CEMEX, INC.

194 IBLA 125 Decided March 20, 2019
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IBLA 2015-266 Decided March 20, 2019

Appeal from a decision of the State Director, California State Office, Bureau of Land Management, rescinding and withdrawing from two competitive mineral materials sales contracts, terminating both contracts for a breach, and holding one contract to have expired. CACA-20139 and CACA-22901.

Affirmed in part, reversed in part, set aside in part, and case remanded.

1. Materials Act

Where a mineral materials sales contract expressly provides that the effective date of the 10-year production period under the contract will begin upon BLM's approval of the mining and reclamation plan, the contract will expire by its terms 10 years after the effective date of the production period, regardless of whether the purchaser has begun operations.

2. Administrative Authority: Estoppel;
Estoppel;
Materials Act

BLM will not be equitably estopped from holding a mineral materials sales contract to have expired, by its terms, by reason of representations previously made by BLM concurring in the view that the term of the contract had not yet begun, where to do so would afford a right not authorized by law, i.e., not consistent with the express provisions of the contract. Nor will BLM be judicially estopped from holding the contract to have expired where it has not been shown to have taken the contrary view
regarding the meaning of the contract term in prior proceedings before the Board and Federal courts.

3. Materials Act

BLM properly determines that a purchaser has breached a mineral materials sales contract for failure to make any in lieu of production payments by the specified anniversary date. But BLM improperly holds a purchaser to be in breach of such a contract for failure to produce mineral materials, where the contract provides that the purchaser may make payments in lieu of production by the anniversary dates.


A BLM decision to cancel a mineral materials sales contract for a breach of its terms by the purchaser of the contract will be set aside and the case remanded where BLM failed to afford the purchaser an opportunity to correct the breach, as required by 43 C.F.R. § 3601.62. But the requirement that BLM afford the purchaser an opportunity for a hearing to challenge the breach, pursuant to section 302(c) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1732(c) (2012), is satisfied by the opportunity to appeal to this Board.

OPINION BY ACTING CHIEF ADMINISTRATIVE JUDGE ROBERTS

CEMEX, Inc. (CEMEX), has appealed from an August 28, 2015, decision of the State Director, California State Office, Bureau of Land Management (BLM). At issue are two competitive mineral materials sales contracts (Contracts CACA-20139 and CACA-22901 (Contracts)) under which CEMEX would, as part of the “Soledad Canyon Sand and Gravel Project” (Project), sever, extract, and remove aggregate materials from the public lands for use in construction. In his decision, the State Director held that BLM was rescinding and withdrawing from the Contracts because CEMEX had failed to fulfill the requirements necessary to trigger the effective date of the Contracts. He further held that, to the extent CEMEX was arguing that the Contracts were effective, Contract CACA-20139 expired by its terms, and both Contracts terminated for breach of contract terms.

SUMMARY

BLM issued Contracts CACA-20139 and CACA-22901 to CEMEX on March 9, 1990, for a 10-year period, under which CEMEX would sever, extract, and remove aggregate materials from the public lands. Under the terms of the Contracts, each Contract became effective on that date. As specified in Contract CACA-20139, its 10-year production period began on August 1, 2000, the date when BLM issued a Record of Decision (ROD) approving CEMEX’s mining and reclamation plan. And because no production occurred during that time, BLM properly determined that the Contract expired by operation of law at the end of the production period 10 years later.

BLM will not be equitably estopped from holding that Contract CACA-20139 expired because it made prior representations that the 10-year production period had not yet begun. CEMEX was not ignorant of the unambiguous terms of the Contract, there is no evidence that BLM engaged in affirmative misconduct, and a finding of estoppel would grant CEMEX a right not authorized by law, i.e., a right contrary to the plain terms of the Contract. Nor will judicial estoppel apply, since BLM did not make misrepresentations or seek any advantage before the Board or in a judicial forum.

As for Contract CACA-22901, BLM properly determined that CEMEX breached its terms by failing to make required payments in lieu of production by the anniversary date specified in the Contract. But before cancelling Contract CACA-22901 for breach of contract, BLM was required to afford CEMEX notice and an opportunity to correct the breach, which it failed to do.
We therefore conclude that BLM, in its August 2015 decision, erred in rescinding and withdrawing from the Contracts on the basis that they never came into existence, since the Contracts became effective when the parties executed them, and we reverse the decision to that extent. We affirm BLM’s decision to the extent it held Contract CACA-20139 to have expired by its terms at the end of the 10-year production period that began upon BLM’s issuance of its ROD on August 1, 2000. But we set aside and remand BLM’s decision terminating Contract CACA-22901 because although CEMEX did not comply with the Contract’s requirement to make in lieu payments, BLM failed to afford CEMEX notice and an opportunity to correct the breach.

BACKGROUND

A. The Mineral Materials Sales Contracts

BLM originally issued the Contracts on March 9, 1990, to the Transmix Corporation (Transmix), CEMEX’s predecessor-in-interest (“Purchaser”).1 The Contracts followed a March 9, 1990, competitive sale held pursuant to the Materials Act of 1947 and its implementing regulations.2 The Contracts encompass a total of 1,280.32 acres of split-estate public land situated in Los Angeles County, California, in the Soledad Canyon area, approximately 30 miles north of Los Angeles, near the City of Santa Clarita (City), California. CEMEX states that the site, which is zoned for heavy manufacturing, is “adjacent to two other active aggregate mines currently operating on private land[].”3 BLM reports that the area “has been used for aggregate mining since the early 1960s and contains several hundred million tons of aggregate in Federal ownership.”4

The Contracts afforded the Purchaser the right to sever, extract, remove, and process, for a total purchase price of $28.08 million (or $0.50/ton), subject to reappraisal, a total of 56.16 million tons of aggregate from the Contract lands, as well as the right to use and occupy the lands as necessary to fulfill the Contracts until their

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1 References herein to CEMEX refer to either CEMEX or Transmix, as appropriate.
3 Statement of Reasons (SOR) at 4.
4 Answer at 1.
termination. Title to the materials sold under the Contracts would transfer to the Purchaser "only upon severance or extraction of and proper payment for such materials." Payment for the mineral materials was to be made in advance of severance, extraction, and removal of the materials. Payment was to be made in installments, with each installment payment to be 10 percent of the fair market value of the total contract amount of the materials, or the bid amount, whichever is greater. The bid deposit, made in conjunction with the competitive sale, was to be applied to the first installment payment.

The Contracts thus provided, during the 10-year production period under each Contract, for the payment of "royalty" in advance of actual severance, extraction, and removal, but also, in the absence of any production, for making an in lieu of production payment each year. Failure to make an installment payment, whether for actual production or in lieu of production, by the due date would result in the immediate suspension of operations under the Contracts, precluding any further removal during the period of the suspension. The total purchase price was to be paid prior to 60 days before the expiration of the Contracts.

Section 1 of Contract CACA-20139 stated that "[t]he production period for this contract will be a maximum of ten years with an effective date beginning the day the mining plan, to be submitted by the Purchaser, is approved by the Authorized Officer." Section 1 of Contract CACA-22901 stated, in turn, that "[t]he production period for this contract will be a maximum of ten years with an effective date of the day after expiration of Contract Serial No. [CACA] 20139 between the Purchaser and the

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5 Contract, CACA-20139, § 2, at 1; Contract, CACA-22901, § 2, at 1; see 43 C.F.R. § 3601.21(a). CEMEX provides copies of Contracts CACA-20139 and CACA-22901 as Exhibits (Exs.) 1 and 2 to the Declaration (Decl.) of G. Cliff Kirkmyer, Executive Vice President, Aggregates, Mining and Resources, CEMEX, dated Sept. 26, 2015 (attached to Petition for Stay (Petition)). They also appear in the Administrative Record (AR) at AR 36042-36053.
7 Contract, CACA-20139, § 4, at 2; Contract, CACA-22901, § 4, at 2.
8 Contract, CACA-20139, § 4, at 2; Contract, CACA-22901, § 4, at 2.
10 Contract, CACA-20139, § 4, at 3; Contract, CACA-22901, § 4, at 3.
13 Contract, CACA-20139, § 1, at 1 (emphasis added).
Authorized Officer." The 10-year production period of Contract CACA-22901 would run, according to its terms, following the expiration of the 10-year production period of Contract CACA-20139. Thus, the Purchaser was provided with two consecutive 10-year production periods, or a total of 20 years, starting with the effective date under Contract CACA-20139.

Section 6 of the Contracts further provided that each Contract "shall expire when the total amount of materials sold has been severed and removed or 10 years from the effective date of the production period unless an extension of time is granted." In addition to any reasons for extension of the Contract provided by regulation, Section 6 stated that BLM "may grant an extension of time up to one year in accordance with the regulations in compensation for periods of mine plan review exceeding six months or legal challenges lasting more than six months which inhibit fulfillment of the Contract by the Purchaser." 

Section 10 of the Contracts provided that the Purchaser would not be in default of the Contracts "if Purchaser is prevented from severing, or removing sand and gravel from the subject property, or otherwise prevented from performing the terms of the Contract, by causes beyond its control." Causes beyond the control of the Purchaser would include "rulings or decisions by municipal, [F]ederal, [S]tate, or other governmental agencies, boards or commissions," or "any laws and/or regulations." The Purchaser was obligated to immediately notify BLM in writing regarding "the cause of the delay of production or performance" by reason of force majeure, and, if the cause was correctable, to use reasonable diligence to correct the cause and resume operations once the cause was corrected. If the cause was not correctable within six months despite the exercise of reasonable diligence, the Purchaser could terminate the Contract without further obligation by giving written notice to BLM of the election to terminate. Section 10 concluded that its provisions would be "in addition to rather than in limitation of any right on the part of the Purchaser to seek a rescission of the Contract under the doctrines of impossibility of

14 Contract, CACA-22901, § 1, at 1.
15 Contract, CACA-20139, § 6, at 2 (emphasis added); Contract, CACA-22901, § 6, at 2 (emphasis added).
16 Contract, CACA-20139, § 6, at 2; Contract, CACA-22901, § 6, at 2.
17 Contract, CACA-20139, § 10, at 4; Contract, CACA-22901, § 10, at 4.
18 Contract, CACA-20139, § 10, at 4; Contract, CACA-22901, § 10, at 4.
19 Contract, CACA-20139, § 10, at 4; Contract, CACA-22901, § 10, at 4.
performance, frustration of purpose or other legal principles as might be applicable."

B. BLM’s Approval of CEMEX’s Mining & Reclamation Plan and Ensuing Legal Challenges

CEMEX submitted a mining and reclamation plan (Plan) in May 1990. On August 1, 2000, the District Manager, California Desert District, BLM, issued a ROD, approving the proposed Plan, subject to the issuance of permits and authorizations by other Federal and State agencies. Approval of the ROD followed the June 2000 issuance of an Environmental Impact Statement pursuant to section 102(2)(C) of the National Environmental Policy Act of 1969.

BLM states that, at the time of the original submission of the Plan, CEMEX planned to commence mining in 1991 and to finish in 2011. However, “[b]y 1997 this had changed,” resulting in the submission and approval of a revised mining plan, under which mining would begin in 1998 and conclude by 2018. In approving the revised mining plan, the District Manager stated that it would take “approximate[ly] . . . six to nine years” for CEMEX to “bring [such] a mine on line.” He stated that actual mining operations would begin under Contract CACA-20139 during the first 10-year production period and conclude during the second 10-year production period under Contract CACA-22901.

During the ensuing 8 years, BLM’s approval of the proposed Plan and related actions were challenged by the City and other parties. CEMEX outlines the administrative and judicial challenges, citing the relevant dispositive rulings.

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21 Contract, CACA-20139, § 10, at 4; Contract, CACA-22901, § 10, at 4.
22 AR 36005-36027.
24 See Decision at 11.
25 Id.
26 ROD at 14.
27 Id.
28 See Petition at 3; Kirkmyer Decl., ¶ 4, at 3; Letter to BLM from CEMEX, dated May 22, 2015 (Ex. 10 to Petition), at 8-10; Decision at 3.

Challenges to the ROD included the following: (1) Sierra Club, Angeles Chapter, 156 IBLA 144 (2002), aff’d, No. ED CV-04-1572 VAP JWX (C.D. Cal. Aug. 2, 2006), aff’d, No. 06-55006 (9th Cir. Sept. 20, 2007) (upholding ROD); (2) CEMEX,
states that, "[i]n 2007, all of the litigation involving the United States was resolved in favor of the Project."

The legal challenges to the Project by the City concluded with a "truce" between CEMEX and the City on January 8, 2007. Under this truce, CEMEX agreed not to pursue the acquisition of any other Federal and State permits and authorizations while the parties pursued legislation or other mutually acceptable resolutions of the City's lingering objections to the Project. The State Director states in his decision that "BLM was not party to the negotiations that led up to the truce, [and] was not a party to the truce[.]" Nor was BLM consulted regarding any extension of the truce. CEMEX reports that it "informed BLM of the truce, which BLM did not oppose." BLM indicates that initially it was not aware of the truce, and that it "refrained" from terminating the Contracts by reason of the truce "for the [period of time] ... the truce was extended." Instead, states BLM, it repeatedly sought assurances from CEMEX that it would begin site preparation, secure permits, and begin mining.

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30 See Principles for Cooperation, Section 1, dated Jan. 8, 2007 (AR 39766); Petition at 3; Reply at 5, 6; Decision at 4; Answer at 1.

31 Decision at 4, 19.

32 Id. at 4; see Answer at 45.

33 See Answer at 10.

34 SOR at 9; see id. (citing Letter to CEMEX from State Director, dated Mar. 7, 2008 (AR 35206)); Reply at 5-6; Answer at 8 ("CEMEX and the City publicly announced the truce [in February 2007]."), 10, 46 ("BLM was not aware of the truce until it was publicly announced on February 6, 2007.").

35 Answer at 1.

36 Id.
C. The Conduct of the Parties Following BLM's Approval of the Plan

CEMEX maintains that BLM confirmed, throughout the period of litigation, that the consecutive 10-year production periods under the Contracts had not yet begun to run. 37 For example, CEMEX stated in a March 17, 2006, letter to BLM, that it “wishe[d] to pursue its responsibilities to the BLM as diligently as possible,” by initiating “pre-mining activities for the Project,” such as Federal and State permitting, site preparation, and other pre-mining activity, but that it also wished to avoid “triggering the start of ... the ten-year terms of the Federal Contracts.”38 It sought written “confirmation” from BLM that “pre-mining activities contemplated by CEMEX ... will not trigger the effective date of the Federal Contracts.”39 The State Director responded by letter dated April 17, 2006, that because BLM’s approval of the Plan in August 2000 was “conditioned upon the requirement to obtain additional agency approvals and reviews,” the initial 10-year production period had not yet begun to run.40 He “concur[red] with [CEMEX’s] request that the [pre-mining] activities ... would not trigger the effective date of the [F]ederal contracts[.]”41 He asked, however, for an “estimated timeline” for undertaking pre-mining activities.42

In a February 25, 2008, letter to CEMEX, the State Director stated that, following the 1990 execution of the Contracts, “[t]he [P]roject mining and reclamation plans ... were subsequently approved by ... the BLM ... in 2000,” and reminded CEMEX of its obligations under the Contracts, despite the “truce” with the City, “to obtain the remaining permits, implement the contracts, and commence with production in a timely manner.”43 He again sought a timeline regarding the performance of pre-mining activities. CEMEX responded by letter dated April 8, 2008, promising to keep BLM informed of any further developments in the matter.44

37 See Petition at 3 (citing Kirkmyer Decl., ¶ 4, at 2 (citing Letter to CEMEX from State Director, dated Apr. 17, 2006 (AR 35202-35203))).
39 Id.
40 Id. Letter from BLM to CEMEX, dated Apr. 17, 2006, at unpaginated (unp.) 1; see id. at unp. 1-2; Answer at 14.
41 Letter from BLM to CEMEX, dated Apr. 17, 2006, at unp. 2.
42 Id.
44 See Letter from CEMEX to BLM, dated Apr. 8, 2008 (AR 35207).
In 2009, upon the conclusion of the protracted litigation involving the Plan, the Acting State Director "asked CEMEX for a timeline for ‘necessary pre-mining activities that will not trigger the 10-year [production periods],’" and thus "the status of the Project." CEMEX did not respond. BLM then asked CEMEX, by letter dated June 11, 2009, "when the company intends to proceed with securing the remaining . . . permits, begin site preparation and pre-production activities, and most importantly when CEMEX intends to commence mining and processing and royalty payments." BLM stated that it "has a continuing legal obligation to ensure that public land resources under contract are appropriately developed and, to this end, CEMEX has a responsibility to implement these contracts." CEMEX responded by letter dated June 16, 2009, that, in light of the ongoing truce, it had not yet secured the necessary permits that would allow it to initiate site preparation and pre-production activities.

As BLM states on appeal, “there was no record correspondence with CEMEX [and BLM] between 2009 and 2014[.]” But Kirkmyer reports that, from 2010 to 2014, CEMEX continued discussing with BLM and other Departmental officials its "options for moving forward" with the Project, stating that “[a]t no point in these discussions did BLM officials suggest that CEMEX was failing to fulfill any obligations under the [C]ontracts.” BLM does not dispute that it failed to suggest, during that time period, any breach of the Contracts. Kirkmyer states that such efforts continued thereafter, from March to July 2015, during which time “BLM appeared open to discussing a path forward for the Project, and did not provide notice to CEMEX that it believed there was a breach [of the Contracts].”

CEMEX further reports that attempts were made in the U.S. Congress, from 2008 to 2015, to enact legislation that would cancel the Contracts, compensate CEMEX, eliminate the Project, and preclude any authorized mining at the Soledad Canyon site. BLM states that in the “truce” agreement, CEMEX and the City had

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45 SOR at 19 (quoting Letter to CEMEX, dated Jan. 16, 2009 (AR 35208)).
46 Letter from BLM to CEMEX, dated June 11, 2009 (AR 35209); see Answer at 15.
47 Letter from BLM to CEMEX, dated June 11, 2009.
48 See Letter from CEMEX to BLM, dated June 16, 2009 (AR 35210-35211).
49 Answer at 16.
50 Kirkmyer Decl., ¶ 6, at 3.
51 See Answer at 16.
52 Kirkmyer Decl., ¶ 7, at 3.
53 See Letter to BLM from CEMEX, dated May 22, 2015, at 11; Answer at 10-12.
agreed to pursue Federal legislation “that would allow CEMEX to leave the [F]ederal mineral materials undeveloped and yet be compensated for failing to fulfill the contract terms.” In any event, CEMEX notes that such efforts affected its plan to begin construction and operations under the Contracts by “substantially alter[ing] the permitting timeline.” CEMEX further states that such efforts were “premised on the understanding that, absent a new arrangement, 20 years of production were [still] available to CEMEX under the Contracts.” However, such efforts proved unavailing and ended in January 2015.

D. Further Discussions Regarding CEMEX’s Performance Under the Contracts

On March 13, 2015, the State Director informed CEMEX that BLM desired to open discussions regarding the resolution of issues associated with the Contracts. He stated that CEMEX had failed, despite BLM’s full support, to exercise due diligence in fulfilling the terms of the Contracts. He indicated that CEMEX had not, during the 14 years since BLM conditionally approved the ROD, even after the resolution of the litigation challenging the Contracts, either produced mineral materials or provided BLM with a clear plan for fulfilling the terms of the Contracts. He expressed doubt that the environmental analysis undertaken prior to approval of the ROD still supported CEMEX’s efforts to obtain the permits and other authorizations. He asserted that BLM might pursue cancellation of the Contracts, since it was “unclear how, or if, this development can proceed.” He specifically stated: “At this stage, CEMEX’s lack of diligence in fulfilling the terms of the [C]ontracts, coupled with changed circumstances, makes a process to consider cancellation of the [C]ontracts legally available.” He indicated that BLM desired “to discuss whether there are

54 Decision at 4; see id. (“[The legislation] would effectively pay CEMEX not to develop the mineral materials under the [C]ontract[s].”); Answer at 6 (“[Parties would] pursue [F]ederal legislation for public funds to buy out the [F]ederal contracts.”).
55 Letter from CEMEX to BLM, dated July 10, 2015 (Ex. 12 to Petition), at 4.
56 SOR at 10.
57 Letter from BLM to CEMEX, dated Mar. 13, 2015 (Ex. 7 to Petition), at unp. 1.
58 Id. at unp. 2.
59 Id.
60 Id.
61 Id.
other avenues for bringing this matter to a close *without development of the mineral materials at this site.* 62

In a letter dated March 27, 2015, CEMEX disputed BLM’s assertions that it had failed to exercise due diligence in fulfilling the terms of the Contracts. CEMEX stated that it had not breached the Contracts, noting that BLM had never before demanded that CEMEX take any “specific actions in order to maintain the valid status of the Contracts,” or indicated, in any way, that CEMEX might be in breach of the Contracts. 63 Rather, CEMEX stated that it had kept BLM fully apprised of its efforts to begin operations under the Contracts, and that BLM had supported such efforts. 64 CEMEX asked whether BLM considered CEMEX to be in breach of the Contracts, and, if so, requested that it be afforded “its full rights to address and cure any alleged default,” under 43 C.F.R. § 3601.62. 65

In a letter dated April 17, 2015, BLM officially requested CEMEX to document, within 30 days of receipt of the letter, its efforts to fulfill its obligations under the Contracts. 66 CEMEX sought to document such efforts in a May 22, 2015, letter, requesting to meet with BLM “to discuss a path forward.” 67 CEMEX noted that it had, to the extent appropriate, initiated much of the process of obtaining permits and other authorizations from relevant Federal and State agencies. Los Angeles County had approved the State surface mining permit, reclamation plan, and financial assurances based on a 2004 Environmental Impact Report, which had been prepared in compliance with the California Environmental Quality Act (CEQA). 68 But other aspects of the process were at various stages of completion. 69

In a June 18, 2015, letter, BLM agreed to a meeting and requested that CEMEX submit, within 15 days of receipt of the letter, a “good faith estimated timeline to begin construction and operations” under the Contracts, as well as “the time needed to secure, and your explanation as to why CEMEX has not yet secured,”

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62 Id. (emphasis added).
63 Letter from CEMEX to BLM, dated Mar. 27, 2015 (Ex. 8 to Petition), at 2.
64 See id. at 1-2.
65 Id. at 4.
66 See Letter from BLM to CEMEX, dated Apr. 17, 2015 (Ex. 9 to Petition).
67 Letter from CEMEX to BLM, dated May 22, 2015, at 12.
69 Letter from CEMEX to BLM, dated May 22, 2015, at 12.
specific authorizations from the remaining Federal and State agencies.\textsuperscript{70} CEMEX responded by letter dated July 10, 2015, stating that it was, in light of termination of the “truce” agreement with the City and the absence of any pending litigation threatening to cancel the Contracts, diligently pursuing all remaining permits and other authorizations “needed to bring the Project on-line within the near future.”\textsuperscript{71} CEMEX set out an estimated 21-month timeline for securing all of the remaining permits and other authorizations, and indicated that it expected to begin construction and operations under the Contracts “as early as April 2017.”\textsuperscript{72} CEMEX further reiterated its request for a meeting with BLM to discuss “resolv[ing] th[e] matter in a way that satisfies the legitimate needs of all interested parties.”\textsuperscript{73}

\textbf{E. The BLM Decision Being Appealed}

BLM met with CEMEX at the State Office on August 28, 2015, at which time it served the State Director’s August 2015 decision on CEMEX.\textsuperscript{74} In his decision, after detailing the lengthy history of the Contracts, the State Director stated that “BLM is entrusted with the public interest of developing the sand, gravel, and aggregate resources from the Soledad Canyon, and that duty compels the BLM to withdraw from the contract[s].”\textsuperscript{75} He surmised from the record that “CEMEX does not believe the first contract’s production period ever commenced—and therefore, by its terms, the contract’s effective date was never reached.”\textsuperscript{76} He stated that “BLM believes that alternative views may exist as a matter of law, [but that] the BLM believes that it is in the parties’ mutual interest to view the contracts as never having become effective.”\textsuperscript{77} Referring to “CEMEX’s failure to make reasonable progress toward commencement of production,” he stated that “BLM now rescinds Contract 20139 and Contract 22901.”\textsuperscript{78}

\begin{itemize}
  \item \textsuperscript{70} Letter from BLM to CEMEX, dated June 18, 2015 (Ex. 11 to Petition), at unp. 2.
  \item \textsuperscript{71} Letter from CEMEX to BLM, dated July 10, 2015 (Ex. 12 to Petition), at 1.
  \item \textsuperscript{72} Id. at 2.
  \item \textsuperscript{73} Id. at 7.
  \item \textsuperscript{74} See Petition at 4.
  \item \textsuperscript{75} Decision at 12; see Petition at 5 n.4 (The State Director variously characterizes its disposition of the Contracts by use of “the terms ‘rescinding,’ ‘withdrawing,’ ‘terminating,’ ‘cancellation,’ ‘expired,’ and variants thereof.”).
  \item \textsuperscript{76} Decision at 12.
  \item \textsuperscript{77} Id.
  \item \textsuperscript{78} Id.
\end{itemize}
The State Director then articulated a series of holdings that are conditional upon whether CEMEX argues that the contracts were effective. Should CEMEX argue that the Contracts are effective, the State Director stated that (1) Contract CACA-20139 “expired” by its terms, in the absence of any production during the 10-year production period that began with BLM’s August 2000 approval of the mining plan; 79 (2) to the extent CEMEX argues that Contract CACA-20139 did not expire by its terms, “both contracts are terminated for default,” because of “CEMEX’s lack of diligence to bring the contracts into development, [as] evidenced by its lack of response to BLM’s requests for schedules and timelines since 2006, and its lack of plans to initiate operations under the contracts since 2000 when the BLM approved the ROD and mine plan”; 80 and (3) “CEMEX owes, and BLM demands, payments in lieu of production for a 16-year time period,” since “CEMEX has had a contractual and legal obligation to produce or to make annual payments to the United States in lieu of production.” 81

Under the third scenario, CEMEX would be required to make payments in lieu of production, totaling $17.54 million, which have accrued since the Contracts were issued in March 1990; to forfeit the bid deposit made in conjunction with the competitive sale of the Contracts, in the amount of $700,000; and forfeit the two performance bonds for the Contracts, in the total amount of $3.5 million. 82 Although the State Director demanded payment of the in lieu of production amount and declared the bid deposit to be forfeited, he did not require payment by a date certain. 83

F. Appeal by CEMEX

CEMEX appealed from and petitioned for a stay of the State Director’s decision, contending that BLM committed “a fundamental procedural error” that invalidates the August 2015 decision. 84 It asserts that BLM failed to follow section 302(c) of the Federal Land Policy and Management Act of 1976 (FLPMA) 85 by not affording it notice and an opportunity for a hearing prior to cancelling the

79 Id. at 13.
80 Id. at 17.
81 Id. at 18 (citing 43 C.F.R. § 3610.1-3(a)(5) (1990)).
82 Decision at 1; see id. at 1, 18-19.
83 See id. at 18, 19.
84 Petition at 8 (emphasis added).
CEMEX emphasizes that under section 302(c) of FLPMA, BLM may "authorize revocation or suspension, after notice and hearing, . . . upon a final administrative finding of a violation . . . [p]rovided . . . [t]hat the Secretary shall terminate any such suspension no later than the date upon which he determines the cause of said violation has been rectified." 87

CEMEX notes that the State Director, in his August 2015 decision, and the Board, in existing precedent, have acknowledged the applicability of section 302(c) of FLPMA to mineral materials sales contracts. 88 CEMEX asserts that "[t]here is no question here that BLM failed to provide the required notice of its intent to cancel the Contracts, and did not give CEMEX an opportunity to be heard or an opportunity to cure prior to issuing its August 28, 2015[,] Decision." 89 CEMEX concludes that, in the absence of notice and a hearing, BLM's decision "must be set aside." 90

CEMEX contends that, in addition, the regulations implementing section 302(c) of FLPMA and the Materials Act require BLM to give the purchaser under a mineral materials sales contract "written notice" of any defaults, breaches, or other causes for cancellation of the contract, and to afford the purchaser 30 days following receipt of notice to either "correct all defaults," request an extension of time to correct the defaults, or "submit evidence" establishing that no default exists. 91

CEMEX argues that it "presently holds valid and fully effective Contracts to produce aggregate at the Soledad Canyon site," with 10-year production periods that

86 Petition at 1; see SOR at 39, 40-41.
88 See Petition at 6-7 (citing Decision at 1-2, 17; Thomas v. BLM, 180 IBLA 182, 183-84 n.2 (2010) ("mineral estate covered by FLPMA"); and James C. Mackey, 96 IBLA 356, 365, 94 I.D. 132, 137 (1987) ("[C]ancellation provisions apply to ‘all land use authorizations issued by the Department under any law for lands managed by BLM.’")).
89 Petition at 9-10; see SOR at 39, 41.
90 Petition at 9 (quoting James C. Mackey, 96 IBLA at 365, 94 I.D. at 138 (Archaeological Resources Protection Act permits)); see id. ("‘BLM may suspend or revoke’ a[] [permit] . . . or license covered by [section 302(c) of FLPMA] . . . ‘only after notice and an opportunity for a hearing[]’" (quoting San Juan County, 102 IBLA 155, 159, 95 I.D. 61, 63 (1988) (Recreation and Public Purposes Act lease))).
91 Id. at 8 (quoting 43 C.F.R. § 3601.62(a)).
were not triggered in August 2000 when BLM issued its ROD approving the Plan.\textsuperscript{92} CEMEX states that BLM had shown a continued willingness, as recently as June 18, 2015, to discuss ways that CEMEX might go forward with activities under the Contracts, while resolving CEMEX's and BLM's concerns.\textsuperscript{93} But CEMEX states that BLM abruptly cancelled the Contracts in its August 2015 decision without complying with the procedural requirements of the statute and regulation.\textsuperscript{94} CEMEX asserts that the 10-year production periods will only be triggered once CEMEX receives all “the remaining approvals required for the Project[].\textsuperscript{95} It asks the Board to reverse the State Director’s August 2015 decision, and “declare the Contracts fully effective.”\textsuperscript{96}

By Order dated November 6, 2015, we granted CEMEX’s petition for a stay of the State Director’s decision to the extent it invalidated Contract CACA-22901, but we denied the petition to the extent it invalidated Contract CACA-20139. The case is now ripe for disposition on its merits.

\textit{DISCUSSION}

\textbf{A. The Contracts Were Effective Upon Signing}

As an initial matter, we agree with CEMEX that the Contracts became effective, \textit{i.e.}, came into existence, when the parties signed them on March 9, 1990, in accordance with Section 1 of the Contracts.\textsuperscript{97}

A contract entered into by the United States is treated in the same manner as any contract arising wholly between private parties.\textsuperscript{98} “A primary task of contract

\begin{itemize}
\item \textsuperscript{92} SOR at 50 (emphasis added).
\item \textsuperscript{93} See Petition at 4.
\item \textsuperscript{94} See id. at 11 (citing, e.g., \textit{National Environmental Development Association’s Clean Air Project v. Environmental Protection Agency}, 752 F.3d 999, 1009 (D.C. Cir. 2014) (“It is axiomatic[] . . . that . . . an agency action may be set aside as arbitrary and capricious if the agency fails to comply with its own regulations.” (internal quotes and citations omitted))).
\item \textsuperscript{95} SOR at 50.
\item \textsuperscript{96} \textit{Id.}
\item \textsuperscript{97} See id. at 13, 14.
\item \textsuperscript{98} See \textit{Mesa Air Group, Inc. v. Department of Transportation}, 87 F.3d 498, 503-04
\end{itemize}
interpretation is to ascertain the intent of the parties from the language of the contract and the circumstances under which it was made by giving contract provisions their natural and most commonly understood meaning.” 99 “The parties’ intent should be ascertained from the words of the contract, when clear and explicit, as long as to do so would not lead to absurd consequences.” 100 Where the language of the contract is “unambiguous on its face,” it “must be enforced according to the plain meaning of its terms.” 101 Further, “ambiguity does not exist merely because the two parties [to the contract] disagree as to the meaning of a term,” but rather, only where “the language is reasonably susceptible to at least two different meanings.” 102

The State Director’s decision reflects a reluctance on BLM’s part to state whether it even views the Contracts as having come into existence. He states that “CEMEX does not believe the first contract’s production period ever commenced—and therefore, by its terms, the contract’s effective date was never reached.” 103 He does not dispute CEMEX’s belief, asserting only that “BLM believes that alternative views may exist as a matter of law[.]” 104 But he states that BLM has chosen to “believe[] that it is in the parties’ mutual interest to view the contracts as never having become effective.” 105 On appeal, BLM seeks to clarify its position, asserting that in his August 2015 decision, the State Director merely “provided CEMEX with the opportunity to mutually rescind the Contracts,” which CEMEX appears to have “rejected” in its SOR. 106

102 Eason v. BLM, 166 IBLA at 295 (quoting Corbin on Contracts, § 24.7 (1998)).
103 Decision at 13 (emphasis added).
104 Id.
105 Id.
106 Answer at 49; see SOR at 49 (“Board precedent and contract law are clear that rescission ‘can only be accomplished by the contracting officer with the approval and joinder of the other party or parties to the contract.’ . . . CEMEX never agreed to end the Contracts, so rescission is simply not possible.”).
BLM's approach of treating the contract as never having become effective, however, is inconsistent with the unambiguous language of the Contracts. Indeed, section 1 of the Contracts is clear, stating that "[t]he Purchaser will be obligated for all terms of the contract upon signing."\(^{107}\) Having been executed by BLM, on behalf of the United States, and the Purchaser, both Contracts came into existence on the date of signing, March 9, 1990, in accordance with the language of Section 1 of the Contracts.\(^{108}\) Not only is the Purchaser obligated upon signing, but BLM, on behalf of the United States, is also obligated upon signing.\(^{109}\) That date is the effective date of the Contracts.\(^{110}\)

Further, BLM cannot have it both ways. For rescission of the Contracts to be appropriate, we must presume that they came into existence. Moreover, to justify rescission of a contract, there must have been a mistake in a material factual assumption of one or both parties to the contract, without which the complaining party would not have entered into the contract.\(^{111}\) Here, the State Director does not assert that the criteria for application of rescission are present. There did not exist, at the time the Contracts were entered into, any mistake of fact that now warrants rescission of the Contracts.\(^{112}\) Rather, it seems clear that BLM decided to rescind the Contracts because of "CEMEX's failure to make reasonable progress toward

\(^{107}\) Contract, CACA-20139, § 1, at 1 (emphasis added); Contract, CACA-22901, § 1, at 1 (emphasis added).

\(^{108}\) See SOR at 13 ("By their plain terms, the Contracts were validly executed and thus took effect, at the time of signing.")


\(^{110}\) See Decision at 8 ("Two consecutive contracts were issued in 1990—CA 20139 and CA 22901.")

\(^{111}\) See Grymes v. Sanders, 93 U.S. 55, 60 (1876); Dow Chemical Co. v. United States, 226 F.3d 1334, 1345 (Fed. Cir. 2000); Exxon Corp., 97 IBLA 330, 335-36 (1987); Irvin Pearce, 5 IBLA 373, 378-79 (1972).

\(^{112}\) See, e.g., Dairyland Power Cooperative v. United States, 16 F.3d 1197, 1202-03 (Fed. Cir. 1994) ("Rules governing rescission for either mutual or singular mistake are inapplicable where, as here, a party's erroneous prediction or judgment as to future events is involved." (quoting United States v. Southwestern Electric Cooperative, Inc., 869 F.2d 310, 315 (7th Cir. 1989))).
commencement of production . . . in the 25 years since the [C]ontracts were issued.”

We therefore hold that the Contracts came into existence and were effective on March 9, 1990, when BLM and CEMEX signed them. Consequently, we reverse BLM's decision to the extent it purported to rescind and withdraw from the Contracts on the basis that they never came into existence. We now turn to whether BLM correctly held Contract CACA-20139 to have expired by its terms or properly terminated both Contracts as a result of CEMEX's breach or default.

B. Contract CACA-20139 Expired at the End of Its Contract Term

[1] In accordance with 43 C.F.R. § 3602.46, the Department currently restricts the term of a mineral materials sales contract to no more than “10 years.” Each of the Contracts now at issue provides that, unless mineral extraction concludes sooner, the term of a mineral materials sales contract coincides with the 10-year production period under the Contract, which is said to begin at an established time. Section 1 of Contract CACA-20139 states clearly that the first 10-year production period was to go into effect on “the day the mining plan, to be submitted by the Purchaser, is approved by the Authorized Officer.”

1. The Production Period Commenced upon Approval of the Plan

We agree with the State Director, as he stated in his August 2015 decision, that “the [mining] plan was approved on August 1, 2000, even though the conditions of that approval had not yet occurred.” He noted that, as provided in Section 1 of the Contract, approval occurred when the District Manager issued the ROD. He added that, even though the Plan was subject to certain conditions, including the requirement that the Purchaser obtain additional authorizations from other Federal and State agencies, the approval spoken of in Section 1 of the Contract had occurred.

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113 Decision at 12; see id. (“[T]he BLM is entrusted with the public interest of developing the sand, gravel, and aggregate resources from the Soledad Canyon, and that duty compels the BLM to withdraw from the [C]ontract[s].”).
114 Contract, CACA-20139, § 6, at 2; Contract, CACA-22901, § 6, at 2.
115 Contract, CACA-20139, § 1, at 1 (emphasis added).
116 Decision at 2 (emphasis added).
He stated: “The[] conditions of approval did not change the date of BLM's approval of the mining plan[.]”\textsuperscript{117} He indicated that approval of the mining plan triggered the “beginning” of the 10-year production period for Contract CACA-20139, the expiration of which would trigger the beginning of the 10-year production period for Contract CACA-22901. \textsuperscript{118} He stated: “The ROD represents BLM's authorization for implementation of the [C]ontracts.”\textsuperscript{119}

CEMEX recognizes on appeal that the plain language of the Contract required approval of “the mining plan,” \textit{i.e.}, “actual Project approval[,] to trigger the production period,” but asserts that BLM’s “execution of the ROD” did not constitute Project approval.\textsuperscript{120} CEMEX states that the Contract “relatedly provides” that “[o]perations [under the Project] will not commence until activities proposed in the mining and reclamation plan are . . . approved by the Authorized Officer,” but that this has not occurred.\textsuperscript{121} CEMEX argues that,

\begin{quote}
[under basic principles of contract interpretation and administrative law, the Contracts are in full force and effect, with complete production periods that have not yet commenced, and will not commence until CEMEX obtains all of the required regulatory permits and approvals required under the ROD and the Contracts.\textsuperscript{122}]
\end{quote}

CEMEX adds that, as a consequence of the conditional approval of the mining plan in the ROD, “neither party is subject to any obligations or duties that are triggered by that ‘approval,’ such as the commencement of the production periods or any consequent obligation to make royalty payments or payments in lieu of production.”\textsuperscript{123}

CEMEX states that its interpretation of Section 1 is consistent with the “purpose” of the Contract, as well as the intent of the Materials Act and its implementing regulations.\textsuperscript{124} It states: “Given the first Contract’s underlying purpose

\begin{quote}
\end{quote}

\textsuperscript{117} \textit{Id.}
\textsuperscript{118} Contract, CACA-20139, § 1, at 1; Contract, CACA-22901, § 1, at 1.
\textsuperscript{119} Decision at 2.
\textsuperscript{120} SOR at 15 (quoting Contract CACA-20139, § 1, at 1).
\textsuperscript{121} \textit{Id.} (quoting Contract CACA-20139, Ex. A (Special Stipulations), ¶ 5, at 1).
\textsuperscript{122} \textit{Id.} at 4 (emphasis added).
\textsuperscript{123} \textit{Id.} at 17.
\textsuperscript{124} SOR at 2; \textit{see id.} at 18, 26-27, 27-29.
to promote aggregate development subject to environmental considerations, both parties could only have intended for the production period to begin once the necessary approvals for the actual commencement of operations were obtained.\textsuperscript{125} It indicates that, were we to hold otherwise, it would be required to begin production or, in lieu thereof, make installment payments even while it was prevented from beginning any production.\textsuperscript{126} CEMEX explains that BLM was well aware that, even absent the unusual legal challenges faced by the Project, it would normally take from 6 to 9 years "to bring a mine on line."\textsuperscript{127} CEMEX adds that neither party could have predicted that most of the 10-year production period of the first Contract would be taken up by efforts to obtain Federal and State permits and other authorizations in order to begin production, or that CEMEX would be required to start making in lieu of production payments pending such approvals.\textsuperscript{128}

We reject CEMEX's premise. That the mining plan required CEMEX to obtain the necessary Federal and State permits and authorizations prior to beginning operations does not mean that the mining plan was not approved. We agree that the commencement of Project operations, pursuant to the ROD, is dependent on the approval of "activities proposed in the mining and reclamation plan," and on the issuance of the required permits and other authorizations by Federal and State authorities.\textsuperscript{129} But we find no justification for CEMEX's view that obtaining the permits and authorizations is not integral to the approved mining plan under the Contract.\textsuperscript{130} Nor are we persuaded that the need to obtain such permits and

\textsuperscript{125} \textit{Id.} at 27.

\textsuperscript{126} \textit{See id.} at 27 ("On BLM's theory, the first 10-year production period would start at a time when it would be illegal to commence mining because necessary approvals would still be lacking."); Reply at 9 ("BLM's position means that the first production period began years before CEMEX would be legally authorized to mine under the Contracts.").

\textsuperscript{127} SOR at 27 (quoting ROD at 14).

\textsuperscript{128} \textit{Id.}

\textsuperscript{129} Contract CACA-20139, Ex. A, ¶ 5, at 1; see SOR at 16 n.5 ("Both this Board and the Federal district court previously held that the 2000 ROD approval was conditional and did not authorize mining to begin."); Answer at 3 ("Without adherence to the conditions of the ROD, including agency approvals[,] . . . the Project would cease to exist.").

\textsuperscript{130} \textit{See Answer} at 21 ("CEMEX's argument is contrary to the plain text of the Contracts, and appears to conflate 'approval of the mining plan' with approval of actual production.").
authorizations meant that the 10-year production period under the Contract would not begin until such permits and authorizations are issued. CEMEX finds the "approv[al]" spoken of in the Contract not to have occurred "because [the Contract] did not authorize mining activities to proceed under the mine plan[.]" But the Contract speaks only of approval of "the mining plan[.]" Certainly, CEMEX must abide by the ROD and the terms of the approved mining plan in initiating and undertaking operations under the Contract. But abiding by those terms is included in, and required by, the Plan. There is no basis for equating the approval of the plan spoken of in the Contract with the approvals spoken of in the ROD that are necessary before operations can begin.

CEMEX relies upon the Board's decision in Pass Minerals, Inc., to support its interpretation of the relevant language of Contract CACA-20139. Pass Minerals involved an appeal from a BLM decision suspending a mining plan of operations for the development of a placer mining claim, which had been approved by BLM pursuant to 43 C.F.R. Subpart 3809. BLM had originally issued a decision approving the plan "subject to certain conditions," one of which stated that, before work was initiated and within 120 days of receipt of the decision, Pass Minerals was to post a suitable reclamation bond with BLM. We held that BLM improperly suspended the plan where Pass Minerals had submitted a bond and, upon notice, cured any deficiency in the bond, consistent with the original decision approving the plan. In that context, we stated that BLM's approval of the plan was not "complete[,]" for purposes of authorizing operations under the plan, until the appellant had "satisfied" certain "condition[s]," which included the requirement to submit a reclamation bond. Similarly, CEMEX argues that BLM's 2000 ROD approval of the mining plan was not "complete" upon issuance of the ROD, but would only be "complete" once the conditions established in the ROD are satisfied, including the obtainment of the necessary Federal and State permits and authorizations prior to beginning pre-mining activity.

See SOR at 17.
Reply at 9.
See 43 C.F.R. § 3601.43(a) ("[Purchaser] must follow BLM-approved mining and reclamation plans, which become part of the contract").
151 IBLA 78 (1999).
See SOR at 15-17.
151 IBLA at 79.
Id. at 86.
See SOR at 16-17; Reply at 10.
BLM properly argues that CEMEX's case is distinguishable from Pass Minerals. BLM distinguished Pass Minerals in three ways. First, BLM said that the plan of operations in that case was not tied to a contract or other regulatory obligation to produce or make payments. Second, BLM said that in Pass Minerals, BLM approved the bond, but here, BLM is not the approving authority for the conditions in the ROD. And third, BLM said that unlike in Pass Minerals, CEMEX has not attempted to secure the required permits. Here, we are concerned with the Contract language providing that the start of the 10-year production period would begin with BLM's "approv[al]" of the Plan. The Contract does not provide that the mining plan will not be effective until CEMEX obtains the necessary Federal and State permits and authorization. Securing such permits and authorizations is a part of the approved plan.

CEMEX also argues that BLM's statements and general course of conduct following execution of the Contracts are relevant in construing Section 1 of the Contract. General contract law principles hold that the course of conduct of the parties to a contract is indicative of the meaning of ambiguous language in the contract. We find no ambiguity in the operative language of the Contracts now at issue.

In particular, CEMEX relies upon the April 17, 2006, letter in which the State Director noted that, while CEMEX desired to initiate pre-mining activities, including seeking and obtaining the necessary permits and other authorizations from other Federal and State agencies, CEMEX wanted "to avoid triggering the start of . . . the ten-[y]-year terms of the two consecutive [F]ederal contracts." The State Director stated that he agreed that the pre-mining activities "would not trigger the effective date of the [F]ederal contracts"; that "[t]he BLM approval of the mining plan in the

139 See Answer at 22.
140 Id.
141 See SOR at 18-19.
143 Letter to CEMEX, dated Apr. 17, 2006, at unp. 1 (emphasis added); see id. at unp. 3 ("[S]ince the ROD requires third-party agency permits before actual project mining, CEMEX took the position that the [pre-mining] ancillary activities . . . would not trigger the effective date of the [C]ontract[s].").
August, 2000 ROD was conditioned upon the requirement to obtain additional agency approvals and reviews”; and thus that “it appears reasonable that the site preparatory work and pre-production activities . . . would not trigger . . . the beginning of the contract term.”

BLM explains its April 2006 letter was a waiver of the contract language providing for the start of the first 10-year production period, and that it later retracted this waiver once CEMEX failed to follow through on its pursuit of production. But we find no evidence in the April 2006 letter or otherwise that BLM intended to waive the contract language. Rather, the letter indicates BLM’s position at the time that the production period had not yet commenced. We agree with CEMEX that, absent evidence of a “clear and unambiguous” waiver, neither an express nor implied waiver is demonstrated in the present record.

CEMEX contends that BLM failed to explain its “180-degree turn” in interpreting the Contract language. It argues that, absent an explanation, BLM acted in an arbitrary and capricious manner, and that the State Director’s decision must be reversed. But we conclude that it was sufficient for BLM to explain in its decision why it currently believes that the production period for Contract CACA-20139 began upon BLM’s August 2000 approval of the Plan. The State Director explained that BLM agreed to allowances sought by CEMEX as to when

144 Id. at unp. 1, 2 (emphasis added); see Decision at 3; Answer at 22-23, 23.
146 Reply at 20 (quoting Kersey v. Washington Metropolitan Area Transit Authority, 586 F.3d 13, 18 (D.C. Cir. 2009)).
147 Id. at 30.
149 See Federal Communications Commission v. Fox Television Stations, Inc., 556 U.S. at 515 (“[T]he agency must show that there are good reasons for the new policy. But it need not demonstrate to a court’s satisfaction that the reasons for the new policy are better than the reasons for the old one; it suffices that the new policy is
Contract CACA-20139 would be effective “in reliance on CEMEX’s assertions of diligence." He stated that “the parties never amended the contract terms, which . . . always stated . . . that this contract would become effective on the date BLM approves the mine plan.” The explanation offered by the State Director is based on the clear language of Contract CACA-20139 and sets forth “why” BLM adopted the different interpretation of the Contract. We conclude that the August 2015 decision is not arbitrary and capricious, and BLM properly determined that the production period of Contract CACA-20139 commenced upon approval of the Plan.

2. Contract CACA-20319 Expired by Its Terms

Having concluded that the Contracts became effective when the parties signed them and that the production periods began when BLM approved CEMEX’s mining plan, the result as to Contract CACA-20139 is clear—it expired by its terms 10 years after BLM’s approval of the Plan.

Both the regulation in effect at the time of BLM’s decision (43 C.F.R. § 3610.3-6 (1990)) and the current regulation (43 C.F.R. § 3602.46) provide that a competitive mineral materials sales contract is to be issued for no longer than a 10-year term, subject to a 1-year extension upon submission of a timely request demonstrating that the delay in removal of mineral materials was due to causes beyond the control of and without the fault or negligence of the Purchaser. Such a request was not sought or granted.

The Contracts are, by their terms, subject to two consecutive 10-year production periods that began “the day the mining plan, to be submitted by the Purchaser, is approved by the Authorized Officer.” The Plan was approved on August 1, 2000, with the issuance of the ROD by the District Manager. Despite the plain language of the Contracts, both BLM and CEMEX have acted as if the

permissible under the statute, that there are good reasons for it, and that the agency believes it to be better, which the conscious change of course adequately indicates.”).

150 Decision at 13.
151 Id.
152 SOR at 32.
153 43 C.F.R. § 3610.1-7 (1990); 43 C.F.R. § 3602.27 (current).
154 See Contract, CACA-20139, § 1, at 1; Answer at 2 (“[N]o maximum one year extension was ever granted by BLM and no request was ever submitted by CEMEX.”).  
155 Contract, CACA-20139, § 1, at 1; see Decision at 11.
production periods did not commence when BLM approved the ROD. The exchange of letters dated March 17, 2006, and April 17, 2006, between CEMEX and BLM, appears to reflect a mutual understanding that the consecutive 10-year production periods had not yet begun to run. That confusion persists, to some extent, in BLM's August 2015 decision.

The State Director first stated: “The production period for the first [C]ontract was required to begin the day the mining plan was approved. BLM approved the mining plan on the day the ROD was approved.” He then premised the potential outcomes under his decision upon what CEMEX might argue as to when and whether the Contracts are effective. He indicated that if CEMEX contends that the Contracts were effective, two alternative outcomes are possible for Contract CACA-20139, i.e., either Contract CACA-20139 expired by operation of law or both Contracts terminated because of CEMEX's breach. He recognized that if the Contracts have been effective since BLM approved the mining plan, “CEMEX has had a contractual and legal obligation to perform under the [C]ontracts.” He stated that if the “conditions . . . are limitations on CEMEX's ability to act on BLM's approval, [they] do not change the date of BLM's approval or the effective date of the [C]ontracts.”

Notwithstanding the State Director's “belie[f] that it is in the parties' mutual interest to view the contracts as never having become effective,” because we have already concluded that the Contracts are effective and that BLM's approval of the mining plan in fact triggered the running of the consecutive 10-year production periods, Contract CACA-20139 expired by its terms 10 years later on July 31, 2010, whereupon Contract CACA-22901 would expire by its terms on July 31, 2020. We thus affirm, as clarified by the Board, the State Director's decision to the extent he held Contract CACA-20139 to have expired by its terms on July 31, 2010.

156 Decision at 11.
157 Id. at 13.
158 Id.
159 Id. at 14.
160 Id. at 13.
3. The Department Is Not Equitably or Judicially Estopped from Holding Contract CACA-20139 to Have Expired

a. Equitable Estoppel

CEMEX argues that BLM is equitably estopped from holding that the effective date of the consecutive 10-year production periods began upon BLM's issuance of the ROD, and from holding "that the first Contract [CACA-20139] ... expired in 2010 and that the second Contract [CACA-22901] is halfway-over."

Estoppel is generally considered an extraordinary remedy when applied against the United States. However, this is not to say that estoppel may never be applied, simply that the hurdles to doing so are considerable. The party seeking estoppel must first establish that the four basic elements of estoppel have been met:

(1) the party to be estopped must know the facts; (2) the party to be estopped must intend that his/her conduct shall be acted on or must so act that the party asserting estoppel has a right to believe it is so intended; (3) the party asserting estoppel must be ignorant of the true facts; and (4) the party asserting estoppel must detrimentally rely on the conduct of the party to be estopped.

However, even then, estoppel must be based upon affirmative misconduct, such as an affirmative misrepresentation or concealment of material facts by a Federal agency, upon which the party asserting estoppel detrimentally relied. Further, estoppel will

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161 See SOR at 30, 32 ("BLM's repeated, affirmative statements that the first production period had not yet begun estop it, as a matter of fundamental fairness, from taking the newfound position that, in fact, the production periods began 16 years ago."); 32-36 (citing, e.g., Watkins v. U.S. Army, 875 F.2d 699, 707-08 (9th Cir. 1989), cert. denied, 498 U.S. 957 (1990); Leitmotif Mining Co. Inc., 124 IBLA 344, 348 (1992)).
162 SOR at 13; see id. at 32-36.
164 Terra Resources, Inc., 107 IBLA 10, 13 (1989) (citing United States v. Georgia-Pacific Co., 421 F.2d 92, 96 (9th Cir. 1970)).
165 See United States v. Ruby Co., 588 F.2d 697, 703-04 (9th Cir. 1978); Terra Resources, Inc., 107 IBLA at 13.

194 IBLA 151
not lie where the crucial misstatement by the Federal agency, relied upon by the party seeking estoppel, no matter how definite and assured, was not in writing.\textsuperscript{166}

Further, while estoppel may lie where failing to do so deprives the party of a right he would have legally acquired had he not relied on the Federal agency, it will not lie where to do so would grant the party a right not authorized by law.\textsuperscript{167} As the court stated in \textit{United States v. Browning}: "[T]he doctrine of estoppel [is invoked] against the [G]overnment with great reluctance. The only circumstances justifying use of the doctrine are those which add up to the conclusion that it does not interfere with underlying [G]overnment policies or unduly undermine the correct enforcement of a particular law or regulation."\textsuperscript{168}

CEMEX bases its estoppel claim on BLM's letters dated April 17, 2006, January 16, 2009, and June 11, 2009, wherein BLM concurred in CEMEX's assessment that the 10-year production periods had not yet begun to run, and then later twice reiterated that view.\textsuperscript{169} It argues that, being ignorant of the true fact that the production periods had begun to run, it reasonably relied on BLM's affirmative misrepresentations to its detriment. It contends that it has invested considerable time and resources in meeting the terms of the Contracts as BLM construed them in those letters. CEMEX also asserts that estopping BLM from holding Contract CACA-20139 to have expired would not afford CEMEX a right not authorized by law, since it would not run afoul of any contrary statute or regulation.\textsuperscript{171}

Given that the Contracts are unambiguous that the successive 10-year production periods began upon BLM's August 1, 2000, approval of the mining plan, we conclude that estoppel does not apply.\textsuperscript{171} Although BLM expressed in writing the view that the production period had not yet begun to run, the State Director adopted

\begin{thebibliography}{99}
\bibitem{167} See 43 C.F.R. § 1810.3(b) and (c); \textit{Heckler v. Community Health Services of Crawford County, Inc.}, 467 U.S. at 60-63 ("[T]hose who deal with the Government are expected to know the law and may not rely on the conduct of Government agents contrary to law."); \textit{Terra Resources, Inc.}, 107 IBLA at 13.
\bibitem{169} \textit{See} SOR at 34.
\bibitem{170} \textit{See id.} at 35.
\bibitem{171} See 43 C.F.R. § 1810.3(b) and (c); \textit{Shamrock Metals, LLC}, 184 IBLA 1, 4 (2013).
\end{thebibliography}
the correct interpretation of the Contract language in his August 2015 decision.\textsuperscript{172} There is no evidence in the record of an affirmative misrepresentation or concealment of material facts by BLM. And CEMEX was aware of the Contract provision stating that the production period began upon BLM's approval of CEMEX's mining plan. Were we to estop BLM from acting in accordance with the correct legal interpretation of the plain language of the Contract, we would afford CEMEX a right to which it is not authorized by law, \textit{i.e.}, an extension of the 10-year production period that began August 1, 2000, and ended July 31, 2010.

The Board has generally found that estoppel will not lie when its application would afford a right not authorized by statute or regulation.\textsuperscript{173} In Linmar Petroleum Co.,\textsuperscript{174} we held that a correct legal interpretation of the "clear and explicit" terms of an oil and gas lease justified an agency decision requiring the payment of additional rentals. We addressed whether the agency was nevertheless estopped from collecting such rentals and concluded that "[e]stoppel does not lie in this case because . . . allowing Linmar to avoid its contractual obligation to pay rentals . . . would grant it a right not authorized by law."\textsuperscript{175} Likewise here, we will not apply estoppel where to do so would grant a right not authorized by the plain terms of the Contract, \textit{i.e.}, an extension of the 10-year production period that began August 1, 2000, and ended July 31, 2010.\textsuperscript{176}

Nor does the fact that BLM allowed the Contracts to remain in existence for over 25 years change the result.\textsuperscript{177} Estoppel does not arise from BLM's failure to take

\textsuperscript{172} See Decision at 13 ("[Although BLM agreed to delay the effective date of the first contract,] the parties never amended the contract terms, which remained the same and always stated on its face that this contract would become effective on the date BLM approves the mine plan.").

\textsuperscript{173} See SOR at 35 (citing, \textit{e.g.}, Shamrock Metals, \textit{LLC}, 184 IBLA at 4, 5-6 (regulation); \textit{Atchee CBM, LLC}, 183 IBLA 389, 409-10 (2013) (statute and regulation)).

\textsuperscript{174} 153 IBLA 99 (2000).

\textsuperscript{175} 153 IBLA at 106, 107.

\textsuperscript{176} See Hudson Investment Co., 17 IBLA 146, 168-73, 81 I.D. 533, 543-46 (1974); \textit{Amoco Production Co.}, 10 IBLA 215, 215-17, 219-20 (1973) (Geological Survey not estopped from collecting additional royalties when consistent with correct interpretation of leases and unit agreement).

\textsuperscript{177} See, \textit{e.g.}, SOR at 23; Reply at 8.
action. BLM committed no error when it expressly declared in its decision that the Contract expired according to its terms.

For all these reasons, we will not equitably estop BLM from holding Contract CACA-20139 to have expired, by its terms, at the expiration of the 10-year production period that began to run when BLM approved CEMEX's mining plan.

b. Judicial Estoppel

CEMEX asserts that BLM is also judicially estopped from holding that the effective date of the consecutive 10-year production periods has occurred, that the production periods began to run upon BLM's issuance of the ROD, and that Contract CACA-20139 has expired. CEMEX argues:

The principle [of judicial estoppel] is directly applicable here because BLM told the [Federal courts (in 1997 and 2002) that the Contracts could not be implemented absent subsequent regulatory approvals and told this Board (in 2001) that the Board's prompt action to clear the path to production at the Site was needed in part because payments to the Government would not start until such production began. Both the [Federal courts and this Board relied on BLM's earlier statements in granting the requested relief.]

Under the doctrine of judicial estoppel, a court has the discretion to prevent a party from asserting a new claim in a legal proceeding that is inconsistent with a previous claim taken by that party in a prior proceeding. The doctrine applies where the current position is clearly inconsistent with the prior position, the court was somehow persuaded to accept the prior position, and the current position would, absent estoppel, afford the party an unfair advantage or impose an unfair detriment on the opposing party. It is an “extraordinary remedy” that should be invoked “only when a party's inconsistent behavior otherwise will result in a miscarriage of

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179 SOR at 36.
justice,” by introducing the risk of inconsistent court determinations, and threatening the integrity of the judicial system.\textsuperscript{181}

We reject CEMEX's argument that judicial estoppel applies in this case. CEMEX points to no representation by BLM in prior litigation before the Board or the courts that appears to be clearly at odds with the position taken in BLM's August 2015 decision. BLM represented to the Board that production under the Contract, with associated royalty payments, could not occur until CEMEX obtained approval to proceed under the mining plan, and to the courts that no royalty payments could be made to the United States until CEMEX was able to begin production, neither of which would occur until receipt of the necessary regulatory approvals.\textsuperscript{182} In each of these instances, BLM correctly referred to the payment of royalty as not being due until production began under the Contracts. There is no evidence that BLM took, before the Board or the courts, a position that was "clearly inconsistent" with the position it adopted in the August 2015 decision, and now champions on appeal.\textsuperscript{183}

Further, any statement by BLM that the production period had not begun was plainly mistaken under a proper reading of the Contract. As BLM properly points out, judicial estoppel "does not apply" when the "incompatible positions are based not on chicanery, but only on inadvertence or mistake[.].\textsuperscript{184} We see no effort by BLM to seek an advantageous ruling by the Board or the courts based on an intentional misrepresentation regarding the start of the production period.\textsuperscript{185} In addition, since the question of the meaning of the Contracts, and specifically whether the 10-year production periods had begun to run, was not clearly before the Board or the courts

\textsuperscript{181} See id. at 750-51; United States v. C.I.T. Construction, Inc., 944 F.2d 253, 259 (5th Cir. 1991).
\textsuperscript{182} See SOR at 37-38; Reply at 18 ("BLM claimed in prior litigation that actual production and the Contracts could not yet be implemented due to the requirements for CEMEX to obtain outstanding regulatory approvals.").
\textsuperscript{183} New Hampshire v. Maine, 532 U.S. at 750 (quoting, e.g., United States v. Hook, 195 F.3d 299, 306 (7th Cir. 1999), cert. denied, 529 U.S. 1082 (2000) (emphasis added)).
\textsuperscript{184} Answer at 30 (quoting Johnson v. Oregon, 141 F.3d 1361, 1369 (9th Cir. 1998) (emphasis added)).
\textsuperscript{185} See, e.g., Helfand v. Gerson, 105 F.3d 530, 536 (9th Cir. 1997) ("Judicial estoppel seeks to prevent the deliberate manipulation of the courts; it is inappropriate, therefore, when a party's prior position was based on inadvertence or mistake.").
on these prior occasions, there is no indication that the Board or the courts “relied” on any such representation in granting expedited review, a preliminary injunction, or intervention.\footnote{SOR at 36; see New Hampshire v. Maine, 532 U.S. at 750 (“[Judicial estoppel may be proper where] judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled.” (quoting Edwards v. Aetna Life Insurance Co., 690 F.2d 595, 599 (6th Cir. 1982))).}

Since we find no equitable or judicial estoppel, we conclude that the first 10-year production period for Contract CACA-20139 began running on August 1, 2000, and ended on July 31, 2010. There is no evidence that BLM ever granted any extension. We, therefore, conclude that BLM correctly held that Contract CACA-20139 has expired by its terms.

We, thus, turn to the question of whether BLM properly cancelled Contract CACA-22901 for a breach of its terms.

C. BLM Properly Found a Breach of Contract CACA-22901

In rescinding and withdrawing from the Contracts, BLM appears to have attempted to cancel them pursuant to section 302(c) of FLPMA and 43 C.F.R. § 3601.62. BLM stated that it was rescinding and withdrawing from the Contracts precisely because “CEMEX has not complied with the requirements of . . . the contracts.”\footnote{Decision at 11.} BLM enumerated various acts of noncompliance, or breaches, which included CEMEX’s failure to (1) sever, extract, and remove mineral materials; (2) occupy the Project site for mining purposes; (3) comply with the approved mining plan; (4) take title to and pay for mineral materials; (5) faithfully and fully perform all terms of the contracts; (6) give immediate written notice of the cause of delay of production or performance of the contracts; (7) use reasonable diligence to correct the cause of delay or performance of the contracts; and (8) terminate the contract due to delay that could not be corrected within six months despite reasonable diligence.\footnote{Id.} BLM offered most, if not all, of these alleged acts of noncompliance in support of its decision to terminate the Contracts for breach of the Contracts.\footnote{See id. at 13-18.}
The State Director also stated, in his decision, that CEMEX had not complied with the requirements "of the ROD" by failing to (1) consult with and obtain permits or other authorizations from other Federal and State agencies; (2) initiate or conclude environmental analyses necessary to obtain such permits or other authorizations; (3) keep BLM informed of the status of obtaining such permits and other authorizations; (4) verify the continued adequacy of CEQA compliance for purposes of obtaining permits or other authorizations from State agencies; and (5) provide specific estimated dates for obtaining other permits and authorizations. 190 While CEMEX was required by the ROD to obtain relevant permits and authorizations before beginning any mining operations, we are not persuaded that CEMEX was obligated by the ROD to obtain them apart from any actual activity under the Project, or that failing to do so constitutes noncompliance with the ROD. 191 In any event, BLM has not shown that any of these alleged failures to comply with the ROD violates any express term of the Contracts.

The State Director further stated in his decision that CEMEX has "failed to reasonably apprise the BLM of its activities and anticipated schedule to commence production." 192 BLM explains that CEMEX "generally refused BLM's requests for information" regarding its efforts to secure the necessary Federal and State permits and other authorizations that would finally allow it to begin construction and operations under the Contracts. 193 CEMEX has resisted BLM's efforts to obtain such information, and has even questioned BLM's authority to request it, but we are not persuaded that CEMEX failed to adequately respond to each of BLM's requests. 194 We do not see that CEMEX has breached any specific duty under the Contracts concerning BLM's requests for information. BLM has identified no such duty in the Contracts, and we find no implied duty.

190 Id. at 11; see id. at 12.
191 See 43 C.F.R. § 3601.43(b) ("Your operation must not deviate from the plan BLM approves.").
192 Decision at 13.
193 Id. at 12, 13, 16; see Answer at 49.
194 See Decision at 16 ("CEMEX continues to maintain that BLM . . . does not have the authority to request from CEMEX this level of 'detailed information' about whether it is taking steps to fulfill its contracts with the BLM."); e.g., Letter to State Director from CEMEX, dated July 10, 2015, at 1; SOR at 48 ("BLM admitted elsewhere in the Decision that CEMEX [recently] 'provide[d] [the] information regarding the status of its activities [when] . . . prompted.'" (quoting Decision at 16)).
1. CEMEX Did Not Breach Contract CACA-22901 by Failing to Produce Sand Gravel or Diligently Pursue the Production of Sand & Gravel

[3] We reject the notion that CEMEX violated any express term of the Contracts by not producing any sand and gravel or taking any specific steps to do so.\textsuperscript{195} Indeed, CEMEX could allow the Contracts to run their entire term without having produced, or taken any steps to produce, any sand and gravel.

Once the 10-year production periods began to run upon approval of the mining plan, CEMEX had the “right to” sever, extract, and remove mineral materials, and occupy the applicable lands, subject to appropriate payment to BLM.\textsuperscript{196} But CEMEX was not \textit{required} to exercise that right. Regardless of whether CEMEX made any effort to produce mineral materials under the Contracts, they would expire by their terms upon the conclusion of their respective 10-year production periods. We find nothing in the Contracts that specifically required production or reasonable efforts toward production.\textsuperscript{197}

Nor can any obligation to produce or make reasonable efforts to produce be implied as a matter of fact or law. The State Director made no effort to demonstrate the existence of such an implied duty. BLM undertakes, however, to show such a duty on appeal.\textsuperscript{198} BLM argues that it is well established, in the case of a mineral development contract, that the party afforded the right to extract minerals under the contract is required to exercise reasonable diligence in producing or pursuing production, and an unreasonable delay in the performance of that obligation constitutes a material breach of the contract.\textsuperscript{199}

It is true that a party to Government and other contracts has an implied duty of good faith, fair dealing, and diligence in the performance of the contract.\textsuperscript{200} But,

\textsuperscript{195} See SOR at 43 (“No discussion of due diligence toward actual production appears in the Contracts, the regulation, or governing statute.”).
\textsuperscript{196} 43 C.F.R. § 3601.21(a); 43 C.F.R. § 3601.1-2 (1990).
\textsuperscript{197} Compare with, e.g., \textit{Black Resources, Inc.}, 180 IBLA 259, 272 (2010) (Unit operator required by unit agreement to diligently drill for and produce oil and gas).
\textsuperscript{198} See Answer at 43-45.
\textsuperscript{199} See \textit{id.} at 43 (citing \textit{Williston on Contracts}, 4th ed., §§ 50:62, 63.24; \textit{Coal Resources,, Inc. v. Gulf & West Industries, Inc.}, 756 F.2d 443, 448 (6th Cir. 1985)).
\textsuperscript{200} See, e.g., \textit{Black Horse Lane Associates, L.P. v. Dow Chemical Corp.}, 228 F.3d 275, 288 (3d Cir. 2000) ("[G]ood faith performance . . . of a contract emphasizes
as CEMEX properly notes, the implied duty in the present case must attach to a specific expressed duty in Contract CACA-22901 to produce or make reasonable efforts to produce. 201 No duty to produce or make reasonable efforts to produce has been shown to exist in the Contracts.

The State Director stated that CEMEX's obligation to sever, extract, and remove mineral materials from the Project site is to be found in Section 2 of the Contracts. 202 Section 2 provides that BLM, on behalf of the United States, “hereby sells to Purchaser” and the Purchaser “hereby buys” from BLM, the mineral materials from a particular area of the public lands “for severance, extraction, and removal, and occupation for mining purposes[.].” 203 But the Contracts do not impose an obligation on the Purchaser “to sever, extract and remove” the mineral materials. BLM only agrees to sell and the Purchaser only agrees to buy whatever mineral materials are severed, extracted, and removed. Whether any mineral materials, subject to appropriate payment to BLM, are actually severed, extracted, and removed is left to the discretion of the Purchaser.

The State Director also stated that the obligation to sever, extract, and remove mineral materials is to be found in 43 C.F.R. § 3610.1-3(a) (1990), which was

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201 See SOR at 46 (citing Precision Pine & Timber, Inc. v. United States, 596 F.3d 817, 831 (Fed. Cir. 2010), cert. denied, 562 U.S. 1178 (2011) (“The implied duty of good faith and fair dealing cannot expand a party’s contractual duties beyond those in the express contract or create duties inconsistent with the contract’s provisions.”); Allstates Air Cargo, Inc. v. United States, 42 Fed. Cl. at 124 (“The implied obligation of good faith and fair dealing must attach to a specific substantive obligation, mutually assented to by the parties” (quoting State of Alaska v. United States, 35 Fed. Cl. 685, 704 (Fed. Cl. 1996)), aff’d, 119 F.3d 16 (Fed. Cir. 1997), cert. denied, 522 U.S. 1108 (1998))); Reply at 27 (“[T]he legislative history of [FLPMA] . . . notes that contract cancellation is limited to the violation of ‘terms and conditions’ that are ‘explicit[ly]’ spelled out ‘in the document.’” H.R. Rep. No. 94-1163, at 6-7 (1976.).”).

202 See Decision at 14, 15, 19 (“CEMEX has not produced mineral materials on the [P]roject site and is, therefore, in violation of Section 2 of the [C]ontracts.”).

203 Contract, CACA-20139, § 2, at 1; Contract, CACA-22901, § 2, at 1.
incorporated into the Contracts. The regulation, which was in effect at the time the Contracts were issued, provided that, "[u]nder a contract of sale for mineral materials, the permittee . . . shall annually produce an amount sufficient to pay to the United States a sum of money equal to the first installment [of $500 or 10 percent of the total purchase price for the mineral materials], or[,] in lieu of such production, shall make an annual payment in the amount of the first installment," which payment is due "on or before the anniversary date of the execution of the contract." The current regulations contain a similar requirement. However, while the regulation clearly contains an obligation to "produce," it allows that obligation to be avoided so long as the Purchaser makes the in lieu of production payments. Such annual in lieu of production payments are also required under the Contracts if there is no production. Thus, CEMEX was not obligated, by regulation, to sever, extract, and remove mineral materials under the Contracts.

BLM next indicated that the obligation to produce is to be found in the force majeure provisions of Section 10 of the Contracts. As CEMEX properly states, however, the force majeure provisions serve only to afford "relief for a purchaser from onerous conditions beyond [its] . . . control," and are not to be construed to advance BLM's interests in production. The Contracts elsewhere provide either for the severance and removal of materials or the making of in lieu of production payments. Either could be avoided, upon the proper invocation of the force majeure provisions, where CEMEX was prevented from severing and removing any material or otherwise performing under the Contracts.

204 See Decision at 15.
206 See 43 C.F.R. § 3602.21(a)(3).
207 See Answer at 41 ("Alternatively [to annual production], the purchaser may make payments in lieu of production."); 66 Fed. Reg. 58892, 58895 (Nov. 23, 2001) ("The provision for in lieu [of production] payments promotes diligent development and deters speculative holding of mineral deposits. Without it, purchasers may be tempted to obtain large contracts for speculative purposes or to reduce competition.").
208 See Decision at 15-16.
Further, BLM argues anew on appeal that CEMEX breached the Contracts by failing to secure or make reasonable efforts “to secure the additional permits [and other authorizations] required by the ROD.”\(^{210}\) BLM states that CEMEX is either explicitly bound by the Contracts to comply with the ROD or implicitly required to take such action because it is necessary for performance under the Contracts.\(^{211}\) Even were we to conclude that CEMEX is contractually obligated to obtain, or make reasonable efforts to obtain, the permits and other authorizations necessary to initiate production, we are not persuaded that CEMEX breached that obligation. BLM’s assertions regarding lack of diligence are belied by CEMEX’s May 22, 2015, letter to BLM, generally detailing its ongoing efforts to obtain the necessary permits and other authorizations. The fact that CEMEX had yet to begin any on-the-ground pre-mining activities, pending the conclusion of the permit and authorization process, does not establish a lack of reasonable diligence in pursuit of that process, or that CEMEX “never intended to begin production under the Contracts.”\(^{212}\)

BLM acknowledges that CEMEX had “valid excuses” for failing to diligently pursue production extending up through the 2008 conclusion of the litigation attacking the Project.\(^{213}\) BLM appears to hinge its argument on the fact that CEMEX entered into a truce with the City in 2007, agreeing for the next 5 years not to produce or pursue production, while it sought a legislative solution to the matter.\(^{214}\) But we cannot fault CEMEX for seeking to resolve the City’s remaining challenges to the Project during the period of the truce.\(^{215}\) CEMEX did not breach any express duty under the Contracts by participating in efforts to obtain the passage of favorable legislation, which would use public funds to buy-out its contractual rights.\(^{216}\)

Finally, BLM argues anew on appeal that, by entering into the January 2007 truce with the City, CEMEX repudiated the Contracts by rendering itself unable to

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\(^{210}\) Answer at 42.

\(^{211}\) See id. ("CEMEX had an implied promise to fulfill that condition [in the ROD]. Williston on Contracts, [4th ed.,] § 38:15[.]").

\(^{212}\) Id. at 47; see id. at 47-48.

\(^{213}\) Id. at 44.

\(^{214}\) See id. at 44, 48.

\(^{215}\) See id. at 1 ("Th[е] secret ‘truce’ was enough for BLM to terminate the contracts but it refrained for the 5.5 years the truce was extended.").

\(^{216}\) See id. at 48 ("CEMEX would have received payment for not implementing the contracts.").
perform its obligations. BLM concludes that, given this repudiation, BLM no longer had a duty to allow CEMEX to use and occupy the public lands for mining purposes or otherwise uphold the Contracts, and "was free to cancel the Contracts[.]" But while the truce may have precluded CEMEX from seeking to obtain the permits and other authorizations necessary for production, the truce did not render it impossible for CEMEX to make the in lieu of production payments, as required by the Contracts. Thus, BLM cannot treat the truce as a repudiation of the Contracts.

We therefore conclude that BLM erred in determining that CEMEX breached Contract CACA-22901 by failing to produce materials or diligently pursue production.

2. CEMEX Breached Contract CACA-22901 by Failing to Make In Lieu of Production Payments

While we conclude that the Contracts did not impose an obligation on CEMEX to produce mineral materials, the Contracts did obligate CEMEX to make "in lieu of" production payments, which were annually due "on or before the anniversary date of the execution of the contract[.]" The in lieu of production payment is due and payable regardless of whether any mineral materials have been severed and removed.

In accordance with Section 1 of the Contracts, CEMEX could not produce until BLM approved the Plan. And because BLM approved the Plan on August 1, 2000, the requirement to make in lieu of production payments was triggered when CEMEX failed to produce under the approved Plan.

217 See id. at 45-46, 46.
218 Id. at 46.
219 See Reply at 29.
220 43 C.F.R. § 3610.1-3(a) (1990); see 43 C.F.R. § 3602.21(a)(3) (requiring annual in lieu of production payments due “on or before each anniversary date of the contract”); Contract, CACA-20139, § 4(a), at 2; Contract, CACA-22901, § 4(a), at 2.
221 See Letter to CEMEX from BLM, dated Mar. 13, 2015, at unp. 2 (“CEMEX is obligated to make payments for production, or non-production.”).
222 See 43 C.F.R. § 3610.1-3(a) (1990) (“[T]he permittee . . . shall annually produce . . . or[,] in lieu of such production, shall make an annual payment.”); 43 C.F.R. § 3602.21(a)(3).
CEMEX, however, failed to make any such payments. Because it does not regard the 10-year production periods as having begun under the Contracts, CEMEX concludes that it “was never subject to any duty to make payments in lieu of production,” and thus “there can be no breach of the Contracts on that basis[].”

But as we have already concluded, this is incorrect: The 10-year production periods began when BLM approved the Plan.

Further, 43 C.F.R. § 3610.1-3(a)(6) (1990) provides that “[f]ailure to comply with the terms and conditions for payment shall constitute a breach of contract and the authorized [BLM] officer may terminate the contract.” Like the current regulation, this regulation afforded BLM “discretionary authority to terminate a [mineral materials] sales contract for a late payment `in lieu of minimum production.’” The State Director, in his August 2015 decision, exercised his authority to terminate both Contracts for this reason. For Contract CACA-20139, we find no evidence that any in lieu of production payment was made during the 10-year production period from August 1, 2000, to July 31, 2010. Contract CACA-22901 was in the middle of its 10-year production period, which began upon expiration of the 10-year production period for Contract CACA-20139. Again, we find no evidence that any in lieu of production payment has been made pursuant to Contract CACA-22901. Thus, we agree that CEMEX was in default as to both Contracts, and that BLM had full authority to cancel the Contracts.

The State Director also recognized that the obligation to produce or make in lieu of production payments was subject to the force majeure provisions of the

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223 SOR at 39 n.9; see Reply at 26 (“BLM’s claim that CEMEX was required to either produce or make in lieu [of production] payments starting in 2000 lacks any legal basis—because the production period has not yet been triggered, no obligation to produce or pay exists.”).

224 T. Brown Constructors, Inc., 95 IBLA 106, 110 (1987); see 43 C.F.R. § 3601.61 (“BLM may cancel your contract . . . if you . . . [d]efault in the performance of any material term, covenant, or stipulation in the contract.”).

225 See Decision at 15.

Contracts. But he concluded that "any restraint that was placed on performance under the [C]ontracts was voluntarily imposed on CEMEX by CEMEX."\(^{227}\)

Section 10 of the Contracts provided that the Purchaser would not be deemed in default if it was prevented from producing sand and gravel or otherwise prevented from performing the terms of the contract "by causes beyond its control, including ... rulings or decisions by ... [F]ederal [or] [S]tate ... governmental agencies[.]"\(^{228}\) BLM indicates that, since CEMEX "never invoked the Force Majeure clause under the [C]ontracts for its failure to produce mineral materials or otherwise provided valid justification for its lack of production or performance," CEMEX is not excused from its breach of contract attributable to the failure to produce or, at least, make in lieu of production payments.\(^{229}\) We note that the failure to produce was clearly attributable to the fact that, under the approved mining plan, CEMEX was required to obtain the necessary Federal and State permits and other authorizations.\(^{230}\) But CEMEX has not been prevented by causes beyond its control from making the required in lieu of production payments. We can find no justification for invoking the force majeure provisions of the Contracts to excuse that "breach of contract." BLM was justified, under 43 C.F.R. § 3610.1-3(a)(6) (1990), in "terminat[ing] the contract[s]."

As we explain next, however, before BLM cancelled the Contracts for failing to make the in lieu of production payments, it was required to follow its own procedures requiring that it provide notice to CEMEX of its breach and an opportunity to correct the breach. Having failed to do so, we must set aside and remand BLM's decision to cancel Contract CACA 22901.

\(D.\) **BLM Must Afford CEMEX the Required Notice and Opportunity to Correct the Breach of Contract CACA-22901 Prior to its Cancellation**

BLM's rescission and withdrawal from the Contracts because CEMEX had "not complied" with the terms of the Contracts constitutes a cancellation of the Contracts, and the cause is a default or breach of their terms.\(^{231}\) CEMEX argues that BLM erred

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\(^{227}\) Decision at 16; see id. at 17, 19 ("CEMEX has not been prevented from severing, extracting, and removing mineral material from the [P]roject site and is therefore not entitled to delay under Section 10 of the [C]ontracts.").

\(^{228}\) Contract, CACA-20139, § 10, at 4; Contract, CACA-22901, § 10, at 4.

\(^{229}\) Decision at 16; see Answer at 2.

\(^{230}\) See Decision at 14.

\(^{231}\) Decision at 11.
by cancelling the Contracts without providing for a hearing, under FLPMA, or notice and opportunity to correct its breach under BLM's regulations.\footnote{See SOR at 39-42.} We address each argument below.

1. \textit{FLPMA's Requirement for a Hearing Is Satisfied by Appeal to this Board}

Section 302(c) of FLPMA directs BLM, on behalf of the Secretary, to insert in any instrument providing for the use, occupancy, or development of the public lands a provision authorizing revocation or suspension, after notice and hearing, of such instrument upon a final administrative finding of a violation of any terms and conditions requiring compliance with regulations under Acts applicable to the public lands\footnote{43 U.S.C. § 1732(c) (2012) (emphasis added); see H.R. Rep. No. 94-1163, at 6, 6-7 (1976), reprinted in 1976 U.S.C.C.A.N. 6175, 6180, 6180-81.}.

\footnote{43 U.S.C. § 1732(c) (2012).} Provided, That such violation occurred on public lands covered by such instrument and occurred in connection with the exercise of rights and privileges granted by it.\footnote{See Answer at 32 ("The Materials Act does not include a provision for notice and hearing, suspension, revocation or cancellation," and no such provision appears in any "other applicable public land statute").} Section 302(c) of FLPMA further provides that where "other applicable law" has specific provisions for suspension, revocation, or cancellation of a permit, license, or other authorization to use, occupy, or develop the public lands, such specific provisions "shall prevail."\footnote{See San Juan County, 102 IBLA at 158-59, 95 I.D. at 63; James C. Mackey, 96 IBLA at 364, 94 I.D. at 137.} Because the Materials Act of 1947 contains no language governing when a mineral materials sales contract is deemed to have expired, or providing for rescission, termination, or cancellation of a contract,\footnote{See San Juan County, 102 IBLA at 158-59, 95 I.D. at 63; James C. Mackey, 96 IBLA at 364, 94 I.D. at 137.} we conclude that the notice and hearing requirements of section 302(c) of FLPMA are applicable to the cancellation of the mineral materials sales contracts now at issue.\footnote{See San Juan County, 102 IBLA at 158-59, 95 I.D. at 63; James C. Mackey, 96 IBLA at 364, 94 I.D. at 137.}

Consistent with established precedent, we hold that CEMEX has, by virtue of its appeal to the Board, been afforded its procedural due process rights under...
section 302(c) of FLPMA, and that BLM's August 2015 decision need not be set aside for that reason.\textsuperscript{237}

BLM properly notes that the "notice and hearing" provided for in section 302(c) of FLPMA "does not require a formal hearing before an administrative law judge," and, in fact, is "satisfied when the [party holding an instrument providing for use, occupancy, or development of the public lands] . . . is given notice of BLM's adverse decision and afforded the right to appeal to the Interior Board of Land Appeals."\textsuperscript{238} For example, in \textit{Dvorak Expeditions}, we explained that the opportunity to appeal to the Board satisfied the "notice and hearing" requirement of section 302(c) of FLPMA, since Congress did not explicitly or implicitly mandate a formal evidentiary hearing on the record before BLM took the adverse action at issue.\textsuperscript{239} And in \textit{Obsidian Services}, we similarly concluded that section 302(c) did not require a formal hearing and that an appellant's "hearing rights under that section are satisfied when the [appellant] is given notice of BLM's adverse decision and afforded the right to appeal to the Interior Board of Land Appeals."\textsuperscript{240} While both of these cases concerned special recreation permits under FLPMA, our conclusion that the right to notice and hearing under section 302(c) is satisfied by appeal to the Board applies equally to mineral materials sales contracts.

Further, CEMEX has identified nothing in the statutory language or legislative history of section 302(c) of FLPMA that would require the Department to ensure that the required "notice and hearing" be afforded "before BLM acts to revoke an authorization," rather than "after BLM's decision [to revoke] is made[]."\textsuperscript{241} \textit{Obsidian Services} and \textit{Dvorak Expeditions} stand for the proposition that section 302(c) of FLPMA is satisfied so long as the party holding the instrument revoked had notice, and could or did appeal to the Board, before revocation became final for the

\textsuperscript{237} See, e.g., Larry Smith D/B/A Top Gun Outfitters, 183 IBLA 321, 322 ("[R]ights under section 302(c) of FLPMA are satisfied by applying established Department procedures for review of BLM's decision by the Interior Board of Land Appeals.") (2013).


\textsuperscript{239} See Dvorak Expeditions, 127 IBLA at 150-51; id. at 151 ("When Dvorak was given notice of BLM's adverse decision and afforded the right to appeal to this Board, his rights were fully satisfied.").

\textsuperscript{240} Obsidian Services, Inc., 155 IBLA at 247-48.

\textsuperscript{241} Reply at 23; see id. at 22-23.
Department, resulting in a “final administrative finding[.]”\textsuperscript{242} We have held that appeal to the Board from an initial BLM decision, which includes the Board’s authority to order a hearing in accordance with the Administrative Procedure Act,\textsuperscript{243} before a final decision is issued on behalf of the Department, is deemed to satisfy an appellant’s rights to procedural due process under the U.S. Constitution.\textsuperscript{244}

We therefore conclude that BLM did not violate FLPMA in cancelling the Contracts without a formal hearing under section 302(c) of FLPMA.

2. BLM Erred by Not Providing CEMEX with Notice and an Opportunity to Cure Its Breach Under Applicable Regulations

CEMEX and BLM disagree as to which version of the implementing regulations applies to the Contracts. CEMEX argues that the current regulations, which were promulgated in 2001, apply, but BLM argues that the regulations in effect when the Contracts were issued apply. We agree with CEMEX. At the time of issuance of the Contracts, the Department’s regulations provided that competitive mineral materials sales contracts were to be issued for a term not to exceed 10 years, subject to a one-time 1-year extension upon submission of a timely request demonstrating that the delay in the removal of mineral materials was due to causes beyond the control and without the fault or negligence of the purchaser. The regulations also provided that BLM might terminate a contract when the purchaser fails to make a payment required by the terms of the contract, or at any time by mutual agreement with the purchaser.\textsuperscript{245} These regulations did not provide any process for cancelling a contract.

Current implementing regulations, which were promulgated effective December 24, 2001, are somewhat more expansive.\textsuperscript{246} They provide that a competitive sales contract will be issued for a term not to exceed 10 years, subject to a one-time 1-year extension upon submission of a timely request demonstrating that the delay in the removal of mineral materials was due to causes beyond the control and without the fault or negligence of the purchaser; that a contract will terminate

\textsuperscript{242} 43 U.S.C. § 1732(c) (2012).
\textsuperscript{244} See, e.g., ANR Company, Inc., 182 IBLA 248, 270 (2012).
\textsuperscript{245} See 43 C.F.R. §§ 3610.1-3(a)(6) and (b), 3610.1-7, and 3610.3-6 (1990). The regulations in effect at the time of issuance of the Contracts were originally promulgated effective July 11, 1983. See 48 Fed. Reg. 27008 (June 10, 1983).
when the term of the contract expires, once the purchaser completes production and reclamation under the contract, or when BLM cancels the contract; and that BLM might, at any time, terminate a contract by mutual agreement with the purchaser.\footnote{See 43 C.F.R. §§ 3602.22, 3602.27, and 3602.46.}

The current regulations further specify that BLM “may cancel” a mineral materials sales contract when the purchaser fails to comply with the Materials Act, fails to comply with any applicable regulations, or “[d]efault[s] in the performance of any material term, covenant, or stipulation in the contract.”\footnote{43 C.F.R. § 3601.61; see Reply at 8.} They also specifically provide that BLM “may cancel” such a contract only when the purchaser fails, within 30 days after receipt of “written notice of any defaults, breach, or cause of forfeiture,” to either correct all defaults, request an extension of time in which to correct the defaults, or submit evidence showing, to BLM’s satisfaction, why BLM should not cancel the contract.\footnote{43 C.F.R. § 3601.62(a) and (b); see Mineral Materials Disposal Handbook H-3600-1 (Rel. 3-315 (2/22/02)), at 44, 56-57. The Mineral Materials Disposal Handbook is available at http://www.blm.gov/style/medialib/blm/wo/Information_Resources_Management/policy/blm_handbook.Par.33601.File.dat/H_3600_1.pdf (last visited Mar. 1, 2019).}

Both Contracts provide that they were entered into by BLM and CEMEX under the “authority of” the Materials Act “and the regulations thereunder set forth in 43 C.F.R. Group 3600[].”\footnote{Contract, CACA-20139, at 1 and § 6, at 4; Contract, CACA-22901, at 1 and § 6, at 3.} Further, Section 9 of the Contracts provides: “The rights of Purchaser shall be subject to the regulations in 43 CFR Group 3600[] (which are made a part of this contract)[.].”\footnote{Contract, CACA-20139, § 9, at 3; Contract, CACA-22901, § 9, at 3.} As CEMEX notes, BLM has acknowledged the general applicability of the current 43 C.F.R. Group 3600 regulations, but has otherwise “suggest[ed]” that the regulations in effect when the Contracts were executed governed the question of cancellation of the Contracts.\footnote{Petition at 8 n. 6 (citing Decision at 1, 2, 7, 14, 15, 18, 19); see id. at 8.} CEMEX argues that the prior regulations, which contained no applicable language regarding “cancellation procedures,” do not apply, since the Contracts incorporate future regulations not inconsistent with the Contracts, and that the current regulations are not inconsistent.\footnote{Id. at 8-9 n.6 (citing 66 Fed. Reg. at 58899; and Kin-Ark Corp., 45 IBLA 159,} It also notes that the Board generally favors giving parties the
benefit of changes in applicable regulations, which is the situation with the current 43 C.F.R. Group 3600 regulations. 254

BLM argues that the Contract language, as construed by the Board in our February 23, 2004, Order in Alyeska Pipeline Service Co., IBLA 2002-324, “did not explicitly incorporate future regulations,” and that the current regulations issued in 2001 do not apply.255

Although we agree with BLM’s reading of the Board’s order in Alyeska, we do not agree that it controls cancellation of the Contracts at issue. Alyeska involved whether it was proper for BLM to apply amendments to the Department’s regulations in disallowing refunds and credits under Alyeska’s mineral materials sales contracts.256 Alyeska’s contracts contained language rendering them subject to the regulations in 43 C.F.R. Group 3600.257 Addressing whether the amended regulations were incorporated into existing contracts, we stated: “We find that the 1997 contracts do not incorporate future regulations and that, therefore, the 2001 regulations do not apply to those contracts.”258 We examined language in permits and other authorizations that incorporated “regulations ‘now or hereafter in effect,’” and explained that “[t]he absence of language in the 1997 contracts explicitly adopting future regulations fatally undermines BLM’s assumption that the 2001 regulations apply here.”259

Our order in Alyeska is not precedential authority.260 We find nothing in the regulatory preamble, upon which the Board relied in Alyeska, that requires a contract

166-67, 87 I.D. 14, 18-19 (1980)).
254 See id. at 9 n.6 (citing, e.g., Mobil Exploration & Producing U.S., Inc., 119 IBLA 76, 79-80, 98 I.D. 207, 209-10 (1991)).
256 Order, Alyeska Pipeline Service Co., IBLA 2002-324, at 11.
257 See Order, Alyeska Pipeline Service Co., IBLA 2002-324, at 10 (“Section 4 of the contracts . . . provides that ‘[t]he rights of Purchaser shall be subject to the regulations in 43 CFR, Group 3600[] (which are made a part of this contract)’”).
258 Id. (citing 66 Fed. Reg. at 58899) (emphasis added).
259 Id. (emphasis added).
260 See Colorado Environmental Coalition, 173 IBLA 362, 369 (2008) (“Like all orders issued by this Board, th[e] order [at issue] does not comply with the requirements of
to “explicitly” incorporate future regulations for them to apply.\textsuperscript{261} We conclude that in the present case the broad contractual language incorporating the regulations in 43 C.F.R. Group 3600 should be deemed to incorporate any changes in the regulations.

Further, by not construing the contracts in \textit{Alyeska} in light of amended regulations, the Board acted to preserve a benefit afforded to the contract holder under the prior regulations.\textsuperscript{262} The Board applies an amended regulation to benefit an affected party in a pending matter, in the absence of prejudice to the intervening rights of any third parties or countervailing public policy considerations, “where this was not contrary to the explicit scope of the amended regulations[].”\textsuperscript{263} Conversely, where the amended regulation would not benefit the affected party, we have declined to apply it.\textsuperscript{264} Application of the amended regulation would not have benefited Alyeska. Here, however, CEMEX would clearly benefit from the amended regulation, since BLM would be required to afford it an opportunity, under 43 C.F.R. § 3601.62, to correct any breach of the contract. Moreover, the regulatory preamble explained that the amendments were applicable to “existing” contracts, provided that the contracts incorporated future regulations and the regulations were not inconsistent with the express terms of the contract.\textsuperscript{265} We find that these prerequisites were satisfied in the case of the Contracts and decline to apply the holding in \textit{Alyeska} to the present case.

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\textsuperscript{261} See 66 Fed. Reg. at 58892.
\textsuperscript{262} See Order, \textit{Alyeska Pipeline Service Co.}, IBLA 2002-324, at 11 (“We therefore conclude that the 2001 regulations did, in fact, substantively change the refund and credit provisions of the 1983 regulations [disallowing the crediting of in lieu of production payments made under expired contracts to new contracts].”).
\textsuperscript{263} \textit{Trigg Drilling Co., Inc.}, 138 IBLA 375, 377 (1997); see, e.g., \textit{Forest Oil Co.}, 107 IBLA 1, 3 (1989); \textit{High Country Communications, Inc.}, 105 IBLA 14, 19, n.4 (1988); \textit{Exxon Corp.}, 95 IBLA 165, 175 (1987); \textit{T. Brown Constructors, Inc.}, 95 IBLA at 110; \textit{Dorius v. BLM}, 83 IBLA 29, 38 (1984); see also \textit{Bradley v. Richmond School Board}, 416 U.S. 696, 711, 715 (1974); \textit{Bruce Anderson}, 80 IBLA 286, 296, 91 I.D. 203, 208 (1984); \textit{James E. Strong}, 45 IBLA 386, 388 (1980); \textit{Christopher A. Marks}, 26 IBLA 84, 85 (1976); \textit{Henry Offe}, 64 I.D. 52, 55-56 (1957).
\textsuperscript{264} See \textit{U.S. Steel Corp.}, 50 IBLA 190, 193-94 n.1 (1980).
\textsuperscript{265} 66 Fed. Reg. at 58899.
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We conclude that the Contracts incorporated regulations in effect at the time of issuance of the Contracts, as amended by future regulations, to the extent they are not inconsistent with the terms of the Contracts. To the extent the amended regulations afford procedural protections in the case of cancellation of the Contracts, we find no inconsistency with the terms of the Contracts. We therefore conclude that the current regulations apply to the Contracts and that BLM was required by those regulations to afford CEMEX an opportunity to correct the default in its performance under Contract CACA-22901. BLM does not assert that it afforded CEMEX such an opportunity and instead argues that the current regulations do not apply to the Contracts. But because we conclude that the current regulations, in fact, apply, we also conclude that BLM improperly cancelled Contract CACA-22901 without complying with the requirement to afford CEMEX an opportunity to correct the default or breach. For this reason, we must set aside the State Director's August 2015 decision and remand the matter to BLM. No notice and opportunity to cure any breach of Contract CACA-20139 need be provided, since that Contract expired by its terms at the end of the 10-year production period that began when BLM approved CEMEX's mining plan in 2000.

CONCLUSION

We conclude that CEMEX has carried in part, and failed to carry in part, its burden to establish an error of fact and law in the State Director's August 2015 decision. We reverse his decision to the extent he concluded that the Contracts never became effective. We affirm his decision to the extent he concluded that the Contracts became effective when BLM approved the Plan on August 1, 2000. We also affirm his decision to the extent he held Contract CACA-20139 to have expired, according to its terms, at the end of its 10-year production period on July 31, 2010. But we will set aside the decision cancelling Contract CACA-22901 and remand the case so that BLM may provide CEMEX notice and an opportunity to correct the breach pursuant to 43 C.F.R. § 3601.62.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, we reverse the decision in part, affirm the decision

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266 See id.; Reply at 25.  
267 43 C.F.R. § 4.1.
in part, and set aside the decision in part and remand the case to BLM for further action consistent with this decision.

/s/
James F. Roberts
Acting Chief Administrative Judge

I concur:

/s/
Amy B. Sosin
Administrative Judge