Consolidated Docket Nos. 04-17365, 04-17458, 05-16961 & 05-16784

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

DAVID P. ADAM *et al.,*

Appellants/Plaintiffs,

v.

GAIL A. NORTON, SECRETARY,
U.S. DEPARTMENT OF THE INTERIOR,

Appellee/Defendant.

On Appeal from the United States District Court

For the Northern District of California

Case No. C 98-02094 CW

The Honorable CLAUDIA WILKEN, District Judge

APPELLANTS' CROSS-APPEAL BRIEF

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ORAL ARGUMENT REQUESTED

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TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

SUMMARY OF ARGUMENT 1

ARGUMENT 2

I. **THE DISTRICT COURT DID NOT COMMIT CLEAR ERROR IN CALCULATING THE DAMAGES AWARDED TO CALZIA AND WRUCKE**. 2

A. STANDARD OF REVIEW 2

B. THE SECRETARY FAILED TO ESTABLISH THAT THE DAMAGES AWARDED TO CALZIA AND WRUCKE WERE CLEARLY ERRONEOUS. 3

1. James Calzia Was Properly Awarded Back Pay, Including Wage Increases He Would Have Obtained, but for the Discriminatory Failure to Promote. 4

2. Chester Wrucke Properly Mitigated His Damages Without Taking the Lower Graded Position Offered to Him. 9

II. THE DISTRICT COURT'S AGE DISCRIMINATION FINDINGS ARE INCONSISTENT.. 14

A. **THE DISTRICT COURT FOUND AGE WAS A FACTOR IN THE RIF.**. 14

B. **THE FINDING THAT THERE WAS INSUFFICIENT EVIDENCE OF AGE DISCRIMINATION FOR APPELLANTS IS INCONSISTENT WITH THE DISTRICT COURT'S FINDINGS FOR APPELLEES CALZIA AND WRUCKE.** 16

1. Under *Costa,* since Age Was Found to Be a "Substantial Factor" in the RIF, Remaining Appellants Are Not Required To Establish Age Discrimination by Additional Direct Evidence. 17

C. **THE STATISTICAL EVIDENCE ESTABLISHED THE REDUCTION IN FORCE HAD A SIGNIFICANT DISPARATE IMPACT ON OLDER EMPLOYEES AND SUPPORTED THE DIRECT AND PRETEXT EVIDENCE OF AGE BIAS**. 18

D. **THE USGS LOST THE SCIENTIFIC EXPERTISE OF APPELLANTS WHICH WAS NEEDED TO ACCOMPLISH THE GOALS IN THE SCIENCE AND STAFFING PLANS.** 21

1. Global Change and Climate History Program 21

2. National Cooperative Geologic Mapping Program 22

3. Marine & Coastal Geology Program 24

4. Mineral Resources Program 28

5. Earthquake Hazards Reduction Program. 28

CONCLUSION 31

APPENDIX II - SUMMARY OF AGE AND YEARS OF SERVICE COMPARISONS 32

CERTIFICATE OF COMPLIANCE 33

TABLE OF AUTHORITIES

CASES PAGE

Anderson v. Bessemer City, 470 U.S. 564 (1985) 2

Boehms v. Crowell, 39 F.3d 452 (5th Cir. 1998). 11

Cariglia v. Hertz Equipment Rental Corp.,
363 F.3d 77 (1st Cir. 2004) 29

Desert Palace v. Costa, 539 U.S. 90, 123 S. Ct. 2148 (2003) 17

Eastmer v. Williamsville Center School District,
977 F. Supp 207 (WD NY 1997) 11

Gerardi v. Hofstra University, 897 F. Supp. 50 (ED NY 1995) 11

Giacoletto v. Amax Zinc Co. 954 F.3d 424 (7th Cir. 1992) 3

Gusman v. Unisys Corp., 986 F.2d 1146 (7th Cir. 1993) 29

Lam v. University of Hawaii, __ F.3d ___(9th Cir. 1999) 18

Laxton v. Gap Inc., 333 F.3d 572 (5th Cir. 2003) 30

Pottenger v. Potlach Corporation, 329 F.3d 740 (9th Cir. 2003). 19

Reeves v. Sanderson Plumbing Products, Inc. 120 S. Ct. 2097(2000). 9

Roebuck v. Drexel University, 852 F.2d 715, 727 (3rd Cir. 1988). 18

Russell v. McKinney Hosp. Venture, 235 F.3d 219 (5th Cir. 2000) 29

Teamsters v. United States, 431 U.S. 324 (1977). 19

United States v. United States Gypsum Co., 333 U.S. 364 (1948) 2

United States v. Yellow Cab Co., 338 U.S. 338, 342 (1949) 3

STATUTES, REGULATIONS AND FEDERAL GUIDES PAGE

Federal Rules of Civil Procedure,

Rule 52(a) 2

Civil Service Reform Act of 1978, as amended,

5 U.S.C. § 3502(a) 12

Office of Personnel Management RIF Guide,

http://www.opm.gov/rif/general/rifguide.asp#9. 12

SUMMARY OF ARGUMENT

On October 15, 1995, the twelve plaintiff/appellants *David P. Adam, Lanford Adami, Bela Csejtey, Alice S. Davis, James L. Drinkwater, Arthur B. Ford, Arthur Grantz, Chi-Yu King, H. Mahadeva Iyer, Stephen L. Lewis, Allan Lindh, and A. Thomas Ovenshine* and two plaintiff/cross-appellees *James P. Calzia* and *Chester T. Wrucke* in this case were separated in a RIF involving the elimination of 550 scientists, 37% of the workforce in the Geologic Division of the U.S. Geological Survey.

Appellants argue that by failing to apply its own legal conclusion that the RIF was motivated by age discrimination, requiring each Appellant to establish direct evidence of intentional discrimination, ignoring the statistical evidence establishing disparate impact and disparate treatment theories and granting summary judgment on the civil service claims, when it should have permitted *de novo* review of the circumstantial and pretext evidence of age discrimination, the District Court erred. Judgment on race/ national origin/retaliation claims of Iyer and King should be remanded for trial. The damage award to Cross-Appellants Calzia and Wrucke should be affirmed under the clearly erroneous standard. Fees and costs were awarded to for Cross-Appellants Calzia and Wrucke on July 12, 2005. ER at 01402. No objections to that report were filed. The defendant/appellee filed an appeal of the fee award; plaintiffs/appellants cross-appealed but

maintained that the fee award could not be challenged on appeal, because no objections were filed with the court below. Appellee indicated that she is not pursuing the appeal of the fee award. Answering brief, 8.

ARGUMENT

I. THE DISTRICT COURT DID NOT COMMIT CLEAR ERROR IN CALCULATING THE DAMAGES AWARDED TO CALZIA AND WRUCKE.

A. STANDARD OF REVIEW

In deciding whether to reverse the District Court's findings of fact regarding the damage award, the cross-appellant is required to show the bench trial findings were "clearly erroneous". *Anderson v. Bessemer City*, 470 U.S. 564 (1985). "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witness". FRCivP 52(a). "A finding is `clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed." *Id., citing, United States v. United States Gypsum Co.,* 333 U.S. 364, 394 -395. This is so even when the district court's findings do not rest on credibility determinations, but are based on physical or documentary evidence or inferences from other facts. *Id.* When findings are based on determinations regarding the credibility of witnesses, Rule 52(a) demands even greater deference to the trial court's finding. Where there are

two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous. *Id. citing, United States v. Yellow Cab Co.*, 338 U.S. 338, 342 (1949). Under the "clearly erroneous" standard, the appellate court must resolve any evidentiary conflict and every permissible inference in favor of the party who won. *Giacoletto v. Amax Zinc Co.* 954 F.3d 424 (7th Cir. 1992).

B. THE SECRETARY FAILED TO ESTABLISH THAT THE DAMAGES AWARDED TO CALZIA AND WRUCKE WERE CLEARLY ERRONEOUS.

The government does not dispute that defendant discriminated against cross-appellees Calzia and Wrucke based on their age. Appellee's brief, p. 2. Nor does defendant/cross-appellant Norton contest the fact that "the Court has found that Plaintiffs James Calzia and Chester Wrucke are entitled to recover on their claims of age discrimination." Appellees SER 00691. At trial, the burden of proof was on Norton to establish the amount of damages to award Calzia and Wrucke. They offered the expert testimony of Thomas C. Thomas; appellee offered the expert testimony of Jerry Udinsky. District Judge Wilken had the opportunity to observe the demeanor at trial of both experts and to judge their credibility.

Udinsky testified that he reviewed "the depositions of all of the plaintiffs as well as various employment files and records from them. I had whatever documents were produced in terms of job search after leaving the government service or remaining with the government service or remaining with the

government on *emeritus*." See Udinsky TR 1570-1624; D. Ex. Nos. 1230-1252, Economic Loss Report, dated November 18, 2002.

District Judge Wilken ordered supplemental briefing on damages. Appellees SER 00691, CR 350. Both sides filed supplemental briefs and expert declarations from Thomas and Udinsky on the damages issue. SER 00694-00717; SER 00718-00734. On September 30, 2004, Dr. Calzia was awarded $171,522.00 plus prejudgment interest and Dr. Wrucke was awarded $169,714.00 plus prejudgment interest. SER 00735-00736.

The District Court properly awarded back pay under the ADEA, 29 U.S.C. § 626(b). This award was based on specific and extremely reasonable expert evidence provided by Mr. Thomas.[1] SER 00694-00717; See Thomas TR 1509-1568, P. Ex. Nos. 331-354, 357-360. The government seeks review of factual findings concerning the lost wages but fails to meet the clear error standard.

1. James Calzia Was Properly Awarded Back Pay, Including Wage Increases He Would Have Obtained, but for the Discrimination.

The government claims there was no factual basis in the record for awarding lost wages due to the fact that the USGS Personnel Office failed to process the

[1] No compensatory damages for pain and suffering were claimed. All severance pay, retirement benefits, unemployment benefits were deducted from the back pay calculation, to eliminate arguments about double recovery. Medical, life insurance, overtime and other benefits were not sought.

paperwork for Dr. Calzia's promotion from GS-12, Step 10 to GS 13, Step 4 for the period 1995 - 2004. The District Court properly based Dr. Calzia's damages award on Dr. Calzia's testimony, which was undisputed, that Dr. Calzia would have received the promotions. Calzia TR 1368-1370.

At trial, the government objected, based on relevancy grounds, to Dr. Calzia going into more detail about the failure to promote him.[2] *Id.* 1368-1370. Dr. Calzia testified that he was not promoted after he was rehired, even though his USGS supervisors in the National Mapping Division put him in for promotion, the paperwork disappeared into personnel and no reason was given for failing to give him the promotion. *Id.* 1368-1370. No evidence to rebut this testimony was offered. The government's claim that there was no evidence that Dr. Calzia would have been promoted is flat wrong.

Plaintiffs' damages expert Mr. Thomas based his expert opinion on Dr. Calzia's earnings since his termination, employment offers, what he did to try to obtain employment, and review of Udinsky's report and deposition. (Thomas TR

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[2] The government's deposition of Dr. Calzia covered mitigation issues, including details concerning the failure to process the paperwork for promotions which Calzia's managers had approved and put into the Personnel Department process. This deposition, deposition exhibits, including the tax returns, W-2 statements and MSPB record were provided to Udinsky prior to his report. (Udinsky TR 1571:20-1572:6). Udinsky could have provided expert testimony at trial on the failure to promote issue, but did not. Similarly, the USGS personnel staff who were on the witness list but not called to testify at trial, could have testified that they were *not* blocking the promotion of Calzia, but elected not to.

1511-1512) Mr. Thomas testified that his calculation of Dr. Calzia's damages was based on same tax records provided to Udinsky and these records established that Calzia was rehired at the USGS at a slightly lower rate than prior to the RIF. (*Id.* at 1527-1529 and P. Ex. 335 - 336)

There are a number of reasons the Court did not credit the opinion of cross-appellant's damages expert, Jerry Udinsky. Udinsky did not criticize Thomas's report or trial testimony, stating "I have no question of his calculations." (Udinsky TR 1573:8-13, 1621:5-11) Udinsky did not use the government pay charts in his analysis. *Id*. at 1593-1594. He "did not consider the fact that other people [500 employees] were being let go from the USGS as necessarily a factor that would alter significantly the supply and demand conditions in the labor market for Ph.D Geologists". *Id.* at 1600:22-1601:1. Dr. Udinsky's opinion that Plaintiffs' searches for comparable employment were not sufficiently thorough or geographically flexible, were ostensibly based on Dr. Udinsky's own personal experience and on information that he admitted came from USGS managers Jill McCarthy and Michael Carr. (Udinsky TR 1583:14-23, 1588:18-23; D. Ex. Nos. 1230-1252, Udinsky Economic Loss Report, footnote 8). He testified that one was required to go to Alaska or Antarctica in order to mitigate your damages. (Udinsky TR 1588:20-21) Significantly, Udinsky did not find one actual job within the commuting distance of Menlo Park California, or anywhere else, which was

comparable to any of the plaintiffs former USGS positions. Udinsky's trial testimony concerning mitigation is contradicted by the facts as they apply to Dr. Calzia, who in fact did obtain another position following the USGS RIF, but his promotion was blocked since his reinstatement in 1996.

Udinsky's conclusion that the "net period loss" for Dr. Calzia from October 15, 1995 through December 31, 1999 was $22,970.00, based on Udinsky's assumption that "Mitigation Earning Capacity from comparable employment would have been expected to meet or exceed the Lost Earning Capacity from USGS." (Udinsky Report, James Calzia, Ph.D., Economic Loss Calculations, footnote 2) This conclusion is at odds with the facts of Calzia's employment status, of which Udinsky was aware: "Mitigation Earning Capacity reflects actual post-RIF earnings data received by Dr. Calzia from reassignment to another position within the USGS." *Id.* at footnote 8. Dr. Calzia was reemployed in a comparable job by the USGS in the Mapping Division within nine months, as Udinsky assumes would normally occur. (Udinsky TR 1582:15-1583:13). However, Dr. Calzia was not able to catch-up over three years (Udinsky's assumption, see *id*. 1587:15-18) because the USGS Personnel Department blocked his promotions after his supervisors selected him and submitted the paperwork.

It should be recalled that the District Court's finding on Calzia's damages was made after the court's conclusion that "Defendant's stated legitimate non-

discriminatory reason for RIF'ing Dr. Calzia is not credible, that Dr. Worl displayed age-based discriminatory animus, and that the Geologic Division at the time of the RIF was tainted by age-based discriminatory animus, the Court finds that it is more probably than not that Dr. Calzia's age was a substantial factor in his termination". ER 01229:11-17.

The pretext evidence in the record which supports this finding is compelling. Ron Worl did not include Calzia in the Western Mineral Resource's Staffing Plan even though his position was not abolished. Dr. Calzia was Project Chief of the Barstow-Ridgecrest Project and the Northern and Eastern Colorado Desert Ecosystem Management Plan Project, two high-priority mineral resource assessment projects for the Bureau of Land Management, which were listed in USGS' National Mineral Resource Surveys Five Year Plan. ER 01228-9 (Calzia TR1356-1360; P. Ex. 428, 429, 430, 441, MSPB testimony of Worl at AR 1335) Worl assigned the Project to someone who had no knowledge of the project. (Calzia TR 1360, 1377-1378)

Dr. Calzia identified eight positions he could bump into, because he was in a higher Tenure Group (1-B) and had a superior Adjusted Service Computation Date (ASCD) (11/06/61) than the incumbents of those eight positions. *Id.* at 1365. Dr. Calzia was older than each of the incumbents. *Id.* Positions W3467A, W3832 , W3678, and W3640A were positions require differing levels of knowledge of GIS

(global information system) and ARC/INFO (a GIS software package for mapping). *Id*. at 1367-1368. Todd Fitzgibbon testified that it would take one year experience to learn ARC/INFO at the GS-7 level. Younger employees were sent to the one week training course in 1995 and given jobs with these requirements without the one year experience, whereas the older employees who were targeted in the RIF were blocked from consideration for all ARC/INFO positions. The inconsistencies and absurdities of the government's reasons for RIF'ing Dr. Calzia provide an additional basis for accepting the damage calculations of Mr. Thomas, because the burden shifted to the employer, once intentional discrimination was found. *Reeves v. Sanderson Plumbing Products, Inc.* 120 S. Ct. 2097 (2000). Norton has not established the back pay award was clearly erroneous.

2. Chester Wrucke Properly Mitigated His Damages Without Taking the Lower Graded Position Offered to Him.

The government claims that the damage award must be reduced by the amount of pay Dr. Wrucke would have earned if he had accepted a reassignment to a GS-13 position, based on Udinsky's supplemental declaration, in which he calculated the basic pay Dr. Wrucke would have received if he was on pay retention. The District Court's award of $169,714.00 should be affirmed, because it is not "clearly erroneous". It is based on Mr. Thomas's expert report, which found $55,880.00 in past economic loss, excluding his pension, $4,619.00 in prejudgment interest and $109,215.00 in future pension loss. SER 000703. In

sharp contract, Udinsky's expert report states: "Plaintiff [Wrucke] has experienced no economic loss as a result of the incident based upon the analysis presented in this report." (D. Ex. 1252, Udensky Report, Chester Wrucke, Ph.D., Economic Loss Calculations, footnote 9)

At trial, defendant's expert Udinsky testified that all of the plaintiffs failed to mitigate their damages. It was only after the court ordered supplemental briefing on damages that calculated that Udinsky devised a completely new mitigation analysis, postulating that the $169,714.00 award should be reduced by $63,144.00 to $106,570.00. Compare SER 00732 with SER 00729. The Court did not accept cross-appellant's assumptions regarding the effect of pay retention on back pay, which would have required Dr. Wrucke to accept the lower graded position in order to fully mitigate his damages.

Dr. Wrucke in fact retired and continued to work for the USGS under an *emeritus* agreement with the USGS between 1995 and 2000. He did not get "pay retention" during this period. Dr. Wrucke's pay award should not be reduced based on false assumptions that he should have taken the demotion and continued at the "pay retention" rates. Udinsky's speculative analysis which assumed Dr. Wrucke received "pay retention" should be rejected.

It is well established that rejection of an offer of reinstatement cuts off the plaintiff's right to back pay, unless plaintiff acted reasonably in rejecting the

offer. See Weirich, Employment Discrimination Law 2002 Supplement, p. 485-486. The employer has the burden of proof as to whether the unconditional offer cuts off back pay. *Eastmer v. Williamsville Center School District,* 977 F. Supp 207, 216 (WD NY 1997). The employee is only required to accept positions that were better than the position he held when discriminated against. *Boehms v. Crowell*, 39 F.3d 452, 461 (5th Cir. 1998). Plaintiff is not required to accept job with materially different job duties and different working hours from the job applied for. *Gerardi v. Hofstra University*, 897 F. Supp. 50, 55 (ED NY 1995).

Like Dr. Calzia, the District Court found that "Defendant's explanation for the decision to terminate Dr. Wrucke is not persuasive. Further, as discussed above, there is credible evidence that Dr. Worl attempted to protect younger workers from being negatively impacted by the RIF. Thus, considering the evidence that Defendant's stated legitimate non-discriminatory reason for RIF'ing Dr. Wrucke is not credible, that Dr. Worl displayed age-based discriminatory animus, and that the Geologic Division at the time of the RIF was tainted by age-based discriminatory animus, the Court finds that it is more probably than not that Dr. Wrucke's age was a substantial factor in his termination". ER 01230:10-20.

Dr. Chester Wrucke, was sixty-seven (DOB 1927) at the time of the RIF. He was a Veteran in Tenure Subgroup 1-A, with an adjusted service computation date

(ASCD) of 07/14/36.[3] (Wrucke TR 589) At the time of the RIF, he was the Project Chief for the Tenabo Project in Nevada and was also assigned a number of projects, including the Denali Project and the Barstow-Ridgecrest Project, which were listed as priority projects on the National Mineral Resource Survey Program Science Plan. See D. Ex. 1007. (Wrucke TR 595-598, 602) His job should not have been abolished, based on the fact that his projects were funded.

Under the Civil Service regulations, based on his veterans status, he would have been at the top of the GS-14 Geologist 1350 RIF retention register, if one had been properly constructed. However, he was placed in a one person "unique" Competitive Level Code (CLC). (Wrucke TR 617:2-8) Eleven GS-14 Geologist Series 1350 with Dr. Wrucke's same specialty and subspecialty were all in competitive level "AA" prior to March 1995. (Wrucke TR 604:4-10, 605-607) Given his ASCD and veterans preference, but for the change to "unique" CLCs, Dr. Wrucke would have been the last to be reached for release, if proper CLCs been used to group people with similar duties.(Wrucke TR 604:15-24, 617:12-22)

Under the RIF regulations for veterans, it was not proper to offer Dr.

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[3] RIF retention regulations promulgated by OPM for Federal employees mandate that tenure of employment, military preference, length of service, and efficiency or performance ratings be factors in the RIF. **http://www.opm.gov/rif/general/rifguide.asp#9.** Dr. Wrucke received an 20 additional years of service for each year he received an Outstanding performance ratings prior to the RIF, pursuant to 5 U.S.C. § 3502(a).

Wrucke a lower graded position in the Second Round Competition, when there were GS-14 positions which he could bump into and was "qualified" to perform. The government was required to permit Dr. Wrucke to bump into positions at the same grade whose position descriptions called for broadly the same fields of expertise that he possesses. Two of these positions (H0181 and H0723) had duties which were closely similar to and interchangeable with Dr. Wrucke's position. Government witness Dr. Charles Bacon, a Second Round Subject Matter Expert (SME) who examined Wrucke's record, was forced to admit that the USGS position that Wrucke was "unqualified" for Position H0723 was not true. Instead, Dr. Bacon testified that Wrucke "was in a gray area" in terms of being able to conduct the work of this position. The Agency's case was weakened further by the fact that for Positions H0181 and H0723, Wrucke was judged "not qualified" because he had not worked in the same geographic area as the incumbents, whereas he was considered "qualified" for a position (W2475) at a lower grade for an area where he had never worked. D. Ex. 1191. He was RIF'd when he rejected the offer of this position, and continued to work as *emeritus* for 30-40 hours per week until the USGS curtailed the position in 2000.[4] (Wrucke TR 603, 613-614).

[4] Dr. Wrucke testified that he rejected the offer to bump into Brett Cox's GS-13 position because Cox (who was considerably younger) had a growing family and Wrucke had 1-A veterans status which gave him bumping rights to a GS-14 position. D. Ex. 1193. (Wrucke TR 608)

Cross-Appellant unlawfully discriminated against Appellant Wrucke on the basis of age when it released him from his competitive level, blocked him from bumping into the existing GS-14 positions, and separated him from federal service. Dr. Wrucke, due to his veterans status, outstanding performance, and fully funded projects should not have been RIFd.. He looked for Geologist positions, but there were very few available. *Id.* at 610. The District Court rejected Udinsky's analysis that Dr. Wrucke's damages award should be reduced because he was offered a GS-13 position and did not accept the lower graded position. Cross-appellant failed to prove the damage findings were clearly erroneous.

II. THE DISTRICT COURT'S AGE DISCRIMINATION FINDINGS ARE INCONSISTENT.

A. THE DISTRICT COURT FOUND AGE WAS A FACTOR IN THE RIF.

The government states: "The district court found that age was not a factor in any of the decisions affecting appellants in the RIF". See Answering Brief of Defendant-Appellee at 45. This is false. The District Court found that there was age biased remarks affecting the RIF, but limited the application to only Appellees Calzia and Wrucke. ER 01194-01230. The District Court found that "the Transition Team Report goes beyond this legitimate concern to explicitly express concern with the age of the USGS's workers. Pl. Ex. 7at 10 ("[s]ome segments of the USGS currently are suffering from an aging, high-grade workforce"; "[a]n

aging workforce is a critical problem"). Nor can the Transition Team's report's references to age be considered to be merely a proxy for experience, because the Transition Team report discusses age and experience as separate characteristics. Pl. Ex. 7 at 10. ("a healthy distribution of age, grade, and skills"; "an aging, high-grade workforce"). Thus the Transition Team's Report strongly suggests that many USGS managers and employees were aware that the USGS, and particularly the Geologic Division, had an aging workforce and believed that this had negative implications for the future of the USGS. Further, the Transition Team report was relied upon by USGS management in planning change. Eaton TR 809." ER 01196:27-01197:15. The findings of the District Court described Eaton's role in disseminating a plan to effectively force out older workers. Eaton gave videotaped speeches at the USGS Regional Offices in Menlo Park, CA, Denver, CO and Reston, VA shortly after his appointment in March 1994, during which he used ageist stereotypes, hostility to older employees, a dinosaur poster, and jokes, together with the Transition Team's "Vision" Report.

> Dr. Eaton explicitly tied this concern to the rules governing RIFs, which he described as having the undesirable effect of depriving of their jobs those most recently hired, including women, minorities, and the young. Pl . Ex. 7 at 45-46. Therefore, the Court finds that Dr. Eaton associated resistance to change in the Geologic Division with older workers and the ability for change with the ability to hire new younger workers.

ER 01199:12-19.

The District Court further found "[i]n accordance with Dr. Eaton's decision to go forward with the RIF, on March 9, 1995, then Acting Chief Geologist Filson issued a "General Notice of Workforce Reduction" and conducted briefings in order to answer questions about the RIF." ER 01207:2-4, 11-13. A flyer containing a Larson cartoon which denigrates older people and notified staff of the time, place, location and topic of the meeting was created and distributed by Ramseyer, secretary to the Assistant Chief Geologist for the Western Region. She claimed she did not intend to make fun of older employees, but "the Court is skeptical of this explanation given the cartoon's clear reference to older people." *Id*. 01207:13-27. The District Court does not state that these anti-older worker attitudes and ageist stereotypes were "stray remarks", or that plaintiff's failed to establish the remarks were "tied directly to plaintiff's termination", or "unrelated to decisional process", as intimated by the Defendant-Appellant. Answering Brief, 46-47. Rather, "[t]he District Court found that the Geologic Division's culture was "tainted with age-based discriminatory animus." Id. 47. It was error to fail to apply these conclusions to the twelve Appellants.

B. **THE FINDING THAT THERE WAS INSUFFICIENT EVIDENCE OF AGE DISCRIMINATION FOR APPELLANTS IS INCONSISTENT WITH THE DISTRICT COURT'S FINDINGS FOR APPELLEES CALZIA AND WRUCKE.**

The District Court's found that Calzia's and Wrucke's age was a substantial

factor in their termination. ER 01229:11-17[5]; ER 01230:10-20.[6]

1. Under *Costa,* since Age Was Found to Be a "Substantial Factor" in the RIF, Remaining Appellants Are Not Required to Establish Age Discrimination by Additional Direct Evidence.

Defendant claims that *Desert Palace v. Costa,* 539 U.S. 90, 123 S. Ct. 2148 (2003) which was decided on June 9, 2003, was not raised before the district court and therefore should not be considered by the appellate court. See Answering Brief at 49. They are mistaken.[7] See Plaintiffs' Closing Argument filed September 16, 2003 at 3, CR 339 and Plaintiff's Motion for New Trial, filed July 6, 2004 at 13, CR 352 which discusses the application of *Desert Palace v. Costa* to this case. Given the District Court's findings that "age was a substantial factor in [their]

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[5] "Defendant's stated legitimate non-discriminatory reason for RIF'ing Dr. Calzia is not credible, that Dr. Worl displayed age-based discriminatory animus, and that the Geologic Division at the time of the RIF was tainted by age-based discriminatory animus, the Court finds that it is more probably than not that Dr. Calzia's age was a substantial factor in his termination".

[6] "Defendant's explanation for the decision to terminate Dr. Wrucke is not persuasive. Further, as discussed above, there is credible evidence that Dr. Worl attempted to protect younger workers from being negatively impacted by the RIF. Thus, considering the evidence that Defendant's stated legitimate non-discriminatory reason for RIF'ing Dr. Wrucke is not credible, that Dr. Worl displayed age-based discriminatory animus, and that the Geologic Division at the time of the RIF was tainted by age-based discriminatory animus, the Court finds that it is more probably than not that Dr. Wrucke's age was a substantial factor in his termination".

[7] The District Court's legal conclusions, particularly when they conflict with a recent U.S. Supreme Court decision, are not reviewed under the "clearly erroneous" standard, as Appellee claims. See Answering Brief at 50.

termination", *supra*, it was error to require each of the twelve Appellants to submit direct evidence of age discrimination". Under *Desert Palace, Inc.,* the burden of persuasion shifts to the defendant when a plaintiff in a proves that plaintiffs' age(s) played a motivating part in an employment decision. "The defendant may avoid a finding of liability only by proving by a preponderance of the evidence that it would have made the same decision even if it had not taken [plaintiffs' age(s)] into consideration." *Id.* The District Court erred by not shifting the burden to the defendant, after finding that age was a factor in the RIF for Calzia and Wrucke. Furthermore, defendant misstates the law when she claims that each plaintiff is required to "present evidence that the relevant decision makers had a discriminatory animus" after a finding that "the Geologic Division's culture was 'tainted with age-based discriminatory animus '". "A plaintiff in a [] discrimination case need not prove intentional discrimination at every stage of the decisionmaking process; impermissible bias at any point may be sufficient to sustain liability." *Lam v. University of Hawaii*, __ F.3d ___(9th Cir. 1999), citing *Roebuck v. Drexel University*, 852 F.2d 715, 727 (3rd Cir. 1988).

C. THE STATISTICAL EVIDENCE ESTABLISHED THE REDUCTION IN FORCE HAD A SIGNIFICANT DISPARATE IMPACT ON OLDER EMPLOYEES AND SUPPORTED THE DIRECT AND PRETEXT EVIDENCE OF AGE BIAS.

Appellee complains that Appellants have not identified "the specific

employment practices that are allegedly responsible for any observed statistical disparities." See Answering Brief at 51. The disparate impact theory was used to challenge the RIF, which this Circuit has held constitutes a specific business practice. *Pottenger v. Potlach Corporation*, 329 F.3d 740 (9th Cir. 2003). The disparate impact theory differs from the disparate treatment theory because no discriminatory intent is required under the disparate impact theory. *Teamsters v. United States*, 431 U.S. 324, 335-36, 15 FEP Cases 1514, n. 15 (1977). However, the statistical evidence supports the direct and pretext evidence of age bias.

Appellee's Statistical Expert, Dr. Palmer performed an analysis based on the same type of data the Appellants used. Athough the RIF was nationwide in scope, Palmer was not provided POD information for the employees in Denver Region or Reston Region and was only given employment data from Menlo Park. (Palmer TR 548:25-549:5) He requested national data, but was specifically told not to analyze it. (Palmer TR 576:15-22) Thus, two-thirds of the employees considered for the RIF were excluded from his analysis. Relying on this same database, as well as retention registers provided by the defendant (Lepowsky TR 511) (P. Ex. 785, Spreadsheet containing database from retention registers, used by Dr. Palmer, TR 538-540), Dr. Palmer testified that USGS Geologic Division employees in Menlo Park age 50 and over "were adversely affected at a significantly higher level than the younger people." (Palmer TR 522:8-12)

Statistical analysis of who was RIFd/not RIFd showed that the chance that age was not a factor in the RIF was very low. Opening Brief at 36-37. Mr. Lepowsky and Dr. Switzer tested the null hypothesis that the age of an individual did not affect the probability that the individual would be 'RIF'd'. Each analysis yielded a P-value that expressed the probability that the observed data (RIF results by age groups) could have arisen by chance alone from an unbiased process. For the nationwide permanent staff, 351 out of 1853 employees were 'RIF'd', and the P-value for the analysis was 6:10,000.For professional staff nationwide, the figures were 209 out of 1199 'RIF'd', and the P-value was 10:1,000,000. Docket No. 324, P. Ex. 314, Switzer's Amended Surrebuttal Report and Docket No. 324, Lepowsky TR 477. In Menlo Park, 61 of 335 permanent professional staff were RIF'd, and the P-value was 4:10,000. Docket No. 324, Lepowsky TR 475-476. Lepowsky testified that the fact that the p-values are extremely small is strong evidence that the observed relationship between age and the probability of being RIF'd is not mere happenstance. This extremely strong evidentiary showing proves age was a factor for purposes of establishing both the disparate treatment and disparate impact claims.

It is significant that the government does not discuss Dr. Palmer's analysis or mention the fact that Norton fought to keep out the more detailed analysis Mr. Lepowsky gave in his deposition prior to trial. Mr. Lepowsky ruled out the

innocent causes for the sharp disparity of treatment, but was not permitted to give his full analysis at trial. Lepowsky testified that the conditional logistic regression analysis used by Palmer does not allow calculation of the estimated probability that each individual would be adversely affected in the RIF. (Lepowsky TR 483-484) He also showed how Palmer's conclusions obscured the data by combining the managers who were not in scientific positions and administrative support staff in Pod 0 and splitting up all of the scientists into Pods 1-10. Palmer admitted that even with all of the problems in his analysis, if he had used a one-tailed, rather than a two-tailed analysis, three out of eight of his findings would show that age was a factor. (Palmer TR 574-576)

D. THE USGS LOST THE SCIENTIFIC EXPERTISE OF APPELLANTS WHICH WAS NEEDED TO ACCOMPLISH THE GOALS IN THE SCIENCE AND STAFFING PLANS.

Appellee's contention that the statistical evidence failed to take into consideration the specific subject matter expertise needed to accomplish the goals in the USGS Program Plans must be rejected for a number of reasons. The administrative record contains dozens of instances in which the person RIF'd had the subject matter expertise, but was replaced by a younger person.

1. Global Change and Climate History Program

At the time of the RIF, David Adam was a Project Chief working in the Klamath Basin on the Five Year Plan (1995-1999) of the Global Change and

Climate History Program. (D Ex 1011) He had been working for the past five years on the design of the Program's state-of-the art Pollen Extraction Laboratory in Menlo Park (TR 35:3-17) and, from 1971 to 1995, had designed and was modifying the design of the data base for identifying and tracking sediment cores. (P.Ex. 386) In 1994, he received a Superior Service Award for this work. (TR 36:10-11; P. Ex. 386) After the RIF, the same work in the Klamath Basin continued. (TR 40:21-25) A new, younger, project chief, Steve Coleman, who was based in Woods Hole, Mass, was appointed. (TR 42:23-24). The Pollen Extraction Laboratory, which cost the government well over a half a million dollars was completed after Dr. Adam was RIFd and had to be ripped out because there was no one left in Menlo Park to use it. Meanwhile, the pollen cores which were extracted at a cost of many millions of tax dollars, were sent unrefrigerated to Denver, at which point they were worthless. The argument that the Program Counsel did not consider or discuss the age of the scientists is specious, given the fact that all notes on these discussions were shredded and the names and ages of the three Paleontologists were known to Mr. Poore.

2. National Cooperative Geologic Mapping Program

Norton claims that age was never considered in staffing the Mapping Program. Answering Brief at 14-15. The USGS records show that all of the Alaska Branch employees over 57 were RIF'd. Carter testified that John Sutter, Geologic

Mapping Office Chief who worked in Reston, VA with Eaton, was responsible for the decision not to fund the Alaskan Mapping Program under the Office of Regional Geology. SER 420. The funding for Southeastern Alaska Project came out of Alaska Mineral Resource Appraisal Program (AMRAP) prior to the RIF. Carter's decision not to include older employees on the staffing plan was consistent with Sutter/Eaton's plan to eliminate them.

Bela Csejtey was the Project Chief for the Denali National Park Mapping Project. Although the Denali National Park Mapping Project was not on the science plan in Spring 1995, the project was not discontinued, as claimed. Answering Brief at 27. After the RIF, Allison Till, who is younger than Csejtey, was assigned as Project Chief for the Denali National Park Mapping Project. Both the project description written by Csejtey and by Till had the same objectives: a 1:250,000 scale geologic map of the Mt. McKinley quadrangle, and a geologic map of the whole park. This project and Csejtey's work continued after eight senior team members were RIF'd. Alison Till superved a staff of 22 substantially younger employees. (TR 289:8 - 290:21)

The government erroneously claims that the Southeastern Alaska Project was discontinued and the Sitka Quadrangle study was no longer active. Answering Brief at 29. However, Dave Brew was Project Chief of the Southeastern Alaska Project and this project was continued by Susan Karl. In April 1995, Arthur Ford

was in fact working in AMRAP in South Eastern Alaska, which included the Sitka/Greenscreek Ore Deposit Project. See Cross-examination of Ford. SER 126.

The government tries to justify eliminating appellants positions by claiming that it was more costly to have Csejtey and Ford work in Alaska. Answering Brief at 17, n. 6. In fact it was more cost effective to have them work from Menlo Park, due to the 25% COLA given to employees living in Alaska. The travel costs were never cited as a basis for eliminating the positions of Csejtey and Ford and there was no evidence of this presented during the administrative stage, the trial, or anywhere else in the record. Field expenses would be the same for an employee living in Anchorage as an employee living in Menlo Park, because the bush pilots charge the same price to get to the field, and the lodging and food costs are the same. The increased COLA costs (more than $10,000 per employee per year) would be greater than travel cost of coming to Alaska from California.

3. Marine & Coastal Geology Program

Appellee contends that Michael Field, Branch Chief for Pacific Marine Geology did not discuss age during the strategic review. Answering brief at 16. However, it is clear that he knew the employees in his Branch and played an active role in eliminating older scientists from the staffing plan, and blocked them from consideration for bumping and retreating during Round II of the RIF by providing false information to the SMEs.

Field manipulated the staffing plan to eliminate Appellant Alice Davis's position even though her project, the Line Island Chain Project, continued to be funded after the RIF. (TR 913:14-17) She was asked to rewrite her PD in Spring 1995. She was instructed by her supervisor to include only the duties she was performing at the present time, and ordered to take out work that she had done previously in the same position, including work on the Alaska Project, which narrowed the scope of her PD. (TR 903:7-21). A younger employee was coached to include in her PD "knowledge" requirements which were specific to herself, namely the Ph.D. research she had completed, which was not funded by the USGS., in order to make it more difficult to bump into the position. During Round II, Davis' personnel file did not include the PD for her GS-9 Pacific Marine Biology Branch job which she had held in 1983-84. (TR 897:17-898:14) As a result, she was not considered for bumping into GS-9 positions. (TR 900:12 - 901:24) The primary duties the Marine Minerals group performed were essentially identical to the duties listed on Jane Reid's PD.

Stephen Lewis was the Chief of the Central California Earthquake Hazards Project, work that was fully funded for the next five years, according to the Science Plan for the Marine and Coastal Geology Program (TR 685:14-19; TR 687: 5-7; TR 688:6-24; D Ex 1010) The Earthquake Hazards Project continued to be funded and staffed after the RIF by thirty-two year old research scientist who

was appointed Chief. (TR 689:10 - 690:2) Dr. Lewis was not found to be qualified (despite his extraordinary competence) to bump or retreat into any positions in the Marine and Coastal Service, he was not considered for any positions involving geographical information systems and mapping of data, in which he was an expert, and, he was not given the reasons for why he was found to be "not qualified". (TR690:3 - 692:7) Dr. Lewis also claimed in the MSPB proceedings that he had been RIF'd in retaliation for blowing the whistle on Gary Hill for accepting gifts from government contractors who provided a vessel for the GLORIA Project. (TR 697:15 - 698:2; TR 700:13 - 703:17) Mike Field, who was appointed by Gary Hill, was aware of the protected disclosure.

Arthur Grantz received a letter dated Oct. 5. 1995 letter proposing the removal of ST (Senior Scientist) positions, including Grantz', from the USGS, in which USGS Director Eaton mischaracterized the work that Dr. Grantz had been doing by saying that he had performed the lower grade duties of organizing Arctic Ocean ship time and operations to collect samples and data for other scientists to analyze, when in fact Dr. Grantz had performed his senior scientist PD duties of collecting and interpreting data and writing research papers on the climate history of the Arctic Ocean. (TR1325:15 - 1326:7) Dr. Grantz' co-Project Chief, Dr Phillips, eleven years his junior, continued to work on the project after the RIF, with the help of Dr. Grantz while in *emeritus* status. (TR 1327:3-13) Although the

letter stated that Dr. Grantz' position was being abolished because Arctic Ocean studies were being de-emphasized, these studies were continued Dr. Grantz continued the work as *emeritus* . (TR 1332:20 - 1333:19; P. Ex 525) The Arctic Ocean studies were the "Highest Priority Science Topics" according to a white paper issued in May, 1996 by the USGS. (TR 1337:6-24; P. Ex. 525 and 515)

Dr. Grantz was found not "qualified" to retreat or bump into any of the 168 positions for which he was considered (TR 1328: 15-19) (D. Ex. 1154) even though he performed and supervised the work of some of those positions. (TR 1332:1-19) The SMEs did not have Dr. Grantz' PDs for the period before 1986 when he was a GS-15. They used an outdated PTR to evaluate whether his GS-15 duties were "essentially identical". He was declared unqualified for all positions. During Round Two, Michael Field told the SMEs that he did not qualify for the positions he was being considered to retreat into, based on the false statement that he had no experience mapping active faults, that there were no active faults to map in his study area in the Arctic continental shelf and slope of Alaska, that he had never used high-resolution (i.e. relatively high seismic frequency) seismic reflection data to map active faults. As a result, the SME Panel ruled that he was not qualified to retreat into those positions in Marine Geology.

On August 14, 1995, the day he went to the USGS to pick up his Specific RIF notice, Dean Anderson, Chief of Personnel told him "it was age." (TR

1349:10 -1350:4; TR 1351:8 -1352:8) In December 1995, Dr. Grantz was awarded the Distinguished Service Award by the Department of the Interior (its highest service award) specifically for the work he was doing in Marine Geology.

4. Mineral Resources Program

A. Thomas Ovenshine became a member of the SES as Chief of the Office of Mineral Resources in 1981 and in 1984, as Chief of the Office of International Geology. (TR 52:25 - 53:8) In 1994, after Eaton was hired by the USGS he voluntarily resigned from the SES position to become a GS-15 scientist with a guarantee give by Eaton of four years of safe pay. (TR 53:7-9; TR 1:55:20-25; Plaintiff Ex. 623). At the time of the RIF, Dr. Ovenshine was bumped by an employee who was in a higher tenure group because of his veteran status, but who was admittedly "not qualified" for the duties of this position. (TR 58:1-4) When Dr. Ovenshine reminded Mr. Eaton by e-mail of his "safe pay" agreement, Mr. Eaton responded by that he "must of legal necessity be completely silent of the issue . . ." (TR 59:7-10; P. Ex. 626 and 628)

5. Earthquake Hazards Reduction Program

Allan Lindh was bumped from his GS-15 position as a Series 1313 Geophysicist (P. Ex. 567) to a GS-12 Operational Geophysicist (TR 144:18-21), a position from which he retired without being promoted in 2003. (TR 154:1-6) Dr. Lindh was Chief of the Branch of Seismology from 1990 to 1994, and shortly

before the RIF in 1994; he was rotated out of that position, to be replaced by Walter Mooney, and to return to his GS 15 position. (TR 140:18-22; TR 146:7-12) Despite the fact that the work which was in his GS-15 PD was a central part of continuing USGS programs, including the Earthquake Program and his position was on the staffing plan, Dr. Lindh was targeted to be RIF'd and his name was removed from the May 17, 1995 staffing plan (TR 151:14-25; TR 152:4-9; TR 144:14-15; TR 145:16-25) after he disagreed with Mooney in a May 25, 1995 meeting over the treatment of Dr. Iyer, a minority scientist, who would later also be RIF'd. (TR 147:1 - 148:20) Dr. Iyer and Dr. King had race/national origin and retaliation claims which were discussed in Appellant's opening brief.

"An employer cannot escape responsibility for willful discrimination by multiple layers of paper review, when the facts on which the reviewers rely have been filtered by a manager determined to purge the labor force of older workers." *Cariglia v. Hertz Equipment Rental Corp*., 363 F.3d 77 (1st Cir. 2004), citing *Gusman v. Unisys Corp*., 986 F.2d 1146, 1147 (7th Cir. 1993). The Subject Matter Experts (SMEs) in the Menlo Park offices of the USGS, were in the "cat's paw" position. "If the employee can demonstrate that others had influence or leverage over the official decisionmaker, and thus were not ordinary co-workers, it is proper to impute their discriminatory attitudes to the formal decisionmaker." *Russell v. McKinney Hosp. Venture*, 235 F.3d 219, 226 (5th Cir. 2000). The cat's

paw analysis is shown in this case by the fact that (1) that a co-worker exhibited discriminatory animus, and (2) that the same co-worker "possessed leverage, or exerted influence, over the titular decisionmaker." *Id*. at 227; *see also Laxton v. Gap Inc.*, 333 F.3d 572, 583 (5th Cir. 2003).

Appendix II summarized information provided by appellee in discovery referred to as the RIF Assignments Rating Sheets. These listed each position which plaintiffs were allegedly considered in Round II of the RIF. Each of the plaintiffs were evaluated by SMEs for bump or retreat to many positions, based on their professional and technical record, position description, and other documentation. Appellants explained how the RIF procedures were manipulated so as to preclude them from being found "qualified" for bumping into positions and/or an overly narrow definition of "essentially identical" was used to deny them retreat rights to other positions. CR 201-223. Appendix II summarizes data for all Appellants by comparing Appellants to the comparators, by age and years of service. It shows that on average, Appellants were older than 95 % of their comparators; seven were the oldest of all their comparators. On average, Appellants had served more years than 98.4 % of their comparators; eleven of the Appellants had served more years than any of their comparators. See Appendix II. The MSPB Hearing Testimony illustrates how the disparate impact was due to unlawful consideration of Appellants' age, rather than other factors.

CONCLUSION

For all the foregoing reasons, this Court should affirm the damage awards to Appellees James Calzia and Chester Wrucke. The District Court's findings and conclusions that age was a substantial factor in the RIF should be applied to the twelve Appellants because there was direct evidence that the RIF was aimed at older scientists, the statistical evidence showed that there was a 1/1,000,000 (one in one million) chance age was not a factor in te RIF, and the reasons given for RIFing Appellants were pretextual. Summary judgment of Dr. Iyer and Dr. King's race/national origin and judgment on their retaliation claims was improper and should be reversed and remanded for trial. All parties agree that the order granting reasonable attorneys fees and costs for the representation of James Calzia and Chester Wrucke prior to the appeal should not be disturbed.

Dated: May 31, 2006

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Mary Dryovage
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Dated: May 31, 2006

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APPENDIX II

SUMMARY OF AGE AND YEARS OF SERVICE COMPARISONS

PLAINTIFF NAME	# OF POSITIONS CONSIDERED AND DENIED (RIF ASSIGNMENTS RATING SHEET)	# OF PEOPLE RETAINING POSITIONS	% OF COMPARATORS YOUNGER THAN PLAINTIFF	% OF COMPARATORS WITH FEWER YEARS OF SERVICE THAN PLAINTIFF
ADAM, DAVID P.	137	123	96	100
ADAMI, LANFORD	137	121	100	100
CALZIA, JAMES P.	101	73	88	100
CSEJTEY JR., BELA J.	170	149	100	100
DAVIS, ALICE	74	54	98	96
DRINKWATER, JAMES	65	45	82	96
FORD, ARTHUR B.	209	200	99	100
IYER, MAHADEVA	142	153	100	100
GRANTZ, ARTHUR	168	131	100	100
KING, CHI-YU	134	121	100	100
LEWIS, STEPHEN D.	41	30	83	90
LINDH, ALLAN G.	164	154	91	94
MANN, DENNIS M.	94	73	86	100
OVENSHINE, THOMAS	197	175	100	100
WRUCKE, CHESTER	105	89	100	100
			Average: 95%	**Average: 98.4%**

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(B), F.R.A.P., the undersigned certifies that this brief complies with the type-volume limitations contained in that rule. It was produced in Word Perfect 11 and contains words and lines, exclusive of the cover, table of contents and authorities, corporate disclosures statement and certificates of compliance and service.

Dated: May 31, 2006

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Dated: May 31, 2006

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Docket No. 04-17365

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

DAVID P. ADAM *et al.,*

Appellants/Plaintiffs,

v.

GAIL A. NORTON, SECRETARY,
U.S. DEPARTMENT OF THE INTERIOR,

Appellee/Defendant.

CERTIFICATE OF SERVICE

I certify that I have served a copy of the foregoing APPELLANT'S OPENING BRIEF this 31st day of May 2006 on counsel for the parties by depositing two copies in the U.S. Mail, first class postage prepaid, prior to 5:00 p.m. on May 31, 2006, addressed to them as follows:

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Dated: May 31, 2006

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