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BEFORE THE ENVIRONMENTAL APPEALS BOARD
ENVIR. APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

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In re: :
J. Phillip Adams : CWA Appeal No. 06-06
Docket No. :
CWA-10-2004-0156 :

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HEARING

ORIGINAL

Washington, DC
Thursday, May 3, 2007

REPORTED BY:
DONALD R. THACKER

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P R O C E E D I N G S

HON. SCOTT FULTON: Good afternoon.

Argument this afternoon will proceed in accordance with the Board's Order dated March 27, 2007.

As specified in that Order each side will have 30 minutes, and five minutes allotted time for rebuttal. Counsel for Appellee, Jacob Adams, will participate today by video conference, but the argument will proceed in the same manner as if both parties were physically present before the Board.

While we no doubt benefit from your prepared remarks, we trust that you will appreciate the primary value of or all argument to the Board in bringing further clarity to our understanding of the arguments presented in the briefs.

Ready to begin?

MR. RYAN: Yes, Your Honor. I am Mark Ryan, and I have with me at counsel table Gary Jonesi of the Office of Enforcement Compliance of EPA and also Kevin Minoli of the Office of General Counsel.

THE COURT: You will be presenting the

1 entire argument though, Mr. Ryan?

2 MR. RYAN: Yes, I will.

3 HON. SCOTT FULTON: Counsel for Appellee,
4 Mr. Adams.

5 MR. T.J. BUDGE: Yes, Your Honor, my name
6 is T.J. Budge, I will be presenting the argument,
7 and with me at counsel table is Randall C. Budge.

8 HON. SCOTT FULTON: Very well, thank you,
9 Mr. Budge, and welcome.

10 MR. T.J. BUDGE: Thank you.

11 HON. SCOTT FULTON: Without further ado
12 then, Mr. Ryan, you may proceed, and if you could
13 begin by indicating what you plans are, do you wish
14 to reserve time for rebuttal?

15 MR. RYAN: Your Honor, yes, I would like
16 to reserve five minutes for rebuttal in the case.

17 I will address the three issues that were
18 raised by the board at its oral argument Order, and
19 I did come today prepared to talk about any other
20 issues that are relevant to the Board's issue today.

21 I would like to start off by saying that
22 the case began in the summer of 2001 with Respondent

1 bulldozing a portion of Potter Creek, a small creek
2 in southeast Idaho, and in doing so with the purpose
3 of constructing a road crossing to move his farm
4 equipment from one road to another and to build an
5 impoundment to serve as a fish pond. He did so
6 without the benefit of a Section 404 permit issued
7 by the Corps of Engineers.

8 This was the summer of 2001. Five years
9 later in the summer of 2005, we went to hearing on
10 July 27th, 2005. Six business days prior to the
11 hearing, on July 19, 2005, respondent filed a Motion
12 to Dismiss alleging, asserting for the first time in
13 the case that the Section 404(f)(1)(E) farm road
14 exemption applied.

15 To whittle down the issues before the
16 Board today are, 1, did he timely raise the 404(f)
17 defense and 2, did the Administrative Law Judge, as
18 presiding officer in this case, properly place the
19 burden on him, the Respondent, to prove by a
20 preponderance of the evidence that he met the
21 requirements he was asserting of the 404(f)? The
22 answer to both questions are no.

1 First, with respect to the waiver
2 argument, he did not timely raise this defense, and
3 EPA was severely prejudiced in his late assertion of
4 the 404 (f) defense.

5 HON. EDWARD REICH: As I understand it
6 your argument is he in fact waived the defense by
7 not raising it in the Answer?

8 MR. RYAN: He waived the defense by not
9 raising it in the Answer and by not asserting it the
10 prehearings, plural, he had three of them, and by
11 not raising it six business days prior to the
12 hearing.

13 HON. EDWARD REICH: Could he have filed a
14 Motion to Amend his Answer, under 22.15, as late as
15 six business days before the hearing? I am sure you
16 would have opposed it.

17 MR. RYAN: Yes.

18 HON. EDWARD REICH: But under the
19 regulations he could have filed that, could he not?

20 MR. RYAN: Certainly, he could have filed
21 any motion he wanted, Your Honor.

22 HON. EDWARD REICH: And if we had the ALJ

1 had granted it then it would no longer have been
2 waived as a defense?

3 MR. RYAN: I do not entirely agree with
4 that, no. I would think it would still have been
5 waived. If I had been faced with that situation,
6 which I was not, I would have certainly opposed the
7 motion, if for no other reason, for the purposes of
8 judicial economy.

9 This is an out of town hearing, we have
10 got court reporters lined up, we have got my
11 co-counsel flying in from Seattle, the judge flying
12 from Washington, D.C. I don't believe a single
13 witness in this case, actually perhaps one, lived
14 like right around Pocatello.

15 HON. EDWARD REICH: I understand what you
16 are saying, but I am just trying to understand why
17 you obstruct this. If, notwithstanding all of
18 that, the ALJ had granted the Motion to Amend the
19 Answer so that the Answer as Amended included this
20 defense, on what basis would you still say it was
21 late?

22 MR. RYAN: I would say it was late

1 because, number 1, six business days from hearing we
2 are prepared to go and he can't wait until the last
3 minute to raise an entirely new defense.

4 In the alternative, hypothetically if I
5 was faced with this situation, which I wasn't, I
6 would have asked for an extension of time, to move
7 the hearing down the road, because I simply could
8 not prepare a case for rebuttal of a defense that
9 had not been raised.

10 HON. SCOTT FULTON: Did you ask for
11 extension of time?

12 MR. RYAN: I did not ask for an extension
13 of time, Your Honor. I filed a Motion to Strike the
14 late-filed Motion to Dismiss. The deadline for
15 dispositive motions in this case was in June 2005.
16 Six weeks later, on the eve of trial, six weeks
17 after the deadline for dispositive motions, he filed
18 a Motion to Dismiss and raises for the first time in
19 the litigation, this defense.

20 Put yourself in my position. As a
21 plaintiff it puts me in a very difficult position to
22 have an entirely new defense raised. I had a

1 choice. I made my choice to file a Motion to Strike
2 on the grounds of his having missed the deadline for
3 dispositive motions by six weeks. That is not the
4 only deadline he met in this case.

5 And I was severely prejudiced in having,
6 one, to drop my preparation for the case I was
7 preparing for, which previous that date had focused
8 on Waters of the United States, real party in
9 interest, I was preparing for that.

10 I had to drop everything I was doing in
11 that preparation, and focus on this motion that he
12 filed late, and alternatively, start preparing a
13 whole new rebuttal to a whole new defense in the
14 case which was scheduled for the next Wednesday.

15 HON. EDWARD REICH: In your view if there
16 is a waiver, is it self-executing, does it
17 automatically attach or is their discretion on a the
18 part of the ALJ to either treat it as waived or not
19 treat it as waived?

20 MR. RYAN: I think there is clearly
21 discretion, Your Honor. And the Board has held, in
22 a series of cases, Lazarus, Carroll Oil, all of

1 those cases, in interpreting 22.15(b) which requires
2 the defendant to assert his Answers, they say they
3 have shown there was leeway would be given under
4 certain circumstances where no prejudice is shown.

5 HON. EDWARD REICH: So by looking at the
6 waiver are we looking at what the ALJ abused his
7 discretion in not treating it as waived?

8 MR. RYAN: Yes, that would be correct.

9 HON. KATHIE STEIN: Can you interpret the
10 ALJ's decision as in effect ruling on your Motion to
11 Strike and concluding that there is no prejudice?

12 MR. RYAN: I am sorry, you cut out.

13 HON. KATHIE STEIN: I am sorry about that.
14 Can you in effect interpret the ALJ's decision as
15 effectively implicitly ruling on your Motion to
16 Strike and ruling against Agency on the motion?

17 MR. RYAN: No, and the reason I would not
18 interpret the initial decision that way is that he
19 specifically ruled on the Motion to Strike at the
20 outset of the hearing from the bench. I filed a
21 Motion to Strike on July 21st, two days after the
22 Motion to Dismiss was filed. I think I filed my

1 Motion to Strike the same day I received his Motion
2 to Dismiss.

3 The judge did not rule on it prior to
4 arriving in Pocatello for the hearing. At the
5 outset of the hearing I asked the judge, Your Honor,
6 do you intend to rule on my Motion to Strike? He
7 did, and that is in the record and I cited it in my
8 brief.

9 HON. KATHIE STEIN: That is where he
10 discussed he ruled against you?

11 MR. RYAN: That is correct, Your Honor,
12 and he did not again revisit the issue in his
13 initial decision.

14 HON. KATHIE STEIN: Does he evaluate the
15 issue of prejudice in the way in which you had to go
16 forward?

17 MR. RYAN: He does not evaluate prejudice
18 as far as I know.

19 HON. SCOTT FULTON: What I would say is
20 that a person in your position might have, in
21 addition to moving to strike argued in the
22 alternative for an extension or continuance of the

1 evidentiary hearing, but you did not do that,
2 correct?

3 MR. RYAN: I did not do that, Your Honor.
4 I felt quite strongly that he had missed the
5 deadline for dispositive motions. Deadlines have to
6 mean something. They are not supposed to be
7 procedural niceties, they are there for a reason, to
8 put us on notice of what we are going to trial on.
9 And he missed his deadline by six weeks, one.

10 And two, he waited, despite having gotten
11 counsel in this case, six months prior to filing of
12 the Complaint in this case, and that is in the
13 record, that counsel became involved in this case
14 six months prior to filing the Complaint, and he
15 waited until six days prior to the trial to raise
16 the defense that could have ultimately disposed of
17 this case.

18 HON. SCOTT FULTON: Can you please briefly
19 review for us the nature of the prejudice that the
20 Region suffered here. What would have happened
21 differently had the Region had time to present its
22 rebuttal case.

1 MR. RYAN: Yes, Section 401, excuse me
2 Section 404(f)(1)(E) is the relevant statutory
3 provision for the farm roads issue. The applicable
4 statutes for the regulatory provision are found at
5 33 C.F.R. 323.4(a). Those are the relevant
6 regulatory provisions for implementing the farm road
7 exemption under the statute, and the A-6 farm road
8 exemption found in the Corps' regulation has 15
9 requirements. There are 15 elements to that
10 defense.

11 Again, this is a defense which the
12 respondent bears the burden. Case law is quite
13 clear on that. He cites no case law to the
14 contrary. The Respondent bears the burden of proof
15 on showing 15 elements of the 323.4(a)(6) farm road
16 exemption.

17 So he would have to come in, into the
18 hearing and put into the record facts to support
19 each of those 15 elements. If he were to accomplish
20 that, and again if you look at C.F.R. 22.24(a), the
21 burden of persuasion, the burden of presentation
22 under affirmative defense, is on the respondents,

1 which must be as in Section B of that section, must
2 be proved by preponderance of the evidence.

3 So he has to come in and make that
4 showing. If he makes that showing by presentation,
5 he accomplished his presentation of evidence and
6 persuasion, the burden would then shift to me to
7 rebut that, to try and push it back over, as my law
8 professor said, to get it past the 50 yard line, so
9 we did have the burden of proof.

10 Then what I would have to show, factually
11 show to rebut those 15 elements, and that is where
12 the prejudice arises. Specifically to take one
13 example, which would be vii under --

14 HON. EDWARD REICH: If you show definitely
15 that it defeated even one of the 15 elements, in
16 your view would that be sufficient?

17 MR. RYAN: Yes.

18 HON. EDWARD REICH: So you don't really
19 have to rebut all 15?

20 MR. RYAN: No, that is correct, Your
21 Honor, you don't have to rebut all 15. If he fails
22 to carry the burden on only one, he fails to make

1 his case on the 404(f) exemption.

2 But, for example, as a litigator I am not
3 going to go in prepared to just rebut one, I am go
4 to be prepared to rebut all 15, if I am doing my job
5 right. And by way of analogy, I can look at the
6 case I have to prove against plaintiff. It is a
7 Clean Water Act case. I have to prove by a
8 preponderance of the evidence all five elements of
9 the Clean Water Case; discharge of a pollutant from
10 a point source by a person to a water of the
11 United States. If I fail to put the facts in the
12 record to support any of those elements, I lose.

13 And consequently, he must do the same.
14 And if he does it, the burden switches me to rebut.
15 So, for example, under vii, free passage aquatic
16 life, for example, the judge found we did not prove
17 there was aquatic life, in the initial decision, he
18 held that we did not prove there was aquatic life
19 that was inhibited by the dam/road.

20 If I was to prepare that rebuttal I would
21 have brought in a fish biologist or someone similar,
22 and with six days notice I can't find an expert who

1 has time on their calendar and knows Potter Creek
2 and has done a literature review and/or has even
3 looked at Potter Creek, to tell me whether there is
4 aquatic life, how is it affected by the same, that
5 is the technical, factually specific and technical
6 question that cannot be developed in six days.

7 HON. EDWARD REICH: Can I ask a question
8 about that? Is it accurate that the Corps did an
9 analysis of whether the farmer exemption applied to
10 this case and if so was there not something in the
11 analysis that you could have used, even on short
12 notice, with the persons who did the analysis of the
13 Corps unavailable to be brought in as a witness? I
14 mean it sounds like there may have been site
15 specific work done and looked at those elements, and
16 I was curious as to whether you used any fact at the
17 hearing and if not why not.

18 MR. RYAN: I did do that, Your Honor.
19 James Joyner testified for over a day, a day and a
20 half he was on the stand for the Corps of Engineers.
21 He was the initial investigator for the Corps who
22 appeared in December of 2001 at the first

1 inspection, there were three different inspections
2 performed.

3 HON. EDWARD REICH: Is he the one who did
4 the analysis as to whether or not the farm road
5 exemption applied?

6 MR. RYAN: Yes. If you look at Exhibit
7 10, Plaintiff's Exhibit 10, you will see his
8 analysis. And in his analysis he says the road as
9 constructed, not down the road, as constructed as of
10 November 2001, when his inspectors first showed up,
11 did not comply with at least four of the 15
12 requirements of the Clean Water Act.

13 HON. EDWARD REICH: So it sounds like it
14 is not completely accurate to say that on that short
15 notice you couldn't bring in somebody who could
16 testify as to the site specific conditions and the
17 applicability --

18 MR. RYAN: But I did. The question is not
19 whether testimony was offered, the question is
20 whether competent testimony was offered, whether we
21 had enough to truly rebut the case, not to mention
22 this of course assumes he puts any evidence on.

1 There is no evidence, no testimony, no documents
2 from respondent stating there is no aquatic life in
3 Potter Creek, there is none. So I was essentially
4 rebutting a case that didn't exist.

5 But, as a litigator I was going in to try
6 to make the best case of what I had. I learned on
7 the first day of the hearing I was going to have to
8 go forward with the rebuttal, and so I put on
9 Mr. Joyner and I asked him those questions, does
10 this project comply with the Corps' regulation? He
11 said no. The judge rejected it.

12 HON. EDWARD REICH: Did Mr. Joyner testify
13 before this issue had been raised?

14 MR. RYAN: Yes.

15 HON. EDWARD REICH: So you were planning
16 on bringing him in anyway.

17 MR. RYAN: That's correct. But, if you
18 look at what the presiding officer found in his
19 initial decision, he specifically found that EPA did
20 not prove the element of aquatic life and if I were
21 to put on enough evidence to truly establish that I
22 would have brought in a fish biologist, for example.

1 There were other examples I could give as well.

2 HON. KATHIE STEIN: Before you allow the
3 question of prejudice and the issue of burden of
4 proof, what remedy are you seeking from this Board
5 with respect to the late assertion of the defense?
6 Are you seeking a determination that defense was
7 waived or are you seeking an alternative ruling?

8 MR. RYAN: I am seeking determination that
9 the defense that the 404(f) exemption in this case
10 was waived. He raised it too late and I was
11 prejudiced, and that is consistent with the Board's
12 prior ruling in Lazarus decision.

13 HON. KATHIE STEIN: Well, if the Board
14 concludes that the defense not waived, but that you
15 were none the less prejudiced, in your ability to
16 present evidence at the trial, what relief would you
17 seek in light of that?

18 MR. RYAN: Again, I would argue that since
19 I was prejudiced in my ability to effectively rebut,
20 for the record I think I did effectively rebut it,
21 but in order to certainly deal with issues raised by
22 the presiding officer in this case, upon with we

1 which he grounded the dismissal of the case, I was
2 certainly prejudiced in my ability to put on the
3 case, and I would ask that that case 404(f) defense
4 not be allowed.

5 HON. KATHIE STEIN: Is there any cure,
6 that this Board could impose, short of the ruling,
7 that the 404 defense is not waived, I mean was
8 waived, excuse me?

9 MR. RYAN: Certainly the Board, it would
10 be within the Board's normal review to find that the
11 respondents failed to meet the burden of proving it,
12 and I quite clearly believe that to be the case.
13 There is no question in my mind that he did not meet
14 the burden of proof of 404(f).

15 HON. SCOTT FULTON: What if we were to
16 conclude number 1, that we thought the ALJ did not
17 err in rejecting your waiver argument, and number 2,
18 that you had been prejudiced, and number 3, that the
19 judge may have misallocated the burden of proof?
20 Would it be appropriate in that circumstance for us
21 to work with the record as it currently exists, and
22 try to make our own determination on whether the

1 burden had in fact been met in this case, or should
2 we be remanding the case to the Administrative Law
3 Judge for further proceedings?

4 MR. RYAN: I believe the record is
5 sufficient to show in this case that the respondent
6 did not meet its burden and that the presiding
7 officer inappropriately shifted the burden. As I
8 mentioned before, there is no evidence in the record
9 whatsoever, to support most of the elements.

10 HON. SCOTT FULTON: Would you agree that
11 an affirmative defense can be established entirely
12 through cross-examination? I mean cross-examination
13 testimony is legitimate testimony for purposes of
14 meeting a preponderant standard on an affirmative
15 defense, right?

16 MR. RYAN: Yes.

17 HON. SCOTT FULTON: But the fact that they
18 did not affirmatively present does not necessarily
19 mean that they couldn't make out a defense, on their
20 cross-examination of your witnesses.

21 MR. RYAN: The bottom line, Your Honor,
22 is, are the facts in the record to support the

1 assertion of the 15 elements of the defense, and the
2 simple answer to that is no, there are no facts.

3 If you look, for example, at footnote 43
4 of the initial decision, the presiding officer makes
5 findings with regard to nine of the 15 elements.
6 There are no citations in the record to support a
7 single one of those nine elements. There is no
8 evidence in the record for a defense for which the
9 respondent bears the burden of proof.

10 This Board has the power in its de novo
11 review to say this defense was not proved at hearing
12 and therefore the dismissal was inappropriate.

13 HON. EDWARD REICH: I want to ask just one
14 last question about the waiver before we leave it
15 entirely.

16 If we were to agree with the ALJ, without
17 raising any defenses presented here, exception is
18 jurisdictional, would your waiver argument still
19 apply? Do you think that there can be a waiver of
20 subject matter jurisdiction.

21 MR. RYAN: No, if it is jurisdictional
22 matter it cannot be waived, I do not believe that.

1 And I think the case law that I cited in my brief
2 establishes that.

3 HON. SCOTT FULTON: Let me ask you a
4 factual question, that has confused me a bit, based
5 on the record. Is it the Agency's position that
6 there ever has in fact been a pooling of water as a
7 result of the construction of this road?

8 MR. RYAN: Yes, there has been. Look at
9 Plaintiff's Exhibit 12. I will be happy to put it
10 up on the monitor, Exhibit 11 as well. You can
11 clearly see ponding of water.

12 Now, is the ponding 20-foot depth, that is
13 ultimately planned for the fish ponds? No, he could
14 respond that the cease and desist order was issued,
15 he would stop in the middle of construction. The
16 question was, standpipes were put in place by the
17 respondent of his own volition, without a permit.
18 The standpipes you can clearly see in Exhibit 12
19 which I will show you. If you will look at the
20 monitor.

21 Forgive me, I am not a technophile. As
22 you can see, Your Honor, the pipes, standpipes are

1 in place. They are vertical standpipes, they are
2 not horizontal culverts that would allow the free
3 passage of water. The water is impounded. Now, is
4 it a large pond, no. At this point the question is,
5 is he arguing he is exempted from the 404 permit
6 requirement, and with that exemption he has to meet
7 all of the requirements, one of which is that the
8 creek be allowed to pass freely under the road.

9 He has clearly standpipes, vertical pipes
10 in place. This is in June 2002. This is a full
11 year before he claims he was ordered to put on the
12 perforated caps by the Idaho Department of Water
13 Resources. So in June of 2002 the standpipes were
14 in place, the water was impounded.

15 HON. SCOTT FULTON: At the time of the
16 evidentiary hearing was it still pretty much the
17 circumstance?

18 MR. RYAN: Yes, the only difference was
19 the sediment filled in where this water is seen in
20 Exhibit 12, up to the top of the pipes, and there
21 was no more water there at the time of the hearing.

22 HON. SCOTT FULTON: Would you explain a

1 little bit your dual purpose concept and how that
2 where relates to the regulatory framework here?

3 MR. RYAN: Yes. The whole idea behind the
4 404(f) exemption from the permit requirement is that
5 it have minimal impact on the resource. And the way
6 we ensure minimal impact is through our regulation
7 33 C.F.R. 323.4(a)(6) and the regulations, the idea
8 is that it has to be specific. The fill material
9 has to be specific for the exemption.

10 If you look at the section I cited for the
11 regulation, if you look at that section of the
12 Corps' regulation, it says that the fill has to be
13 specific for the farming activity at issue, in this
14 case moving equipment from one field to another.
15 And, by the way we have never contested that he is
16 moving farm equipment. That has never been the
17 issue. The only issue is, that the start of it.
18 Anything else is in compliance with the requirements
19 and in the regulations in building that road.

20 So, our contention has been from the
21 beginning, yes, maybe he can move farm equipment
22 across, but he is doing all sorts of damage. His

1 permit application under 404 submitted to the Corps
2 of Engineers a month before the hearing says
3 describe the existing, earthen filled dam. His own
4 testimony, in the Respondent's own testimony at
5 hearing at page 767 of the transcript says, "I
6 intended to impound this from the very beginning."

7 James Joyner from the Corps stated this is
8 a dam. Respondent's own expert, his own expert,
9 stated that with a vertical standpipe as we saw in
10 Exhibit 12, this is a dam.

11 HON. SCOTT FULTON: I want to understand
12 how this dual purpose concept tracks within the
13 regulation. What I hear you saying, let me play it
14 back to you, and you tell me whether I have got it
15 right, you are not suggesting that a project that
16 has a dual purpose is not a farm road.

17 MR. RYAN: No.

18 HON. SCOTT FULTON: You are rather saying
19 that if the dual, if the other purpose, in addition
20 to the road, is to serve as a dam, then it may not
21 be a qualifying farm road, because of the
22 application of the DMC and recapture and whatnot, is

1 that a correct way of looking at it?

2 MR. RYAN: That is correct, Your Honor, it
3 doesn't mean the minimal impact requirements set
4 forth in the regulations.

5 I see my time is ended.

6 HON. SCOTT FULTON: Other questions?

7 Before you sit down could you describe
8 what you see as the elements of a 404(f)(1)(E)
9 defense? What are the elements of the defense?

10 MR. RYAN: Well, there is (f)(1) and
11 (f)(2). The elements of (f)(1) are set forth in the
12 Corps' regulations. I have talked about those at
13 length 323.4(a)(6), the 15 elements. Those clearly
14 are the (f)(1) requirement. And (f)(2) is the
15 recapture provision, and Corps has acknowledged the
16 existence of the recapture provisions in the
17 Veldhuis case.

18 It is not enough to simply show you have
19 put in a farm road and met the requirements set
20 forth in the regulation. You also have to show you
21 haven't recaptured. By recapture, this is from the
22 statute, that you haven't produced or reduced the

1 extent of the reach of the waters of the
2 United States or effected a change in use of those
3 waters.

4 HON. SCOTT FULTON: Can you imagine a
5 scenario in which a project that has damming as part
6 of its objective would not be recaptured?

7 MR. RYAN: No, it would not be exempted.
8 It could be permitted. This project could clearly
9 be permitted if, the question here is whether it is
10 exempt from the requirements. Could it be exempted?
11 And it is not possible, the damming of a river can
12 not be.

13 HON. SCOTT FULTON: Thank you, Mr. Ryan.

14 Mr. Budge, have you been able to hear what
15 we are doing here okay?

16 MR. T.J. BUDGE: Fairly well.

17 HON. SCOTT FULTON: Very good. Are you
18 prepared to proceed?

19 MR. T.J. BUDGE: I am, Your Honor.

20 HON. SCOTT FULTON: Please proceed.

21 MR. T.J. BUDGE: May it please the Court,
22 my name is T.J. budge and we are representing the

1 Respondent in this action, J. Phillip Adams.

2 Let me first thank the members of the
3 Board for permitting us to appear by video
4 conference, we appreciate that. And let me begin by
5 stating that this is a case that never should have
6 been.

7 More than five years ago Mr. Adams began
8 preparing to improve an existing farm road,
9 the Corps of Engineers showed up. They deal with
10 the farm road exemption by the client with his road,
11 and then they demand that Mr. Adams submit a section
12 404, obtain a 404 permit. He then spends the next
13 three or four years trying to gain a permit that he
14 never needed. And, had the Corps simply notified
15 Mr. Adams that his road may be exempt from the
16 requirement we would not be here today. We would
17 not have had a hearing, he would not have spent tens
18 of thousands of dollars trying to obtain a permit
19 that wasn't needed. But we are here and it did
20 happen and the EPA is doing all it can to avoid this
21 farm road exemption.

22 We will address the issue that you raised

1 in your order, namely whether the 404 exemption is
2 waived, whether the EPA was materially prejudiced,
3 and third, whether the judge improperly shifted the
4 burden. And I am confident based on the briefs and
5 our arguments presented today, that you will find
6 that the decision was correct and it should be
7 upheld.

8 Regarding the waiver, it is certainly not
9 clear from the consolidated rules of practice, that
10 the specific farm road exemption must be expressly
11 raised in Answer. Even the federal rules do not
12 require all events be raised, and the rule,
13 consolidated rules of practice are certainly not
14 strict. They simply require that the very notice of
15 circumstances for the argument upon which the
16 defense is raised, and EPA here cannot claim that
17 this farm road exemption came out of the blue.

18 If I may show the opening statement of EPA
19 counsel at the hearing, says quote, the evidence
20 will show the court of its own initiative considered
21 -- (inaudible) -- late 2001 or early 2002, years
22 before this matter was brought for the this hearing,

1 and the presiding judge noted that it certainly did
2 not come out of the blue to the EPA, and they could
3 have put on their witness James Joyner, who had made
4 that determination, and the question extensively at
5 the hearing, most counsel mentioned that he was
6 testifying for a day and a half.

7 HON. SCOTT FULTON: Perhaps Mr. Budge if
8 you could speak a little more slowly and
9 deliberately that might help too. I think our main
10 problem is a technical problem on this end.

11 Speak for us for a second, Mr. Budge, if
12 you would.

13 MR. T.J. BUDGE: How is this?

14 HON. SCOTT FULTON: Okay, let's give it
15 another go and see how it goes for us.

16 Just pick up where you left off.

17 MR. T.J. BUDGE: Okay, can you hear me
18 now?

19 HON. SCOTT FULTON: That's better. Okay,
20 let's proceed.

21 MR. T.J. BUDGE: As I was stating, the
22 consolidated rules of practice certainly don't

1 require that the farm road exemption be expressly
2 raised in the Answer, and the decisions of the
3 Environmental Appeals Board as well as federal
4 courts have not held that every defense be expressly
5 raised in an Answer.

6 And if I might quote two federal decisions
7 relating to amendment of pleadings, the first, the
8 function of Rule 15 is to provide parties an
9 opportunity to assert new matters that may not have
10 been known to them at the time they filed their
11 original pleadings.

12 And the second quote, the purpose of
13 allowing amendments is to permit final decisions on
14 the merits, not on technicalities.

15 HON. KATHIE STEIN: Counsel, let me
16 interrupt you for a moment.

17 MR. T.J. BUDGE: Certainly.

18 HON. KATHIE STEIN: Given that the time
19 periods for filing motions was well in advance of
20 the time that you raised this defense to the judge
21 six days before the hearing, can you explain why we
22 should not conclude that the time for filing motions

1 was the final time in which your client should have
2 been allowed to raise this defense?

3 MR. T.J. BUDGE: I give two reasons. We
4 certainly respect that deadline, but certain
5 defenses can be raised at any time, one being
6 jurisdiction. This is arguably a jurisdictional
7 matter. And also, it is the policy of the Board to
8 not overrule decisions based on minor pleadings
9 deficiencies.

10 And, in this case we think that would
11 certainly qualify, particularly considering the fact
12 that the government has deliberately hid this
13 defense from our client, and it is not something
14 that is well known in the legal practice, perhaps
15 except by EPA and the Corps, who attempted to keep
16 that secret.

17 HON. SCOTT FULTON: But Mr. Budge, I feel
18 the need to stop you on that. Do you think, the
19 defense we are talking about, is this a defense that
20 you think is ambiguous as it exists on the face of
21 the Clean Water Act itself and on the regulations,
22 or would a consultation of the applicable law have

1 kind of highlighted what a defense that is fairly
2 plainly potentially applicable in this kind of
3 circumstance?

4 MR. T.J. BUDGE: The defense is certainly
5 outlined in the Clean Water Act. I don't think that
6 precludes the judge from, in his discretion,
7 considering that defense even though it was raised a
8 week prior to the hearing. And I certainly don't
9 think that the EPA was substantially prejudiced by
10 the judge's consideration of that defense.

11 And, perhaps the most -- most importantly,
12 consideration of that defense was necessary to
13 receive a just result, and not to, not have a just
14 result based on technical pleading requirement.

15 HON. EDWARD REICH: Don't you think it is
16 a little over blown to talk about the Agency hiding
17 this defense when the defense is articulated right
18 on the face of the statute?

19 I mean, you obviously have some
20 independent obligation to research the area in which
21 the Complaint alleges a violation. I don't quite
22 see how you can consider it being hidden because the

1 Agency didn't go out of its way and point out to you
2 that there were potential exemptions that you may
3 want to look at.

4 MR. T.J. BUDGE: I would disagree with
5 that, Your Honor, for this reason. Mr. Adams did
6 not hire legal counsel until being drug through the
7 ringer, so to speak, for three years by the
8 government, at which point he realized that his
9 attempt to obtain a 404 permit was useless.

10 The Corps was aware of this exemption from
11 day one. And the fact that four years evaluating
12 the applicability of this exemption and never once
13 during that time did the Corps notify Mr. Adams, who
14 was not represented, that his road may not be or may
15 be exempt from the permit requirement.

16 So certainly between the time that the
17 Corps got involved and Mr. Adams resorted to legal
18 counsel, the Corps was in fact deliberately hiding
19 this exemption. In fact, there is an exhibit
20 Complainant's Exhibit 10, I believe, in which the
21 Corps wrote a letter to Mr. Adams clearly inquiring
22 about the exemption, but never explaining that his

1 project could be exempt.

2 He certainly had time to modify the
3 project if that was needed to be exempt, but he was
4 never made aware of that. And after listening to
5 the testimony Judge Moran, the presiding officer,
6 found that in fact it appeared clear that the
7 government had deliberately kept that secret.

8 HON. SCOTT FULTON: Is it not the case
9 that at that time the Corps, I guess the government,
10 I guess the Corps was the primary presence at that
11 time, was laboring under the impression that this
12 project included a dam? I mean the difficulty, the
13 difficulty that we have here it seems, I hear what
14 you are saying, is perhaps if Mr. Adams had been
15 told, you know, that if you drop the dam part of the
16 project perhaps this thing would fly under the farm
17 road provision of the Clean Water Act. He was not
18 told that.

19 On the other hand, isn't it true that the
20 regulators here thought they had a project that
21 contemplated a dam? So that is what they thought
22 the project was. How was it, how should we regard

1 that as not fair dealing to sort of anticipate the
2 fact that the dam was not an integral part of the
3 project from Mr. Adams standpoint.

4 MR. T.J. BUDGE: Certainly Mr. Adams
5 contemplated an incidental use of the crossing for a
6 fish pond. If you look at the initial application
7 for joint 404 permit, it says two things. Under
8 description of the project, it says impoundment for
9 road crossing. And then under part seven, where it
10 identifies the purpose of the project, it only says
11 road crossing. And actually, a short time
12 thereafter Mr. Adams was informed that if he dropped
13 this dam aspect of the crossing that he would be
14 able to get his 404 permit, and he readily agreed to
15 do that.

16 The impoundment was simply incidental, and
17 the testimony presented both by EPA witnesses and
18 our own, acknowledged that Mr. Adams expressly
19 dropped this impoundment aspect of the crossing.
20 And, contrary to what EPA counsel allege, this
21 crossing has never impounded water. It doesn't have
22 the capability to impound water. The stand pipes

1 don't impound water, they are simply intake valves
2 to avoid clogging and this structure has only
3 functioned as a road from day one, and that is all
4 its current intent is.

5 Later on after three years of trying to
6 jump through hoops, Mr. Adams did investigate other
7 possibilities, and the Idaho Department of Water
8 Resources advised Mr. Adams that if he would
9 actually change his structure and apply for a small
10 dam that he could take this matter out of the Clean
11 Water Act jurisdiction, and that is why Mr. Adams
12 submitted a subsequent 404 permit application that
13 did in fact include a dam as a primary purpose.
14 However, that has never been processed and his road
15 has never operated as a dam.

16 If I may continue and discuss this
17 material prejudice issue. EPA counsel implies that
18 if there is any prejudice the motion must be
19 dismissed, and that is plainly contradictory to at
20 least federal law, when it comes to amending
21 pleadings. I will only quote a few Circuits. The
22 Sixth Circuit has held that, an opposing party's

1 mere statement that they will be prejudiced if an
2 amendment is allowed is not sufficient reason for
3 denying leave to amend. The opposing party must
4 show in what way it was prejudiced and that the
5 prejudice is substantial.

6 The 10th Circuit, added to that, in
7 saying, the test is not whether any practical
8 prejudice results from such amendment, but whether
9 allowing the amendment produces grave injustice to
10 the opposing party.

11 That certainly did not happen here. The
12 EPA claimed that it could not put on rebuttal
13 evidence. However, they made their determination.
14 They made it years prior to the hearing. And the
15 Corps witness who made the determination and made
16 the analysis was on the stand.

17 We simply don't see how EPA can take this
18 position that even though the Corps made the
19 determination, kept the secret from Mr. Adams, they
20 did not have enough evidence to support their
21 decision. And from our perspective, EPA is replying
22 to play both sides of the coin. What they are

1 saying is we, have no obligation to operate above
2 board and we can keep these exemptions internal,
3 make our determination.

4 But then if our determination is
5 discovered and found to be wrong, it's no big deal,
6 because it was the applicant's responsibility in the
7 first place. We just don't think that is good
8 policy or supported by the law that is out there.

9 HON. SCOTT FULTON: Would you agree,
10 Mr. Budge, that your client has the burden of proof
11 on this defense?

12 MR. T.J. BUDGE: We would, Your Honor, and
13 we certainly believe that we met that burden.
14 Contrary to counsel's assertion that there are no
15 facts in the record supporting the initial decision,
16 the initial decision itself spent over 15 pages
17 evaluating both sides' arguments on the farm road
18 exemption, weighing the evidence, and making a
19 decision. We put on ample evidence specifically
20 regarding the presence of aquatic wildlife. The
21 presiding officer considered that evidence and
22 weighed and that and clearly found that we had met

1 our burden.

2 Now, the presiding officer did note that
3 the EPA failed to successfully rebut our proof, and
4 that certainly does not mean that it improperly
5 shifted the burden, it simply noted that the EPA
6 failed to effectively rebut the proof that we had
7 established. And, that is particularly important in
8 this case because the government had made its
9 decision on its own without giving us notice or
10 chance to assert the exemption much earlier in this
11 process.

12 HON. EDWARD REICH: Mr. Budge, are you
13 saying that the record supports findings for each of
14 the 15 BMPs in your favor and if we found that the
15 record in fact did not support any one of those 15
16 BMPs would we not then have to conclude that the
17 farm road exemption does not apply.

18 MR. T.J. BUDGE: Yes, we are asserting
19 that the farm road exemption, that we met our burden
20 of proof.

21 HON. EDWARD REICH: Which includes every
22 one of the 15 elements?

1 MR. T.J. BUDGE: Yes. There is evidence
2 to support each of the 15 elements, that is correct,
3 Your Honor.

4 HON. EDWARD REICH: And if we found to the
5 contrary for any of those elements do you agree that
6 the farm road exemption would be defeated?

7 MR. T.J. BUDGE: If you were to find the
8 presiding officer erred in his analysis then
9 certainly it should perhaps be remanded or before
10 the exemption would be defeated. However, we are
11 confident that the presiding officer in his
12 extremely thorough and meticulous, well reasoned and
13 well documented decision, considered all the
14 evidence and found that there was sufficient
15 evidence to support our assertion that the exemption
16 applied.

17 Now, it also must be considered that this
18 farm road exemption cannot be forced upon farmers to
19 obtain a declaratory judgment before they decide
20 that they don't have to obtain a 404 permit.

21 I don't know if that was clear, but in a
22 recent Oregon case, Jones v. Thore, the court held,

1 the District of Oregon, held that the existence of
2 these exemptions enables farmers to determine
3 whether they in fact even have to apply for a 404
4 permit. In doing so I don't know that farmers need
5 to hire a slew of experts before they make that
6 decision, but can use common sense and experience,
7 and we certainly put on evidence in this case, our
8 client had enough experience and enough knowledge
9 and enough understanding to assert that the
10 exemption applies, and in fact it did apply.

11 HON. EDWARD REICH: Can I ask if your
12 client didn't know that the farm road exemption
13 existed then how did he evaluate whether or not all
14 of these 15 BMPs were satisfied? It seems like any
15 analysis that was done was done substantially after
16 the fact, not before the fact.

17 MR. T.J. BUDGE: That is correct. He did
18 not understand up front that the exemption was out
19 there. It just so happened that the construction of
20 his road nevertheless complied with those Best
21 Management Practices.

22 HON. EDWARD REICH: So he never really did

1 the evaluation that you imply that he had the
2 ability to do because he didn't know he needed to do
3 that?

4 MR. T.J. BUDGE: He simply constructed a
5 farm road, as all farmers do on occasion, and that
6 farm road fell within this exemption that Congress
7 had intended to ease the burden on the farmers.

8 Now, when his legal counsel discovered
9 this exemption they did in fact evaluate it and
10 develop that his road as constructed did in fact
11 qualify and that this was the type of road that
12 Congress intended to exempt from the 404 permit
13 requirement.

14 HON. SCOTT FULTON: Mr. Budge, if we agree
15 with you on the waiver issue and were to conclude
16 that the ALJ did not err in allowing the defense to
17 be asserted, but nonetheless found that that
18 decision had been prejudicial to the Region and
19 influenced the Region's capacity to present a
20 rebuttal case, how would you have us proceed?

21 MR. T.J. BUDGE: I would assume the Region
22 would need to present whatever evidence that the

1 court didn't use when it made its determination. I
2 don't know that that is just. By all indications
3 the EPA is pulling out a procedural trump card here
4 at this late stage in the game, it should be noted
5 that the EPA put on all of their evidence before its
6 determination and put on James Joyner, also that the
7 EPA argued against exemption vigorously in both its
8 posthearing briefs and post hearing reply briefs,
9 and never did any of those brief did EPA make one
10 argument that it was unduly prejudiced by the
11 judge's consideration of this exemption.

12 Only after losing on the permits did the
13 EPA pull out this new argument that it was
14 prejudiced and that now that we have gone through
15 the post hearing brief and reply briefs and a 30
16 page decision has been rendered that it must have
17 been incorrect because they were unduly prejudiced.

18 HON. SCOTT FULTON: I understand what you
19 are saying about that, and I know it is not your
20 preferred outcome, but in the event that we were
21 nonetheless to agree with the Agency that it had
22 been prejudiced, what would be the appropriate

1 recourse for the Board at that point? Would we be
2 remanding it to the Administrative Law Judge to look
3 at this further? How should we proceed if that is
4 where we ended up?

5 MR. T.J. BUDGE: Remand would be
6 appropriate, Your Honor.

7 HON. SCOTT FULTON: Where is Pocatello,
8 Idaho, which I gather is where the evidentiary
9 hearing in this case was conducted, in relation to
10 where you are. Is it difficult for you to appear in
11 Pocatello?

12 MR. T.J. BUDGE: No, Your Honor, we
13 practice in Pocatello.

14 HON. SCOTT FULTON: I see, okay.

15 A similar question, if we were to agree
16 with the Region here that the ALJ erred in
17 allocating the burden of proof, would you prefer
18 that we attempt to re-sort through the proof
19 ourselves in this forum or that we remand the case
20 to the Administrative Law Judge to properly allocate
21 the burden's of proof and proceed in accordance with
22 that proper allocation?

1 MR. T.J. BUDGE: I think it would have to
2 be remanded to the Administrative Law Judge to
3 allocate the burden of proof, because that judge is
4 also going to have to make a determination as to
5 whether EPA proved that the point it sought was
6 appropriate under the circumstances, and considering
7 the Administrative Law Judge was there to hear the
8 witnesses and determine the credibility of the
9 evidence, I think he would be in the best position
10 to determine the appropriateness of the finding.
11 Therefore, he should consider the burden of proof at
12 that time.

13 However, I would point out that nowhere in
14 the initial decision does the Administrative Law
15 Judge state that the burden is on the EPA to
16 disprove this exemption. In fact, EPA counsel is
17 reading volumes between the lines of that decision
18 when it makes that allegation. The decision did
19 expressly note that it is the respondent's burden to
20 prove the applicability of the farm road exemption,
21 therefore I don't know how it can be inferred that
22 the judge countered that statement or went back on

1 it. Rather, the initial decision makes clear that
2 he weighed all the evidence, that he considered the
3 evidence that we established, and he considered the
4 rebuttal evidence, and in the end he found that the
5 exemption did in fact apply, and that is a legally
6 correct result, and it is a just result, and a fair
7 result; we should have never got this far, but we
8 did.

9 HON. SCOTT FULTON: Mr. Budge, let me just
10 check in on time here because I see that our clock
11 is not running. How are we doing?

12 MS. DURR: Eight minutes left.

13 HON. SCOTT FULTON: Okay, Mr. Budge, are
14 there further thoughts that you would like to share?

15 MR. T.J. BUDGE: We simply don't see the
16 thoroughness of the initial decision, the extreme
17 depth that the presiding officer went into the
18 evidence, that he was there to view and hear three
19 day's worth of evidence, that he in fact visited
20 this site and that he, his decision was well
21 supported by the record. And it deserves being
22 upheld in the circumstances.

1 Other than that, we simply note that many
2 of the allegations made by EPA counsel regarding
3 whether this structure functions as a dam are simply
4 false, and our brief makes that clear. With that we
5 would request that you uphold the initial decision,
6 unless there are any further questions.

7 HON. KATHIE STEIN: Can you explain to me
8 your rationale for contending that the defense here
9 is jurisdictional?

10 MR. T.J. BUDGE: The effect of the
11 exemption is to take away from Clean Water Act
12 jurisdiction certain activities that Congress felt
13 were too burdensome on farmers. It may be a little
14 different twist on jurisdiction as we normally
15 consider it, but the practical effect is the same.
16 The Clean Water Act does not apply to those
17 activities, it has no authority to regulate those
18 authorities, and therefore, it has a jurisdictional
19 effect, and that farmers can decide that they don't
20 have to get preapproval from the Corps, or EPA
21 before they engage in these activities.

22 HON. KATHIE STEIN: I take it it doesn't

1 go to the power of this Board to adjudicate the
2 controversy?

3 MR. T.J. BUDGE: That is correct, Your
4 Honor, but it does weigh on the consideration of
5 that exemption at the time it was raised and goes to
6 show that the Administrative Law Judge was justified
7 and that his decision to consider that exemption was
8 supported.

9 HON. KATHIE STEIN: How does this differ
10 from any other affirmative defense that a respondent
11 would have the burden of proof on?

12 MR. T.J. BUDGE: Typically the burden of
13 proof falls on the person make making the
14 affirmative defense, and we are confident that we
15 have met that burden, that the evidence presented at
16 trial shows that the farmer exemption did in fact
17 apply under these circumstances.

18 HON. KATHIE STEIN: I am troubled by the
19 notion of converting what would be an ordinary
20 affirmative defense, I mean it may be the farming
21 exemption under the Clean Water Act, but clearly
22 there are numerous affirmative defenses to

1 violations under the environmental laws. I am
2 concerned about the notion of converting those
3 affirmative defenses into something that is
4 jurisdictional, and I am wondering if you can help
5 me through that challenge and explain how finding
6 this particular defense to be jurisdictional doesn't
7 implicate a host of other affirmative defenses under
8 other environmental laws?

9 MR. T.J. BUDGE: I think the argument we
10 make is that this defense is analogous to a
11 jurisdictional defense. We are not necessarily
12 trying to lump it in with subject or personal matter
13 jurisdiction, but it does affect the justice in
14 considering these defenses, even if not specifically
15 raised in the Answer.

16 The federal rules do identify some
17 defenses that should be raised in the Answer, and
18 there are many others out there that are held to
19 that same standard. Ideally these would all be
20 raised in the Answer but that is not always
21 practical. Sometimes additional information comes
22 to light that makes these defenses apparent that was

1 not previously there and federal court and the
2 administrative appeal boards, or excuse me the
3 Environmental Appeals Board, has taken leniency in
4 allowing consideration of those defenses within the
5 judge's discretion, to ensure that the decisions are
6 proper and that they are based on the merits and
7 that this is has not become a game of procedural
8 maneuvering.

9 In fact, I may quote the Supreme Court in
10 this matter, Conley v. Gibson, in which it held the
11 courts must reject the approach, the pleading is a
12 game of skill and one misstep of counsel may decide
13 the outcome and accept the principle that the
14 purpose of pleading is to facilitate a proper
15 decision on the merits.

16 The reality is, Your Honor, that we raised
17 this exemption as soon as we discovered it and we
18 hoped to evaluate it before we saw applicability to
19 our case.

20 HON. KATHIE STEIN: At what point in time
21 in this process was counsel retained by your client?
22 You indicated in the beginning he was pro se.

1 MR. T.J. BUDGE: That is correct, Your
2 Honor. I wasn't here when counsel was retained. It
3 was I believe two years after the Corps got
4 involved, I think in 2004.

5 HON. KATHIE STEIN: But well in advance of
6 the hearing?

7 MR. T.J. BUDGE: Yes, I guess that was
8 after the Complaint was filed. So there were two or
9 three years in which he was on his own.

10 HON. KATHIE STEIN: Does the record
11 reflect that your client offered any explanation for
12 the late assertion of the affirmative defense?

13 MR. T.J. BUDGE: I don't know, I don't
14 have the motion in front of me and don't recall the
15 specific content of that. But there is plenty of
16 argument made that the government kept it under
17 wraps, so to speak, and had they been more
18 forthright we certainly would have raised it long
19 before the Complaint. We would have raised it from
20 the very beginning, and we wouldn't be here today,
21 in that case. But I can't answer with specificity,
22 I am sorry, Your Honor.

1 HON. KATHIE STEIN: Thank you.

2 HON. SCOTT FULTON: Just a factual
3 question from me, again back to this issue of
4 whether there is impounding of water, as a factual
5 matter, as a result of this project. You said no
6 impounding, counsel for Region 10 said pooling,
7 showed us a photograph that seemed to show some
8 pooling. Is there a difference between impounding
9 and pooling, and do you dispute that there is some
10 sort of collecting of water that has occurred as a
11 result of this project.

12 MR. T.J. BUDGE: Perhaps the difference
13 between impoundment and a pool is a little bit a
14 matter of semantics. The fact is that there has
15 never been a structure in place to impound water and
16 form a pond or reservoir.

17 Now, the culvert, the inlet for the
18 culvert that goes underneath the road crossing, you
19 will note from that picture that there are two
20 culverts. There is a 12-inch culvert and an 18-inch
21 culvert and the 12-inch culvert and the 12 inch
22 culvert is simply for over flow in the event of a

1 flood or high flows or something like that. And the
2 top of that was extended a few feet further so as to
3 prevent clogging. The main culvert, which is 18
4 inches, is simply an elbow on the upstream end of
5 the pipes running underneath the road, and it is in
6 place so that the opening of the culvert is on a
7 horizontal plane, and that simply is to prevent
8 clogging.

9 That is not to create a dam, to create
10 impoundment. However, because of the horizontal
11 plane on which the intake culvert is placed, he
12 cited us one picture that immediately after
13 installation of those there was a small puddle maybe
14 eight or ten feet wide and one to two inches deep.
15 That doesn't count or qualify as a dam or
16 impoundment.

17 Also, the culvert itself lets water flow
18 continuously through it allowing any bugs that might
19 move in there to move up and down.

20 HON. SCOTT FULTON: Okay, Mr. Budge, I
21 think we are good on our end. Thank you very much
22 for your thoughts on this.

1 MR. T.J. BUDGE: Thank you.

2 HON. SCOTT FULTON: Mr. Ryan.

3 MR. RYAN: Thank you, Your Honor.

4 First of all I would like to correct the
5 record on when counsel became involved for
6 Respondent. I checked my notes and the person I
7 spoke with Randall Budge. Mr. Thomas Budge is
8 standing, Mr. Randall Budge is sitting there. I
9 spoke with him on November 4th, 2004, this is six
10 months prior to filing.

11 If you look at the record at 539 to 556
12 the testimony indicates that counsel for Respondent
13 became involved in approximately early
14 November 2004, six months prior to filing the
15 Complaint.

16 A lawyer is presumed to know the law. The
17 404(f) is not a secret. Any law student that finds
18 a treatise on 404 will know 404 exists. This
19 respondent had effective representation of counsel
20 six months prior to filing of the Complaint and yet
21 waited six days prior to the hearing to raise the
22 defense. There is no excuse.

1 HON. SCOTT FULTON: You are not suggesting
2 that they broke it at the last minute as a means of
3 gaining surprise over the Region, are you?

4 MR. RYAN: I am not, Your Honor. I don't
5 know why they did it.

6 With regard to the impoundment, that is
7 not the defining element of our case or the defining
8 elements of the defense of the 404(f). It is an
9 element. Whether it was clear that the standpipes
10 are in place, the question is not whether an
11 impoundment was created at that time, the question
12 is did those standpipes comply with the
13 requirements. So we shouldn't get hung up simply on
14 whether it was an impoundment or not. That is
15 simply one factor to be considered.

16 HON. SCOTT FULTON: This is a little
17 stream, right?

18 MR. RYAN: Yes, it is a small one, that is
19 correct.

20 HON. SCOTT FULTON: Several feet wide?

21 MR. RYAN: That is correct.

22 HON. SCOTT FULTON: A few inches deep?

1 MR. RYAN: That is correct.

2 HON. SCOTT FULTON: So the aquatic life we
3 are talking about is not like large fish seeking
4 passage?

5 MR. RYAN: No one knows, Your Honor, no
6 one looked. We didn't have that opportunity. But
7 probably not. It is probably minimal, if at all.
8 We don't know.

9 HON. SCOTT FULTON: Is there a screening
10 or anything in place in relation to the culverts
11 that would prevent small insects, minnows and the
12 like from passing through freely?

13 MR. RYAN: Assuming they could jump. It
14 is a vertical pipe.

15 HON. SCOTT FULTON: I thought counsel for
16 Mr. Adams is suggesting that part of the culverting
17 system was not driven through the vertical planes.

18 MR. RYAN: That is correct, Your Honor.
19 It is essentially a horizontal culvert which runs
20 underneath the road, but then it takes a 90 degree
21 turn and you see it quite clearly in the Exhibit 12,
22 and in Respond's own drawing, Exhibit 3.

1 HON. SCOTT FULTON: The only path for the
2 water is through the top of that pipe?

3 MR. RYAN: Through the top of that
4 vertical pipe. If the critters can jump, I guess
5 they can get back and forth. Again, we didn't have
6 a chance to develop that.

7 HON. EDWARD REICH: When you say nobody
8 looked, does that mean when the Corps did its
9 evaluation it didn't look?

10 MR. RYAN: I am not aware, if they did I
11 don't know about it.

12 HON. EDWARD REICH: Okay.

13 HON. KATHIE STEIN: To what extent did
14 EPA's proof on the appropriateness of the penalty
15 parallel in some way some of the considerations you
16 would needs to look at in terms of recapture and the
17 farm road exemption? In other words, to the extent
18 that you are having to prove, or you would make a
19 part of your penalty case, a look at environmental
20 harm and things like that, to what extent do those
21 dovetail with the practices you would have to look
22 at for the recapture?

1 MR. RYAN: In this particular case, not
2 much at all. And I stated in my opening argument,
3 my opening statement at the hearing, that this was
4 not a big environmental harm case. We tried to
5 settle this case before the 309 requirement, before
6 we filed the administrative penalty action, and I
7 submitted right up front when I went to hearing, it
8 is not a big environmental harm case.

9 This case is about recalcitrance, about a
10 Respondent who just would not come into compliance,
11 but numerous, in fact contacted by three different
12 agencies. So this is a rabble case, and we did not
13 prepare an environmental harm case for that reason,
14 until six days prior to the hearing I didn't know it
15 was an issue.

16 HON. SCOTT FULTON: What do I think about
17 the appeal that we are hearing from Mr. Budge that,
18 gee, if the government had been more affirmative in
19 its approach to this and of a mind to offer
20 instruction to Mr. Adams that perhaps it would have
21 spared everyone the challenge of this case? I mean
22 if the Corps folks, Mr. Joyner, whoever the right

1 person was, would have said early in the going,
2 sounds like the farmer is trying to build a road
3 here, that is a pig part of what you are about,
4 actually that is something you probably can do, you
5 just need to do it right, here is how you do it,
6 scrap the dam part of the project, and proceed.

7 MR. RYAN: I think --

8 HON. SCOTT FULTON: If they are raising
9 the concern about fair dealing with members of the
10 regulated community, and that is not an
11 insignificant concern, we have parties who don't
12 have sophistication on environmental matters as a
13 general proposition, who may or may not be trying to
14 do the right thing. To the extent that the arm of
15 the regulator that is out in the field can provide
16 some instruction, that can carry a long ways, and
17 that did not happen here, really, did it?

18 MR. RYAN: I can't disagree that the more
19 communication may possibly have changed the outcome.
20 That is of course possible. But when you look at
21 that, the record of this Respondent, failing to
22 reply and failing to respond to letters and failing

1 to respond to telephone calls, it is quite clear
2 this was a difficult person to deal with, and that
3 record is quite well established.

4 And I see my time is up. I would like to
5 just make one closing statement. The Respondent
6 said several times this is a minor issue, this minor
7 pleading issue resulted in the dismissal of the
8 case. It was not minor.

9 Thank you, Your Honors.

10 HON. SCOTT FULTON: Okay. Well, we
11 appreciate all the arguments we have heard today.
12 We want to extend our thanks to the parties for
13 their contributions; the folks out in Idaho,
14 Mr. Budge, thank you so much for making yourself
15 available, and working to find a forum that would
16 make this hearing work for you.

17 And we have found the arguments I think
18 very helpful. We will take them under advisement in
19 reaching our decision in this case.

20 So, thank you again, and have a good day.

21 (Whereupon, at 2:44 p.m., the hearing was
22 concluded.)

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CERTIFICATE OF NOTARY PUBLIC & REPORTER

I, DONALD R. THACKER, the officer before whom the foregoing deposition was taken, do hereby certify that the witness whose testimony appears in the foregoing deposition was duly sworn; that the testimony of said witness was taken in shorthand and thereafter reduced to typewriting by me or under my direction; that said deposition is a true record of the testimony given by said witness; that I am neither counsel for, related to, nor employed by any of the parties to the action in which this deposition was taken; and, further, that I am not a relative or employee of any attorney or counsel employed by the parties hereto, nor financially or otherwise interested in the outcome of this action.



Notary Public in and for the
District of Columbia

My Commission Expires:

MAY 14, 2011