BEFORE THE
STATE OF WISCONSIN
DEPARTMENT OF TRANSPORTATION

IN THE MATTER OF THE PETITION OF FRANK BROS., INC., WITH RESPECT TO THE APPLICATION OF WIS. STATS. 103.50 AND 84.015 TO MOVEMENTS OF CERTAIN MATERIALS FOR HIGHWAY PROJECTS	:	**DECLARATORY RULING NO. 03-1** **WIS. STAT. 227.41**

FINAL DECLARATORY RULING

This is the Declaratory Ruling of the Wisconsin Department of Transportation under Wis. Stat. 227.41 in response to the Petition of Frank Bros., Inc., with respect to the application of Wis. Stats. 103.50 and 84.015 to movements of certain materials for highway projects of the Wisconsin Department of Transportation.

Secretary of Transportation Frank J. Busalacchi delegated the final, irrevocable decision making authority in this declaratory ruling matter to James S. Thiel, General Counsel, Wisconsin Department of Transportation pursuant to Wis. Stat. 15.02(4).

BACKGROUND:

Petitioner Frank Brothers, Inc. [Frank Bros.] is a subcontractor on two highway contracts under the jurisdiction of the Wisconsin Department of Transportation [WISDOT]. Both prime contracts involved were fully executed on March 11, 2002.

Wisconsin Teamsters Joint Council No. 39 [Teamsters] and truck operators performing work under the contracts have an interest in compliance with the prevailing wage rate requirements applicable to the contracts.

WISDOT staff has previously demanded that Frank Bros. and the prime contractors involved comply with the prevailing wage rate requirements applicable to the contracts.

Under Wis. Stat. 227.41(1), WISDOT may issue a declaratory ruling with respect to the applicability to any person, property or state of facts of any rule or statute enforced by it. Full opportunity for hearing shall be afforded to interested parties. A declaratory ruling shall bind the agency and all parties to the proceedings on the statement of facts alleged, unless it is altered or set aside by a court.

Bruce L. Frank submitted this Petition for Declaratory Ruling regarding prevailing wage rates on **September 5, 2003** on behalf of Frank Bros., Inc., pursuant to a Stipulation For Dismissal Without Prejudice and Remand for Further Administrative Proceeding in Rock County Case No. 03 CV 761 entered **July 10, 2003**. Frank Bros., Inc., seeks a declaratory ruling by the WISDOT pursuant to Wis. Stat. 227.41 on the application of prevailing wage rate law to certain trucking operations for WISDOT administered highway projects.

On **July 18, 2003**, the United States District Court for the Western District of Wisconsin in Case 03-C-83-C dismissed a related action initiated by Frank Bros., Inc., for declaratory relief on the application of prevailing wage rate laws to certain trucking operations for WISDOT administered highway projects. The federal court dismissed the action for failure to state a claim upon which relief may be granted and the court declined to exercise supplemental jurisdiction over a state law claim. Frank Bros., Inc., filed a Notice of Appeal of this decision on August 19, 2003.

WISDOT issued a Declaratory Ruling regarding similar issues on **May 22, 1985** regarding Wis. Stat. 103.50(1) (1983-84). At that time, (1983-84), the statute read as follows:

> "(1) Hours of Labor. No laborer or mechanic in the employ of the contractor or of any subcontractor, agent or other person doing or contracting to do all or a part of the work under a contract based on bids as provided in s. 84.06(2) to which the state is a party for the construction or improvement of any highway shall be permitted to work a longer number of hours per day or per calendar week than the prevailing hours of labor determined pursuant to this section; nor shall he be paid a lesser rate of wages than the prevailing rate of wages thus determined, for the area in which the work is to be done; except that any such laborer or mechanic may be permitted or required to work more than such prevailing number of hours per day and per calendar week if he is paid for all hours in excess of the prevailing hours at a rate of at least 1-1/2 times his hourly basic rate of pay. **This section shall not apply to wage rates and hours of employment of laborers or mechanics engaged in the processing or manufacture of materials or products or to the delivery thereof by or for commercial establishments which have a fixed place of business from which they regularly supply such processed or manufactured materials or products; except that this section shall apply to laborers or mechanics who deliver mineral aggregate such as sand, gravel or stone which is incorporated into the work under the contract by depositing the material substantially in place, directly or through spreaders, from the transporting vehicle**." (Emphasis added.)

The statute in effect when the two contracts were fully executed March 11, 2002 and that gave rise to this Declaratory, Wis. Stat. 103.50(2) and (2m) (2001-02), with no changes through 2003 Wisconsin Act 136 and March 1, 2004, reads as follows:

"(2) Prevailing wage rates and hours of labor. No person performing the work described in sub. (2m) in the employ of a contractor, subcontractor, agent or other person performing any work on a project under a contract based on bids as provided in s. 84.06 (2) to which the state is a party for the construction or improvement of any highway may be permitted to work a greater number of hours per day or per week than the prevailing hours of labor; nor may he or she be paid a lesser rate of wages than the prevailing wage rate in the area in which the work is to be done determined under sub. (3); except that any such person may be permitted or required to work more than such prevailing hours of labor per day and per week if he or she is paid for all hours worked in excess of the prevailing hours of labor at a rate of at least 1.5 times his or her hourly basic rate of pay.

"(2m) Covered employees.

(a) Subject to par. (b), all of the following employees shall be paid the prevailing wage rate determined under sub. (3) and may not be permitted to work a greater number of hours per day or per week than the prevailing hours of labor, unless they are paid for all hours worked in excess of the prevailing hours of labor at a rate of at least 1.5 times their hourly basic rate of pay:

1. All laborers, workers, mechanics and truck drivers **employed on the site of a project** that is subject to this section.

2. All laborers, workers, mechanics and truck drivers **employed** in the manufacturing or furnishing of materials, articles, supplies or equipment **on the site of a project** that is subject to this section **or from a facility dedicated exclusively, or nearly so, to a project that is subject to this section by a contractor, subcontractor, agent or other person performing any work on the site of the project**.

(b) Notwithstanding par. (a) 1., a laborer, worker, mechanic or truck driver who is regularly employed to process, manufacture, pick up or deliver materials or products **from a commercial establishment that has a fixed place of business from which the establishment regularly supplies processed or manufactured materials or products is not entitled** to receive the prevailing wage rate determined under sub. (3) or to receive at least 1.5 times his or her hourly basic rate of pay for all hours worked in excess of the prevailing hours of labor **unless any of the following applies**:

1. The laborer, worker, mechanic or truck driver is **employed to go to the source** of mineral aggregate such as sand, gravel or stone that is to be **immediately incorporated into the work, and not stockpiled or further transported by truck, pick up that mineral aggregate and deliver that mineral aggregate to the site of a project that is subject to this section by depositing the material substantially in place, directly or through spreaders from the transporting vehicle**.

2. The laborer, worker, mechanic or truck driver is employed to **go to the site** of a project that is subject to this section, **pick up excavated material or spoil from the site of the project and transport that excavated material or spoil away from the site of the project and return to the site of the project.**

(c) A truck driver who is an owner-operator of a truck shall be paid separately for his or her work and for the use of his or her truck." (Emphasis added.)

The instant Declaratory Ruling addresses the application of the current statute, Wis. Stat. 103.50(2) and (2m) (2001-02), that was in effect when the contracts were fully executed March 11, 2002 that give rise to this proceeding. Copies of all of the above referenced documents were provided to the parties by transmittal letter dated September 29, 2003 and are incorporated herein by reference as follows:

Frank Bros., Inc., Petition for Declaratory Ruling of September 5, 2003
USDC WD WI Decision in Case No. 03-C-83-C of July 18, 2003
WISDOT Declaratory Ruling 84-1 of May 22, 1985

ISSUES PRESENTED:

The parties agreed that the Declaratory Ruling will respond to the Petitioner's four requests as stated below.

1. "Whether crushed and processed limestone from a commercial quarry must be treated as a manufactured product, and must therefore be exempt from the prevailing minimum wage under Wis. Stat. 103.50(2m), when the highway contract specifications require that recycled concrete be crushed and blended into a mix of limestone for delivery to the highway project."

   The parties stipulated that the material in question originated from a "commercial establishment that has a fixed place of business from which the establishment regularly supplies processed or manufactured materials or products." Exhibit 114.

2. "Whether crushed and processed limestone from a commercial quarry must be treated as a manufactured product, and must therefore be exempt from the prevailing minimum wage under Wis. Stat. 103.50(2m), due to the fact that the material is crushed and blended by equipment and that such process is deemed to be "manufacturing" under Wisconsin law, Wis. Stat. 77.54(6m)."

3. "Whether the delivery of crushed and processed limestone from a commercial quarry into piles on the highway project, without the use of spreaders from the transporting vehicle, constitutes stockpiling or constitutes immediate incorporation into the work by depositing the material substantially in place, directly, when other contractors and equipment move the material from the pile to other areas of the project in order to maintain grade."

4. "Whether Wis. Stat. 84.015 requires on federally-funded highway projects that the state prevailing wage under Wis. Stat. 103.50(2m) not be applied to the delivery of crushed and processed limestone from a commercial quarry due to the fact that such delivery is exempt from the application of the federal prevailing wage under the Davis Bacon Act, 40 USC 3141-3148 and its regulations."

The parties separately reached a stipulation on a proposed 5th issue with regard to the amount of back pay, if any, and interest, if any, owed by Petitioner or Zignego to the truck drivers for these activities. Exhibit 114.

HEARING:

A hearing was held on December 9, 2003, starting at 9:00 AM at the Wisconsin Department of Transportation located at 4802 Sheboygan Avenue, Room 419 Conference Room, of the Hill Farms State Transportation Building, Madison, WI, 53705.

WITNESSES:

Petitioner Frank Bros. presented two witnesses at the hearing:

Roger Frank, owner of Frank Bros., Inc.
Donald Frank, owner/manager of Frank Bros., Inc.

Teamsters presented three witnesses:

Ralph Giese, employee of Mayville Limestone, truck driver, crusher, equipment operator
Jan Orth, employee of Vinton Construction Company, truck driver
Gary Shealy, retired employee of Wisconsin Department of Workforce Development, chief of construction wage standards section

WISDOT presented two witnesses:

Paul Trombino, employee of WISDOT, Bureau of Highway Construction, chief proposal management engineer
Joseph White, employee of WISDOT, coordinator for highways materials sampling and testing

EXHIBITS:

The parties stipulated to the admission of all exhibits.

Petitioner's Exhibits are numbered 1 through 38. Petitioner's Exhibit 39 was drawn by its witness Roger Frank at the hearing and admitted.

Teamsters did not submit any separate Exhibits. Teamsters' Exhibit 39a was a marked up version of Exhibit 39 prepared at the hearing by its witness Jan Orth and admitted.

WISDOT's Exhibits are numbered 101 to 114. WISDOT formally withdrew Exhibit 105. In the Conference Report issued October 15, 2002, I reserved the right to use agency records and to take official notice as may be allowed in accordance with Wis. Stats. 227.45(2) and (3). I have considered the following agency records numbered ALJ1 to ALJ6 that are attached hereto:

ALJ1: Federal Highway Administration [FHWA] Notice of Proposed Rulemaking [NPRM] published September 27, 1985, 50 FR 39137, Docket 85-11, that would have precluded payment of federal funds for excess costs due to State prevailing wage rates being higher than United States Department of Labor [USDOL] rates.

ALJ2: April 13, 1988 Memorandum from USDOT Assistant Secretary of Transportation for Budget and Program to General Counsel objecting to the above NPRM.

ALJ3: August 9, 1989 Briefing Memorandum from Chief Counsel of FHWA to FHWA Administrator to withdraw the above NPRM on August 21, 1989, confirming continued payment of federal funds for the higher of the State or Federal prevailing wage rates.

ALJ4: 1993 Little Davis-Bacon Wage Rate Survey Summary showing 34 States had their own prevailing wage rate laws and 15 States had higher rates than those provided by USDOL at that time, and 21 States incorporated their wage rate requirements along with those provided by USDOL in their projects.

ALJ5: Chapter II A of the FHWA's Contract Administration Core Curriculum Participant's Manual and Reference Guide 2001, Section 4. Payment of Predetermined Minimum Wage, Additional Guidance:

http://www.fhwa.dot.gov///programadmin/contracts/cor_IIA.htm

"State Wage Rates. Approximately two-thirds of the States have laws establishing minimum wage rates. These laws are commonly referred to as "Little" Davis-Bacon Acts. The wage rates for about 15 of these States are predominately higher than the DOL rates. The FHWA has generally accepted the States' right to establish their own prevailing wage statutes, and rates higher than the Federal rates are implicitly approved for Federal-aid contracts."

ALJ6: WISDOT June 18, 1991 letter and explanation that decision in Midway Excavators, Inc. v. USDOT and AFL-CIO (CA DC 1991) has no impact on WISDOT enforcement of Wis. Stat. 103.50.

BRIEFS:

I have received and considered the following briefs and responses:

Petitioner's Brief dated January 5, 2004
Teamsters Brief in Opposition dated January 30, 2004
WISDOT's Brief dated February 4, 2004
Petitioner's Reply Brief dated February 6, 2004

DECLARATORY RULING ON ISSUES PRESENTED:

I. I will consider the fourth issue first. It reads as follows:

4. **"Whether Wis. Stat. 84.015 requires on federally-funded highway projects that the state prevailing wage under Wis. Stat. 103.50(2m) not be applied to the delivery of crushed and processed limestone from a commercial quarry due to the fact that such delivery is exempt from the application of the federal prevailing wage under the Davis Bacon Act, 40 USC 3141-3148 and its regulations."**

Petitioner argues that Wis. Stat. 84.015 requires WISDOT to follow only Davis Bacon Act regulations that exempt delivery drivers from the application of any prevailing wage rate laws on highway projects that are funded in whole or in part with federal highway funds.

Wis. Stat. 84.015 currently reads as follows:

> "84.015 **Federal highway aid accepted.**
> 84.015(1)
> (1) The state of Wisconsin **assents** to the provisions of Title 23, USC and all acts of congress amendatory thereof and supplementary thereto. The state of Wisconsin declares its purpose and intent to give **assent** to all federal highway acts and to make provisions that will **insure receipt by this state of any federal highway aids that have been or may be allotted to the state** including all increased and advanced appropriations, and **insure** that such highways and related facilities in this state as may be **eligible** to be improved or constructed in accordance with any such federal highway acts may be improved, constructed and maintained in accordance therewith. The good faith of the state is pledged to make available funds sufficient to adequately carry out such construction and maintenance.
>
> 84.015(2)
> (2) The department **may** enter into all contracts and agreements with the United States relating to the construction and maintenance of streets and highways and related facilities under Title 23, USC and all acts amendatory thereof and supplementary thereto, submit such scheme or program of construction and

> maintenance as may be required by said code or rules and regulations of the United States promulgated thereunder and do all other things necessary fully to carry out the **cooperation** contemplated and provided for by said code." (Emphasis added.)

Wis. Stat. 84.015 on its face does not expressly nor implicitly preempt or override other Wisconsin law nor does Wis. Stat. 84.015 expressly adopt any specific federal law, as it exists on a particular date. State administrative agencies in Wisconsin such as WIISDOT have only such authority as specifically granted to them by legislation or that which may be fairly implied therefrom. **American Brass Co. v. State Board of Health**, 245 Wis. 440, 15 N.W.2d 27 (1944).

The decision of the Wisconsin Court in **Mitton v. Wisconsin Dept. of Transp.**, 184 Wis. 2nd 738, 748, 516 N.W.2d 709, 714 (1994) provides guidance as to the scope and efficacy of the permissive authority granted by Wis. Stat. 84.015. The case involves WISDOT's desire to acquire private property in order to preserve a portion of an archaeologically significant site in the proximity of that part of the archaeological site that WISDOT would be disturbing through its highway construction project. To support its acquisition of the property, WISDOT relied upon the strong encouragement of federal laws and regulations that made historic preservation an apparent precondition of timely federal highway funding approval. WISDOT cited, among other things, for this authority, Wis. Stat. 84.015. The Wisconsin Court disagreed and stated:

> "If we were to allow the DOT action to stand, there would be nothing to stop it from condemning 10 or even 100 acres of land outside the highway right-of-way based upon nothing more than the possibility that it would be denied federal authorization. The DOT cannot, under the statute, simply conclude without some reasonable grounds, that five acres outside the highway right-of-way should be condemned. If it could, there would be no limit to its authority. The federal statutes relied on by the DOT, which **do not require** them to condemn any land, do not provide reasonable grounds." (Emphasis added.)

Wis. Stat. 84.015 does authorize cooperation and compliance with provisions of federal highway laws that are prerequisites of receipt of federal highway funds under Title 23 of the U.S. Code, if within the reasonable scope of authority granted to WISDOT by Wisconsin Statutes. The statute does not authorize WISDOT to ignore Wisconsin laws that conflict with, but are not preempted by federal laws. The statute does not authorize WISDOT to exceed the statutory authority granted to WISDOT by Wisconsin law simply to obtain federal funding approval or avoid the possibility of denial of funds.

The statute was first created by Chapter 175, Laws of **1917** as Section 1312 to read as follows:

> "The legislature of the state of Wisconsin hereby **assents** to the provisions of the Act of Congress approved July eleventh, nineteen hundred and sixteen, entitled "An Act to provide that the United States shall aid the States in the construction of

rural post roads, and for other purposes," thirty-ninth U.S. Statutes at Large, page three hundred and fifty-five. The Wisconsin Highway Commission is hereby authorized to enter into all contracts and agreements with the United States Government relating to the construction and maintenance of rural post roads under the provisions of the said Act of Congress, to submit such scheme or program of construction and maintenance as may be required by the Secretary of Agriculture and to do all other things necessary fully **to carry out the cooperation contemplated and provided for** by the said Act. The **good faith** of the State is hereby pledged to make available funds sufficient to equal the sums apportioned to the State by or under the United States Government during each of the years for which Federal funds are appropriated by the said Act and to maintain the roads constructed under the provisions of said Act, and to make adequate provisions for carrying out such construction and maintenance." (Emphasis added.)

It was renumbered as Wis. Stat. 84.01 and entitled Federal Highway Aid Accepted by Chapter 108, Laws of **1923**, Section 158. It was amended as Wis. Stat. 84.01(3) by Chapter 11, Laws of **1925** to read:

"The legislature of the state of Wisconsin hereby declares its purpose and intent to make arrangements for and **to provide such legislation as will insure the receipt by this state of the total funds** that may be allotted to the state under any and all acts of Congress enacted subsequent to the acts approved November 9, 1921, and June 19, 1922, amendatory and supplementary to the federal aid act of July 11, 1916, by which further allotments of federal aid for the improvement of highways may be made available to this state, **so that such roads in this state as may be entitled to receive federal aid** in accordance with the provisions of any such acts, may be constructed, maintained, marked and signed in accordance therewith." (Emphasis added.)

It was renumbered as Wis. Stat. 84.01(4) by Chapter 22, Laws of **1931** and renumbered as Wis. Stat. 84.015 and revised to read as follows by Chapter 334, Laws of **1943**, Section 118:

"84.015 Federal Highway Aid Accepted. (1) The state of Wisconsin **assents** to the provisions of the act of congress, approved July 11, 1916, entitled "An act to provide that the United States shall aid the states in the construction of rural post roads, and for other purposes," (39 Stats. 355) and all acts of congress amendatory thereof and supplementary thereto. The state of Wisconsin hereby **declares its purpose and intent** to give **assent to** all federal **highway acts and to make provisions that will insure receipt by this state of any federal highway aids** that heretofore have been or hereafter may be allotted to the state including all increased and advanced appropriations, **and insure** that such highways and related facilities in this state as may be **eligible** to be improved or constructed in accordance with the provisions of any such federal highway acts may be improved, constructed and maintained in accordance therewith. The **good faith** of the state is hereby pledged to make available funds sufficient as required

to adequately carry out such construction and maintenance.

(2) The state highway commission is authorized to enter into all contracts and agreements with the United States relating to the construction and maintenance of streets and highways and related facilities under the provisions of the Federal Aid Road Act, approved July 11, 1916, and all acts amendatory thereof and supplementary thereto, to submit such scheme or program of construction and maintenance **as may be required** by said acts or rules and regulations of the United States promulgated thereunder and to do all other things necessary fully to carry out the cooperation contemplated and provided for by said acts." (Emphasis added.)

It was amended again by Chapter 62, Laws of **1965**, Section 2, to eliminate the references to old laws and modernize the language as follows:

"84.015 (1) The state of Wisconsin assents to the provisions of ~~the act of congress approved July 11, 1916, entitled "An act to provide that the United States shall aid the states in the construction of rural post roads, and for other purposes," (39 Stats. At L. 355)~~ *Title 23, USC* and all acts of congress amendatory thereof and supplementary thereto. The state of Wisconsin ~~hereby~~ declares its purpose and intent to give assent to all federal highway acts and to make provisions that will insure receipt by this state of any federal highway aids that ~~heretofore~~ have been or hereafter may be allotted to the state including all increased and advanced appropriations, and insure that such highways and related facilities in this state as may be eligible to be improved or constructed in accordance with ~~the provisions of~~ any such federal highway acts may be improved, constructed and maintained in accordance therewith. The good faith of the state is ~~hereby~~ pledged to make available funds sufficient ~~as required~~ to adequately carry out such construction and maintenance.

(2) The state highway commission ~~is authorized to~~ *may* enter into all contracts and agreements with the United States relating to the construction and maintenance of streets and highways and related facilities under ~~the provisions of the Federal Aid Road Act, approved July 11, 1916,~~ *Title 23, USC* and all acts amendatory thereof and supplementary thereto, to submit such scheme or program of construction and maintenance as may be required by said ~~acts~~ *code* or rules and regulations of the United States promulgated thereunder and to do all other things necessary fully to carry out the co-operation contemplated and provided for by said ~~acts~~ *code*."

The most recent change in Wis. Stat. 84.015 was in Chapter 29, Laws of **1977**, section 1654 (8) (a) and simply substituted the phrase "department (of transportation)" for "state highway commission."

A similar provision is found in Wis. Stat. 20.395(9)(qx) that allows WISDOT to match federal funds for the purposes of receipt of the funds if otherwise within the general

authority granted to WISDOT. It reads as follows:

> "20.395(9)(qx) Matching federal aid and other funds. All or part of any allotment from the appropriations made in this section may be used to match or supplement federal aid or other funds made available by any act of congress or any county, city, village or town or other source **for the purposes set forth in such paragraphs, provided the department and any municipality or other commission or official given any control over the disposition of any such allotment deems it advisable**. Every part of every allotment made from an appropriation in this section shall be **expended only for the purpose for which the allotment is made**. The intent of this paragraph is to **permit, where state funds are as herein provided made available for such purposes**, the matching or supplementing of federal aid funds in accordance with the purposes of any act of congress, including, without limitation because of enumeration, the elimination of hazards to life at railroad grade crossings, the construction, reconstruction and improvement of secondary or feeder roads and any other highway or transportation purpose within the purview of any such act of congress."

These statutes are more conforming, encouraging, pledging and collaborative than proscriptive or prescriptive nor unnecessarily and gratuitously self-preemptive of conflicting or differing state law. For example, in 59 OAG 23, 26 (1970), the Attorney General stated:

> "I am aware that the practices under sec. 103.50 and under the federal Davis-Bacon Act vary in this respect, but the variance results from a difference in statutory language. Further, the operation of the federal Davis-Bacon Act is not repugnant to the force and effect of sec. 103.50, Stats."

Regardless of the breadth of enabling and permissive statutory authority that may be granted by Wis. Stat. 84.015 or the appropriation of matching state funds by Wis. Stat. 20.395(9)(qx), there is no federal supremacy clause or preemptive statutory requirement nor administrative practice or demand as a condition of receipt of federal funds that WISDOT must adopt the federal Davis Bacon Act prevailing wage rate requirements exclusively in lieu of the Wisconsin prevailing wage rate requirements of Wis. Stat. 103.50 when projects are funded with any federal highway funds.

The decision of **July 18, 2003**, by the United States District Court for the Western District of Wisconsin in Case 03-C-83-C, **Frank Bros., Inc. V. Wisconsin Department of Transportation**, 297 F. Supp. 2d 1140, 2003 U.S. Dist. LEXIS 23968 (W.D. Wis. 2003) clearly holds that federal law does not preempt the application of Wisconsin's prevailing wage laws as a matter of field preemption or conflict preemption. The federal court also concludes that there was nothing in federal statutory and regulatory law that expressed anything other than a clear preference for state and federal collaboration and cooperation. The federal court did decline to exercise supplemental jurisdiction of the Frank Bros., Inc., state law claim under Wis. Stat. 84.015.

There is uncontradicted testimony by Paul Trombino that the Federal Highway Administration (FHWA) has continuously approved contracts let by WISDOT that require and include the documentation and the application of both the Wisconsin prevailing wage requirements of Wis. Stat. 103.50 and the federal Davis Bacon requirements, whichever are greater in amount or scope. That is the long-standing and consistent policy of both FHWA and WISDOT. [Tr. pp 89 to 91 and 94.]

The testimony of Gary Shealy also supports the existence of a continuing, common understanding by highway contractors and state agencies that deal with highway related construction that Wisconsin's prevailing wage rate laws and federal wage rate laws generally coexist with the higher standards prevailing. [Tr. pp. 101 and 110.]

The documents attached as ALJ1 to ALJ5 independently confirm that the FHWA does not require and has not required States to implement lower or narrower federal Davis Bacon requirements than any State prevailing wage rate requirements as a prerequisite to receipt of federal highway funds.

Petitioner fashions a novel and puzzling argument[1]. Petitioner states that Wis. Stat. 84.015:

> "...was not considered in the 1985 DOT Declaratory Ruling. However, the Davis Bacon Act regulations exempting delivery drivers from the prevailing wage were not issued until 1992."

Neither the nexus between Petitioner's two statements nor the conclusion to be drawn is clear.

It is correct that Wis. Stat. 84.015 is not mentioned in that 1985 Declaratory Ruling. That does not mean Wis. Stat. 84.015 is a new statute that in any way changes, undermines or invalidates the logic of that Declaratory Ruling. As shown above, Wis. Stat. 84.015 was first enacted in 1917 and has not been amended at all since 1977. Moreover, pages 6 to 9 of that 1985 Declaratory Ruling clearly address the degree of applicability of the Davis Bacon Act requirements and Wis. Stat. 103.50, the Wisconsin prevailing wage requirements. In brief, the relevant discussion in the 1984 Declaratory Ruling concludes as follows:

> "Davis-Bacon Act provisions **do not supersede** broader State prevailing wage

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[1] Petitioner also argues that agreements between WISDOT and FHWA require WISDOT to follow policies and procedures adopted by FHWA. Assuming that Petitioner is entitled to benefit as a third party from these agreements, the argument is premised on the erroneous assumption that WISDOT did not require payment of "**not less than**" what is required by the Davis-Bacon Act. Petitioner also errs in suggesting that the definition of "construction" in 23 USC 101(a)(3) is narrow. It is not.

> rate laws under federal or Wisconsin law. .... [Wis. Stat.] 103.50 applies in all cases and is different in coverage than the Davis-Bacon Act. The Davis-Bacon Act covers one set of human activities; the Wisconsin law covers another set of activities. The set of human activities covered by the Davis-Bacon Act does not appear to be fixed. Human activities for highway construction purposes also change over time. The two sets of activities covered by federal and Wisconsin law overlap in part, but are not identical. **The Davis-Bacon Act, when applicable, does supersede any lower Wisconsin minimum prevailing wage rates. ... Hence, the minimum level of coverage in Wisconsin on all projects is determined by Wisconsin law. To the extent the Davis-Bacon Act differs from Wisconsin law, it can only expand upon the minimum Wisconsin rates and the minimum Wisconsin coverage**." (Emphasis added.)

That Declaratory Ruling has not been superseded by any amendments to Wis. Stat. 103.50 and remains binding on WISDOT and the affected industry. Petitioner then states that:

> "Davis-Bacon Act regulations exempting delivery drivers from the prevailing wage were not issued until 1992."

As concluded in the 1985 Declaratory Ruling, however, Davis-Bacon can only expand upon the minimum Wisconsin coverage on all contracts for highway work let by WISDOT, whether state funded only, or federally funded in whole or in part.

ALJ6 attached hereto also shows a contemporaneous determination by WISDOT in 1991 that the decision in Midway Excavators, Inc. v. USDOT and AFL-CIO (CA DC 1991) has no impact on WISDOT enforcement of Wis. Stat. 103.50 on all highway contracts let by WISDOT whether federally funded in whole or in part or not at all. This is the same case cited by Petitioner in its Exhibit 6, and the 1992 US Department of Labor regulation, 29 CFR 5.2(j)(2), as **Building and Construction Trades Department AFL-CIO v. United States Department of Labor Wage Appeals Board (Midway Excavator's Inc.)** 932 F.2d 985 (DC Cir 1991).

The history of the Wisconsin and federal prevailing wage rate laws adds further perspective. Wis. Stat. 103.50 was first enacted by Chapter 432, Laws of **1931**, relating to the insertion of prevailing hours of labor and wage clauses in "Every contract to which the state is a party for the construction or improvement of any highway..."

The federal government did not apply prevailing wage rate laws to any federally funded state highway construction before **1958**. Public Law 85-767, 72 Stat. 895, for the first time created 23 USC 113 to apply federal prevailing wage rate laws only to projects for the initial construction work of the Interstate System as follows:

23 USC "113 **Prevailing rate of wage – Interstate System**

(a) The Secretary shall take such action as may be necessary to insure that all laborers and mechanics employed by contractors or subcontractors on the **initial construction work** performed on highway projects on the Interstate System authorized under section108(b) of the Federal-Aid Highway Act of 1956, shall be paid wages at rates **not less than** those prevailing on the same type of work on similar construction in the immediate locality as determined by the Secretary of Labor in accordance with the Act of August 30, 1935, known as the Davis-Bacon Act (40 USC 276a).

(b) In carrying out the duties of subsection (a) of this section, the Secretary of Labor shall consult with the highway department of the State in which a project on the Interstate System is to be performed. After giving due regard to the information thus obtained he shall make a predetermination of the **minimum** wages to be paid laborers and mechanics in accordance with the provisions of subsection (a) of this section which shall be set out in each project advertisement for bids and in each bid proposal form and shall be made a part of the contract covering the project." (Emphasis added.)

The same **1958** law codified 23 USC 114(a) to read in part:

"...The construction work **and labor** in each State shall be performed under the direct supervision of the State highway department and **in accordance with the laws of the State and the applicable Federal laws**." (Emphasis added.)

The federal prevailing wage rate law was not extended to certain other federally-aided highway projects until **1968** when the phrase "Federal-aid systems, the primary and secondary, as well as their extension in urban areas, and the Interstate System authorized under the highway laws providing for the expenditure of Federal funds upon the Federal-aid systems" was substituted for "Interstate System authorized under section 108(b) of the Federal-Aid Highway Act of 1956." The phrase "initial construction work" was not modified by deleting the word "initial" until **1983**.

The applicable federal law as most recently amended in 2002 reads as follows:

23 USC 113 Prevailing rate of wage

(a) The Secretary shall take such action as may be necessary to insure that all laborers and mechanics employed by contractors or subcontractors on the **construction work** performed on the Federal-aid highways authorized under the highway laws providing for the expenditure of Federal funds upon the Federal-aid systems, shall be paid wages at rates **not less than** those prevailing on the same type of work on similar construction in the immediate locality as determined by the Secretary of Labor in accordance with sections 3141-3144, 3146, and 3147 of Title 40."

There has been no change in the quoted phrase from 23 USC 114(a) above.

The Wisconsin Legislative, Executive and Judicial branches have all been aware of the need to insert federal prevailing wage rate requirements into WISDOT administered highway contracts **when applicable** to insure that **in no case will any laborer or mechanic be paid less than** the rates required by federal law, while maintaining the Wisconsin prevailing wage rates and scope on all highway contracts to which WISDOT is a party. See for example, **Habermehl Electric, Inc. v. State Dept. of Transp.**, 260 Wis. 2d 466, 471-472, ¶ 3, 659 N.W.2d 463 (2002) (Petition to Review Denied 6/12/03):

> "In addition to the DWD certified prevailing wage rates, the contracts contained federal prevailing wage rates because some projects are funded by both state and federal funds. The contracts provided that, when both federal and state prevailing wage rates for a given classification were included, the higher of the two rates governed."

The Wisconsin Legislature has amended Wis. Stat. 103.50 many times since it was first enacted in 1931. At no time has the Legislature taken any steps to exempt from Wis. Stat. 103.50 anyone doing any work under any contract to which WISDOT is a party for the construction or improvement of any highway simply because WISDOT or its successors receive federal funds for all or a portion of that work. The Legislature makes specific reference to the Davis-Bacon Act in Wis. Stat. 103.50 only when it intends to do so. For example, to authorize the Department of Workforce Development to consider a broad category of data in establishing the Wisconsin prevailing wage rates under Wis. Stat. 103.50:

> "103.50(4m)
> (4m) Wage rate data. In determining prevailing wage rates for projects that are subject to this section, the department shall use data from projects that are subject to this section, s. 66.0903 or 103.49 or 40 USC 276a [now 40 USC 3141-3148]"

Another example is to clearly provide an alternative method of payroll deductions:

> "103.50(7)(d)
> (d) Whoever induces any person who seeks to be or is employed on any project that is subject to this section to permit any part of the wages to which the person is entitled under the contract governing the project to be deducted from the person's pay is guilty of an offense under s. 946.15 (3), unless the deduction would be permitted under 29 CFR 3.5[2] or 3.6[3] from a person who is working on a project that is subject to 40 USC 276c.

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[2] 29 CFR 3.5 "Payroll deductions permissible without application to or approval of the [US] Secretary of Labor."

[3] 29 CFR 3.6 Payroll deductions permissible with the approval of the [US] Secretary of Labor.

103.50(7)(e)
(e) Any person employed on a project that is subject to this section who knowingly permits any part of the wages to which he or she is entitled under the contract governing the project to be deducted from his or her pay is guilty of an offense under s. 946.15 (4), unless the deduction would be permitted under 29 CFR 3.5[1] or 3.6[2] from a person who is working on a project that is subject to 40 USC 276c."

As stated in the 1985 Declaratory Ruling and confirmed by this Declaratory Ruling:

> **"The Davis-Bacon Act, when applicable, does supersede any lower Wisconsin minimum prevailing wage rates. ... Hence, the minimum level of coverage in Wisconsin on all projects is determined by Wisconsin law. To the extent the Davis-Bacon Act differs from Wisconsin law, it can only expand upon the minimum Wisconsin rates and the minimum Wisconsin coverage."**

The State of Wisconsin has always intended to provide and continues to provide broader coverage for Wisconsin persons doing work under a contract to which WISDOT is a party for highway construction than ever imposed by the Davis-Bacon Act where applicable.

WISDOT 1985 Declaratory Ruling has never been altered or set aside by a court; it has been affirmed or followed. It remains binding on WISDOT and the industry that the Davis-Bacon Act can only expand upon the minimum prevailing wage rates and scope of Wis. Stat. 103.50. WISDOT further declares that Wis. Stat. 84.015 does **not** require on federally funded highway projects that the state prevailing wage law under Wis. Stat. 103.50(2m) not be applied in general or to the delivery of limestone or other mineral aggregate from a commercial quarry. Whether such delivery is exempt from the application of the federal prevailing wage law under the Davis Bacon Act, 40 USC 3141-3148, and its regulations does not impair the broader application required by Wis. Stat. 103.50 to all work under a contract to which the State or WISDOT is a party for the construction or improvement of any highway.

II. The second issue reads as follows:

> **2. "Whether crushed and processed limestone from a commercial quarry must be treated as a manufactured product, and must therefore be exempt from the prevailing minimum wage under Wis. Stat. 103.50(2m), due to the fact that the material is crushed and blended by equipment and that such process is deemed to be "manufacturing" under Wisconsin law, Wis. Stat. 77.54(6m)."**

Petitioner argues that crushed and processed limestone is a "processed or manufactured material or product" within the meaning of Wis. Stat. 103.50(2m)(b):

> "Notwithstanding par. (a) 1., a laborer, worker, mechanic or truck driver who is regularly employed to process, manufacture, pick up or deliver materials or products **from a commercial establishment that has a fixed place of business from which the establishment regularly supplies processed or manufactured materials or products is not entitled** to receive the prevailing wage rate determined under sub. (3) or to receive at least 1.5 times his or her hourly basic rate of pay for all hours worked in excess of the prevailing hours of labor **unless any of the following applies**:"

The parties stipulated that the material at issue is delivered from a commercial establishment with a fixed place of business, but not that the crushed and processed limestone is a "processed or manufactured" material under Wis. Stat. 103.50(2m)(b). Exhibit 114. In its brief, however, WISDOT concedes that "whether or not crushed limestone is a manufactured product is immaterial." WISDOT Brief p. 13. Teamsters maintain in its brief that crushed limestone is not a "manufactured product" within the meaning of Wis. Stat. 103.50(2m)(b) regardless of whether it is mixed with crushed concrete, but acknowledge that it is a legal distinction without a difference as it is a mineral aggregate such as sand, gravel or stone. Teamsters' Brief pp. 13 to 16.

The 1985 Declaratory Ruling 84-1 does point out that asphalt, bituminous concrete, and ready-mix concrete are manufactured or processed materials or products. Summary pp. 3 and 4 and Opinion pp. 29 to 32. That determination was a prerequisite to exclusion from coverage from the general terms of Wis. Stat. 103.50 (1983-84) that read:

> "**This section shall not apply to wage rates and hours of employment of laborers or mechanics engaged in the processing or manufacture of materials or products or to the delivery thereof by or for commercial establishments which have a fixed place of business from which they regularly supply such processed or manufactured materials or products; except that this section shall apply to laborers or mechanics who deliver mineral aggregate such as sand, gravel or stone which is incorporated into the work under the contract by depositing the material substantially in place, directly or through spreaders, from the transporting vehicle.**" (Emphasis added.)

The same portions of that Declaratory Ruling also concluded that asphalt, bituminous concrete, and ready-mix concrete were not mineral aggregates within the meaning of the exception to this exclusion for deliveries from commercial sources.

Likewise, the 1985 Declaratory Ruling clearly stated:

> "The production of these materials, including mineral aggregates, i.e. their "processing or manufacture" by or for "commercial sources....." is exempt from White Sheet Rates [Wis. Stat. 103.50 Rates]." Opinion p. 19.

The Declaratory Ruling then goes on to fit the delivery of processed or manufactured "mineral aggregates such as sand gravel and stone" within the exception to the exclusion. Summary, p.1; Opinion, pp. 24 -25. For clarity it also defines the phrase, "mineral aggregates such as sand gravel and stone" as follows:

> "As a matter of formal declaration and clarification WisDOT further declares that it has used and will continue to use the following definition of "mineral aggregate such as sand, gravel or stone:"
>
> > "Mineral aggregate is an inert solid material of mineral composition, such as sand, gravel, crushed stoned, crushed rock, screenings, slag and other hard and durable mineral soil or rock fragments or granulated material with similar characteristics, or a combination thereof, specified or selected under the contract with WisDOT, but not concrete, ready-mix concrete, bituminous concrete, asphalt, mastic, mortar, plaster, macadam and other similar processed or manufactured products. Mineral aggregate does not include other material such as clay, topsoil, fill dirt, silt, boulders, riprap, wall stone, loam gumbo, loess, peat, muck, hardpan or other similar soils or mixed earth which may contain scattered rocks, boulders and vegetable material."
>
> "This is a longstanding and consistent WisDOT interpretation as shown on page 1 of Exhibit #4 ("aggregates for gravel or crushed stone base course, granular subbase course, and granular backfill.")." (Opinion p. 33, Summary p.4.)

The current statute follows a similar pattern:

> 103.50(2m) "(b) Notwithstanding par. (a) 1., a laborer, worker, mechanic or truck driver who is regularly employed to process, manufacture, pick up or deliver materials or products **from a commercial establishment that has a fixed place of business from which the establishment regularly supplies processed or manufactured materials or products is not entitled** to receive the prevailing wage rate determined under sub. (3) or to receive at least 1.5 times his or her hourly basic rate of pay for all hours worked in excess of the prevailing hours of labor **unless any of the following applies**:
>
> 1. The laborer, worker, mechanic or truck driver is **employed to go to the source** of **mineral aggregate such as sand, gravel or stone** that is to be **immediately incorporated into the work, and not stockpiled or further transported by truck, pick up that mineral aggregate and deliver that mineral aggregate to the site of a project that is subject to this section by depositing the material substantially in place, directly or through spreaders from the transporting vehicle**."

Petitioner's witness, Roger Frank, admitted that crushed limestone and crushed concrete are screened and mixed together with about 12% as crushed concrete to meet specifications for base course material for delivery to the highway project. Tr. pp. 34-36.

He also admitted that use of recycled concrete, as part of the mineral aggregate base course had been a routine practice farther back than 10 years, but probably not 30. Tr. pp. 43-44. Also he testified that it is usually at 90/10 homogenous mix for the highway work of crushed limestone and recycled, crushed concrete. Tr. pp. 48-49.

Petitioner's witness Don Frank also testified:

> "Q Now, were you able to estimate the percentage of the aggregate base course on this project that was recycled concrete?
>
> A Yes, our estimate was at 12 percent."

He further stated: "We had a stockpile of concrete along with our blasted rock, and that's where we put the bid together to just crush them both together and put them out there." Tr. pp. 55 and 56.

WISDOT's witness Joseph White, WISDOT's coordinator for highway materials sampling and testing, also testified in response to a question regarding the differences between crushed concrete and crushed limestone for purposes of meeting WISDOT specifications for crushed aggregate base course:

> "Well, fundamentally for simanalysis gradation purposes for the use purposes it's the same. We don't distinguish. In fact, our specifications, it's been in there quite some time as a permissive use where it's equivalent. Crushed concrete is equivalent to a crushed dolomite, dolostone, crushed limestone." Tr. pp. 138-139.

Similarly, with respect to Petitioner's concern that crushed recycled concrete contains cement paste in some proportion, Joseph White testified:

> "Q But you have to be concerned about how much recycled concrete you use on the highway because the cementing agent is still in there, isn't that correct?
> A It's pretty much all hydrated out. We're not concerned about that at all.
> Q When it sits on the roadbed and water gets in it?
> A Doesn't matter." Tr. p. 150.

The physical process is the same for crushing and screening limestone and recycled concrete for use as base course on highway projects; it is crushed and screened to the proper gradation and foreign, unwanted materials are removed. There may be less need to use magnets to remove metallic impurities from virgin, blasted limestone before crushing, but there may also be roots and other material to be removed during the preparation stage. Tr, pp. 57-59.

Accordingly, it is hereby declared that for purposes of Wis. Stat. 103.50(2m)(b)1, that "mineral aggregate such as sand, gravel or stone" falls within the exception to the exclusion from the prevailing wage requirements of Wis. Stat. 103.50 for commercial sources when it otherwise complies with the remainder of the exception language

regarding manner of delivery. Crushed and processed or screened limestone from a commercial source, whether crushed and blended by equipment with crushed and screened recycled concrete, or entirely crushed, screened and recycled concrete that meets specifications provided by WISDOT, are all within the existing definition of "mineral aggregate such as sand, gravel or stone." Delivery of this material by or for commercial sources when delivered in compliance with exception language requires compliance with the prevailing wage law of Wis. Stat. 103.50 and payment of Wisconsin's White Sheet Rates under that statute.

III. The first issue reads as follows:

1. **"Whether crushed and processed limestone from a commercial quarry must be treated as a manufactured product, and must therefore be exempt from the prevailing minimum wage under Wis. Stat. 103.50(2m), when the highway contract specifications require that recycled concrete be crushed and blended into a mix of limestone for delivery to the highway project."**

For the reasons stated in response to the previous issue, it is immaterial whether the "mineral aggregate such as sand, gravel or stone" is a manufactured material or product from a commercial source if it falls within the remainder of the exception from the exemption. The fact that crushed recycled concrete and crushed virgin limestone are screened and blended together to meet WISDOT specifications does not remove it from the definition of the phrase "mineral aggregate such as sand, gravel or stone" promulgated in the 1985 binding Declaratory Ruling.

Joseph White testified as follows:

> "Q When used in crushed aggregate base course, do you consider crushed concrete to be a hard and durable granulated material with characteristics similar to that of crushed rock?
> A Yes.
> Q Thank you.
> A We equate the two as the same."

The identical phrase, mineral aggregate such as sand, gravel or stone, is used in the current statute. It continues to mean:

> ""Mineral aggregate is an inert solid material of mineral composition, such as sand, gravel, crushed stoned, crushed rock, screenings, slag and **other hard and durable mineral soil or rock fragments or granulated material with similar characteristics, or a combination thereof, specified or selected under the contract with WisDOT**..." (Emphasis added.)

IV. The third and final issue reads as follows:

2. **"Whether the delivery of crushed and processed limestone from a commercial quarry into piles on the highway project, without the use of spreaders from the transporting vehicle, constitutes stockpiling or constitutes immediate incorporation into the work by depositing the material substantially in place, directly, when other contractors and equipment move the material from the pile to other areas of the project in order to maintain grade."**

The 1985 Declaratory Ruling made the following determinations:

> "Mineral aggregate such as sand, gravel or stone is deposited substantially in place directly or through spreaders from the transporting vehicle if it is deposited, dumped, placed, spread or laid on the roadbed within the site of the work where it will be or is being bladed, spread, scraped, pushed, raked, rolled compacted or similarly worked without further hauling." Summary, p. 2, Opinion p. 25, see also pp. 16.-26.

The determination was made binding prospectively on WISDOT and the industry in 1985. The phrase in Wis. Stat. 103.50 (1983-84) that was the subject of the 1985 Declaratory Ruling read:

> "....this section shall apply to laborers or mechanics who deliver mineral aggregate such as sand, gravel or stone which is incorporated into the work under the contract by depositing the material substantially in place, directly or through spreaders, from the transporting vehicle."

The phrase in the current statute, Wis. Stat. 103.50(2m)(b)1. reads:

> "1. The laborer, worker, mechanic or truck driver is employed to go to the source of mineral aggregate such as sand, gravel or stone that is to be **immediately incorporated into the work, and not stockpiled or further transported by truck, pick up that mineral aggregate and deliver that mineral aggregate to the site of a project that is subject to this section by depositing the material substantially in place, directly or through spreaders from the transporting vehicle.**" (Emphasis added.)

To a large extent, the new statute codifies the 1985 Declaratory Ruling and expands the applicability of the exception for delivery of mineral aggregates such as sand, gravel or stone from commercial sources so that the required prevailing wage law is applied to these operations.

For example, the current statute eliminates any ambiguity in the Declaratory Ruling's use of the phrase "without further hauling" by substituting the phrase "and not ...further transported by truck." Hence, if the mineral aggregate is pushed into a trench by a bobcat, grader or front-end loader it is not being "further transported by truck."

The former statute and the current statute both use the identical phrase:

> "by depositing the material substantially in place, directly or through spreaders from the transporting vehicle."

The 1985 Declaratory Ruling concludes that this phrase:

> "...must mean White Sheet Rates (Wis. Stat. 103.50 prevailing wage requirements) apply to the delivery of mineral aggregate by truck to the highway project by or for commercial sources when the truck dumps or spreads the mineral aggregate on the project roadbed while the highway contract is in effect:" Opinion, p. 24

> "[mineral aggregate] ...is deposited substantially in place directly or through spreaders from the transporting vehicle if it deposited, **dumped**, placed, spread or **laid** on the roadbed within the site of the work **where it will be or is being bladed, spread, scraped, pushed, raked, rolled compacted or similarly worked** without further hauling." (Emphasis added.) Summary, p. 2, Opinion p. 25, see also pp. 16-26.

The only narrowing of the exception to the commercial exclusion is arguable the new phrase:

> "...immediately incorporated into the work, and not stockpiled."

The previous Declaratory Ruling appears to have defined "stockpile" as the situation where a contractor took the risk of moving significant quantities of materials to a location at or near the project site before any contract was executed and went into effect. As stated on p. 22:

> "Exhibit #6, dated November 10, 1980, at p.1 concludes that "stockpiling" of materials "before the contract execution" is exempt because the contract cannot apply and White Sheet Rates cannot apply. An implication of this reasoning is that a different result would be possible after contract execution depending on the circumstances."

Witnesses for the Petitioner and Teamsters concentrated on Exhibit 39 and 39A drawn at the hearing to attempt to establish what was or was not "immediately incorporated into the work, and not stockpiled."

Roger Frank, on behalf of Petitioner, admitted there was no "further hauling" of the material even when the mineral aggregate was dumped in a pile or piles on the base course. Tr. p. 44.

Roger Frank, on behalf of Petitioner, also admitted that the material was usually pushed from the surface of the base course to the sub base or roadbed by a dozer as soon as it was dumped. Tr. p. 36. The only exception was when rain forced discontinuation of the work one or two times. Tr. pp. 36-37. And sometimes trucks would arrive in a group that require some pushing by dozer further than 10 feet. Tr. 38-39. The material was pushed on to the sub base or roadbed within "a couple minutes, maybe three, four" except perhaps at the end of the day. Tr. p. 39.

Roger Frank also testified that he had "stockpiles" in his quarry. Tr. p. 46. That reflects a more common understanding and use of the word than the piles created temporarily by trucks dumping their load within 10 feet of the sub base or roadbed to be further pushed into place by a dozer from the existing base course.

No matter how it happened, however, Roger Frank confirmed that the material was immediately incorporated into the work and was intended to be incorporated in the work and not "stockpiled" or "further transported by truck." Tr. p. 48.

The testimony of Ralph Giese, an employee of Mayville White Lime with experience in crusher and aggregate preparation, equates a "stockpile" to the large gathering of materials at a quarry or crusher and screening site in size that "probably range anywhere from 40 feet in the air to I would say 300, 400, 500 yards long by who knows how wide." He also estimated it would take about 400 quad axle trucks to move that stockpile. Tr. p. 77.

Jan Orth, a truck driver for Vinton Construction Company, Manitowoc, had experience delivering gravel, sand, crushed recycled concrete and combinations of these and other similar aggregate materials to many highway projects. He describes the delivery as basically the same regardless of the aggregate make up:

> "A. We pull up into the roadbed. If I would be the very first truck there, I dump my load right at the end. A dozer would come and spread it out. The next truck would pull up next to me and dump his load, and the dozer would come over, spread that. And as the tucks would come, we would just go back and forth dumping our loads working our way down the grade."
> Q So you're working your way down along the roadbed?
> A Right.
> Q You don't pile it up in one spot?
> A No. If we piled it up in one spot, the blade would have to be working backwards and pushing twice forward.
> Q And so when you do this hauling of this crushed limestone or crushed concrete, it's not moved by truck to any other part of the project, correct?
> A Right." Tr. pp. 80-81.

Other than nomenclature, the description of the operation by Petitioner's witness Roger Frank and the Teamsters' witness Jan Orth was not conflicting. It is my opinion that they both described a trucking operation where the:

"...[the material was delivered] by truck to the highway project by or for commercial sources when the truck dumps or spreads the mineral aggregate on the project roadbed while the highway contract is in effect." Opinion, p. 24

"[and the material was]...deposited substantially in place directly or through spreaders from the transporting vehicle if it deposited, **dumped**, placed, spread or **laid** on the roadbed within the site of the work **where it will be or is being bladed, spread, scraped, pushed, raked, rolled compacted or similarly worked** without further hauling." (Emphasis added.) Summary, p. 2, Opinion p. 25, see also pp. 16-26.

More importantly than fulfilling the requirements for coverage under the former Declaratory Ruling, they also both described an operation where the:

"... truck driver is employed to go to the source of [the material]... that is to be **immediately incorporated into the work, and not stockpiled or further transported by truck, pick up that ... [material] and deliver that ...[material] to the site of a project that is subject to this section by depositing the material substantially in place, directly or through spreaders from the transporting vehicle**."

For purposes of this Declaratory Ruling, I find that "the delivery of crushed and processed limestone from a commercial quarry into piles on the highway project[4] while the contract was in effect, without the use of spreaders from the transporting vehicle, does not constitute stockpiling and does constitute immediate incorporation into the work by depositing the material substantially in place, directly, when other contractors and equipment move the material from the pile to other areas of the project without further transport by truck in order to maintain grade.

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[4] It is noted that Section DWD 290.01(18)(a), Wis. Admin. Code, defines "site or project" as follows:

(a) "Site of project" means the physical place or places where the construction called for in the contract will remain when work on it has been completed and other adjacent or nearby property used by a contractor or subcontractor in connection with the project.

CONCLUSION.

State prevailing wage rate laws fall within a regulatory field traditionally occupied by the States. **Frank Bros., Inc. v. Wisconsin Dept. of Transportation**, 297 F. Supp. 2d 1140 (DC WD WI 2003); **California Division of Labor Standards Enforcement v. Dillingham Construction, N.A., Inc.**, 519 U.S. 316, 325, 330, 136 L. Ed. 2d 791, 117 S. Ct. 832 (1997).

The object of the Davis-Bacon Act is "not to benefit contractors, but rather to protect their employees from substandard earnings by fixing a floor under wages on Government projects." **U.S. v. Binghampton Construction Co., Inc.**, 347 U.S. 171, 176-77 (1954).

The Wisconsin prevailing wage law is applicable to highway construction and improvement contracts to which the State of Wisconsin Department of Transportation is a party. It has been in existence and applicable to these contracts far longer than the federal Davis-Bacon Act has been required to be applied to certain more narrowly defined federally-aided highway contracts in Wisconsin. Wis. Stat. 103.50 applies to contractors, subcontractors, agents or other persons performing any work on a project under a contract based on bids as provided in s. 84.06 (2) to which WISDOT is a party for the construction or improvement of any highway. Neither Wis. Stat. 84.015, the doctrine of federal supremacy or preemption, federal statutory language or interpretation, regulations or agreements between WISDOT and USDOT/FHWA or administration of federal highway and transportation funds prevent the simultaneous application of both laws. The Davis-Bacon Act, when applicable, does supersede any lower Wisconsin minimum prevailing wage rates. Hence, the minimum level of coverage in Wisconsin on all projects is determined by Wisconsin law, Wis. Stat. 103.50. To the extent the Davis-Bacon Act differs from Wisconsin law, it can only expand upon the minimum Wisconsin rates and the minimum Wisconsin coverage.

The competitive bidding process on state highway and transportation projects is designed to obtain a competent and responsible contractor to do the specified work at the lowest price. All competing contractors obtain the same bid proposal documents and specifications from WISDOT prior to submitting bids to WISDOT. These documents include the Wisconsin prevailing wage requirements under Wis. Stat. 103.50, as well as those of the federal Davis-Bacon Act when applicable due to federal funding participation in these contracts. The Wisconsin Legislature has determined that, as a minimum, persons doing work under these contracts shall be paid no less than the prevailing wages required by Wisconsin law. The Legislature has decided that a determinative factor in the competitive bidding process for the State highway and transportation work to which WISDOT is a party will not be the ability of a contractor to persuade workers to accept less than the prevailing wage rate established by Wisconsin for work covered by Wisconsin law.

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ATTACHMENTS:

I certify the following are true and correct copies of the following official records and documents of the State of Wisconsin Department of Transportation pursuant to Wis. Stat. 909.02(4) and 63 Atty. Gen. 605:

ALJ1: Federal Highway Administration [FHWA] Notice of Proposed Rulemaking [NPRM] published September 27, 1985, 50 FR 39137, Docket 85-11, that would have precluded payment of federal funds for excess costs due to State prevailing wage rates being higher than United States Department of Labor [USDOL] rates.

ALJ2: April 13, 1988 Memorandum from USDOT Assistant Secretary of Transportation for Budget and Program to General Counsel objecting to the above NPRM.

ALJ3: August 9, 1989 Briefing Memorandum from Chief Counsel of FHWA to FHWA Administrator to withdraw the above NPRM on August 21, 1989, confirming continued payment of federal funds for the higher of the State or Federal prevailing wage rates.

ALJ4: 1993 Little Davis-Bacon Wage Rate Survey Summary showing 34 States had their own prevailing wage rate laws and 15 States had higher rates than those provided by USDOL at that time, and 21 States incorporated their wage rate requirements along with those provided by USDOL in their projects.

ALJ5: Chapter II A of the FHWA's Contract Administration Core Curriculum Participant's Manual and Reference Guide 2001, Section 4. Payment of Predetermined Minimum Wage, Additional Guidance:

http://www.fhwa.dot.gov///programadmin/contracts/cor_IIA.htm

"State Wage Rates. Approximately two-thirds of the States have laws establishing minimum wage rates. These laws are commonly referred to as "Little" Davis-Bacon Acts. The wage rates for about 15 of these States are predominately higher than the DOL rates. The FHWA has generally accepted the States' right to establish their own prevailing wage statutes, and rates higher than the Federal rates are implicitly approved for Federal-aid contracts."

ALJ6: WISDOT June 18, 1991 letter and explanation that decision in Midway Excavators, Inc. v. USDOT and AFL-CIO (CA DC 1991) has no impact on WISDOT enforcement of Wis. Stat. 103.50.

Dated: May 24, 2004

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END NOTES

[1] *29 CFR § 3.5 Payroll deductions permissible without application to or approval of the Secretary of Labor.*

Deductions made under the circumstances or in the situations described in the paragraphs of this section may be made without application to and approval of the Secretary of Labor:

(a) Any deduction made in compliance with the requirements of Federal, State, or local law, such as Federal or State withholding income taxes and Federal social security taxes.

(b) Any deduction of sums previously paid to the employee as a bona fide prepayment of wages when such prepayment is made without discount or interest. A *bona fide prepayment of wages* is considered to have been made only when cash or its equivalent has been advanced to the person employed in such manner as to give him complete freedom of disposition of the advanced funds.

(c) Any deduction of amounts required by court process to be paid to another, unless the deduction is in favor of the contractor, subcontractor, or any affiliated person, or when collusion or collaboration exists.

(d) Any deduction constituting a contribution on behalf of the person employed to funds established by the employer or representatives of employees, or both, for the purpose of providing either from principal or income, or both, medical or hospital care, pensions or annuities on retirement, death benefits, compensation for injuries, illness, accidents, sickness, or disability, or for insurance to provide any of the foregoing, or unemployment benefits, vacation pay, savings accounts, or similar payments for the benefit of employees, their families and dependents: *Provided, however,* That the following standards are met:

(1) The deduction is not otherwise prohibited by law;

(2) It is either:

(i) Voluntarily consented to by the employee in writing and in advance of the period in which the work is to be done and such consent is not a condition either for the obtaining of or for the continuation of employment, or

(ii) provided for in a bona fide collective bargaining agreement between the contractor or subcontractor and representatives of its employees;

(3) No profit or other benefit is otherwise obtained, directly or indirectly, by the contractor or subcontractor or any affiliated person in the form of commission, dividend, or otherwise; and

(4) The deductions shall serve the convenience and interest of the employee.

(e) Any deduction contributing toward the purchase of United States Defense Stamps and Bonds when voluntarily authorized by the employee.

(f) Any deduction requested by the employee to enable him to repay loans to or to purchase shares in credit unions organized and operated in accordance with Federal and State credit union statutes.

(g) Any deduction voluntarily authorized by the employee for the making of contributions to governmental or quasi-governmental agencies, such as the American Red Cross.

(h) Any deduction voluntarily authorized by the employee for the making of contributions to Community Chests, United Givers Funds, and similar charitable organizations.

(i) Any deductions to pay regular union initiation fees and membership dues, not including fines or special assessments: *Provided, however,* That a collective bargaining agreement between the contractor or subcontractor and representatives of its employees provides for such deductions and the deductions are not otherwise prohibited by law.

(j) Any deduction not more than for the "reasonable cost" of board, lodging, or other facilities meeting the requirements of section 3(m) of the Fair Labor Standards Act of 1938, as amended, and part 531 of this title. When such a deduction is made the additional records required under §516.25(a) of this title shall be kept.

(k) Any deduction for the cost of safety equipment of nominal value purchased by the employee as his own property for his personal protection in his work, such as safety shoes, safety glasses, safety gloves, and hard hats, if such equipment is not required by law to be furnished by the employer, if such deduction is not violative of the Fair Labor Standards Act or prohibited by other law, if the cost on which the deduction is based does not exceed the actual cost to the employer where the equipment is purchased from him and does not include any direct or indirect monetary return to the employer where the equipment is purchased from a third person, and if the deduction is either

(1) Voluntarily consented to by the employee in writing and in advance of the period in which the work is to be done and such consent is not a condition either for the obtaining of employment or its continuance; or

(2) Provided for in a bona fide collective bargaining agreement between the contractor or subcontractor and representatives of its employees.

[29 FR 97, Jan. 4, 1964, as amended at 36 FR 9770, May 28, 1971]

[2] *29 CFR § 3.6 Payroll deductions permissible with the approval of the Secretary of Labor.*

Any contractor or subcontractor may apply to the Secretary of Labor for permission to make any deduction not permitted under §3.5. The Secretary may grant permission whenever he finds that:

(a) The contractor, subcontractor, or any affiliated person does not make a profit or benefit directly or indirectly from the deduction either in the form of a commission, dividend, or otherwise;

(b) The deduction is not otherwise prohibited by law;

(c) The deduction is either (1) voluntarily consented to by the employee in writing and in advance of the period in which the work is to be done and such consent is not a condition either for the obtaining of employment or its continuance, or (2) provided for in a bona fide collective bargaining agreement between the contractor or subcontractor and representatives of its employees; and

(d) The deduction serves the convenience and interest of the employee.