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9 UNITED STATES DISTRICT COURT  
10 NORTHERN DISTRICT OF CALIFORNIA  
11 OAKLAND DIVISION

12 DAVID P. ADAM, et al., )

13 Plaintiffs, )

14 v. )

15 GALE NORTON, Secretary, U.S. )  
16 DEPARTMENT OF THE INTERIOR, )

17 Defendant. )

No. C 98-2094 CW (EDL)

**DEFENDANT'S PROPOSED FINDINGS  
OF FACT AND CONCLUSIONS OF  
LAW**

Pretrial Conf.: June 13, 2003  
Time: 9:30 a.m.

Trial Date: June 30, 2003

Hon. Claudia Wilken

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19  
20 Pursuant to Civil L.R. 16-10 (9), defendant hereby submits her proposed findings of fact and  
21 conclusions of law.

22 **I. PROPOSED FINDINGS OF FACT**

23 A. Geologic Division Pre-RIF Organizational Structure

- 24 1. At all times relevant hereto, the Geologic Division of the U.S. Geological Survey was  
25 responsible for carrying out the work of ten science programs appropriated by Congress: (1)  
26 Energy Resources Program; (2) Marine & Coastal Surveys Program; (3) National  
27 Cooperative Geologic Mapping Program; (4) Volcano Program; (5) Landslide Program; (6)  
28 Earthquake Hazards Reduction Program; (7) Magnetic Field Monitoring & Charting

1 Program; (8) Mineral Resource Surveys Program; (9) Global Change Program; and (10) Deep  
2 Continental Surveys Program.

3 2. Before the 1995 Reduction in Force (“RIF”) and reorganization, the Geologic Division was  
4 comprised of the following five offices: (1) Office of Energy & Marine Geology (responsible  
5 for the Energy Resources and Marine & Coastal Surveys Programs); (2) Office of Regional  
6 Geology (responsible for the National Geologic Mapping Program); (3) Office of  
7 International Geology; (4) Office of Earthquakes, Volcanoes & Engineering (responsible for  
8 the Volcano, Landslide, Earthquake Hazards Reduction, and Magnetic Field Monitoring &  
9 Charting Programs); and (5) Office of Mineral Resources (responsible for the Mineral  
10 Resource Surveys Program).

11 3. Each office was managed by an Office Chief and contained several branches. Each branch  
12 was managed by a Branch Chief. The Branch Chief positions were staffed by scientists on a  
13 rotating basis. In other words, a scientist would rotate into a Branch Chief position for a  
14 limited time period, generally 3-5 years. When the limited term was up, the scientist would  
15 return to his scientific position and one of his colleagues would rotate into the Branch Chief  
16 position.

17 4. In addition to the programmatic division into offices and branches, the Geologic Division  
18 was divided geographically into the Eastern, Central and Western Regions, with the Western  
19 Region based in Menlo Park, California. The management of the USGS was centralized in  
20 Reston, Virginia, under the supervision of the Office Chiefs. Branch Chiefs were located in  
21 regional offices, but they reported to the Office Chiefs at headquarters.

#### 22 B. Financial Justification for RIF

23 5. The Geologic Division began experiencing financial problems in the mid-1980s, when  
24 budgets could not keep pace with increasing inflationary costs. The financial concerns took  
25 on increasing serious tones as a result of decreasing appropriated funding beginning in about  
26 1991. Funding remained approximately level while costs, especially salary, increased with  
27 each federal pay raise and each year in accordance with pay rules, such a regularly scheduled  
28 within-grade-increases. Because certain fixed expenses, such as rents, contracts, utilities, and

1 employee salaries were regularly increasing, funding was effectively decreasing. As a result,  
2 program activities and field work were restricted because of a lack of funds for operating  
3 expenses.

- 4 6. On March 27, 1992, the Chief Geologist sent a memorandum to all Geologic Division  
5 personnel advising that the Division would have to reduce staffing levels and costs by a  
6 combination of actions including, possible, a RIF. When the agency finally received funding  
7 similar to the 1992 funding, plans for a RIF were shelved.
- 8 7. On March 15, 1994, Chief Geologist Ben Morgan prepared a memorandum for the Director  
9 of the USGS entitled “Downsizing of the Geologic Division including a Reduction in Force,”  
10 in which he explained the background, causes and need to reduce the work force by  
11 approximately 380 employees. Dr. Morgan identified two objectives of downsizing: (1) to  
12 regain financial solvency for the Division; and (2) to provide significant increases in  
13 operating expenses required to carry out field work and maintain and improve  
14 instrumentation and facilities. He explained that the ten programs supporting the Division  
15 “cannot operate with the given salary load and cannot continue to be effective without funds  
16 for operating expenses.” Dr. Morgan concluded that “the only avenue available is to increase  
17 operating expenses by conversion of salary dollars.”
- 18 8. The agency had previously taken other measures to improve its financial status, including  
19 restricting hiring to replace departing employees; reducing temporary and term appointments;  
20 limiting travel, awards, and promotions; and buyouts, including two in the late 1980s and  
21 early 1990s and three in 1994-95. The agency also considered a furlough. However, the  
22 agency concluded that these were temporary solutions that did not address the real problem:  
23 establishing and maintaining a suitable balance between salary costs and operating expenses.
- 24 9. Based on the foregoing facts, the Court concludes that defendant had a bona fide financial  
25 justification for conducting the RIF.

26 C. Post-RIF Organizational Structure

- 27 10. In conjunction with the 1995 RIF, the Geologic Division underwent a reorganization. The  
28 reorganization had three primary goals: (1) strengthening the role of the regions in

1 management, (2) consolidating branches into a fewer number of teams, and (3) ensuring that  
2 each team had a defined funding source. The USGS replaced the branches with teams. It  
3 was not a simple change of name, however, but a reorganization. Branches with related  
4 missions, such as earthquakes, were consolidated into a single team. In addition, prior to the  
5 reorganization, there were branches that were not well linked to a funding source. Those  
6 branches, such as the Branch of Geophysics, that did not have a defined funding source were  
7 disbanded and the positions redistributed among teams with dedicated funding sources. This  
8 change was made in order to manage costs by avoiding incurrence of salary obligations that  
9 the Division had no defined funds to satisfy. The position of Branch Chief was abolished,  
10 and the teams, fewer in number than the branches, were led by Team Chief Scientists,  
11 positions that were filled on a rotating basis from the pool of scientists. Rather than reporting  
12 to the Office Chiefs at headquarters, the Team Chief Scientists reported to the Regional  
13 Geologist, which was intended to strengthen the role of the region in the management of  
14 science programs.

15 D. 1995 Geologic Division Reduction in Force

16 11. In 1995, in conjunction with the reorganization described above, the USGS conducted a RIF  
17 in its Geologic Division. The planning and implementation of the RIF was carried out in  
18 several distinct phases.

19 (1) RIF Preparation

20 a. Creation of Five-Year Science Program Plans.

21 12. On February 1, 1995, Acting Chief Geologist John Filson directed each of the five Office  
22 Chiefs to appoint a Program Council for each of the science programs under that Office  
23 Chief's control. This resulted in the creation of ten Program Councils, each of which was  
24 comprised of the Branch Chiefs and Senior Scientists whose research was principally funded  
25 by the science program that was the domain of that council.

26 13. Each Program Council was charged with the task of developing a "Five-Year Plan" to meet  
27 the scientific responsibilities of the program over the next five fiscal years. These plans were  
28 to state the scientific priorities of each program, with sufficient specificity to serve as the

1 basis for the development of staffing plans.

2 b. Revision of Position Descriptions.

3 14. On March 9, 1995, Acting Chief Geologist John Filson directed all managers to have their  
4 employees update their position descriptions to accurately describe their current duties.  
5 Managers were asked to ensure that position descriptions for research scientists reflected all  
6 major project assignments and any special duties or responsibilities.

7 c. Creation of Staffing Plans.

8 15. In April 1995, the Program Councils prepared staffing plans. In preparing staffing plans,  
9 each Program Council had to determine which duties and skills were required to meet the  
10 goals and priorities of that program's Five-Year Plan, given the expected funding. A salary  
11 cap was established for each program using a "worst-case" funding scenario.

12 16. In May 1995, a non-managerial ad hoc committee, led by senior scientist Thomas Fouch and  
13 comprised of scientific staff from across the Division (the "Fouch Committee"), reviewed  
14 each staffing plan to ensure that it was sufficient to meet the priorities set forth in that  
15 program's Five-Year Plan. The Fouch Committee prepared comments and recommendations  
16 for each Program Council, which resulted in some changes being made to the staffing plans.

17 17. The staffing plans were then "populated" by the Program Councils by comparing the duties  
18 identified in the recently updated position descriptions with the program needs as reflected in  
19 the staffing plans. If a position description was not placed on a staffing plan, that position  
20 was to be abolished.

21 18. The staffing decisions of each of the Program Councils were then reviewed by the Geologic  
22 Division Council, which was comprised of the new Chief Geologist, Patrick Leahy, the two  
23 Associate Chief Geologists, the three Regional Geologists, and the five Office Chiefs. On  
24 May 16-17, 1995, the Geologic Division Council reviewed the list of positions to be  
25 abolished to see if another program, group of programs, or support office could support any  
26 of the positions. Some positions were added to some of the staffing plans as a result of this  
27 review.

28 19. A final review and adjustment to the staffing plans took place in late July 1995 when it

1 became clear that funding for the Geologic Division would be above the “worst-case”  
2 planning level. Office Chiefs were asked to submit a list of positions to add to the staffing  
3 plans of their respective programs. The final selection of positions to be added back, based  
4 on the new funding projections and overall Geologic Division needs, was conducted by the  
5 Geologic Division Policy Council, comprised of the Division Council less the five Office  
6 Chiefs. The primary criteria used by the Division Policy Council for positions back to the  
7 staffing plans were to find positions that were multidisciplinary or broad enough for multiple  
8 applications, or that required key skills for the future. Some of the positions were vacant, and  
9 some were encumbered. Add-back decisions were based on the position descriptions, not the  
10 individuals in the positions.

11 d. Treatment of Management Positions.

12 20. Because the new organizational structure of the Geologic Division was more regional in  
13 nature, with the former “branches” reorganized by region and funding source and  
14 concentrated into a fewer number of “teams,” the old management structure did not bridge  
15 directly into the new management structure. Previous managers could not fill the new  
16 positions because of significant changes in the positions in terms of role, responsibility, and  
17 authority.

18 21. It had been the tradition of the Geologic Division to fill management positions from the  
19 science ranks for limited terms on a rotational basis. Scientists would compete for leadership  
20 slots with the understanding that the assignment would be for a limited period of time and  
21 they would rotate back into science positions after serving a term in management.

22 22. Since there was no direct bridge between the old and new managerial positions, and since the  
23 individuals holding management positions would have rotated back into science positions in  
24 any event, the USGS reassigned the individuals occupying those positions in June 1995 to  
25 their original science positions so that they would compete in the RIF from their science  
26 positions. A few individuals had been hired directly as managers, with the understanding  
27 they would be reassigned to science positions following their management terms. The USGS  
28 had these managers compete in the RIF from science positions that were most closely

1 associated with their current programs and consistent with their scientific skills. The USGS  
2 intended to continue staffing managerial positions on a rotational basis from the science staff,  
3 so the new managerial positions were included on the staffing plan, but they were neither  
4 staffed nor funded.

5 (2) RIF Implementation

6 23. In conducting the 1995 RIF, defendant was governed by the regulations contained in 5 CFR  
7 Part 351 (1-1-95 Edition).

8 a. Advance General Notice.

9 24. On March 9, 1995, Acting Chief Geologist John Filson issued a general notice to all  
10 Geologic Division employees that a RIF was anticipated. Employees were advised to  
11 “update their personnel records to reflect all pertinent experience (paid and unpaid) not  
12 already documented in their official personnel folder,” and that such information would be  
13 “used by the personnel office in determining placement rights.” On that same date, Dr.  
14 Filson also directed managers to have their employees update their position descriptions. See  
15 supra at ¶ 9.

16 b. Competitive Levels.

17 25. Under the OPM regulations in effect in 1995, the USGS was required to identify competitive  
18 levels consisting of “all positions within a competitive area which are in the same grade (or  
19 occupational level) and classification series and which are similar enough in duties,  
20 qualification requirements, pay schedules, and working conditions so that the incumbent of  
21 one position could successfully perform the critical elements of any other position upon entry  
22 into it, without loss of productivity beyond that normally expected in the orientation of any  
23 new but fully qualified employee.” Under 5 CFR 351.402, a “competitive area” must at a  
24 minimum consist of a “bureau, major Command, directorate, or other equivalent major  
25 subdivision of an agency within the local commuting area.”

26 26. Beginning in late 1994, the Geologic Division Human Resources Officer and position  
27 classification specialists in the USGS Office of Personnel conducted a review of the criteria  
28 used by the Geologic Division to establish research and technical competitive levels.

1 27. Under the competitive level system in use at the time, competitive levels were based on a  
2 three letter code. The first two letters identified scientific specialities selected from a list of  
3 specialities by the scientists themselves with the approval of immediate supervisors. The  
4 third letter identified the program that was the principal funding source for the research  
5 described in the position.

6 28. Human Resources Officer John McGurk concluded that existing competitive levels for  
7 geologists, geophysicists, and geochemists did not comply with OPM regulations and MSPB  
8 case law because the competitive levels reflected the incumbent's personal qualifications  
9 rather than the duties of the position as reflected in the position description. Mr. McGurk  
10 recommended that a new competitive level system be established, and that "unless  
11 established otherwise by detailed management review and knowledgeable scientific  
12 certification, each research position in the Geologic Division be placed in a separate  
13 competitive level for reduction-in-force considerations."

14 29. On March 29, 1995, Acting Chief Geologist Filson accepted this recommendation only in  
15 part. He wrote:

16 The attached paper on Earth Science Competitive Levels ends in the  
17 recommendation that "...each research position in the Geologic Division be placed  
18 in a separate competitive level for reduction-in-force consideration." We prefer  
19 not to follow this recommendation blindly and explicitly. It is our position that  
20 competitive levels should be established by detailed management review and  
21 knowledgeable scientific certification of each research and development position  
22 within the Division. Upon review it may be that many, or most, research positions  
23 will fall in separate and unique competitive levels; however, this should not be the  
24 assumed conclusion.

25 See Defendant's Trial Exhibit 1023.

26 30. The procedure used by the agency to establish new competitive levels involved three levels of  
27 review. First, a panel of subject matter experts ("SME") reviewed the recently updated  
28 position descriptions (or summaries thereof) to determine which positions were  
interchangeable, and therefore in the same competitive level. The SMEs who reviewed the  
Western Region positions were non-managerial senior scientists from the Western Region.  
The SME panel's preliminary determination was then reviewed by a "validation team,"  
consisting of a position classification specialist from the Western Region Office of Personnel,

1 the Branch Chief of the branch to which the position was assigned, and National RIF  
2 Coordinator William Cannon (a non-managerial senior scientist who was assigned national  
3 responsibility for technical input to RIF decisions). Finally, the National RIF Coordinator  
4 and a position classification specialist from the Office of Personnel at USGS Headquarters in  
5 Reston, Virginia conducted a review to ensure national consistency in the application of  
6 competitive level regulations.

7 31. After new competitive levels were established, approximately 97% of the competitive levels  
8 in the Geologic Division contained only one position. Under the old system, which had been  
9 found in conflict with OPM regulations, there were 1001 competitive levels in the Geologic  
10 Division, 85% of which contained only one position.

11 32. Each of the plaintiffs was in competitive levels which contained only one position.

12 33. As research scientists follow a career path in the Geologic Division, their research necessarily  
13 becomes more specialized. Since the nature of the individual research defines the position  
14 description, it is not surprising that most scientists in grade GS-12 and higher occupied a  
15 unique competitive level.

16 34. On August 31, 1995, James B. King, Director of the U.S. Office of Personnel Management,  
17 responded to an inquiry by Representative John L. Mica, Chairman of the Subcommittee on  
18 Civil Service, Committee on Government Reform and Oversight, regarding RIF planning at  
19 the USGS and the fact that many positions were being assigned to one-person competitive  
20 levels. In recognition of the fact that highly specialized positions can result in unique  
21 competitive levels, Mr. King of OPM wrote:

22 The fact that an agency has a large number of small competitive levels does not  
23 imply that the agency is abusing either OPM's retention regulations or the  
24 employee's rights. . . . Instead, a one-person competitive level may simply  
document that the agency has no other positions that are interchangeable with that  
position in the competitive area that is conducting the RIF.

25 b. Release from Competitive Levels.

26 35. If a competitive level contained a position that was identified for abolishment, the employee  
27 with the lowest retention standing in that competitive level was released. Employees released  
28 from their competitive levels were then separated, unless they were assigned to another

1 position through bump or retreat, as described below. If several positions were identified for  
2 abolishment within a competitive level, then several employees were released in the inverse  
3 order of their retention standing. 5 CFR § 351.501.

4 c. Determination of Assignment Rights.

5 36. OPM regulations required the USGS to offer released employees assignment to another  
6 position in two situations, provided that the position is no more than three grades below the  
7 position from which the employee was released:

8 (i) **Bumping:** An employee can bump to a position held by another employee in a  
9 lower tenure group/subgroup if he/she is qualified to perform that job. For  
10 example, career veterans (Tenure Group/Subgroup IA) can bump career non-  
11 veterans (Tenure Group/Subgroup IB), and career non-veterans can bump career-  
12 conditional and temporary or term employees (Tenure Groups II or III).

11 (ii) **Retreating:** An employee can retreat into a job in the same tenure  
12 group/subgroup that is “essentially identical” to a job he/she previously held if the  
13 employee has higher retention standing than the incumbent.

13 5 CFR §351.402(b). The right to bump to a position is based on the released employee’s  
14 qualifications, while the right to retreat to a position is based on the job duties of the released  
15 employee’s previous position, as reflected in the position description.

16 37. A second SME (subject matter expert) panel was convened to review the assignment rights  
17 of employees released from their positions. The SME panel members (“SMEs”) that  
18 evaluated reassignment rights of Western Region employees were non-managerial senior  
19 scientists from the Western Region. The SME panel’s evaluation was reviewed by the  
20 Branch Chief of the position whose incumbent was to be displaced. If there was a  
21 disagreement between the SMEs and the Branch Chief regarding a bump or retreat, it was  
22 resolved by the Chief Geologist. However, this did not occur with any of the named  
23 plaintiffs.

24 38. For each released employee, the SMEs were provided a list of all positions in the Geologic  
25 Division within the Menlo Park local commuting area that were: (1) held by employees with  
26 lower retention standing, and (2) no more than three grades below the grade of the released  
27 employee. In order to assist in their search for assignment rights, the SMEs used a list of  
28 specialties referred to as “Pods.” The Pods were comprised of the areas of expertise

1 originally developed by the Geological Society of America (“GSA”), plus additional  
2 categories to accommodate positions that did not fit into any of the GSA specialties. Each  
3 position remaining in the staffing plans was assigned one or more Pods based on the  
4 expertise required by the position, as reflected in the position description. The SMEs then  
5 assigned Pods to the current and past position descriptions of the released employees. The  
6 Pods allowed the SMEs to identify those positions to which released employees were likely  
7 to have assignment rights, and that therefore warranted closer examination.

8 39. To evaluate possible bumps, the SMEs used plaintiffs’ position descriptions and Professional  
9 & Technical Records (“PTR”). Like a *curriculum vitae*, a PTR describes a Geologic  
10 Division employee’s positions, research, and publications throughout his or her career. To  
11 evaluate retreats, the SMEs used position descriptions for the plaintiffs’ prior positions, and  
12 the position descriptions of the position being considered for retreat. If a released employee  
13 was found to have a right to bump or retreat to a position, he or she was offered assignment  
14 to that position. If a released employee was not found to have such a right, he or she was  
15 separated.

16 E. The Individual Plaintiffs

17 40. **David Adam:** Dr. Adam began his career with the USGS in June 1971. At the time of the  
18 RIF, he was a GS-14 Geologist in the Branch of Paleontology and Stratigraphy, which was  
19 part of the Office of Regional Geology. Dr. Adam was an expert in palynology (the study of  
20 pollen in spores) and Quaternary Geology. After new competitive levels were established in  
21 the Spring of 1995, his position was the only position in its competitive level. Dr. Adam’s  
22 position was not included in the final staffing plan for the Office of Regional Geology. After  
23 being released from his position, Dr. Adam’s assignment rights were evaluated by SMEs  
24 Stephen Ellen and Robert Christiansen. A Personnel Specialist provided the SMEs with a list  
25 of all positions in grades 11 to 14 occupied by incumbents with lower retention standing than  
26 Adam. The SMEs reviewed positions in Pods (general categories of expertise developed by  
27 Dr. McCarthy) 1 (Paleontology, including Palynology) and 8 (Climate & Quaternary  
28 Geology). They found that Adam was not eligible to retreat into any positions, because none

1 of the retained positions held by employees within his tenure group/subgroup were essentially  
2 identical to a position he had previously held. The SMEs also concluded, based upon a  
3 review of his position description and Professional Technical Record, that Adam was not  
4 technically qualified to bump to any positions held by employees in lower tenure  
5 groups/subgroups. Dr. Adam was separated effective October 14, 1995.

6 41. **Lanford Adami:** Mr. Adami joined the USGS on June 4, 1967 as a GS-9 Chemist. At the  
7 time of the RIF, he was a GS-12 Chemist assigned to the Branch of Isotope Geology, which  
8 was under the Office of Regional Geology. Mr. Adami's position had always been the only  
9 one in his competitive level, even before new competitive levels were establish in 1995. His  
10 position was not on the staffing plans, and he was released. Mr. Adami contended at the  
11 MSPB that he should have been allowed to retreat to a Physical Science Technician position  
12 held by James Saburamaru. SMEs Robert Christiansen and Floyd Gray evaluated Mr. Adami  
13 for assignment to that position and other positions in grades 7 through 12 held by employees  
14 with lower retention standing in Pods 16, 17 and 18 (analytical chemistry, isotope  
15 geochemistry, and geochemistry), but did not find a position to which he was entitled and  
16 qualified to bump or retreat. He was separated effective October 14, 1995.

17 42. **James Calzia:** Dr. Calzia was hired by the USGS in November 1973. He was a GS-12  
18 Geologist at the time of the RIF, assigned to the Branch of Western Mineral Resources in the  
19 Office Mineral Resources. Dr. Calzia agrees that his position belonged in a unique  
20 competitive level. His position was not on the staffing plans, and he was released. SMEs  
21 Charles Bacon and Floyd Gray evaluated Dr. Calzia for assignment to positions in grades 7  
22 through 12 held by employees with lower retention standing in Pods 2 (volcanology and  
23 igneous and metamorphic petrology), 6 (economic geology - metals and industrial minerals),  
24 7 (structure and tectonics), 10 (geologic mapping), 17 (isotope geochemistry), 18  
25 (geochemistry), 29 (computer-related activities), and 30 (borehole geophysics). The SMEs  
26 found no position to which Dr. Calzia had a right to bump or retreat, and he was separated.

27 43. **Bela Csejtey, Jr.:** Dr. Csejtey joined the USGS in July 1966. He was a GS-14 Geologist at  
28 the time of the RIF and was assigned to the Branch of Alaskan Geology in the Office of

1 Mineral Resources. His position was not on the staffing plans, and he was released. SMEs  
2 Stephen Ellen, Carl Wentworth and Richard Blakely evaluated Dr. Csejtey for assignment to  
3 all GS-11 to 14 positions held by employees with lower retention standing in Pods 2  
4 (volcanology and igneous and metamorphic petrology), 6 (economic geology - metals and  
5 industrial minerals), 7 (structure and tectonics), and 10 (geologic mapping). The SMEs  
6 concluded that there were no positions to which Dr. Csejtey had a right to bump or retreat,  
7 and he was separated.

8 44. **Alice Davis:** Ms. Davis was hired by the USGS in October 1981, and was separated in the  
9 RIF as a GS-13 Geologist. At the time of the RIF, she was assigned to the Branch of Pacific  
10 Marine Geology in the Office of Energy and Marine Geology. Her position was not included  
11 on the final staffing plan, and she was released from her competitive level. SMEs Charles  
12 Bacon and Floyd Gray evaluated Ms. Davis for bump or retreat to all GS-9 to 13 positions  
13 held by employees with lower retention standing than her in Pods 2 (volcanology and igneous  
14 and metamorphic petrology), 6 (economic geology - metals and industrial minerals), 13  
15 (mineralogy), and 16 (analytical chemistry). They did not find a position to which she was  
16 entitled and qualified to bump or retreat.

17 45. **James Drinkwater:** Mr. Drinkwater was a GS-11 Geologist assigned to the Branch of  
18 Alaskan Geology in the Office of Mineral Resources when he was separated in the RIF.  
19 SMEs Charles Bacon and Floyd Gray evaluated him for bump and retreat by looking at  
20 positions in the next three lower grades held by individuals with lower retention standing in  
21 Pods 2 (volcanology and igneous and metamorphic petrology), 6 (economic geology - metals  
22 and industrial minerals), 10 (geologic mapping), 13 (mineralogy), 18 (geochemistry), and 29  
23 (computer-related activities). They did not find a position to which he was entitled to be  
24 assigned.

25 46. **Arthur Ford:** Dr. Ford joined the USGS in October 1960. At the time of the RIF he was a  
26 GS-15 Geologist assigned to the Branch of Alaskan Geology in the Office of Mineral  
27 Resources. His position was not included on a staffing plan, and he was released from his  
28 competitive level. Dr. Ford was evaluated by SMEs Stephen Ellen and Carl Wentworth for

1 his eligibility for bump and retreat to all GS-12 to 15 positions held by employees with lower  
2 retention standing in Pods 2 (volcanology and igneous and metamorphic petrology), 6  
3 (economic geology - metals and industrial minerals), 10 (geologic mapping), and 18  
4 (geochemistry). The SME panel did not find any positions to which Dr. Ford was eligible to  
5 bump or retreat, and he was separated effective October 14, 1995.

6 47. **Arthur Grantz:** Dr. Grantz was hired by the USGS in July 1949. At the time of the RIF, he  
7 was a GS-16 Geologist in the Branch of Alaskan Geology, Office of Mineral Resources. Dr.  
8 Grantz' position was not included on the staffing plan of the Office of Mineral Resources,  
9 and he was released from his competitive level. SMEs Charles Bacon and Floyd Gray  
10 evaluated Dr. Grantz for assignment rights to all positions from GS-13 through 16 held by  
11 incumbents with lower retention standing in Pods 3 (neotectonics & geomorphology), 4  
12 (sedimentology), 5 (economic geology - fuels), 7 (structure & tectonics), 10 (geologic  
13 mapping), and 25 (remote sensing and geophysical mapping). They concluded that there were  
14 no positions to which Dr. Grantz was entitled to bump or retreat, and he was separated  
15 effective October 14, 1995.

16 48. **H. Mahadeva Iyer:** Dr. Iyer joined the USGS in August 1967. When he was separated in  
17 the RIF, he was a GS-15 Geophysicist assigned to the Branch of Seismology in the Office of  
18 Earthquakes, Volcanoes & Engineering. When Dr. Iyer's position was abolished, he was  
19 released from his competitive level. SMEs Stephen Ellen and William Ellsworth evaluated  
20 Dr. Iyer for all GS-12 through 15 positions held by employees with lower retention standing  
21 in Pods 19 (earthquake seismology), 20 (controlled-source seismology), and 33 (geothermal  
22 energy), but found no positions to which he was entitled to bump or retreat.

23 49. **Chi-Yu King:** Dr. King was hired by the USGS in June 1968, and separated in the RIF. At  
24 the time of the RIF, he was a GS-14 Geophysicist assigned to the Branch of Earthquake  
25 Geology and Geophysics in the Office of Earthquakes, Volcanoes & Engineering. Dr. King's  
26 position was not on a staffing plan, and he was released from his competitive level. SMEs  
27 Richard Blakely and Carl Wentworth evaluated Dr. King for assignment to all GS-11 through  
28 GS-14 positions held by employees with lower retention standing in Pods 2 (volcanology, &

igneous and metamorphic petrology), 12 (hydrology), 17 (isotope geochemistry), 18 (geochemistry), 19 (earthquake seismology), 23 (engineering seismology & geophysics), 24 (tectonophysics & geodynamics), and 28 (engineering and mathematical studies). However, the SMEs found that there was no position to which he was entitled to bump or retreat.

50. **Stephen Lewis:** Dr. Lewis was hired by the USGS as a Research Geophysicist in February 1987. At the time of the RIF he was a GS-14 Geophysicist assigned to the Branch of Pacific Marine Geology in the Office of Energy and Marine Geology. His position was not on the staffing plan, and he was released from his competitive level. SMEs Richard Blakely and Carl Wentworth evaluated Dr. Lewis for bump or retreat to all GS-11 through 14 positions held by employees with lower retention standing in Pods 4 (sedimentology), 5 (economic geology - fuels), 7 (structure & tectonics), 20 (controlled-source seismology), 21 (potential field geophysics), and 25 (remote sensing and geophysical mapping). He was not found to have a right to bump or retreat, and he was separated.

51. **Allan Lindh:** Dr. Lindh joined the USGS in November 1973. At the time of the RIF, he was a GS-15 Geophysicist assigned to the Branch of Seismology in the Office of Earthquakes, Volcanoes, and Engineering. Although Dr. Lindh's position was not on the initial staffing plan, it was placed on an intermediate plan because he had recently served as Branch Chief. The new Branch Chief Walter Mooney requested that the position be removed to make room for an Electrical Engineer position, and because the retention of Dr. Lindh's position was based on a preference to a former manager, rather than programmatic needs. When his position was abolished, Dr. Lindh was released from his competitive level. SMEs Stephen Ellen and William Ellsworth evaluated Dr. Lindh for bump and retreat to all GS-12 through 15 positions held by employees with lower retention standing in Pods 7 (structure and tectonics), 19 (earthquake seismology), 23 (engineering seismology & geophysics), and 24 (tectonophysics & geodynamics). The SMEs found Dr. Lindh qualified to bump to a GS-12 Geophysicist position held by Margaret Hellweg, and he accepted the position.

52. **A. Thomas Ovenshine:** Dr. Ovenshine was hired by the USGS in July 1965. At the time of the RIF, he was a GS-15 Geologist assigned to the Branch of Resource Analysis in the Office

1 of Mineral Resources. Dr. Ovenshine's position was included in the staffing plan. However,  
2 he was bumped by David Piper, an employee who was in a higher tenure group because of  
3 his veteran status. Dr. Piper is older than Dr. Ovenshine. Dr. Piper's assignment rights were  
4 evaluated by SME Floyd Gray. SMEs Charles Bacon and Randolph Koski then evaluated  
5 Dr. Ovenshine for bump or retreat to GS-12 through 15 positions held by employees with  
6 lower retention standing in Pods 3 (neotectonics & geomorphology), 4 (sedimentology), 6  
7 (economic geology - metals & industrial minerals), and 10 (geologic mapping), but found no  
8 positions to which he was entitled to be assigned.

9 53. **Chester Wrucke:** Dr. Wrucke joined the USGS in July 1952. At the time of the RIF, he was  
10 a GS-14 Geologist assigned to the Branch of Western Mineral Resources in the Office of  
11 Mineral Resources. His position was abolished, and he was released from his competitive  
12 level. Because he is a veteran, Dr. Wrucke's tenure group is IA (career veteran). SMEs  
13 Robert Page and Randolph Koski evaluated Dr. Wrucke for bump or retreat to GS-11 through  
14 14 positions held by employees with lower retention standing in Pods 2 (volcanology, &  
15 igneous and metamorphic petrology), 4 (sedimentology), 6 (economic geology - metals &  
16 industrial minerals), 7 (structure & tectonics), 10 (geologic mapping), and 13 (mineralogy).  
17 Dr. Wrucke was found qualified to bump to a GS-13 Geologist position held by Brett Cox,  
18 but he declined the position. Having declined the assignment, Dr. Wrucke was separated.

19 F. Evidence of Purported Discriminatory Animus

20 54. Gordon Eaton, Ph.D. was appointed Director of the USGS in March 1994. Shortly after he  
21 was sworn in, he embarked on a tour of the three major regional centers of the USGS: Menlo  
22 Park, California, Denver, Colorado, and Reston, Virginia. Dr. Eaton was 68 years old at the  
23 time of the RIF.

24 55. On March 23, 1994, he spoke to the staff in the Western Region at Menlo Park, where he  
25 made the following remarks:

26 The transition team . . . visited in a number of different places and along the way  
27 they heard some things from members of the Geologic Division which sounded to  
28 them like intransigency and an unwillingness to change, even an unwillingness in  
fact to embrace it, and while that clearly is not true for the whole Geologic  
Division, the most that are of my generation within the organization may have



1 regarding its content were the dates, times, locations, participants, and subject matter. The  
2 decision to include this particular cartoon was hers and hers alone. Nobody instructed her to  
3 use the cartoon. As a secretary, she did not participate in any decisions involving staffing  
4 plans, competitive levels, assignment rights, or any other aspect of the RIF.

5 60. Because the notice was created by a lower level employee who was not involved in any RIF  
6 decisions, the Court finds that the notice is not sufficient to raise an inference of  
7 discriminatory motive as to the decisions affecting the plaintiffs.

8 61. P. Patrick Leahy was appointed Chief Geologist of the Geologic Division in April 1995. On  
9 June 19, 1995, he issued a memorandum to the Personnel Officer entitled “Ground Rules for  
10 Reduction-in-Force” attaching a list of ground rules covering “those areas where management  
11 decisions are needed to establish policy for reduction-in-force procedures.” Among the  
12 choices Dr. Leahy made was to follow the Code of Federal Regulations definition of  
13 bumping rights, i.e., allow bumping to positions held by those in a lower tenure group and  
14 subgroup, rather than allowing employees to displace employees within their own tenure  
15 subgroup, referred to as intra-tenure subgroup displacement.

16 62. During the implementation of a RIF, the regulations require that an employee be permitted  
17 bumping and retreating rights. Bumping consists of displacing a person in a lower tenure  
18 group or a lower tenure subgroup in a different competitive level in the same competitive  
19 area. Bumping is not permitted within a tenure subgroup. Retreating consists of displacing a  
20 person in the same tenure group and competitive area, but in a different competitive level,  
21 who holds a position that is identical or essentially identical to the position the retreating  
22 employee previously held. Bumping and retreating rights are mandatory. 5 CFR §  
23 351.402(b).

24 63. Administrative assignment is an optional process which an agency can employ at its  
25 discretion to permit more expanded displacement of employees by other employees. Expert  
26 testimony has shown that it is highly unusual for an agency to permit administrative  
27 assignment through intra-tenure subgroup displacement, because it would be highly  
28 disruptive to the agency due to the large numbers of displacements that would occur. In

1 addition, as a result of mandatory pay retention, this form of administrative displacement  
2 would also defeat the payroll savings motive behind most RIFs, as it leads to the retention of  
3 a larger percentage of employees with higher seniority and, thus, higher salaries.

4 64. As an attachment to his June 19, 1995 memorandum, Dr. Leahy provided the following  
5 explanation for declining to allow intra-tenure subgroup displacement:

6 Allowing bumping within subgroups would expand bumping rights for most  
7 Division employees. This would have both positive and negative impacts. A  
8 premium would be placed on seniority as a retention factor. For instance, Tenure  
9 Group IB employees could bump into positions for which they are qualified up to  
10 three grades lower than their present position and that are held by other Tenure  
11 Group IB employees with less service. Employees with least seniority would be  
12 most vulnerable to downgrading or separation. As a result the remaining staff  
13 would include most of our highly experienced senior scientists, but many of the  
14 younger, more recently trained staff would be lost. The extended assignment  
15 rights would also result in an increase in the number of staff who would be  
16 bumped to lower-graded positions. The displacement and downgrading of staff  
17 would be highly disruptive to Division programs and result in higher salary costs  
18 for post-RIF programs because of salary retention rights of downgraded  
19 employees. That salary inflation, in turn, could increase to [sic] number of  
20 employees who would have to be separated to achieve required savings.

21 There is no choice that the Division can make that will not adversely impact some  
22 demographic segment of the staff. The decision not to extend bumping rights to  
23 include within-subgroup bumping was made acknowledging that it denies senior  
24 staff an advantage that we could have granted them. Denying that advantage was  
25 not the determining factor in the decision. Rather, the decision to use only the  
26 minimum assignment rights inherent in bumping to lower subgroups was made to  
27 minimize disruption to programs and employees.

28 See Defendant's Trial Exhibit 1033.

65. The Court finds that Dr. Leahy declined to allow bumping within tenure subgroups for two  
principle reasons: (1) it would lead to an increase in retention of higher salaried personnel,  
which is contrary to the cost-savings motivation of the RIF, and (2) it would lead to a  
significant increase in the number of disruptions (employees moved from one job to another)  
occurring during a RIF.

#### G. Statistical Analysis of the RIF

66. Both defendant and plaintiffs submitted expert testimony concerning their respective  
statistical analyses of the RIF. The Court finds that defendant's expert, Chester Palmer  
performed a sound and thorough analysis. Therefore, the Court adopts Dr. Palmer's analysis  
in deciding plaintiff's claims.

1 67. In order to determine whether age was a statistically significant determining factor in the RIF,  
2 Dr. Palmer first had to identify “comparably situated employees.” While it would be possible  
3 to analyze the impact of the RIF on employees by age without considering whether the  
4 employees were comparably situated, it would make no sense to do so. An employer does  
5 not perform a RIF strictly based upon seniority, for example, with no attention to the nature  
6 of the job being performed by the employee. An employer is not indifferent to whether it  
7 retains a secretary or an attorney. It is likewise not indifferent to whether it retains an  
8 attorney specializing in bankruptcy or an attorney specializing in family law. To determine  
9 whether age was a factor in a RIF, you have to compare apples with apples, or look at the  
10 impact among comparably situated employees. With this in mind, Dr. Palmer looked at the  
11 available factors and determined which factors should be used.

12 68. In a workforce where many employees hold positions that are interchangeable, the  
13 competitive level can be used to identify comparably situated employees for purposes of  
14 performing statistical analyses. However, given that the USGS had a highly specialized  
15 workforce, with a large percentage of its employees occupying unique competitive levels, a  
16 different approach was required in this case than would be required in a shipyard RIF where  
17 each competitive level would be populated by tens or hundreds of employees.

18 69. Dr. Palmer determined that he should begin by using the factors that the USGS was required  
19 by regulation to consider, to wit, tenure group, veterans status, and performance appraisals.  
20 Dr. Palmer chose not to use seniority as a variable, because it has a statistical relationship to  
21 age, the variable of interest in this case. Use of both age and seniority in the same prediction  
22 equation would have made it difficult to separate the effect of each variable. Dr. Palmer also  
23 concluded that the identification of comparably situated employees should include  
24 consideration of the kind of job an employee holds, as an employer is not indifferent to an  
25 employee’s skill set in determining who to retain in a RIF (secretary vs. scientist). Since the  
26 use of competitive levels was infeasible, Dr. Palmer chose to use the broader scientific  
27 specialty categories (Pods) that had been included in the retention registers and used to assist  
28 with determining assignment rights.

1 70. Next, Dr. Palmer examined the possible outcomes of a RIF on an employee. He defined two  
2 outcomes: (1) separated, defined as having no job at the conclusion of the RIF, including  
3 involuntary retirement; and (2) adversely affected, a broader group including those separated  
4 and those downgraded. He defined these measures by the employer's intent. In other words,  
5 if an employee was released from his competitive level but offered assignment to a lower-  
6 grade position, Dr. Palmer considered the outcome to be a downgrade, even if the employee  
7 rejected the offered position.

8 71. For comparative purposes only, Dr. Palmer conducted an analysis strictly by age, without  
9 taking any other factors (tenure, scientific specialty, performance appraisals) into  
10 consideration. Whether examining adversely affected employees (i.e., separation and  
11 demotion) or separated employees, employees 40 and above were slightly favored over  
12 (impacted less than) employees under 40, though the difference was not statistically  
13 significant.

14 72. Dr. Palmer also checked the impact on younger/older employees by breaking the age 40, 41,  
15 42, etc., and examining the impact of the RIF on older vs. younger employees given the  
16 stated age break. He determined that older employees were favored over younger employees  
17 (though the difference was not statistically significant) for all age groups when the starting  
18 age was 40-44. Between 45 and 50, the older employees were less favored than the younger  
19 employees (though the difference was not statistically significant). From ages 50 through 62  
20 (for adversely affected) and ages 50 through 64 (except 63, for separated), the older group  
21 was treated less favorably than the younger group, and the difference was statistically  
22 significant. However, these calculations were based upon age alone, with no consideration of  
23 other factors, such as tenure, specialty, performance appraisals, etc.

24 73. When Dr. Palmer ran the analyses comparing comparably situated employees, based upon  
25 tenure group, performance appraisals, and scientific specialty, he found that higher age led to  
26 less favorable outcomes, but the difference based upon age was not statistically significant  
27 (less than 1.96 standard deviations). In the same analyses, Dr. Palmer also examined the  
28 outcome to employees based upon performance appraisals, rather than age, and determined

1 that performance appraisals were very strongly related (in a statistically significant manner)  
2 to outcome (separation or adversely affected) of employees. Dr. Palmer also discovered that  
3 the results of his analyses did not change materially if the occupational series, grade, or both  
4 the occupational series and the grade of the employee were included.

5 74. Based on Dr. Palmer's analysis, the Court finds that, for comparably situated employees, a age  
6 was not a statistically significant variable in the USGS RIF. Even in the analysis that did not  
7 take comparable ability into account, there was no adverse impact on employees aged 40 and  
8 above; in fact, they were slightly favored, though not to a statistically significant degree.

9 H. The Court's Previous Findings

10 75. Each of the plaintiffs appealed the action taken against them in the RIF to the Merit Systems  
11 Protection Board ("MSPB"). After a hearing that included 91 days of testimony and  
12 generated an administrative record of 175 volumes, MSPB Administrative Judge Philip  
13 Arnaudo issued written decisions sustaining the agency's actions in each of the plaintiff's  
14 appeals.

15 76. On May 17, 2001, the Court granted defendant's motion for partial summary judgment and,  
16 in so doing, upheld the decisions of the MSPB judge regarding the validity of the RIF  
17 procedures employed by the USGS and the validity of the employment decisions made with  
18 respect to the plaintiffs. See Order Granting Defendant's Motion for Partial Summary  
19 Judgment, Denying Plaintiff's Rule 56(f) Request, and Denying Motions to Strike, dated May  
20 17, 2001 ("May 17, 2001 Order"). Accordingly, the Court has made, and will not disturb, the  
21 following findings.

22 77. The Geologic Division (the "Division") conducted the RIF for legitimate financial reasons.  
23 (May 17, 2001 Order at 9:15-16.)

24 78. The Division developed its reorganization plan properly. (May 17, 2001 Order at 11:24-  
25 12:23, and 15:18-16:1.) This finding includes a rejection of the following contentions by  
26 plaintiffs that: (1) certain managerial positions were created as sham positions to protect  
27 some managers from being separated during the RIF; (2) the Division improperly returned  
28 some managers to science or research positions; (3) managers were able to retain positions

1 improperly without regard to programmatic needs; and (4) managers improperly influenced  
2 staffing plans. (May 17, 2001 Order at 10:8-14, 12:25-13:2, and 15:18-16:1.)

3 79. The development and implementation of staffing plans was accomplished through a  
4 consensus decision-making process with input from employees at all levels. (May 17, 2001  
5 Order at 12:25-13:2.)

6 80. The subject matter experts (“SME”s) functioned independently (with no undue influence  
7 from management), were qualified for the tasks they performed, and were not required to  
8 keep their notes. (May 17, 2001 Order at 13:3-14, and 15:18-16:1.)

9 81. The Division’s decision to return all managers on rotational assignments to their original  
10 science or research positions was proper. (May 17, 2001 Order at 12:19-21, and 15:18-16:1.)

11 82. The Division’s revision of the competitive level system, including the use of a large  
12 percentage of single position competitive levels for scientist and research positions, was  
13 proper. (May 17, 2001 Order at 13:22-15:11, and 15:22-16:1.)

14 83. Plaintiffs were incorrect in their assertions that other positions should have been included in  
15 their competitive levels. (May 17, 2001 Order at 16:20-17:2.)

16 84. Plaintiffs were incorrect in asserting that their competitive levels should include the same  
17 positions as the pre-1995 competitive level system. (May 17, 2001 Order at 17:3-5.)

18 85. The duties of the specific positions that plaintiffs asserted should be included in their  
19 competitive levels were too dissimilar. (May 17, 2001 Order at 17:5-7.)

20 86. Plaintiff Adam’s claim that the competitive area should have been the national program of  
21 the branch to which he was assigned was properly rejected. (May 17, 2001 Order at 17:20-  
22 18:2.)

23 87. The Division did not transfer the functions performed by plaintiffs Adam, Calzia, Csejtey and  
24 Ford without allowing them to transfer. (May 17, 2001 Order at 19:17-25.)

25 88. The Division’s bump and retreat decisions with regard to each of the plaintiffs were proper.  
26 (May 17, 2001 Order at 20:19-25:16.)

27 89. The Division was not required by the Civil Service Reform Act to notify employees separated  
28 in the RIF about post-RIF vacancies at the Division. (May 17, 2001 Order at 26:8-11.)

1  
2 **II. PROPOSED CONCLUSIONS OF LAW**

3 A. Disparate Treatment

4 90. 29 U.S.C. § 633a(a) provides that all personnel actions affecting federal employees “shall be  
5 made free from any discrimination based on age.” An employee establishes a prima facie  
6 case of age discrimination by showing that: (1) at the time of the adverse employment action,  
7 he was 40 years of age or older; (2) some adverse employment action was taken against him;  
8 (3) at the time of the adverse employment action, he was satisfactorily performing his job;  
9 and (4) he was replaced by a significantly younger person with equal or inferior  
10 qualifications. Coleman v. Quaker Oats Company, 232 F.3d 1271, 1281 (9<sup>th</sup> Cir. 2000);  
11 Becka v. APCOA/Standard Parking, 146 F. Supp 2d 1109, 1111 (C.D. Cal. 2001). If plaintiff  
12 establishes a prima facie case, the burden shifts to the employer to articulate a legitimate,  
13 nondiscriminatory reason for the action. Coleman v. Quaker Oats Company, 232 F.3d at  
14 1281. Once defendant provides such a reason, the presumption of discrimination drops from  
15 the case, and plaintiffs must demonstrate that the articulated reasons are a pretext for  
16 discrimination by “either directly persuading the court that a discriminatory reason more  
17 likely motivated the employer or indirectly by showing that the employer’s proffered  
18 explanation is unworthy of credence.” Texas Department of Community Affairs v. Burdine,  
19 450 U.S. 248, 256 (1981). Plaintiff’s evidence must be “both *specific and substantial* to  
20 overcome the legitimate reasons” articulated by defendant. Aragon v. Republic Silver State  
21 Disposal, Inc., 292 F. 3d 654, 659 (9<sup>th</sup> Cir. 2002). The ultimate burden of proof remains  
22 always on the plaintiffs to show that the employer intentionally discriminated against them  
23 because of their age. Coleman v. Quaker Oats Company, 232 F.3d at 1281.

24 91. The Court concludes that plaintiff Ovenshine cannot establish a prima facie case of disparate  
25 treatment age discrimination. Although he was subjected to an adverse employment action  
26 when he was separated in the RIF, and he was over 40 years of age at the time of his  
27 separation, he cannot show that he was replaced by a younger employee. In fact, Dr.  
28 Ovenshine was replaced by an older employee. While his position was not abolished, Dr.

1 Ovenshine was bumped by David Piper, an employee who was in higher tenure group  
2 because he was a veteran. There is no dispute that Dr. Piper is older than Dr. Ovenshine .  
3 92. Ovenshine argues that he can prove a prima facie case of discrimination under Douglas v.  
4 Anderson, 656 F.2d 528, 533 (9<sup>th</sup> Cir. 1981), a case in which the Ninth Circuit recognized  
5 that there are conceivably circumstances in which replacement by a younger employee is not  
6 critical to a prima facie case. However, the only exception noted by the Ninth Circuit in  
7 Douglas applies when the employee can demonstrate that his replacement by an older or  
8 similarly aged worker was an obvious after-the-fact ploy on the part of the employer to avoid  
9 liability. Ovenshine was released from employment because he was displaced by an older  
10 worker during the bump and retreat process of the RIF. Ovenshine has offered no evidence  
11 that this process was engineered by his employer to cover up age discrimination against him.  
12 Accordingly, Dr. Ovenshine cannot establish a prima facie case of age discrimination.  
13 Coleman v. Quaker Oats Company, 232 F.3d at 1281. Therefore, defendant is entitled to  
14 entry of judgment in her favor on Dr. Ovenshine’s disparate treatment age discrimination  
15 claim.

16 93. Each of the remaining plaintiffs (except for Dennis Mann, who is barred by a settlement  
17 agreement from pursuing claims arising from the RIF) has established a prima facie case of  
18 disparate treatment age discrimination.

19 94. Defendant has sustained her burden to show that the personnel actions were taken against the  
20 remaining plaintiffs for legitimate, nondiscriminatory reasons. “A RIF is a legitimate  
21 nondiscriminatory reason for laying off an employee.” Coleman, 232 F. 3d at 1282; see also  
22 Gianacualas v. Trans World Airlines, Inc., 761 F. 2d 1391, 1395 (9<sup>th</sup> Cir. 1985) (general  
23 reduction in workforce as result of economic downturn constitutes “good cause” to terminate  
24 employment).

25 95. Defendant has presented evidence that the RIF was implemented for legitimate budgetary  
26 reasons. See May 17, 2001 Order at 3, 7-9. Defendant has also presented evidence that the  
27 RIF was designed and implemented without discriminatory intent and to comply with  
28 governing procedures. See May 17, 2001 Order at 10-12.

1 96. Since defendant satisfied her burden of showing a legitimate nondiscriminatory reason for the  
2 adverse employment actions, the presumption of discriminatory intent “drops out of the  
3 picture.” St. Mary’s Honor Center v. Hicks, 509 U.S. 502, 511 (1993). Plaintiffs must  
4 therefore prove by a preponderance of the evidence that defendant’s proffered explanation is  
5 false or that the true reason for the discharge was discriminatory. Nidds v. Schindler Elevator  
6 Corp., 113 F. 3d 912, 918 (9<sup>th</sup> cir. 1996).

7 97. Although plaintiffs attempted to present evidence that the personnel decisions made in the  
8 RIF were wrong, or not in compliance with applicable regulations, these decisions were  
9 sustained by the MSPB and then upheld by this Court. See May 17, 2001 Order. Plaintiffs  
10 cannot continue to challenge the validity of these decisions on grounds other than  
11 discriminatory motivation. Thus, plaintiffs cannot show that defendant’s proffered  
12 explanation for the adverse employment actions is false.

13 98. Plaintiffs offer the following evidence from which they contend the Court should infer a  
14 discriminatory motive: (1) the “Jurassic Park” joke made by USGS Director Gordon Eaton in  
15 speeches to Geologic Division employees; (2) the Gary Larson cartoon contained in a notice  
16 of a RIF briefing; and (3) Chief Geologist Patrick Leahy’s explanation for the agency’s  
17 decision not to expand assignment rights beyond what is required by regulation in the  
18 “Ground Rules for the Reduction in Force.”

19 99. Stray remarks that are not tied directly to the employment decision or made by one involved  
20 in the decision are not enough to create an inference of age discrimination. See Nidds v.  
21 Schindler Elevator Corp., 113 F. 3d 912, 918-919 (supervisor’s comment that he wanted to  
22 get rid of “old-timers” does not support inference o discriminatory motive where comment  
23 not tied to layoff); Nesbit v. Pepsico, Inc., 994 F. 2d 703, 705 (9<sup>th</sup> Cir. 1993) (ambivalent  
24 remark that “we don’t necessarily like grey hair” that was not tied directly to termination is  
25 “at best weak circumstantial evidence”); Merrick v. Farmers Insurance Group, 892 F. 2d  
26 1434, 1438-1439 (9<sup>th</sup> Cir. 1990) (comment that selectee chosen because he was “a bright,  
27 intelligent, knowledgeable young man” does not show pretext); Cianci v. Pettibone Corp.,  
28 152 F. 3d 723, 727-728 (7<sup>th</sup> Cir. 1998) (comment made by supervisor does not create

1 inference of discrimination where no evidence that supervisor was involved in decision to  
2 terminate employee). In contrast, a reasonable factfinder may infer a discriminatory motive  
3 where the remark is made by a decisionmaker or by one who provided input into the decision.  
4 See, e.g., Fakete v. Aetna, Inc., 308 F. 3d 335, 339 (3d Cir. 2002) (statement by supervisor  
5 who made the decision to fire plaintiff); Hunt v. City of Markham, Illinois, 219 F. 3d 649,  
6 652-53 (7<sup>th</sup> Cir. 2000) (statements by mayor, who recommends actions, including the denial  
7 of raises sought by plaintiffs, to city council).

8 100. The Court finds that the neither Dr. Eaton’s “Jurassic Park” remarks, nor the Gary Larson  
9 cartoon included by Cynthia Ramsayer in the notice of RIF briefing, are sufficiently tied  
10 to the personnel decisions that adversely affected the plaintiffs to create an inference of  
11 discriminatory motive. Neither Dr. Eaton nor Ms. Ramsayer were involved in RIF  
12 decisions that affected the plaintiffs.

13 101. The Court also finds that Dr. Eaton’s remarks do not constitute evidence of  
14 discriminatory animus. His remarks related to the subject of change, not age.

15 102. With respect to Dr. Leahy’s explanation in the “Ground Rules” for not allowing intra-  
16 tenure subgroup displacement, the Court concludes that his decision was motivated by his  
17 concern that: (1) it would lead to an increase in retention of higher salaried personnel,  
18 which is contrary to the cost-savings motivation of the RIF, and (2) it would lead to an  
19 exponential increase in the number of disruptions (employees moved from one job to  
20 another) occurring during a RIF. An ADEA violation does not occur when a decision is  
21 motivated by factors other than age, even if the motivating factor is correlated with age,  
22 such as salary costs and seniority. Hazen Paper Co. v. Biggins, 507 U.S. 604, 611  
23 (1993); see also EEOC v. Insurance Co. of North America, 49 F. 3d 1418, 1420 (9<sup>th</sup> Cir.  
24 1995) (employer’s refusal to interview or hire applicant over 40 on the ground that he was  
25 overqualified did not constitute age discrimination). Dr. Leahy’s statement is not  
26 evidence of discriminatory animus based upon age.

27 103. Plaintiffs also offer their statistical analysis to prove intentional discrimination.

28 However, to so do plaintiffs must show a “stark pattern of discrimination unexplainable

1 on grounds other than age.” Pottenger v. Potlach Corp., \_\_\_ F. 3d \_\_\_, \_\_\_, 2003 WL  
2 21138956, \*6 (9<sup>th</sup> Cir. 2003); Coleman, 232 F. 3d at 1283. Plaintiffs’ statistical analysis  
3 fails to take into account relevant variables other than age. Therefore, the Court  
4 concludes that plaintiffs’ statistical analysis is insufficient to show intentional  
5 discrimination.

6 B. Disparate Impact

7 104. In order to make out a prima facie case of employment discrimination based upon a  
8 disparate impact theory, plaintiffs must identify a particular employment practice and  
9 then demonstrate that the particular practice created the disparate impact under attack.

10 Wards Cove Packing Company, Inc. v. Atonio, 490 U.S. 642, 656-57 (1989)<sup>1</sup>, Watson v.  
11 Fort Worth Bank and Trust, 487 U.S. 977, 994 (1988).

12 First, we note that the plaintiff’s burden in establishing a prima facie case goes beyond  
13 the need to show that there are statistical disparities in the employer’s work force. The  
14 plaintiff must begin by identifying the specific employment practice that is challenged.

14 \* \* \*

15 Once the employment practice at issue has been identified, causation must be proved; that  
16 is, the plaintiff must offer statistical evidence of a kind and degree sufficient to show that  
17 the practice in question has caused the exclusion of applicants for jobs or promotions  
18 because of their membership in a protected group.

19 Watson, 487 U.S. at 994. Plaintiffs cannot establish a prima facie case if their analysis does  
20 not link the noted disparity to one of the practices they were challenging. Wards Cove, 490  
21 U.S. at 657.

22 105. In their responses to discovery, plaintiffs identified the following “practices” as having a  
23 disparate impact on older workers:

24 1) “The bump and retreat procedures, *inter alia*, the change to ‘unique competitive  
25 level codes’ (CLCs), to prevent bump and retreat to positions within grade.”

26 2) “The creation of procedures to protect supervisors/managers from being affected by

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27 <sup>1</sup> In Wards Cove, the Supreme Court held that, once a plaintiff demonstrates a prima facie  
28 case of disparate impact discrimination, the burden of production shifts to defendant to  
demonstrate that the challenged practice serves, in a significant way, the legitimate employment  
goals of the employer. The Court went on to conclude that the burden of persuasion remained  
always with plaintiff. Congress legislatively overruled this aspect of the Wards Cove decision  
through the Civil Rights Act of 1991, Pub. L. 102-166.

1 the RIF and which prevented plaintiffs from bumping or retreating into the ‘essentially  
2 identical’ supervisory/managerial positions they had held in the past.”

3 3) “The use of ‘add back’ positions to save 100 positions (approximately half of  
4 which were left vacant during the RIF and filled afterward with younger people).”

5 4) “The policy of the USGS Personnel Office, in which each of the “Subject Matter  
6 Experts” were told to destroy all notes of meetings in Round I and Round II, so that the  
7 evidence would not be available in litigation to refute the assertions of the USGS.”

8 5) “The decision to allow positions to be abolished on an *ad hoc* basis, without  
9 specific written criteria.”

10 6) “The stereotyping of older workers, for example, as not qualified to perform jobs  
11 that included use of new software and technology, when they could have learned to use  
12 those tools within a six month period.”

13 7) “Changing the position descriptions to prevent accurate comparison of employees  
14 or to block employees from bumping and/or retreating into ‘essentially identical’ jobs for  
15 which they were qualified/eligible.”

16 8) “The lack of oversight over the decisions made in the RIF which were inconsistent,  
17 unfair, retaliatory, preferential or otherwise unlawful.”

18 9) “Failing to notify, provide information on, and/or consider plaintiffs for vacant  
19 positions filled after the RIF.”

20 10) “Retaliating against plaintiffs following the RIF by blocking promotions and other  
21 job benefits, taking away their emeritus agreement benefits and threatening them with  
22 loss of access to their offices, library, colleagues, etc.”

23 106. Disparate impact claims reach only facially neutral policies that have a disparate impact  
24 on a protected class. Hazen Paper Company v. Biggins, 507 U.S. 604, 608 (1993),  
25 quoting from Teamsters v. United States, 431 U.S. 324, 335-36, n. 15 (1977). Therefore,  
26 those practices identified by plaintiffs as discriminatory in nature or intent, rather than  
27 facially neutral with a disparate impact, cannot serve as the basis of a disparate impact  
28 claim. A practice that is alleged to be facially or intentionally discriminatory is  
appropriately challenged under a disparate treatment, not a disparate impact, theory. Id.

107. Several of the practices identified by plaintiffs cannot serve as the basis of a disparate  
impact claim, because the alleged practice identified was not facially neutral. This  
includes practice number 4, regarding the alleged destruction of documents for the  
purpose of interfering with later litigation. Such a policy is not facially neutral, as its  
intent would be to impact only those employees released during the RIF who would have

1 putative grounds for challenging the adverse employment action through litigation.

2 Practice number 6 fails as well, as the alleged stereotyping of older workers is not a  
3 facially neutral policy. Practice numbers 9 and 10 challenge alleged action or inaction  
4 toward the particular plaintiffs in this case, not “facially neutral” policies of the RIF. The  
5 claim as to practice number 10 fails for the additional reason that none of the plaintiffs  
6 can bring a retaliation claim in this action due to failure to exhaust.

7 108. Practice number 8 fails under a disparate impact analysis, because it addresses only RIF  
8 decisions which were allegedly “inconsistent, unfair, retaliatory, preferential, or otherwise  
9 unlawful.” In addition, practice number 8 does not address a policy, but the alleged lack  
10 of one, namely some unidentified form of oversight that would have prevented the alleged  
11 discrimination from occurring. Finally, plaintiffs’ contention that the decisions regarding  
12 release and assignment were “inconsistent, unfair, retaliatory, preferential, or otherwise  
13 unlawful” is conclusory and unsupported by evidence.

14 109. Practice number 5 fails for similar reasons. Plaintiffs identify as the allegedly facially  
15 neutral policy the alleged lack of written procedures governing the abolishment of jobs  
16 during the RIF. There is no authority for the proposition that a disparate impact claim  
17 may be brought to challenge the lack of a policy, rather than to challenge the impact of a  
18 facially neutral policy. In addition to being legally unsupportable, this claim is factually  
19 inaccurate. The RIF was performed in a complex series of stages, governed by detailed  
20 federal regulations. The decisions regarding abolishment of positions, in particular,  
21 began with the drafting of five-year science plans for each of the science programs,  
22 followed by creation of an unpopulated staffing plan to accomplish the goals established  
23 for the science programs. Position descriptions for all encumbered positions were  
24 updated to reflect accurately the skills required and the tasks accomplished in each  
25 position. The staffing plan was then populated. Positions that were not in the populated  
26 staffing plan were abolished. Plaintiffs’ suggestion that the abolishment of positions was  
27 done in a haphazard manner with no controls in place is simply inconsistent with the  
28 factual record.

1 110. With respect to the remaining identified practices, plaintiffs have failed to demonstrate  
2 that the specific practice caused a disparity. Their statistical analysis addresses the RIF as  
3 a whole, rather than the impact of isolated employment practices. Therefore, the Court  
4 concludes that plaintiffs are unable to establish a prima facie case of disparate impact age  
5 discrimination with respect to the practices they identified in response to discovery. To  
6 the extent that plaintiffs are challenging the RIF itself as the specific business practice  
7 causing a disparate impact, the Court finds that plaintiffs have failed to demonstrate a  
8 disparate impact, in that plaintiffs' statistical analysis improperly failed to take into  
9 consideration factors other than age that influenced the RIF outcomes. As Dr. Palmer's  
10 analysis demonstrated, when the relevant factors of scientific specialty and geographic  
11 location were taken into consideration, there was no statistically significant disparity in  
12 the treatment of older workers."

13 111. If plaintiffs were able to prove such a disparity and causal link, the burden would then  
14 shift to defendant to prove that the policy was used for a legitimate business reason, such  
15 as job-relatedness or business necessity. Coleman v. Quaker Oats Company, 232 F.3d at  
16 1291. Once defendant meets this burden, the burden shifts again to plaintiffs to prove  
17 that "other selection practices could serve the same business interest identified by the  
18 company *without having a discriminatory effect*." Id. (emphasis added).

19 112. As discussed below, even if plaintiffs established a prima facie case, the court concludes  
20 that defendant has proved that she had a legitimate business or regulatory reason for using  
21 each of the challenged policies.

22 113. Plaintiffs challenge the revision of the competitive level system. The USGS was required  
23 by regulation, as well as case authority from the Merit System Protection Board, to have a  
24 competitive level system that reflected the duties of the positions at issue, rather than the  
25 qualifications of the individuals holding the positions. 5 CFR § 351.403; Estrin v. Social  
26 Security Administration, 24 M.S.P.R. 303, 307 (MSPB 1984) (it is the qualifications set  
27 forth in the official position description, not the qualifications of an employee, which  
28 determine the composition of the competitive level); Kline v. Tennessee Valley

1 Authority, 805 F. Supp. 545, 548 (E.D. Tenn. 1992). As the competitive level system in  
2 place in 1994 at the USGS for geologists, geophysicists, and geochemists reflected the  
3 qualifications of the individual employees, rather than the position descriptions, it was not  
4 a compliant system. The USGS proceeded to correct its competitive level system in a  
5 three-stage process. First, a panel of subject matter experts (“SME”) reviewed the  
6 recently updated position descriptions (or summaries thereof) to determine which  
7 positions were interchangeable, and therefore in the same competitive level. The SME  
8 panel’s preliminary determination was then reviewed by a “validation team” consisting of  
9 a position classification specialist from the Western Region Office of Personnel, the  
10 Branch Chief of the branch to which the position was assigned, and National RIF  
11 Coordinator William Cannon (a non-managerial senior scientist who was assigned  
12 national responsibility for technical input to RIF decisions). Finally, the National RIF  
13 Coordinator and a position classification specialist from the Office of Personnel at USGS  
14 Headquarters in Reston, Virginia conducted a review to ensure national consistency in the  
15 application of competitive level regulations. Thus, the USGS updated the competitive  
16 level system for legitimate business reasons, to wit, to bring its system into compliance  
17 with federal regulation and to make any changes necessary to reflect the updated position  
18 descriptions.

19 114. Plaintiffs challenge the policy not to allow intra-tenure subgroup displacement. It is  
20 highly unusual for an agency to permit administrative assignment through intra-tenure  
21 subgroup displacement, because it would be highly disruptive to the agency due to the  
22 large numbers of displacements that would occur. In addition, as a result of mandatory  
23 pay retention, this form of administrative displacement would also defeat the payroll  
24 savings motive behind most RIFs, as it leads to the retention of a larger percentage of  
25 employees with higher seniority and, thus, higher salaries. The USGS’s decision not to  
26 permit administrative displacement was based upon three primary motivations: (1) to  
27 minimize the number of employees that would be separated by avoiding the higher salary  
28 costs that would be caused by administrative displacement, (2) to minimize the

1 disruption to employees and programs, and (3) to maintain balance by retaining senior  
2 scientists as well as recently trained scientists. Thus, the USGS exercised its discretion  
3 not to permit administrative displacement for legitimate business purposes, involving its  
4 funding and scientific needs.

5 115. Plaintiffs also challenge the alleged “creation of procedures to protect  
6 supervisors/managers from being affected by the RIF and which prevented plaintiffs from  
7 bumping or retreating into the ‘essentially identical’ supervisory/managerial positions  
8 they had held in the past.” Plaintiffs appear to be challenging two decisions here: (1) the  
9 decision to reorganize the Geologic Division, which included abolishment of the branch  
10 chief positions and creation of new, but different, managerial positions which the  
11 Division left unstaffed and unfunded during the RIF process; and (2) the decision to  
12 permit those who held the managerial positions that were being abolished to compete  
13 during the RIF from science positions.

14 116. The reorganization of the Division was done to decentralize the management of the  
15 Division, placing more authority for management at the regional level, and to tie the  
16 subdivision of the regions into defined funding sources to avoid further fiscal concerns.  
17 The branch system was scrapped in favor of a system comprised of teams, which were not  
18 identical in number or composition to the branches that had existed before. The branch  
19 chief position was not identical to the team chief scientist position and it was not treated  
20 as such. Therefore, the decision of the USGS to abolish the branch chief positions was  
21 taken for legitimate business reasons concerning both organizational structure and  
22 funding issues.

23 117. The branch chief positions were held by senior-level scientists who took on the  
24 management role for a limited term and then rotated back into their science positions.  
25 When it became clear that the reorganization was resulting in a different management  
26 structure and that the existing management positions would be abolished, the USGS  
27 decided that the individuals holding those positions should rotate back to their science  
28 positions for purposes of competing in the RIF. Those individuals, like their science

1 colleagues, were subject to losing their positions through the bump and retreat process in  
2 the RIF. The USGS could have simply released the individuals from their positions,  
3 rather than moving them back to science positions, but that would have ignored the fact  
4 that the individuals had rotated into limited term management positions from science  
5 positions with the understanding that they would rotate out to science positions at the end  
6 of the management term. Had the USGS released these employees as managers, rather  
7 than putting them through the RIF process as scientists, it would have been the equivalent  
8 of sending an individual on detail to another position for a limited term, abolishing that  
9 position during that term, and not allowing the individual to return to the position which  
10 she left for the detail. At their core, these individuals are scientists, and the USGS made  
11 the decision to treat them as such in the RIF process.

12 118. Plaintiffs also challenge the alleged “use of ‘add back’ positions to save 100 positions  
13 (approximately half of which were left vacant during the RIF and filled afterward with  
14 younger people).” The original staffing plan for the RIF was based upon a worst-case  
15 funding scenario. When the USGS received updated information that indicated they  
16 would receive more funding than anticipated in the worst-case scenario, the management  
17 went through a process to determine which positions should be added to the staffing plan.  
18 The Division Policy Council made the final decisions regarding which positions would be  
19 added to the staffing plan as a result of the increase in available funding. The Council  
20 sought to maintain staffing flexibility, which led them to use term appointments for many  
21 of the positions that were added back. In determining which positions to add to the  
22 staffing plan, the Council sought positions with skills that were multi-disciplinary, or  
23 broad enough for multiple application, and positions that represented key skills for the  
24 future in order to support the long-term scientific health of the Division. Some of the  
25 positions chosen for addition to the staffing plan were encumbered, i.e., held by current  
26 employees, while others were not.

27 119. Positions were placed on the staffing plan because the expertise represented by those  
28 positions was critical to the future mission of the agency. After the staffing plan was

1 populated, non-managerial vacancies occurred when there was no one on the existing  
2 staff with the expertise necessary to fill an identified position. The staffing decisions  
3 were made to further the scientific mission of the agency. The first set of staffing  
4 decisions was based upon the five-year science plans, while the second set of staffing  
5 decisions was based upon the goals of assisting as many programs through the use of  
6 multi-disciplinary positions, matching positions to key future needs, and maintaining  
7 staffing flexibility through the use of term appointments. The second set of staffing  
8 decisions occurred only because the agency received more funding than it had anticipated.  
9 These decisions regarding which positions were most critical to the future needs of the  
10 agency were legitimate business decisions.

11 120. Finally, plaintiffs challenge the alleged “Changing the position descriptions to prevent  
12 accurate comparison of employees or to block employees from bumping and/or retreating  
13 into ‘essentially identical’ jobs for which they were qualified/eligible.” Plaintiffs are  
14 alleging that the USGS undertook the task of changing position descriptions for the  
15 nefarious purpose of interfering with the assignment rights of its employees. There is no  
16 evidence to support this contention.

17 121. Rather, the evidence demonstrates that the USGS requested that employees update their  
18 position descriptions so that they would accurately reflect the nature of each position  
19 performed at the agency. In order to revise the competitive level system so that it was in  
20 compliance with applicable regulations it was necessary for the agency to determine  
21 which positions were interchangeable, a task for which current and complete position  
22 descriptions were necessary. The agency also required accurate position descriptions to  
23 assist them in populating the staffing plan and in determining retreat rights. All of these  
24 legitimate business purposes supported the agency’s direction that employees update their  
25 position descriptions.

26 122. To the extent that plaintiffs challenge the RIF as a whole under a disparate impact theory,  
27 the Court concludes that defendant had a legitimate business reason for conducting the  
28 RIF. As the Court found in granting defendant partial summary judgment, there were

1 bona fide financial reasons for the RIF. See May 17, 2001 Order at 7-9.

2 123. The Court further concludes that plaintiffs failed to demonstrate, for each challenged  
3 practice or for the RIF as a whole, that an alternative practice existed that would have  
4 accomplished the same business interests of the USGS without having a discriminatory  
5 affect on older employees. Coleman v. Quaker Oats Company, 232 F.3d at 1291.

6 C. Retaliation Claims of Plaintiffs Calzia, Lindh and Mann

7 124. Plaintiffs Calzia, Lindh and Mann claim that the USGS retaliated against them after the  
8 RIF for raising age discrimination claims in the MSPB appeals. Defendant argues that  
9 these plaintiffs are barred from pursuing these claims because they failed to exhaust their  
10 administrative remedies. The Court agrees.

11 125. A federal employee who alleges violations of the Age Discrimination in Employment Act  
12 need not exhaust administrative remedies, but may file in federal court in the first  
13 instance. Stevens v. Department of the Treasury, 500 U.S. 1, 6 (1991). However, when a  
14 plaintiff chooses to forego administrative remedies under the ADEA, he or she is required  
15 to give notice to the EEOC of his or her intent to file an action within 180 days of the  
16 alleged unlawful act and not less than 30 days prior to filing suit. Stevens, 500 U.S. at 6-  
17 7; 29 U.S.C. § 633a(d).

18 126. It is undisputed that none of these plaintiffs filed EEO complaints regarding their  
19 retaliation claims. It is also undisputed that they did not notify the EEOC of their intent  
20 to file this civil action. Accordingly, plaintiffs Calzia, Lindh and Mann are barred from  
21 pursuing their retaliation claims.

22 127. Even if they were allowed to pursue their claims, these plaintiffs have presented no  
23 evidence that they were subjected to adverse employment actions that were causally  
24 connected to their MSPB appeals. See Ray v. Henderson, 217 F. 3d 1234, 1240 (9<sup>th</sup> Cir.  
25 2000). Thus, defendant is entitled to judgment on the retaliation claims of plaintiffs  
26 Calzia, Lindh and Mann.

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DATED: May 26, 2003

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