contractors' Claims clauses (AF 7 at 160, 177, 180-81).

Events During the Course of Contract

21. In response to a September 30, 1977, request from EPA's Cost Review and Policy Branch for proposed final overhead rates for FY 1976-77, on October 5, 1977, D&M proposed 35 percent for fringe and 113.4 percent for regular overhead,[3] noting that DCAA had not yet audited its figures (AF 8, AF 9).

22. Unilateral Modification 1, effective March 10, 1978, increased LOF cost and fee funding to $1,494,139 and $102,061, respectively (AF 10).

23. An internal D&M project status memorandum dated March 17, 1978, stated that "The overall budget picture on the job is favorable, but tight, with present projected expenditures coming in on budget" (SAF 53).

24. On March 14 and April 14, 1978, D&M proposed equitable adjustments based upon changed EPA and statutory requirements. The parties agreed to increase estimated cost and fee in by $305,970 and $22,948, respectively, and executed Bilateral Modification 2, effective July 31, 1978. Its stated purpose was to change the scope of work, pursuant to the Changes clause, and the estimated cost and fee, to provide funding under the *LOC* clause. However, it increased the estimated cost and fee to $1,958,970 and $146,923, for a total CPFF of $2,105,893, and amended the Incremental Funding clause to provide that, pursuant to the *LOF* clause, $1,800,109 for costs and $125,009 for fee was now available (AF 11 at 259-60; SAF 52, SAF 54, SAF 56).

25. Unilateral Modification 3, executed September 27, 1978, provided final incremental funding of $170,780 and deleted the Incremental Funding clause from the contract. It involved no change in estimated cost or fee (AF 12).

26. By letter dated October 1, 1978, D&M notified EPA's Project Officer, with a copy to the contracting officer, as follows:

[3] Once regular overhead is established, field overhead is easy to compute (AF 37 at 374).

> As required by contract, under the [LOC] clause we hereby are notifying you that we have reached 75 percent of the allowable costs under our contract * * * This includes both modifications * * *. [4]
>
> It is expected that the remaining funds will support [D&M's] work effort through approximately February 11, 1979, and that this same date will be the one at which time the scope of work will be completed. If this situation should change between now and February 11, 1979, we will notify you immediately.
>
> If you require any additional information please contact us.

(AF 13).

27. On February 23, 1979, EPA noted that it had not received D&M's proposed final overhead rates for FY 1977-78. On March 14, 1979, D&M replied that it had not submitted the rates because DCAA was still auditing the proposed rates for FY 1976-77, which D&M had submitted in October 1977. DCAA had questioned some pool elements. D&M stated that it would submit the 1977-78 proposed rates when negotiations with DCAA were completed and invited EPA to call if it had questions. On July 31, 1979, after it had reached a favorable agreement with DCAA on allowable costs in late May 1979 (below), D&M informed EPA that it had been able to analyze its FY 1977-78 figures and proposed a fringe rate of 45.3 percent and a regular overhead rate of 100.5 percent. It had submitted the rates to DCAA, which had not yet responded (AF 14, AF 16, AF 21).

28. Unilateral Modification 4, issued on March 6, 1979, just prior to the end of D&M's FY 78-79, documented a directed change under the Changes clause expanding the contract's scope of work; provided interim funding of $25,000; extended the contract completion date to October 31, 1979; increased the estimated cost to $1,983,970, leaving the fee, then $146,923, unchanged, for a CPFF of $2,130,893; and provided that D&M's equitable adjustment proposal was due within 30 days of receipt of the modification (AF 15).

29. Modification 4's expanded statement of work emphasized that management of the Construction Grants Program had become one of EPA's top priorities. EPA required a computer system to provide information on contracts awarded for the construction of wastewater facilities. The information was essential to the accurate estimation and management of Federal funds, to the goals of the Needs Survey, and to meeting the Federal statutory requirements. D&M was to develop computer programs to support a contract level file maintenance system and a series of output reports to manage contract data, and a Users Manual. D&M also was to serve as an on-site consultant at various locations and to work closely with EPA. The system was to be technically operational by May 4, 1979 (AF 15).

30. EPA had a strong interest in the completion of the 1978 Needs Survey and insisted that D&M adhere to schedule (Ramsey Dec. ¶ 3).

31. On March 21, 1979, D&M submitted a modification proposal with a total direct labor cost of $15,055, including about $4,525 of fringe benefit costs, resulting in an estimated fringe rate of over 41 percent,

[4] It appears that D&M had not received unilateral Modification 3 by the time of this letter. It is likely, but not clear, that it was aware of the "final" funding increment to be provided by that modification.

and an estimated regular overhead rate of 113.4 percent. D&M reduced its proposed fee from 10 to 7.5 percent. This was one of the first times, and the first time of record for this contract, that D&M proposed an indirect cost rate different than its previously negotiated rate. EPA's contract personnel, thus, were aware prior to completion of the contract work, that D&M projected indirect rates higher than the provisional rates contained in the contract (AF 17, AF 20, AF 64, No. 21).

32. On April 12, 1979, EPA's Project Officer recommended acceptance of all costs as proposed (AF 23 at 286).

33. On May 4, 1979, EPA requested assistance from its Washington Cost Advisory Operations Office (WCAO). WCAO sought additional information from D&M, but did not inquire about the increase in its proposed fringe and overhead rates. On June 29, 1979, WCAO recommended acceptance of total costs at $37,391, based upon 35.9 percent fringe and 113.4 percent regular overhead rates (AF 19, AF 20, AF 23 at 287).

34. WCAO concluded that "[t]he contractor's cost accounting system is considered adequate for Government contracts" and that "[t]he results of our review of the subject proposal are based upon adequate cost and pricing data available and sufficiently documented in our files" (AF 20 at 282).

35. In the meantime, D&M completed contract performance during the week ending May 18, 1979 (AF 25; Ramsey Dec. ¶ 2).

36. In late May 1979, after 2 years of negotiations regarding allowable expenses in D&M's overhead pools, DCAA found in D&M's favor on all major points (although some issues were not resolved formally until January 1982). DCAA had been asserting a potential disallowance of over $900,000. Among other things, newly allowable expenses included D&M's firmwide overhead and overseas losses experienced in Beirut and Iran (SAF 60; Ramsey Dec. ¶ 13).

37. By letter dated May 25, 1979, D&M sought approval from DCAA to use provisional estimated fringe and regular overhead rates of 43 and 115 percent, which it had projected based upon its actual performance in FY 1978-79, for future proposals on Government contracts. Improved computer techniques had enabled it to calculate estimated firmwide overhead rates more promptly following the close of the fiscal year than previously. DCAA approved the rates, effective April 1, 1979. D&M, accordingly, advised EPA that the indirect rates WCAO had recommended for Modification 4 were not current, and DCAA verified its approval of the new rates to EPA (AF 23 at 287, 292; SAF 60; Attachment to AF 64).

38. On August 8, 1979, D&M and EPA 's Contract Specialist agreed by telephone to an equitable adjustment based upon Modification 4, including fringe at 43 percent and overhead at 115 percent. On August 31, 1979, the Contract Specialist recommended that EPA accept the adjustment. He added that the contract's provisional

overhead rate of 118 percent would not be adjusted until EPA approved final rates. He noted that D&M had accepted the unilateral change order; had performed the work satisfactorily within the desired time frame; and that the adjustment was fair and reasonable and in the best interests of the Government. EPA approved on September 27, 1979, and bilateral Modification 5 was issued that day. In addition to the $25,000 provided by Modification 4, Modification 5 increased the contract's estimated cost by $16,030, to $2,000,000, and the fee by $3,077, to $150,000, for a CPFF of $2,150,000 (AF 22, AF 23 at 288-90, AF 24).

39. DCAA for many years has been aware of D&M's GAS cost accounting system in effect since the summer of 1977, has reviewed it from time to time, and has not declared it inadequate or inappropriate (AF 64, No. 1; Ramsey Dec. ¶ 5).

Contractor's Overrun and Claim

40. D&M's Assistant Controller and Manager of Government Contracts, Mr. Ramsey, was not aware of the imminence of an overrun on the contract until early August 1979, when data became available from FY 1978-79, and he was able to make rough, preliminary overhead and fringe rate calculations, taking into account the firmwide indirect cost rates authorized by DCAA in late May 1979, and the partial resolution at that time of D&M's cost disputes with DCAA, including the allowance of the challenged costs in excess of $900,000. Had DCAA's views prevailed, the several years DCAA still was auditing would have been affected, and the overhead rate for FY 1978-79 would have dropped by 5.2 percent, offsetting any rise in fringe rates for that year (Ramsey Dec. ¶¶ 7, 13).

41. On August 8, 1979, during the same telephone conversation in which they agreed to an equitable adjustment for Modification 4, D&M reported to EPA's Contract Specialist that its fringe and overhead for FY 1978-79 ran significantly higher than predicted, resulting in an estimated under collection of $100,000 on the contract. By letter dated August 13, 1979, to the Project Specialist, D&M confirmed its oral notice, stating that a detailed analysis was in progress and it expected to submit a more refined estimate to the contracting officer shortly (AF 22).

42. As of the completion of the contract work, however, DCAA had not even started its audits of the years affected. In February 1980, EPA requested that D&M initiate close-out procedures. D&M submitted an overrun claim to the contracting officer on October 3, 1980, using unaudited rates. On July 24, 1986, after DCAA audits and negotiated overhead rate agreements had been completed for FY 1977-78, 1978-79, and 1979-80 (except for field overhead for FY 1978-79), D&M submitted a revised claim. EPA found the claim unjustified due to alleged lack of timely notice to the contracting officer of the overrun (AF 26, AF 36-38, AF 40, AF 43, AF 44).

43. On October 16, 1987, D&M submitted its final claim, requesting a contracting officer's decision. D&M noted a total cost overrun of $180,043, despite a $51,698 underrun in direct labor costs. D&M did not seek reimbursement for $46,407 of the overrun, for materials, travel and other direct costs it attributed largely to work imposed by Modification 2, mainly because it had failed to include them in its equitable adjustment negotiations at the time. Rather, pursuant to the Negotiated Overhead Rates clause, based upon audited rates, D&M claimed $133,636 in indirect costs incurred for labor and overhead in excess of the amount paid under the provisional rates. The overrun amounted to about 6 percent of the final estimated CPFF (AF 45, AF 47; Ramsey Dec. ¶ 2).

44. By final decision dated August 4, 1988, relying upon the LOC clause, the contracting officer denied D&M's claim, on the sole ground that it did not provide timely notice of a foreseeable overrun, which he attributed entirely to increased fringe costs:

> Finally, to be aware of this overrun, it was only necessary for the Contractor to know that its actual fringe benefit costs were higher than the fringe benefit costs (rate) contained in [D&M's] initial cost proposal. All other factors being equal, an overrun may be expected when actual costs exceed or are expected to exceed the contract's projected cost for that element. Here, the overrun was in the Fringe Benefits where [D&M] must have been intimately aware of any changes which would cause an increase or decrease in the indirect rate.

(AF 48 at 407). The contracting officer erroneously calculated that D&M's fringe pool increased by 233 percent from FY 1976 to FY 1979. The actual increase was 133 percent (AF 48 at 405; D&M 3/9/89 Letter at 7). This appeal followed.

Evolution of the Overrun and Foreseeability

45. The amount of the $133,636 overrun is not disputed, but the parties were unable to stipulate to its composition. Appellant's analysis is reasonable, supported by documentation, uncontroverted by EPA, and we adopt it. D&M experienced an overrun of indirect costs in the amount of $185,334, offset by a direct labor underrun of $51,698, resulting in the $133,636 figure. That claimed amount consists of indirect costs, composed of fringe benefit costs and two types of overhead—regular and field—for 2 of the 3 fiscal years involved. Field overhead was eliminated for the third fiscal year at issue, FY 1979-80, involving only about 6 weeks of work. Except for FY 1979-80 (see below), proposed regular overhead rates were always lower than the provisional 118-percent rate billed. Including field overhead, however, overhead billings were $801,334, but total overhead incurred was $883,188, for an overrun of $81,854, or about 45 percent of the total $185,334 overrun in indirect costs. Fringe accounted for the remaining 55 percent. The same ratio reasonably can be applied to the $133,636 figure, which, thus, consisted of about 55 percent in fringe benefit costs and 45 percent in regular and field overhead. Moreover, including the

$46,407 overrun in travel, materials and other direct costs for which D&M did not claim, the total overrun base was $231,741, of which fringe benefit costs were only about 44 percent (AF 45, schedules 1 and 2, AF 64, Nos. 15, 16, 18; Ramsey Dec. ¶ 12; Appellant's 5/21/92 Response to Board's 2/12/92 Call for Quantum Information).

46. D&M knew during contract performance that its fringe benefit rate was exceeding the 29-percent provisional rate, but it allocated and billed indirect costs at the provisional rates because DCAA did not conclude audit and negotiation of the indirect rates until long after the contract was completed (AF 64, Nos. 1, 5, 19; Ramsey Dec. ¶ 8).

47. Beginning with FY 1976-77, when D&M's Government business increased, DCAA reviewed D&M's final overhead rate proposals much more intensely than in prior years. Final indirect cost rate agreements for the years of contract performance, which involved D&M, DCAA, FEMA, and EPA, took years to achieve, as follows:

Date of Agreement	FY	Fringe (Percent)	Labor A (Percent)	Labor B (Percent)
1/6/82	1976-77	42.7[1]	110.5[2]	75.8
2/20/84	1977-78	43.4[3]	99.6[4]	67.4
11/14/84	1978-79	45.6[5]	114.5[6]	80.1
12/23/85	1979-80	42.6[7]	116.8[8]	N/A

1 (42.7 percent proposed)
2 (110.5 percent proposed)
3 (45.3 percent proposed)
4 (100.5 percent proposed)
5 (43 percent proposed)
6 (116.8 percent proposed)
7 (45.6 percent proposed)
8 (120.7 percent proposed)

(AF 1 at 11-12, AF 21, AF 27, AF 28-35, AF 37 at 374, 377, AF 39, AF 64, Nos. 10-12; SAF 60; Ramsey Dec. ¶ 8).[5]

48. The negotiated rate agreements provided that they were subject to limitations contained in the contracts at issue. Most mentioned the LOC clause (AF 29, AF 30, AF 32, AF 35).

49. DCAA's close-out cost audit, delayed several years pending completion of the audits and negotiations regarding final indirect cost rates, was not completed until 1987 (Ramsey Dec. ¶ 9).

50. D&M's new use of a firmwide pool for indirect costs and refinements to its methods of calculating fringe rates contributed to a rise in its fringe rate, but it was not alerted to an imminent overall indirect cost overrun, both because approval to use the firmwide pool was not obtained until several days after the close of the contract, and because other factors influenced its overall expenditures during the contract period. D&M's fringe and overhead rates can go up or down independently of the dollar amounts in its cost pools. The primary determining factor is its "direct labor ratio." A high level of business

[5] It is not clear whether the FY 1976-77 rate, and other rates cited as "proposed," were the rates D&M first estimated and presented or "proposed" rates reached by agreement during audit. The exact amount and timing of overhead and fringe rates as first estimated by D&M, compared to officially "proposed" rates, and modified proposals after audit, and the precise percentages, are not material, however. The point is that proposed and accepted rates often differed and final agreement took a long time to achieve.

increases the ratio and produces lower overhead and fringe rates. The reverse occurs when business is slow. Changing business volume has a large impact upon the fringe benefit rate and regular overhead rate. Due to the nature of D&M's business, it cannot predict the level of its business activity very far in advance. The direct ratio cannot be determined until its fiscal year books are closed (Ramsey Dec. ¶¶ 10, 11).

51. An increase in D&M's fringe rate does not automatically result in an actual dollar overrun. Many more dollars are included in overhead than in fringe and the regular overhead rate fluctuates independently of the fringe rate. Overhead rates decreased in FY 1977-78, while fringe increased; for FY 1978-79 both went up; and in FY 1979-80, overhead went up, but fringe went down (Ramsey Dec. ¶¶ 8, 11).

52. In FY 1977-78, when D&M's direct labor ratio increased and its overhead rate decreased, D&M's business was good. During FY 1978-79 and 1979-80, its business was affected adversely due to turmoil in Iran, the site of D&M's largest and most profitable overseas operation. It was forced to evacuate a large staff of employees there, with little or no work for them at D&M's United States' offices. Accordingly, D&M's direct labor ratio went down and its overhead increased substantially for FY 1978-79 (AF 64, No. 14; Ramsey Dec. ¶ 11).

53. The largest amount of work was performed during FY 1978-79. Direct labor charges for that period totalled $438,501, compared to $192,955 for FY 1977-78 and $4,135 for FY 1979-80 (covering only the final six weeks of work). For FY 1978-79, by far the largest increase over the previous year was in the overhead rate. The fringe rate increase was relatively small (AF 45 at 395; Ramsey Dec. ¶ 12).

54. The amount of direct labor required to complete the contract was difficult for D&M to gauge in advance, as EPA would decide from time to time whether to add more tasks. Despite the last-minute surge of activity occasioned by Modification 4, overall direct labor costs on the contract proved to be $51,698 less than the estimated amount negotiated for the project (see above) (Ramsey Dec. ¶ 14).

55. Mr. John J. Zabretsky, Chief of the Cost Policy & Rate Negotiation Section of EPA's Procurement and Contracts Management Division since 1980 is a certified public accountant, with an undergraduate degree in accounting and a masters degree in business administration, and over 20 years of audit and indirect rate negotiation experience with the Government. He is a contracting officer for EPA. Based upon his review of what he described as relevant portions of the record, Mr. Zabretsky concluded that: "[D&M] would have had reason to believe that its cost expenditures under the Contract would exceed the amount specified in the [LOF] clause, had D&M followed normal and reasonable accounting and business management practices

used to monitor costs under Government contracts" (6/3/91 Declaration of John J. Zabretsky ¶ 4).

56. There is no evidence that Mr. Zabretsky examined the accounting and management systems in place at D&M. D&M's "Rebuttal to EPA Submittal of 3 June 1991" adequately refutes Mr. Zabretsky's opinion, which is speculative and based in part upon cost data not available to D&M until after the end of contract performance.[6]

57. Mr. Alfred E. Johns, a retired certified public accountant, and graduate of Northwestern University, who majored in finance and accounting, is a Special Consultant with KPMG Peat Marwick's Government Contractor Advisory Service. Previously, he had over 21 years' experience at Northrup Corp., where he directed the corporate internal audit, accounting, banking and employee benefit administration functions, and was the senior corporate executive communicating with the Government on all financial matters related to Government contracting, especially compliance with cost accounting standards and cost principles contained in the Federal Acquisition Regulation. Prior to that, he had managed 15 consultants at what is now Ernst & Young, specializing in cost accounting and cost efficiency studies. Appellant offered his declaration as an expert opinion and we accept it as such (5/29/91 Declaration of Alfred E. Johns (Johns Dec.)).

58. Mr. Johns examined D&M's accounting system, ascertained the features in place from January 1, 1979, through May 31, 1979, and evaluated whether the cost accounting and cost reporting portions of the company's system depicted actual indirect cost rates, or indirect cost rate growth, to company management on any periodic basis less than annually. Mr. Johns concluded as follows:

> The answer to this question is clearly No. Both of the two systems of monthly cost reports in place at [D&M] during the period in question (and still in place today) show changes in *direct* cost incurrence, but employ indirect cost rates obtained from the cognizant government agency which are not changed until new annual indirect cost rates are negotiated. [Italics in original.]

(Johns Dec. ¶ 2).

59. Based upon D&M's accounting system, and the documents of record, Mr. Johns opined that D&M was not in a position from January 1, 1979, to May 31, 1979, to have foreseen that its total costs incurred during contract performance, including direct and indirect, overhead and fringe, would be higher than the estimated contract amount as modified, notwithstanding the company's knowledge of increased fringe benefit rates. He concluded that there was no indication that overall costs had overrun until July 1979 (Johns Dec. ¶ 3).

60. Based upon our above findings of fact (FF), including the cost documentation of record and the timing of its availability, and Mr. Ramsey's and Mr. Johns' declarations, which we find persuasive

[6] Unlike appellant with respect to Mr. Johns, below, whether intentionally or not, EPA did not offer Mr. Zabretsky's declaration formally as an expert opinion. Regardless, we do not question Mr. Zabretsky's expertise, we merely find his opinion unpersuasive in this particular matter.

and supported by relevant and material evidence, we find that, despite an adequate accounting system, D&M did not know, and did not have reason to foresee in time to provide written notice to the contracting officer prior to the conclusion of the contract work, that it would suffer a cost overrun.

DISCUSSION

[1]In reviewing contracting officers' disallowances of overruns due to alleged lack of timely notice under the LOF and LOC clauses, which are substantially similar, boards apply the same criteria. *See Carltech Associations, Inc.*, ASBCA No. 42576, BCA ¶ (July 14, 1992) (1992 Westlaw 173857); *Falcon Research & Development Co.*, ASBCA No. 26853, 87-1 BCA ¶ 19,458. This contract was fully funded by September 27, 1978 (FF 25). Although the LOF clause had applied to that point, the LOC clause became effective thereafter (FF 19, ¶ (h)). It is not clear from the record at precisely what point an overrun occurred, but the thrust of the evidence is that it developed during the later period of contract performance, most likely after the LOC clause applied. The contracting officer relied upon the LOC clause in his decision,[7] and it is to that clause that we will refer principally.

The LOC clause (FF 18) requires that the contractor notify the contracting officer in writing if, "at any time," the contractor has reason to believe that (1) its costs, during the next 60 days, when added to all costs previously incurred, will exceed 75 percent of the contract's then estimated cost, or (2) the total cost to the Government for contract performance will be more than the then estimated cost. In its notice, the contractor is to provide a revised estimate of the total cost of contract performance. If the contracting officer does not notify the contractor in writing that the estimated cost has been increased, the Government is not obligated to reimburse the contractor for costs incurred in excess of the contract's specified amount and the contractor is not obligated to continue performance under the contract.

The purpose of the contractor's notice requirement under the LOC is to enable the Government to stop the contract work before the funds then obligated for it are exhausted and to avoid the expenditure of more funds, if it so elects. *RMI, Inc.* v. *United States*, 800 F.2d 246, 248 (Fed. Cir. 1986); *Cosmic, Inc.*, ASBCA No. 15078, 72-1 BCA ¶ 9278 at 42,998. However, the Court of Claims established over 20 years ago that "[i]f the contractor has no reason to believe that an overrun is imminent, he is not required to give notice" under the clause and that "[t]he clause appears to anticipate that in some circumstances where advance authorization is not given it would be inequitable for the Government to refuse additional funding." *General Electric Co.* v. *United States*, 440 F.2d 420, 423 (Ct. Cl. 1971). The Court held that:

[7] The Government, however, used the clauses interchangeably on occasion (FF 24) and its declarant, Mr. Zabretsky, addressed the LOF clause (AF 65, ¶ 3).

[A] contracting officer abuses his discretion under paragraph (b) of the [LOC] clause if he refuses to fund a cost overrun where the contractor, through no fault or inadequacy on its part, has no reason to believe, during performance, that a cost overrun will occur and the sole ground for the contracting officer's refusal is the contractor's failure to give proper notice of the overrun.

440 F.2d at 425.

Subsequently, the Armed Services Board of Contract Appeals (ASBCA), in *ARINC Research Corp.*, ASBCA No. 15861, 72-2 BCA ¶ 9721, questioned the Court's abuse of discretion reference and based its own finding in favor of the contractor upon what it found to be the implicit ruling in *General Electric*: the Government's right to refuse funding of an overrun is dependent upon a contractor's ability to comply with the LOC clause's notice requirements. If the contractor cannot comply, the LOC clause is not a defense to funding an overrun, if it is composed of allowable costs under the contract's Payment clause.

The ASBCA recently has relied upon *General Electric's* abuse of discretion standard, *Carltech*, slip op. at 11-12. The court of appeals might have retreated from it, however (although far from certainly). In *RMI*, its most current articulation of the law, the Federal Circuit quoted selectively from *General Electric*, omitting any reference to abuse of discretion:

One of our predecessor courts has held that by its own terms [paragraph (a) of the LOC] can relieve a contractor of the notice requirement. * * * Therefore if a "contractor, through no fault or inadequacy on its part, has no reason to believe, during performance, that a cost overrun will occur and the sole ground for the contracting officer's refusal [to fund a cost overrun] is the contractor's failure to give proper notice of the overrun" the contractor is entitled to have the overrun funded. [Citations omitted.]

800 F.2d at 248. In this case, we follow what appears to be the more general rule of *RMI*, and that of *ARINC*, but our decision would be the same if an abuse of discretion standard were to apply.

The sole reason contained in the contracting officer's decision for his refusal to fund the overrun was D&M's failure to give advance notice of it under the LOC clause (FF 44). Thus, we examine whether D&M had reason to believe during contract performance that an overrun would occur. The burden of proving that the cost overrun was not reasonably foreseeable during contract performance is upon the contractor. *RMI*, 800 F.2d at 248.

In determining whether an overrun was foreseeable, we assess whether the contractor's accounting system was adequate and, if so, whether it, nonetheless, failed to alert the contractor to the imminence of an overrun in time to provide advance notice to the Government. *General Electric*, 440 F.2d at 425; *Metametrics, Inc.*, IBCA-1552-2-82, 82-2 BCA ¶ 16,095; *California Earth Sciences Corp.*, IBCA-1138-12-76, 77-1 BCA ¶ 12,541, *after remand*, 78-1 BCA ¶ 13,045. The cases involving LOC clause disputes are many and various. Their outcomes depend highly upon the particular facts involved. A liberal approach to the realities of contractors' accounting systems and the practical availability of cost data has been advocated by at least one commentator in the area, Paul M. Trueger, *Accounting Guide for Government Contracts* 800 (9th ed. 1988).

We have found that, despite an adequate accounting system, D&M did not know, and did not have reason to foresee in time to provide written notice to the contracting officer prior to conclusion of the contract work, that it would suffer a cost overrun (FF 60). Our finding was based upon several factors, as follows.

D&M's fiscal year runs from the last Friday in March to April 1 of each year. The contract ran from September 30, 1977, to October 31, 1979 (D&M's FY's 1977-78, 1978-79, and 1979-80), although work was substantially complete in mid-May 1979. The overrun for which D&M seeks reimbursement is composed of indirect costs. Those costs include fringe benefit costs for all fiscal years involved; two types of overhead (regular and field) for FY 1977-78 and 1978-79; and regular overhead for FY 1979-80 (involving only about 6 weeks of work) (FF 3, 11, 35, 45).

D&M's GAS system does not report actual indirect costs when incurred. Rather, they are gathered and analyzed on an annual basis following the close of D&M's fiscal year. It takes about 3 months from the end of each fiscal year for costs to be collected and audited by D&M's outside auditors. Thereafter, D&M submits its proposed indirect cost rates to DCAA for audit and negotiation of final rates. Then, FEMA, and ultimately EPA, must accept the rates for the year involved. Final agreement takes many years to achieve (FF 2-4, 9, 47).

D&M's proposal for this contract included as provisional indirect cost rates the fringe and overhead rates most recently approved by DCAA—29 percent (fringe), 118 percent (regular overhead) and 69.3 percent (field)—the only rates DCAA would accept for use in negotiating a new contract. These rates had not been calculated on a firmwide basis. Ultimately, DCAA allowed D&M to use firmwide fringe and overhead costs, effective FY 1976-77, but DCAA did not agree to this approach until late May 1979, several days after the contract was substantially complete (FF 7, 10).

D&M allocated and billed fringe costs at the provisional rate because DCAA did not conclude audit and negotiation of D&M's indirect rates for the relevant fiscal years until long after the contract had been completed. D&M acknowledges that it knew during contract performance that its actual fringe rate was higher than the contract's provisional rate. Indeed, on October 5, 1977, shortly after contract award, in response to a request from EPA's Cost Review and Policy Branch, D&M proposed final indirect rates for the preceding FY 1976-77 at 35 percent for fringe and 113.4 percent for regular overhead, noting that the rates had not yet been audited by DCAA (FF 21). Thus, if, as EPA alleges, an increased fringe benefit rate, alone, were determinative of a contract overrun, then EPA knew of an impending overrun from the outset of the contract, albeit not pursuant to written notice to the contracting officer under the LOF clause, then in effect.

Precisely what information was contained in the monthly cost reports D&M was required to submit to EPA is not clear from the record (and the contract provides that they do not constitute notice to the contracting officer under the LOC clause). On October 1, 1978, however, prior to unilateral Modification 4, citing the LOC clause, D&M notified EPA and the contracting officer that it had reached 75 percent of the allowable costs on the contract. Moreover, EPA contracting personnel certainly knew in March 1979, prior to completion of the contract work, that D&M's fringe rate had increased. D&M's proposal at that time for an equitable adjustment due to Modification 4 included an estimated fringe rate of over 41 percent. Regardless, there is no evidence of record that EPA raised the issue of a possible cost overrun in connection with its negotiations with D&M for the equitable adjustment or otherwise (FF 12, 26, 31, 46).

Further, contrary to EPA's claim, D&M's increased fringe rate did not automatically mean a contract cost overrun. First, it was not clear that DCAA would accept the increased fringe rate, or at least the increase D&M sought. As noted, DCAA did not accede to D&M's use of firmwide indirect cost pools until late May 1979, after the contract work was completed.

Second, although it appears that D&M had projected by the time of its March 1979, equitable adjustment proposal that some increased fringe rate would be accepted, this did not ensure a contract overrun. The contracting officer speculated in his final decision that, "[a]ll other factors being equal," D&M should have foreseen the overrun, which he attributed entirely to increased fringe costs (FF 44). The contracting officer's reasoning was incomplete, however, and the factual predicate for his decision erroneous.

D&M's unaudited fringe rates were not dispositive. *All* actual contract costs, including direct, regular and field overhead, and fringe, must be considered. Under the Negotiated Overhead Rates clause, allowable indirect costs are derived from rates based upon the contractor's actual costs during a given period, often its fiscal year, as here. Prior to determination of those rates, the provisional rates provided in the contract, or billing rates acceptable to the contracting officer, can be used, subject to adjustment when actual rates are known. Either party can request adjustment of a provisional rate and the contracting officer can adjust a billing rate at any time (FF 16).

It takes time to accumulate and evaluate the costs upon which a contractor's final indirect rates are based. As the court of appeals noted in *RMI*, "even though financial data is deemed *currently available*, its availability has a time lag beyond the end of the particular accounting period." 800 F.2d at 248 (italics in original). The Negotiated Overhead Rates clause gives the contractor 90 days after the close of the applicable accounting period to submit its proposed indirect rates for that period. In this case, D&M did not submit its proposed rates for the various fiscal years involved until well after that 90-day period, because it did not have the information necessary to compute the rates, due to unresolved cost issues with DCAA (FF 16, 21, 27). EPA appears to have recognized the difficulties involved, as there is nothing in the record indicating that it pressed, or attempted to enforce, the 90-day period.

EPA asserts that, as allowed under the Negotiated Overhead Rates clause, D&M should have requested an adjustment of its provisional fringe rate during contract performance. The record, though, supports as legitimate the reasons D&M gave for the delays in its fringe rate proposals—the unresolved audits and cost issues it was negotiating with DCAA. When the Government's failure to conduct timely audits contributes substantially to a contractor's inability to determine its actual overhead expenses, the contractor may be relieved from the contract's overrun reporting requirements. *Scherr & McDermott, Inc.* v. *United States*, 360 F.2d 966, 969 (Ct. Cl. 1966); *SAI Comsystems Corp.*, DOT CAB No. 1406, 84-2 BCA ¶ 17,234 at 85,832.

Moreover, EPA was aware prior to the conclusion of the contract work that D&M was projecting an increased fringe rate. It, too, could have sought an adjustment under the Negotiated Overhead Rates clause, but did not do so.

In any case, projected increases in indirect rates do not mean that an overrun will occur and they should not necessarily be given great weight. *Carltech*, slip op. at 9, 11. Unless it is possible to forecast indirect rates accurately for an entire year, indirect rates cannot be known with certainty pursuant to the Negotiated Overhead Rates clause until the actual costs upon which they are based are known. *Metametrics*, 82-2 BCA at 79,911. Given the vagaries of contractors' cost experiences, as evidenced by the number of LOC/LOF cases which have ensued, accurate forecasts are not the rule.

Indeed, in *ARINC*, the ASBCA concluded that, despite the contractor's knowledge of a probable overhead rate increase—knowledge that the Government shared, or should have shared based upon proposals submitted by the contractor—ARINC could not have known of the actual contract overrun in time to notify the contracting officer under the LOC clause and receive approval for a funding increase prior to the completion of contract performance:

> ARINC's awareness of a probable overhead rate increase * * * cannot be equated with foresight of an actual cost overrun. ARINC's proposal of March 1968 made allowance for a probable increase in overhead rates—had it not done so, the overrun would have been substantially greater than it actually turned out to be. An accurate forecast of actual overhead rates nine months in advance could only be attributable to just plain luck or to the possession of clairvoyance of a magnitude which we are unwilling to say ARINC should have possessed.

72-2 BCA at 45,407. The Board found that ARINC did not have reason to foresee the overrun even though, unlike here, its accounting system reported all actual overhead rates on a monthly and cumulative basis.

Id. at 45,402. Similarly, in *Cosmic*, the ASBCA found that a contractor could not foresee an overrun even though its "books were kept on a monthly basis with great accuracy, and the bookkeeping system permitted the computation of both monthly and cumulative overhead rates at the end of each month." 72-1 BCA at 42,996.

Even boards which have found against contractors on LOC/LOF overrun issues have stressed that an increased overhead rate, for example, is not alone, a basis for predicting that an overrun will occur. In *SAI*, the Transportation Board noted:

> Overhead costs are but one of many factors considered in the computation of estimated cost of, and the resulting obligation of dollars to, a contract. The actual costs when incurred may or may not reflect the parties' estimates; some cost items may be greater and some less. Increases in one area may be offset by deceases in another. Thus, knowledge that one element, such as overhead, is running greater than estimated, cannot operate to establish foreknowledge of an overrun situation, for the possibility remains that other cost elements are running below expectations.

84-2 BCA at 85,832. *Accord Falcon*, 87-1 BCA at 98,336 (citing cases).

Moreover, contrary to the contracting officer's rationale, all other factors were *not* equal. An increase in D&M's fringe rate does not automatically yield a cost overrun. Many more actual dollars are included in D&M's overhead than in fringe, and the regular overhead rate fluctuates independently of the fringe rate. In FY 1977-78, although fringe rates went up, overhead rates went down; both increased in FY 1978-79, the year when, by far, the largest amount of contract work was performed. FY 1978-79 was the last complete fiscal year of contract performance, and ended only about 6 weeks before D&M finished the work. EPA had issued unilateral Modification 4, increasing the contract's scope of work, on March 6, 1979, just prior to the close of FY 1978-79. The largest increase for that year was in the overhead rate. The fringe rate increase was relatively small. In FY 1979-80, although overhead again went up, fringe went down (FF 51, 53).

Further, D&M's direct labor ratio is key. Because its indirect rates fluctuate inversely to its business activity, a high level of business increases its direct labor ratio and produces lower overhead and fringe rates. A lower level of business causes the ratio to decrease and results in higher overhead and fringe rates. The direct labor ratio cannot be determined until after fiscal year books are closed (FF 50).

There is nothing unusual about the fact that business can vary and this, alone, is an insufficient excuse for failure to foresee an overrun. *Carltech*, slip op. at 9. D&M's circumstances are somewhat out of the ordinary, however. Its business is seasonal and not subject to prediction very far in advance (FF 50).

For example, before FY 1975-76, D&M had only three cost-reimbursable Government contracts subject to audit by DCAA. By FY 1975-76, D&M had 15 to 20 such contracts. At the time of its proposal on this contract in FY 1977-78, about 21 percent of its business involved Government contracts and business otherwise was good. Although business overall remained good in FY 1977-78, from FY 1977 to 1979, D&M's Government business dropped to less than 10 percent of its total business. It increased again in 1980 (FF 5, 6, 9).

Additionally, in FY 1978-79 and 1979-80, due to the well-known major turmoil in Iran during that period, which a contractor cannot have been expected to anticipate, D&M was forced to evacuate a large staff of employees located there, its largest and most profitable overseas operation, with little or no work available for them at D&M's United States' offices. As a result, D&M's direct labor ratio went down and its overhead increased substantially for FY 1978-79 (FF 5, 6, 9, 50, 52).

The Government's own work requirements were not readily predictable. For instance, Modification 2 had increased the contract's scope of work, due to changed EPA and statutory requirements, and at the relative last minute, EPA had changed the scope again by the change order contained in Modification 4 (FF 24, 28).

Also, and significantly, DCAA was challenging costs D&M was proposing for inclusion in its overhead pools in excess of $900,000, including costs associated with losses by D&M in Iran and in Beirut. Those cost issues were not resolved in D&M's favor until late May 1979, after completion of the contract work. If DCAA's views had prevailed, several years would have been affected and the overhead rate for FY 1978-79 would have dropped by 5.2 percent, offsetting any rise in fringe rates for that year. Moreover, those were not the only cost factors that changed. Overall direct labor costs on the contract were $51,698 *less* than had been negotiated. Ultimately, the claimed overrun in indirect costs consisted of about 55 percent in fringe costs and 45 percent in overhead (FF 10, 36, 45, 54).

Mr. Ramsey, D&M's Assistant Controller and Manager of Government Contracts, and Mr. Johns, its proffered expert, have presented evidence and opinion that, despite an adequate accounting system, D&M did not know about, and did not have reason to foresee, the cost overrun at issue in time to provide written notice to the contracting officer prior to conclusion of the contract work. We have found their declarations persuasive (FF 60).

Evidence in addition to the Ramsey and Johns declarations supports their conclusions. Like the contractor in *Cosmic, see* 72-1 BCA at 42,994, D&M had a history of fiscal responsibility. At the time of its proposal, it had performed a 1976 Needs Survey contract, and was performing at least its major CPFF contracts, without overruns. D&M expected to complete this contract, as well, without incurring an overrun (FF 6, 23, 26).

The circumstances in this case plainly are unlike those addressed in *Systems Engineering Associates Corp.*, ASBCA No. 38592, 91-2 BCA ¶ 23,676, and other cases cited by EPA, distinguished adequately by appellant, in which contractors knew, based upon information readily available from their accounting systems, sometimes known for years, that the indirect rates contained in their contract were not accurate and an overrun was inevitable.

EPA's claim that the overrun was foreseeable is inconsistent with its concession in its brief that "[i]t is * * * undisputed that during contract performance, [D&M] did not maintain a procedure to monitor and track its indirect costs in a current manner, so as to be alert to the imminence of an overrun stemming from indirect costs, including fringe benefit costs" (Respondent's Brief at 11). Indeed, it is because D&M's accounting system, although found adequate by the Government, did not provide a basis for D&M to forecast the overrun, that we have found that appellant could not have foreseen it in time to provide advance notice to EPA.

[2]In *Cosmic*, although the contracting officer, in his decision, as here, had mentioned only the alleged lack of timely notice under the LOC clause as the basis for denying the contractor's overrun claim, at hearing, he testified that the contract work did not meet with technical success and that an Air Force office did not wish to fund the overrun. In finding for the contractor, the ASBCA discounted both of those assertions. 72-1 BCA at 42,997-98.

We have examined whether any reasons for the EPA's refusal to fund the overrun, other than the failure to give advance notice cited by the contracting officer, appear in the record. We find none.

There is no evidence that EPA was displeased with the contractor's performance. *See General Electric*, 440 F.2d at 425. In fact, in recommending approval of D&M's equitable adjustment proposal following Modification 4, EPA's Contract Specialist stated that D&M had performed the modification work satisfactorily within the desired time frame, which had been limited (FF 29, 38).

Furthermore, the LOF and LOC clauses do not set a particular time limit for a contractor's notice of overrun. The notice is to be made "at any time" the contractor has reason to believe that its costs will exceed 75 percent of the contract's estimated cost, or that a total cost overrun might be imminent (FF 18, 19).

Other than the fact of the contracting officer's decision, we do not find any separate evidence that any EPA office wished to decline funding, or that EPA's funding options were, in practicality, affected by the timing of D&M's overrun notice. Although after completion of the contract work, and not made directly to the contracting officer, the notice was given in early August 1979, about 3 months after the close of D&M's fiscal year, consistent with the normal time frame during which its yearly cost data was analyzed. The notice came nearly 4 months before the contract's completion date, and not several years after the overrun occurred, as, for example, in *Systems Engineering*. *See* 91-2 BCA at 118,577-78 (FF 4, 11, 41).

The evidence indicates that the overrun resulted from cost issues, such as the use of firmwide rates, the loss of business due to the Iranian conflict, and the impact of Modification 4, that arose toward the end of the contract. In any event, they were not resolved by DCAA and EPA until May 1979, or later, after the contract work had been completed. By that time, the contract long had been funded fully. In that circumstance, there can be no meaningful decision to avoid the incurrence of costs in excess of allocated funds (and possibly no reasonable election by the contractor to cease work), and the LOC's notice requirement is rendered nugatory. *RMI*, 800 F.2d at 248; *Cosmic*, 72-1 BCA at 42,998.

Too, lack of advance notice is not a legitimate bar to funding an overrun if it is unlikely that the Government would have directed work to stop, even if it had had prior notice. *Thiokol Chemical Corp.*, ASBCA No. 5726, 60-2 BCA ¶ 2852. EPA was not displeased with D&M's work, as noted. D&M had had prior experience on the 1976 Needs Survey that presumably was valuable to EPA. EPA had a strong interest in the completion of the 1978 Needs Survey, and was insistent upon D&M's adherence to schedule. Even if the work on the 1978 survey was not virtually complete by the time the overrun occurred, as it seems to have been, Modification 4, issued on March 6, 1979, required what EPA considered to be very high priority work to be technically operational by May 4, 1979, and that D&M work closely with EPA (FF 6, 28-30). Thus, it is highly unlikely that EPA would have directed a work stoppage if it had received formal written notice of a potential overrun before the work was complete.

The contract contemplated, by the Negotiated Overhead Rates clause, that indirect rates would fluctuate. There is no question that D&M incurred the costs claimed, which have been audited fully, and that they are allowable costs under the Payment clause.

In sum, EPA was not prejudiced by the lack of advance notice under the LOF or LOC clauses of an overrun which D&M could not foresee, *see Metametrics*, 82-2 BCA at 79,912; *Cosmic*, 72-1 BCA at 42,998, and D&M is entitled to be paid for the overrun.

DECISION

The appeal is sustained. The EPA shall pay appellant the sum of $133,636, plus interest in accordance with the contract's Disputes clause.

CHERYL S. ROME
Administrative Judge

I CONCUR:

RUSSELL C. LYNCH
Chief Administrative Judge

November 13, 1992

REINDEER HERDERS ASSOCIATION *v.* JUNEAU AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

23 IBIA 28 Decided: *November 13, 1992*

Appeal from a decision holding that non-Native commercial reindeer operations in Alaska are permissible in certain circumstances under the Reindeer Industry Act of 1937.

Reversed and remanded.

1. Administrative Procedure: Standing--Board of Indian Appeals: Generally--Bureau of Indian Affairs: Administrative Appeals: Generally

An organization need not be incorporated in order to have standing to appeal under 25 CFR Part 2.

2. Board of Indian Appeals: Generally--Intervention

An intervenor in an appeal before the Board of Indian Appeals is normally limited to the issues raised by the appellant.

3. Board of Indian Appeals: Jurisdiction--Constitutional Law: Generally--State Laws

The Board of Indian Appeals has no authority to declare a Federal statute violative of the United States Constitution or in conflict with a state constitution.

4. Alaska: Reindeer--Alaska: Statehood Act--Indians: Alaska Natives: Reindeer--Statutory Construction: Implied Repeals--Statutory Construction: Indians

The Reindeer Industry Act of 1937, 25 U.S.C. §§ 500-500n (1988), was not repealed by the Alaska Statehood Act, 72 Stat. 339.

5. Alaska: Reindeer--Indians: Alaska Natives: Reindeer--Statutory Construction: Indians--Statutory Construction: Legislative History

The legislative history of the Reindeer Industry Act of 1937, 25 U.S.C. §§ 500-500n (1988), makes it clear that Congress intended to reserve the reindeer industry in Alaska for the exclusive benefit of Alaska Natives.

6. Alaska: Reindeer--Indians: Alaska Natives: Reindeer--Statutory Construction: Administrative Construction

Courts commonly give deference to the construction of a statute by the agency charged with its administration, particularly one which was contemporaneous with the statute and has been consistently followed by the agency.

7. Alaska: Reindeer--Indians: Alaska Natives: Reindeer--Statutory Construction: Indians

Ambiguities in the Reindeer Industry Act of 1937, 25 U.S.C. §§ 500-500n (1988), must be construed in favor of the Alaska Natives who are the intended beneficiaries of the Act.

8. Alaska: Reindeer--Indians: Alaska Natives: Reindeer--Statutory Construction: Generally

In a case where the literal application of a statute will produce a result demonstrably at odds with the intention of its drafters, the intention of the drafters, rather than the strict language, controls.

APPEARANCES: Eric Smith, Esq., Anchorage, Alaska, for appellant; Roger L. Hudson, Esq., Office of the Regional Solicitor, Alaska Region, U.S. Department of the Interior, Anchorage, Alaska, for the Area Director; Thomas E. Williams, *pro se*.

Appellant Reindeer Herders Association seeks review of a May 27, 1992, decision of the Juneau Area Director, Bureau of Indian Affairs (Area Director; BIA), which concluded that the Reindeer Industry Act of 1937 (Reindeer Act), 25 U.S.C. §§ 500-500n (1988),[1] does not preclude a person who is not an Alaska Native from importing reindeer into Alaska and engaging in commercial reindeer operations with those imported reindeer and their progeny. For the reasons discussed below, the Board reverses the Area Director's decision and remands this matter to him for further action.

Background

Appellant is an unincorporated association with a membership of 17 Alaska Native reindeer herders, whose 16 herds are located on or near the Seward Peninsula.[2] Appellant states that

> [t]hese herders operate their herds for providing meat to local community members, through outlets in Nome, Kotzebue, Barrow, and Bethel, and to a specialty market of reindeer sausage makers. [Appellant] represents the herders on matters relating to their welfare, including protection of the health and strength of the reindeer herding industry.

(Appellant's Opening Brief at 2). Appellant's members conduct their reindeer operations pursuant to the Reindeer Act.

The history of reindeer in Alaska and the conditions leading to enactment of the Reindeer Act are described in the 1937 House report on the bill:

> The coming of the white man to the western and northwestern parts of Alaska brought disaster to the natives. The sources of native food on both land and sea were materially depleted and in some cases almost exterminated. By the year 1890 the Eskimos of northwestern Alaska, for the reasons mentioned, were faced with starvation. To save them, 1,280 reindeer were imported from Siberia between the years 1892 and 1902. The reindeer so imported have multiplied until they now number several hundreds of thousands. Reindeer today form the most important single element in the Eskimo economy. This is due to two factors: The variety of uses to which reindeer can be put, and their peculiar and unique adaptation to the climate and to the land and forage of that region. * * *

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[1] Except where otherwise noted, all further references to the *United States Code* are to the 1988 edition.

[2] According to R. Stern *et al., Eskimos, Reindeer and Land* at 98 (Univ. of Alaska, 1980), appellant is funded by BIA and was "incorporated in 1971 (formerly the Northwest Alaska Reindeer Herders Association, organized in 1964) through a grant to Kawerak, Inc., the nonprofit social services arm of the Bering Straits Native Corporation."

In 1986, appellant's corporation was involuntarily dissolved by the State of Alaska. Appellant states that it continues as an unincorporated association and a project of Kawerak, Inc.

On Dec. 6, 1991, intervenor Thomas E. Williams was issued a certificate of incorporation by the State of Alaska for a new corporation named "Reindeer Herders Association, Inc." Based on his state certificate of incorporation, Williams challenges appellant's right to continue using the name "Reindeer Herders Association."

Assuming *arguendo* that it has jurisdiction to address this question, the Board declines to do so because the question has no bearing on the issue in this appeal.

November 13, 1992

The security of the Eskimos in the reindeer industry is threatened by nonnative ownership of deer and by nonnative occupation and control of the range. * * * In the year 1914 white men first entered the reindeer business. At the present time approximately one-third of all the reindeer in Alaska are owned by others than natives, and on certain ranges of outstanding importance to the Eskimos, the percentage is higher. Those ranges which are most attractive to nonnative owners invariably coincide with or overlap ranges essential to the welfare of the native Eskimos. * * *

Attempts to occupy range jointly by the Eskimo and non-Eskimo owners have not been successful. Bitter conflicts have grown out of the mixing of the herds and these conflicts threaten irreparable damage not only to the reindeer industry but to the entire life and economy of the Eskimos.

H.R. Rep. No. 1188, 75th Cong., 1st Sess. 1-3 (1937).[3] During the early 1930's, the Department of the Interior undertook a number of investigations and studies of the reindeer situation in Alaska and in 1936, the Senate Committee on Indian Affairs held hearings on the matter. *See generally* R. Stern at 61-70. In 1937, identical bills were introduced in the House and Senate, providing for purchase by the Federal Government of non-Native owned reindeer and establishment of a Native reindeer industry.[4] The Senate bill, as amended, was enacted by Congress and signed by the President on September 1, 1937.

Section 1 of the Reindeer Act, 25 U.S.C. § 500, provides:

[A] necessity for providing means of subsistence for the Eskimos and other natives of Alaska is hereby declared to exist. It is also declared to be the policy of Congress, and the purpose of this subchapter, to establish and maintain for the said natives of Alaska a self-sustaining economy by acquiring and organizing for and on behalf of said natives a reindeer industry or business, by encouraging and developing native activity and responsibility in all branches of the said industry or business, and by preserving the native character of said industry or business thus established.

The Act authorized the Secretary of the Interior to acquire non-Native owned reindeer, as well as certain kinds of equipment, 25 U.S.C. § 500a; to distribute the acquired reindeer to Alaska Natives, 25 U.S.C. § 500g;[5] and to organize and manage a reindeer industry for

[3] Prior to 1937, Congress had made some substantive provisions for reindeer operations in the context of appropriations acts. *See, e.g.*, 48 U.S.C. § 39 (1934), derived from provisions in various appropriations acts enacted between 1907 and 1927:

"All reindeer owned by the United States in Alaska shall as soon as practicable be turned over to missions in or natives of Alaska, to be held and used by them under such conditions as the Secretary of the Interior shall prescribe. The Secretary of the Interior may authorize the sale of surplus male reindeer and make regulations for the same. The proceeds of such sale shall be turned into the Treasury of the United States. The Commissioner of Education is authorized to sell such of the male reindeer belonging to the Government as he may deem advisable and to use the proceeds in the purchase of female reindeer belonging to missions and in the distribution of reindeer to natives in those portions of Alaska in which reindeer have not yet been placed and which are adapted to the reindeer industry."

By regulation of the Department of the Interior, female reindeer distributed to Alaska Natives were made subject to restrictions against alienation. *See* Solicitor's Opinion, Apr. 2, 1930, 53 I.D. 71; Solicitor's Opinion M-26690, Sept. 16, 1931, I *Op. Sol. on Indian Affairs* 281. Reindeer controlled by Natives were held not to be taxable by the Territory of Alaska. Solicitor's Opinion, May 27, 1925, 51 L.D. 155. Restricted reindeer were held to be subject to the Secretary's authority to probate trust and restricted Indian estates. Solicitor's Opinion M-27127, July 26, 1932, 54 I.D. 15, I *Op. Sol. on Indian Affairs* 320.

[4] H.R. 5126 was introduced on Feb. 25, 1937, by Delegate Dimond of Alaska. Shortly thereafter, S. 1722 was introduced by Senator Thomas of Oklahoma. The Secretary of the Interior recommended a number of amendments, all of which were accepted. *See* H.R. Rep. No. 1188 at 4.

[5] Sec. 500g was amended in 1986 to add a proviso: "That during the period of trust, income derived directly from the sale of reindeer and reindeer products as provided in this subchapter shall be exempt from Federal income

Continued

the Natives, 25 U.S.C. § 500f. It required non-Native reindeer owners to file declarations of ownership. 25 U.S.C. § 500b. It imposed restrictions upon the alienation of reindeer acquired under the Act and reindeer belonging to Alaska Natives, 25 U.S.C. § 500i, and authorized the Secretary to regulate reindeer grazing on public lands, 25 U.S.C. § 500m. Finally, it authorized an appropriation of $2,000,000 for purposes of carrying out the Act. 25 U.S.C. § 500 note.

Pursuant to the Act, the Department of the Interior purchased all non-Native-owned reindeer in Alaska. The acquisition program was completed in the winter of 1939-40.[6] Thereafter, it seems to have been generally assumed that the Reindeer Act precluded the re-entry of non-Natives into the reindeer industry in Alaska. This assumption apparently prevailed, at least within the Department of the Interior, until the events giving rise to this appeal were initiated.[7] *See, e.g.*, Regional Solicitor's January 26, 1987, memorandum, discussed *infra*, at 1-2; letter from Deputy Solicitor to Senator Ted Stevens, July 1, 1970, II *Op. Sol. on Indian Affairs* 2016. A BIA report prepared in 1953 concluded, *inter alia*, that the Reindeer Act "should be amended to allow for greater flexibility in developing the reindeer industry and not restrict it to Natives only"[8] (R. Stern at 94). In 1961, the Bureau of Land Management (BLM) promulgated reindeer grazing regulations, which restrict grazing privileges on public lands to Natives and Native organizations. *See* 43 CFR 4310.2.

In December 1986, Thomas E. Williams, a non-Native resident of Alaska, informed the Area Director that he intended to purchase reindeer outside Alaska, import them into the State, and establish a private herd for commercial purposes. He requested an opinion from the Area Director as to whether the Reindeer Act would apply to his proposed enterprise. The Area Director sought advice from the Regional Solicitor's Office. By memorandum of January 26, 1987, an

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taxation." This amendment followed the Ninth Circuit Court of Appeals' decision in *Karmun* v. *Commissioner*, 749 F.2d 567 (9th Cir. 1984), *cert. denied*, 474 U.S. 819 (1985), holding that such income was subject to Federal income taxation.

[6] The acquisitions followed the completion in 1938 of a congressionally authorized study to estimate the number of reindeer in Alaska, and the appropriation of funds in 1939. *See* H.R. Doc. No. 174, 76th Cong., 1st Sess. (1939); R. Stern at 71-73. 84,001 reindeer were purchased. Although Congress appropriated $720,000 for the program, the actual cost was less: $330,003 for reindeer purchased, $112,925.72 for improvements purchased, and $45,673.48 for administrative expenses, for a total of $491,602.20 (R. Stern at 72-73).

[7] It appears that the State of Alaska also shared this view, at least through 1979. According to a Sept. 8, 1992, memorandum of the Assistant Attorney General, Natural Resources-Anchorage, State of Alaska, a 1979 Alaska Attorney General's memorandum took the position that the Reindeer Act "had the effect of limiting ownership of reindeer in Alaska to Alaska Natives or the United States in trust for Natives" (Sept. 8, 1992, Memorandum at 4 n.5). The 1992 memorandum overrules the 1979 memorandum. No copy of the 1979 memorandum has been submitted to the Board.

A Mar. 18, 1982, memorandum of an Alaska Assistant Attorney General, which commented on draft BIA regulations, was inconsistent with the 1979 memorandum but did not overrule it. The 1982 memorandum took the position, presumably for the first time by the State, that non-Natives may engage in commercial reindeer operations without violating the Act.

The 1982 and 1992 memoranda were submitted to the Board by intervenor Williams. The 1992 memorandum, which appears to have been drafted with this appeal in mind, was received after the close of briefing. Williams failed to seek permission to make a supplemental filing. *See* 43 CFR 4.311(b). Although the document was improperly filed, the Board accepts it for the limited purpose of noting that it agrees with the Area Director's decision on appeal here and that it authorizes the issuance of State reindeer grazing leases to non-Natives.

[8] This recommendation appears to reflect the termination policy of the time in which it was made. It indicates, however, that BIA believed amendment of the Reindeer Act was necessary to allow non-Natives to enter the reindeer industry.

attorney in the Regional Solicitor's Office responded, stating in conclusion:

> In our view there is nothing in the 1937 Reindeer Act to prohibit a non-Native such as Mr. Williams from importing live reindeer from outside of the State of Alaska and raising them within the State as either a hobby or a business. He would be, however, subject to the reporting requirement of 25 U.S.C. § 500b, and the requirement that he file a declaration of ownership would apply not only to animals initially imported, but on an annual basis to any increase in his herd through calving as well. While it is true, as you observed, that establishment of non-Native commercial herds could have a serious impact on the Alaska Native reindeer industry, the Secretary of the Interior has the statutory authority to ameliorate or eliminate such impact at such time as he determines that it is necessary to acquire the non-Native owned reindeer by purchase or exercise of the power of eminent domain.

(Jan. 26, 1987, Regional Solicitor's Memorandum at 8).[9] In support of these conclusions, the memorandum states in part:

> As a means of assuring continued dominance of the industry by Alaska Natives, 25 U.S.C. § 500i prohibited any form of sale or transfer of ownership of reindeer to non-Native individuals. Criminal penalties were provided for willful violations by any buyer or other transferee. This prohibition remains on the books, and in fact continues to be enforced. But a careful reading of the statutory language demonstrates that it does not absolutely prevent an individual such as Mr. Williams from entering into commercial reindeer herding as a business. The "loophole" in the statute, if it may be fairly so characterized, arises from the specification of the animals to which the restrictions on alienation apply. Specifically, § 500i bars alienation of the following animals:
>
> Live reindeer in Alaska, and the increase thereof, acquired by the Secretary of the Interior pursuant to this subchapter, and live reindeer in Alaska, and the increase thereof, owned by the said natives of Alaska or corporations, associations, or other organizations of said natives, however acquired . . . .
>
> This language cannot fairly be interpreted as including within the statutory prohibition against alienation reindeer which were neither physically located within the Territory of Alaska at the time the law was passed, nor later descended from animals that were. Therefore, there is nothing in the statute to prohibit a non-Native from acquiring reindeer from outside this State's borders as Mr. Williams proposes to do. * * * Although Congress might have seen fit to expressly prohibit prospectively the importation of reindeer from outside the State, it evidently did not do so.
>
> * * * * * * *
>
> [T]he requirement with respect to filing of declarations of ownership set forth in § 500b refers to "Alaskan reindeer." [[10]] The most straight-forward interpretation would be that Alaskan reindeer are reindeer located within the borders of the State of Alaska. Therefore, in our view the filing requirement in § 500b attaches to any reindeer brought into the State of Alaska, since they become, in effect, Alaskan reindeer by virtue of their

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[9] The two Regional Solicitor's Office memoranda discussed in this decision were signed by an attorney in that office, rather than the Regional Solicitor himself. However, for ease of reference, they are referred to as Regional Solicitor's memoranda.

[10] 25 U.S.C. § 500b provides:

"All persons, other than natives of Alaska, who upon September 1, 1937, claim title to any Alaskan reindeer shall, within one year after September 1, 1937, file in Alaska, with the duly authorized agent or agents of the Secretary of the Interior, declarations of their ownership. Similar declarations concerning Alaskan reindeer acquired by any person not a native of Alaska by purchase or by gift at any time after September 1, 1937, shall be filed as aforesaid within thirty days of such acquisition. Records of all declarations thus filed shall be made and kept open to public inspection in Alaska. If any owner of Alaskan reindeer, to whom the foregoing provisions are applicable, shall fail to file the required declaration within the stated period, he shall be barred thereafter from asserting his claim of title."

presence with the borders of the State, and notwithstanding the circumstances that they may have been born, reared, and purchased in some other locality.

Likewise, the calves born to imported reindeer within the State of Alaska would be subject to the § 500b filing requirement. A reasonable interpretation relative to the progeny of imported reindeer would require one annual filing with respect to calves at the conclusion of each calving season.

The just-stated interpretation as to the applicability of § 500b is not only consistent with the express language of the statute, but also makes sense in terms of the structure and purposes of the 1937 Act as a whole. In order for the Secretary to make appropriate determinations as to the necessity of acquiring reindeer from non-Native owners for the purpose of preserving the Native character of the industry, he must have a means of determining the extent of non-Native ownership, the identity of individual owners, and the number of animals they own. An interpretation of § 500b which failed to impose information filing requirements across the board would be inconsistent with the general purpose and scheme of the legislation.

Id. at 3-4 and 6-7.

On March 19, 1987, Williams reported to the Area Director that he had imported 19 reindeer from Canada. He stated that the reindeer were owned by a corporation named Alaska Reindeer, Inc., for which he was the registered agent. He stated further:

[W]hile most of the stockholders of this corporation have some native blood, none desire to claim ownership as natives. Specifically, this herd of animals is to be a commercial herd of reindeer whose uses are not to be limited by the Act of 1937.

These animals are to be used for shows, expositions, racing, recreation, breeding, and selling as pets. At a later date, we will sell antlers, hides, and meat, but at this time we have no intention of competing with the Alaska Native reindeer industry which we believe is solely dedicated to food production.

On December 6, 1988, Gary Arnold Engelstad, an Alaska Native and an employee of Alaska Reindeer, Inc., wrote to the Area Office, requesting a loan of trust reindeer for the purpose of starting a new herd in south central Alaska. Engelstad stated that he intended to organize a new corporation, to be called Matanuska Reindeer, Inc., of which he would own at least 51 percent of the stock. He stated further that the new corporation would lease land from Williams Farms, where it would operate a feed lot, and would raise reindeer for antler and meat production.

Following further correspondence, it became apparent that Williams would own 49 percent of the stock of the new corporation and would also be the corporation's attorney, as well as Engelstad's personal attorney (Jan. 19 and Mar. 27, 1989, Letters from Williams to Area Office).

The Area Director sought advice from the Regional Solicitor concerning whether 25 U.S.C. § 500i would preclude a corporation organized in the manner proposed by Engelstad and Williams from engaging in a reindeer business. The Area Director also requested the Regional Solicitor to reconsider his January 26, 1987, memorandum in light of a memorandum prepared by a Native American Rights Fund (NARF) attorney concerning interpretation of the Reindeer Act.

The Regional Solicitor responded on May 11, 1989. His memorandum states:

November 13, 1992

Addressing ourselves first to the specific issue regarding non-Native stock ownership, we hasten to indicate our agreement with your conclusion that the statutory prohibition is absolute and unequivocal. 25 U.S.C. § 500i, which sets forth the restriction on alienation of Alaskan reindeer, includes the following statement:

. . . No stock or other interest in any corporation, association, or other organization of said natives, engaged in or organized for the purposes of engaging in the reindeer industry or business, shall be transferred, by descent, devise, or in any other manner whatsoever, to anyone other than said natives of Alaska, the United States for and on behalf of said natives, or corporations, associations, or other organizations of said natives.

In our view, this language is unmistakable; a non-Native can hold no ownership interest at all in a corporation engaged in the business of owning, raising, or otherwise dealing in Alaskan reindeer. We would construe the prohibition of "transfer" of corporate stock broadly to preclude also the initial issuance of stock in connection with the incorporation of a reindeer business. * * *

* * * * * * *

In response to your request that we reconsider our January 26, 1987 memorandum interpreting the Reindeer Industry Act, we have carefully reviewed NARF's March 10, 1989 opinion letter, as well as the Act itself, but having done so we remain unpersuaded of the necessity for revision of our prior opinion. While the legislative history of the 1937 Act is replete with statements which indicate an *intent*, at least on the part of some, to permanently preclude non-Natives from owning live Alaska reindeer, the issue we must address in implementing the law is the *legal effect* of the congressional enactment. As we indicated two years ago, we can identify no express provision of the Act which appears to have been violated by Mr. Williams' importation and ownership of Canadian reindeer.

There is no particular ambiguity on the face of the statute which would require us to refer to the legislative history as an aid to interpretation on the point in question. Unlike some statements made by proponents prior to enactment of the statute, the legislation's explicitly stated purpose is not permanent exclusive Native ownership, but rather establishment and maintenance for Alaska Natives of a self-sustaining economy. 25 U.S.C. § 500. Likewise, § 500a directs the Secretary of [the] Interior to acquire, *inter alia*, reindeer he deems necessary to effectuation of the Act's purpose, but does *not* expressly mandate purchase of *all* non-Native owned animals. The logical inference we draw is that these less-than-absolute provisions go hand in hand with a congressional reluctance to write a "blank check" in regard to the cost of implementing the law. In other words, Congress may have wanted to provide for permanent exclusive Native ownership, but a depression-era legislature was not willing to dictate achievement of such a goal *at any cost*. Rather, the statute directed the Secretary to exercise his discretion in acquiring reindeer so as to establish and maintain a Native reindeer industry.

* * * * * * *

Nor do we believe our literal interpretation "thwarts the purpose of the overall statutory scheme or leads to an absurd result." The stated purposes of establishing and maintaining a self-sustaining economy and preserving the Native character of the reindeer industry or business have not been seriously threatened thus far by the allowance of non-Native importation of non-Alaskan reindeer, and [the NARF attorney] concedes that the Secretary of [the] Interior retains both the means and the obligation to accomplish those purposes even under our reading of the statute. Indeed, your own memorandum expresses the view that Mr. Williams' current operation presents no threat to the Native reindeer industry. [[1]]

[1] The Area Director's Apr. 12, 1989, memorandum to the Regional Solicitor states:

Continued

> However, our principal reason for sticking by our original interpretation is that we can discern no statutory grounds upon which we could confidently proceed against Mr. Williams or any other individual in like circumstances. The only criminal penalty provided is a $500 fine for a willful violation of the alienation restrictions of § 500i, and we don't believe we could establish such a willful violation in Mr. Williams' case. On the civil side, the most obvious remedies would be a judicial declaration of non-ownership under § 500b, an injunction against additional imports, or local sales, or some sort of monetary damage claim for lost profits brought on behalf of Native reindeer owners. None of these forms of actions appears at present to have either a high likelihood of success or a promise of great benefit to Alaska Native reindeer herders. [Italics in original; footnotes omitted.]

(Regional Solicitor's May 11, 1989, Memorandum at 1-5).

During 1989, an extensive correspondence developed between Williams and the Area Office. Williams filed a large number of Freedom of Information Act requests and also asked several questions concerning enforcement of the Reindeer Act. Other correspondence concerned a purchase of 30 live reindeer from an Alaska Native. BIA requested that Williams file a report on the purchase; Williams responded that the reindeer had been purchased by and were the sole property of Engelstad.[12]

Following an August 29, 1989, meeting at which Williams, Williams' wife, Engelstad, BIA staff, and Solicitor's Office staff were present, the Area Director sent Williams three letters in which he, *inter alia*, (1) recognized Engelstad as the owner of the purchased reindeer,[13] (2) announced a policy that would allow Natives to pledge reindeer as security for loans as long as a non-Native lender complied with 25 U.S.C. § 500i, and (3) promised to prepare regulations for publication and for interim use as Area Office policy.[14]

In March 1990, Williams imported 179 reindeer from Canada. In November 1990, Williams reported to BIA that Engelstad had sold all his interest in reindeer at Williams Farm to another Alaska Native, Dorinda Gastelum.[15]

In August 1991, Williams reported that Alaska Reindeer, Inc., owned 248 reindeer and Matanuska Reindeer owned 54 reindeer.

"The Bureau does not feel that Mr. Williams' operation will ever be a threat to the Native reindeer industry, so long as he is never able to obtain additional reindeer. We understand that Canadian policy has changed, so he is unable to buy reindeer from Canada now; however, that policy could change again. With U.S. Department of Agriculture quarantine regulations, live reindeer could not be shipped to Alaska from any other reindeer producing region in the world, with the possible exception of Greenland."

[12] As a Native, Engelstad was not subject to the requirement in 25 U.S.C. § 500b for filing declarations of ownership. *See* note 10.

[13] In one of two letters dated Sept. 25, 1989, the Area Director explained BIA's concern about the reindeer purchase. He stated:

"Our past concerns regarding whether Mr. Engelstad was a bona fide purchaser arose out of circumstances that were substantially confirmed by you and your wife in the aforementioned meeting; namely, that Mr. Engelstad is an employee of Williams Farms; that you loaned Mr. Engelstad the money on an unsecured personal note to buy and transport the deer to a farm owned by your wife; and that the deer were being kept (at least on July 18) in another pen of the same corral with the deer owned by Alaska Reindeer, Inc."

[14] There are also a number of draft letters in the administrative record, some of which contain what are described as interim rules. It is not clear from the record what status the Area Office considers these "rules" to have.

At present, BIA's published regulations under the Reindeer Act are far from comprehensive, addressing only the filing of declarations of ownership. *See* 25 CFR Part 243. (As noted above, reindeer grazing on public lands is regulated by BLM under 43 CFR Part 4300.) Statements in the record indicate that BIA prepared draft regulations in 1982 or 1983 but that these fell victim to the Administration's policy favoring de-regulation. It appears, however, that BIA's difficulties in promulgating comprehensive regulations under the Reindeer Act began in the 1940's. *See* R. Stern at 81-82.

[15] Gastelum is vice-president and a director of Williams' new corporation Reindeer Herders Association, Inc. *See* "Notification [of] Appointment of Officers and Directors" accompanying the certificate of incorporation.

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In 1991, appellant filed suit against BIA, challenging the interpretation of the Reindeer Act espoused in the two Regional Solicitor's memoranda. *Reindeer Herders Association* v. *Cesar*, No. A91-511 Civ (D. Alaska). Appellant filed a motion for summary judgment on April 30, 1992. By letter of May 14, 1992, an Assistant United States Attorney, who represented BIA in the litigation, suggested to appellant's counsel that she would move for dismissal of the case based on appellant's failure to exhaust administrative remedies.

Appellant agreed to pursue an administrative remedy rather than litigate the procedural issue in court. On May 27, 1992, the Area Director issued a decision formally adopting the two Regional Solicitor's memoranda. This was done in order to provide appellant with a decision appealable through the administrative appeal process.

Appellant's notice of appeal from the Area Director's decision was received by the Board on June 8, 1992. In its July 7, 1992, notice of docketing, the Board approved the request of appellant and the Area Director for expedited briefing. On July 28, 1992, Williams filed a motion to intervene. His motion was granted. All parties filed briefs.

Expedited consideration by the Board has been requested by appellant, the Area Director, and the Assistant Secretary--Indian Affairs. Expedited consideration is granted.[16]

Discussion and Conclusions

Before proceeding to the merits of this appeal, the Board addresses an apparent challenge to appellant's standing to bring the appeal. Williams contends that appellant, "an unincorporated association, and lacking the 'minimal attributes' necessary to be accountable for process and results of legal proceedings, does not have the capacity to sue and may not represent the real party in interest in this matter" (Williams' Brief at 4).

[1] An organization need not be incorporated to order to have standing before BIA or this Board. Under Board regulations, any interested party affected by a final BIA decision may file an appeal. 43 CFR 4.331. Board regulations do not define "interested party." For purposes of appeals from BIA decisions, therefore, the Board employs the definition in BIA's appeal regulations at 25 CFR Part 2. *See Noyo River Indian Community* v. *Acting Sacramento Area Director*, 19 IBIA 63 (1990). 25 CFR 2.2 defines "interested party" as "any person who could be adversely affected by a decision in an appeal." The section defines "person" to include "an Indian or non-Indian individual, corporation, tribe, *or other organization*." (Italics added.) The record

[16] Williams opposed expedited consideration as well as expedited briefing. Although Williams was served with a copy of the notice of appeal in this case, and subsequently has had notice of all proceedings, the Board did not receive his motion to intervene and his objections to expedited briefing and expedited consideration until July 28, 1992, after expedited briefing had been approved. Despite his belated request, Williams was given an opportunity to file a brief.

Briefing has now been concluded. The Board does not see how Williams can be harmed by the Board's expedition of its consideration of this appeal. In any event, the Board finds that the reasons given by appellant, the Area Director, and the Assistant Secretary are sufficient to warrant expedition of the appeal over Williams' objection.

here is replete with evidence that appellant is in fact a functioning organization and has been in existence for a long time. The Board finds that appellant has standing to bring this appeal.

The substantive issue raised by appellant is, as the parties agree, a relatively straightforward one: Does the Reindeer Act preclude a person who is not an Alaska Native from importing reindeer into Alaska and engaging in a commercial reindeer enterprise with those imported reindeer and their progeny?

Appellant contends that the Reindeer Act does prohibit such activity even though the prohibition is not explicitly stated in the Act. Appellant argues that Congress intended to reserve the reindeer industry in Alaska exclusively to Alaska Natives; that such an intent is readily apparent in the legislative history of the Act; and that, read as a whole, the Act effectively expresses the intent of Congress to prevent the importation and commercial herding of reindeer by non-Natives.

The Area Director's position is set out, in large part, in the two Regional Solicitor's memoranda quoted above. In his brief before the Board, the Area Director argues that the Reindeer Act should not be interpreted to include a ban on importation of reindeer because (1) Congress must have been aware that reindeer could be imported because importation was the acknowledged original source of reindeer in Alaska; (2) Congress knew how to express a blanket prohibition of impermissible conduct; (3) in accord with the maxim "expressio unius est exclusio alterius," the restrictions on alienation in 25 U.S.C. § 500i should not be extended to imported reindeer; (4) the range management provision of the Reindeer Act was viewed by Congress as a key to achievement of the statutory purposes set forth in 25 U.S.C. § 500; and (5) there is no statutory enforcement mechanism or remedy against an importer of reindeer.

The Area Director contends that

> the authority to put Mr. Williams out of business through purchase of his reindeer, either by agreement or condemnation, and the authority to exclude him from federal grazing range, are the only direct authorities over his activities which the statute provides. * * * The Juneau Area Director does not dispute the fact that he has a responsibility to exercise his discretion under [section 500a], and stands ready to do so at such point in time as the circumstances indicate the necessity to acquire non-Native-owned imported reindeer in order to accomplish the statutory purpose.

(Area Director's Brief at 14-15).

Williams supports the Area Director's decision in part and challenges it in part. With respect to the issue raised by appellant, Williams states that he is in agreement with the Area Director. However, in other respects, Williams takes issue with the Area Director, either directly or impliedly. In fact, Williams contends that the Reindeer Act does not apply to him at all. Such a contention is a clear challenge to the Area Director's findings that Williams is required to file declarations of ownership under 25 U.S.C. § 500b and that his reindeer are subject to acquisition by the Secretary under 25 U.S.C. § 500a.

[2] To the extent Williams challenges the Area Director's decision, alleging errors different than those alleged by appellant, it is arguable that he is not properly before the Board. Williams did not file a notice of appeal from the Area Director's decision. As an intervenor, he would normally be limited to the issues raised by appellant. *See Navajo Nation* v. *Acting Deputy Assistant Secretary--Indian Affairs (Operations)*, 15 IBIA 179, 185, 94 I.D. 172, 175 (1987); *cf. Estate of Ethel Edith Wood Ring Janis*, 15 IBIA 216 (1987). Williams clearly should have filed his own notice of appeal in order to raise some of the issues he now seeks to put before the Board. The Board notes, however, that the Area Director's decision does not show that a copy of the decision was sent to Williams. It is possible, therefore, that Williams would have a continuing right to appeal the Area Director's decision under 25 CFR 2.7 unless his challenges to the Area Director's decision are considered in the context of this appeal.[17] In order to avoid further delays in this matter, the Board will consider Williams' arguments as if he had properly filed a notice of appeal from the Area Director's decision.

[3] The Board turns to Williams' arguments before proceeding to the principal issue in this appeal. Some of his arguments, however, raise issues which are beyond the scope of this Board's jurisdiction. He argues, for instance, that, if interpreted as appellant advocates, the Reindeer Act may be in violation of the Alaska State Constitution and may therefore compel the State to terminate services to Native reindeer herders. This Board has no authority to determine whether a Federal statute conflicts with the Alaska Constitution. In any case, the Board's task here is to interpret Federal law, not State law. Accordingly, even if the Board had authority to make determinations concerning State law, it would not need to do so in this case.

Williams also argues that the Reindeer Act is racially discriminatory. It appears that he may have intended to argue in this regard that the Act violates the Constitution of the United States as well as the Alaska Constitution. The Board has no authority to determine the constitutionality of a Federal statute. *E.g., Redleaf* v. *Muskogee Area Director*, 18 IBIA 268 (1990). The Board observes, however, that the authority of Congress to legislate for the benefit of Indians and Alaska Natives as a class is well established. *See, e.g., United States* v. *Antelope*, 430 U.S. 641, 645 (1977) ("Legislation with respect to these 'unique aggregations' has repeatedly been sustained by this Court against claims of unlawful racial discrimination").

Alaska Natives have long been considered to possess the same legal status as Indians and to be subject to the same plenary authority of Congress to legislate for their benefit. *E.g., Pence* v. *Kleppe*, 529 F.2d

[17] Williams became aware of the Area Director's decision at the time he was served with appellant's notice of appeal to the Board, even if he was not aware of it earlier. Under 25 CFR 2.7, however, an aggrieved person's right to appeal continues until proper notice is given by the BIA deciding official.

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135, 138 n.5 (9th Cir. 1976); *Eric* v. *Secretary of HUD*, 464 F. Supp. 44, 46 (D. Alaska 1978); Solicitor's Opinion, M-26915, Feb. 24, 1932, 53 I.D. 593, I *Op. Sol. on Indian Affairs* 303. Congress has, on occasions other than the Reindeer Act, specifically allowed Alaska Natives certain privileges, including economic ones, which it has denied to non-Natives. For instance, Congress provided an exemption for Alaska Natives from the moratorium imposed on the taking of marine mammals by the Marine Mammal Protection Act of 1972, 16 U.S.C. §§ 1361-1407. Under 16 U.S.C. § 1371(b), certain Alaska Natives are allowed to take marine mammals if the taking is for subsistence purposes or "for purposes of creating and selling authentic native articles of handicrafts and clothing." This Native exemption has been construed in *United States* v. *Clark*, 912 F.2d 1087 (9th Cir. 1990), *cert. denied*, 111 S. Ct. 705 (1991), and *Katelnikoff* v. *United States Dept. of the Interior*, 657 F. Supp. 659 (D. Alaska 1986). From the legislative history of the exemption, as quoted and discussed in these cases, it clearly appears that the exemption was intended to protect, not only Native subsistence, but also the cash economy of the coastal Natives. Thus it appears that the purpose of the Native exemption in the Marine Mammal Protection Act is very similar to the purpose of the Reindeer Act. Both statutory provisions are components of a much larger body of Federal statutory law concerning Alaska Natives. The Board sees no reason to believe that a court would find the Reindeer Act unconstitutional as racially discriminatory.

[4] Next, Williams argues that the Reindeer Act was repealed, at least in part, by the Alaska Statehood Act of 1958, 72 Stat. 339, the Alaska Omnibus Act of 1959, 73 Stat. 141, and/or the Alaska Constitution. Specifically, he contends, the provisions of the Reindeer Act which affect non-Natives, such as the reindeer acquisition authority in 25 U.S.C. § 500a and the reporting requirement in section 500b, were repealed because they were "Territorial laws" within the meaning of subsection 8(d) of the Statehood Act.

Subsection 8(d) of the Statehood Act defines "Territorial laws" to include "all laws or parts thereof enacted by the Congress the validity of which is dependent solely upon the authority of the Congress to provide for the government of Alaska prior to the admission of the State of Alaska into the Union." Certain Territorial laws, as defined in the Statehood Act, were terminated by section 3 of the Alaska Omnibus Act. Williams contends that the provisions of the Reindeer Act affecting non-Natives were "governmental functions" and thus subject to this provision. He does not, however, support his contention with any analysis.

It is apparent that Williams' contention must be rejected on the basis of the very statutory language he relies upon. The Territorial laws subject to repeal or termination were those whose validity was "dependent solely upon the authority of the Congress to provide for the government of Alaska." The provisions in the Reindeer Act affecting non-Natives were clearly not enacted *solely*, if at all, under Congress' power to govern the Territory. Rather, the validity of those provisions, and the validity of the Reindeer Act as a whole, is grounded first and foremost in the plenary power of Congress to legislate for the benefit of Alaska Natives. The Board rejects Williams' argument that the Reindeer Act has been repealed in part.

The Board returns to the principal issue in this appeal--whether a non-Native may engage in the reindeer industry in Alaska, using imported reindeer, without running afoul of the Reindeer Act.

At the outset, the Board observes that the Area Director's interpretation of the Reindeer Act is not an unreasonable one. As the Area Director persuasively argues, no provision in the Reindeer Act explicitly prohibits the importation of reindeer into Alaska or explicitly precludes a non-Native from entering the reindeer business, using imported reindeer. However, even though reasonable, the Area Director's interpretation is clearly adverse to the interests of the Natives for whose benefit the statute was enacted. Under rules of statutory construction applicable to Indian legislation, discussed *infra*, an interpretation of a statute, even though reasonable, must be rejected if another interpretation is possible, which is more favorable to the Native beneficiaries.

Appellant contends that its interpretation of the Reindeer Act is both reasonable and supported by the statutory language and the legislative history. First, it argues that Congress' intent to exclude non-Natives from the reindeer industry is evident in 25 U.S.C. § 500, quoted *supra*, which indicates that a purpose of the Reindeer Act is to "preserv[e] the native character of the industry." In appellant's view, the reindeer industry can be Native in character only if it is exclusively Native.

It is arguable, however, that the "reindeer industry" with which section 500 is concerned is not the entire reindeer industry in Alaska, but only the reindeer industry which the Act created for Natives. Under this interpretation, a non-Native reindeer industry, parallel to the Native industry, might exist in Alaska without offending section 500.[18] A provision in 25 U.S.C. § 500i, however, appears to resolve any ambiguity in section 500 with respect to the scope of the reindeer industry encompassed by the Act. Section 500i, *inter alia*, authorizes the Secretary of the Interior to promulgate regulations governing transfer of reindeer "for the purpose[ ] of preserving the native character of the reindeer industry or business in Alaska." This explicit statement makes clear that the Act was intended to encompass the entire reindeer industry in Alaska. The Board therefore concludes that Congress intended in the Reindeer Act to require preservation of the Native character of the entire reindeer industry in Alaska. Even so, it does not necessarily follow, from this language alone, that Congress

[18] This is the theory espoused in the Mar. 18, 1982, Alaska Assistant Attorney General's memorandum submitted by Williams in this appeal. *See* note 7.

intended the reindeer industry in Alaska to be exclusively Native. It is conceivable that the industry could be Native in character even though not exclusively Native.

Appellant further contends that the explicit restrictions in 25 U.S.C. § 500i demonstrate an intent not to allow non-Native ownership of reindeer. In particular, appellant notes, Congress explicitly prohibited the re-importation of live reindeer previously exported from Alaska and reasons that, given this prohibition, Congress could not have intended to allow importation of foreign reindeer.

25 U.S.C. § 500i provides in its entirety:

> Live reindeer in Alaska, and the increase thereof, acquired by the Secretary of the Interior pursuant to this subchapter, and live reindeer in Alaska, and the increase thereof, owned by the said natives of Alaska or corporations, associations, or other organizations of said natives, however acquired, shall not be sold or transferred, by descent, devise, or in any other manner whatsoever, to anyone other than the said natives of Alaska[,] the United States for and on behalf of said natives, or corporations, associations, or other organizations of said natives, except with the consent in writing of the Secretary of the Interior or his duly authorized agent, stating that such consent is given upon the condition that the reindeer, and any increase thereof, sold or otherwise transferred with said consent, shall either be butchered in the Territory of Alaska within thirty days or shipped out of said Territory and never brought back alive into said Territory. Sales or other transfers of said reindeer, if made without the consent in writing herein required, or, although made with such consent, if followed by failure to comply with the condition therein required, shall be null and void, and shall not pass any title to or right to possession of any reindeer or increase thereof. No stock or other interest in any corporation, association, or other organization of said natives, engaged in or organized for the purposes of engaging in the reindeer industry or business, shall be transferred, by descent, devise, or in any other manner whatsoever, to anyone other than said natives of Alaska, the United States for and on behalf of said natives, or corporations, associations, or other organizations of said natives. Any willful violation of the provisions of this section by any vendee or other transferee shall be punishable by a fine of not more than $500: *Provided*, That no title to any reindeer, or any reindeer products, owned by the United States for and on behalf of the said Natives of Alaska, nor any title to reindeer, or reindeer products, owned by any of said natives or said corporations, associations, or other organizations of said natives, nor any stock or other interest in said corporations, associations, or other organizations of said natives, shall be transferred by descent, [devise] or in any other manner whatsoever, except pursuant to regulations promulgated by the Secretary of the Interior for the purposes of preserving the native character of the reindeer industry or business in Alaska and effectuating the other purposes of this subchapter: *Provided further*, That nothing herein contained shall prevent any native of Alaska who owns any reindeer or any interest therein through stock ownership, or otherwise, in any corporation or association or other organization owning reindeer, from transferring his reindeer, or any interest therein, to his children or other native relatives by gift, sale, devise, or bequest, or prevent the same from being transferred or passed by descent.

Appellant and the Area Director have widely divergent views of the import of this section. While appellant sees evidence of Congress' attempts to keep live reindeer out of the possession of non-Natives, the Area Director invokes the maxim "expressio unius est exclusio alterius" to contend that, since the section specifically mentions only reindeer owned by the United States, Natives, or Native corporations, Congress must have intended to exclude reindeer owned by others from the scope of the section.

It is true that the principal thrust of the section is to impose restrictions upon the alienation of Native and Government-owned reindeer. The section does much more, however. The restrictions imposed upon these reindeer differ markedly from the usual restrictions imposed upon Indian trust or restricted property in that they continue to affect the property after it has left Native ownership. These continuing restrictions upon reindeer in the hands of non-Native transferees ensure that the transferees do not retain ownership of live reindeer in Alaska. It seems indisputable that the purpose of these post-transfer restrictions was to preclude the re-emergence of a non-Native reindeer industry descended from reindeer purchased from Natives. As appellant contends, there would seem to be little point to these detailed restrictions if they could so easily be circumvented with imported reindeer. Certainly, the extent to which the Native reindeer industry would be adversely affected by non-Native commercial reindeer operations does not depend upon the source of the reindeer with which the non-Native operations are launched.

[5] Appellant places substantial reliance on the legislative history of the Reindeer Act, which, on the whole, is very supportive of its position. There are a number of explicit statements in the legislative history which reflect an understanding that the bill under consideration, if enacted, would result in the permanent elimination of non-Native reindeer ownership in Alaska.

For instance, the House report states:

> At the present time only one solution [to the problems caused by conflicts between Natives and non-Natives] seems practicable and that lies in the purpose of the bill under consideration for the purchase by the Government of all nonnative-owned reindeer and such reindeer range equipment as may be useful and the distribution of the same among the natives or the holding of such reindeer and other property by the Government in trust for the use of the natives. *With the permanent elimination in this manner of the nonnative owners*, the problem will be a comparatively simple one, for then all of the deer will be native deer and the deer may be distributed and the ranges allocated in an equitable manner satisfactory to the natives. [Italics added.]

H.R. Rep. No. 1188 at 3. The House report also includes a letter from the Secretary of the Interior recommending amendments to the original bill but supporting its enactment. The Secretary stated:

> The experience of the Department in the administration of the affairs of the natives of Alaska and of the Reindeer Service convinces me that nonnative ownership of deer must be eliminated and the industry must be operated in a manner guaranteeing the economic security to the native residents of the reindeer areas. * * * *It is believed that the reindeer industry will not be assured permanently to the natives of Alaska unless all possibility of white ownership be eliminated.* It will therefore be necessary to buy all the deer of a nonnative owner on a given range or all interests in ownership. If only deer are purchased which are run through a corral or chute, nonnative ownership will still attach to escaped deer on the range or to stray deer on other ranges. [[19]] Such a

[19] The original bill provided that "all reindeer purchased must be actually counted in corrals or through chutes or in some other effective manner." 81 Cong. Rec. 9471 (1937) (remarks of Delegate Dimond). In accordance with the Secretary's recommendation, this provision was deleted.

situation would be calamitous and *we would in a space of a few years be faced with the same situation we now seek to eliminate entirely and avoid forever.* [Italics added.]

Id. at 5.

Statements made on the House floor by the House sponsor of the bill, Delegate Dimond of Alaska, are in accord. At one point, he stated:

The purpose of the bill is to purchase all of the reindeer of Alaska, now owned by others than natives, * * * and that *thereafter the reindeer in Alaska shall be reserved as to ownership and grazing for the natives alone, so that all others than natives will be excluded from the reindeer business or industry.* * * *

We are now seeking to do the thing that should have been done when reindeer were first brought to Alaska. From the very beginning the reindeer should have been reserved for the use or benefit of the natives and no one but natives should ever have been permitted to own or graze a reindeer in the Territory. [Italics added.]

81 Cong. Rec. 9471. Delegate Dimond's remarks were made during an extended debate on the House floor, in which he forcefully advocated enactment of the bill. The bill proved controversial in the House because it was considered costly and because it was thought by some to be a bail-out for the Northwestern Livestock Corporation, formerly Lomen and Company, which owned most of the non-Native reindeer in Alaska. This company was in financial difficulty at the time and was generally considered to have been the principal catalyst of the conflict between Native and non-Native reindeer owners. Supporters of the bill acknowledged that it was costly but argued that its effects would be permanent and would ultimately result in a cost benefit to the Federal Government because the Natives would become self-supporting. *See, e.g.*, Remarks of Rep. Green, 81 Cong. Reg. 9480: "If we pass this bill, the result we hope will be, and I think it will be, that as the white Alaskan reindeer owner vanishes from Alaska the native owner and the native Eskimo will be enabled to survive without the Federal Government having to contribute to his existence." In the end, despite heated opposition, the bill was passed by a vote of 109 to 51. It is apparent from a reading of the complete debate that House members were well aware that the bill was proposed as a measure which would, *inter alia*, preclude the future involvement of non-Natives in commercial reindeer operations in Alaska.

Consideration of the bill in the Senate was considerably less protracted than in the House. *See* 81 Cong. Rec. 4278-80, 9569-70. The legislative history shows, however, that the Senate's understanding of the bill was similar to that of the House. Senator Thomas of Oklahoma, the sponsor of the bill in the Senate, explained the bill on the floor of the Senate, stating in part: "The pending bill has for its purpose the taking of title to reindeer in northern Alaska and holding the title in the Government for the benefit of the Eskimos. * * * It provides further for the operation of the reindeer industry as a governmental institution for the benefit of the Eskimos." 81 Cong. Rec. 4278. Senate Report No. 474, 75th Cong., 1st Sess. (1937), states at page 3:

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> These problems [concerning conflicts between Native and non-Native reindeer owners], together with the charges and counter-charges of distraught and bewildered reindeer owners, have been the subject of several lengthy investigations and voluminous reports. A review of the entire matter, the scope, details, and seriousness of which this presentation can only indicate, forces the conclusion that *the rehabilitation of the Eskimo started in 1892 can be safeguarded and continued only if complete ownership of deer and control of the range is again established in the natives or in the Government on behalf of the natives.* [Italics added.]

While acknowledging that many statements in the legislative history support appellant's position, the Area Director also invokes the legislative history in support of his own position. He contends that it supports his argument that Congress depended in large part upon the range management provision of the Act, 25 U.S.C. § 500m, to accomplish the purposes of the Act.[20] He contends that "the grazing management provision, rather than any prohibition of non-Native importation of reindeer, was seen as the key to preserving the Native character of the industry" (Area Director's Brief at 12).[21]

There is no doubt that Congress viewed the range management provision as an important aspect of the Act. This provision was not a part of the original bill, however, but was added pursuant to a recommendation of the Secretary of the Interior, whose expressed concern was for preservation of the range. In recommending the amendment, the Secretary stated:

> One of the factors basic in insuring the food supply of the natives of Alaska from reindeer is the proper use of the range. At the present time certain ranges have become so overgrazed as to constitute a serious menace to the continuation of the reindeer industry in those regions and it is believed to be highly important that this bill providing for a self-sustaining economy for the natives of Alaska should contain authority for the regulation of reindeer grazing, round-ups, handlings, marketing, and butchering.

H.R. Rep. No. 1188 at 6. It is true, as the Area Director contends, that Delegate Dimond made statements indicating that a purpose of the range management provision was to exclude non-Natives from the reindeer industry. *See, e.g.*, his remarks at 81 Cong. Rec. 9472: "[I]t is necessary to purchase these deer as are owned by the white men and

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[20] 25 U.S.C. § 500m provides:

"In order to coordinate the use of public lands in Alaska for grazing reindeer with the purposes of this subchapter, the Secretary of the Interior is hereby authorized to regulate the grazing of reindeer upon said lands. He may, in his discretion, define reindeer ranges and regulate the use thereof for grazing reindeer; issue grazing permits; regulate and control all round-ups, handlings, markings, and butcherings of reindeer upon said public lands; and may issue rules and regulations to carry into effect the provisions of this section. Any person who willfully violates any of the rules and regulations promulgated for the purpose of carrying into effect the provisions of this section shall be deemed guilty of a misdemeanor and, upon conviction thereof, shall be punished by imprisonment for not more than one year or by a fine of not more than $500."

[21] Appellant charges the Area Director with inconsistency in making this argument. It contends that, although 25 U.S.C. § 500m does not explicitly restrict reindeer grazing to Natives, the Area Director is here willing to read such a restriction into the section, when he is unwilling to find that the Act as a whole restricts the reindeer industry to Natives.

It was actually BLM which, in implementing the Act, explicitly restricted reindeer grazing on Federal lands to Natives. 43 CFR 4310.2. No explanation of this restriction appears in the *Federal Register* preambles to the proposed and final rulemaking. *See* 26 FR 6476 (July 19, 1961); 26 FR 12696 (Dec. 29, 1961). Given the lack of any explicit restriction in 25 U.S.C. § 500m, the Board assumes that BLM considered its authority to impose the restriction as deriving from the Reindeer Act as a whole.

It is certainly arguable, as appellant's contention suggests, that the Area Director's present position is inconsistent with the BLM regulation.

distribute them among the natives and forever forbid, through the control of the range, white men from going into the business so that we will never have to go back and do this job all over again." However, most of the floor comments about range management reflected the concern expressed in the Secretary's recommendation, *i.e.*, the need to prevent overgrazing. *See, e.g.*, Remarks of Rep. Knutson, 81 Cong. Rec. 9481; Rep. Dempsey, 81 Cong. Rec. 9484, 9492; Rep. Engelbright, 81 Cong. Rec. 9485. Further, although it is clear that Congress viewed the presence of non-Native herders on the range as a problem, it is also clear that it did not consider range management alone adequate to solve the problem. Indeed, the House rejected the suggestion made at one point during the debate that the entire purpose of the bill could be accomplished by regulation of the range.[22] Clearly, if Congress had believed that regulation of the range would be adequate to accomplish the purpose of the Act, once the initial reindeer acquisitions had been made, it would not have seen a need to enact the elaborate post-transfer restrictions upon reindeer in 25 U.S.C. § 500i. *See* discussion, *supra*. In any event, regulation of the range in Federal ownership, even if it had been adequate at one time to enforce the Act, can hardly be considered adequate now, because much of the formerly Federal land has passed out of Federal ownership. The Board rejects any implication in the Area Director's argument that Congress saw range management as the exclusive means of enforcing the Act.

[6] Appellant next contends that the Department of the Interior, contemporaneous with enactment of the Reindeer Act, construed the Act to restrict the reindeer industry to Natives. It further contends that the Department's contemporaneous interpretation is entitled to respect.

It is clear that the Department initially interpreted the Act as authorizing and requiring the Department to eliminate all non-Native ownership of reindeer. This understanding is reflected not only in the statements made to Congress by the Secretary of the Interior, but also in the fact that the Department proceeded as soon as possible to acquire all non-Native-owned reindeer. Further, as noted above, until very recently, the Department appears to have maintained the view that only Natives could engage in the reindeer industry.

In *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965), the Supreme Court stated:

> When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration. * * * "Particularly is this respect due when the administrative practice at stake 'involves a contemporaneous construction of a statute by the men charged with

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[22] Rep. Taber stated:

"I do want to say one other thing now with reference to the bill. It appears that every bit of this grazing land is in Government ownership. This is the statement of the Delegate from Alaska. It is under Government control, and everything that is needed to do to maintain this grazing land for the Eskimo is for the Government, by law or otherwise, to establish a regulation so that only the Eskimo can have this privilege. There is not any sense at all in going through all this rigmarole and spending all this money to accomplish something that can be done in a very simple way." 81 Cong. Rec. at 9488.

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the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new.' " [Citations omitted.]

The Court also places value on the consistency of an administrative interpretation. *See, e.g., Watt* v. *Alaska*, 451 U.S. 259, 272-73 (1981) ("The Department's contemporaneous construction carries persuasive weight. * * * The Department's current interpretation, being in conflict with its initial position, is entitled to considerably less deference." (Citations omitted.) This does not mean, of course, that an agency is precluded from ever changing a longstanding interpretation of a statute. *Cf. Montana* v. *Blackfeet Tribe*, 471 U.S. 759, 768 n.7 (1985). It suggests, however, that such a change should be made with caution and only upon a conclusion that the Department's initial interpretation was clearly erroneous.

Finally, appellant contends that its position is supported by principles of statutory construction governing the interpretation of statutes enacted for the benefit of Indians. Appellant cites *Winters* v. *United States*, 207 U.S. 564 (1907), and *Alaska Pacific Fisheries* v. *United States*, 248 U.S. 78 (1918), in support of its position. Appellant's reliance on these cases suggests that, in a broad sense, appellant views Congress as having purchased a "reservation" for Alaska Natives, consisting of the reindeer industry in Alaska.[23]

Although the Reindeer Act is unique, its underlying intent is somewhat analogous to one of Congress' traditional reasons for establishing Indian reservations--to enable the Indians to remain or become self-sustaining through undisturbed utilization of reservation resources. The Supreme Court has interpreted some of the treaties and statutes creating reservations as having impliedly reserved for the Indians certain property or rights not specifically mentioned in the authorizing enactments. In *Winters*, the Court held that an 1888 agreement establishing the Fort Belknap Reservation included an implied reservation of water sufficient for irrigation purposes. In *Alaska Pacific Fisheries*, the Court held that the statute setting aside "the body of lands known as Annette Islands" for the Metlakatla Indians impliedly reserved as well the adjacent waters and submerged land. In both cases, the Court found that the implied reservations were necessary to carry out the purposes of the Congressional enactments. In both cases, also, the Court invoked the rule of construction which requires that ambiguities in treaties and statutes be resolved in favor of the Indians. In *Winters*, the Court stated that this rule should "certainly be applied to determine between two inferences, one of which would support the purpose of the agreement and the other impair or

[23] *Cf.* F. Cohen, *Handbook of Federal Indian Law* 409 (U.S. Dept. of the Interior, 1942): "The most important law relating to reindeer is the Act of September 1, 1937, which is designed to establish for the natives of Alaska a self-sustaining economy *by acquiring for them the whole reindeer business*, and to develop native activity in all branches of the industry (Italics added; footnote omitted)"; Senator Thomas' statement on the floor of the Senate: "The pending bill has for its purpose *the taking of title to reindeer in northern Alaska and holding the title in the Government for the benefit of the Eskimos.*" 81 Cong. Rec. 4278 (italics added).

defeat it." 207 U.S. at 577. *See also Alaska Pacific Fisheries*, 248 U.S. at 89.

The circumstances present in *Alaska Pacific Fisheries* present a number of interesting parallels to the case at issue here. The Metlakatla Indians had emigrated from Canada in 1887 and settled on one of the Annette Islands because, the Court noted, "the fishery adjacent to the shore would afford a primary means of subsistence and a promising opportunity for industrial and commercial development." 248 U.S. at 88. Four years later, Congress set apart for their benefit "the body of lands known as Annette Islands." In 1916, a non-Indian corporation built a fish-trap approximately 600 feet from the high-tide line of the island on which the Indians lived. The Court noted that operation of the fish-trap would "tend materially to reduce the natural supply of fish accessible to the Indians." 248 U.S. at 87.

In determining what Congress meant by the term "the body of lands known as Annette Islands," the Court observed that

[t]he purpose of creating the reservation was to encourage, assist and protect the Indians in their effort to train themselves to habits of industry, become self-sustaining and advance to the ways of civilized life. * * * The Indians could not sustain themselves from the use of the upland alone. The use of the adjacent fishing grounds was equally essential. Without this the colony could not prosper in that location. * * * Evidently Congress intended to conform its action to their situation and needs.

Id. at 89. The Court concluded that the reservation "embrac[ed] the intervening and surrounding waters as well as the upland," continuing:

This conclusion has support in the general rule that statutes passed for the benefit of dependent Indian tribes or communities are to be liberally construed, doubtful expressions being resolved in favor of the Indians. * * * And it has further support in the facts that, save for the defendant's conduct in 1916, the statute from the time of its enactment has been treated, as stated in the opinion of the Alaska court, by the Indians and the public, as reserving the adjacent fishing grounds as well as the upland, and that in regulations prescribed by the Secretary of the Interior on February 9, 1915, the Indians are recognized as the only persons to whom permits may be issued for erecting salmon traps at these islands. [Citation omitted.]

Id. at 89-90.

In this case, it is clear from the face of the Reindeer Act and its legislative history that Congress sought to encourage and protect Alaska Natives in their efforts to become self-sustaining through a reindeer industry. It is abundantly evident that Congress was aware that the entry of non-Natives into the reindeer business had proved devastating to the Native industry in the past, and numerous explicit statements in the legislative history illustrate an intent to exclude non-Natives from the industry permanently. There can be no doubt that, in enacting the Reindeer Act, "Congress intended to conform its action to [the Natives'] situation and needs." In this case, the Natives' recognized need was an opportunity to develop and manage a reindeer industry unthreatened by non-Native competition.

Further, as was the case in *Alaska Pacific Fisheries*, the Reindeer Act has been treated by the Department of the Interior, the Natives, and the public, at least until Williams appeared on the scene in 1986, as having reserved the privilege of engaging in the reindeer industry in Alaska exclusively to Alaska Natives.

Finally, as in *Alaska Pacific Fisheries*, the Department of the Interior has promulgated regulations recognizing Natives as the only persons to whom reindeer grazing permits may be issued.

Thus, under the analysis in *Alaska Pacific Fisheries*, it appears that Congress should be deemed to have reserved the entire reindeer industry to the Natives--in other words, to have precluded non-Natives from engaging in the industry.

[7] The rule of statutory construction invoked in *Winters* and *Alaska Pacific Fisheries* is still vital today. In employing the principle recently, the Supreme Court stated: "When we are faced with these two possible constructions, our choice between them must be dictated by a principle deeply rooted in this Court's Indian jurisprudence: 'statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.' " *County of Yakima* v. *Confederated Bands & Tribes of the Yakima Indian Nation*, 112 S. Ct. 683, 693 (1992). Where a choice lies between two inferences, one of which would support the purpose of the statute and the other impair or defeat it, *Winters* teaches that the rule must be applied. There seems to be no doubt that an interpretation which would allow non-Natives to re-enter the reindeer industry in Alaska would impair or defeat the purpose of the Reindeer Act.[24]

The Board cannot agree with the Regional Solicitor's statement that "there is no particular ambiguity on the face of the [Reindeer Act]" (Regional Solicitor's May 11, 1989, memorandum at 3, quoted *supra*). There is neither a specific prohibition of, nor a specific allowance of, importation of foreign reindeer for commercial purposes. The lack of any explicit provision concerning this matter, in the face of the overall purpose expressed in the Act, creates a significant ambiguity. To resolve this ambiguity, it is both appropriate and necessary to employ the principle discussed. While, as noted above, the Area Director's interpretation of the statute is a reasonable one, it is also reasonable to conclude, especially in light of the strong support for such a conclusion in the legislative history, that Congress intended to preclude the re-entry of non-Natives into the reindeer industry. Accordingly, this ambiguity in the Reindeer Act must be resolved in the Natives' favor.

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[24] Williams states that he has only 300 reindeer and maintains them on his own land. He contends that his operation could never be a threat to the Native industry, in part because, according to him, the Natives have "exclusive, free access to millions of acres of Native, Federal and State lands" (Williams' Motion to Intervene at 5). It is apparent, however, that Williams' herd has increased markedly since 1987. Moreover, the arguments he makes before this Board suggest that he will seek to lease State-owned lands for reindeer grazing. And, apparently, the State would not deny him a permit on the grounds that he is a non-Native. *See* note 7.

It clearly appears to have been recognized by Congress that herds of a size to threaten the Native industry could well evolve from an initially small number of reindeer. Thus, for instance, Congress accepted the amendment proposed by the Secretary of the Interior which would allow the Department to purchase escaped and stray reindeer, the absence of which authority the Secretary stated would lead to a situation where "we would in a space of a few years be faced with the same situation we now seek to eliminate entirely and avoid forever." H.R. Rep. No. 1188 at 5.

[8] Another principle of statutory construction, if applied here, would produce the same result as the rule just discussed. It is described in 2B N. Singer, *Sutherland on Statutory Construction*, § 54.05 (5th ed. 1992):

> Broadly speaking, the language of a statute will be extended to include situations which would reasonably have been contemplated by the legislature in light of the circumstances giving rise to the legislation. If the language of a statute reasonably covers a situation, the statute applies irrespective of whether the legislature ever contemplated that specific application. In the words of the First Circuit Court of Appeals [in *Johnson* v. *United States*, 163 F. 30 (1st Cir. 1908)] "it is not an adequate discharge of duty for courts to say: We see what you are driving at, but you have not said it, and therefore we shall go on as before."

See also United States v. *Ron Pair Enterprises, Inc.*, 498 U.S. 235, 242 (1989): "The plain meaning of legislation should be conclusive, except in the 'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intention of its drafters.' * * * In such cases, the intention of the drafters, rather than the strict language, controls." On at least two recent occasions, the Ninth Circuit Court of Appeals has employed this exception to enforce a statute beyond its literal terms. *See Commodity Futures Trading Comm'n* v. *P.I.E., Inc.*, 853 F.2d 721, 725 (9th Cir. 1988); *Trailer Train Co.* v. *State Board of Equalization*, 697 F.2d 860, 866 (9th Cir.), *cert. denied*, 464 U.S. 846 (1983) ("A court may look beyond the express language of a statute where a literal interpretation thwarts the purpose of the overall statutory scheme or leads to an absurd result").

There is no doubt that a literal interpretation of the Reindeer Act, to the extent it would allow the reentry of non-Natives into the reindeer industry, conflicts with the intention of its drafters and thwarts the purpose of the overall statutory scheme. Further, insofar as the Act is interpreted to be unenforceable except by the Federal purchase of reindeer, it produces the potentially absurd result of guaranteeing a market to non-Natives who import reindeer.

It is apparent that this rule of statutory construction is appropriately applied only in rare circumstances. Here, however, the rule serves to reinforce the result reached under the previously discussed rule concerning construction of Indian statutes. Thus, it has added force in this case.

The Board holds that, given the overall statutory scheme, the strong legislative history, and the rules of statutory construction discussed, the Reindeer Act must be construed to prohibit non-Native entry into the reindeer industry in Alaska, regardless of the source of the reindeer involved.

Describing the prohibition and enforcing it, however, are two different things. It appears from the Regional Solicitor's May 11, 1989, memorandum, that a perceived difficulty of enforcement helped him to reach the conclusion he did. Appellant and the Area Director agree that a "remedy" is available through Federal purchase of non-Native-owned reindeer. Thereafter, however, they part company.

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Appellant contends that 25 U.S.C. § 500i is applicable to Williams' reindeer and requests that Williams be ordered to slaughter them or ship them out of Alaska in accordance with that section. The Board cannot agree that this section can be construed to authorize such an order. As discussed above, section 500i by its terms is applicable only to reindeer owned or sold by the United States, Natives, or Native organizations.

Further, Williams cannot be deemed to have forfeited title to his reindeer under 25 U.S.C. § 500b, because he has filed declarations of ownership, as required by that section, on a regular basis.

In his May 11, 1989, memorandum, the Regional Solicitor noted that civil remedies are available but doubts that they would be likely to succeed or that they would be of any great benefit to the Native reindeer herders. *See* Regional Solicitor's Memorandum, May 11, 1989, at 5, quoted *supra*.

In this case, in light of Williams' reliance on advice given by BIA, it appears that BIA should purchase or condemn the reindeer presently owned by him rather than attempt to pursue a more drastic remedy. Clearly, however, Federal acquisition of reindeer cannot be viewed as a satisfactory long-term enforcement mechanism if Williams and/or others continue to import reindeer for the purpose of engaging in commercial reindeer operations. Accordingly, BIA should begin to consider other means of enforcing the Act.[25]

25 U.S.C. § 500a authorizes the Secretary to acquire reindeer, "the acquisition of which he determines to be necessary to the effectuation of the purposes of [the Reindeer Act]." The Area Director contends that this authority gives him the discretion to determine when "the circumstances indicate the necessity to acquire non-Native-owned reindeer in order to accomplish the statutory purpose" (Area Director's Brief at 15). The Regional Solicitor's May 11, 1989, memorandum suggests, at pages 4-5, that such circumstances would be present when importation of reindeer by non-Natives "seriously threatens" the Act's purposes of "establishing and maintaining a self-sustaining economy and preserving the Native character of the reindeer industry or business." The memorandum does not further describe how or at what point the Area Director would determine that a serious threat to the Native industry was present.

Section 500a clearly vests discretion in the Secretary with respect to the acquisition of reindeer. However, to the extent the Area Director contends that this discretion is unfettered, the Board disagrees. The Area Director's discretion is limited by the requirement that he carry out the intent of the statute. As discussed above, the Board has held that Congress intended to reserve the reindeer industry exclusively to the Natives and to exclude non-Natives from the industry.

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[25] In addition to the litigation possibilities mentioned by the Regional Solicitor, diplomatic or legislative options might be considered. The Board assumes that BIA's efforts to promulgate regulations are ongoing. Published regulations would, of course, aid in future enforcement of the Act.

The Board concludes that the discretion vested in the Secretary by section 500a is the discretion to determine *how* the intent of the statute should be implemented. That is, section 500a allows him to take other actions, such as initiating litigation, to accomplish the intent of the statute and, if such action proves adequate, relieves him of any obligation to purchase the reindeer because acquisition would no longer be "necessary to the effectuation of the purposes of [the] Act."[26] The section presumably allows him to disregard small numbers of imported reindeer kept as pets or for subsistence purposes by the non-Native individuals who imported them.[27] It does not, however, permit him to allow the development of non-Native commercial herds to the point where they "seriously threaten" the Native industry, when to do so is likely to lead to the need for another major Federal buy-out of non-Native reindeer.[28] This is an eventuality Congress sought to avoid, as is abundantly evident from the legislative history of the Act.

The Board holds that, where BIA learns that non-Native-owned reindeer are kept for commercial purposes, it is required to take some action to eliminate the threat or potential threat to the Native industry. The Board further holds that the manner in which action is to be taken is within BIA's discretion to determine.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Juneau Area Director's May 27, 1992, decision is reversed, and this matter is remanded to him for further action.

ANITA VOGT
Administrative Judge

I CONCUR:

KATHRYN A. LYNN
Chief Administrative Judge

APPEALS OF HARDRIVES, INC.

IBCA-2319 *et al.* Decided: *December 1, 1992*

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

Contracts: Contract Disputes Act of 1978: Jurisdiction

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[26] The Secretary's determination, through BLM, to restrict reindeer grazing on public lands to Native herders can also be viewed as an exercise of this discretion.

[27] Non-Natives are required under 25 U.S.C. § 500b to file declarations of ownership for their imported reindeer, even under these circumstances. Under section 500b, a non-Native who fails to do so is "barred thereafter from asserting his claim of title." It may be that the Secretary would bear some responsibility to seize unreported reindeer or otherwise enforce this section. Because this case does not involve unreported reindeer, the Board reaches no conclusion in this regard.

[28] As noted, the point at which a serious threat would be perceived is not specified by the Area Director. Presumably, the seriousness of a threat would be determined, in part at least, by the number of reindeer in non-Native ownership. It is entirely possible that a threat would not be deemed serious until Williams' and/or other non-Native-owned herds had increased to the point where the acquisition costs to the Federal Government would be considerable. *See also* note 24.

1. A contractor's claim certification that the amounts requested accurately reflected the contract price adjustment to which it was entitled, and which otherwise followed the language of the Contract Disputes Act of 1978, 41 U.S.C. § 605(c)(1), substantially complied with the statutory requirements.

Contracts: Contract Disputes Act of 1978: Jurisdiction

2. A claim certification in which the certifier represented that "I" certify that the claim is made in good faith and that the supporting data are accurate and complete to the best of "my"knowledge and belief, and which otherwise followed the language of the Contract Disputes Act, amounted to the corporate contractor's certification, and substantially complied with the statutory requirements.

Contracts: Contract Disputes Act of 1978: Jurisdiction

3. A corporate Vice-President and member of the Board of Directors, who executed and had full responsibility for the bid which became the contract; had full responsibility for the management of the contract project; had full authority to submit claims, without prior approval; was present about 10 percent of his time at the relatively remote desert project site; attended all meetings with the contracting officer and all other significant meetings; and was in at least daily communication with his onsite project manager, who reported directly to him, qualified under FAR 33.207(c)(2)(i) to certify the contractor's claims as "[a] senior company official in charge at the contractor's plant or location involved."

APPEARANCES: Graeme Hancock, John R. Jefferies, Fennemore Craig, Phoenix, Arizona, for Appellant; Fritz L. Goreham, Wayne C. Nordwall, Department Counsel, Phoenix, Arizona, for the Government.

OPINION BY ADMINISTRATIVE JUDGE ROME

INTERIOR BOARD OF CONTRACT APPEALS

These appeals involve claims in connection with earthwork, canal trenching and lining, piping and concrete structures, under the above contract with the Department of the Interior, Bureau of Reclamation (BOR), for the construction of the Hohokam Canal near Phoenix, Arizona, part of the Central Arizona Project. The hearing has been completed and decisions on dispositive motions and the merits are pending. During the extended proceedings on these appeals, the BOR never has questioned the wording of Hardrives' claim certifications or the qualifications of the certifier, Mr. Raymond J. Hite, who was Hardrives' Vice-President in charge of its Civil Division (Transcript (Tr.) 1346). Nonetheless, in view of *United States* v. *Grumman Aerospace Corp.*, 927 F.2d 575 (Fed. Cir. 1991), *cert. denied*, 112 S. Ct. 330 (1991), by order dated October 21, 1992, the Board, *sua sponte*, raised the issue of the adequacy of the certifications under the Contract Disputes Act of 1978 (CDA), 41 U.S.C. § 605(c)(1), and Federal Acquisition Regulation (FAR) 33.207(c)(2), 48 CFR 33.207(c)(2) (1986), and requested evidence and briefing from appellant because the record was insufficient in this regard. If the Government disputed the certifications upon any ground (apart from various issues previously raised in motions to dismiss not relevant or addressed here), it was to do so by November 23, 1992.

On November 9, 1992, appellant submitted a brief, with affidavits and documentation, asserting that Mr. Hite was qualified to certify its claims under both subsections (i) and (ii) of FAR 33.207(c)(2) (below). On November 18, 1992, BOR responded:

The United States does not intend to dispute that Raymond Hite was entitled to sign documents on behalf of Hardrives, Incorporated. Mr. Hite signed the original bid, which was accepted by the government as a binding contract with Hardrives. In addition, Mr. Hite was in charge of Hardrives' Civil Division. Thus, it appears he was qualified to certify claims on behalf of Hardrives.

The Board appreciates BOR's position, but, as is apparent from *Grumman* and subsequent case law, the factors it cites are not sufficient, alone, to sustain a certification as adequate.

The CDA, as applicable here, requires that:

* * * For claims of more than $50,000, the contractor shall certify that the claim is made in good faith, that the supporting data are accurate and complete to the best of his knowledge and belief, and that the amount requested accurately reflects the contract adjustment for which the contractor believes the government is liable.

41 U.S.C. § 605(c)(1).

The statute does not designate any particular certifier on behalf of the contractor, but FAR 33.207(c)(2) provides: "If the contractor is not an individual, the certification shall be executed by—(i) A senior company official in charge at the contractor's plant or location involved; or (ii) An officer or general partner of the contractor having overall responsibility for the conduct of the contractor's affairs."

In *Grumman*, the court of appeals upheld the validity of the FAR and interpreted subsection (i), upon which our decision is based, to require that "the certifying senior company official have both primary responsibility for the execution of the contract *and* a physical presence at the location of the primary contract activity." 927 F.2d at 580 (italics in original).

Subsequent cases have concluded that "execution" of the contract refers to contract management, and not to the act of signing the contract. *See, e.g., Algernon Blair, Inc.*, ASBCA No. 40754, 91-2 BCA ¶ 23,920 at 119,830. As to the requirement for "a physical presence" at the primary contract activity location, neither the FAR nor *Grumman* define what constitutes sufficient presence. The Armed Services Board of Contract Appeals (ASBCA) has held that:

There is no magic amount of time, whether ten percent or twenty percent, that the certifying individual must have been present at the site. The critical question is whether the individual was present a sufficient amount of time so that, given his or her duties within appellant's organization, he or she can fairly be said to have been "in charge."

A. J. Maggio Co., ASBCA No. 40719, 91-3 BCA ¶ 24,312 at 121,499 (*citing Algernon Blair*). The ASBCA in *Maggio*, and in *Algernon Blair*, determined that the certifiers'presence 10 to 20 percent of the time at the project site, coupled with other evidence that the certifier was "in charge" (including, for example, in *Algernon Blair*, virtual daily contact by telephone when not on site) was sufficient. *But see R-E Corp. dba Reliance Enterprises*, ASBCA No. 43090, 92-3 BCA ¶ 25,136, and *Clearwater Constructors, Inc.*, ASBCA No. 42665, 92-1 BCA ¶ 24,450, where the certifiers' limited visits to the project sites, supported by other evidence of responsibility that the ASBCA's panels found unpersuasive, resulted in the dismissal of the appellants' appeals for improper certification.

Although not mentioned by either party in their briefs, on October 29, 1992, after the Board's order, President Bush signed S. 1569, the "Federal Courts Administration Act of 1992" (Administration Act), which in Title IX, § 907(a)(1), *amended* section 6(c) of the CDA, 41 U.S.C. § 605(c), so that it now reads, in relevant part:

> (1) * * * For claims of more than $50,000, the contractor shall certify that the claim is made in good faith, that the supporting data are accurate and complete to the best of his knowledge and belief, that the amount requested accurately reflects the contract adjustment for which the contractor believes the Government is liable, *and that the certifier is duly authorized to certify the claim on behalf of the contractor.*
>
> * * * * * * *
>
> (6) The contracting officer shall have no obligation to render a final decision on any claim of more than $50,000 that is not certified in accordance with paragraph (1) if, within 60 days after receipt of the claim, the contracting officer notifies the contractor in writing of the reasons why attempted certification was found to be defective. *A defect in the certification of a claim shall not deprive a court or an agency board of contract appeals of jurisdiction over that claim.* Prior to the entry of a final judgment by a court or a decision by an agency board of contract appeals, the court or agency board shall require a defective certification to be corrected.
>
> (7) *The certification required by paragraph (1) may be executed by any person duly authorized to bind the contractor with respect to the claim.* [Italics added.]

Section 907(a)(2) of the Administration Act, however, provides that the amendment to the certification provisions is effective with respect to all claims filed before, on, or after its enactment date, except claims that have been the subject of an appeal to a board of contract appeals or a suit in the United States Claims Court, before that date. The amendment, thus, does not apply to these appeals, and proper certification, under pre-existing law, is still a jurisdictional prerequisite to our entertaining them. The parties cannot confer subject matter jurisdiction by waiver or agreement and the Board must ensure itself that it has jurisdiction. *See, e.g., Bender* v. *Williamsport Area School District*, 475 U.S. 534 (1986); *W. M. Schlosser Co.* v. *United States*, 705 F.2d 1336, 1338 (Fed. Cir. 1983).

Nevertheless, the fact that the Government does not dispute the certifications, and the now clear congressional intent that individuals authorized by corporations to certify claims may do so, and that certification will no longer be a jurisdictional barrier, support the common sense approach we would have taken here in any event.

The Language of the Certifications

All of Hardrives' claims requiring certification were certified by Mr. Hite. Except for the December 10, 1987, certification of the claim which formed the basis for IBCA-2475, all of the certifications were substantially as follows:

In accordance with Section 6(c)(1) of the Contract Disputes Act of 1978, Hardrives, Inc. hereby certifies that the attached claim for equitable adjustment in excess of $50,000.00 is made in good faith, that the supporting data are accurate and complete to the best of its knowledge and belief and that the amounts requested by Hardrives, Inc. accurately reflect the contract price adjustment to which it is entitled.

(Appeal File (AF) for IBCA-2375 at Section V, Tab 6). The certification for the IBCA-2475 claim reads: "I certify that the claim is made in good faith; that the supporting data are accurate and complete to the best of my knowledge and belief, and that the amount requested accurately reflects the contract adjustment for which the contractor believes the Government is liable" (Government Exhibit 6-G).

A certification need not parrot the exact language of the CDA. "A substantially equivalent certification having the same meaning and effect is sufficient." *Whittaker Corp., Bermite Division*, ASBCA No. 39126, 92-1 BCA ¶ 24,376 at 121,752. Rather than specifically referencing the contractor's belief in the Government's liability, as does the CDA's certification language, most of appellant's certifications refer instead, in the third clause, to Hardrives' "entitlement" to the requested contract adjustment. This language substantially complies with the CDA's requirement and does not render the certification defective. *United States* v. *General Electric Corp.*, 727 F.2d 1567, 1569 (Fed. Cir. 1984).

The certification for the IBCA-2475 claim properly refers to the contractor's belief in the Government's liability, but states that "I" certify, and cites to "my" knowledge and belief, rather than invoking the contractor. We agree with the Claims Court, however, that this does not defeat a certification. *Sun Cal, Inc.* v. *United States*, 21 Cl. Ct. 31, 35 (1990); *Todd Building Co.* v. *United States*, 13 Cl. Ct. 587, 588 (1987). The CDA (inconsistently with the remainder of its certification language, and possibly fostering confusion) uses the personal term "his" when referring to a contractor's "knowledge and belief"; the concepts of "knowledge and belief" more readily apply to individuals than to entities; and, while the certification "is to be the *contractor's* certification," *Heyl & Patterson, Inc.*, ASBCA Nos. 40604 and 42589, 91-2 BCA ¶ 23,972 at 119,986 (italics in original), a central purpose of certification is that the certifier be a responsible representative of the contractor.[1] Prior to the

[1] In *Heyl & Patterson*, the Government had argued that the certifier's reference in the second clause of the certification to "our" knowledge and belief was not personal enough and did not make clear exactly who was certifying the claim. The ASBCA rejected that argument, noting that certifications relying upon the certifier's own knowledge and belief had been challenged by the Government in the past. (The referenced challenges were dismissed by the Claims Court, however. See above.) Indeed, although it may not have meant to be taken literally in the context examined here, one board has stated that "[t]he statute requires that the official certify *to his* knowledge *and* belief." *Liberty Environmental Specialties, Inc.*, VABCA No. 2948, 89-3 BCA § 21,982 at 110,564 (italics added, except for emphasis upon "and" in original).

Administration Act, the FAR designated those individuals who could certify on behalf of the contractor.

Thus, we find that the language of Hardrives' claim certifications substantially complied with the CDA and next examine whether Mr. Hite qualified under the FAR to certify its claims.

Mr. Hite's Qualifications to Certify

Although, as noted, Hardrives asserts that Mr. Hite meets the certification standards of both subsections (i) and (ii) of the FAR, because we find that he qualified as "(i) [a] senior company official in charge at the contractor's plant or location involved," we do not decide whether he was also "(ii) [a]n officer or general partner of the contractor having overall responsibility for the conduct of the contractor's affairs."

The affidavits of Mr. Hite, of Mr. Kenneth Hall, president of Hardrives, and of Mr. Kenneth Locke, resident project manager, as well as the corporate by-laws, minutes, and resolutions appended to the affidavits, establish that Mr. Hite was a senior company official and in charge of operations at the contract project site.

A Vice-President of Hardrives and member of its Board of Directors, Mr. Hite was in charge of the Civil Division, which handled all construction for the company, other than paving matters, including the Hohokam Project at issue. He was authorized to sign any contract, bid or bid bond on behalf of the corporation, relating to any division, and signed the $6,743,617.65 bid which became the contract here (AF in IBCA-2375, Tab V). Mr. Hite was authorized by the Board of Directors to represent Hardrives in any job construction-related matters. At all relevant times, he had authority to bind the company, and to submit any claim that he deemed appropriate, and to negotiate and execute any contract modification without consulting the president or the Board of Directors.

There is no doubt that Mr. Hite was a senior company official and no doubt that he was in charge of the Hohokam Project on behalf of the contractor.

As to Mr. Hite's presence at the relatively remote desert project site, although he was based at Hardrives' Civil Division and corporate headquarters in Minneapolis, Minnesota, he made regular monthly trips to the site, was present for all meetings with the contracting officer, and for all important meetings with representatives of BOR and of Franzoy-Corey, Inc., BOR's project designer, Construction Engineer and authorized representative.

Mr. Hite estimates that he spent about 10 percent of his time at the site. When he certified the claim involved in IBCA-2475, he actually was on site. When he was not present physically, he was in direct contact with Hardrives' Project Manger, Mr. Locke, who reported to him, and with other field personnel and supervisors, who also reported to him. It was Mr. Locke's practice to telephone Mr. Hite virtually every morning before construction began. There were additional contacts throughout the day as necessary.

We are satisfied that Mr. Hite, although not based at the site, was "in charge" there and appropriately certified Hardrives' claims.

DECISION

Hardrives' claim certifications comply with the CDA and the FAR.

CHERYL S. ROME
Administrative Judge

I CONCUR:

RUSSELL C. LYNCH
Chief Administrative Judge

ROCK POINT COMMUNITY SCHOOL BOARD

IBCA-3008, 3010 Decided: *December 30, 1992*

Contract No. CTN 35X01101, Grant No. GTN 35X01101, Bureau of Indian Affairs.

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

The Board held that it possessed jurisdiction to decide a dispute involving the funding of an administrative grant issued under the Indian Education Amendments of 1988.

APPEARANCES: Carol L. Barbero, Matthew S. Jaffe, Hobbs, Straus, Dean & Wilder, Washington, D.C., for the Appellant; Thomas O'Hare, Department Counsel, Albuquerque, New Mexico, for the Government.

OPINION ON JURISDICTION BY ADMINISTRATIVE JUDGE ROME

INTERIOR BOARD OF CONTRACT APPEALS

This is an appeal filed under the Contract Disputes Act of 1978 (CDA), 41 U.S.C. § 601, *et seq.*, from the contracting officer's deemed denial of appellant's claims for funding under the above administrative cost grant issued pursuant to 25 U.S.C. § 2008a, part of the Indian Education Amendments of 1988, Title V, P.L. 100-297, 102 Stat. 369.

The Board directed that the parties brief the issue of the Board's jurisdiction over such an appeal.[1] The parties concur that we possess jurisdiction and we so conclude.

Rock Point Community School Board operates the Rock Point Community School on the Navajo Reservation at Rock Point, Arizona,

[1] By unpublished order dated July 8, 1992, in *Rough Rock Community School Board*, IBCA-3037, the Board accepted jurisdiction over an appeal involving a grant under the Tribally Controlled Schools Act of 1988, 25 U.S.C. § 2501, *et seq.*, not at issue here, although the jurisdictional predicate is substantially the same.

December 30, 1992

under the above contract with the Bureau of Indian Affairs, executed pursuant to the Indian Self-Determination and Education Assistance Act of 1975, P.L. 93-638, 88 Stat. 2203, codified at 25 U.S.C. § 450 *et seq*. (1992 Supp.) (hereinafter Indian Self-Determination Act). The contract reimburses Rock Point for its direct costs of operating the school. The grant is for indirect costs. The parties disagreed as to the proper amount of grant funding for fiscal years 1990 and 1991 and these appeals ensued.

The relevant portion of the administrative grant statute is as follows:

> The Secretary shall, subject to the availability of appropriated funds, provide grants to each tribe or tribal organization operating a contract school in the amount determined under this section with respect to the tribe or tribal organization for the purpose of paying the administrative and indirect costs incurred in operating contract schools * * *.

25 U.S.C. § 2008a.(a)(1) (1992 Supp.). A "contract school" includes one, such as Rock Point, operated under an Indian Self-Determination Act contract. 25 U.S.C. § 2019(5) (1992 Supp.); 25 U.S.C. § 450f.

Title 25, United States Code, further provides that:

> * * * [A]ny 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 Act].

25 U.S.C. § 2508(e) (1992 Supp.).

The referenced provisions governing Indian Self-Determination Act contract disputes provide that the CDA, from which the Board's jurisdiction is derived, shall apply to those disputes. 25 U.S.C. § 450m-1; 25 U.S.C. § 450b.(j).

Decision

Accordingly, the Board possesses jurisdiction to entertain these appeals concerning appellant's 25 U.S.C. § 2008a administrative cost grant.

CHERYL S. ROME
Administrative Judge

I CONCUR:

RUSSELL C. LYNCH
Chief Administrative Judge

APPEALS OF HARDRIVES, INC.

IBCA-2319 *et al.* Decided: *December 30, 1992*

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

Motions to Dismiss Denied.

1. Contracts: Contract Disputes Act of 1978: Jurisdiction--Contracts: Disputes and Remedies: Jurisdiction--Rules of Practice: Appeals: Dismissal--Rules of Practice: Appeals: Jurisdiction--Rules of Practice: Appeals: Motions

In deciding motions to dismiss for lack of jurisdiction, in connection with appellant's claims under its contract with the Bureau of Reclamation for canal construction, the Board construed the complaint's allegations favorably to appellant; accepted unchallenged allegations as true; and considered relevant evidence of record.

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

The Board found that a subcontractor had not withdrawn its claims against appellant arising out of the Bureau of Reclamation contract, and the fact that appellant was required to pay the subcontractor in accordance with the subcontract, if the Bureau paid appellant, was sufficient to bar the application of the "*Severin* doctrine," which provides that a prime contractor cannot recover sums from the Government if they pertain only to a subcontractor's claim which the prime is not liable to pay. The Board also found that appellant properly was pursuing claims in its own right, as the entity in privity of contract with the Government.

3. Contracts: Contract Disputes Act of 1978: Jurisdiction--Contracts: Disputes and Remedies: Jurisdiction--Rules of Practice: Appeals: Dismissal--Rules of Practice: Appeals: Jurisdiction--Rules of Practice: Appeals: Motions

In finding that appellant's administrative delay claim in connection with the resolution of a design defect involving five concrete structures was based upon the same operative facts included in its original certified claim to the contracting officer under the Contract Disputes Act of 1978, and did not constitute a new claim, the Board considered the totality of the relevant correspondence and communications. It also found that the claim satisfied the dispute and "sum certain" requirements of FAR 33.201.

4. Contracts: Contract Disputes Act of 1978: Jurisdiction--Contracts: Disputes and Remedies: Jurisdiction--Rules of Practice: Appeals: Dismissal--Rules of Practice: Appeals: Jurisdiction--Rules of Practice: Appeals: Motions

The Board concluded that appellant's increase in its amended complaint of the number of delay days sought, its presentation of its quantum proof on a modified total cost basis, and its inclusion of costs associated with the effect of erroneous contract earthwork elevations upon pipe trenching, previously presented as a separate claim, then withdrawn, did not constitute new claims that had not been submitted to the contracting officer.

5. 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

While finding that the Government had ample opportunity to audit and review appellant's claims, the Board stressed that an audit was not a jurisdictional prerequisite under the Contract Disputes Act of 1978 to the Board's consideration of a properly submitted claim.

APPEARANCES: Graeme Hancock, John R. Jefferies, Fennemore Craig, Phoenix, Arizona, for Appellant; Fritz L. Goreham, Wayne C. Nordwall, Department Counsel, Phoenix, Arizona, for the Government.

OPINION BY ADMINISTRATIVE JUDGE ROME

INTERIOR BOARD OF CONTRACT APPEALS

These appeals involve claims under appellant Hardrives' above contract with the Department of the Interior (DOI), Bureau of Reclamation (BOR), for the construction of the Hohokam Canal near Phoenix, Arizona, part of the Central Arizona Project. Before, during, and after the 3-week hearing on the appeals, BOR offered various motions to dismiss. For the reasons stated at the hearing, and below, we deny the motions.

BACKGROUND

I. The Claim in IBCA-2375

On April 3, 1987, Hardrives wrote to the contracting officer, referencing "much" prior correspondence, and prior discussions with representatives of Franzoy-Corey, Architects and Engineers, Inc. (FC), the firm which had prepared the plans and specifications for the job, and had served as BOR's Construction Engineer and authorized representative. FC also was responsible for evaluating claims or proposals submitted by the contractor. Hardrives complained of defects in the contract documents, the magnitude of which was not yet known, direct impacts and a "ripple effect," 5-months' delay in the project and unresolved commercial issues. It noted that its recitation of problems relating to the defects was not all-inclusive, but rather illustrative of their impact (Appeal File (AF) for IBCA-2375, V, Tab 3).

By letter dated April 13, 1987, to the contracting officer's representative, with a copy to the contracting officer, Hardrives confirmed oral notice to BOR that it had been forced to terminate its earthwork subcontractor, MRT, Construction, Inc. The letter referred to an April 9, 1987, meeting with the contracting officer, other BOR personnel, and FC, after which Hardrives had expected FC's imminent release of an undefinitized modification. When FC, instead, had failed to communicate with Hardrives about the modification, MRT had declared its insolvency. The letter concluded:

December 30, 1992

We will make very effort to resume and execute the previously subcontracted earthwork portion of the contract, in as efficient a manner as possible given the quality of the contract documents and direction we have received, to date.

(AF for IBCA-2375, V, Tab 5).

On April 15, 1987, Hardrives submitted a certified claim to the contracting officer (AF for IBCA-2375, V, Tab 6). In relevant part, Hardrives sought direct and impact costs due to faulty contract documents that specified earthwork quantities and structural reinforced concrete work inaccurately. Concerning concrete work, the claim elaborated:

The calculations for the quantity of "Structural Reinforced Concrete Work, Excluding Precast Concrete," appear, based on our calculations and actual concrete used, to be deficient by approximately 270 cubic yards. While the Documents provide for payment at the bid price, the forming requirements for the work are substantially more difficult than the Documents (mis)led us to conclude. Additional costs and substantially greater time has (*sic*) been required due to this defect in some thirty-six structures that we have identified, to date. Each is requiring approximately one extra day to complete along with substantially more forming material, due to the greater mass.

(AF for IBCA-2375, V, Tab 6 at 7). The stated claim amounts totalled $2,423,260.38, including 197.58 delay days. Hardrives and its subcontractors' overhead rates were specified.

Additionally, Hardrives again referenced "much" earlier correspondence and complained generally of defects in the contract documents, five months' project delay, and unresolved commercial issues, the magnitude of which, direct impacts and "ripple effect," were not yet known. It again stressed that its recitation of problems relating to the defects was illustrative rather than comprehensive.

Among Hardrives' earlier communications with FC regarding concrete work were some relating to five particular structures, which appellant alleges, and BOR has not disputed, are included in the 36 structures referenced above (Appellant's April 14, 1992, Opposition to the Government's Numerous Supplemental Motions to Dismiss at 15-16). For those five, the contract documents had depicted "broken-back" transition structures where "check and pipe inlets" were required.

On July 29, 1986, FC had issued "Plan and Spec. Revision No. 19" (PS 19) changing the five structures to check and pipe inlets. FC had described the revision as "minor," "for informational purposes only," to clarify the specifications. As of August 4, 1986, FC specifically had not sought a cost proposal from Hardrives, on the ground that there allegedly had been no contract change. Hardrives had disagreed, however, asserting that the structures had been enlarged substantially. By letter dated December 11, 1986, FC had requested a cost proposal, later warning by letter dated February 19, 1987, that Hardrives was not to commence work on the structures without a contract modification. On February 19, 1987, Hardrives had submitted a proposal in the amount of $120,695.58, plus 5 additional working days per structure, which converted to 33 additional calendar days. By the time of Hardrives' April 15, 1987, claim in IBCA-2375, nearly 2 months later, neither FC nor BOR had responded to the proposal (Appellant's Exhibit (AX) 55; AX 216 at 11).

On April 22, 1987, the contracting officer wrote that he needed additional information on Hardrives' April 15 claim and that Hardrives would be contacted by BOR's representative, FC (AX 201). BOR asked FC to prepare a technical analysis of the claim and to obtain from the contractor any further information required (AX 202). On May 19, 1987, FC requested from Hardrives cost information, the amount of delay sought and justification, and documentation as to defective contract documents (AX 229).

In the meantime, on April 23, 1987, Hardrives had responded to a show cause notice from the contracting officer concerning job delays (AX 203). On May 8, 1987, Hardrives had written again to the contracting officer detailing reasons for job delay, including its claims of numerous defects in the contract documents, FC's delay in resolving construction problems, and its arbitrary contract administration. Hardrives requested an extension of "at least" 173 calendar days, noting:

> [BOR] received actual notice through on-site inspections and participation in meetings and discussions with and between Hardrives and [FC] about certain defects in the contract specifications and these other causes of delay. Through its agent, [FC], [BOR was] informed about all reasons for the delay.

(AX 216 at 2). Hardrives also incorporated its April 15 claim and others by reference, noted that the delay days sought had increased, and that cost supplementation would follow (AX 216 at 2, 4, 7, 8).

In its May 8, 1987, letter, under the caption "[FC] Failed to Solve or Inordinately Delayed In Solving Construction Problems," Hardrives cited FC's failure to respond to Hardrives' proposal concerning PS 19 and the five concrete structures (AX 216 at 7-8). Under the caption "[FC] Repeatedly Failed To Provide Hardrives With Material Facts Necessary To Its Performance," Hardrives wrote:

> [FC] advised Hardrives by letter dated August 14, 1986, that Revision 19 was only for informational purposes. Revision 19 deletes dimensions regarding stations 347+93, 430+03, 563+59, 577+04, and 722+26, as shown on sheet S14 of the plans. These stations are at the location of the broken back inlet and outlet transitions. When Hardrives studied the revision, it discovered [FC] was substantially enlarging the structure without informing Hardrives. Hardrives submitted a proposal to perform this work, but [FC] has not responded.

(AX 216 at 11). The letter contained an additional extensive section captioned "[FC] Arbitrarily Administered The Contract" (AX 216 at 8) and concluded by requesting final decisions within 60 days of BOR's receipt of Hardrives' various claims, noting that "[p]rompt resolution of issues on this project has yet to occur, despite repeated promises made by [FC] and [BOR] that appropriate contractual adjustments were 'in the pipeline' " (AX 216 at 12).

On June 16, 1987, in response to FC's letter of May 19, 1987, seeking information pertaining to Hardrives' April 15 claim, the contractor asserted:

> The issue of delays speaks for itself. The number of "Plan and Spec. Revisions" has reached 48 (see F.C. correspondence - File 00412.310). Obviously we cannot complete the construction until you complete the design. Of the 48 aforementioned revisions, an insignificant minority have been reduced to Contract Modifications, thus we have neither the direction nor the financial means to complete the work.
>
> The "contention" of "defective documents" is well detailed in the correspondence, to date, and a cursory review will provide sufficient information.

(Government's Exhibit (GX) 6D at 2). Hardrives increased its claim by $68,312.62, attributable to profit, an increase in the cost of concrete, and an increase in direct overhead costs.

In its November 23, 1987, and January 28, 1988, technical analyses, FC noted that Hardrives' April 15, 1987 claim, which it described as updated on June 16, 1987, had referred to considerable prior correspondence. FC found that the most comprehensive accumulation of information was included in Hardrives' May 8, 1987, letter (which had referred directly to the delays in resolving PS 19), and attached a copy as an exhibit (AX 132; AX 334 at 1222-23).

II. Appellant's Original Complaint in IBCA-2375

On September 4, 1987, Hardrives appealed to the Board from the failure of the contracting officer to render a decision on its claims. In its November 4, 1987, complaint, Hardrives alleged, among other things, that it, and its subcontractors, had incurred considerable expense and delay due to the defects in the contract documents; that the implied duty to cooperate in contract administration was breached when the defects were not corrected within a reasonable time; and that the failure to administer the contract promptly and accurately had substantially increased the cost of construction (Complaint at ¶¶ 26-31). The contractor sought $2,423,260.10, computed as of April 15, 1987 (inexplicably, not including the June 1987, increase), plus profit, interest, and "an equitable extension of time" (Complaint at ¶ 42).

In its December 8, 1987, answer, BOR alleged that the complaint failed to state a claim upon which relief could be granted and that the claim was not a proper claim under the Contract Disputes Act of 1978 (CDA), 41 U.S.C. § 605(a), because Hardrives had not requested a contracting officer's decision.

III. The Claim in IBCA-2475

Although disputing BOR's contention, on December 9, 1987, Hardrives submitted a claim, ultimately docketed as IBCA-2475, specifically requesting a contracting officer's decision (GX 6G). Hardrives considered the claim to be a recertification of its April 15, 1987, claim, which, in turn, it considered to be a culmination of requests for compensation and time extensions raised with FC and BOR previously (*see* GX 6F at 2; GX 6G). In the December 9, 1987, claim, Hardrives reiterated the grounds for the claim it believed it had already presented and increased the claim amount and delay days sought:

> Several times in the past, including on April 15, 1987, Hardrives submitted a claim for equitable adjustment pursuant to the Changes, Delays and Differing Site Conditions clauses ofthe subject contract. It has been Hardrives' contention that differing site conditions in the form of caliche where such material was not indicated to be, defective specifications in the form of incorrect grades, elevations, locations, and other problems, and inappropriate contract administration have led to tremendous additional costs. Our latest calculation shows these costs total $3,723,997.30. * * * Our claim also requests a time extension of 244 days, in addition to the 42 days sought in connection with the joint sealant dispute. To date, the claim has been discussed in a series of meetings. Meetings have concluded with requests for further documentation and support, and promises of modifications and equitable adjustments. However, resolution of this claim appears to be no closer than it was on the date the claim was submitted on April 15, 1987. It has been our position that this claim was certified specifically on this date to allow a final decision to be rendered. Nevertheless, we have been informed by [BOR] that [BOR] believes no final decision was desired. Obviously, we find such reasoning unpersuasive, as our purpose for certifying a claim was to obtain an appealable decision.

(GX 6G). The contractor continued that it intended to consolidate with IBCA-2375 any appeal arising from BOR's response to its December letter.

On February 18, 1988, Hardrives appealed to the Board from the contracting officer's failure to render a decision on its December 9, 1987, claim. The appeal was docketed as IBCA-2475 and on March 3, 1988, appellant moved to consolidate it with IBCA-2375. However, by order dated February 26, 1988, the Board had dismissed IBCA-2475 without prejudice and remanded it to the contracting officer for decision. Thus, it denied the motion to consolidate.

Thereafter, BOR withdrew its contention that the IBCA-2375 claim had not sought a contracting officer's decision.[1] Believing its claims to be covered in IBCA-2375, appellant did not then seek to reinstate IBCA-2475 after it had been remanded to the contracting officer, who failed to issue a decision. After BOR's motions to dismiss, as a protective measure, appellant moved to reinstate IBCA-2475 and to consolidate it with IBCA-2375. By order dated October 15, 1992, the Board granted appellant's requests. We deem BOR's motions to dismiss to cover both IBCA-2375 and IBCA-2475.

IV. The PS 19 Administrative Delay Claim

The aspect of Hardrives' claim pertaining to PS 19 focuses upon FC's alleged continuous delay in resolving the design change issue, compounded by FC's refusal to allow Hardrives to work on the five concrete structures affected absent Hardrives' execution of a contract modification with which it disagreed.

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[1] That contention was erroneous. *See, e.g., Transamerica Insurance Corp.* v. *United States,* 973 F.2d 1572 (Fed. Cir. 1992).

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It is uncontested that, after submitting its proposal in February 1987, 2 months prior to its April 15, 1987, claim, Hardrives raised the issue of PS 19 at every weekly meeting in 1987 (Tr. 621; appellant's proposed finding of fact 351 and BOR's concurrence). Although discussions and a revised proposal requested by FC eventually ensued, disagreement on the cost impact of PS 19 and delays in determining how the five structures were to be completed persisted.

On December 4, 1987, 5 days before it filed its December 9, 1987, claim, Hardrives met with FC and BOR to discuss administrative delays, among other things. Hardrives advised that it intended to demobilize if pending modification issues were not resolved. On December 4, FC forwarded a draft of a proposed modification covering PS 19 to BOR (AX 340; AX 343). On December 11, 1987, BOR issued a unilateral, undefinitized modification containing limitations which Hardrives found unacceptable. The modification provided that Hardrives was not to commence performance unless it agreed to the limitations. BOR issued another unilateral, undefinitized modification on January 5, 1988, also containing limitations unacceptable to Hardrives, and a direction that Hardrives was not to commence work unless it agreed to them. Hardrives alleges that the structures were not completed until spring 1988, because it had to wait for instructions on how to proceed (AX 347; AX 366; Tr. 712-13).

V. The Audits

After receiving Hardrives' initial claims, including those contained in IBCA-2375, the contracting officer requested an audit on July 7, 1987, but none occurred.[2] In March 1988, BOR made another audit request, and DOI's Office of the Inspector General (IG) began the audit process that month. At some point, BOR referred appellant's claims to the Department of Justice (DOJ) for investigation of fraud. At hearing, and in a prior deposition, although his testimony wavered, an FC representative stated that he had been informed that the matter had been referred to DOJ during 1988, or earlier, when Hardrives still was completing the project and FC still was administering it (Tr. 3528-33).

In an August 1, 1990, motion to stay proceedings before the Board (below), BOR reported that the "nature of the claim" had prompted "an extensive audit" by the IG, DOI, and DOJ (Motion at 2). Apparently, however, the fraud referral had been based upon a letter from a terminated employee. In his June 6, 1991, ruling in favor of Hardrives in the United States District Court civil fraud action which ensued, Judge William P. Copple found that employee to be devoid of credibility (*United States* v. *Hardrives, Inc.*, No. 90 CV-1656 (D. Ariz), Judge's Ruling, judgment entered June 11, 1991, appended to appellant's July 29, 1991, motion to lift stay).

[2] This, like some of the other audit information, was derived from uncontroverted facts presented in appellant's Dec. 10, 1991, motion to exclude the audit report, denied by the Board's order of Dec. 19, 1991.

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From the IG's office alone, at least three auditors were involved. Their field work was completed in the spring of 1989. The overall audit report on Hardrives' claims, including summaries of subcontractor-related claims, issued in December 1989.

Prior to the release of the audit report, no later than the spring of 1989, the IG's office, including at least the auditor principally involved, Mr. Raymond J. Macy, began to participate in DOJ's fraud investigation (Tr. 3780; Tr. 3784-85; Appellant's Dec. 10, 1991, motion to exclude audit report at 5). In his June 6, 1991, ruling dismissing the Government's fraud action, Judge Copple concluded that the auditors had not approached their review of Hardrives' records objectively.

Commencing on December 15, 1988, approximately 1 year before the audit report issued, and at various times thereafter, Hardrives had advised Mr. Macy that it was updating its claim to reflect a modified total cost approach and that it had hired Mr. David Duin, a claims consultant, to assist in that regard. Mr. Raymond Hite, former Vice President of Hardrives in charge of its Civil Division, which had been responsible for the contract work, and who had presented and certified Hardrives' claims; Mr. Ken Hall, Hardrives' President; and Mr. Scott D. Sinjem, Hardrives' Comptroller, all so testified, including testimony by Mr. Sinjem that Hardrives did not waiver from its determination to pursue that approach and that the auditors were fully aware of it (Tr. 1356-57; Tr. 2520-22; Tr. 2629-30; Tr. 2664; Tr. 2669-70).

Mr. Macy's testimony and workpapers confirm that he was notified that Hardrives was pursuing a modified total cost approach, and that Mr. Duin had been hired, although Mr. Macy testified that Mr. Hall and Mr. Sinjem later told him that they had decided to stay with the claim as originally presented (Tr. 3777-79; Tr. 3783; Tr. 3880; GX 47 at F-3-6, at 4-5). Mr. Sinjem testified that Hardrives did not raise the issue of its modified total cost approach at a September 1989, audit exit conference because Hardrives had informed the auditors prior thereto that, as Hardrives had not been provided with any draft report for review and comment, Hardrives' personnel planned only to listen at the conference (Tr. 2668-69). In any case, Mr. Macy never communicated with Mr. Duin (Tr. 3987).

During the course of the audit, Hardrives supplied the auditors with all financial information requested (Tr. 3986-87). All of the information from which Hardrives calculated its modified total cost damages, including all source materials, was made available to the auditors, and a significant portion of it was included in the auditors' work papers (Tr. 2664-65; GX 51). The auditors, in fact, compiled Hardrives' total costs from the information available and possessed the information necessary for a total cost audit (Tr. 3943-51).

Further, Mr. Hite and Mr. Sinjem both discussed PS 19 and FC's delay in acting upon it with the auditors as part of their claim and provided the auditors with information concerning it (Tr. 3947).

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VI. Discovery

By order dated December 20, 1989, because there had been no action before the Board since its October 1988, order denying Hardrives' motion for sanctions for BOR's failure to comply with a prior discovery order, the Board dismissed Hardrives' appeals without prejudice to reinstatement within 180 days at such time as the parties were prepared to proceed to hearing.

In the meantime, and thereafter, Hardrives pursued discovery vigorously. BOR did not conduct discovery, except for the deposition of Mr. Duin, which it did not notice until December 30, 1991, 1 week before the scheduled hearing. For the most part, BOR relied upon exhibits prepared for the prior DOJ fraud action.

VII. Government's Motion to Stay Proceedings

On June 14, 1990, appellant moved to reinstate its appeals and for the scheduling of a hearing. By order dated June 28, 1990, the Board reinstated the appeals and requested discovery and hearing information. Next, though, on August 1, 1990, BOR moved to stay proceedings pending the outcome of the civil fraud action then anticipated by DOJ. In its September 24, 1990, response, appellant described IBCA-2375 as follows:

> The largest claim, IBCA-2375, focuses on the changed conditions which directly resulted from the ground elevation errors and the engineer's delay in redesigning certain concrete structures at several points along the canal. The size of this claim is due in large part to Hardrives' increased overhead expenses.

(Response at 5).

DOJ postponed filing suit, including, among other reasons, its opportunity first to monitor a Miller Act action filed by MRT against Hardrives in 1988 (*United States ex rel. MRT Construction, Inc.* v. *Hardrives, Inc.*, CIV 88-1768-PHX-RGS (D. Ariz.) -- also heard by Judge Copple), which sought payment of funds at issue in portions of Hardrives' claims against BOR. MRT had delayed prosecuting that action, pending the outcome of Hardrives' claims, but had proceeded to schedule trial in October 1990, when it had become apparent that resolution of those claims was not imminent. Appellant's consultant, Mr. Duin, testified on Hardrives' behalf in that action.

DOJ ultimately filed its complaint against Hardrives on October 26, 1990, and the Board granted a stay. Hardrives has represented, and BOR has not contested, that Hardrives' claim in connection with PS 19 was raised repeatedly during the fraud trial (Appellant's April 14, 1992, Opposition to the Government's Numerous Supplemental Motions to Dismiss at 11-12).

VIII. Resumption of Board Proceedings and First Amended Complaint

In his June 6, 1991, ruling upon the close of the Government's fraud case, Judge Copple dismissed all of the Government's claims. On August 2, 1991, we granted appellant's motion to lift the stay of Board proceedings. Appellant sought to file an amended complaint in view of the audits and damage information garnered since its original complaint was filed 4 years previously. In its September 13, 1991, notice of hearing, which was scheduled to commence in December 1991, the Board directed that the amended complaint be filed by October 11, 1991; that BOR's response be filed by November 8, 1991; and that any pre-hearing motions be filed no later than November 19, 1991.

Appellant filed its amended complaint on schedule, alleging, in relevant part of Count 1 " 'Earthwork, Concrete and Misadministration Claims' (IBCA # 2375)," that:

> Other defects and inaccuracies in the Contract Documents are numerous and interrelated, and the expense and delay caused by these defects and inaccuracies were all compounded by [FC's] mismanagement of the Project and its delay in addressing the problems * * * or otherwise providing necessary direction to Hardrives to permit it to complete the Contract. These include [in addition to earthwork-related and other cited defects]:
>
> * * * * * * *
>
> (j) Changes in the number and design of concrete structures, which affected the forming requirements and associated expenses.
>
> (k) Failures to provide timely amended plans and specifications or to direct changes to correct deficiencies discovered in the Contract Documents, including, but not limited to, the check and pipe inlets * * *.

(Complaint at ¶ 52). The complaint continued that BOR and FC had breached their duty to cooperate with the contractor, in administering the contract, and in failing to correct errors and defects in a reasonable time, compounding the resulting costs, delays and impacts, which were interrelated, requiring a single claim for a total recovery in IBCA-2375, in the amount of at least $3,864,196, and a time extension of at least 373 days (Complaint at ¶¶ 53-67).

IX. Response to Amended Complaint and Pre-Hearing Motion to Dismiss

In its November 7, 1991, answer to the amended complaint, BOR alleged, as "affirmative defenses," that (1) any "subcontractor claims" had been withdrawn or compromised and that the Board did not have jurisdiction over them and (2) in count 1 appellant had increased its request for an extension of the contract performance period from 244 to 373 days, and the Board lacked jurisdiction over that portion of the claim because it had not been presented to the contracting officer. BOR did not file any motion to dismiss.

By order dated November 19, 1991, rescheduling the hearing, at the parties' request, to commence in January 1992, the Board directed that, if BOR intended to pursue its jurisdictional allegations, it was to file "a well-supported motion for partial dismissal" by December 10, 1991, and that any other pre-hearing motions now were due by that date.

On December 10, 1991, BOR filed a motion for partial dismissal. The grounds for its motion were that MRT had withdrawn its claim and Hardrives had no authority to pursue it; MRT's action against Hardrives had been resolved in favor of Hardrives, purportedly an adjudication that MRT's earthwork claim, through Hardrives, against the United States, was without merit; and Hardrives had been absolved of any liability to MRT, hence, allegedly pursuant to *Severin* v. *United States*, 99 Ct. Cl. 435 (1943), *cert. denied* 322 U.S. 733 (1943), Hardrives had no earthwork claim against the United States.

BOR also alleged that, while the amount of Hardrives' earthwork claim had not increased significantly, the increase in delay days sought was substantial, and based upon a theory and operative facts not presented to the contracting officer. BOR did not elaborate upon the alleged differences in theory and operative facts and did not move to dismiss any portion of the appeals upon any other grounds.

On December 20, 1991, the Board scheduled oral argument on BOR's motion for the pre-hearing conference and directed that, with regard to the "new claim" allegation, the parties were to focus upon the operative facts.

On December 30, 1991, MRT filed a "Motion to Intervene to Present its Earthwork Claims or for Payment of its Claim Monies to it or a Third Party Escrow Account" and requested oral argument at the pre-hearing conference.

A. MRT's Vacillations[3]

On April 6, 1990, apparently prompted by DOJ's fraud investigation, MRT had written to Hardrives withdrawing support of claims "allegedly filed on its behalf by Hardrives," claiming that they were presented improperly. (Judge Copple, in the DOJ fraud action, found that contention unfounded (June 6, 1991, Ruling at 8-9)). On June 5, 1990, Hardrives had responded that it would treat MRT's action as "an unequivocal decision by MRT to withdraw all interest in any government contract claim seeking reimbursement for any work performed, equipment used, or expenses incurred on the Hohokam canal project." Hardrives urged MRT to reconsider, deeming MRT's action not to be in MRT's interest. It is clear from the correspondence that discussions had been ongoing.

As of the hearing, MRT's district court action against Hardrives had been dismissed without prejudice pending potential settlement (November 21, 1991, Judgment Dismissing Action By Reason of Settlement). Prior thereto, Judge Copple had indicated that MRT

[3] Copies of the documents referenced in this section are appended to the Government's Dec. 10, 1991, motion for partial dismissal, to MRT's Dec. 30., 1991, motion to intervene, or were submitted to the Board at hearing.

appeared liable to Hardrives in the amount of approximately $140,000, apart from sums which might otherwise become due to MRT in the event Hardrives recovered monies on MRT's behalf in these appeals (Tr. 51). On April 30, 1991, during the course of its suit, MRT had filed a motion with Judge Copple for permission to pursue its earthwork claims in district court or on its own behalf before the Board. At the core of that motion was its desire to pursue earthwork claims on a variation in estimated quantities theory, one Hardrives alleges the subcontractor had not expressed to it when the claims or original complaint before the Board were filed (*see, e.g*, MRT's April 4, 1988, letter to Hardrives and Hardrives' April 28, 1988, response).

Before MRT's motion in district court was heard, by telefaxed letter dated October 11, 1991, MRT advised Hardrives that, pursuant to agreements reached, including "proper formatting of" MRT's claims, it would support the earthwork claims to be heard by the Board. Hardrives proceeded to file its amended complaint that day. Further, by letter dated December 10, 1991, after Hardrives had filed its amended complaint, MRT wrote to Hardrives that:

> It appears that we have reached an impasse with respect to Hardrives' nonnegotiable terms * * *. However, MRT remains committed to advancing its claim reinstated pursuant to my October 11, 1991 letter to you. To that end, MRT will continue to provide reasonable assistance to Hardrives and its counsel in the preparation of claims pending before the IBCA. Further, MRT will participate in the hearing, present testimony and use its best efforts to secure the presence and assistance of former employees of MRT, including Paul Acreman.

Twenty days later, MRT filed its motion to intervene in the Board proceedings. In that motion, MRT asserted that it had "not fully and finally released Hardrives from liability for its duty to present MRT's earthwork claims to the government, refusing to present MRT's claims except under Hardrives' terms, or for liability for defective documents and differing site conditions" (Motion at 4). The subcontractor noted that it would agree to release Hardrives under agreements yet to be executed. As of the hearing, no such agreements had been executed, MRT pursued its motion to intervene, and there is no evidence that MRT ever has released Hardrives from any alleged liability to it.

MRT's June 23, 1986, subcontract with Hardrives provides, in the Payments clause, that MRT is not entitled to payment from Hardrives prior to Hardrives' receipt of payment from the Government, which is subject to withholding by Hardrives on account of any damages allegedly owed to it by MRT. The subcontract further provides, in pertinent part:

> VIII. Claims: Hardrives, Inc., may, upon the written request of the Subcontractor, appeal on behalf of the Subcontractor from any ruling or decision of the Principal or A/E, or institute any action or proceeding to recover damages by reason of any affirmative claim by the Subcontractor, or by reason of any deduction or refusal to pay by the Principal, for any reason, involving the work or performance of the Subcontractor. In that event, the Subcontractor shall pay all costs attributable thereto and shall render all assistance requested by Hardrives, Inc. The Subcontractor shall be bound by the determination of the Principal, the A/E, or in the event of an appeal or further action or proceeding, by the determination of same, and shall be entitled only to its

proportionate share of any actual net recovery, less overhead and profit to Hardrives, Inc. and less Hardrives, Inc.'s expenses and attorney's fees in handling said matter. The Subcontractor hereby waives and releases any and all claims, causes of actions, and rights to further payment beyond the Contract amount, except as Hardrives, Inc. may receive funds or extensions of time from the Principal or A/E.

* * * * * * *

XI. Progress and Performance: * * * The Subcontractor * * * shall perform this Contract at such times, in such order, and in such manner as Hardrives, Inc. may direct. * * * The Subcontractor acknowledges that the Contract price is based on the fact that Hardrives, Inc. is not liable to the Subcontractor, absent any actual fraud or intentional and active tortious act, for any damages or costs due to delays, accelerations, non-performance or sequence of the Subcontractor's work. * * * Hardrives, Inc. owes no damage, duty, obligation, or liability to the Subcontractor as a result of any delay, interference, suspension, or other event, except for seeking [an] extension of time from the Principal.

At oral argument on MRT's motion to intervene, held during the pre-hearing conference on January 8, 1992, it was apparent that MRT had no intention of abandoning its claims against BOR and that it believed that "all parties, Hardrives and all of the subs, have been damaged by the problems inherent in the documents and certain practices on the job" (Tr. 88). Rather, it wanted to pursue the claims directly. Although MRT felt constrained by the subcontract's provisions that it would not be paid until Hardrives had been paid, it was not purporting to release Hardrives from any alleged liability to it (Tr. 88-89).

Indeed, Mr. Paul Acreman, who was co-owner of MRT at the time of its subcontract with Hardrives and MRT's project manager (Tr. 1778-79), testified extensively in support of Hardrives' claims at the Board hearing.

B. The Alleged New Claim as Presented at Oral Argument

During the January 8, 1992, oral argument on the second aspect of its motion for partial dismissal, BOR alleged not only that the increase in the number of delay days sought by Hardrives constituted a new claim, but also that the presentation of the claim on a modified total cost basis amounted to a new theory and new claim never presented to the contracting officer, or audited. BOR did not identify any allegedly new operative facts. It stated that the amount of Hardrives' earthwork claim "concededly has remained fairly constant throughout, but the method used to get there has changed drastically." It also noted that some of the claims had decreased in amount (Tr. 73).

BOR asserted that the contracting officer had been deprived of his right to analyze the claims, and that he would testify that Hardrives' claims as presented for hearing were not the ones presented to him (Tr. 72). The contracting officer, however, did not testify at the hearing. o intervene (Tr. 97-103) and the Government's motion to dismiss (Tr. 103-06).

X. During-Hearing Motions to Dismiss for Lack of Jurisdiction

A. January 23, 1992, Motion

On January 23, 1992, during the hearing, BOR filed another motion to dismiss for lack of jurisdiction, alleging that, although the total amount of appellant's claim in IBCA-2375/2475 had remained relatively stable, appellant's shifting of the cost structure of the claim, so that some aspects increased and others decreased in amount, violated the requirement of Federal Acquisition Regulation (FAR) 33.201, that a claim under the CDA be "in a sum certain."

BOR also alleged that the contract (clauses unspecified), 41 U.S.C. § 254(d)(1)(D), and FAR 15.804-2(a)(1)(ii), required that the contractor submit cost or pricing data in connection with a contract modification of over $100,000 and that BOR had the attendant right to audit, under 41 U.S.C. § 254(d)(3) and (4), which Hardrives had subverted.

B. January 29, 1992, Motion

On January 29, 1992, during testimony by its auditor, BOR again urged dismissal upon the ground that the Government had not audited a total cost claim. It also advanced, for the first time, a motion to dismiss IBCA-2375 on the basis that the portion of it involving PS 19 never had been certified or presented to the contracting officer. According to BOR, that aspect of IBCA-2375 was so intertwined with the remainder of the IBCA-2375 claims that the entire appeal must be dismissed.

XI. Post-Hearing Motion to Dismiss

On March 2, 1991, after the hearing, BOR filed a "supplement" to its motions to dismiss, reiterating earlier arguments and adding the allegation that a portion of the IBCA-2375/2474 earthwork claim, related to elevation errors affecting pipe trenching, was not properly before the Board because Hardrives originally had filed a pipe trench claim separately, then withdrawn it.

On December 1, 1987, Hardrives had submitted a claim in the amount of $116,007.52, based upon its contention that, at pipe trench locations, it was required to dig one and one-half feet deeper than shown on erroneous contract drawings. The contracting officer never decided the claim and the ensuing appeal was docketed as IBCA-2503. It was dismissed without prejudice, along with other pending appeals, by the Board's order of December 20, 1989.

According to appellant, and unrefuted by BOR, the pipe trench claim had been based upon a mathematical computer formula that had attempted to segregate the amount of additional earth removed from all pipe trenches due to elevation errors in the contract documents. The formula proved to be erroneous. Appellant recognized the error and informed the auditors that the claim had been based upon incorrect data; could not be supported in the amount of $116,000; was more likely to be $5,000 to $10,000, but could not be determined readily from field data available or segregated from related costs; and that the $116,000 claim would be withdrawn. Appellant did not seek to reinstate it when it moved to reinstate its appeals in June 1990. Appellant's costs in connection with elevation errors affecting pipe trench locations instead are included as part of its overall costs in the calculation of its modified total cost claim (Tr. 2644-45, 2647, 3806, 3842-44, 3910-11, 4277-78, 4290, 4314-15; GX 58 at Q-3-2, Q-3-4, and Q-3-5).

DISCUSSION

[1] In deciding a motion to dismiss for lack of jurisdiction, the allegations of the complaint normally are construed in favor of the appellant. Any unchallenged allegations are accepted as true. When the jurisdictional facts are in dispute, however, we will consider relevant evidence of record (particularly here, when new jurisdictional contentions were raised mid-and post-hearing). The burden is upon appellant to establish jurisdiction. *Scheuer* v. *Rhodes*, 416 U.S. 232, 236 (1974); *Rocovich* v. *United States*, 933 F.2d 991, 993 (Fed. Cir. 1991); *Hamlet* v. *United States*, 873 F.2d 1414, 1416 (Fed. Cir. 1989); *Reynolds* v. *Army & Air Force Exchange Service*, 846 F.2d 746, 747 (Fed. Cir. 1988); *Rohmann* v. *United States*, 25 Cl. Ct. 274, 277 (1992).

[2] The Board's denial at the pre-hearing conference of MRT's motion to intervene, confirmed here, was based upon the principle that, with rare exceptions not applicable here, direct subcontractor appeals under the CDA are barred for lack of privity of contract with the Government. *Erickson Air Crane Co. of Washington, Inc.* v. *United States*, 731 F.2d 810, 813 (Fed. Cir. 1984); *United States* v. *Johnson Controls, Inc.*, 713 F.2d 1541 (Fed. Cir. 1983). A subcontractor has no right to intervene to pursue a claim, or a theory, not advanced by the prime contractor. *See Techcraft, Inc.* v. *United States*, 13 Cl. Ct. 248 (1987).[4]

BOR's contention that MRT has withdrawn its claims arising out of its subcontract with Hardrives, and that, therefore, Hardrives has no right to pursue earthwork-related claims under its contract with BOR, is unfounded. In its original December 10, 1991, motion papers, BOR cited *Severin*. Under the "*Severin* doctrine," a prime contractor cannot recover sums from the Government if they pertain only to a subcontractor's claim which the prime is not liable to pay. *Severin*, 99 Ct. Cl. at 443; *Utley-James, Inc.*, GSBCA No. 5370, 85-1 BCA ¶ 17,816 at 89,117. The doctrine is construed narrowly. *Johnson Controls*, 713 F.2d at 1552, n.8.

[4] The Claims Court in *Techcraft* denied a subcontractor the right to intervene over a contractor's objection, as here, despite its RUSCC 24, which parallels Fed. R. Civ. P. 24, and allows interested parties to intervene as of right or by permission in certain circumstances. The Board has no such rule and, although we may elect to be guided by the Federal Rules, we are not bound by them. Moreover, MRT's interests will be protected, in accordance with the terms of its subcontract.

In deciding whether the prime contractor is liable to pay the subcontractor for those aspects of the prime's claim that pertain to the subcontractor's work or costs, tribunals have examined whether the subcontract contains a pertinent exculpatory clause, or whether there is a release, completely by exonerating the prime and expressly negating any liability of the prime contractor to the subcontractor. The burden of proof of exculpation or release is upon the Government. *Blount Brothers Construction Co.* v. *United States*, 346 F.2d 962, 965 (Ct. Cl. 1965);[5] *Folk Construction Co.* v. *United States*, 2 Cl. Ct. 681, 685 (1983).

BOR has not carried its burden. Its premise that the district court found in Hardrives' favor on certain of MRT's contentions under its subcontract, and its convoluted conclusion that BOR thereby was absolved from liability to Hardrives on earthwork-related claims, are faulty. Based upon the record before us, MRT's district court action has no affect upon the claims Hardrives has asserted against BOR, or upon MRT's own allegations against BOR. Moreover, as of hearing, the district court had dismissed MRT's action without prejudice, prior to making formal findings of fact. There is no evidence of any court-imposed unconditional release of Hardrives from MRT's earthwork-related claims. To the extent that the district court may have considered any such claims, it was in the context of an offset against monies the court concluded MRT owed to Hardrives. Even if there were an adjudication in favor of Hardrives, it would not affect BOR's liability to Hardrives for defective contract documents, delays, and the like.

Furthermore, despite language in MRT's subcontract which otherwise might be considered exculpatory, the agreement provides that MRT does not waive any claim to the extent that Hardrives receives compensation therefor, or an extension of time, from the Government. This conditional payment provision is sufficient to bar the application of the *Severin* doctrine. *J. L. Simmons Co.* v. *United States*, 304 F.2d 886, 889 (Ct. Cl. 1962); *Donovan Construction Co.* v. *United States*, 149 F. Supp. 898, 900 (Ct. Cl. 1957), *cert. denied*, 355 U.S. 826 (1957); *Pan Arctic Corp.* v. *United States*, 8 Cl. Ct. 546, 548 (1985).

In oral argument, BOR's counsel changed course and contended that the *Severin* doctrine was irrelevant because, as MRT allegedly had withdrawn its claim, there was no MRT-related claim that the Board could consider (Tr. 68). To the contrary, it is clear from Hardrives' oral argument, evidence presented at the pre-hearing conference, evidence adduced at hearing, and the testimony of Mr. Acreman, a former principal of MRT, that MRT has by no means abandoned its claims

[5] The subcontract in *Blount* contained a clause providing that the prime contractor was not liable to the subcontractor for delay to the subcontractor's work caused by the Government. The Court of Claims found the clause inapplicable because the contractor was asserting an equitable adjustment claim, not a delay claim. Here, although it does not mention alleged Government-caused delays specifically, the subcontract provides that Hardrives is not liable for delays in MRT's work, except to seek time extensions. However, the delay days Hardrives seeks pertain to its own overall completion of the contract and its extended overhead and are intermingled with delays and associated costs incurred by MRT.

against Hardrives under its subcontract, which in turn arise from its claims that BOR's contract documents were defective, the contract was misadministered *et al.* What is irrelevant is the fact that MRT might have wished to rely upon the variation in estimated quantities clause in connection with the existing claim that the contract documents misrepresented the earthwork to be performed. MRT has no claim to present, absent sponsorship by Hardrives (which, under the terms of the subcontract, is elective), because MRT is not in privity of contract with BOR.

Unless the limited *Severin* doctrine applies, and we have found that it does not, the prime contractor has every right to submit contract claims for work performed by a subcontractor, regardless of whether the subcontractor originates the claims. The prime contractor is the one liable to the Government for contract performance and, accordingly, is the one which enjoys the attendant right to claim for excess work or costs. While MRT's subcontract provides that Hardrives "may" take action against BOR upon MRT's written request, it neither requires Hardrives to do so, nor limits Hardrives' ability to pursue BOR on its own initiative. The same privity of contract principle that protects the Government from direct suits by subcontractors provides the basis for the prime contractor's right to sue. *See Time Contractors, J.V.*, DOT BCA Nos. 1669, 1691, 87-1 BCA ¶ 19,582 at 99,047.

Indeed, in a post-*Severin* case in which there had been no finding that the contractor was liable to the subcontractor, and the contractor had not paid the subcontractor, the Supreme Court nevertheless held:

> Clearly the subcontractor could not recover this claim in a suit against the United States, for there was no express or implied contract between him and the Government * * *. But it does not follow that respondent [prime contractor] is barred from suing for this amount. *Respondent was the only person legally bound to perform his contract with the Government* and he had the undoubted right to recover from the Government the contract price for the . . . work whether that work was performed personally or through another. *This necessarily implies the right to recover extra costs and services wrongfully demanded of respondent under the contract, regardless of whether such costs were incurred or such services were performed personally or through a subcontractor.* Respondent's contract with the Government is thus sufficient to sustain an action for extra costs wrongfully demanded under that contract. [Citations omitted; italics added.]

United States v. *Blair*, 321 U.S. 730, 737 (1944).

Other boards have followed the dictates of privity in denying motions to dismiss and allowing the prime contractor to pursue claims even when a subcontractor, unlike here, has withdrawn them unequivocally, *Utley-James, Inc.*, 85-1 BCA at 89,116-17, or has settled with the Government. *Batteast Construction Co.*, ASBCA Nos. 30452, 33357, 89-3 BCA ¶ 21,933 at 110,342.

Accordingly, BOR's motion to dismiss based upon MRT's alleged withdrawal of its claims is denied.

[3] We turn to BOR's allegations that Hardrives has presented new claims that were not submitted to the contracting officer. The 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). Whether a board has jurisdiction under the CDA to consider a contractor's claims depends upon the sufficiency of its submission to the contracting officer, not upon the contents of its complaint. *Hibbitts Construction Co.*, ASBCA No. 35224, 88-1 BCA ¶ 20,505.

The CDA does not prescribe the format for a claim. The applicable FAR, 33.201, defines a claim as:

> a written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to the contract. * * * A voucher, invoice, or other routine request for payment that is not in dispute when submitted is not a claim. The submission may be converted to a claim, by written notice to the contracting officer as provided in 33.206(a),[6] if it is disputed either as to liability or amount or is not acted upon in a reasonable time.

48 CFR 33.201. The United States Court of Appeals for the Federal Circuit (CAFC) has upheld the FAR as a legitimate implementation of the CDA's statutory requirements and has confirmed that a claim must seek a sum certain as a matter of right. *Essex Electro Engineers, Inc.* v. *United States*, 960 F.2d 1576 (Fed. Cir. 1992). (The CAFC's particular emphasis in *Essex Electro*, in which it found that cost proposals and contractor inspection reports did not constitute claims, was upon the FAR's requirement that a claim be asserted as a matter of right.)

Similarly, in *Dawco Construction, Inc.* v. *United States*, 930 F.2d 872 (Fed. Cir. 1991), the court of appeals confirmed the FAR's provision that routine requests for payment, not in dispute when submitted, were not to be considered "claims" under the CDA. In *Dawco*, the court found that certain of a contractor's letters were merely attempts "to spur negotiations on an equitable adjustment," 930 F.2d at 879, rather than requests for a final decision from the contracting officer on a disputed matter.

Most recently, with regard to claim format, the CAFC has stressed that no "magic words" are required, that a claim need not specifically request a contracting officer's decision, and that the intent of the claim governs. *Transamerica*, 973 F.2d at 1578. In *Transamerica*, the court reaffirmed the liberal construction it had expressed in *Contract Cleaning Maintenance, Inc.* v. *United States*, 811 F.2d 586, 592 (Fed. Cir. 1987):

> [A]ll that is required is that the contractor submit in writing to the contracting officer a clear and unequivocal statement that gives the contracting officer adequate notice of the basis and amount of the claim. [Citations omitted.]

As we detailed in *Blaze Construction Co.*, IBCA-2863, 91-3 BCA ¶ 24,071 at 120,502-03:

> "Adequate notice" requires a sufficient statement "to enable the contracting officer to undertake a meaningful review of the claim." * * * The assertion of a new legal theory

[6] FAR 33.206(a) provides in part that "[c]ontractor claims shall be submitted in writing to the contracting officer for a decision."

of recovery, based upon the same operative facts included in the original claim, does not constitute a new claim. * * * Essentially, whether a sufficient claim has been presented to the contracting officer "is a question of judgment, which must be exercised on a case by case basis as the particular facts present themselves." [Citations omitted.]

Whether a claim has been expressed or submitted adequately may be gleaned from the " 'totality of the contractor's communications.' " *PAE GmbH Planning & Construction*, ASBCA Nos. 39749 and 40317, 92-2 BCA ¶ 24,920 at 124,255 [citations omitted.]; *see also Contract Cleaning Maintenance*, and *United States* v. *General Electric Corp.*, 727 F.2d 1567 (Fed. Cir. 1984).

BOR contends that Hardrives failed to submit to the contracting officer its claim in connection with the delayed resolution of the design defects in five concrete structures and the associated PS 19. BOR did not offer its motion to dismiss upon this ground until 2 days before the close of the 3-week hearing, despite the Board's order directing that any motions to dismiss be filed pre-hearing and despite the facts that Hardrives raised this aspect of its claims in connection with its April 15, 1987 claim, its December 9, 1987, claim, during audit, during the district court fraud trial, in its first complaint, in its response to the Government's stay motion, and in its amended complaint. BOR's unjustified delay in presenting its motion suggests that the foundation for it is not solid, and we so find.

Hardrives' April 15, 1987, claim, properly certified and submitted to the contracting officer, sought extra costs and delay days in specified amounts due to inaccurate contract documents affecting the forming requirements for structural reinforced concrete work and sought to include a "ripple effect," the total consequences of which could not then be known. The claim also referred to unresolved commercial issues[7], stated that its recitation of problems associated with the contract documents was intended to be illustrative and not all-inclusive, and incorporated "much" prior correspondence.

Prior relevant communications included those pertaining to the discovery that five of the concrete structures should be formed as check and pipe inlets rather than the broken-back structures depicted in the drawings; FC's position that this was not a contract change and no cost proposal should be submitted; Hardrives' disagreement; the issuance of PS 19 incorporating the change; Hardrives' eventual submission of a cost proposal at FC's request; FC's February 19, 1987, warning letter that no work could be done on the structures without a contract modification; Hardrives' raising the issue at every weekly meeting thereafter; coupled with FC's and BOR's failure to respond to Hardrives' proposal. Prior correspondence also included Hardrives' April 13, 1987, letter, which complained about the poor quality of the contract documents and lack of administrative direction to date.

[7] Although it is possible that this, too, could refer to FC's delay in resolving the concrete structure design issue, appellant has not offered guidance and we have not given this reference great weight.

The contracting officer responded to Hardrives' April 15, 1987, claim by stating that he needed additional information and that FC would be communicating with Hardrives about the claim. Hardrives' June 16, 1987, response to FC's inquiries, which FC itself identified as an update to the April 15, 1987, claim, identified the problem of plan and specification revisions awaiting contract modifications, the lack of direction, and Hardrives' inability to complete work under the circumstances. Hardrives noted that its contentions concerning defective contract documents were detailed in prior correspondence.

By the time of Hardrives' response, prior correspondence included its May 8, 1987, letter complaining about FC's failure to respond to the contractor's proposal concerning PS 19 and FC's failure to resolve, or inordinate delay in resolving, construction problems. FC deemed that letter to be the most thorough presentation of the basis for Hardrives' claims and attached it as part of its technical analyses of the claims.

Although the presentation of Hardrives' claims in its April 15, 1987, letter was not ideal, given the "totality" of the communications regarding them, we find that the contracting officer was apprised that the claims included the contractor's complaint that the design defect problem concerning the five concrete structures and PS 19 were not resolved promptly, resulting in project delay.

Concerning the need for a dispute at the time of claim submission, it is apparent from the April 15, 1987, claim letter and associated correspondence that Hardrives' complaints had ripened into a full dispute. FC disputed the alleged defect in the five concrete structures from the outset, and it is clear from the record as a whole, including testimony by FC's representative Laurel Hodges (Tr. 1843), that it always disputed that it had misadministered the contract. The fact that FC sought a "proposal" from Hardrives concerning PS 19, which it provided, is irrelevant in this context. FC's alleged delay in resolving the issue constitutes Hardrives' complaint and the matter in disagreement. *See Essex Electro Engineers, Inc.*, ASBCA No. 40553, 91-2 BCA ¶ 23,712 at 118,690 (involving impact costs of alleged delays and disruptions associated with unresolved contract modifications).

As to the requirement for a "sum certain," the 36 concrete structures referred to in the April 15, 1987, claim are said to include the 5 involved in PS 19. The money and delay days sought in the claim with regard to the 36 differ from Hardrives' proposal concerning PS 19, however. Nonetheless, due to Hardrives' proposal, FC and BOR were on notice of the initial amount of money and time the contractor was claiming for the five structures. While no precise amount of delay days were identified in the claim pertaining to the administrative delay associated with PS 19, FC and BOR were aware that Hardrives was complaining of the ripple and delay impact of the design defects and administrative problems. Hardrives', MRT's and the other subcontractors' direct and extended overhead rates were identified, but, as Hardrives noted, it simply was not possible for it to quantify the delay days at that point.

The language of FAR 33.201 pertaining to a "sum certain" is associated with specific requests for money. The FAR also notes that other sorts of relief (such as delay days and time extensions) may be sought. *See, e.g., Blake Construction Co.*, ASBCA Nos. 39937, 39938, 90-3 BCA ¶ 23,196 at 116,413-14 (requests for extensions of time do not require the assertion of a sum certain); *Batteast*, at 110,341 (delay days sought in an amended complaint were allowed even if not sought in the claim, or presented to the contracting officer, because they were merely an additional element of damage arising out of the same set of operative facts as the properly submitted claim).

Further, we consider Hardrives' December 9, 1987, letter, seeking $3,723,97.30, plus 244 days of delay and a time extension in the same amount, to be an update of the April 15, 1987, claim (as the letter itself indicates), and to request a sum certain in part attributable to the contractor's "inappropriate contract administration" claim cited in the letter. Although the letter was certified due to BOR's insistence that the prior claim had been defective, Hardrives was not required to do so.

It has long been the law that the "sum certain" language of the FAR does not bar even uncertified claim revisions in amount based upon subsequent experience, as long as no inherently new claim, founded upon different operative facts, is asserted and the claimant neither knew, nor reasonably should have known, of the factors pertaining to the quantum revision. *Tecom, Inc.* v. *United States*, 732 F.2d 935 (Fed. Cir. 1984); *Essex Electro Engineers*, at 118,691; *AAI Corp.* v. *United States*, 22 Cl. Ct. 541, 544 (1991).

The December letter was based upon the same operative facts that Hardrives had been asserting for months in connection with its April 15 claim. The quantum increase was based upon factors that developed after the initial claim was submitted.

Accordingly, BOR's motions to dismiss IBCA-2375/2475 on the ground that it allegedly included an administrative delay claim related to PS 19 that was not certified or submitted to the contracting officer is denied.

[4] In its amended complaint, appellant slightly increased the quantum it was claiming and increased alleged delay days from 244 to 373. BOR contends that the latter increase was based upon operative facts and a theory not presented to the contracting officer and violated FAR 33.201's requirement for a certified claim in a sum certain. BOR has not clearly identified the alleged new operative facts and theory to which it alludes, but it appears to refer to Hardrives' presentation of its amended claim amount on a modified total cost basis and its shift in the allocation of the delay days.

A contractor is not precluded on appeal from proving more extensive delay than presented in its original certified claim. *National Alliance Corp.*, ASBCA No. 32861, 87-1 BCA ¶ 19,671. *Accord, The O'Rourke*

Co., ASBCA No. 41841, 91-3 BCA ¶ 24,286. Moreover, Hardrives' presentation of its quantum on a modified total cost basis does not render it insufficiently specific. *Kirk Brothers Mechanical Contractors, Inc.*, ASBCA No. 4337, 1992 ASBCA Lexis 374 (August 19, 1992). so long as it is based upon the same operative facts presented to the contracting officer, does not constitute a new claim. *Blaze*. There are no new operative facts here. The modified total cost presentation involved a different statement and arrangement of quantum, based upon factors and damage analysis developed in the several years since Hardrives originally submitted its claims, not a new underlying claim.

Moreover, the fact that the modified total cost analysis includes costs associated with inaccurate earthwork elevations affecting pipe trenching, originally presented as a separate, now withdrawn, claim based upon a computer analysis that proved to be incorrect, does not render the modified total cost claim deficient. Hardrives' basic claim concerning defective contract documents, and what the parties have described as earthwork elevation "busts," was advanced by it from the time of its April 15, 1987 claim and never was abandoned. The elevation discrepancies affecting pipe trenching are subsumed in that claim.

Accordingly, BOR's motions to dismiss IBCA-2375/2475 on the grounds that it allegedly includes a modified total cost analysis, delay days, and a pipe trench claim, that were not presented to the contracting officer, are denied.

[5] BOR asserts that the Government had no opportunity to audit Hardrives' modified total cost claim, allegedly a *jurisdictional* impediment to our consideration of the claim and a violation of unspecified contract provisions, of 41 U.S.C. § 254(d)(1) and § 254(d)(3) and (4), and of FAR 15.804-2(a)(1)(ii).

We presume BOR's contract references were intended to be to the Audit clause, I.1.5, which provides for the Government's right to audit cost or pricing data submitted in connection with the pricing of any contract modification; the Examination of Records by Comptroller General and by Department of the Interior clauses, I.1.9 and I.1.10, which provide for the Comptroller General's and DOI's right to examine the contractor's books and records involving "transactions related to the contract" for a period of up to 3 years after final contract payment; and the Change Order Accounting—Modification clause I.4.7, which applies to a contractor's proposal or claim for a price adjustment pursuant to the Changes or any other contract clause and requires the contractor to maintain sufficient records and data to establish the cost of the work.

The statutory and FAR provisions cited by BOR pertain to the need for a contractor to submit cost or pricing data in connection with the pricing of a contract change or modification in excess of $100,000 and the right of the Government to examine that data for a period of up to 3 years after final contract payment. Hardrives' action before this Board is an appeal from the contracting officer's failure to render a decision on its CDA claims and does not involve the pricing of a contract change or modification.

An audit, in this setting, is a Governmental opinion as to the legitimacy of claimed costs from the standpoint of support and allowability—not liability. It can be pursued during discovery, if necessary. The Board can accept or reject the audit opinion. *Baldwin/Thomas Designers & Planners*, AGBCA No. 92-103-3, 92-1 BCA ¶ 24,646.

BOR audited Hardrives and its subcontractors' claims extensively; the auditors compiled Hardrives' total costs and had the information necessary to evaluate a total cost claim; they were informed about Hardrives' claims consultant, Mr. Duin, but never interviewed him; BOR was privy to the fruits of the fraud investigation and trial; it had the ability to monitor MRT's district court action, during which Mr. Duin testified; and, to the extent that it required further information, BOR could have re-examined Hardrives' and its subcontractors' books and records through discovery or under the contract's record retention provisions.

BOR, however, never pursued discovery in the many years that these appeals have been pending, except to depose Mr. Duin on the eve of hearing. The parties themselves elected not to follow the Board's pre-hearing order requiring the exchange of exhibits well before hearing. Hardrives updated its analyses during hearing, but BOR did the same.

In the context of these jurisdictional motions to dismiss, we construe appellant's allegations most favorably to it, as noted. Three of appellant's senior officials, all credible, testified that the auditors were informed that Hardrives intended to pursue its claims on a modified total cost basis and that the intent was not abandoned.

According to the district court's findings, it was the auditors who abandoned a fair analysis of Hardrives' claims once fraud allegations and DOJ became involved. The contracting officer never issued a decision on any of the claims at any time. We find BOR's contention that he might have done so, or might have settled the claims, had he been presented with a modified total cost claim, to be disingenuous.

Dispositively, the CDA, from which the Board's jurisdiction is derived, does not require that a Government audit of a CDA claim must be accomplished before a board can entertain a contractor's appeal from the contracting officer's decision, or failure to render a decision, on the claim.

Accordingly, BOR's motion to dismiss based upon the Government's alleged inability to audit Hardrives' modified total cost claim is denied.

DECISION

BOR's motions to dismiss are denied.

CHERYL S. ROME
Administrative Judge

I CONCUR:

RUSSELL C. LYNCH
Chief Administrative Judge

MESA OPERATING LIMITED PARTNERSHIP

125 IBLA 28 Decided: *December 31, 1992*

Appeal from a decision of the Deputy to the Assistant Secretary—Indian Affairs (Operations) denying an appeal of an assessment for additional royalties from Indian oil and gas lease Nos. 607-032354, 607-033483, and 607-061149. MMS-89-0003-IND.

Reversed and remanded.

1. Federal Oil and Gas Royalty Management Act of 1982: Generally--Federal Oil and Gas Royalty Management Act of 1982: Royalties--Statutory Construction: Legislative History

In enacting sec. 102(a) of FOGRMA, 30 U.S.C. § 1712(a) (1988), Congress did not expand the Secretary's authority, but allowed him to determine, under existing authority of law, which person is responsible for making royalty payments.

2. Federal Oil and Gas Royalty Management Act of 1982: Generally--Federal Oil and Gas Royalty Management Act of 1982: Royalties--Oil and Gas Leases: Assignments and Transfers--Oil and Gas Leases: Royalties: Payments--Rules of Practice: Evidence

Sec. 102(a) of FOGRMA, 30 U.S.C. § 1712(a) (1988), requires a lessee to notify the Secretary of the assignment of the obligation to pay royalty. Sec. 3(7) of FOGRMA, 30 U.S.C. § 1702(7) (1988), defines lessee as including any person who has been assigned an obligation to make a royalty or other payment required by a lease. Under secs. 102(a) and 3(7) of FOGRMA, for a person who holds no interest in a lease to be liable for the lessee's royalty payments, the lessee and the person must have agreed to an assignment of the obligation to pay royalty, and notice of that assignment must have been filed with the Secretary. A PIF filed under FOGRMA is not an assignment or either evidence of or notice of an assignment, and filing a PIF, without more, does not render the person filing it a lessee under sec. 3(7) of FOGRMA, 30 U.S.C. § 1702(7) (1988). There must be a document assigning the obligation to make royalty payments or a contract or agreement stating this obligation.

3. Act of Mar. 3, 1909--Federal Oil and Gas Royalty Management Act of 1982: Generally--Federal Oil and Gas Royalty Management Act: Royalties--Indians: Leases and Permits: Assignments--Indians: Mineral Resources: Oil and Gas: Allotted

December 31, 1992

Lands--Oil and Gas Leases: Assignments and Transfers--Oil and Gas Leases: Royalties: Payments--Rules of Practice: Evidence

The assignment of the obligation to make royalty payments is not related to an assignment of a lease or an interest in a lease that must be approved by BIA under 25 CFR 212.22.

4. Federal Oil and Gas Royalty Management Act of 1982: Generally--Federal Oil and Gas Royalty Management Act of 1982: Royalties--Oil and Gas Leases: Assignments and Transfers--Oil and Gas Leases: Royalties: Payments--Rules of Practice: Evidence

The making of royalty payments and the filing of PIFs are not sufficient evidence to indicate an intent to be bound as an agent by lessees' obligation to pay royalty.

APPEARANCES: Jerry E. Rothrock, Esq., and Susan Brooks, Esq., Washington, D.C., and Robert C. Thomas, Esq., and Edward K. Norfleet, Esq., Amarillo, Texas, for appellant; Peter J. Schaumberg, Esq., Geoffrey Heath, Esq., and Howard W. Chalker, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for the Minerals Management Service.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

INTERIOR BOARD OF LAND APPEALS

I. *Introduction*

Pioneer Gas Products Co. (Pioneer) purchased the gas produced from three oil and gas leases on allotted Indian lands from 1981-1986, processed it, and paid the royalties owed to the Indian lessors.[1] Mesa Operating Limited Partnership (Mesa) acquired Pioneer in June 1986 and continued to purchase the gas from the leases and pay the royalties. The Minerals Management Service (MMS) reviewed Pioneer's January and April 1986 royalty payments and determined Pioneer had underpaid.[2] MMS required Mesa to pay the amount of Pioneer's January and April 1986 underpayments and to recalculate the royalties for all other months from March 1981 to November 1988 and report any additional royalty due. Mesa appealed under 30 CFR Part 290. Mesa argued that it was not liable for any underpayment because neither Pioneer nor Mesa owned any interest in the leases. In a September 20, 1990, decision, the Deputy to the Assistant Secretary—Indian Affairs (Operations) denied Mesa's appeal. Mesa appealed to us under 30 CFR 290.7. Because we find Mesa is not a lessee within the meaning of the Federal Oil and Gas Royalty

[1] The leases are Indian lease No. 607-032354, located in the SE¼, sec. 3, T. 9 N., R. 11 W.; Indian lease No. 607-033483, located in the NW¼, sec. 11, T. 9 N., R. 11 W.; and Indian lease No. 607-061149, located in the NE¼, sec. 11, T. 9 N., R. 11 W., all west of the Indian Meridian, in Caddo County, Oklahoma.

[2] Letter of Nov. 22, 1988, to Mesa from Royalty Management Program MMS. MMS determined that beginning in January 1986 Pioneer had paid royalties on the basis of the value of the products made from the gas, rather than the higher value of the gas at the wellhead, even though the leases provide that royalty would be computed on whichever was the higher value. *See* paragraph 3(c) of Lease Nos. 32354, 33483, and 61149; *see also* 25 CFR 212.16.

Management Act (FOGRMA), or liable as an agent of the lessees, we reverse.

II. *The Decision Below and the Parties' Arguments*

In response to Mesa's arguments on appeal under 30 CFR Part 290, the MMS Area Manager quoted the definition of "lessee" in FOGRMA[3] and stated that Pioneer had "filed Payor Information Forms (PIF) with MMS obligating Pioneer and subsequently Mesa to remit royalties on behalf of lessees. * * * Pioneer and Mesa have recognized this obligation by making the royalty payments on these Indian leases during the audit period."[4]

In answer to the Area Manager, Mesa argued it was not a lessee, as defined in FOGRMA, because the leases were not issued to Mesa, the owners of the leases had not assigned to Mesa their obligation to make royalty payments, and neither Mesa's payment of the royalties nor its filing of PIFs made it "a guarantor of the owners' royalty obligations."[5] Further, Mesa argued, MMS pointed to no regulation or contract that establishes Mesa's responsibility to pay the lease owners' royalties.

The September 20, 1990, decision of the Deputy to the Assistant Secretary—Indian Affairs (Operations) proceeded on three bases. First, it stated that Pioneer acted as agent for the lease owners by remitting royalties on their behalf:

> While an agent (royalty payor) is not ordinarily bound by the obligations of the contract between a principal (lessee) and a third party (lessor), the agent can become bound to the third party * * * if he conducts himself in such a way as to indicate the intent to be bound. [6] * * * Both Pioneer and Mesa conducted themselves in such a way as to indicate their intent to be bound. Both completed a PIF for MMS, both were assigned a payor code number, and both assumed the responsibility to make royalty payments for the lessees. Thus, Pioneer and Mesa represented to MMS that they would act as the royalty payor on behalf of the lessees of record, and that the royalty payments would be proper and in accordance with all the regulations, and that they would be responsible if the payments were in error.

(Decision at 2-3).

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[3] "'[L]essee' means any person to whom the United States, an Indian tribe, or an Indian allottee, issues a lease, or any person who has been assigned an obligation to make royalty or other payments required by the lease." 30 U.S.C. § 1702(7) (1988).

[4] Memorandum of Apr. 12, 1989, from Area Manager, Dallas Area Compliance Office, through Chief, Royalty Compliance Division, to Chief, Division of Appeals, concerning Notice of Appeal from [Mesa] (Docket No. MMS-89-0003-IND), at 2. (The Area Manager's memorandum which constituted the report required by 30 CFR 290.3(b), was sent to Mesa for comment.)

Under 30 CFR 210.51, a PIF (Form MMS-4025) must be submitted to MMS by the party who is making the royalty payment for each lease on which royalties are paid, within 30 days after issuance of a new lease or a modification of an existing lease that changes the paying responsibility on the lease.

On Dec. 5, 1991, MMS submitted copies of the following PIF's:

Lease No. 607-032354: MMS submitted an undated 1983 payor information form filed by Pioneer Gas Products Co. and two other forms filed by Pioneer dated July 1, 1986, and Dec. 31, 1986. The Dec. 31, 1986, form indicated that Dec. 31 was an "end date." On Sept. 12, 1986, Mesa filed a PIF for this lease; the form indicates at the top left hand corner that it is a "revised" form, to be "added" on Jan. 1, 1987. Also submitted for this lease is a PIF filed by Mesa on Mar. 25, 1989.

Lease Nos. 607-033483 and 607-061149: PIF's for each lease filed by Pioneer dated May 30, 1984, and Dec. 31, 1986 (each indicating end dates); and PIF's filed by Mesa on Jan. 1, 1987, and Mar. 27, 1989.

[5] Mesa's Comments in Opposition to MMS' Report, dated June 6, 1989, at 6.

[6] MMS cited *Lake City Stevedores, Inc.* v. *East West Shipping Agencies, Inc.*, 474 F.2d 1060 (5th Cir. 1973), in support of this statement. The decision continued:

"An agent may be responsible when he voluntarily incurs a personal responsibility, either expressly or implicitly, when an agent agrees to be personally bound or the agreement can be inferred by implications reasonably drawn from all facts and circumstances in evidence. *Publicker Industries, Inc.* v. *Roman Ceramics Corp.*, 652 F.2d 340, 344 (3rd Cir. 1981)." (Decision at 3).

Second, the September 20, 1990, decision held Pioneer and Mesa were lessees under the FOGRMA definition, *supra* note 3. The decision stated that "assign" means to "appoint, allot, select, or designate for a particular purpose or duty," citing *Black's Law Dictionary* (5th ed. 1979) at 108, and concluded:

> [T]he completion by Pioneer (and later, Mesa) of PIF's for the subject leases evidence[s] the designation of Pioneer (and * * * Mesa) as the party responsible for the disbursement of royalty payments. Therefore, [under the definition of "assign"], Pioneer and Mesa were *assigned* an obligation to make royalty payments, and are considered *lessees* within the meaning of FOGRMA and the leases." [Italics in original.] [7]

(Decision at 4).

Finally, the September 20, 1990, decision cited *Forest Oil Corp.*, 113 IBLA 30, 41-42, 97 I.D. 11, 18 (1990), in support of its statement that "[w]hile it is true that the lease owners are ultimately responsible for payment of the royalties due under their leases, it does not follow that the lease owners are the only parties to whom the Government may direct a demand for payment."

> [IBLA] * * * concluded that in view of the definition of "lessee" in FOGRMA * * * the filing of a PIF by a payor (who was also a co-lessee) indicated that the payor was assigned and accepted the responsibility of rendering timely and correct royalty payments on behalf of its co-lessees. Thus, IBLA affirmed the agent's liability for the royalty due on the share of production attributable to the co-lessees.

(Decision at 4-5).

On appeal to us, Mesa responds to the statement in the September 20, 1990, decision that filing a PIF made it a lessee by noting that "nothing in the [PIF] * * * makes any reference to" the filer's becoming a guarantor of the owner's royalty obligations.[8] In addition, Mesa observes that, although FOGRMA defines "lessee" as a person "who has been assigned an obligation to make royalty or other payments required by the lease," FOGRMA also requires that a "lessee * * * shall notify the Secretary, in the time and manner as may be specified by the Secretary, of any assignment the lessee may have made of the obligation to make any royalty or other payment under a lease." 30 U.S.C. § 1712(a)(2) (1988). Mesa requests discovery "of any notices that the Secretary of Interior has received in accordance with Section [1712(a)(2)] of FOGRMA assigning a royalty payment obligation to Mesa or [Pioneer]" (Supplemental Statement of Reasons (SOR) at 14). MMS responds that "Mesa and Pioneer filed PIFs. MMS has no other documents that are responsive to Mesa's request" (Answer at 16). Mesa replies that the PIFs it submitted were not prepared by a lessee and did not identify any lessees making an assignment and therefore

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[7] Here the decision cited *Philips Petroleum Co.*, MMS-84-0030-O&G (Sept. 15, 1986), 4 Gower Federal Service, Royalty Valuation and Management, Rocky Mountain Mineral Law Foundation. In that case, Phillips assumed the lessee's obligation to pay royalty. *See Phillips 66 Natural Gas Co.*, 107 IBLA 223, 226 (1989).

[8] (Supplemental SOR at 7). Mesa adds: "It is ludicrous to suggest that any company would agree to guarantee some other company's royalty obligation without receiving any compensation for its services and without seeking any means to obtain reimbursement for any sums tendered on the other company's behalf." *Id.*

cannot constitute the notice of an assignment required by section 1712(a)(2) (Reply of Mesa at 2-3).

Mesa also argues that the Board's decision *Forest Oil Corp., supra*, involved "a co-lessee [that] * * * had contractually agreed to be bound for the royalty payments due from other lessees," and that Mesa neither is a lessee nor has made any such agreement (Supplemental SOR at 8). Although it acknowledges these factual differences, MMS nevertheless concludes that "pursuant to IBLA's rationale in *Forest*, Mesa is responsible for the additional royalties" (Answer at 15). Mesa replies that "*Forest Oil* did not conclude that a Payor Information Form constituted a valid assignment. Rather, the Board * * * concluded that under its operating agreement, Forest, as operator-lessee, had contractually agreed to remit royalty payments for its own interest and the interest of the other lessees" (Reply at 3).

III. *The Oil and Gas Royalty Accounting System*

One of the legislative purposes behind the enactment of FOGRMA was prevention of inadequate or inaccurate accounting to the Government for oil and gas royalties due on Federal and Indian leases. The legislative history of the Act speaks to this purpose as follows:

> Under Federal and Indian leases, the lessee has the contractual obligation to pay royalties, fully and accurately, when due. It is customary in the oil business to split up shares in leases and it is common to trade them frequently. The MMS accepts royalty payments not just from the lessee or his agent, but from any owner of an interest in a lease and also in some cases from other parties such as purchasers. While a lessee must notify the Department of the Interior of an assignment of an interest in a lease, USGS [United States Geological Survey] had no capacity for tracking these assignments. Because shares in leases change hands frequently and are not always reported, the USGS often did not know who all the payors were on a particular lease.
>
> Under the old system, the USGS kept its royalty records primarily on the lease as a whole; but payment was often made by individual interests on the lease or other smaller units. If royalties for a particular lease were underpaid, the USGS had no way of knowing which party was responsible. This type of problem could occur repeatedly because USGS failed to collect essential data; but even the data it did collect was often misplaced and irretrievable. Entire accounts were often overlooked, allowing an interest holder to entirely evade his royalty obligation.

H.R. Rep. No. 859, 97th Cong., 2d Sess. 16, *reprinted in* 1982 U.S. Code Cong. & Admin. News 4268, 4270.

Thus, section 101(a) of FOGRMA, 30 U.S.C. § 1711(a) (1986), requires the Secretary to "establish a comprehensive inspection, collection and fiscal and production accounting and auditing system to provide the capability to accurately determine oil and gas royalties, interest, fines, penalties, fees, deposits, and other payments owed, and to collect and account for such amounts in a timely manner." The Auditing and Financial System was developed by the MMS Royalty Management Program "to accomplish these functions." MMS Royalty Management Program, *Oil & Gas Payor Handbook*, Vol. I, Introduction at 1-1. It is within this framework that the PIF was developed.

IV. *The Law Applicable to Who is Liable to Pay Royalties*

[1] As we observed in *Forest Oil Corp.*, 113 IBLA at 41, n.10, 97 I.D. at 18, n.10, in enacting section 102(a) of FOGRMA, 30 U.S.C. § 1712(a) (1988), Congress did not expand the Secretary's authority, but allowed him to determine, under existing authority of law, which person is responsible for making royalty payments.[9] Because the leases in this case are located on allotted Indian lands, we look to (1) FOGRMA and its implementing regulations; (2) the provisions of the Act of March 3, 1909, *as amended*, 25 U.S.C. § 396 (1988), and its implementing regulations; and (3) the common law.

A. *The Federal Oil and Gas Royalty Management Act*

[2] As indicated above, section 102(a) of FOGRMA, 30 U.S.C. § 1712(a) (1988), provides that a lessee must make royalty payments in the time and manner specified by the Secretary and notify the Secretary, in the time and manner specified by the Secretary, that he has assigned this obligation.[10] Correspondingly, section 3(7) of FOGRMA, 30 U.S.C. § 1702(7) (1988), defines "lessee" for purposes of that Act to include "any person who has been assigned an obligation to make royalty or other payments required by the lease."

The regulation requiring notification of the assignment of payment responsibility and the regulation defining "lessee" reflect these statutory provisions. 30 CFR 218.52(a) provides that "[w]hen the lessee or revenue payor assigns any paying responsibility to any other entity, MMS must be notified within 30 days of the assignment."[11] And "lessee" is defined as

> any person to whom the United States, an Indian Tribe, or an Indian allottee issues a lease, and any person who has been assigned an obligation to make royalty or other payments required by the lease. This includes any person who has an interest in a lease as well as an operator or payor who has no interest in the lease but who has assumed the royalty payment responsibility.

30 CFR 206.101. The phrase "who has been assigned an obligation" in the first sentence of the regulation was a revision of the proposed regulation in response to comments objecting that the proposed language—"who has assumed an obligation"—was "too broad." One

[9] "Subsection [102](a) sets forth the duties of lessees and interest holders to make all payments required under the lease in the time and manner specified by the Secretary, and to notify, and request approval of the Secretary of any assignment or other transfer the lessee or interest holder intends to make. * * *

"The Committee is not granting the Secretary new authority to designate a 'principal payor', i.e., a single payor legally obligated to make payment for any royalty obligation on a lease. The Committee is allowing the Secretary the discretion to determine under existing authority of law which person (i.e. lessee, interest holder, operator, etc.) is responsible for making royalty payments to the United States.

"It should be made clear that under section 102(a)(2) notification to the Secretary of any assignment or other transfer of a lease is required, but approval of the assignment for transfer by the Secretary is not a condition precedent to the parties initiating the steps necessary to effect the assignment or transfer." H.R. Rep. No. 859, *supra* at 4282.

[10] Specifically, sec. 102(a) states:

"A lessee--

"(1) who is required to make any royalty or other payment under a lease or under the mineral leasing laws, shall make such payments in the time and manner as may be specified by the Secretary; and

"(2) shall notify the Secretary, in the time and manner as may be specified by the Secretary, of any assignment the lessee may have made of the obligation to make any royalty or other payment under a lease or under the mineral leasing laws."

[11] Neither 30 CFR 218.52 nor the regulation requiring the filing of a PIF, 30 CFR 210.51, *supra* note 4, indicates the PIF is to serve as the notification required by 30 CFR 218.52(a).

commenter stated: "* * * Thus, under the proposed definition, the voluntary royalty remitter would become subject to all of the royalty valuation obligations imposed on lessees and would, consequently, become directly liable for any infractions of the application reporting and payment regulations, a result which is not sanctioned by existing statutory law." 53 FR 1242 (Jan. 15, 1988).[12]

MMS agreed with the suggestion to make the definition consistent with section 3(7) of FOGRMA:

MMS Response: The MMS agrees with the comments regarding consistency with the definition found in FOGRMA and, therefore, has replaced the word "assumed" with the word "assigned." It should be specifically noted that the term "assigned," as used in this Part, is restricted to the assignment of an obligation to make royalty or other payments required by the lease. It is in no way related to lease "assignments" approved through the MMS, BLM, or BIA. It is MMS's intent that operators and others who pay royalties follow these regulations in determining the royalties due. The lessee of record is ultimately responsible if the operator or other payor does not properly pay the royalties due the lessor.

53 FR 1242 (Jan. 15, 1988).

Thus, for a person who holds no interest in a lease to be liable for the lessee's royalty payments, the lessee and the person must have agreed to an assignment of the obligation to pay royalty, and notice of that assignment must have been filed with the Secretary.

However, a PIF is not an assignment. As indicated above, *supra*, note 4, the PIF is the document that must be filed with MMS by a payor.[13] A PIF provides spaces for a lease number and for the name of a payor and a revenue source operator ("if different from payor"). It does not provide space for the name of any lessee or assignee. It does not contain any language indicating an intent to transfer, assign, or convey—or to accept—any lease right, interest, or obligation. There is no language on the form that would lead a payor to understand that submitting the form is tantamount to an agreement between lessee and payor that the payor becomes an assignee under the lease or

[12] The full preamble discussion of the comments on the proposed definition of "lessee" reads:

" 'Lessee'—Several industry representatives and trade groups commented that the originally proposed definition of 'lessee' was too broad. One commenter stated that 'as drafted, it would include any person who pays royalties, notwithstanding the fact that such payors may have no contractual obligation to the lessor to make royalty payments. Thus, under the proposed definition, the voluntary royalty remitter would become subject to all of the royalty valuation obligations imposed on lessees and would, consequently, become directly liable for any infractions of the application [sic] reporting and payment regulations, a result which is not sanctioned by existing statutory law.' To be consistent with that law, industry suggests that MMS substitute for its definition of 'lessee' the one which is contained in section 3(7) of the Federal Oil and Gas Royalty Management Act (FOGRMA), 30 U.S.C. 1702(7) * * *.

"Most of these commenters favored this definition because 'the statutory definition includes persons who have been issued a lease or who have been *assigned* an obligation to make royalty or other payments required by the lease. The gas proposal would wrongfully expand the definition to include any person who has *assumed* an obligation to make such payments.' "

"One industry commenter recommended adding the phrase 'for royalty payment purposes' directly after the word 'Lessee' for the purpose of clarity. 'We do not believe it is the intent of Congress that a lessee be able to divest himself of all lease obligations by someone else merely assuming royalty responsibility.' " 53 FR 1242 (Jan. 15, 1988) (italics in original).

[13] "The completed form must be filed by the party who is making the rent or royalty payment (payor) for each revenue source." 30 CFR 210.51.

A "payor" is defined for Federal leasing purposes as "any person responsible for reporting royalties from a Federal lease or leases on Form MMS 2014 [the Report of Sales and Royalty Remittance]." 30 CFR 208.2.

A revenue source, according to the *Oil and Gas Payor Handbook*, Vol. I, section 2.6.2, is "an accounting subdivision of a Federal or Indian lease. It is a source of production within a lease from which the MMS expects to receive royalties." A revenue source may be one of four types: unitized production allocation, communitized production allocation, lease production, or compensatory royalty. The revenue source type for Lease No. 607-032354 is lease production; Lease Nos. 607-099483 and 607-061149 are both subject to communitization agreements.

agrees to assume the lessee's obligation to pay royalty. The only "fine print" on the form is a notice required by the Paperwork Reduction Act that the information "is being collected to set up an automated accounting data base for Federal and Indian oil and gas lease production and sales. MMS will use the information to monitor and collect rents and royalties due the Government and Indians." Several of the PIFs provide no space for a signature by the payor. With these contents, the PIF cannot constitute an assignment of the obligation to pay royalty, nor is it either evidence of or notice of an assignment.

The definition of lessee in 30 CFR 206.101 includes a "payor who has no interest in the lease but who has assumed the royalty payment responsibility." Under its proposed definition, MMS anticipated that the assumption of the responsibility to pay royalty would be "by contract or other agreement with the persons who have the actual lease interest."[14] As noted above, a PIF contains no language indicating a payor has assumed that responsibility. Therefore, filing a PIF does not alone constitute the assumption of royalty payment responsibility.

This conclusion is consistent with our previous decisions. MMS argues, based on our decision in *Forest Oil Corp., supra*, that the filing of a PIF evidences an assignment of the royalty obligation under section 102(a) of FOGRMA and renders the person filing it a "lessee." We stated recently that our decision in *Forest Oil Corp.*[15] was based on the fact that the unit operator was obligated under the unit agreement to pay the royalties for the other co-lessees and filed PIFs for that reason:

> In *Forest Oil Corp., supra*, Forest was the named unit operator under an agreement that specified payment of royalties as one of its obligations. In fulfilling that obligation, Forest filed a PIF indicating it was responsible for all royalties. On that basis we held that Forest fell within the definition of "lessee" as "any person who has been assigned an obligation to make royalty or other payments required by the lease."

Phillips Petroleum Co., 121 IBLA 278, 284 (1991).[16] *See Forest Oil Corp.*, 113 IBLA at 39, n.8, 41, 97 I.D. at 17, n.8, 18. Thus, *Forest Oil*

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[14] The preamble to the proposed rule definition of "lessee" stated:

"The MMS is proposing to expressly include in the definition all persons who may have to make royalty payments. This would include all persons who have an interest in a lease as well as an operator or other payor, including in some instances, the purchaser who has assumed a royalty payment responsibility *by contract or other agreement with the persons who have the actual lease interest*. By using this broad definition for the product valuation regulations, it would not be necessary to use multiple terms such as lessee/payor/operator throughout the rules. This definition is not intended to change any contractual obligations under the lease instrument between the lessor and the current or original lease holder, except as it pertains to royalty valuation." 52 FR 4734 (Feb. 13, 1987) (italics supplied).

[15] *Forest Oil* was reconsidered on other grounds in *Forest Oil Corp. (On Reconsideration)*, 116 IBLA 176, 97 I.D. 239 (1990), and reaffirmed, and subsequently reviewed by the Director, Office of Hearings and Appeals, and reversed in part. *Forest Oil Corp.*, 9 OHA 68, 98 I.D. 248 (1991). *See also Mesa Operating Limited Partnership*, 98 I.D. 193 (1991).

[16] In *Phillips Petroleum Co., supra*, "Phillips owned partial interests in the leases and, pursuant to gas purchase contracts, purchased the production attributable to the other owners (co-lessees) and remitted royalty for itself and the other owners for all the production from the leases * * *." 121 IBLA at 284. MMS argued that, like Forest Oil, "Phillips * * * notified MMS of its responsibility to pay all royalties from the leases by filing a * * * (PIF)." *Id.* We set aside the portion of MMS's decision that required Phillips to recalculate royalties for its co-lessees, stating:

"The record, however, does not contain any PIF's. Nor is there any other indication that Phillips assumed legal responsibility for the co-lessee's royalties * * *. [Unlike *Forest Oil Corp.*], in this case it is not apparent from the record

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Corp. does not stand for the proposition that simply filing a PIF, without more, obligates a person to pay royalties. Rather, the unit operator was obligated by contract under the terms of the unit agreement, *i.e.*, under existing authority of law to pay royalties.[17]

Thus, filing a PIF does not "evidence the designation" of the person filing it as responsible for paying the royalty and therefore a "lessee," as the September 20, 1990, decision stated. There must be a document assigning the obligation to make royalty payments, or a contract or agreement stating this obligation as there was in *Forest Oil Corp., supra*. MMS may specify the "time and manner" for a lessee to notify it of such an assignment or agreement. 30 U.S.C. § 1712(a)(2).

B. *Leasing of Minerals on Lands Allotted to Individual Indians*

[3] Leasing of minerals on lands allotted to individual Indians is governed by 25 U.S.C. § 396 (1988), and its implementing regulations, rather than by the Mineral Leasing Act of 1920, 30 U.S.C. § 181 (1988).[18] In the Act of March 3, 1909, Ch. 263, 35 Stat. 781, 783, Congress provided that all lands allotted to Indians may be leased by the allottee

> for mining purposes for any term of years as may be deemed advisable by the Secretary of the Interior; and the Secretary of the Interior is authorized to perform any and all acts and make such rules and regulations as may be necessary for the purpose of carrying the provisions of this section into full force and effect * * *.

25 U.S.C. § 396 (1988). Part 212 of 25 CFR contains the implementing regulations. Under 25 CFR 212.14(a), royalties must be submitted to an officer of the Bureau of Indian Affairs (BIA) for deposit to the credit of the Indian lessor(s) unless the officer authorizes the lessee in writing to make direct payment to the lessor(s) under § 212.14(b). *See also* 30 CFR 218.51(e)(3)(i). Royalties must be paid by the lessee. 25 CFR 212.16.[19] Further, a lease or any interest in a lease may be assigned only with the approval of the Secretary; the assignee must be qualified to hold a lease; and the assignment must be filed with the BIA superintendent. 25 CFR 212.22(a) and (c).[20] *See HCB Industries,*

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that Phillips was assigned or assumed legal responsibility for payment of royalties for all owners of interests in the leases." 121 IBLA 284-85. MMS has filed a Motion for Partial Reconsideration of this part of our decision, accompanied by PIF's filed by Phillips.

[17] In finding Forest Oil was liable for the royalty on the share of production attributable to other working interests, we noted the result was "consistent with the obligations assumed by the unit operator acting as a payor prior to FOGRMA." 113 IBLA at 41, 97 I.D. at 18.

[18] *Melvin L. Collier*, A-25878 (July 3, 1950).

"The Mineral Leasing Act of February 25, 1920, authorizes * * * the issuance of oil and gas leases on lands 'owned by the United States' [30 U.S.C. § 181 (1988)]. Indian reservation lands which have been allotted to individual Indians are not 'owned by the United States,' within the meaning of the quoted phrase as used in the Mineral Leasing Act. (See 58 I.D. 103, 114 (1942).) Consequently, the Mineral Leasing Act is not applicable to lands [allotted to individual Indians]." 25 U.S.C. § 396 codifies the Act of Mar. 3, 1909, 35 Stat. 781, 783, *as amended by* the Act of Aug. 9, 1955, 69 Stat. 540.

Cf. Benson-Montin-Greer Drilling Corp. v. *Acting Albuquerque Area Director, BIA*, 21 IBIA 88, 98 I.D. 419 (1991); *Mobil Oil Corp.* v. *Albuquerque Area Director, BIA*, 18 IBIA 315, 97 I.D. 215 (1990).

The most recent statute relating to the mineral development of Indian lands, the Indian Mineral Development Act of 1982, 25 U.S.C. §§ 2101-2108 (1988), does not affect these leases. 25 U.S.C. § 105 (1988).

[19] 25 CFR 212.19 provides that "[l]essees may make arrangement with the purchasers of oil for payment of the royalties," in which case division orders permitting the purchasers to withhold the royalty interest shall be executed. By its terms this provision does not apply to purchasers of gas.

[20] 25 CFR 212.22 provides, in part:

"(a) Leases hereafter approved, or any interest therein, may be assigned or transferred only with the approval of the Secretary of the Interior, and to procure such approval the assignee must be qualified to hold such lease under

Inc. v. *Muskogee Area Director, BIA*, 18 IBIA 222 (1990); *Administrative Appeal of W. J. B. Graham & William S. Graham* v. *Area Director BIA, Billings, & All Other Interested Parties*, 4 IBIA 205, 82 I.D. 568 (1975).

In order to determine whether the record contains any documents that indicate that an assignment of the leases or of royalty payment responsibility was made by lessees to Pioneer or Mesa, or assumed by Pioneer or Mesa, we requested MMS to file with the Board the lease files for Indian Lease Nos. 607-032354, 607-033483, and 607-061149. MMS did not provide the files but did submit copies of the leases and all assignments of record title affecting them. No interest in a lease is assigned to either Pioneer or Mesa. Further, the assignments expressly provide that the assignees, not Pioneer or Mesa, agree to fulfill "all the obligations" of the leases.[21]

Because these assignments did not indicate whether any of the assignees had subsequently assigned their obligation to pay royalties to Pioneer or Mesa, we requested Mesa to provide copies of gas purchase contracts, division orders, or any other document that would indicate whether Pioneer or Mesa was assigned the obligation to pay royalty. The gas purchase contracts submitted by Mesa between the current interest holders (sellers) and Pioneer (buyer) provide in Article X that Pioneer is to make monthly payment to sellers for gas taken during the previous month and "shall remit for Seller's account to the proper taxing authority, production taxes for which Seller is liable and shall make appropriate deductions therefor from settlements due thereunder." There is no mention in the contracts of Pioneer's responsibility to remit royalty payments.[22] And Article XV, Section 4

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existing rules and regulations and shall furnish a satisfactory bond conditioned for the faithful performance of the covenants and conditions thereof.

"(b) No lease or any interest therein or the use of such lease shall be assigned, sublet, or transferred, directly or indirectly, by working or drilling contract, or otherwise, without the consent of the Secretary of the Interior.

"(c) Assignments of leases and stipulations modifying the terms of existing leases shall be filed with the superintendent within 30 days after the date of execution."

[21] Each assignment contains the following language:

"Acceptance by Assignee

"The assignee in the above and foregoing assignment, made subject to the approval of the Secretary of the Interior, hereby accepts such assignment and agrees to fulfill all the obligations, conditions, and stipulations in said described indenture of lease, when assigned, and the rules and regulations of the Secretary of the Interior applicable thereto, and to furnish proper bond guaranteeing a faithful compliance with said lease and this agreement." This language corresponds to the requirements of 25 CFR 212.22(a), *supra* note 20. The assignments were all approved.

[22] A production tax is not a royalty. Williams and Meyers define "production tax" as:

"(1) In one usage, a SEVERANCE TAX (q.v.); that is, a tax levied on each unit of production—barrell of oil or thousand cubic feet of gas. Severances [sic] taxes are usually levied as occupation taxes.

"(2) In another and inconsistent usage, an ad valorem property tax, measured by the value of the product removed annually, or by such value less certain expenses.

"Thus the same term may describe two different sorts of taxes, measured by different means. The local type of statute, whether an occupational severance tax or a real property ad valorem tax, seems to govern the meaning of the term in each state." Williams & Meyers, *Manual of Oil & Gas Terms*, Vol. 8, at 974 (1992).

A royalty, in contrast, is

"(1) The landowner's share of production, free of expenses of production. (2) A share of production, free of expenses of production, e.g., an OVERRIDING ROYALTY (q.v.) of ⅛ of the ⅞ working interest. * * * Royalty may be payable in kind (that is, the royalty owner is entitled to a share of the oil or gas as produced), or it may be payable in money (that is, the royalty owner is to be paid in money for the value or market price of his share of the product). * * * Although the royalty is not subject to costs of production, usually it is subject to costs incurred after production, e.g., production or gathering taxes, costs of treatment of the product to render it marketable, costs of transportation to

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of the contracts provides that "neither party shall be considered notified of any conveyance, or transfer of interest of the other party until such other party has been furnished with written notice and true copy of such conveyance or transfer." Mesa states it is not aware of any such written transfer.

As MMS indicated in its response to the comments on its proposed rule defining lessee, the assignment of the obligation to make royalty payments is not related to an assignment of a lease or an interest in a lease that must be approved by BIA. Even if the obligation to pay royalty were an interest in a lease within the meaning of 25 CFR 212.22, there is no evidence in the record that such an interest has been assigned to Pioneer or Mesa, or that Pioneer or Mesa assumed the obligation to make royalty payments.

C. *The Common Law of Agency*

[4] We cannot accept the argument that by filing PIFs and making royalty payments Mesa and Pioneer indicated they intended to be bound as agents by the lessees' obligation to pay royalties. The cases cited in the September 20, 1990, decision, *supra*, note 6, state the general rule that an agent is not personally liable for a contract obligation between his principal and another party—in this case, the lease obligation to pay royalty—unless he intended to be. "In the absence of an unambiguous contract, all relevant extrinsic evidence may be considered in determining whether an agent has sufficiently indicated an intent to become personally bound." *Lake City Stevedores, Inc.* v. *East West Shipping Agencies, Inc.*, 474 F.2d 1060, 1063 (5th Cir. 1973). Absent an assignment to Mesa or Pioneer of the obligation to pay royalty or an agreement by them to do so, we do not think the filing of PIFs and the payment of royalties is sufficient evidence of an intent to be ultimately liable. Although it may have been convenient for Mesa and Pioneer, as purchasers of the gas, to pay the royalties and submit the required forms, "there was no valid business reason for [Mesa or Pioneer] to bind itself." *Lake City Stevedores, supra* at 1064; *see* note 8, *supra*. As discussed above, the PIFs contain no language indicating any intent to be bound to the lessees' obligation to pay royalty, and there is no other extrinsic evidence indicating either company intended to be bound.[23]

We hold that the filing of PIFs and making of royalty payments by Pioneer and Mesa do not result in Mesa's being a lessee under FOGRMA or liable as an agent for the lessees' obligation to pay royalty. Mesa is therefore not required to pay the amount of Pioneer's

market. * * * A royalty is freely assignable." *Id.* at 1087-88. The statutory definition of royalty is "any payment based on the value or volume of production which is due to the United States or an Indian tribe or an Indian allottee on production of oil or gas * * *." 30 U.S.C. § 1702(14) (1988).

[23] The Sept. 20, 1990, decision also states an agent may become bound by his principal's obligations to a third party by a separate agreement, 3 *Am. Jur. 2d*, Agency, § 302; that Federal regulations defining the obligations of the agent can be the basis for such an agreement, *United States Fidelity & Guaranty Co.* v. *Clover Creek Cattle Co.*, 452 P.2d 993 (Idaho 1969); and that 30 CFR 218.100(c) requires that a payor shall tend all payments in accordance with 30 CFR 218.51. We do not find in FOGRMA, as the Idaho Supreme Court did in the Packers and Stockyards Act in *Clover Creek, supra* at 1003, provisions that would supersede the common law of agency governing liability of a person paying royalty on behalf of a lessee. The regulations cited deal with method of payment, not liability.

underpayment of royalty. Accordingly, we find it unnecessary to reach other issues raised by the parties on appeal.

We recognize that one of the purposes of FOGRMA is to fulfill the trust responsibility of the United States for the administration of Indian oil and gas resources and that the Congress directed the Secretary to "aggressively carry out his trust responsibility in the administration of Indian oil and gas." 30 U.S.C. §§ 1701(a)(4), (b)(4) (1988). The Department is responsible for collecting the royalties due these Indian lessors from someone, presumably the working interest holders or, ultimately, the lessees. However, it may not do so from Mesa under the circumstances of this case.

V. *Procedural Motions Denied*

In December 1988, Mesa also filed a request that MMS stay the provisions of the November 1988 letter. MMS apparently responded on June 21, 1990, requiring Mesa to post a bond or letter of credit for $5,642,000 as a surety for Pioneer's alleged $7,362.51 underpayment.[24] On July 20, 1990, Mesa filed a notice of appeal of this decision to the Deputy to the Assistant Secretary—Indian Affairs (Operations). On October 30, 1990, Mesa filed a Motion for Discovery concerning its July 20, 1990, appeal. Because this appeal was not in the record, we requested a copy of its notice of appeal, which Mesa provided on October 31, 1990. In its Supplemental SOR filed December 21, 1990, Mesa referred to this appeal and stated its "understanding that [Mesa's] appeal of the June 21, 1990, decision partially denying the company's stay request had been consolidated with the company's appeal in this case, and that this consolidated appeal has been assigned docket number IBLA 91-55" (Supplemental SOR at 4, n.2). In our January 4, 1991, order we observed that neither the June 21, 1990, MMS decision nor any documents relating to it were in the record and requested MMS to respond to Mesa's Motion for Discovery. In its Answer, MMS responded:

> MMS is recalculating the amount of surety that the Department will require Mesa to post. When Mesa is notified of the revised surety amount, MMS will provide Mesa the information necessary for Mesa to understand and challenge its bonding requirement. Thus, discovery is not necessary or appropriate in this instance.

It therefore appears that the Deputy to the Assistant Secretary has not rendered any decision concerning Mesa's request for a stay so that the issue has never become ripe for review by this Board. Therefore, Mesa's July 20, 1990, notice of appeal is not consolidated with this appeal and its Motion for Discovery concerning that appeal is denied. However, we note that our decision reversing the November 1988 audit letter moots the question of Mesa's responsibility to post a bond.

Because we found the briefs sufficient for our disposition of this appeal, Mesa's request for oral argument is denied.

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[24] Only Mesa's request for stay is in the record forwarded to the Board by MMS. Neither the June 21, 1990, MMS decision nor Mesa's July 20, 1990, notice of appeal were included. No explanation is apparent for the difference between the surety demanded and the underpayment.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the September 20, 1990, decision of the Deputy to the Assistant Secretary—Indian Affairs (Operations) is reversed and remanded.

WILL A. IRWIN
Administrative Judge

I CONCUR:

DAVID L. HUGHES
Administrative Judge

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