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San Bernardino County  
Appeals of --

ARMED SERVICES BOARD OF CONTRACT APPEALS

City of Adelanto

Under Contract Nos. AF04(609)-318,  
AF04(609)S-95 and Lease LA-691

)  
)  
) ASBCA Nos. 48202 & 48633  
)  
)

APPEARANCES FOR THE APPELLANT:

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APPEARANCES FOR THE GOVERNMENT:

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OPINION BY ADMINISTRATIVE JUDGE DICUS

These appeals arise from the final decision of a contracting officer for respondent Department of the Air Force, Base Conversion Agency, denying appellant City of Adelanto's claim for water rights and monetary damages in the total amount of \$19,790,911.86. The underlying contracts are for the sale and purchase of water. Lease LA-691, for a period of 75 years commencing 1 July 1952, grants to the Government, inter alia, the right to construct wells on property hereinafter designated "the Elario property." We dismiss ASBCA No. 48202 and sustain ASBCA No. 48633 in part.

FINDINGS OF FACT

1. An Application to Appropriate Unappropriated Water, Application No. 10342, was filed on 11 December 1941 by the San Bernardino County Waterworks, District No. 2 (predecessor in interest to appellant), with the State of California, Department of Public Works. The application was granted and Permit No. 6121, which limited appropriation of water to an amount not exceeding 2.5 cubic feet per second (cfs), was issued on 2 April 1943 (R4, tab 12; exh. B-1). Permit No. 6121 was revoked on 15 December 1947 and reinstated 20 April 1951 (R4, tabs 15, 16).

2. With the construction of George Air Force Base in 1941, wells were drilled into the Mojave River by the Government, but it had no right to transport the water. Consequently, a formal lease was entered into with Adelanto Mutual Water Company for transport of 100 miner's inches of water (a miner's inch equals 1/40 cfs or 16 million gallons per day). Water supply proved insufficient and an additional well was drilled (R4, tab 23).

3. In the early 1950's additional water was sought by George Air Force Base. It was agreed that San Bernardino Water District No. 2 would purchase a well site and lease it to the Government. Under Permit No. 6121, George Air Force Base would receive 75 miner's inches and make the remainder available to the Town of Adelanto. The Corps of Engineers was to acquire easement rights (R4, tab 24).

4. Lease LA-691, between the United States of America ("the Government" or "Lessee") and appellant's predecessor-in-interest, County of San Bernardino ("Lessor"), was entered into on 18 June 1952. LA-691, although titled "Department of the Air Force, George Air Force Base, California," was executed for the Lessee by a contracting officer with the Corps of Engineers. For consideration of \$1.00, LA-691 granted to the Lessee rights to the Elario property for a period of 75 years commencing 1 July 1952. LA-691 provides in part:

THIS LEASE, made and entered into this 18th day of June, 1952 by and between the County of San Bernardino, a body corporate and politic of the State of California, whose address is San Bernardino, California, herein referred to as "Lessor" and the United States of America, herein referred to as the "Lessee",

WITNESSETH:

WHEREAS, Lessor is the owner of certain real property situate in the vicinity of George Air Force Base herein set forth and particularly described, and the Lessee has the available pumping and plant facilities for the drawing and circulation of the water supply that is obtainable from said parcel of land;

AND WHEREAS, both the Lessor and Lessee are desirous that the water obtainable on said parcel of land be developed for the use of George Air Force Base, Victor Valley Housing Corporation, Mesa Estates, Inc. and San Bernardino County Water Works District No. 2 for the domestic use of the Town of Adelanto, California;

NOW, THEREFORE, in consideration of one dollar (\$1.00) in hand paid and the benefits to be derived by the County of San Bernardino under a certain Water Service Contract,

designated for the purpose of identification as Contract No. AF 04(609)-27 to be entered into between the Lessee and the Lessor, providing for the furnishing of water services to the Lessor herein, a copy of which is attached hereto, marked Exhibit "A" and incorporated herein, the same as if set forth in full, the Lessor hereby leases unto the Lessee all that certain parcel of land in the County of San Bernardino, State of California, . . . .

TO HAVE AND TO HOLD the said premises for the term beginning July 1, 1952 and ending June 30, 2027, provided further that such term may be extended thereafter, at the option of the Lessee, for the same purposes for a similar term of seventy-five (75) years from June 30, 2027.

The Lessee shall have the right, during the existence of this lease, to enter upon said lands and construct one or more wells thereon; to extract and export water therefrom to the extent and in such amount as granted under any permit issued to the San Bernardino County Water Works District No. 2 by the Division of Water Resources, State of California, and to distribute such water for the benefit and use of said San Bernardino County Water Works District No. 2 for the domestic use of the inhabitants of the community known as Adelanto, California, and for the use of the George Air Force Base, the Victor Valley Housing Corporation, Mesa Estates, Inc. and for any other housing project built on or near the George Air Force Base and for the use of other facilities or activities co-related to said Base or housing projects. The Lessee shall also have the right, during the existence of this lease, to attach fixtures, erect structures or signs and to install any other facilities incident to the purposes for which the premises are to be utilized.

All equipment placed on the leased premises by the Lessee shall remain the property of the Lessee; provided, however,

that upon the expiration or termination of this lease any well-casing in place shall become the property of the Lessor in lieu of restoration of the premises to the condition existing at the time of the effective date of this lease.

(Exh. B-2)

5. Contract No. AF 04(609)-27, referenced in LA-691 and effective 1 July 1952, obligated the Government to provide water to the County of San Bernardino at the initial rate of \$0.0603 per 1000 gallons for use by the Town of Adelanto. In exchange, San Bernardino agreed to assign the rights and privileges under Permit No. 6121 to the Government. The Government was understood to have total responsibility for producing water under LA-691 (R4, tab 2). Contract No. AF 04(609)-27 was terminated effective 10 January 1957 (R4, tab 58).

6. By Notice of Assignment dated 10 November 1952 San Bernardino County informed the California Department of Public Works that it had assigned "a portion of all my right, title, and interest in Application 10342, Permit 6121 . . . to George Air Force Base . . . ." (R4, tab 36) In 1955, San Bernardino County filed a similar notice that "all my right, title and interest in Application 10342, Permit 6121" had been assigned to Adelanto Community Services District (R4, tab 48).

7. On 31 December 1956 the Government and Adelanto Community Services District, a predecessor-in-interest to appellant, entered into a Water Sale Contract (AF 04(609)S-95) ("the sale contract") and a Negotiated Water Purchase Contract (AF 04(609-318) ("the purchase contract"). Neither contract had a termination date or otherwise articulated a performance period (R4, tabs 3, 6). Each of the contracts had a Disputes clause, as follows:

10. DISPUTES. Except as otherwise provided in this contract, any dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided by the Contracting Officer, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the [Contractor or Purchaser]. Within thirty (30) days from the date of receipt of such copy, the [Contractor or Purchaser] may appeal by mailing or otherwise furnishing to the Contracting Officer a written appeal

addressed to the Secretary, and the decision of the Secretary or his duly authorized representative for the hearing of such appeals shall, unless determined by a court of competent jurisdiction to have been fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or not supported by substantial evidence, be final and conclusive; provided that if no such appeal is taken, the decision of the Contracting Officer shall be final and conclusive. In connection with any appeals proceeding under this clause, the [Contractor or Purchaser] shall be afforded an opportunity to be heard and to offer evidence in support of its appeal. Pending final decision of a dispute hereunder, the [Contractor or Purchaser] shall proceed diligently with the performance of the contract and in accordance with the Contracting Officer's decision.

(Exh. B-2)

8. The sale contract included the following provisions:

#### NEGOTIATED WATER SALE CONTRACT

THIS NEGOTIATED CONTRACT, entered into this 31st day of December, 1956, by and between the UNITED STATES OF AMERICA (hereinafter called the "Government") represented by the Contracting Officer executing this contract and ADELANTO COMMUNITY SERVICES DISTRICT, County of San Bernardino, State of California (hereinafter called the "Purchaser"), . . . .

#### GENERAL PROVISIONS

1. SERVICES TO BE RENDERED. From the effective date of this Contract, until terminated at the option of the Government by giving of not less than thirty (30) days' advance written notice of the effective date of termination, the Government will furnish, subject to the limitations hereinafter provided, and the Purchaser will receive and pay for, such utility as described herein.

The Government agrees that this contract will not be terminated, except for cause, unless Contract No. AF 04(609)-318 between the Government and the Adelanto Community Services District is simultaneously or previously terminated; provided that water service continues to be unavailable from any local utility firm.

PAYMENTS. For and in consideration of the faithful performance of the stipulations of this contract, the Purchaser shall pay the Government for service herein contracted for, at the rates and under the terms and conditions set forth in Clause 4 herein. The Government will render statements to the Purchaser, and bills for utility services will be due and payable fifteen (15) days after the receipt of such bills.

3. USE OF SERVICE. The Government, by reason of this contract, is obligated to supply the Purchaser with utility services for no longer than its pumping and pipeline facilities for the rendering of such services continue to be maintained and operated by the Government. The Government agrees to furnish the Purchaser all the water required for the use of the inhabitants of the Adelanto Community Services District; provided that in the event of a water shortage so that the supply is insufficient to satisfy the entire needs of all parties, the Government agrees to make available to Purchaser twenty (20) per cent of all water pumped from Government wells located on Adelanto Community Services District property. . . .

4. WATER RATES. The Government shall be paid for all water supplied through the Government's facilities regardless of its source, as computed on the meter located at the point of delivery.

The rate to be paid for water supplied pursuant to this contract shall be computed as follows:

The rate paid by the Government under Contract No. AF 04(609)-318 which, at the date of signing of this contract is \$.030691 per thousand gallons) [sic] plus the

Government's average cost of water distribution as reflected by Air Force Regulation No. 91-5 as amended or superseded (which at the date of the signing of this contract is \$0.0653 per thousand gallons).

The Government reserves the right to change the above charges from time to time as required to meet current operating costs. The Government will give the Purchaser written notice at least thirty (30) days prior to the effective date of any change in the rates charged hereunder.

\* \* \*

7. PERMITS. In the event that George Air Force Base is inactivated or abandoned, and remains under the jurisdiction of the Department of the Air Force, the Government will grant to the Purchaser, severally and jointly together with any privately owned housing project on Federal owned land serving said Base, a license to use these facilities for the purpose of obtaining water services for the housing projects and the Adelanto Community Services District. Such license is to be granted without charge, but the Purchaser shall be responsible for the maintenance and operation of the water works facilities at its own expense during the time the license is in effect.

(Exh. B-2)

9. The purchase contract included the following provisions:

DEPARTMENT OF THE AIR FORCE

NEGOTIATED WATER PURCHASE CONTRACT

This Contract entered into this 31st day of December, 1956, by and between the United States of America (hereinafter called the "Government"), represented by the Contracting Officer executing this contract and the Adelanto Community Services District, a body corporate and politic of the County of San Bernardino, State of California (hereinafter called the "Contractor"),

WITNESSETH THAT:

WHEREAS, the Government has established an Air Force Base, and owns, maintains and operates facilities for the pumping of water, and

WHEREAS, the Government and Adelanto Mutual Water Company, Victor Valley Housing Corporation and Mesa Estates, Inc., entered into Contract No. AF 04(173)-43 for furnishing water service to George Air Force Base, California, and

WHEREAS, the Adelanto Community Services District has purchased the entire holdings of Adelanto Mutual Water Company, and

WHEREAS, the San Bernardino County Water District No. 2 has assigned and transferred all rights, titles and interest in Application 10342, Permit 6121, on file with the State Division of Water Resources, State of California to the Adelanto Community Services District, such rights and interests having been the basis of Contract No. AF 04(609)-27 between San Bernardino County Water District No. 2 and the Government, which contract will be terminated by customary procedures upon the execution of this agreement, and . . . .

NOW, THEREFORE, in consideration of the premises and mutual agreements herein contained to be performed by the parties hereto respectively, it is agreed as follows:

1. SCOPE AND TERM OF CONTRACT. Subject to the terms and conditions herein set forth the Contractor shall sell to the Government, and the Government shall purchase and receive from the Contractor, all water available from water rights possessed by the Contractor.

2. RATES AND CHARGES:

a. For all water pumped under this Contract, the Government shall pay the Contractor at the rate of \$0.030691 per thousand gallons until the Government has paid \$50,000.00, after which the Government is no longer obligated to make any payment for any water pumped and consumed hereunder.

The Government reserves the right to increase the rate payable under this contract after five years to insure complete payment of \$50,000.00 within a ten year period. However, any unpaid remainder of said \$50,000.00 will be payable ten years after the execution of this contract. . . .

3. ASSIGNMENT OF WATER RIGHTS. The Contractor certifies they [sic] have acquired all the necessary water rights required under this contract and said rights are in the form of an agreement, (Exhibit "A"); Application 10342, Permit No. 6121, (Exhibit "B"); San Bernardino Board of Supervisors Resolution dated 14 November 1955. [Sic] (Exhibit "C"); Assignment from the San Bernardino County Board of Supervisors, State of California, (Exhibit "D") which are attached and become a part of this Contract. The Contractor and the Government hereby recognizes [sic] Lease No. LA-691 dated 18 June 1952, a copy of which is attached hereto marked Exhibit "E" and hereby accepts [sic] said lease and will be responsible for fulfillment of all the terms and conditions of said lease. The Contractor agrees that the Government is assigned all rights, privileges and responsibilities for pumping water from the wells on the property of the Contractor. The Government shall have the right to drill water wells, construct pumping stations, lay pipe lines and construct and maintain the aforesaid facilities and such other facilities as are required to produce the water. All material and appliances heretofore and hereafter installed by the Government shall remain the property of the Government. All material and appliances installed by the Contractor and at his expense shall be and remain his property.

\* \* \*

5.d. The Contractor hereby agrees to pay all the obligations now contained in the Turner Lease (dated 9 November 1949, recorded in Book 2486, Page 33 of the official records of the County of San Bernardino, State of California) with the Adelanto Mutual Water Company and dispose of all claims in respect

to the claims of Mrs. Nettie J. Turner and will hold and save the Government free of any liabilities with respect to said lease.

6. ACCESS. The Government hereby grants to the Contractor, free of any rental or similar charge, but subject to the limitations specified in this contract, a revocable permit to enter the service location for any proper purpose under this contract, including use of the site or sites agreed upon by the parties hereto for the installation, operation and maintenance of the facilities of the Contractor. Authorized representatives of the Contractor will be allowed access to the facilities of the Contractor at suitable times to perform the obligations of the Contractor with respect to such facilities. It is expressly understood, however, that proper military or Governmental authority may limit or restrict the right of access herein granted in any manner considered by such authority to be necessary for the national security.

7. TERMINATION. This Contract may be terminated at the option of the Government by giving of not less than thirty (30) days' advance written notice of the effective date of termination.

(Exh. B-2)

10. The point of diversion for Permit 6121 was changed in 1958 to include points of diversion on certain additional land (hereinafter "the Turner property") (R4, tab 64). A predecessor to appellant had acquired rights to water from the Turner property (R4, tabs 19, 23; exh. A-3).

11. On 21 March 1962 the California Water Rights Board issued License No. 6506 to "United States - George Air Force Base and Adelanto Community Services District." The license gave the parties the right to use water of the Mojave River under Permit 6121 (R4, tab 69).

12. Supplemental Agreement No. 1 to LA-691 was entered into on 18 September 1969. It substituted Adelanto Community Services District for San Bernardino County as party to the lease, deleted

the reference to Contract No. AF 04(609)-27, and added the following:

3. Delete the "NOW, THEREFORE" clause and insert the following:

NOW THEREFORE, in consideration of ONE DOLLAR (\$1.00) in hand paid and the benefits to be derived by the Lessee and contractor (purchaser) - Adelanto Community Services District, under the following agreements: Water Purchase Contract AF 04(609)-318, providing for the contractor (Lessor) selling to the Lessee and the Lessee purchasing and receiving from the contractor all water available from water lines possessed by the contractor; and Water Sale Contract No. AF 04(609)S-95, providing for the Lessee furnishing and the Purchaser receiving and paying utility services for as long as its pumping and pipeline facilities for the rendering of such services continue to be maintained and operated by the Lessee, the Lessor hereby leases unto the Lessee as a water well site [the Elario property]. . . .

(R4, tab 70)

13. By agreement dated 20 January 1971 the sale and purchase contracts were amended to substitute the City of Adelanto for Adelanto Community Services District (Appellant's Supplemental R4 (ASR4), tab 10).

14. By Supplemental Agreement No. 2 to LA-691, dated 21 July 1982, City of Adelanto was substituted for Adelanto Community Services District and the following change effected:

3. Delete paragraph 4 from pages 3 and 4 of Supplemental Agreement No. 1 in its entirety and insert in lieu thereof:

"Delete paragraph 2 from page 3, and insert the following: THE LESSEE shall have the right, during the existence of this lease to enter upon said land and construct one or more wells thereon; to extract and export water therefrom to the extent and in such amount as granted by the LESSOR and to distribute such water for the benefit and use of the inhabitants of the City of Adelanto,

California, and for the use of George Air Force Base. Use of water supply to serve any other private housing or commercial development located in any incorporated or unincorporated community other than the City of Adelanto and George Air Force Base will require the explicit consent of the City of Adelanto. The LESSEE shall also have the right, during the existence of this lease, to attach fixtures, erect structures or signs and to install any other facilities incident to the purposes for which the premises are to be utilized, as well as to install, remove, and maintain underground utilities for a sewer lift within the right-of-way for road purposes as displayed in Schedule A, attached hereto and made a part hereof: . . .

(ASR4, tab 10)

15. Wells designated as 1, 2, 3, 4 and 8 were drilled on the Turner property. Wells designated as 5, 6 and 7 were drilled on the Elario property (tr. 1/82-83).

16. Water was supplied to Adelanto by the Air Force until sometime in 1985. George Air force Base had increased its rates and Adelanto began producing its own water at rates less than \$.36 per thousand gallons (tr. 1/86-88). Adelanto received no water from George Air Force Base from 1985 to 1991 (tr. 1/89).

17. Rates were computed under Air Force Regulation No. 91-5 as amended or superseded under the terms of the sale contract (see finding 8). That regulation requires that the labor charges, utilities, capitalized charges, overhead, maintenance, and operation charges for the prior year are used to calculate the current year's rate. It also provides for treatment of line loss. That rate is compared to the local prevailing rate, and the higher of the two is the rate assessed under Regulation No. 91-5 (R4, tab 168; tr. 3/41-43, 54). The testimony of Charles Kuykendall, appellant's consulting engineer, that Regulation 91-5 is not applicable (tr. 2/63) is unpersuasive in light of the sale contract's specific provision that rates are to be computed in accordance with that Regulation (finding 8; exh. B-2).

18. In a report forwarded to the Secretary of Defense with a 29 December 1988 letter, the Base Realignment and Closure Commission recommended to the Secretary that, inter alia, George Air Force Base be closed (ASR4, tab 12).

19. The first request for renewal of water service came in a 12 July 1991 letter in which appellant also inquired about price (R4, tab 167). Appellant had a limited capacity to receive water in its pumping and booster stations (tr. 1/96). In a 1 August

1991 letter from City Administrator Patricia A. Chamberlaine, Adelanto requested that water service be renewed immediately. The letter asserted that the amount of water needed could not be determined. It also reminded respondent that "under our existing contract we are entitled to a minimum of twenty (20%) percent of your total pumpage." (R4, tab 75) Appellant was informed that a new meter was necessary and that the meter was appellant's responsibility in a 12 August 1991 letter (R4, tab 76). After installation of a new meter in September 1991, service was resumed until a manifold breakdown caused discontinuation of service. The manifold was repaired in October 1992, and appellant was supplied water from 1993 to the present (tr. 1/93-95, 102). Jack Stonesifer, Adelanto's Superintendent of the Water Department, testified that appellant may not have needed water from October through December 1992 (tr. 1/95-96).

20. Various attempts were made by Adelanto to have the "United States - George Air Force Base" removed as co-owner of License 6506 (R4, tabs 77-84). They culminated in a letter of 14 October 1992 from the California Division of Water Rights stating it would "not take any action concerning ownership of License 6506 until the matter is either determined by a court or adjusted to the mutual satisfaction of the parties." (R4, tab 85)

21. Adelanto, in a 25 November 1992 letter, requested a license to operate the George Air Force Base water facilities pursuant to clause 7 "Permits" of the sale contract (exh. A-8). The request was forwarded to Headquarters, Air Force Disposal Agency, according to an Air Force letter of 14 December 1992 (R4, tab 86).

22. George Air Force Base closed on or about 15 December 1992 and the Air Force Base Disposal Agency (subsequently "Base Conversion Agency" and hereinafter "the Agency") took over. Its mission statement is "TO ACHIEVE TIMELY, BENEFICIAL DISPOSAL OF CLOSED AIR FORCE INSTALLATIONS IN AN ECONOMICALLY RESPONSIBLE MANNER CONSISTENT WITH THE BEST INTERESTS OF THE FEDERAL GOVERNMENT AND THE PUBLIC." (Tr. 2/8, 3/62, 76, 97; ASR4, tab 12; exh. G-4). Automatic controls on the water system were removed contemporaneously with departure of the military (tr. 1/74). Departure of uniformed personnel also meant the water system was contractor-operated (tr. 1/101).

23. Part of the Agency's role is to assist with economic recovery and commercial development in the area (tr. 3/97-100). Redevelopment of George Air Force Base would be "an extremely difficult proposition" without access to the existing water supply (tr. 3/169). The Agency was concerned about the adequacy of funding for operation of and the condition of the water system (tr. 3/64). The presence of operator personnel was necessary to pump water to Adelanto (tr. 3/12).

24. By letter of 18 December 1992 Ms. Chamberlaine complained to the Agency's contractor, HJL Total Base Management, Inc. (HJL), that its plan to provide water for two hours per day from 7:30 a.m. to 4:30 p.m. was "totally unacceptable." The letter also asserts that the sale contract obligated the Government to provide all the water required for Adelanto, and noted that Adelanto had requested issuance of a license for sole operation of the Base's water supply facilities under Provision No. 7 of the contract (R4, tab 87). HJL responded in a 23 December 1992 letter by advising appellant to direct questions about water availability to the Air Force (R4, tab 88).

25. The Air Force denied Adelanto's request for a license in a 4 January 1993 letter, asserting there was a sound legal basis to support the Air Force's ownership of License 6506 and that it was premature to make any decision on granting Adelanto a license to operate the George Air Force Base facilities. The letter stated the Agency would continue to pump water and Adelanto would be notified when it ceased to do so (R4, tab 89).

26. In a 17 March 1993 letter appellant requested water service, although it did not specify quantity (R4, tab 94). A meeting was held on 8 April 1993 in which respondent agreed to provide 20 percent of the water produced to Adelanto, which Adelanto rejected summarily (tr. 2/125-26). Respondent had a fixed price contract with HJL which provided for a labor schedule for the water system of 7:30 a.m. to 4:30 p.m., 5 days per week. The contract had to be modified in order to provide the water, and the arrangements took time (tr. 2/126-28). Adelanto thereafter made an unquantified 17 June 1993 request that the service connection between Adelanto and George Air Force Base be activated immediately (R4, tab 94). Service began in early July 1993 at the rate of 161,000 gallons per day (R4, tab 170).

27. Beginning in July 1993 Adelanto threatened eminent domain action to acquire all right, title, and interest in License 6506, the well fields and equipment, "and all other water and distribution rights to water in or around George Air Force Base . . ." (R4, tabs 103-08). Sometime thereafter suit was filed. Several related suits involving water rights are pending (R4, tab 93).

28. The city of Victorville, California passed a resolution on 20 July 1993 expanding its borders to encompass an area including George Air Force Base (exh. A-9). It is quite common for military bases to be located within the boundaries of cities. City zoning requirements and other local laws do not govern the operations of bases so located (tr. 3/125-26).

29. Adelanto ran into problems in late March and early April 1994 with high fluoride content in water from its own wells and sought additional water from the Agency, as mixing the two brought the fluoride to acceptable levels (R4, tab 95; tr. 2/34; exhs. A-19, -20). The initial request on 8 April 1994 for an increase for two periods of six hours was met (R4, tabs 95-97). The request was increased to 6 hours daily effective 16 April 1994 on 13 April 1994. By letter of 14 April 1994 the request was increased to 24 hours a day, 7 days a week (R4, tabs 96, 97). Water was being provided at a rate of 6 hours per day, 5 days per week (R4, tab 98). By letter of 19 April 1994 the California Department of Health Services requested respondent to increase the supply of water to Adelanto because of the fluoride problem, but it was not increased (R4, tab 97). Water was purchased elsewhere in June and July of 1994 at \$.54 per 1000 gallons (tr. 1/116). The rate charged by respondent at that time was \$.3928 per thousand gallons, or \$.14972 less (exh. A-28).

30. In a 23 June 1994 letter from John E. B. Smith, Program Manager, respondent agreed to increase service to Adelanto to 12 hours per day, 7 days per week, and in October 1994 to 24 hours per day, 7 days per week upon Adelanto's agreement to pay the additional costs involved (R4, tab 100; tr. 3/71-74). The letter states:

I regret that we are unable to provide greater support, however. As we previously explained, we are constrained by existing contracts and limited funding in addition to concerns with the capacity of the physical plant to operate at increased levels. We do not believe it is in either of our interests to risk the integrity of the system and we will use the next several months to evaluate the capacity of the system and the need for repair or enhanced maintenance.

However, the letter informed Adelanto it considered the 24 hour a day level a temporary solution it could offer only until 1 January 1995. The letter also agreed to discuss an early transfer of Air Force wells to Adelanto (R4, tab 100; tr. 3/72-74). According to Mr. Collins, respondent's Site Manager, service at the 24 hours a day level began 1 December 1994 (tr. 2/129). It continued at that level until Adelanto reduced the quantity requested in 1995 to 8 hours per day, 5 days per week (id.).

31. By letter of 27 June 1994 appellant, through its counsel, agreed to the terms of the 23 June 1994 letter, while preserving the dispute over who owns the right to use the water.

The letter accepts the 12 hours per day, 7 days per week quantity and states "We agree that it is not in either of our interests to risk the integrity of the system and are aware of your limited funding to alleviate concerns about the capacity of the physical plant." The letter thanks the Air Force for its "good faith in this temporary solution." (R4, tab 101) The letter also states Adelanto will staff its own facility to accept the 12 hours per day, 7 days per week quantity.

32. In October 1994 Adelanto sent a drilling rig to the Turner property where Government wells were located on a Friday afternoon without advance notice. The Agency objected out of concern for the Government wells and refused the drilling rig access (tr. 3/87-89, 95). Adelanto was at that time receiving water from respondent in sufficient quantity to solve its fluoride problem (tr. 2/93).

33. The Agency did continue to provide the water on the requested schedule at an increased price (R4, tab 102). It also agreed by letter of 21 October 1994 to continue water deliveries past 1 January 1995 and consented to Adelanto's request to drill a well in close proximity to a Government well (no. 4 on the Turner property). However, the letter also articulated the Agency's position that the United States has an exclusive right to the Elario property (exh. G-5). Adelanto filed a Notice of Appeal from that letter dated 13 December 1994 docketed as ASBCA No. 48202.

34. By letter of 9 November 1994 Adelanto filed a "claim" addressed to James F. Boatright, Deputy Assistant Secretary for Installations. The claim made no attempt at certification in accordance with the Contract Disputes Act (CDA), although in its Complaint in ASBCA No. 48202 it elected to proceed under the CDA, and sought \$18,241,238.47 in damages and demanded that the Air Force leave the property it had leased from Adelanto (ASR4, tab 1).

35. Thereafter, a certified claim seeking a license and \$19,790,911.86 in damages (derived from the 12 January 1995 Complaint in ASBCA No. 48202) was filed on 14 February 1995 (ASR4, tab 8; Complaint). An 11 April 1995 final decision was issued denying the claim. The decision advised appellant it could proceed under the CDA (R4, tab 110). Appellant filed a notice of appeal on 17 April 1995 and elected to proceed under the CDA (letter of 17 April 1995 forwarding amended Complaint). The appeal was docketed as ASBCA No. 48633.

36. Except as some inference may be drawn from License 6506 or Permit 6121 and the purchase contract, there is no evidence of record that a lease or other writing giving the Government rights to the Turner property was in effect as of the time in 1991 when Adelanto began to request water from George Air Force Base.

However, the Government had access to the Turner property, put wells on it, maintained at least part of it, and was responsible for security for 50 years (tr. 2/150, 3/130).

37. Respondent overcharged Adelanto for water from March to June 1995 when output was confused with capacity in the calculations under Regulation 91-5. The rate, which should have been \$0.65066 per thousand gallons, was erroneously calculated as \$1.12 per thousand gallons (tr. 2/121-22, 3/44-45). Adelanto was informed of the mistake and has never paid for water at the erroneous price (tr. 2/122). Notwithstanding Mr. Kuykendall's testimony (see generally tr. 2/55-75, 2/95-98, and finding 17), we find there is no evidence of record that Regulation 91-5 was improperly applied during the period in dispute except for the above described error.

38. The state legislature designated Victor Valley Economic Development Authority (VVEDA) as the "Local Redevelopment Authority" (LRA) (tr. 3/68; exh. G-4). Pub L. 103-421, § 2910(9) defines "redevelopment authority" as

in the case of an installation to be closed under this part, means any entity (including an entity established by a State or local government) recognized by the Secretary of Defense as the entity responsible for developing the redevelopment plan with respect to the installation or for directing the implementation of such plan.

39. Thereafter, the Agency entered into a caretaker cooperative agreement with VVEDA on 1 December 1994 under which the water facilities at George Air Force Base are operated (tr. 1/137-38, 167, 3/65; exh. A-11). The Agency has also leased space at George Air Force Base to businesses, conveyed property for a Federal prison and a local school, and conveyed some property to a religious organization, and it provides water to such organizations (except the prison) through the VVEDA cooperative agreement (exhs. A-28, -29; tr. 2/133-38, 3/100). Conveyances are generally not possible, however, because the Agency is under a legal requirement for environmental cleanup that will take years (tr. 3/121).

40. We have considered the testimony of Government witnesses Caponpon (tr. 3/39-56), Caron (tr. 2/172-85), Collins (tr. 1/166-82, tr. 2/119-72), Fivehouse (tr. 3/109-79), and Smith (tr. 3/57-108). We find they acted in good faith in dealing with Adelanto. In so finding we are particularly persuaded by the testimony of Mr. Smith (see, e.g. tr. 3/63-64, 71, 79, 82-84, 93-94), who was the principal decision-maker, that the Government employees involved were motivated by the intention to carry out their Agency's mission, and by the letter from appellant's counsel thanking the Agency for its good faith (R4, tab 101).

41. Appellant offered the testimony of Mary Skarpa (tr. 1/31-41) and Edward Deutchmann (tr. 1/27-31) as to the intent of the parties with regard to certain aspects of the agreements. Mr. Deutchmann's testimony was not probative, as it referred to events about which he was uncertain as to time. We did not rely on Mrs. Skarpa's testimony, as she did not testify that she participated in negotiations for Supplemental Agreement No. 2 to LA-691 and her testimony was therefore hearsay and insufficiently trustworthy to be probative.

#### DECISION

Appellant argues that the contracts and lease, read together, require respondent to grant it a license to the George Air Force Base water facilities, and that respondent breached the contracts by overcharging appellant, holding over its tenancy, and not supplying water as required. It also charges that respondent acted in bad faith. Respondent argues that we have no jurisdiction over these appeals and that, in any event, it has neither breached the contracts nor acted in bad faith. We find we have jurisdiction in ASBCA No. 48633 and sustain the appeal in part.

#### Jurisdiction

The appeal in ASBCA No. 48202 was filed before submission of a claim and no attempt was made at CDA certification even though appellant elected to proceed under the CDA (finding 34). When there is no certification, it cannot be cured under 41 U.S.C. § 605. Eurostyle Inc., ASBCA No. 45934, 94-1 BCA ¶ 26,458. ASBCA No. 48633 was properly certified and arises from the same subject matter. Accordingly, ASBCA No. 48202 is dismissed.

ASBCA No. 48633 involves a lease and two contracts. The lease gives the Government the right to use of the Elario property for 75 years, and specifically provides for construction of wells on the property. Through the purchase contract, the Government bought all water available from appellant's water rights, a portion of which it agreed to sell back to appellant under the sale contract. The arrangement was mutually beneficial in that appellant owned the rights to water the Government needed and the Government had the capability to deliver the water.

While acknowledging that we have jurisdiction over leases under the CDA and that appellant has elected the CDA, respondent argues that the lease, LA-691, does not involve subject matter covered by the CDA, which provides at 41 U.S.C. § 602(a):

. . . this Act applies to any express or implied contract . . . entered into by an executive agency for--

(1) the procurement of property, other than real property in being;

- (2) the procurement of services;
- (3) the procurement of construction, alteration, repair or maintenance of real property; or,
- (4) the disposal of personal property.

According to respondent, LA-691 is for provision of water services, a subject not covered by the CDA. We are not persuaded by respondent's arguments. Aside from other considerations, one of the express purposes of LA-691 is the construction of a well or wells by the Government (finding 4). As LA-691 is for a period of years, it is clearly a lease of an interest in the property on which the wells were constructed and as such is personalty. Arnold V. Hedberg, ASBCA No. 31748, 90-1 BCA ¶ 22,577, and cases cited therein. Moreover, we have found jurisdiction where the Government was lessor of the excess capacity of a pipeline. Yukong Limited, ASBCA No. 27666, 84-1 BCA ¶ 17,035. We find we have jurisdiction over LA-691.

Respondent argues the purchase contract expired by its own terms upon payment within 10 years as provided in the "Rates and Charges" provision. However, the contract does not tie duration to payment. Instead, it references LA-691 and gives the Government "all water available from water rights possessed by [appellant]" in the Scope and Term of Contract provision (finding 9). Supplemental Agreement No. 1 to LA-691, executed more than 10 years after the purchase contract, references the purchase contract, describes it as for an indefinite term, and provides that under the purchase contract appellant shall sell to the Government "all water available from water lines possessed by [appellant]." (Finding 12) Further, the purchase contract was amended in 1971 (finding 13). We find the parties intended for the water to be available on a continuing basis and that it has been provided through the many years since contract execution. Moreover, the sale contract references the purchase contract and precludes termination of the sale contract without termination of the purchase contract except for cause. The purchase contract also provides specifically that termination shall be at the Government's option by 30 days' advance written notice. We find respondent's argument that the contract has expired by its terms is unpersuasive.

Respondent next argues that the purchase contract involves the purchase of real property in being. We also find this argument unavailing. Water is severable from real property without material harm and is, therefore, personalty. Uniform Commercial Code, § 2-107; K.S.B. Technical Sales Corp., et al. v. North Jersey District Water Supply Commission of the State of New Jersey, et al., 151 N.J. Super. 218, 376 A.2d 960 (1977), and

cases cited therein; see also City of Altus v. Carr, 255 F. Supp. 828 (W. D. Texas 1966). We find we have CDA jurisdiction over the purchase contract.

Respondent questions our CDA jurisdiction with regard to the sale contract, characterizing it as a contract for provision of utility services by the Government, a category not covered by the CDA. In Yukong Limited, supra, the facts involved leasing of unneeded pipeline capacity of a Government oil pipeline. The Government had operational control over the pipeline, including all deliveries and movement of product. The Board found jurisdiction under 41 U.S.C. § 602(a)(4), "disposal of personal property." Here, the contract is titled "Negotiated Water Sale Contract." The sale of water to appellant by respondent is the subject matter of the contract. The water, as noted, is personal property once it is removed from the Mojave River. See also Everett Plywood Corporation v. United States, 651 F.2d 723 (Ct. Cl. 1981) (contracts for sale of standing timber covered by § 602(a)(4)). Accordingly, we find CDA jurisdiction over the sale contract.

#### License to Use the Facilities

Respondent argues that George Air Force base has not been inactivated or abandoned and that it is not required to grant appellant a license to use the facilities. Respondent maintains that changes in the law since execution of the contracts make it unreasonable to turn operation of the water facilities over to appellant. Appellant argues that the only reasonable interpretation of the sale contract's "Permits" clause is that George Air Force Base has been inactivated and that it is entitled to a license.

The "Permits" clause provides:

In the event George Air Force Base is inactivated or abandoned, and remains under the jurisdiction of the Department of the Air Force, the Government will grant to [appellant], severally and jointly with any privately-owned housing project on Federal owned land serving said base, a license to use these facilities for the purpose of obtaining water services for the housing projects and [appellant]. Such license is to be granted without charge, but [appellant] shall be responsible for the maintenance and operation of the water works facilities at its own expense during the time the license is in effect.

(Finding 8)

We think there is little question that George Air Force Base has been inactivated, which we consider synonymous with "closed." The uniformed services of the Air Force departed on 15 December 1992, implementing the recommendation of the Base Realignment and Closure Commission (findings 18, 22). Moreover, the fact that the Air Force Base Conversion Agency (formerly "Base Disposal Agency") maintains a small workforce to oversee environmental cleanup and assist with economic recovery does not mean George Air Force base has not been inactivated. To the contrary, the Agency's mission statement - "TO ACHIEVE TIMELY, BENEFICIAL DISPOSAL OF CLOSED AIR FORCE INSTALLATIONS . . ." (finding 22) - indicates that the Agency only gets involved when a base is closed. Further, since the "Permits" clause specifically and singularly addresses a situation where the Air Force retains jurisdiction over the Base, an Air Force presence after inactivation does not somehow invalidate the requirements of the clause. Indeed, if the Base Conversion Agency were not part of the Department of the Air Force, the condition in the clause of continuing Air Force jurisdiction would not be met.

The "Permits" clause unambiguously states that in such circumstances a license will be granted to appellant (along with any housing projects on Federal property) to use the sale contract water facilities for "obtaining water services for the housing projects and [appellant]." The record does not evidence the existence of such a housing project. Thus, under the facts adduced, we find the contract requires respondent to issue a license to appellant permitting use of the water facilities as provided in the "Permits" clause.

#### The Breach Claims

As a general proposition, we note that appellant's breach claims are lacking in factual support. Appellant's specific record citations often do not support the proposition being presented. Specific claims are discussed below.

Appellant first argues that respondent is a "lessee that held over its tenancy" under LA-691. Appellant refers to Supplemental Agreement No. 2 to LA-691 and its "express terms 'until the Base was deactivated or abandoned.'" We cannot find the quoted language in LA-691 or Supplemental Agreements 1 and 2 and therefore do not conclude that deactivation or abandonment of George Air Force Base automatically terminates the lease. Further, LA-691 is between the United States and appellant, not George Air Force Base or the Air Force and appellant. It leases the Elario property to the United States for 75 years with a 75 year extension at the option of the United States (finding 4). We cannot, on this record, find that the Air Force has held over its tenancy.

Appellant also argues that the Air Force has a mere right of entry to the Turner property, and that its right of entry terminated upon notice. We agree that there is no evidence of record that the Turner property is specifically leased to the United States (finding 36). However, the evidence relied on to support notice of termination (tr. 1/54, cited at p. 27 of app. brief) is testimony about the appellant's request that water service be renewed. Thus, appellant's argument is not supported by evidence that appellant has given notice to respondent that its right of entry to the Turner property has been terminated.

Related to appellant's argument that respondent is holding over on the Turner property is the issue regarding ownership of License 6506. That license includes the Turner property as a point of diversion (finding 10). Respondent is shown as co-owner of License 6506 (finding 11). Changing the ownership of licenses issued by the state is a state matter not for consideration here. Accordingly, we have no basis to find that respondent is not a co-owner of License 6506.

Appellant next argues that respondent serves water to parties other than itself and appellant in violation of Supplemental Agreement No. 2 of LA-691. We disagree. Appellant adduced testimony that commercial facilities on George Air Force Base leased out by respondent as part of the base conversion process are receiving water, as are a church and a school (finding 39). The prohibition in Supplemental Agreement No. 2 is for "private housing or commercial development located in any incorporated or unincorporated community other than the City of Adelanto or George Air Force Base." (Finding 14) The church and school are neither housing nor commercial developments. The commercial facilities leased by respondent are on George Air Force Base. We find no breach of Supplemental Agreement No. 2.

Appellant argues that respondent has breached the agreements by failing to furnish water as demanded by appellant. Appellant supports this claim by references to testimony in which non-specific difficulties arising from respondent's contract with a caretaker contractor are described (tr. 3/63-65). We are not persuaded that this testimony supports its claim. The record establishes that appellant ceased requesting water from 1985 to 1991 (findings 16, 19). In August 1991 a request for an undetermined quantity was made (finding 19). After a meter was installed, service was resumed until mechanical problems intervened, which were repaired in October 1992. While appellant complained to respondent's contractor in December 1992 that the offered supply was "completely unacceptable," no request to the Air Force for a specific quantity is in evidence until months later, and appellant's need for water in December 1992 has not been established (finding 19). The contractor's reply to the effect that it was not the proper party to address such requests, which referred appellant to the appropriate Air Force office, was prompt (finding 24). The operation of the water system was, of necessity, by a contractor after base closure (finding 22).

Contractor operation, funding limitations, and the condition of the system itself, created problems acknowledged by appellant (findings 23, 31).

No request was made again until March 1993. Appellant's Superintendent of the Water Department testified that water may not have been needed in December 1992 and no quantified request was made before respondent began supplying water in July 1993 (findings 19, 26). The burden of proof is on appellant as the proponent of the claim. Sphinx International Inc., ASBCA No. 38784, 90-3 BCA ¶ 22,952. We cannot find respondent failed to meet contract requirements. Adelanto had developed its own water supply because it could do so at lower cost and was not buying all its water from respondent under the contracts and lease at issue here. Moreover, its capacity to receive water was limited (finding 19). Thus, the situation in 1993 was that the water "required for the use of the inhabitants of Adelanto" was that quantity which was needed in addition to its own supply. Since no quantified requests in 1993 are documented (finding 28) and its Superintendent of the Water Department was uncertain that Adelanto needed water as late as December 1992 (finding 19), appellant has failed to carry its burden.

The fluoride problems experienced by appellant with its own water supply in 1994 are well documented, as are its quantified (specific hours of service) requests for additional water during the period (finding 29). The Agency at one point informed appellant that it was the Agency's intention to discontinue service at the 7 days a week, 24 hours a day level after 1 January 1995 (finding 30). However, the Agency relented and continued to provide water at that level until appellant reduced the service requested (findings 30, 33).

Appellant has established that respondent did not meet its 4 April 1994 demand for 24 hour daily service until 1 December 1994 and that it purchased water for \$.14972 per thousand gallons more than the price charged by respondent in June and July of 1994 to supplement its supply (finding 29). Accordingly, we find appellant suffered damage during June and July of 1994 and a potential claim for partial breach arises. Respondent was supplying sufficient water to solve the appellant's fluoride problem at the time of the well drilling incident in October 1994 (finding 32). Moreover, the 27 June 1994 letter from appellant's counsel documents the parties' agreement on the supply proposed by respondent and acknowledges the funding concerns and concerns for the physical condition of the system raised by respondent (finding 31). The letter carefully preserves appellant's claim that it owns the water but does not preserve any right to damages for partial breach arising from respondent's failure to meet its

demand sooner under the supply requirements of the sale contract. Thus, any partial breach that may have occurred regarding water delivery is effectively cured by acceptance of respondent's performance. RESTATEMENT (SECOND) OF CONTRACTS § 277 (1981).

Appellant argues that the well-drilling incident (finding 32) constitutes a breach. Appellant sent a drilling rig out unannounced to the Turner property on a Friday afternoon to a site where the Government had erected wells and was responsible for security (finding 36). It did so after agreeing to accept the supply proposed by respondent and without an intervening request. The purchase contract permits access only at "suitable times" by authorized representatives (finding 9). We are unpersuaded that the Government's actions in refusing to allow the rig to enter somehow give rise to a breach of contract, particularly since the Government permitted access soon thereafter (finding 33).

Appellant's argument that it was overcharged by respondent is also unsupported by the record. The sale contract provides for a rate structure based on "Air Force Regulation 91-5 as amended or superseded." We have rejected testimony that Regulation 91-5 was inappropriate here (finding 17) and found that, except for a 3-month period when an error was made, the record contains no evidence that respondent did not properly set rates in accordance with that regulation or its successor during the period at issue (finding 37). The error was found and corrected, appellant was notified, and appellant has never paid the erroneous rate (*id.*). Appellant's argument that it is being charged unfairly for line losses is also without merit. Regulation 91-5 specifically addresses line losses and there is no evidence of deviation from that Regulation (finding 17). Further, the parties agreed in the sale contract that the volume of water would be measured by a meter at the point of delivery (finding 8). There is no contention by appellant that respondent has failed to abide by that provision. Appellant has not met the burden of proving that it was overcharged. Sphinx International Inc., supra.

Finally, appellant argues that respondent acted in bad faith. Respondent, in rebuttal, cites the "well nigh irrefragable proof" standard for abandoning the presumption of good faith articulated in Kalvar Corp. v. United States, 543 F.2d 1298, 1301-02 (Ct. Cl. 1976), cert. denied, 434 U.S. 830 (1977). As with its breach claims, appellant fails to meet its burden.

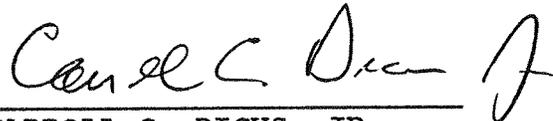
Appellant is hard-pressed to prove bad faith after its counsel has thanked respondent in writing for its good faith (finding 31). Further, the examples of actions appellant has relied on to prove bad faith (app. brief at 34-39) fail either because the evidence cited is incomplete or otherwise inadequate,

or because the action complained of, even if proven, does not rise to the level of bad faith. Proof of bad faith is "equated with evidence of some specific intent to injure the plaintiff . . . [comparable to] actions which are 'motivated alone by malice.'" (emphasis in the original) Kalvar Corp., supra at 1302. Bad faith allegations have been rejected where the contractor failed to prove the officials involved were "actuated by animus toward the plaintiff." Librach v. United States, 147 Ct. Cl. 605, 614 (1959). More persuasive than the evidence cited by appellant is respondent's contrary evidence in the form of the testimony of the various Government officials (Smith, Fivehouse, Caron, Collins and Caponpon) that they were motivated by their responsibility for their Agency's mission and not by malice or animus toward appellant (finding 40). While the role of the Agency in attempting to aid the area with economic recovery placed them in a difficult position with respect to Adelanto and the George Air Force Base water facilities, their handling of the situation has not induced us "to abandon the presumption of good faith dealing." Kalvar Corp., supra at 1302. Appellant's claim that respondent acted in bad faith is denied.

#### Summary

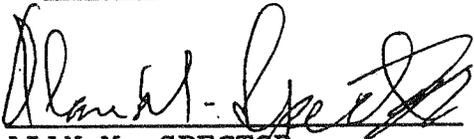
The appeal in ASBCA No. 48202 is dismissed. The appeal in ASBCA No. 48633 is sustained with respect to Adelanto's right to a license under the "Permits" clause of the sale contract. Appellant's claims of breach of contract and bad faith are denied. The matter is remanded to the parties.

Dated: 9 July 1996



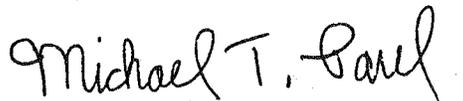
CARROLL C. DICUS, JR.  
Administrative Judge  
Armed Services Board  
of Contract Appeals

I concur



ALAN M. SPECTOR  
Administrative Judge  
Acting Chairman  
Armed Services Board  
of Contract Appeals

I concur



MICHAEL T. PAUL  
Administrative Judge  
Acting Vice Chairman  
Armed Services Board  
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA Nos. 48202 and 48633, Appeals of City of Adelanto, rendered in conformance with the Board's Charter.

Dated:

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EDWARD S. ADAMKEWICZ  
Recorder, Armed Services  
Board of Contract Appeals