

Office of Chief Counsel
Internal Revenue Service
memorandum

Number: 20043102F
Release Date: 7/30/04
UIL: 9999.98-00
CC:LM:NR:DEN:PRESP-158684-03
WRDavis

date: January 26, 2004

to: Team Manager, LMSB:
ATTN:

from: Area Counsel (Natural Resources: Houston)

subject: **Request for Legal Advice: Evaluation of Taxpayers' Compliance with
Placed-in-Service and Written Binding Contract Requirements
Taxpayers:**

This memorandum responds to your request for assistance dated December 16, 2003. Branch 6 of Passthroughs & Special Industries has reviewed the advice contained herein, and concurs with it. This memorandum should not be cited as precedent.

DISCLOSURE STATEMENT

This writing may contain privileged information. Any unauthorized disclosure of this writing may have an adverse effect on privileges, such as the attorney-client privilege. If disclosure becomes necessary, please contact this office for our views.

LEGEND

A

=

Corporation =

Facility Location =

B =

Execution Date =

C =

D =

Facilities =

Process =

E =

F =

G =

Subprocess =

Date 1 =

H =

Timeframe 1 =

I =

Timeframe 2 =

J =

K =

L =

Partnership A =

Partnership B =

Partnership C =

Partnership D =

State X =

Date 2 =

Month 3 =

Date 4 =

\$m =

N =

Date 5 =

Date 6 =

O =

p =

Q =

R =

S =

T =

State Y =

U =

Department =

Date 7 =

Consultant =

V =

Duration =

Timeframe 3 =

W =

Date 8 =

X =

Date 9 =

Y =

Z =

Aa =

Ab =

Ac =

Month 10 =

Ad =

Ae =

Af =

Date 11 =

Date 12 =

Ag =

Ah =

Date 13 =

Agreement A =

Date 14 =

Ai =

Aj =

Date 15 =

\$ak =

Al =

\$am =

An =

Ao =

Article A =

Ap =

Article B =

Article C =

Aq =

Month 16 =

Date 17 =

Ar =

Date 18 =

Date 19 =

Date 20 =

As =

At =

Au =

Av =

\$aw =

Date 21 =

Ax =

Ay =
Partnership E =
Partnership F =
Partnership G =

Partnership H =
Month 22 =
Date 23 =
Date 24 =
Agreement B =

Az =
Date 25 =

Ba =

Bb =

Bc =

Bd =
Year =

ISSUES

1. Do the facts, as set forth below, support the taxpayers' contention that a synfuel facilities constructed for Corporation at the Facility Location were placed in service before July 1, 1998? Sub-issues of this issue are as follows:

a. Do the facts show that the taxpayers that owned the facilities as of July 1, 1998, were in the trade or business of producing and selling qualified fuel?

b. What additional information will assist in determining whether the facilities were timely placed in service?

2. Were the facilities placed in service pursuant to a binding written contract in effect as of January 1, 1997?

CONCLUSION

1. The facts, as presented, raise serious questions about whether the a synfuel facilities constructed for Corporation at the Facility Location were placed in service before July 1, 1998.

a. The facts are insufficient to show that the taxpayers that owned the facilities as of July 1, 1998, were in the trade or business of producing and selling qualified fuel.

b. [REDACTED]

2. There appears to be some question as to whether the contract was, in fact, a binding written contract as of January 1, 1997. [REDACTED]

[REDACTED]

FACTS

1. On or about Execution Date, Corporation entered into an agreement with c for the construction of d Facilities. The agreements enumerate several types and amounts of equipment for the facilities. The equipment described in the agreement related to systems that were designed to accomplish the Process. Among other things, the agreement listed e, f, g, and other equipment designed for the Process. Additional equipment focused on Subprocess. This plan was described in a Date 1

report by a construction/engineering firm, apparently prepared for h.

Some time during Timeframe 1, the agreement was assigned to i. During Timeframe 2, construction began on a synthetic fuel production facilities at the Facility Location, near j. This site is owned by k, a subsidiary of l. While Corporation acted as the owner of the facilities during construction, at some point, these facilities were transferred to, and owned by Partnership A, Partnership B, Partnership C, and Partnership D. Each was a State X entity, formed on Date 2.

A construction permit was obtained in Month 3. Construction began at the Facility Location on or about Date 4. Plans called for the construction of a facilities, each projected to cost approximately \$m. It appears that n of the plants were constructed by i, and the remainder by c.

The taxpayers produced several videotapes, labeled with dates between Date 5 and Date 6, showing equipment operating at the site. Among the parts of a facility shown to be running were o, p, and q. What was clear was that some of the feedstock coal was run through r.

The videotapes did not show operation of s. No narrative accompanied the images shown on the videotapes, making it difficult to discern what was being shown. It was not clear from the videotape that each of the a facilities was operational.

One fact that was evident from the videotapes was the emission of t that occurred during operations. Documents provided by the taxpayers were somewhat inexact

. It appears that Corporation never applied for a permanent operating permit from the State Y Department. However, a Date 7 memorandum from u, the Chief Operating Officer of Corporation, to one of the contractors states, "

Other documents raise a question as to whether the facilities complied with Department permits.

The taxpayers provided a affidavits prepared by Consultant, a consultant from y. These affidavits state that the a facilities were substantially constructed as designed and that each facility operated in excess of Duration during the inspection, but do not describe the level of review of the design that Consultant undertook. Consultant's affidavits also

state that no mechanical failure was observed during each Duration period. Consultant did not opine as to whether any facility was capable of sustained daily operations.

The taxpayers also produced many photographs documenting construction of the facilities during the Timeframe 3 period. The initial photographs show the fabrication of the equipment off-site. Later photos show this equipment at the Facility Location. Photographs accompanying a affidavits prepared by Consultant show the operation of several parts of the facilities. The photographs included with the Consultant affidavits have descriptions of what is shown.

Records provided by the taxpayers reflect inconsistent information concerning the production between Date 5 and Date 6. An affidavit by u states that w tons of synfuel were produced between Date 5 and Date 6. Spreadsheets showing production reflect an aggregate production of w tons of product for this time frame¹. u's affidavit states that the production total was divided equally among the a facilities, but does not make clear that this accurately reflects the actual production at each facility. Other documents state that the material was run through the facilities n times. This coincides with records that show that k had only delivered x tons of coal by Date 9². One of the contractor's documents stated that the material was used for aa. Finally, other documents indicate that ab tons of material was processed, of which amount ac tons were sold to k in Month 10. The question of what was sold is discussed below.

Additionally, the taxpayers provided the affidavit of ad of c. This affidavit states that the facilities were placed in service prior to July 1, 1998, subject to completion of the ae. However, here again, there is no assertion that the facilities were in a state of readiness sufficient to produce qualified fuel on a sustained and reliable basis in commercial quantities. More important, as is described below, ae involves equipment integral to the facility.

The taxpayers provided copies of n separate certifications of completion, containing nearly identical language. Those executed by c attested to the completeness of af Facilities by Date 11, and the other, executed by i, attested to the

¹ After Date 8, the production spreadsheets show daily amounts.

² Other records show that y tons of z was purchased from another supplier. This coal was not included in any production details, and may have been unsuitable for production of briquettes. z consists of .

completeness of the other facilities by that same date. Each certification made reference to ae to be completed. Neither certification was dated, nor did they contain details describing ae.

In addition to these certifications, the documents produced by the taxpayers contained contradictory documents. One was a memorandum dated Date 12, and directed from c to Corporation. It identified ae as items that remained to be completed prior to becoming operational under ag or ah³. Moreover, ae were not of a minor nature, but major systems that appear to have been integral to the continued operation of the facilities. Further, it stated that upon completion of those items, the contractor "ae" of Partnership A and Partnership B facilities.

The other memorandum, dated Date 13, from the contractor responsible for turn-over of Partnership C and Partnership D Facilities, states, "

."

Documents produced by the taxpayers include an undated Agreement A between k and Corporation, effective Date 14, under which k agreed to sell to Corporation ai tons of aj. The provision to sell the initial ai tons covered through the period ending Date 15,

. The initial contract price was \$ak per ton, FOB al. After the initial period and under certain circumstances not relevant here, the contract price for coal purchased by Corporation from k was \$am per ton, FOB al.

Agreement A also included the agreement of k or its assignee, l, to purchase an tons of solid fuel produced from coal that Corporation or Partnerships A, B, C, and D have processed so as to qualify for the nonconventional fuels credit under section 29 ("Synthetic Fuel"⁴) at the rate of ao tons per month, through Date 15. Article A set the contract rate for the

³ From other correspondence, it was clear that Corporation was not certain whether it was subject to regulation by ag or ah.

⁴ Agreement A includes, in its definition of Synthetic Fuel, the "

."

Synthetic Fuel at ap.

Further, Article B of Agreement A specified that Corporation was responsible for transporting the Synthetic Fuel to one of l's b, and for any incremental handling and transportation costs incurred by k attributable to the Synthetic Fuel.

Additionally, Article C of Agreement A called for k to provide aq to Corporation. It also stated that:

Important to note is that the provision calling for k to purchase Synthetic Fuel from Corporation was expressly subject to the above provision that excused k of its obligation, so long as l

. Perhaps more important was the initial clause above that completely excused l from purchasing any Synthetic Fuel if it caused l any increased costs or problems.

After the operation during Month 16, records reflect no production of any Synthetic Fuel until Date 17. In fact, each of the facilities sat idle of production for the vast majority of the period after Date 6. Production spreadsheets show that, out of the ar days between Date 8 and Date 18, production was recorded on

respectively. Moreover, some questions are raised concerning days,

the amounts of synfuel recorded as having been produced on two specific dates: Date 19 and Date 20. On those facility-production days (out of a total of as facility-production days), the amounts of synfuel produced totaled more than at percent of the total production reflected on the spreadsheets. Graphs reflecting the production in tons per day, and in tons per hour, are attached.

The taxpayers submitted documents reflecting sales by Corporation to k of the material processed between Date 5 and Date 6, and presented these as proof of sales of synthetic fuel to an unrelated third-party. However, the shipping documents show this to be au from the Facility Location. Further, other documents reflect that this material was used for aa, and that k considered it to be av. Finally, the sales of this material were recorded at the rate of \$aw per ton, rather than at the rate specified by Agreement A, which called for k or l to buy the synfuel at the rate of ap. While the documents reflect that later sales were computed in this manner, the sale of the material produced by Corporation between Date 5 and Date 6 was not so treated. Moreover, as described above,

. Thus, we do not believe that the initial sale to k reflects the sale of synfuel, but rather the sale of au.

The initial sale of Synthetic Fuel by Corporation to k under the contract rate set forth in Agreement A did not occur until Date 21, when Corporation sold ax tons. The terms of Agreement A essentially provided k with a customer for a minimum of ai tons of coal mined by it through Date 15. With the delivery of this amount of coal to Corporation and Corporation's production of Synthetic Fuel, k would have had to purchase up to an tons of Synthetic Fuel, but only if it proved to serve as a useable fuel for l's b. The taxpayer has not provided an explanation as to why k did not deliver ai tons of coal to Corporation for production through Date 15.

A substantial amount of construction remained to be completed on each of a facilities as of June 30, 1998, as is reflected in ae. This document for

."

Below is a description of several ae and the significance, as it relates to the facilities' fitness for the intended use:

are examples of the "electrical, instrumentation and control systems (and related auxiliaries, including the structures that house the electrical, instrumentation and control systems)" that constitute part of the facility. ILM 200347024 (Jan. 21, 2003), reprinted in 2003 TNT 226-18.

The documentation does not clearly show that the facilities had access to ay to support daily continued operations as of July 1, 1998. Documents reflected ongoing negotiations about ay into Month 16.

The taxpayers—Partnership E, Partnership F, Partnership G, and Partnership H—purchased the facilities from Partnership A, Partnership B, Partnership C, and Partnership D, respectively, in Month 22. On Date 23, the taxpayers' representative submitted a letter, a copy of which is attached hereto, highlighting the information and documents that it contends show the a facilities were placed in service as of June 30, 1998. Additionally, on Date 24, the taxpayers' representative supplied a memorandum (copy attached) setting forth its analysis with regard to whether the facilities were timely placed in service.

a. An affidavit was provided by u of Corporation, stating that attempts and plans were made to market the synthetic fuel. Corporation also had a contract for the purchase of coal from, and the delivery of synthetic fuel to k. Beyond this, Corporation entered into an agreement with az, a k subsidiary to market its Synthetic Fuel.

The taxpayers provided an undated copy of Agreement B between Corporation and az. This agreement set Date 11 as its effective date. It is not known when Agreement B was reached. The earliest dated reference to it was on Date 25 in a cover letter from Corporation to i.

The terms of Agreement B required az to use its best efforts to market the Synthetic Fuel produced by Corporation, and ba to third parties. This included identification of, and contacts and meetings with third parties, coordination of bid proposals and requests for proposals, participation in the negotiation of sales agreements. The right to set the terms of any sales remained with Corporation. In addition, the contract was not exclusive, permitting Corporation to market the Synthetic Fuel or ba itself or through other agents.

In exchange, az was entitled to bb for the sale of Synthetic Fuel or ba to third parties. Agreement B further obligated Corporation to use its best efforts to assist az in its marketing efforts.

Agreement B provided az with

While not part of Agreement B, Agreement A restricted Corporation from

.
With the exception of Agreement A, no information was provided that showed any efforts by Corporation or Partnerships A, B, C, and D, or by az to market any Synthetic Fuel at any time prior to or during the operation of the facilities at Facility Location.

After Month 16, Corporation

. These actions tend to indicate that it was unable to produce or market a saleable product. The taxpayers have not shown the reasons for this lack of production to be outside of Corporation's control. Moreover, as previously stated, Corporation did not sell any Synthetic Fuel under Agreement A until Date 21.

Article C of Agreement A set forth terms concerning the data that k or l was to supply Corporation with aq. This information was not supplied by the taxpayer. [REDACTED]

Additionally, documents obtained from

and

discuss the lack of a market for Corporation's synfuel.

b. Certain information may assist in better discerning whether the facilities were placed in service by July 1, 1998, among which is the following:

i. [REDACTED]

[REDACTED]

ii. [REDACTED]

[REDACTED]

iii. [REDACTED]

[REDACTED]

iv. [REDACTED]

[REDACTED]

[REDACTED]

v. [REDACTED]

[REDACTED]

vi. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

vii. [REDACTED]

[REDACTED]

viii. [REDACTED]

ix. [REDACTED]

[REDACTED]

x. [REDACTED]

[REDACTED]

xi. [REDACTED]

[REDACTED]

xii. [REDACTED]

[REDACTED]

[REDACTED]

xiii. [REDACTED]

[REDACTED]

[REDACTED]

xiv. [REDACTED]

[REDACTED]

xv. [REDACTED]

[REDACTED]

[REDACTED]

xvi. [REDACTED]
[REDACTED]

xvii. [REDACTED]
[REDACTED]
[REDACTED]

xviii. [REDACTED]
[REDACTED]
[REDACTED]

xix. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

xx. [REDACTED]
[REDACTED]

xxi. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

(1) [REDACTED]

(2) [REDACTED]

(3) [REDACTED]

(4) [REDACTED]

xxii. [REDACTED]
[REDACTED]
[REDACTED]

xxiii. [REDACTED]
[REDACTED]
[REDACTED]

(1) [REDACTED]

(2) [REDACTED]

(3) [REDACTED]

(4) [REDACTED]

- (5) [REDACTED]
- (6) [REDACTED]
- (7) [REDACTED]
- (8) [REDACTED]
- (9) [REDACTED]
- (10) [REDACTED]
- (11) [REDACTED]
- (12) [REDACTED]

2. An additional potential issue has arisen based upon the document review. This question deals with whether Corporation entered in to a valid binding written contract as of December 31, 1996, to construct the subject synfuel facilities. It is duly noted that the taxpayers have each received PLRs stating that the Execution Date contract is a qualified binding written contract. Nevertheless, a review of the subject contract discovered that the parties, per the terms of the contract, were not bound until

. To our knowledge,
pursuant to this

contract until Year.

It is also noted that the facility described in the agreement for the construction of d Facilities is not the facility ultimately constructed. The main difference is that the contract called for material handling/control components which would have allowed for the Process. These facilities were never constructed.

The contract rights to bc of the Facilities were sold to another taxpayer. Of the remaining Facilities that it contracted for, Corporation had bd constructed.

LAW AND ANALYSIS

1. In general, section 29 provides a credit for the production of solid synthetic fuel from coal. Section 29(g)(1) provides a tax credit for the sale of qualified fuels that are sold through the end of 2007 and produced from a facility that was originally placed in service after December 31, 1992, and

before July 1, 1998, pursuant to a binding written contract that was in effect before January 1, 1997. No regulations have been promulgated under section 29. Thus, we look to other published guidance of the Service and other analogous Code sections to interpret the meaning and scope of that section, in particular the meaning of placed in service.

In general, property is placed in service in the taxable year the property is placed in a condition or state of readiness and availability for a specifically designed function. See, Treas. Reg. sections 1.46-3(d)(1)(ii) and 1.167(a)-11(e)(1)(i). Placed in service is construed as having the same meaning for purposes of the investment tax credit under section 46 and depreciation under section 167, in Rev. Proc. 2001-30, 2001-1 C.B. 1163 and in private letter rulings. Section 1.46-3(d)(2) provides examples of when property is in a condition of readiness and availability. One of those examples is equipment that is acquired for a specifically assigned function and is operational but undergoing tests to eliminate any defects. See also Rev. Proc. 79-40, 1979-1 C.B. 13, where machinery and equipment were placed in service in the year critical tests (with appropriate materials) and operational tests were completed.

Several Tax Court cases have held that facilities can be deemed placed in service upon sustained power generation near rated capacity. However, a facility that operates on a regular basis but does not produce the projected output may still be considered placed in service. Sealy Power, Ltd v. Commissioner, 46 F.3d 382 (5th Cir. 1995), nonacq. 1996-1 C.B. 6. At a minimum, a property has to have been in a state of readiness sufficient to produce its product on a sustained and reliable basis in commercial quantities to have been placed in service. See Sealy Power, Ltd., AOD 1995-010. And in Rev. Rul. 84-85, 1984-1 C.B. 10, a solid waste facility that was experiencing operational problems such that it was unable to operate at its rated capacity was considered to have been placed in service since it was being operated on a regular basis and saleable steam was being produced. But if a facility is merely operating on a test basis, it is not placed in service until it is available for service on a regular basis. Consumers Power Co. v. Commissioner, 89 T.C. 710, 724 (1987).

The above-referenced cases and rulings, which address electric generating facilities, provide some parallels in evaluating a placed in service issue for section 29 facilities. The following factors are important in determining when a

synfuel plant is placed in service:

- (1) approval of required licenses and permits;
- (2) passage of control of the facility to taxpayer;
- (3) completion of critical tests; and
- (4) commencement of daily or regular operation.

As stated above, the Service found that reaching the design capacity is not a prerequisite to a determination that a facility was placed in service. Rev. Rul. 84-85, 1984-1 C.B. 103. In that ruling, the Service looked to daily operation of the facility to determine the placed in service date. In Valley Natural Fuels v. Commissioner, T.C. Memo. 1991-341, aff'd in unpublished opinion, 1993 U.S. App. LEXIS 6739 (9th Cir. Mar. 23, 1993), the court required an ethanol plant to be producing ethanol of the quality for which the plant was designed prior to being placed in service.

Likewise, however, a facility is not placed in service when it is merely at an interim stage of construction. Noell v. Commissioner, 66 T.C. 718, 729 (1976). Thus, the operation of equipment, such as g, prior to

, is an interim construction stage, and not placed in service.

The focus in determining a placed in service date should be on ascertaining from the relevant facts and circumstances the date the unit begins supplying product in such a manner that it is routinely available and is consistent with the unit's design. To do so, one must examine relevant factors occurring both before and after the claimed placed in service date to verify the commencement of commercial operations. However, a facility does not have to achieve full design output to be placed in service as long as it is in the process of ramping up its production levels. Subject to exceptions that are beyond the taxpayer's control, the Service has generally required actual operational use as a prerequisite for an asset to be deemed placed in service. For this reason, it is critical to know when the facility began producing synfuel, and whether this production continued to Aramp-up@ or ceased until significant problems with the facility were corrected.

Regarding facilities that are not operating as of the cut-off date, the facilities' readiness and availability to produce, on a regular basis, commercial quantities of synfuel are critical to determining whether it has been placed in service. In addition, subsequent production should reflect the same ramp-

up to facility capacity. However, if the facility never operates at a significant production level, or in the same or next tax year shuts down for any significant period of time to correct production problems, the earlier activity is likely in the nature of start-up and testing, and the facility has not been placed in service.

We believe that, based upon the facts as presently known, it is questionable whether any of the facilities were placed in service by June 30, 1998. We believe that the facts concerning

[REDACTED]

[REDACTED] are critical to this analysis. To the extent that you can further develop these areas, it will make clearer the proper determination, and address areas of ambiguity.

a. As set forth above, in the absence of regulations specific to section 29, we look to other published guidance of the Service and other analogous Code sections to interpret the requirement that the taxpayers were in the trade or business of producing and selling synthetic fuel at the time that the facilities were placed in service.

In general, business operations must have begun for the subject property to be considered placed in service. See, Piggly Wiggly Southern, Inc. v. Commissioner, 84 T.C. 739, 748 (1985), nonacq. on another issue, 1988-2 C.B. 1, aff'd on another issue, 803 F.2d 1572 (11th Cir. 1986). Sporadic activity may be merely start-up activity. The property cannot be placed in service until the trade or business begins. Wall v. Commissioner, T.C. Memo. 1992-321; Richmond Television Corp. v. United States, 345 F.2d 901, 909 (4th Cir. 1965), vacated and remanded on another issue, 382 U.S. 68 (1965), on remand, 354 F.2d 410 (4th Cir. 1965), overruled on other grounds.

To depreciate property, section 167 requires property to be used in a trade or business or for the production of income. However, activities that constitute a trade or business are not defined in the regulations under 167. Similar provisions under section 162 provide guidance. In pertinent part, section 162(a) allows as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business. To qualify as such a deduction, an expenditure must: (1) be paid or incurred during the taxable

year, (2) be for carrying on any trade or business, (3) be an expense, (4) be necessary, and (5) be ordinary. Commissioner v. Lincoln Sav. & Loan Ass'n, 403 U.S. 345, 352 (1971). The instant issue concerns the interpretation of the second requirement.

Neither the Code nor the regulations provide any explicit definition of the term "carrying on any trade or business" for purposes of section 162. The Supreme Court has stated that to be engaged in a "trade or business" for purposes of section 162, the taxpayer must be involved in the activity with continuity and regularity, and the taxpayer's primary purpose for engaging in the activity must be for income or profit. Commissioner v. Groetzinger, 480 U.S. 23, 35 (1987). Determining whether a taxpayer is carrying on a trade or business for purposes of section 162 requires an examination of the facts in each case. 480 U.S. at 36.

In Richmond Television Corp., supra, the Fourth Circuit addressed the issue of the point in time at which the taxpayer's business began. After reviewing other cases to see the evidentiary bases on which factual determinations were made, the court stated the following rule: "[E]ven though a taxpayer has made a firm decision to enter into business and over a considerable period of time spent money in preparation for entering that business, he still has not 'engaged in carrying on any trade or business' within the intendment of section 162(a) until such time as the business has begun to function as a going concern and performed those activities for which it was organized." 345 F.2d at 907 (footnote omitted). In Jackson v. Commissioner, 864 F.2d 1521, 1526 n.7 (10th Cir. 1989), the court discussed the case of Kennedy v. Commissioner, T.C. Memo. 1973-15, which held that a pharmacy did not begin to function as a going concern until the date it first opened its doors to the public. The Jackson court explained that, although sales presumably followed, this holding properly focused on the taxpayer's "opening its doors" to attempt to make a sale, and not on the taxpayer's success at selling.

We do not find the facts, as developed, as providing sufficient basis to allow the credits. It does not appear that Corporation or Partnerships A, B, C, and D were engaged in the trade or business of producing and selling Synthetic Fuel as of the cut-off date for purposes of the section 29 credit. None of these entities had an existing business to supply coal or synthetic fuel prior to that time. While the taxpayer presented Agreement A, it is not certain when Corporation and k entered

into that contract. Further, it created no real obligation for k to purchase Synthetic Fuel. The lack of current contracts or of an available inventory of synfuel is not determinative, provided the taxpayer has "opened his doors," is actively soliciting contracts and has a facility ready and available to produce, on a regular basis, commercial quantities of synfuel. These things are not evident under these facts.

[REDACTED]

b. Please see comments in Analysis, ¶¶ 1. and 1.a., above.

2. It appears that the Execution Date contract between c and Corporation did not constitute a binding written contract, as this term has been interpreted in the context of the transitional investment tax credit rules. [REDACTED]

[REDACTED]

If you have questions concerning this memorandum, please contact the undersigned at

BERNARD B. NELSON
Area Counsel
(Natural Resources: Houston)

By: _____
WILLIAM R. DAVIS, JR.
Mining Industry Counsel
(Large & Mid-size Business)

cc:

