



**In the Matter of:**

**GARY J. WICKE**

**ARB CASE NO. 06-124**

**Dispute concerning payment of prevailing wage rate paid to a laborer or mechanic employed by a contractor that is a party to a contract with the Forest Service, United States Department of Agriculture, for stream crossing rehabilitation at various locations within the Nicolet-Chequamegon National Forests, including culvert replacement, roadbed shaping, aggregate placement, seeding and mulching, riprap placement, while operating employer-owned trucks to transport dirt and other materials to and from various locations within the Nicolet-Chequamegon National Forests.**

**DATE: September 30, 2008**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

*For Petitioner:*

**Terry R. Yellig, Esq., *Sherman, Dunn, Cohen, Leifer & Yellig, P.C.*, Washington, District of Columbia**

*For Respondent Administrator, Wage and Hour Division:*

**Roger W. Wilkinson, Esq., William C. Lesser, Esq., Steven J. Mandel, Esq., Howard M. Radzely, Esq., *United States Department of Labor*, Washington, District of Columbia**

**FINAL DECISION AND ORDER**

Gary J. Wicke claims that work he performed as a truck driver on a construction project while employed by the E. Larsen Company (Larsen) was subject to the minimum

wage provisions of the Davis-Bacon Act (DBA or the Act).<sup>1</sup> The Administrator of the United States Department of Labor’s Wage and Hour Division (Administrator) held that Wicke was not entitled to DBA wages for such work. Wicke requested that we review the Administrator’s decision. We affirm the decision.

## BACKGROUND

### 1. The Legal Framework

The DBA applies to every contract of the United States exceeding \$2,000 for construction, alteration, or repair, including painting and decorating, of public buildings or public works in the United States.<sup>2</sup> It requires that contractors pay a minimum wage to the various classifications of mechanics or laborers whom they employ.<sup>3</sup> The Administrator determines these minimum wages and publishes them as “Wage Determinations.”<sup>4</sup> The minimum wage rates contained in the wage determinations derive from rates prevailing in the area where the work is to be performed or from rates applicable under collective bargaining agreements.<sup>5</sup> “Prevailing” wages are wages paid to the majority of laborers or mechanics in corresponding classifications on similar projects in the area.<sup>6</sup>

### 2. Chronology of Events

In 1999, the Forest Service of the United States Department of Agriculture (USDA) awarded Larsen a contract for stream crossing rehabilitation work at various locations within the Nicolet-Chequamegon National Forests in Wisconsin.<sup>7</sup> The contract was subject to the DBA’s minimum wage provisions.<sup>8</sup> Wicke worked for Larsen on the project in the summer of 2000 as a laborer, a power equipment operator, and a truck

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<sup>1</sup> 40 U.S.C.A. §§ 3141-3148 (West Supp. 2003). The regulations that implement the Act are found at 29 C.F.R. Parts 1 and 5 (2008).

<sup>2</sup> 40 U.S.C.A. § 3142(a).

<sup>3</sup> *Id.*

<sup>4</sup> 29 C.F.R. Part 1.

<sup>5</sup> 40 U.S.C.A. § 3142(b); 29 C.F.R. § 1.3.

<sup>6</sup> *See* 29 C.F.R. § 1.2(a)(1).

<sup>7</sup> Tab T.

<sup>8</sup> Tab K.

driver.<sup>9</sup> Larsen paid Wicke the applicable prevailing DBA wage rates for his work as a laborer and a power equipment operator, but not for his work as a truck driver.<sup>10</sup> Wicke operated employer-owned trucks to transport crushed aggregate and other materials from five borrow pits located within, and one pit located outside, the Nicolet-Chequamegon National Forests to various locations within the Nicolet-Chequamegon National Forests where stream crossing rehabilitation work was being done.<sup>11</sup> The materials were to be used for the stream crossing rehabilitation work.

On August 20, 2000, Wicke filed a complaint with the Department of Labor's Wausau, Wisconsin Wage and Hour office in which he alleged that Larsen had not paid the proper DBA wage rate for the truck-driving duties he had performed.<sup>12</sup> A Wage and Hour investigator informed Wicke that the DBA did not apply to the truck-driving work Wicke performed, but Wage and Hour took no further action on the complaint and issued no written decision in response to the complaint.<sup>13</sup> After receiving no further satisfaction, Wicke requested on February 26, 2002, that the Administrative Review Board (ARB or Board) review Wage and Hour's decision that the DBA was inapplicable to the truck-driving duties he performed for Larsen.<sup>14</sup> But because the Administrator had not yet issued a final decision as provided in 29 C.F.R. § 7.9(a) (2001), the case was not yet ripe for review. Thus, the Board dismissed Wicke's petition for review without prejudice and remanded the case to the Wage and Hour Division for an official ruling.<sup>15</sup>

On May 5, 2003, the Administrator issued a final decision.<sup>16</sup> Based on Wicke's statements and information obtained from the Forest Service, the Administrator determined that the borrow pits were located approximately one-half to ten miles from the various locations within the Nicolet-Chequamegon National Forests where stream crossing rehabilitation work was performed. The Administrator reaffirmed the Wage and Hour investigator's conclusion that the DBA did not apply to the truck-driving work Wicke performed. Specifically, the Administrator held that the borrow pits were not located adjacent or virtually adjacent to the various locations where the stream crossing

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<sup>9</sup> Tabs K, S.

<sup>10</sup> *Id.*

<sup>11</sup> Tabs A, K.

<sup>12</sup> Tab M.

<sup>13</sup> Tabs M, Q.

<sup>14</sup> Tabs O.

<sup>15</sup> Tab L.

<sup>16</sup> Tab K.

rehabilitation work was performed or, therefore, the “site of the work” as defined “under our current regulations.” Thus, the Administrator decided that no enforcement action would be taken with respect to Wicke’s complaint.<sup>17</sup>

Wicke filed a petition for review with the Board on May 12, 2003, requesting that it review the Administrator’s final decision.<sup>18</sup> Subsequently, the Building and Construction Trades Department, AFL-CIO, (BCTD) intervened in the case, requesting that the Board remand this case to take additional evidence and make new or modified findings by reason of the additional evidence.<sup>19</sup> Specifically, BCTD noted that information revealed by the contract between Larsen and the Forest Service, which was not part of the record when the Administrator made her final decision, might affect that determination. Moreover, although the Department of Labor amended the regulations implementing the DBA effective as of January 19, 2001,<sup>20</sup> BCTD noted that the work on the contract at issue in this case was completed in 2000.<sup>21</sup> As neither party objected and for good cause shown, the Board dismissed Wicke’s petition for review and remanded the case to the Administrator take additional evidence.<sup>22</sup> The Board instructed the Administrator to issue a final decision based upon the evidence and addressing which regulations apply to the contract at issue in this case.<sup>23</sup>

### **3. The Administrator’s Final Determination**

On remand, the Administrator issued a final determination on June 5, 2006.<sup>24</sup> After a review of additional information that the BCTD, Larsen, and the USDA provided, the Administrator determined that Wicke’s work as a truck driver involved hauling from five borrow pits located within the Nicolet-Chequamegon National Forests and from one privately owned pit located outside the forest boundaries, approximately ten miles from where actual contract work was being performed. Furthermore, evidence that the USDA provided indicated that the other borrow pits were located an estimated three to five miles from where stream crossing rehabilitation construction work was performed and some of

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<sup>17</sup> *Id.*

<sup>18</sup> *See* Wicke’s May 12, 2003 Petition for Review.

<sup>19</sup> Tab E.

<sup>20</sup> *See* 29 C.F.R. § 5.2 (2007); 65 Fed. Reg. 80,268-80,277 (Dec. 20, 2000).

<sup>21</sup> Tab E.

<sup>22</sup> Tab D.

<sup>23</sup> *Id.*

<sup>24</sup> Tab A.

the borrow pits had been established prior to the award of the contract at issue in this case.

The Administrator reviewed the evidence pursuant to the pre-2001 regulations defining “site of the work,” applicable to this case involving work performed in 2000, as construed by the Board in *Bechtel Constructors Corp.*, ARB No. 95-045A, slip op. at 7 (ARB July 15, 1996)(*Bechtel I*). The ARB issued *Bechtel I* in light of federal appellate court decisions that invalidated the pre-2001 regulations to the extent that they included work performed at borrow pits that were not located adjacent or virtually adjacent to the construction work site.<sup>25</sup> Based on the Board’s decision in *Bechtel I*, the Administrator determined that Wicke’s truck driving work did not meet the statutory requirement that it be performed at the “site of the work.” Accordingly, the Administrator declined to seek back wages on Wicke’s behalf because his truck driving work was not performed at the “site of the work” as defined by the DBA and, alternatively, as “a reasonable exercise of [the Administrator’s] enforcement discretion.”<sup>26</sup> Wicke petitioned the ARB to review the Administrator’s final determination.<sup>27</sup>

#### JURISDICTION AND STANDARD OF REVIEW

The Administrative Review Board has jurisdiction to decide appeals from the Administrator’s final decisions concerning DBA wage determinations.<sup>28</sup> The Board’s review of the Administrator’s rulings is in the nature of an appellate proceeding.<sup>29</sup> We assess the Administrator’s rulings to determine whether they are consistent with the DBA and its implementing regulations and are a reasonable exercise of the discretion delegated to the Administrator to implement and enforce the Act.<sup>30</sup> The Board generally defers to

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<sup>25</sup> See *Ball, Ball & Brosamer v. Reich*, 24 F.3d 1447, 1449, 1452 (D.C. Cir. 1994)(DBA only covers borrow pits located in actual or virtual adjacency to the construction site and borrow pit located “about two miles” from the construction site is not covered); *L.P. Cavett Co. v. U.S. Dep’t of Labor*, 101 F.3d 1111, 1115 (6th Cir. 1996)(while a facility in virtual adjacency to a public work site might be considered part of that site, a facility located two or three miles away from the site would not).

<sup>26</sup> Tab A.

<sup>27</sup> 29 C.F.R. § 7.9(a) (“Any party or aggrieved person shall have a right to file a petition for review with the Board (original and four copies), within a reasonable time from any final decision in any agency action under part 1, 3, or 5 of this subtitle.”).

<sup>28</sup> 29 C.F.R. § 7.1(b)(2008). See Secretary’s Order 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002).

<sup>29</sup> 29 C.F.R. § 7.1(e).

<sup>30</sup> *Miami Elevator Co. & Mid-American Elevator Co., Inc.*, ARB Nos. 98-086, 97-145, slip op. at 16 (Apr. 25, 2000). See also *Millwright Local 1755*, ARB No. 98-015, slip op. at 7

the Administrator as being “in the best position to interpret [the DBA’s implementing regulations] in the first instance . . . , and absent an interpretation that is unreasonable in some sense or that exhibits an unexplained departure from past determinations, the Board is reluctant to set the Administrator’s interpretation aside.”<sup>31</sup>

## DISCUSSION

### 1. Relevant Law

As we have already indicated, the DBA applies to Federal contracts for the construction of public buildings or public works. The Act requires employers to pay mechanics and laborers “employed directly on the site of the work” the local prevailing wage rates as determined by the Secretary of Labor.<sup>32</sup> The Department of Labor’s pre-2001 regulations interpreting the term “directly upon the site of the work,” applicable to this case involving work performed in 2000, are found at 29 C.F.R. § 5.2(l) (2000).<sup>33</sup>

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(May 11, 2000); *Dep’t of the Army*, ARB Nos. 98-120, 98-121, 98-122, slip op. at 16 (Dec. 22, 1999) (under the parallel prevailing wage statute applicable to federal service procurements, the Service Contract Act, 41 U.S.C.A. § 351 *et seq.* (West 1987)), *citing ITT Fed. Servs. Corp. (II)*, ARB No. 95-042A (July 25, 1996) and *Service Employees Int’l Union (I)*, BSCA No. 92-01 (Aug. 28, 1992).

<sup>31</sup> *Titan IV Mobile Serv. Tower*, WAB No. 89-14, slip op. at 7 (May 10, 1991), *citing Udall v. Tallman*, 380 U.S. 1, 16-17 (1965).

<sup>32</sup> 40 U.S.C.A. § 3142(a), (c)(1).

<sup>33</sup> 29 C.F.R. § 5.2(l) (2000) provided:

(l) The term *site of the work* is defined as follows:

(1) The *site of the work* is limited to the physical place or places where the construction called for in the contract will remain when work on it has been completed and, as discussed in paragraph (l)(2) of this section, other adjacent or nearby property used by the contractor or subcontractor in such construction which can reasonably be said to be included in the *site*.

(2) Except as provided in paragraph (l)(3) of this section, fabrication plants, mobile factories, batch plants, borrow pits, job headquarters, tool yards, *etc.*, are part of the *site of the work* provided they are dedicated exclusively, or nearly so, to performance of the contract or project, and are so located in proximity to the actual construction location that it would be reasonable to include them.

In *Bechtel I*, the Board considered whether batch plants located up to one-half mile from a DBA-covered construction project were located at the “site of the work” on the project as defined pursuant to the Department of Labor’s pre-2001 regulations at 29 C.F.R. § 5.2(l) (2000). The DBA-covered construction project at issue consisted of the construction of 330 miles of aqueduct and pumping stations. Temporary batch plants located up to one-half mile from each of the pumping stations under construction were built to provide concrete for the project. The Board considered whether the batch plants were located at the “site of the work.”<sup>34</sup> The Board noted that “it is the nature of construction, *e.g.*, highway, airport and aqueduct construction, that the work may be long, narrow and stretch over many miles” and, therefore, concluded that “[w]here to locate a storage area or batch plant along such a project is a matter of the contractor’s convenience and is not a basis for excluding the work from the DBA.”<sup>35</sup> And after examining aerial photographs, a map of the project, and the nature of the construction, the Board found that “work performed in actual or virtual adjacency to one portion of the long continuous project is to be considered adjacent to the entire project.”<sup>36</sup> Ultimately, the Board determined that the batch plants, given their location and purpose, were reasonably to be included in the site of work.<sup>37</sup>

Subsequently, in light of the federal appellate court decisions and the Board’s decisions in *Bechtel I* and *II* interpreting the term “directly upon the site of the work” as found in the DBA, the Department of Labor amended the relevant regulations.<sup>38</sup> The

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<sup>34</sup> The Board has also held that 29 C.F.R. § 5.2(l)(2) (2000) applies to mineral borrow pits. *See Ball, Ball & Brosamer, Inc.*, slip op. at 10 (applying site of the work definition to a “sand and gravel pit” that provided sand, gravel and other aggregates).

<sup>35</sup> *Bechtel I*, slip op. at 7.

<sup>36</sup> *Id.*

<sup>37</sup> *See Bechtel Constructors Corp.*, ARB No. 97-149, slip op. at 5-6 (ARB Mar. 25, 1998)(*Bechtel II*).

<sup>38</sup> *See* 29 C.F.R. § 5.2(l) (2008). This regulation became effective on January 19, 2001. *See* 65 Fed. Reg. 80,268 (Dec. 20, 2000). As amended, “site of the work” is defined as follows:

(1) The *site of the work* is the physical place or places where the building or work called for in the contract will remain; and any other site where a significant portion of the building or work is constructed, *provided* that such site is established specifically for the performance of the contract or project;

(2) Except as provided in paragraph (1)(3) of this section, job headquarters, tool yards, batch plants, borrow pits, etc., are

Administrator nevertheless stated that the Board's decisions in *Bechtel I* and *II* provide "an excellent example" and "considerable guidance on how the amended [site of the work] definition will be applied by the Department."<sup>39</sup>

Thus, Wicke engaged in DBA construction work as a truck driver and is entitled to DBA wages for such work if the borrow pits, from which he transported crushed aggregate and other materials, were part of the various stream crossing rehabilitation project sites. The borrow pits were part of those sites if they were dedicated exclusively, or nearly so, to the performance of the stream crossing rehabilitation projects and if they were adjacent or virtually adjacent to those project sites.

Finally, the principles enunciated in *Anderson v. Mt. Clemens Pottery Co.*<sup>40</sup> apply to the instant case regarding the determination of back wage claims arising under the DBA and its related Acts, including the parties' respective burdens of proof.<sup>41</sup> Under

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part of the *site of the work*, *provided* they are dedicated exclusively, or nearly so, to performance of the contract or project, and *provided* they are adjacent or virtually adjacent to the *site of the work* as defined in paragraph (l)(1) of this section;

(3) Not included in the *site of the work* are permanent home offices, branch plant establishments, fabrication plants, tool yards, etc., of a contractor or subcontractor whose location and continuance in operation are determined wholly without regard to a particular Federal or federally assisted contract or project. In addition, fabrication plants, batch plants, borrow pits, job headquarters, tool yards, etc., of a commercial or material supplier, which are established by a supplier of materials for the project before opening of bids and not on the *site of the work* as stated in paragraph (l)(1) of this section, are not included in the *site of the work*. Such permanent, previously established facilities are not part of the *site of the work*, even where the operations for a period of time may be dedicated exclusively, or nearly so, to the performance of a contract.

29 C.F.R. § 5.2(l) (2008).

<sup>39</sup> 65 Fed. Reg. at 80,272.

<sup>40</sup> 328 U.S. 680 (1946).

<sup>41</sup> See *Thomas & Sons Bldg. Contractors, Inc.*, ARB No. 00-050, ALJ No. 1996-DBA-037, slip op. at 4 (ARB Aug. 27, 2001), *order denying recon.*, slip op. at 1-2 (ARB Dec. 6, 2001); *Tratoros Constr. Corp.*, WAB No. 92-03, slip op. at 6 (Apr. 28, 1993).



these principles, Wicke, as the party that initiated this case, has the initial burden of proof of establishing that he performed work for which he was improperly compensated.<sup>42</sup> Wicke carries his burden “if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference.”<sup>43</sup>

## 2. The Parties’ Arguments

Wicke contends that the Administrator erred in “narrowly” construing the term “site of the work” as set forth in the DBA, thereby restricting its application only to work sites defined by the boundaries of the public building or public work that will remain upon completion of the government contract.<sup>44</sup> Instead, Wicke contends that the plain meaning of the term “site of the work” includes any place where laborers and/or mechanics employed by government construction contractors or subcontractors perform contract work or tasks that are necessary and dedicated exclusively to the successful performance of the government construction contract.<sup>45</sup> Furthermore, Wicke argues that the place where the construction called for in a government construction contract will remain when work on it has been completed includes all of the boundaries of the real property (such as the boundaries of the Nicolet-Chequamegon National Forests in this case) on which the public building or public work is situated, as described in a recorded deed of land.<sup>46</sup>

In response, the Administrator contends that he properly determined that Wicke’s truck driving work transporting materials to and from borrow pits located three to five miles from the various stream crossing rehabilitation project sites was not covered by the DBA in accordance with the pre-2001 regulations defining “site of the work” as construed by the Board in *Bechtel I* and *II*.<sup>47</sup>

Alternatively, the Administrator argues that even if any of Wicke’s truck driving work was covered under the DBA, the Administrator nevertheless reasonably exercised

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<sup>42</sup> See, e.g., 1 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 63 (2d ed. 1994) (“[The] broadest and most accepted idea [is] . . . that the person who seeks court action should justify the request, which means that the plaintiffs bear the burdens on the elements in their claims.”).

<sup>43</sup> *Mt. Clemens Pottery*, 328 U.S. at 687-688; see also *Thomas & Sons*, *supra*.

<sup>44</sup> See Petition for Review at 9-10; Wicke Brief at 9.

<sup>45</sup> See Wicke Brief at 12-23.

<sup>46</sup> See Wicke Brief at 24.

<sup>47</sup> See Administrator’s Brief at 7-16.

his discretion not to pursue enforcement in this case, which involves neither a “large group of employees” nor “significant sums of money.”<sup>48</sup> In reply, Wicke contends that the Administrator’s discretion not to pursue enforcement does not preclude review of his interpretation of the term “site of the work” as set forth in the DBA.<sup>49</sup>

**3. The Administrator’s determination that Wicke’s truck driving work transporting materials from borrow pits located three to five miles from the various stream crossing rehabilitation project sites was not covered by the DBA is supported by the evidence in the record and consistent with the DBA and its implementing regulations.**

The Administrator reviewed the additional evidence submitted on remand, which included the contract between Larsen and the Forest Service, as well as information that Larsen and the USDA provided.<sup>50</sup> New information that Larsen and the USDA provided on remand indicated that Wicke’s truck driving work involved transporting materials from five borrow pits located within, and one pit located outside, the Nicolet-Chequamegon National Forests.<sup>51</sup>

Initially, we note that the Administrator determined that some of these pits were established prior to the contract between Larsen and the Forest Service.<sup>52</sup> As the ALJ found, the record indicates that the Gieter Pit was privately owned and that the East Haystack Pit had been used for other government projects.<sup>53</sup> Thus, as these borrow pits were not dedicated exclusively, or nearly so, to the performance of the stream crossing rehabilitation projects, they were not part of the “site of the work” as set forth at 29 C.F.R. § 5.2(l)(2) (2000). Consequently, Wicke is not entitled to DBA wages for his work transporting crushed aggregate and other materials from the Gieter Pit and the East Haystack Pit.

Next, we reject Wicke’s contention that the Administrator erred in construing the term “site of the work” as set forth in the DBA. The Administrator considered all of the additional evidence submitted on remand and properly determined that Wicke’s truck

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<sup>48</sup> See Administrator’s Brief at 16-19; *see also* 29 C.F.R. § 7.1(b).

<sup>49</sup> See Wicke Brief at 25-30.

<sup>50</sup> See Tabs A, C, T.

<sup>51</sup> The borrow pits included East Haystack Pit, Peeks Pit, Wischer Pit, Highway 8 Pit, and Camo One Pit, which were government owned, and the Gieter Pit, which was privately owned. See Tabs A, C.

<sup>52</sup> Tab E at 1.

<sup>53</sup> See Tab A.

driving work transporting materials from the other remaining borrow pits was also not covered by the DBA in accordance with the applicable pre-2001 regulations defining “site of the work” as construed by the federal appellate courts and the Board in *Bechtel I* and *II*.

The additional evidence submitted on remand includes the contract between Larsen and the Forest Service. While the contract includes maps indicating the locations of the various borrow pits and stream crossing rehabilitation project sites, the maps do not provide any specific or clear indication as to the distances between the borrow pits and the stream crossing rehabilitation project sites.<sup>54</sup> Steve Sprister, an inspector for the USDA (the contracting agency), estimated that the borrow pits were located three to five miles from the stream crossing rehabilitation project sites.<sup>55</sup> Wicke has not submitted any other evidence that contradicts Sprister’s estimate.

In accordance with federal appellate court holdings, the Board held in *Bechtel I* that “work performed in actual or virtual adjacency to” a DBA-covered construction project site is located at the “site of the work” on the project as defined pursuant to the Department of Labor’s pre-2001 regulations at 29 C.F.R. § 5.2(l) (2000).<sup>56</sup> While the Board held that batch plants located up to one-half mile from a DBA-covered construction project site were located at the “site of the work,”<sup>57</sup> federal appellate courts have held that borrow pits located two miles or more from a DBA-covered construction project site are not considered to be at the “site of the work” for DBA coverage purposes.<sup>58</sup>

Thus, the Administrator’s finding that Wicke’s truck driving work involved transporting materials from borrow pits located three to five miles from the various stream crossing rehabilitation project sites is supported by the evidence of record. Consequently, the Administrator properly determined that such work did not meet the statutory requirement that it be performed at the “site of the work” and, therefore, is not covered by the DBA in accordance with the DBA and its implementing regulations as construed by the federal appellate courts and the Board in *Bechtel I* and *II*.

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<sup>54</sup> See Tab T.

<sup>55</sup> See Tab A.

<sup>56</sup> See *Bechtel I*, slip op. at 7.

<sup>57</sup> See *Bechtel II*, slip op. at 5-6.

<sup>58</sup> See *L P. Cavett Co.*, 101 F.3d at 1115; *Ball, Ball & Brosamer, Inc.*, 24 F.3d at 1449, 1452.

Accordingly, as Wicke has failed to carry his burden of proof of establishing that he in fact performed work for which he was improperly compensated,<sup>59</sup> we affirm the Administrator's determination not to seek back wages on Wicke's behalf.

### CONCLUSION

The Administrator properly determined that the truck driving work Wicke performed for Larsen transporting materials to and from borrow pits located three to five miles from the various stream crossing rehabilitation project sites was not covered by the DBA. Therefore, we **AFFIRM** the Administrator's June 5, 2006 final determination.

**SO ORDERED.**

**WAYNE C. BEYER**  
**Administrative Appeals Judge**

**M. CYNTHIA DOUGLASS**  
**Chief Administrative Appeals Judge**

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<sup>59</sup> *See Mt. Clemens Pottery*, 328 U.S. at 687-688; *see also Thomas & Sons, supra*.