APPELLEE'S BRIEF

No. 2011-5063

IN THE UNITED STATES COURT APPEALS FOR THE FEDERAL CIRCUIT

RESOURCE CONSERVATION GROUP, LLC,

Plaintiff-Appellant,

v.

THE UNITED STATES,

Defendant-Appellee.

Appeal from the United States Court of Federal Claims in 08-CV-768,
Judge Susan G. Braden

BRIEF AND APPENDIX FOR DEFENDANT-APPELLEE, THE UNITED STATES

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STATEMENT OF RELATED CASES

Pursuant to Rule 47.5 of the Rules of the Court of Appeals for the Federal Circuit, counsel for appellee states that this case was previously on appeal before this Court. *Resource Conservation Group, LLC v. United States*, Fed. Cir. No. 2009-5091. This Court issued a decision on March 1, 2010, with an opinion authored by Judge Dyk. *Resource Conservation Group, LLC v. United States*, 597 F.3d 1238 (Fed. Cir. 2010).

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APPEAL FROM THE UNITED STATES COURT OF FEDERAL CLAIMS IN 08-CV-768, JUDGE SUSAN G. BRADEN

STATEMENT OF THE ISSUES

1. Did the Court of Federal Claims ("CFC") correctly decide that 10 U.S.C. § 6976 forbade the United States Department of the Navy ("Navy") from permitting the excavation of sand and gravel from the United States Naval Academy Dairy Farm ("dairy farm")?

2. Assuming the Navy correctly interpreted the statute, did the CFC correctly hold that the Navy had no obligation to inform a potential bidder about published regulations prior to the submission of a bid, where the potential bidder never asked the Navy if its proposed use would be permissible?

STATEMENT OF THE CASE

Resource Conservation Group's ("RCG") "Statement of the Case" and "Statement of the Facts," Appellant's Brief at 3 - 6 ("RCG Brief"), contain assertions and legal conclusions with which we disagree, or which are not relevant to the issues in this appeal. We also believe that additional information may assist the Court. For these reasons, we provide below a statement of the nature of the case, a statement of the facts, and a description of the prior proceedings.

I. Nature Of The Case

Appellant, RCG, appeals the final decision of the United States Court of Federal Claims in *Resource Conservation Group, LLC v. United States Dep't of the Navy*, 96 Fed. Cl. 457 (Fed. Cl. 2011) ("*RCG II*"). The decision dismissed RCG's complaint for failure to state a claim pursuant to Rule 12(b)(6) of the Rules of the Court of Federal Claims ("RCFC"). *Id.* at 467.

II. Statement Of The Facts

In 1913, the United States Naval Academy purchased land in Gambrills, Maryland for use as a dairy farm to supply midshipmen with fresh milk. *RCG II* at 459. By the 1990s, the Navy decided that it could save money by purchasing milk commercially, and sought authority to cease operations of the Dairy Farm. *Id.*

A. Legislative And Regulatory Background

As part of the Military Construction Authorization Act of 1968, Congress prohibited the Navy from disposing of the Dairy Farm under the Federal Property and Administrative Services Act of 1949, now codified at 40 U.S.C. § 101 et seq.

> (a) The Naval Academy Dairy Farm is a self-supporting operation, an economic and morale-building asset to the Department of the Navy, and shall continue in its present status and function.
>
> (b) Notwithstanding the provisions of the Federal Property and Administrative Services Act of 1949 (40 U.S.C. § 471 et seq.) or any other provision of law, the real property located in Gambrills, Anne Arundel County, Maryland, and comprising the Naval Academy Dairy Farm shall not be determined excess to the needs of the holding agency or transferred, reassigned, or otherwise disposed of by such agency, nor shall any action be taken by the Navy to close, dispose of or phase out the Naval Academy Dairy Farm unless specifically authorized by an Act of Congress.

Pub. L. 90-110, § 810, 81 Stat. 279, 309 (1967).

By 1997, Congress decided to permit the Naval Academy to cease operating the dairy farm through an amendment to the 1998 National Defense Authorization Act. The Senate initially proposed eliminating the restrictions entirely. 143 Cong. Rec. S2356, S2366 (Mar 17, 1997) (Section 904). The House of Representatives, however, passed a version that, although repealing the prior statute, contained

numerous restrictions. 143 Cong. Rec. H3945, H4017 (Jun. 19, 1997) (Section 2881). The House version only permitted a lease and otherwise forbade any disposal of any of the real property containing the dairy farm. *Id.* Additionally, the House forbade any use that was not rural and agricultural. *Id.*

In the end, Congress adopted the House's version in enacting 10 U.S.C. § 6976. 10 U.S.C. § 6976; Pub. L. No. 105-85, § 2871, 111 Stat. 2014, 2015 (Nov. 18, 1997). Specifically, 10 U.S.C. § 6976 now states:

> (a) Discretion regarding continued operation.—
>
> > (1) Subject to paragraph (2), the Secretary of the Navy may terminate or reduce the dairy or other operations conducted at the Naval Academy dairy farm located in Gambrills, Maryland.
> >
> > (2) Notwithstanding the termination or reduction of operations at the Naval Academy dairy farm under paragraph (1), the real property containing the dairy farm (consisting of approximately 875 acres)—
> >
> > > (A) may not be declared to be excess real property to the needs of the Navy or transferred or otherwise disposed of by the Navy or any Federal agency; and
> > >
> > > (B) shall be maintained in its rural and agricultural nature.

(b) Lease authority.—

> (1) Subject to paragraph (2), to the extent that the termination or reduction of operations at the Naval Academy dairy farm permit, the Secretary of the Navy may lease the real property containing the dairy farm, and any improvements and personal property thereon, to such persons and under such terms as the Secretary considers appropriate. In leasing any of the property, the Secretary may give a preference to persons who will continue dairy operations on the property.
>
> (2) Any lease of property at the Naval Academy dairy farm shall be subject to a condition that the lessee maintain the rural and agricultural nature of the leased property.

10 U.S.C. § 6976(a), (b).

The current Federal Management regulations for Government property define "real property" as including embedded sand and gravel. "Real Property means . . . (3) Embedded gravel, sand and stone under the control of any Federal agency, whether designated by such agency for disposition with the land or by severance and removal from the land, excluding timber felled, and gravel, sand, or stone excavated by or for the Government prior to disposition." 41 C.F.R. § 102-71.20 (definition of "real property").

B. The Navy's Evaluation Of Bids

Starting in 2000, the Navy leased the old dairy farm to Horizon Organic Holding Corporation, which produced organic milk on the location. *RCG II* at 459. In 2005, the Navy decided to seek out new tenants. On November 28, 2005, the Navy issued a Request of Interest, number LO-10,019, asking for expressions of interest in leasing the property. *RCG II* at 459. On January 16, 2006, Cheney-Reliable Joint Venture (later reorganized as RCG) wrote a letter expressing interest in leasing the Dairy Farm. *Id.* Later, RCG told the Navy that it intended to excavate sand and gravel from the site for use in road construction, and would later reclaim the site as a bog or wetland. A 7.[1] The Navy then issued a Notice of Availability for Lease N4008007RP00005 ("the notice"), and requested that all bids be submitted by March 19, 2007. *RCG II* at 459. The notice also indicated that all bids must comply with 10 U.S.C. § 6976 and provided a copy of the statute. *Id.* at 466.

On February 6, 2007, representatives of the interested bidders entered the property for a tour. *Id.* With the written permission of the Navy, representatives of RCG entered the property a second time, this time to do more extensive testing

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[1] For purposes of an appeal from a final judgment made pursuant to RCFC Rule 12(b)(6), the defendant assumes without admitting the facts of the complaint. "A" refers to the appendix RCG filed with its brief.

for the presence of sand and gravel. *Id.* Although other bidders submitted questions about the solicitation, RCG did not ask about the mining of sand and gravel. *See RCG II* at 466. RCG then submitted a formal bid on March 19, 2007, outlining its desire to lease the land to mine the sand and gravel underneath it. *RCG II* at 459.

On April 30, 2007, Joan Markey, the Director of Real Estate for the Department of the Navy, wrote to RCG, stating that its bid would not be considered further, because it was non-responsive. *Id.* Ms. Markey explained that RCG's proposal to mine sand and gravel from the property did not fall within the scope of the solicitation, because that would constitute a disposal of real property under 41 C.F.R. § 102-71.20, which 10 U.S.C. § 6976 forbade. *Id.* In a later debriefing, the Navy noted that it had no obligation to tell RCG that its bid would be non-responsive prior to the Navy actually receiving RCG's bid. *Id.* at 460. The Navy later leased the Dairy Farm to Anne Arundel County. *Id.* at 459-60.

III. Course Of Proceedings Below

RCG first filed suit with the GAO. The GAO dismissed the suit, holding that "[a] solicitation of offers to lease government-owned land is not a procurement of property or services by a federal agency; thus it is not

encompassed within our CICA bid protest jurisdiction." *Resource Conservation Group, LLC*, B-31-831 (Comp. Gen. Nov. 28, 2007). GA at 19.

On October 24, 2008, RCG filed suit in the Court of Federal Claims, seeking to recover its bid preparation costs under a theory of breach of an implied-in-fact contract of fair and honest consideration and under the Administrative Procedure Act ("APA"). *RCG II* at 460. The complaint alleged jurisdiction with the Court of Federal Claims pursuant to 28 U.S.C. § 1491(a)(1) and 28 U.S.C. § 1346(a)(2). *Id.* The Government filed a motion to dismiss pursuant to RCFC Rules 12(b)(1) and 12(b)(6), challenging jurisdiction and whether RCG had stated a claim pursuant to 28 U.S.C. § 1491(a). Relevant here, the motion asserted that the Navy correctly interpreted 10 U.S.C. § 6976's prohibition on otherwise disposing of "the real property containing the dairy farm" as forbidding the disposal of sand and gravel, because those are included within the definition of "real property." *RCG II* at 462. The motion also alleged that, assuming that the Navy correctly interpreted the statute, RCG could not have a claim for a breach of the implied contract of fair and honest consideration. *Id.* at 465.

After this Court held that the CFC possessed jurisdiction pursuant to 28 U.S.C. § 1491(a), (*Resource Conservation Group, LLC v. United States*, 597 F.3d 1238 (Fed. Cir. 2010) ("*RCG I*"), the CFC considered the Government's motion to

dismiss for failure to state a claim upon which relief may be granted. *RCG II* at 460-61. The Court permitted RCG to file a supplemental response brief, along with a sur-reply to the Government's supplemental reply brief. *RCG II* at 461.

On January 11, 2011, the CFC granted the Government's motion to dismiss, holding that RCG had failed to allege that the Navy had violated the implied contract of fair and honest consideration. The CFC first held that 10 U.S.C. § 6976 did forbid the disposal of sand and gravel, making it statutorily impermissible for the Navy to accept RCG's bid. *RCG II* at 464-65. The CFC then held that RCG's complaint failed to raise allegations of Government bad faith, where the complaint solely alleged that the Navy either erroneously interpreted the statute or failed to disclose the Navy's interpretation of 10 U.S.C. § 6976 and the regulations to RCG. RCG II at 466. Finally, RCG, as a bidder, was presumed to have knowledge of published statutes and regulations. *Id.* RCG could not, therefore, claim that the Navy had superior knowledge of the law. *Id.*

On March 9, 2011, RCG filed a timely notice of appeal.

SUMMARY OF THE ARGUMENT

This Court should affirm the decision below. First, the Navy correctly rejected RCG's bid, because what RCG proposed would violate 10 U.S.C. § 6976. Section 6976 states that "the real property containing the dairy farm . . . may not

be . . . otherwise disposed of by the Navy . . . ." The applicable definition of "real property" includes "embedded gravel, sand and stone . . . . whether designated by such agency for disposition with the land or by severance and removal from the land." RCG's bid was premised on extracting large quantities of embedded gravel and sand, necessarily disposing of what was defined as the "real property containing the dairy farm." Furthermore, nothing within Section 6976 could reasonably be read as altering the statutory requirements for the disposal of embedded sand and gravel, which is governed by statutes other than the general statutes regarding the disposal of real property. RCG's arguments to the contrary lack any basis in the statutory text, the legislative history, or the regulations.

Second, RCG's otherwise fails to allege a breach of the implied contract of fair and honest consideration. RCG asserts that the Navy should have told it that mining sand and gravel was impermissible, prior to RCG even submitting a bid. This argument ignores that RCG is presumed to have knowledge of the applicable statutes and regulations, and that RCG never asked whether mining was permissible. Section 6976 encouraged rural activities and contained an express prohibition on disposal of the real property. Additionally, the sale of mineral resources found on Federal land is heavily regulated by multiple statutes, and nothing within 10 U.S.C. § 6976 made any mention of altering those requirements.

A reasonable bidder never would have submitted a proposal, when the request for proposals made no mention of mineral extraction, without first formally requesting information on whether this would be permissible. The Navy, therefore, had no duty to inform a prospective bidder about statutory and regulatory requirements.

Finally, RCG did not sufficiently plead bad faith. Its complaint alleges solely that: (1) the Navy was aware that RCG primarily intended to mine sand and gravel, and (2) the Navy's granted RCG a license to test for sand and gravel amounted to encouraging RCG to submit a bid. These allegations, even if true, are not sufficient to "overcome the presumption of good faith on behalf of the [G]overnment."

ARGUMENT

I. Standard Of Review

This Court reviews the granting of a motion to dismiss for failure to state a claim *de novo*. Although a complaint "attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do[.]" *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (internal quotation marks and citations omitted). In order to survive a motion to dismiss,

however, the court "[does] not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face." *Id.* at 570, 127 S.Ct. 1955; *see also Ashcroft v. Iqbal*, —— U.S. ——, 129 S.Ct. 1937, 1950 (2009) ("[O]nly a complaint that states a plausible claim for relief survives a motion to dismiss."). "While the court assumes that the facts in a complaint are true, it is not required to indulge in unwarranted inferences in order to save a complaint from dismissal." *Juniper Networks, Inc. v. Shipley*, - - - F.3d - - -, 2011 WL 1601995 (Fed. Cir. 2011) (quoting *Metzler Inv. GmbH v. Corinthian Colls., Inc.*, 540 F.3d 1049, 1064–65 (9th Cir.2008)).

In its standard of review section, RCG relies upon the standards from *Scheuer v. Rhodes,* 416 U.S. 232 (1974), and other pre-*Twombly* decisions. RCG Brief at 7-8. *Scheuer v. Rhodes*, however, relied upon *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957), which was supplanted by *Bell Atlantic v. Twombly*, 550 U.S. 544, 561-63 (2007). *See, e.g., Crusan v. United States*, 86 Fed. Cl. 415, 418 (2009) (recognizing *Scheuer* as no longer good law for a standard of review). Indeed, nowhere within the "Standard of Review" section does RCG even cite *Twombly*, *Iqubal*, or any case decided after those decisions, a glaring omission considering that those two cases are the Supreme Court's most recent and

definitive statements on the standards governing review of a motion made pursuant to Rule 12(b)(6).

II. The Navy Correctly Rejected RCG's Proposal As Non-Responsive, Because RCG Planned To Dispose Of A Portion Of The Dairy Farm's Real Property, As Defined By The Applicable Regulations

RCG argues that, because 10 U.S.C. § 6976 is silent about whether mining is permissible, the statute should be read as permitting mining as part of a lease. RCG Brief at 10. This interpretation not only ignores the statute's language, but also RCG's own cases, where mineral interests are expressly stated. In contrast to the cases cited by RCG, the mineral interests at the Dairy Farm have not been severed from th rest of the estate by a previous transaction and are, therefore, still part of the real property subject to the prohibition on disposal. Finally, RCG fails to appreciate that the general rule with Federally-owned property is that a right to extract minerals never occurs silently. The CFC's decision, therefore, should be affirmed.

A. The CFC's Decision Comports With Other Statutes Governing Disposal Of Sand And Gravel And Disposal Of Real Property

The Navy's and the CFC's rationale is simple: the statute forbids disposing of the "real property containing the dairy farm." 10 U.S.C. § 6976(a). "Embedded gravel, sand and stone" is included within the definition of "real property." 41

C.F.R. § 102-71.20 (definition of "real property"). Accepting RCG's bid, premised on extracting and disposing of the "embedded gravel, sand, and stone," therefore, would violate Congress's prohibition on disposing of the "the real property containing the dairy farm." In addition, nothing within 10 U.S.C. § 6976 purports to alter the laws regarding the disposal of embedded sand and gravel or any mineral; it only gives the Naval Academy authority to lease the property. This Court has held that statutory "[l]anguage unmistakably certain on its face ends our inquiry." *Hemscheidt Corp. v. United States*, 72 F.3d 868, 871 (Fed.Cir.1995). The CFC decision, therefore, should be affirmed.

The CFC's interpretation of 10 U.S.C. § 6976 comports not only with the statute's language, but with other statutes and regulation of Federally-owned property. Pursuant to 32 C.F.R. § 736.1, the disposal of real property owned by the Navy is governed by the Federal Property Act, as well as the regulations of the Administrator of General Services. 32 C.F.R. § 736.1 ("Accordingly, in disposing of its property, the Department of the Navy is subject to applicable regulations of the Administrator of General Services and the Secretary of Defense . . . ."); 32 C.F.R. § 736.4 (disposal of real property is either done pursuant by the General Services Administration ("GSA") pursuant to the Federal Property Act or by a Navy Official "under authority delegated in Title II, Regulations of the General

Services Administration, or under special delegations from the Administrator of General Services."). The regulations for the General Services Administration ("GSA") begin at 41 C.F.R. § 102-1, and include 41 C.F.R. § 102-71.20, which includes "embedded gravel, sand, or stone" within the definition of "real property." 41 C.F.R. § 102-71.20. The CFC, therefore, correctly applied the statute and the regulations in concluding that the mining and extraction of sand and gravel from the Dairy Farm would violate 10 U.S.C. § 6976's prohibition on disposal of the dairy farm's real property.

Furthermore, the inclusion of embedded gravel and stone within the definition of "real property" is common within the Department of Defense and other agencies. *See* 32 C.F.R. § 644.501(b) ("Standing Timber, Embedded Gravel, Sand or Stone. These are defined as real property."); 32 C.F.R. § 644.502 ("Military. The procedure for excessing and disposal of standing timber and embedded gravel, sand and stone is outlined in AR 405-90."); AR 405-90 (entitled "Disposal of Real Property"). Indeed, the means for disposing of embedded sand and gravel within AR 405-90 is found within Chapter 6, "Disposal of Real Property." RCG Brief at 50.

Additionally, other statutes support the Court's decision that a statute permitting a lease of a Federally owned property would not allow for mining

operations in the absence of specific language governing mining. For example, the Federal Land Policy and Management Act, 43 U.S.C. § 1701 *et seq*, states "all conveyances of title issued by the Secretary . . . shall reserve to the United States all minerals in the in the lands . . . ." unless the Secretary determines either there is no mineral interests or that reservation of mineral rights is interfering with non-mineral development of the land. 43 U.S.C. § 1719(e). *See also Watt v. Western Nuclear, Inc.*, 462 U.S. 36, 50, 56-58 (1983) (determining that under the Stock Raising Homestead Act, Congress reserved the right to extract sand and gravel to the United States for separate disposition from the surface land, which was reserved for grazing). The CFC's conclusion that "the real property containing the dairy farm" included the embedded sand and gravel, therefore, is amply supported by the similar regulations and statutes.

Finally, 10 U.S.C. § 6976's legislative history bolsters the CFC's more restrictive reading of the statute. The Senate initially proposed simply eliminating the restriction altogether. 143 Cong. Rec. S2356, S2366 (Mar 17, 1997) (Section 904) ("Section 810 of the Military Construction Authorization Act, 1968 (Public Law 90-110; 81 Stat. 309) is hereby repealed."). The House of Representatives, however, passed the more comprehensive version containing the present restrictions, including the prohibition on disposal of any of the "real property

containing the dairy farm" and the requirement that the lessee "maintain the rural and agricultural nature of the leased property." 143 Cong. Rec. H3945, H4017 (Jun. 19, 1997) (Section 2881). In conference committee, Congress chose the more restrictive House version, which was later enacted. H.R. Conf. Rep. 105-340, 359-60, Section 2871 (Oct. 23, 1997); Pub. L. No. 105-85, § 2871 (Nov. 18, 1997). That Congress chose the version containing the restrictions on disposal of the real property and mandating that the real property containing the dairy farm remain rural and agricultural demonstrates that Congress did not intend for 10 U.S.C. § 6976 to permit a lessee to extract sand and gravel from the Dairy Farm.

Indeed, RCG faces an even greater challenge than did Western Nuclear, because the Stock-Raising Homestead Act at least did not explicitly forbid the disposal of any of the "real property." The Supreme Court noted that, in the Stock-Raising Homestead Act, Congress specifically sought "to encourage the concurrent development of both the surface and the subsurface of SRHA lands." *Western Nuclear*, 462 U.S. at 50. In contrast, 10 U.S.C. § 6976 forbids the disposal of the real property, and limits a lessee to using the property for rural and agricultural uses, with a special preference permitted for dairy farming. 10 U.S.C. § 6976(b)(1). To the extent Section 6976 addresses subsurface rights, therefore, it forbids their development.

Congress chose to prohibit the disposal of any of the "real property containing the dairy farm." The applicable regulations include "embedded gravel, sand, and stone" within the definition of "real property." The CFC, therefore, correctly held that the Navy could not have considered RCG's bid to dispose of the embedded gravel and sand.

B. RCG's Arguments Ignore The Language Of The Statute And That The Statute And The Solicitation Never Mentioned Mining

RCG focuses upon subsection (b) of the statute to argue that the only restriction was that the Dairy Farm had to maintain its rural and agricultural nature. RCG Brief at 9-11. RCG argues that 10 U.S.C. § 6976 afforded the Navy enough discretion to permit mining on the Dairy Farm. RCG Brief at 11. Where RCG's arguments fail, however, is ignoring the absence of mining in either the statute or the notice, and the binding effect of the regulations.

1. 41 C.F.R. § 102-71.20 Applied To The Navy, Because 32 C.F.R. § 736.1 Required The Navy To Follow GSA Regulations

RCG argues that the Navy was not bound by 41 C.F.R. § 102-71.20's definition of real property. RCG Brief at 9-11. RCG is simply wrong.

As an initial matter, RCG has waived the argument that 41 C.F.R. § 102-71.20 is not binding on the Navy. Arguments not raised before the trial

court are waived. *J.M.T. Machine Co., Inc. v. United States*, 826 F.2d 1042, 1048-49 (Fed. Cir. 1987) (argument in support of EAJA fee not raised to trial court is waived); *Bockhoven v. Marsh*, 727 F.2d 1558, 1566 (Fed. Cir. 1984) (claim not raised to trial court is waived). RCG has never before argued that 41 C.F.R. § 102-71.20 is "limited to the real property 'policies' of the General Services Administration." RCG Brief at 9. RCG's prior position in its response brief, supplemental response brief, and sur-reply was simply that the mineral interest could be separated from the surface interest. *See RCG II* at 462-63 (summarizing RCG's arguments); *see generally Resource Conservation Group*, Fed. Cl. No. 08-768, Doc. No. 6 at 10-12 ("Response Brief") (never arguing that 41 C.F.R. 102-71.20 is not binding on the Navy or that it only applies to GSA "policies"); Doc. No. 21 at pp. 10-12 ("supplemental response") (same); Doc. No. 27 ("sur-reply") (never mentioning 41 C.F.R. § 102-71.20). Because RCG never gave the trial court the opportunity to consider this argument, this Court should not entertain it now.

Regardless of whether RCG waived this argument, RCG is incorrect that the Navy was free to ignore 41 C.F.R. § 102-71.20's definition of "real property." As the CFC correctly noted, pursuant to 32 C.F.R. § 736.1, "in disposing of its property, the Department of the Navy is subject to applicable regulations of the

Administrator of General Services and the Secretary of Defense . . . ." 32 C.F.R. § 736.1. The GSA's regulations, beginning at 41 C.F.R. § 102-1, "apply to Federal agencies . . . operating under, or subject to, the authorities of the Administrator of General Services." 41 C.F.R. § 102-71.5. The Navy regulations, therefore, bind the Navy to disposing of property pursuant to the GSA's policies. 32 C.F.R. § 736.1; 41 C.F.R. § 102-71.5. RCG presents no reason or citation why a regulation labeled a "policy" is not binding. The Navy, therefore, was required to apply 41 C.F.R. § 102-71.20's definition of "real property" in interpreting 10 U.S.C. § 6976.

Because the applicable regulations defined the real property as including "the embedded gravel, sand, and stone", RCG submitted a non-responsive bid. The statute forbade otherwise disposing of "the real property containing the dairy farm." 10 U.S.C. § 6976(a). RCG's proposal to extract the sand and gravel, therefore, was impermissible pursuant to the statute.

2. Congress Chose To Limit The Navy's Discretion With 10 U.S.C. § 6976, and The Request For Proposals Never Sought To Sever The Surface Interest From The Subsurface Interest

RCG next argues that 10 U.S.C. § 6976 permits mining, because a mining interest may be severed from a surface interest. RCG Brief at 11-15. This

argument might have some validity, except for neither the statute nor the notice ever indicating that the Navy had separated or intended to separate the two interests.

Section 6976 only permits the Navy to lease the Dairy Farm to a lessee who will maintain its rural and agricultural nature. 10 U.S.C. § 6976(b). The Navy also may not do anything that would dispose of the real property containing the dairy farm. 10 U.S.C. § 6976(a). Although RCG argues that 10 U.S.C. § 6976 gives the Navy unfettered discretion to accept any lease for the dairy farm, so long as it is returned to a rural state after the lease and is not fragmented, RCG ignores that Congress chose to limit the Navy's discretion. Specifically, Congress rejected the Senate's proposal, which would have simply eliminated the prior law. *CF* 143 Cong. Rec. S2356, S2366 (Mar 17, 1997) (Section 904) ("Section 810 of the Military Construction Authorization Act, 1968 (Public Law 90-110; 81 Stat. 309) is hereby repealed.") *with* 143 Cong. Rec. H3945, H4017 (Jun. 19, 1997) (Section 2881) (containing the current restrictions). Under the Senate's version, the Navy would have been only been subject to the general provisions of 10 U.S.C. § 2667, which contain no restrictions on the use of leased land. RCG's argument that 10 U.S.C. § 6976 somehow gives the Navy unique discretion, therefore, is undermined by Congress's deliberate choice to limit the Navy's

discretion. RCG is further thwarted by the deafening silence of 10 U.S.C. § 6976 and the notice regarding mining or subsurface rights. The extraction of minerals from Federally-owned lands is heavily regulated, and subject to numerous statutes and restrictions. *See, e.g.*, 30 U.S.C. § 101 (Mining Act); 30 U.S.C. § 601 *et seq* (Surface Resource Act); 43 U.S.C. § 1701 et seq (Federal Land Policy and Management Act).[2] In short, when Congress wishes to permit mining on Federally-owned lands, it makes it explicit. Section 6976, in contrast, contains no provision regarding mining, but many use restrictions that are contrary to mining, such as a restriction on disposing of any of the real property. 10 U.S.C. § 6976(a). Additionally, the notice made no mention of subsurface rights being accessible or being subject to bid. In light of the heavy regulation of mining on Federally-owned land, RCG acted at its own risk in submitting a bid where the request for proposals was silent on mining.

In addition, all of the cases cited by RCG support the conclusion that a transfer of a mineral right only occurs explicitly, never by implication. *See Cochran v. United States*, 19 Cl. Ct. 455, 456 (1990) (mineral contract where court

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[2] This case does not present the issue of which, if any, of these statutes applies when the Navy desires to obtain bids to mine embedded sand and gravel from a property. Rather, these statutes illustrate that, where Congress wishes to permit mining on Federally-owned lands, it does so explicitly.

decided whether sand and gravel where minerals); *French v. Chevron*, U.S.A., Inc., 896 S.W. 2d 795, 796 (Tex. 1995) (owner conveyed an ambiguous mineral deed); *Yoss v. Markley*, 68 N.E.2d 399, 400 (Ohio Ct. Comm. Pleas 1946) (original owner severed coal rights from the land estate). Because neither the Notice of Availability for Lease nor 10 U.S.C. § 6976 makes any mention of severing the mineral and the surface estates, and RCG does not dispute that embedded sand and gravel is included within the controlling definition of "real property," this Court should hold that the statute's language prohibited the Navy from permitting a contractor to dispose of the embedded sand and gravel.

RCG argues that the Navy's interpretation would prohibit all uses of the dairy farm, including the leasing to other dairy operations. RCG Brief at 14. Although RCG notes that a "lease" may be defined as an interest of the "real property," a lease that does not dispose of any of the real property is the only property interest for which the statute allows the Navy to seek bids. 10 U.S.C. §§ 6976(b)(1)-(2). RCG's argument, therefore, ignores that Section (b) of the statute explicitly permits the Secretary of the Navy to lease the property, subject to the other statutory requirements. It is a "central tenet of interpretation" that "a statute is to be considered in all its parts when construing any one of them." *Lexecon Inc. v. Milberg Weis Bershad Hynes & Lerach*, 523 U.S. 26, 36 (1998).

The language of the statute supports the Navy's interpretation: leases are explicitly permitted, subject to the other conditions of the statute. The Navy's interpretation, rejecting RCG's request to dispose of the embedded sand and gravel, therefore, rationally permits uses of the dairy farm that would comply with the statute while prohibiting uses that dispose of the real property. RCG cannot explain how it would not be disposing of the real property, when RCG sought to dig up a large part of the subsurface (included within the definition of the "real property") and haul that part of the real property offsite.

It may be that in general property law, the subsurface may be severed from the surface. There is no indication, however, that the Navy sought to do so here, and the statute expressly forbade this. This Court, therefore, should affirm the CFC's decision.

III. RCG Has Not Otherwise Stated A Claim For Breach Of An Implied Contract, Because The Navy Had No Duty To Perform Potential Bidders's Legal Research

If the Navy correctly interpreted the statute, then RCG has not stated a claim pursuant to the implied contract of fair and honest consideration.[3] The superior

[3] The Title for RCG's Section III refers to the Administrative Procedures Act ("APA"). RCG Brief at 16. Although RCG previously disclaimed that reliance upon the APA (Sur-Reply at 1), RCG has again cited to it. Not to belabor the point, but the implied-in-fact contract of fair and honest consideration pursuant to 28 U.S.C. § 1491(a) has its own standards, not the APA

knowledge doctrine, upon which RCG relies, has only been applied in express contract cases. Additionally, the doctrine requires superior knowledge of a fact, rather than superior knowledge of the published laws and regulations. Finally, RCG's allegations simply do not rise to the level of bad faith.

A. RCG Has Not Stated A Claim For Superior Knowledge, Because Bidders Are Responsible For Knowing Published Statutes And Regulations

1. Even If Superior Knowledge Applies To Bid Protests, RCG Has Failed To State A Claim

It is axiomatic that *ignorentia legis non excusat.* Put another way, "[j]ust as everyone is charged with knowledge of the United States Statutes at Large, Congress has provided that the appearance of rules and regulations in the Federal Register gives legal notice of their contents." *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 384-85 (1947). Despite this admonition, RCG asserts that the Navy breached the implied contract to fairly consider its bid by not informing RCG of the applicable statutes and regulations *prior* to RCG even submitting a bid. RCG Brief at 18-20. RCG asserts that the Navy breached the implied contract by withholding its superior knowledge. RCG Brief at 22-25. RCG is wrong.

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standards. *See, e.g., Southfork Systems, Inc. v. United States*, 141 F.3d 1124, 1132 (Fed. Cir. 1998). The APA standards are applicable only in bid protests brought pursuant to 28 U.S.C. § 1491(b). *See* 28 U.S.C. § 1491(b)(4).

To establish that an agency withheld superior knowledge, a plaintiff must allege that it:

> (1) undert[ook] to perform without vital knowledge of a fact that affects performance costs or direction, (2) the government was aware the contractor had no knowledge of and had no reason to obtain such information, (3) any contract specification supplied misled the contractor, or did not put it on notice to inquire, and (4) the government failed to provide the relevant information.

GAF Corp. v. United States, 932 F.2d 947, 949 (Fed. Cir. 1991).

First, RCG cites to no case in which the superior knowledge doctrine has been applied in a bid protest generally or under the implied contract of fair and honest consideration specifically. *See* RCG Brief at 25 (citing *AT&T Comms., Inc. v. Perry*, 296 F.3d 1307, 1309-10 (Fed. Cir. 2002) (express contract for telecommunications services); *Helene Curtis Indust., Inc. v. United States*, 312 F.2d 774, 775 (Cl. Ct. 1963); (express contract for disinfectant); *Northrop Grumman Corp. v. United States*, 63 Fed. Cl. 12, 13 (2004) (express contract for missiles). In addition, although RCG attempts to rely upon *D.F.K. Enterprises, Inc. v. United States*, 45 Fed. Cl. 280 (Fed. Cl. 1999) (RCG Brief at 20), the CFC in that case noted that the claim only existed because DFK had already been awarded an express contract. "DFK's claim is entirely dependent on the existence of a contract between it and the Corps, and the core of the dispute revolves around

competing interpretations of contract documents." *D.F.K.* 45 Fed. Cl. at 285. Although DFK involved a claim of a breach of an implied warranty, DFK's claim was dependent upon the express contract itself. *Id.* RCG, therefore, presents this Court with no support that the superior knowledge doctrine even applies to bid protests.

Indeed, the very language of the superior knowledge claim indicates that only contractors already possessing express contracts may assert it. *See GAF*, 932 F.2d at 949 ("the contractor had no knowledge . . ."; "any *contract* specification supplied . . . ."). In its brief, RCG changes "contract specification" to "the contractor solicitation specifications." RCG Brief at 25. RCG's mischaracterization of the test, however, does not make any sense, as it is the agency, not the contractor, who supplies the specifications. Additionally, that RCG needed to alter the language of the test so dramatically only emphasizes that the superior knowledge claim is simply not part of the implied-in-fact contract of fair and honest consideration.

Second, even assuming that the superior knowledge doctrine applies in a bid protest, the complaint fails to state a claim under that doctrine. RCG acknowledges that the claim requires that the plaintiff lack "vital knowledge of a fact." RCG Brief at 25; *GAF*, 932 F.2d at 949. Here, however, RCG is claiming

that the Navy withheld knowledge of 10 C.F.R. § 102-71.20, a published regulation, which RCG was responsible for knowing. *Merrill*, 332 U.S. 384-85. RCG, therefore, has not alleged that the Navy withheld any "fact," other than that the fact that the Navy would correctly interpret its statutes and regulations.

Third, the notice for proposals placed all potential bidders "on notice to inquire regarding this issue," because: (a) the solicitation specifically noted that "[t]he use of the [Dairy Farm Property] shall be in compliance with 10 U.S.C. § 6976" and (b) the solicitation included the entire text of 10 U.S.C. § 6976 in Appendix A. *RCG II* at 466. The solicitation, therefore, gave RCG notice of the statutory restrictions, and even provided the full text of the statute, including the prohibition on disposing of any of the real property and the mandate that the real property maintain its rural and agricultural character. *Id.* The notice, providing the full statute and restrictions, gave ample notice of the restrictions. Further, given the extensive regulation of mining on Federally-owned property (*see, e.g.*, 30 U.S.C. § 101 *et seq.*; 30 U.S.C. § 601 *et seq*; 43 U.S.C. § 1701 *et seq.*), RCG acted irrationally by choosing to place a mining bid on a property, where the solicitation made no reference to mining being permitted.

Finally, RCG faults the Government for failing to provide its statutory interpretation, before RCG even submitted a bid. RCG does not dispute, however,

the CFC's finding that it never asked whether mining would be permitted. *RCG II* at 466. RCG ignores that the first indication that it was interested in mining sand and gravel came not from RCG, but from its previous incarnation, Cheney-Reliable Joint Venture. *RCG II* at 2, n.2. Despite these facts, RCG asks this Court to hold that the Navy had a contractual obligation to privately discuss a company's possible bid. RCG Brief at 25. If anything, an agency communicating privately with a potential bidder prior to the agency receiving a bid would be a breach of the implied contract with the other potential bidders.

This Court has never applied the superior knowledge doctrine in the context of a bid protest. Even if the doctrine applies, however, RCG has failed to state a claim, because it only alleges that the Government did not do RCG's legal research. This Court, therefore, should affirm the decision below.

2. RCG's Other Precedents Are Irrelevant

RCG cites a number of cases in an attempt to demonstrate that the Navy should be liable for failing to tell RCG about the applicable regulations. RCG Brief at 19. The cases cited by RCG are simply irrelevant.

The first case, *Owen of Georgia v. Shelby County*, 648 F.2d 1084 (6th Cir. 1981), involved the Sixth Circuit predicting Tennessee law regarding promissory estoppel. *Owen of Georgia*, 648 F.2d at 1095. The CFC, however, does not

possess jurisdiction over cases arising pursuant to promissory estoppel, because the Federal Government is not liable for the erroneous advice of its agents acting without specified authority. *Hercules v. United States*, 516 U.S. 417, 423 (1996). "We have repeatedly held that this jurisdiction [28 U.S.C. S 1491a] extends only to contracts either express or implied in fact, and not to claims on contracts implied in law."); *Office of Personnel Management v. Richmond*, 496 U.S. 414, 415-16, 433 (1990) ("To open the door to estoppel claims would only invite endless litigation over both real and imagined claims of misinformation by disgruntled citizens, imposing an unpredictable drain on the public fisc"); *see also Steinberg v. United States*, 90 Fed. Cl. 435, 444 (2009) (*citing Arakaki v. United States*, 71 Fed. Cl. 509, 521 n. 7 (2006)) (promissory estoppel does not apply against the Government); *Shoshone Indian Tribe of the Wind River Reservation v. United States*, 58 Fed. Cl. 542, 546 (2003) (same).

Additionally, the CFC has already held that *Owen of Georgia* is irrelevant to this Court's jurisprudence, where the issue is whether the bidder complied with the applicable statute. *All Florida Network Corp v. United States*, 82 Fed. Cl. 468, 473 (2008) ("The dispute before the Court in this bid protest is whether Plaintiff in fact complied with the requirements of the RFB . . . . *Owen of Georgia* does nothing to advance Plaintiff's argument."). *Owen*, therefore, has no bearing on

whether RCG stated a claim pursuant to the implied contract of fair and honest consideration.

City of Cape Coral v. Water Services of America, Inc., 567 So. 2d 510 (Fla. Dist. Ct. App. 1990) is also irrelevant to the question of whether RCG has stated a claim pursuant to the implied contract of fair and honest consideration. *Water Services of America* involved a government entity making an express representation that an unlicensed contractor would be allowed to bid, but then deciding that only licensed contractors would be allowed. *Id.* at 511-12. The Florida Supreme Court held that the City's decision to disallow a contractor was incorrect pursuant to the statute. *Envirogenics Systems Company v. City of Cape Coral*, 529 So.2d 279, 280-81 (Fla. 1988). As in *Owen of Georgia*, therefore, the bidder only had a claim, because the City had interpreted the statute incorrectly. *Owen of Georgia*, 648 F.2d at 1093. Finally, as in *Owen of Georgia*, the bidder sued pursuant to a theory of promissory estoppel. *Water Services of America, Inc.*, 567 So. 2d at 511. As established above, this Court does not have jurisdiction over claims of promissory estoppel (*Steinberg*, 90 Fed. Cl. at 444), making *Water Services of America* irrelevant regarding the issue of whether RCG has stated a claim pursuant to the implied-in-fact-contract of fair and honest consideration.

State Mechanical Contractors, Inc. v. Village of Pleasant Hill, 477 N.E. 2d 509 (Ill. App. Ct. 1985) is also irrelevant for almost the same reasons: It is based upon promissory estoppel (477 N.E. 2d at 512-13); contains a claim only because the Government agency had misinterpreted the statute (*id.* at 511); and the winning bidder was non-responsive. *Id.*

The court below correctly held that RCG had not stated a claim for breach of implied contract of fair and honest consideration based upon the superior knowledge doctrine. RCG has cited no case from this Court, its predecessors, or anywhere that holds that an agency is liable for failing to tell a company that its possible bid will be non-responsive, prior to even receiving a bid. The decision, therefore, should be affirmed.

B. RCG's Complaint Does Not Stated A Claim For Bad Faith, Because RCG Solely Alleges That The Navy Failed To Tell A Prospective Bidder About Publicly Available Information

RCG's remaining claim is based upon vague insinuations of bad faith on the part of the Navy. Even accepting the complaint's allegations as true, however, RCG has failed to state a claim of bad faith.

To state a claim pursuant to the implied contract of fair and honest consideration, a bidder must establish that an agency's treatment of a bid was

"arbitrary and capricious." *Southfork*, 141 F.3d at 1132. This Court will consider allegations of:

> (1) subjective bad faith on the part of the government; (2) absence of a reasonable basis for the administrative decision; (3) the amount of discretion afforded to the procurement officials by applicable statutes and regulation; and (4) proven violations of pertinent statutes or regulations.

Id. at 1132. To establish bad faith, a plaintiff's allegations, if true, must amount to "almost irrefragable" proof." *Galen Medical Associates v. United States*, 369 F.3d 1324, 1330 (Fed. Cir. 2004). "In proving that the government acted in bad faith the claimant must show specific intent to injure the plaintiff, for example, by predetermining the awardee or by harboring a prejudice against the plaintiff." *Contract Custom Drapery Service, Inc. v. United States*, 6 Cl. Ct. 811, 817 (1984).

RCG concedes that its complaint never even mentions the words "bad faith." RCG Brief at 17. Indeed, in its complaint, RCG only alleges the following: the Navy permitted RCG to enter onto the property to do surveying and tests (A6 at ¶6); the Navy knew that RCG's interest in the property was to mine sand and gravel (A6 at ¶7); and the Navy did not tell RCG or any other bidders that proposals to mine sand and gravel would be unacceptable (A7 at ¶10).

As noted above, however, RCG does not dispute that it never asked if mining sand and gravel would actually be acceptable. *RCG II* at 466. RCG never alleges that the Navy had a specific intent to injure RCG or why the Navy would even want to do so. *See Iqbal*,129 S.Ct. at 1950 (a claim must be "plausible on its face."). RCG has also failed to allege that the Navy had any prejudice against RCG or predetermined an awardee. *Contract Custom Drapery*, 6 Cl. Ct. at 817. Additionally, RCG does not allege that the Navy ever expressly told it that mining would be acceptable, distinguishing this case from *Water Services of America. Water Services of America*, 567 So. 2d at 511-12. Furthermore, the complaint fails to provide any factual allegations of what "encouragement" the Navy allegedly gave RCG to bid, other than acquiescing in RCG's request to test for sand and gravel. RCG Brief at 24; A6 at ¶6. RCG has cited no case in which any court has held that failing to inform a potential bidder of a *correct* statutory interpretation prior to the bidder submitting a bid would be an act of bad faith. RCG's complaint, therefore, fails as a matter of law to state a claim

RCG attempts to create a claim of bad faith by making insinuations about why the Government has not filed a record (RCG Brief at 21) or why the Navy has not indicated when it came to a decision (RCG Brief at 23). The answer to these questions is very simple. With regards to the record, the Government has not filed

it, because the CFC granted its dispositive motion. In addition, RCG's claim is a challenge to the Navy's legal interpretation of the statute, and RCG already has all the materials relevant to the decision: RCG's bid proposing to mine sand and gravel, and the Navy's letter rejecting the bid and providing the rationale. A 12 (letter containing the rationale).

With regards to when the Navy realized that sand and gravel mining would not be permissible, RCG never alleged in its complaint when the Navy made its decision. In a motion to dismiss, the movant is bound by the facts of the complaint. Additionally, RCG has presented this Court with no authority demonstrating why the timing would matter. So long as the Navy correctly interpreted the statute, RCG does not have a claim.

Finally, in a footnote, RCG alleges that the facts may also demonstrate a mutual mistake of fact. RCG Brief at 24, n.4. RCG, however, presents no authority that would support a mutual mistake of fact being a viable claim pursuant to the implied contract of fair and honest consideration; what elements are required for such a claim; or what allegations within the complaint would support such a claim. *Id.* RCG's complaint likewise fails even to attempt to allege the elements of a mutual mistake of fact, and the theory did not appear in the briefing below until being placed in a footnote in RCG's supplemental response

brief. Supp. Resp. Br. at 7 n.4. RCG, therefore, has waived any claim for a mutual mistake of fact. *SmithKline Beecham Corp. v. Apotex Corp.*, 439 F.3d 1312, 1320 (Fed. Cir. 2006) ("'It is a settled appellate rule that issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived.'") (quoting *Tolbert v. Queens Coll.*, 242 F.3d 58, 75 (2d Cir.2001)); *United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir.1991) ("A skeletal 'argument', really nothing more than an assertion, does not preserve a claim . . . . Judges are not like pigs, hunting for truffles buried in briefs.").

RCG has not pled bad faith or superior knowledge. Additionally, the Navy correctly interpreted the statute, and 10 U.S.C. § 6976 afforded the Secretary of the Navy discretion in how to lease the dairy farm, subject to the statute's constraints. RCG, therefore, has failed to state a claim pursuant to the implied in-fact contract of fair and honest consideration.

CONCLUSION

For the foregoing reasons, the Court of Federal Claims's decision should be affirmed.

Respectfully submitted,

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June 20, 2011

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APPENDIX

APPENDIX TABLE OF CONTENTS

143 Cong. Rec. S2356-07, 1997 WL 116610 (Cong.Rec.)

Congressional Record --- Senate
Proceedings and Debates of the 105th Congress, First Session
Monday, March 17, 1997

*S2356 STATEMENTS ON INTRODUCED BILLS AND JOINT RESOLUTIONS

By Mr. ROBB:

S. 448. A bill to amend the Solid Waste Disposal Act to authorize local governments and Governors to restrict receipt of out-of-State municipal solid waste, and for other purposes; to the Committee on Environment and Public Works

THE LOCAL GOVERNMENT INTERSTATE WASTE CONTROL ACT

Mr. ROBB

Mr. President, today, I introduce legislation which will protect communities from being inundated with unwanted garbage generated out-of-State. The essential thrust of the legislation is to empower localities to *S2357 protect themselves from unwanted trash by allowing them to decide whether landfills or incinerators located within their communities should be permitted to accept out-of-State waste. It also seeks to strike the appropriate balance between State and local authority.

Those of us who formerly served in State government are keenly aware of the divisions of labor among the various levels of government. Due to Supreme Court decisions regarding the U.S. Constitution's commerce clause, disposing of trash implicates all three levels of government.

Under the commerce clause, only Congress is permitted to regulate interstate commerce. Because the Supreme Court has determined that garbage is commerce like any other commodity, States and localities have been powerless to halt the disposal of waste disposed in their jurisdictions which was generated outside the State. Thus the Federal Government must determine how best to regulate this article of commerce.

The role of the States in regulating the disposal of garbage centers on its responsibility to protect the State's environment. Based on environmental criteria, the States determine whether to issue permits for the construction of landfills, and are charged with monitoring the operation of landfills and incinerators to guarantee compliance with environmental laws. My bill will not affect in any way the State's right to enforce the States environmental standards.

The real responsibility for disposing of trash, however, has rested historically with local governments. It is their responsibility to pick up the trash and to find a place to put it down. Because this is the locality's ultimate responsibility, and because the local community is the one most directly affected by garbage imports, my bill delegates primary authority regarding interstate waste to the local governments.

The legislation defines an affected local government as the political subdivision of the State charged with making land use decisions. In my view, if an elected body is competent to make decisions regarding the use of land in the community, then it is certainly competent to determine whether a landfill, already permitted under State law, should be allowed to accept out-of-State waste.

Striking the right balance between State and local authority was only half the battle. The other major issue implicated by placing restrictions on out-of-State waste is how to treat existing facilities. In many cases, existing facilities which accept out-of-State waste do so in the face of local opposition. These communities understand-

This legislation is measured in its approach. It provides for State enforcement of a clear, reasonable Federal standard. And, before a floor vote, the legislation will include a conscience clause exception for providers and entities. After months of good-faith, bipartisan discussion, the precise legislative language to establish a conscience clause exception to the gag rule has not yet been crafted.

However, all parties agree in principle that the rights and prerogatives of health plans and individual providers who, for religious or moral reasons, choose not to discuss certain treatments, must be protected. The question is, how best to accomplish this.

I am committed to continuing to work with all interested parties to achieve the greatest consensus possible on this critical issue. I will continue to work to see that all interested parties have been heard on this issue and the greatest amount of consensus possible has been reached.

By Mr. THURMOND (for himself and Mr. LEVIN):

S. 450. A bill to authorize appropriations for fiscal years 1998 and 1999 for military activities of the Department of Defense, to prescribe military personnel strengths for fiscal years 1998 and 1999, and for other purposes; to the Committee on Armed Services.

THE NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEARS 1998 AND 1999

By Mr. THURMOND (for himself and Mr. LEVIN) (by request):

S. 451. A bill to authorize construction at certain military installations for fiscal year 1998, and for other military construction authorizations and activities of the Department of Defense; to the Committee on Armed Services.

THE MILITARY CONSTRUCTION AUTHORIZATION ACT FOR FISCAL YEAR 1998

Mr. THURMOND.

Mr. President, I am pleased to introduce, by request and with the distinguished Senator from Michigan, the ranking minority member of the Committee on Armed Services, the National Defense Authorization Act for fiscal years 1998 and 1999 and the Military Construction Authorization Act for fiscal year 1998. I ask unanimous consent that the bills and their accompanying sectional analyses be printed in the RECORD.

There being no objection, the bills were ordered to be printed in the RECORD, as follows:

S. 450

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "National Defense Authorization Act for Fiscal Years 1998 and 1999".

SEC. 2. TABLE OF CONTENTS.

The table of contents for this Act is as follows:

SUBTITLE D-OTHER MATTERS

TITLE VII-HEALTH CARE PROVISIONS

TITLE VIII-REPEAL OF ACQUISITION REPORTS AND ACQUISITION POLICY

SUBTITLE A-REPEAL OF CERTAIN ACQUISITION REPORTS

SUBTITLE B-ACQUISITION POLICY

TITLE IX-DEPARTMENT OF DEFENSE ORGANIZATION AND MANAGEMENT

TITLE X-GENERAL PROVISIONS

the maintenance, repair, restoration, or replacement of the leased property.".

TITLE IX-DEPARTMENT OF DEFENSE ORGANIZATION AND MANAGEMENT

SEC. 901. AMENDMENT TO FREQUENCY OF PROVIDING POLICY GUIDANCE FOR CONTINGENCY PLANS.

Section 113(g) of title 10, United States Code, is amended in paragraph (2) by striking "annually" and inserting in lieu thereof "every two years or as needed".

SEC. 902. REVISION OF MEMBERSHIP TERMS FOR STRATEGIC ENVIRONMENTAL RESEARCH AND DEVELOPMENT PROGRAM SCIENTIFIC ADVISORY BOARD.

Section 2904(b) of title 10, United States code, is amended in paragraph (4) by striking "three" and inserting in lieu thereof "not less than two and not more than four".

SEC. 903. CLOSURE OF THE UNIFORM SERVICES UNIVERSITY OF THE HEALTH SCIENCES.

(a) REPEAL OF AUTHORITY.-Chapter 104 of title 10, United States Code, is hereby repealed.

(b) PHASE-OUT PROCESS.-(1) Notwithstanding any other provision of law, the Secretary of Defense shall phase out the Uniformed Services University of the Health Sciences, beginning in fiscal year 1998, and ending with the closure of such University not later than September 30, 2001. No provision of section 2687 of title 10, United States Code, or of any other law establishing preconditions to the closure of any activity of the Department of Defense shall operate to establish any precondition to the phase-out and closure of the Uniformed Services University of the Health Sciences as required by this Act.

(2) Under the phase-out process required by paragraph (1), the Secretary of Defense may exercise all of the authorities pertaining to the operations of the Uniformed Services University of the Health Sciences that were granted to the Secretary of Defense, the Board of Regents, or the Dean of the Uniformed Services University of the Health Sciences by Chapter 104 of title 10, United States Code, prior to enactment of the repeal of that chapter by subsection (a). Such authorities may be exercised by the Secretary of Defense so as to achieve an orderly phase-out of operations of the Uniformed Services University of the Health Sciences.

(3) No new class of students may be admitted to begin studies in the Uniformed Services University of the Health Sciences after September 30, 1997. No students may be awarded degrees by such University after September 30, 2001, except that the Secretary may grant exceptions on a case-by-case basis for any students who by that date have completed substantially all degree requirements.

(c) AUTHORITIES AFFECTED.-(1) Commissioned service obligations incurred by students of the Uniformed Services University of the Health Sciences shall be unaffected by enactment of the repeal of chapter 104 of title 10, United States Code, by subsection (a).

(2) Nothing in this Act shall be construed as limiting the exercise by the Secretary of Defense of other authorities under law pertaining to health sciences education, training, and professional development, graduate medical education, medical and scientific research, and similar activities. To the extent the Secretary of Defense assigned any such activities to another component or entity of the Department of Defense, such activities shall not be affected by the phase-out and closure of the Uniformed Services University of the Health Sciences pursuant to this Act.

(d) CONFORMING AMENDMENTS.-(1) Section 178 of title 10, United States Code, pertaining to the Henry M. Jackson Foundation for the Advancement of Military Medicine, is amended-

(A) in subsection (b), by striking "Uniformed Services University of the Health Sciences" and inserting in lieu

thereof "Department of Defense";

(B) in subsection (c)(1)(B), by striking "the Dean of the Uniformed Services University of the Health Sciences" and inserting in lieu thereof "a person designated by the Secretary of Defense"; and

(C) in subsection (g)(1), by striking "Uniformed Services University of the Health Sciences" and inserting in lieu thereof "Secretary of Defense".

(2) Section 466 of the Public Health Service Act (42 U.S.C. Section 286a), pertaining to the Board of Regents of the National Library of Medicine, is amended in subsection (a)(1)(B) by striking "the Dean of the Uniformed Services University of the Health Sciences".

(e) CLERICAL AMENDMENT.-The table of chapters at the beginning of Subtitle A and at the beginning of part II of such subtitle of title 10, United States Code, is amended by striking the items pertaining to chapter 104.

SEC. 904. REPEAL OF REQUIREMENT TO OPERATE NAVAL ACADEMY DAIRY FARM, GAMBRILLS, MARYLAND.

Section 810 of the Military Construction Authorization Act, 1968 (Public Law 90-110; 81 Stat. 309) is hereby repealed.

SEC. 905. INCLUSION OF INFORMATION RESOURCES MANAGEMENT COLLEGE IN THE NATIONAL DEFENSE UNIVERSITY.

(a) TECHNICAL AMENDMENT AND ADDITION OF INFORMATION RESOURCES MANAGEMENT COLLEGE TO THE DEFINITION OF THE NATIONAL DEFENSE UNIVERSITY.-Section 1595(d)(2) of title 10, United States Code, is amended by striking "the Institute for National Strategic Study" and inserting in lieu thereof "the Institute for National Strategic Studies, the Information Resources Management College".

(b) CONFORMING AMENDMENT.-Section 2162(d)(2) of title 10, United States Code, is amended by inserting "the Institute for National Strategic Studies, the Information Resources Management College," after "the Armed Forces Staff College,".

TITLE X-GENERAL PROVISIONS

Subtitle A-Financial Matters

SEC. 1001. TWO-YEAR EXTENSION OF COUNTERPROLIFERATION AUTHORITIES.

Section 1505 of the Weapons of Mass Destruction Act of 1992 (Public Law 102-484; 106 Stat. 2570; 22 U.S.C. 5859a) is amended-

(1) in subsection (d)(3), by striking "or" after "fiscal year 1996," and by inserting", $15,000,000 for fiscal year 1998, or $15,000,000 for fiscal year 1999" before the period at the end; and

(2) in subsection (f), by striking "1997" and inserting in lieu thereof " 1999".

Subtitle B-Other Matters

SEC. 1010. NEGOTIATING SALES OF VESSELS STRICKEN FROM THE NAVAL REGISTER.

Section 7305(c) of title 10, United States Code, is amended to read as follows:

"(c) PROCEDURES FOR SALE.-A vessel stricken from the Naval Register and not subject to disposal under any other law may be sold under this section. In such a case, a vessel may be sold, regardless of the appraised

143 Cong. Rec. H3945-02, 1997 WL 335360 (Cong.Rec.)

Congressional Record --- House of Representatives
Proceedings and Debates of the 105th Congress, First Session
Thursday, June 19, 1997

*H3945 NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 1998

The SPEAKER pro tempore.

Pursuant to House Resolution 169 and rule *H3946 XXIII, the Chair declares the House in the Committee of the Whole House on the State of the Union for the consideration of the bill, H.R. 1119.

2:24 p.m.

IN THE COMMITTEE OF THE WHOLE

Accordingly, the House resolved itself into the Committee of the Whole House on the State of the Union for the consideration of the bill (H.R. 1119) to authorize appropriations for fiscal years 1998 and 1999 for military activities of the Department of Defense, to prescribe military personnel strengths for fiscal years 1998 and 1999, and for other purposes, with Mr. YOUNG of Florida in the chair.

The Clerk read the title of the bill.

The CHAIRMAN.

Pursuant to the rule, the bill is considered as having been read the first time.

Under the rule, the gentleman from South Carolina <Mr. SPENCE> and the gentleman from California <Mr. DELLUMS> each will control 1 hour.

The Chair recognizes the gentleman from South Carolina (Mr. SPENCE).

Mr. SPENCE.

Mr. Chairman, I yield myself such time as I may consume.

(Mr. SPENCE asked and was given permission to revise and extend his remarks.)

Mr. SPENCE.

Mr. Chairman, once again the Committee on National Security has reported a bipartisan bill that attempts to address many of the problems facing our Nation's military. H.R. 1119 also reflects the committee's deep concern over the difficulty in managing the risks posed by continued forced downsizing and budget reductions.

The fundamental dilemma facing the Department of Defense remains the same: how to maintain a viable all-volunteer force in an environment where the number, scope, and duration of military missions, especially peacekeeping and humanitarian missions, continue to grow while military forces and defense budgets continue to decline. A long-standing gap between the U.S. military strategy and resources persists. In fact, it is widening.

In looking at the challenges to our national security interests over the past year, the committee has continued to focus on China, an emerging power, and Russia, a once and perhaps future power. While neither nation is currently an enemy of the United States, they do represent the nations most likely and able to amass military power sufficient to challenge our vital interests.

I support efforts to bolster the democratic process in Russia. However, Russia's future will be shaped less by our policy than by its own internal decisionmaking over whether to remain independent and driven by its own history and character or to form working partnerships with the United States and the West.

by the party receiving the property.

(d) TECHNICAL CORRECTIONS REGARDING PREVIOUS CONVEYANCE.-Section 835 of the Military Construction Authorization Act, 1985 (Public Law 98-407; 98 Stat. 1527), is amended-

(1) in subsection (b), by striking out "subsection (b)" and inserting in lieu thereof "subsection (a)"; and

(2) in subsection (c), by striking out "Clark Street," and all that follows through the period and inserting in lieu thereof "Village West Drive, on the west by Allen Avenue, on the south by 8th Street, and the north is an extension of 11th Street between Allen Avenue and Clark Street.".

SUBTITLE E-OTHER MATTERS

SEC. 2881. REPEAL OF REQUIREMENT TO OPERATE NAVAL ACADEMY DAIRY FARM.

(a) OPERATION.-(1) Chapter 603 of title 10, United States Code, is amended by adding at the end the following new section:

"s6976. Operation of **Naval Academy dairy farm**

"(a) DISCRETION REGARDING CONTINUED OPERATION.-(1) Subject to paragraph (2), the Secretary of the Navy may terminate or reduce the **dairy** or other operations conducted at the **Naval Academy dairy farm** located in Gambrills, Maryland.

"(2) Notwithstanding the termination or reduction of operations at the **Naval Academy dairy farm** under paragraph (1), the real property containing the **dairy farm** (consisting of approximately 875 acres)-

"(A) may not be declared to be excess real property to the needs of the Navy or transferred or otherwise disposed of by the Navy or any Federal agency; and

"(B) shall be maintained in its rural and agricultural nature.

"(b) LEASE AUTHORITY.-(1) Subject to paragraph (2), to the extent that the termination or reduction of operations at the **Naval Academy dairy farm** permit, the Secretary of the Navy may lease the real property containing the **dairy farm**, and any improvements and personal property thereon, to such persons and under such terms as the Secretary considers appropriate. In leasing any of the property, the Secretary may give a preference to persons who will continue dairy operations on the property.

"(2) Any lease of property at the **Naval Academy dairy farm** shall be subject to a condition that the lessee maintain the rural and agricultural nature of the leased property.

"(c) EFFECT OF OTHER LAWS.-Nothing in section 6971 of this title shall be construed to require the Secretary of the Navy or the Superintendent of the **Naval Academy** to operate a **dairy farm** for the **Naval Academy** in Gambrills, Maryland, or any other location.".

(2) The table of sections at the beginning of such chapter is amended by adding at the end the following new item:

"6976. Operation of **Naval Academy dairy farm**.".

(b) CONFORMING REPEAL OF EXISTING REQUIREMENTS.-Section 810 of the Military Construction Authorization Act, 1968 (Public Law 90-110; 81 Stat. 309), is repealed.

SEC. 2882. LONG-TERM LEASE OF PROPERTY, NAPLES ITALY.

(a) AUTHORITY.-Subject to subsection (d), the Secretary of the Navy may acquire by long-term lease structures and real property relating to a regional hospital complex in Naples, Italy, that the Secretary determines to be necessary for purposes of the Naples Improvement Initiative.

(b) LEASE TERM.-Notwithstanding section 2675 of title 10, United States Code, the lease authorized by subsection (a) shall be for a term of not more than 20 years.

Congressional Record --- House of Representatives
Proceedings and Debates of the 105th Congress, First Session
Thursday, October 23, 1997

*H9076 CONFERENCE REPORT ON H.R. 1119, NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 1998

Mr. SPENCE submitted the following conference report and statement on the bill (H.R. 1119) to authorize appropriations for fiscal year 1998 for military activities of the Department of Defense, for military construction, and for defense activities of the Department of Energy, to prescribe personnel strengths for such fiscal year for the Armed Forces, and for other purposes:

CONFERENCE REPORT (H. REPT. 105-340)

The committee of conference on the disagreeing votes of the two Houses on the amendments of the Senate to the bill (H.R. 1119) to authorize appropriations for fiscal year 1998 for military activities of the Department of Defense, for military construction, and for defense activities of the Department of Energy, to prescribe personnel strengths for such fiscal year for the Armed Forces, and for other purposes, having met, after full and free conference, have agreed to recommend and do recommend to their respective Houses as follows:

That the House recede from its disagreement to the amendment of the Senate to the text of the bill and agree to the same with an amendment as follows:

In lieu of the matter proposed to be inserted by the Senate amendment, insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "National Defense Authorization Act for Fiscal Year 1998".

SEC. 2. ORGANIZATION OF ACT INTO DIVISIONS; TABLE OF CONTENTS.

(a) DIVISIONS.-This Act is organized into three divisions as follows:

(1) Division A-Department of Defense Authorizations.

(2) Division B-Military Construction Authorizations.

(3) Division C-Department of Energy National Security Authorizations and Other Authorizations.

(b) TABLE OF CONTENTS.-The table of contents for this Act is as follows:

ning on the date of enactment of this Act, pay to the United States an amount equal to the lesser of-

(1) the amount of sale of the property sold; or

(2) the fair market value of the property sold as determined without taking into account any improvements to such property by the City.

(d) DESCRIPTION OF PROPERTY.-The exact acreage and legal description of the real property conveyed under subsection (a) shall be determined by a survey satisfactory to the Secretary. The cost of the survey shall be borne by the City.

(e) ADDITIONAL TERMS AND CONDITIONS.-The Secretary may require such additional terms and conditions in connection with the conveyance under subsection (a) as the Secretary considers appropriate to protect the interests of the United States.

SEC. 2867. STUDY OF LAND EXCHANGE OPTIONS, SHAW AIR FORCE BASE, SOUTH CAROLINA.

Section 2874 of the Military Construction Authorization Act for Fiscal Year 1996 (division B of Public Law 104-106; 110 Stat. 583) is amended by adding at the end the following new subsection:

"(g) STUDY OF EXCHANGE OPTIONS.-To facilitate the use of a land exchange to acquire the real property described in subsection (a), the Secretary shall conduct a study to identify real property in the possession of the Air Force (located in the State of South Carolina or elsewhere) that satisfies the requirements of subsection (b)(2), is acceptable to the party holding the property to be acquired, and is otherwise suitable for exchange under this section. Not later than three months after the date of the enactment of the National Defense Authorization Act for Fiscal Year 1998, the Secretary shall submit to Congress a report containing the results of the study.".

SUBTITLE E-OTHER MATTERS

SEC. 2871. REPEAL OF REQUIREMENT TO OPERATE NAVAL ACADEMY DAIRY FARM.

(a) OPERATION.-(1) Chapter 603 of title 10, United States Code, is amended by adding at the end the following new section:

"s6976. Operation of Naval Academy dairy farm
"(a) DISCRETION REGARDING CONTINUED OPERATION.-(1) Subject to paragraph (2), the Secretary of the Navy may terminate or reduce the dairy or other operations conducted at the Naval Academy dairy farm located in Gambrills, Maryland.

"(2) Notwithstanding the termination or reduction of operations at the Naval Academy dairy farm under paragraph (1), the real property containing the dairy farm (consisting of approximately 875 acres)-

"(A) may not be declared to be excess real property to the needs of the Navy or transferred or otherwise disposed of by the Navy or any Federal agency; and

"(B) shall be maintained in its rural and agricultural nature.

"(b) LEASE AUTHORITY.-(1) Subject to paragraph (2), to the extent that the termination or reduction of operations at the Naval Academy dairy farm permit, the Secretary of the Navy may lease the real property containing the dairy farm, and any improvements and personal property thereon, to such persons and under such terms as the Secretary considers appropriate. In leasing any of the property, the Secretary may give a preference to persons who will continue dairy operations on the property.

"(2) Any lease of property at the Naval Academy dairy farm shall be subject to a condition that the lessee maintain the rural and agricultural nature of the leased property.

"(c) EFFECT OF OTHER LAWS.-Nothing in section 6971 of this title shall be construed to require the Secretary of the Navy or the Superintendent of the Naval Academy to operate a dairy farm for the Naval Academy in Gambrills, Maryland, or any other location.".

(2) The table of sections at the beginning of such chapter is amended by adding at the end the following new item:

"6976. Operation of Naval Academy dairy farm.".

(b) CONFORMING REPEAL OF EXISTING REQUIREMENTS.-Section 810 of the Military Construction Authorization Act, 1968 (Public Law 90-110; 81 Stat. 309), is repealed.

(c) OTHER CONFORMING AMENDMENTS.-(1) Section 6971(b)(5) of title 10, United States Code, is amended by inserting "(if any)" before the period at the end.

(2) Section 2105(b) of title 5, United States Code, is amended by inserting "(if any)" after "Academy dairy".

SEC. 2872. LONG-TERM LEASE OF PROPERTY, NAPLES ITALY.

(a) AUTHORITY.-Subject to subsection (d), the Secretary of the Navy may acquire by long-term lease structures and real property relating to a regional hospital complex in Naples, Italy, that the Secretary determines to be necessary for purposes of the Naples Improvement Initiative.

(b) LEASE TERM.-Notwithstanding section 2675 of title 10, United States Code, the lease authorized by subsection (a) shall be for a term of not more than 20 years.

CERTIFICATE OF SERVICE

I certify under penalty of perjury that on this 20th Day of June 2011, I caused to be delivered by United States mail (first class mail, postage prepaid) service copies of "BRIEF FOR APPELLEE, THE UNITED STATES" addressed as follows:

Warren K. Rich & Anthony G. Gorski
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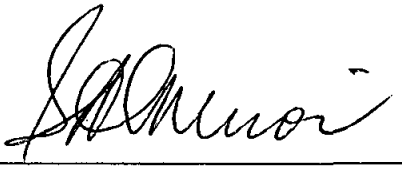

CERTIFICATE OF COMPLIANCE WITH RULE 28.1(e)2 OF THE FEDERAL RULES OF APPELLATE PROCEDURE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, counsel for Appellee, the United States, certifies that this brief complies with Rule 28.1(e)(2)(B)(i), because, based on a word count by the word processing software, it contains 8,267 words.

June 20, 2011

Christopher A. Bowen