CASE NO. 12-107705-A

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

IN THE MATTER OF THE EQUALIZATION APPEALS OF COFFEYVILLE RESOURCES NITROGEN FERTILIZERS, L.L.C. FOR THE YEAR 2008 IN MONTGOMERY COUNTY, KANSAS

BRIEF OF APPELLEE

Appeal from the Kansas Court of Tax Appeals
Honorable Bruce F. Larkin, Honorable J. Fred Kubik, and Honorable Trevor C. Wohlford, Judges
Docket Nos. 2008-7226-EQ and 2008-7227-EQ

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Oral Argument: 30 minutes

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NATURE OF THE CASE

This is an appeal of a property tax case from the Kansas Court of Tax Appeals ("COTA"). The key issue is whether a nitrogen fertilizer plant in Montgomery County should be classified for property tax purposes as real or personal property. Farmland Industries, Inc. ("Farmland") constructed the plant in the mid-90s with the proceeds of $263 million of Industrial Revenue Bonds issued by the City of Coffeyville. The plant was exempt from property tax for the ten-year period from 1998-2007. Coffeyville Resources Nitrogen Fertilizers, LLC ("CRNF" or "Taxpayer"), acquired the plant and adjacent refinery in 2004 out of Farmland's bankruptcy. The first tax year after the ten-year IRB exemption was 2008. The County classified the property as real property and valued it at fair market value when it came on the tax rolls in 2008. This appeal is taken by CRNF from the 2008 classification and appraisal. The subject property consists of approximately fifteen acres of land; a concrete-block control building; concrete piers, pads, foundations, and other structural improvements; infrastructure systems; assorted steel structures; and hundreds of other assets which Taxpayer owns and uses for a fertilizer manufacturing operation. All of the assets are attached to the real estate in some significant way and, in many places, are supported by and anchored to massive concrete foundations that are buried down to the earth's bedrock. Other assets incorporated in the plant are surrounded by and attached to steel structures, which are also anchored to large (sometimes enormous) concrete foundations. The assets are all interconnected with miles of piping, conveyors, cables, and wiring built on and under the massive foundations that support the subject property.

After analyzing the three-part fixtures test, COTA upheld the County's classification of the subject property as real property used for commercial and industrial

purposes. CRNF appealed, contending that the subject property is personal property that should be classified as commercial and industrial machinery and equipment.

ISSUES ON APPEAL

I. WHETHER COTA APPLIED THE CORRECT FIXTURES TEST TO CLASSIFY THE SUBJECT PROPERTY.

II. WHETHER COTA ERRED IN APPLYING THE FIXTURES TEST TO CLASSIFY THE SUBJECT PROPERTY AS REAL PROPERTY.

III. WHETHER COTA ERRED BY REFUSING TO EQUALIZE THE CLASSIFICATION AND VALUE OF THE SUBJECT PROPERTY WITH TAXPAYER'S PROPOSED COMPARISON FACILITIES.

IV. WHETHER COTA'S DETERMINATION OF VALUE WAS ERRONEOUS.

STATEMENT OF FACTS

The Subject Property.

The subject property is a nitrogen fertilizer plant used to convert petroleum coke into ammonia-based fertilizers, particularly liquid ammonia and liquid urea-ammonium-nitrate ("UAN"). [R. 31, Ex. 209, p. 3370] The main product produced by the fertilizer plant is UAN. [R. 31, Ex. 209, p. 3370] The plant consists of the land and integrated improvements, including sections or subdivisions for: coke handling, storage, crushing, and transfer; rod mills and coke slurry preparation; main and spare coke gasification; synthesis gas separation and purification; ammonia synthesis; urea-ammonium-nitrate solution, as an integrated facility consisting of a urea plant, nitric acid plant, and ammonium nitrate plant; product storage and loading; and water treatment and utilities. [R. 31, Ex. 209, pp. 3372-73] The fertilizer plant is, in effect, a single unit constructed in place on massive underground structures all integrated together. The removal of any one asset would in most cases render the rest of the subject facility unable to perform to its design capability. [R. 31, Ex. 209, p. 3387]

Fig. 1. R. 36, Ex. 552, p. 177. Aerial view of coke storage at fertilizer plant from gasifier tower.

The fertilizer plant itself is unique, as it is the only facility in the United States that manufactures nitrogen fertilizer using a gasifier unit, which unit converts petroleum coke into forms of carbon and hydrogen suitable for the production of ammonia-based fertilizers. [R. 31, Ex. 209, p. 3372] Petroleum coke is the solid, carbon-rich residue that remains after petroleum is refined under some methods. The fertilizer plant was built by Farmland at its location to utilize the coke by-product produced by Farmland's adjacent refinery. [R. 17, p. 334-35] County expert James Watson, an engineer with 27 years of experience working in the refining, chemicals, pipeline, and power generation industries, summarized the production process as follows:

> In very simple terms, the manufacture of ammonia and UAN requires the building blocks of nitrogen, hydrogen, carbon and oxygen. The third-party owned air separation unit (ASU) provides nitrogen and oxygen, the gasification of the petroleum coke provides the carbon and hydrogen, and water added to the gasification shift reactors provides additional hydrogen and oxygen. The nitrogen and hydrogen are converted into ammonia. The carbon and oxygen are converted into carbon dioxide. The ammonia and carbon dioxide, along with the hydrogen are processed into the UAN. Impurities and undesired compounds such as slag, metals, sulfur, hydrogen sulfide, carbon monoxides, and nitric oxides are removed at various points in the facility.

[R. 31, Ex. 209, p. 3372]

In addition to its integration with the refinery, the subject property is integrated with the adjacent third-party owned air separation unit that supplies oxygen and nitrogen used in fertilizer production. [R. 31, Ex. 209, p. 3370] The subject property is also integrated with another third-party owned plant that further refines one of the by-products of fertilizer production, hydrogen sulfide. [R. 31, Ex. 209, pp. 3370-71] The fertilizer plant was designed and constructed to be part of an integrated operation with these adjacent facilities. [R. 31, Ex. 209, p. 3371] Taxpayer should be able to operate without the TKI facility, assuming Taxpayer can find another method to dispose of hydrogen sulfide, [R. 17, p. 337-38], but Taxpayer cannot otherwise operate without the other integrated facilities. [R. 31, Ex. 209, p. 3371]

As described by Watson in his expert report, significant modification of the land was necessary to accommodate the subject assets:

> The land upon which the CRNF facility was constructed was significantly modified, excavated, treated and shaped to accommodate the installation of the underground foundations and piers, underground sewers, underground utility systems such as cooling water and electrical distribution, and other sub grade structures. The land was adapted specifically to allow for the installation of the CRNF facility for the purpose of converting petroleum coke into nitrogen based fertilizer.

[R. 31, Ex. 209, pp. 3386-87] Approximately 30,000 cubic yards (1,450 dump trucks) of soil was excavated, backfilled, and compacted during construction of the subject facility. [R. 20, p. 1324]

The fertilizer plant's various sections are interconnected with miles of piping, conveyors, cables, and wiring built on and under massive foundations designed for the assets. [R. 31, Ex. 209, p. 3375] The components of the sections are supported and housed by steel support structures, which are in turn affixed to the massive concrete foundations. The main and spare gasifier units and the rod mill superstructures shown below exemplify the type of steel superstructures constructed to house these components.

Fig. 2. Excerpt from R. 31, Ex. 211, p. 2241. Rod Mill (left) and main and spare gasification structures (right).

Fig. 3. R. 35, Ex. 502. Main gasifier superstructure (larger structure, background) and gray water system (foreground), under construction.

The assets are anchored to over 28 million pounds of concrete and rebar at varying depths below the surface. [R. 20, p. 1322] As described by Watson in his report, the rod mill and main and spare gasifier unit superstructures

> are anchored to horizontal steel reinforced concrete foundations with thicknesses of three to five feet. These horizontal foundations are installed below the ground level of the CRNF facility and are not visible at the site. The visible concrete and paving that is seen on the ground level is a second layer of concrete above the actual foundation and piers. The underground horizontal foundations sit on and are connected to over 170 steel reinforced concrete piers, each pier being installed deep into the

> ground into the layer of limestone or shale that exists between 25 to 40 feet below the ground level of the CRNF facility. Each pier weighs roughly 15,000 to 40,000 pounds depending on its diameter. For illustrative purposes, the main gasification section . . . is supported by 66 underground piers and a horizontal steel reinforced concrete foundation of dimensions 51 feet by 72 feet by 5 feet thick, having a combined weight of approximately 4.5 million pounds. Each of these three . . . structures . . . has its own pier and foundation system.

[R. 31, Ex. 209, pp. 3383-84] The main gasification unit's steel superstructure penetrates the surface concrete layer and extends through to the underground horizontal foundation as depicted below.

Fig. 4. Excerpt from R. 31, Ex. 211, p. 2242. Main gasifier unit's attachment point penetrating surface concrete.

Other concrete foundations and piers at the fertilizer plant are similarly massive, as demonstrated by the County's Exhibits 503 and 508 as follows:

Fig. 5. R. 35, Ex. 503. Concrete foundation and supporting structure, under construction.

Fig. 6. R. 35, Ex. 508. Partially formed piers for the UAN Air Compressor.

Appendix 4, attached hereto, includes some of the additional hundreds of photographs showing portions of the significant undertaking necessary to construct the subject property and integrate the various parts of the fertilizer plant.

Both new and used materials were incorporated into the fertilizer plant during its construction, though most of the materials were newly fabricated and specifically designed for incorporation into the fertilizer plant at its location in Coffeyville. [R. 31, Ex. 209, p. 3375] Some structures, such as the coke storage silo, were constructed in place at their final location on fertilizer plant land, as shown in County Exhibits 540 and 541, below.

Fig. 7. R. 35, Ex. 540. Coke storage silo being constructed in place on land at the fertilizer plant.

Fig. 8. R. 35, Ex. 541. Later photograph of coke storage silo construction.

As described by Watson:

> The coke silo (103113) is an elevated bin used to store petroleum coke prior to be[ing] conveyed over to the rod mill and slurry section. The coke silo is 60 feet in diameter and 150 feet tall and is designed to hold millions of pounds of coke. The coke silo is supported by an underground steel reinforced horizontal concrete foundation supported by 48 steel reinforced concrete piers drilled 25 to 40 feet below ground and into the underlying limestone or shale. The combined weight of the foundation and piers is approximately 5 million pounds. This asset is annexed and adapted to the land.

[R. 31, Ex. 209, p. 3437]

Some of the materials used in construction were purchased from a United States government-supported demonstration plant in California that converted coal into electrical power through the gasification of coal. [R. 31, Ex. 209, p. 3375] That demonstration plant began operation in 1984 but ceased operations in 1989. [R. 31, Ex. 209, p. 3375] The fertilizer plant reclaimed and recycled portions of the steel structures for the fertilizer plant's main and spare gasification sections and ancillary pipe support racks, along with certain pieces of equipment for the rod mills, slurry preparation, gasification and syngas sections. [R. 31, Ex. 209, p. 3375] The materials chosen to be reclaimed and recycled from the demonstration plant were incorporated into the design of the fertilizer plant where the materials matched the design requirements for the fertilizer plant and where the materials were still in useable condition, as the demonstration plant ceased operations nine years before fertilizer plant construction began. [R. 31, Ex. 209, pp. 3375-76]

As previously explained by Farmland personnel, the materials from the demonstration plant were not just relocated to Coffeyville; instead, significant upgrades and modifications were necessary to install and incorporate these pre-existing materials. [R. 31, Ex. 209, p. 3376] For example, the main gasification section depicted under construction in Exhibit 502 [R. 35], above, was significantly modified and reduced in

height from 349.5 feet (demonstration plant) to 265 feet (fertilizer plant). [R. 31, Ex. 209, p. 3376]

Watson's expert report, Exhibit 209, further describes the construction of the fertilizer plant, the nature of the subject property, and the processes and operations conducted at the plant. [R. 31, Ex. 209] Watson prepared Exhibit 209 after spending a full day on-site inspecting the plant, examining numerous photographs, and reviewing voluminous design, engineering, construction, and operations documents. [R. 20, p. 1295] After such review and further analysis of Kansas case law, Watson concluded the subject property was properly classified as real property. [R. 31, Ex. 209, p. 3366] Exhibit 550 [R. 36], which contains over 450 photographs showing the fertilizer plant during construction and thereafter, helps to visualize the enormity of the assets and the plant itself, as well as the massive efforts needed to prepare the land, construct the fertilizer plant, and integrate its various sections. Exhibits 209 [R. 31] and 653 [R. 13], together with Watson's testimony at pages 1292 through 1432 of the hearing transaction [R. 20-21], contain detailed factual analysis and information presented to COTA for use in its determination that these assets were properly treated as real property by the County, including descriptions of the nature of the subject property and plant operations and a concise analysis of the fixtures test as applied to the subject property.

Montgomery County's 2008 Appraisal of the Subject Property.

The subject property's ten-year tax abatement ended in 2007, and the subject property first became subject to ad valorem taxation in 2008. [R. 25, Ex. 11, p. 1286] Farmland acquired and constructed the subject property with the proceeds of Industrial Revenue Bonds of the City of Coffeyville, Kansas, Series A and B, 1997 in total amount

of $263 million. [R. 25, Ex. 1, pp. 1407, 1488] Pursuant to the terms of the bond documents and the laws of Kansas, the property was to be exempt "from real property taxation and personal property taxation . . . for a period of ten (10) years commencing with the taxable year 1998." [*Id.*] To effect the tax exemption and secure repayment of the bonds, Farmland conveyed the property to the City, which entered into a "head lease" with the indenture trustee for the bond issue, Wilmington Trust Company, which in turn leased the property to Farmland as the lessee. [R. 25, Ex. 1, pp. 1412, 1418-19] Taxpayer admits that the Head Lease "was executed only to satisfy statutory IRB requirements," [R. 2, p. 72], and the Head Lease states that the indenture trustee, as head lessee, had no personal liability to pay rent. [R. 25, Ex. 1, p. 1443] The City is required to repay the bonds only from rent paid by the lessee, and by paying the rent due under the Head Lease, Taxpayer simultaneously exercises its option to purchase the subject property. [R. 25, Ex. 1, pp. 1409, 1440] The Head Lease expressly provides that Farmland as the lessee, "will be treated as the owner of the Project Improvements and will be entitled to all tax benefits ordinarily available to an owner of property . . . ." [R. 25, Ex. 1, p. 1423] Taxpayer further clarified that the Head Lease "is in name only" and "the parties intended for Farmland to be treated as the owner of the subject property." [R. 2, p. 72]

Under the bond financing agreements, Farmland paid no taxes or payments in lieu of taxes on the property for the years 1998-2002. [R. 25, Ex. 1, pp. 1488-89] A formal application for tax exemption was not filed until October 2003, at which time Farmland was in bankruptcy. [R. 16, p. 207; R. 25, Ex. 1, pp. 1326-28] The property valuation in the exemption application was based on cost data utilized in disbursing the industrial

revenue bond financing which provided the basis for the tax exemption being sought in 2003. [R. 25, Ex. 1, pp. 1328, 1407, 1455-86] This list of property values listed the items of machinery and equipment that were to be erected and installed on the real property during construction at their cost before incorporation into the real property. [R. 25, Ex. 1, pp. 1419, 1455-86]

In 2004, CRNF, or its predecessors, acquired the subject property in a bankruptcy liquidation sale. [R. 16, pp. 207-08] In early 2005, Lauri Poe, an employee of an independent consulting firm retained by CRNF, discussed with employees of the County some questions she had about the cost data for assets included in the fertilizer plant. [R. 17, pp. 575] Most of Poe's conversations were with Kathy Craig, whom she knew was not the County Appraiser and could not be relied upon as having authority to bind the County. [R. 18, pp. 658-59] In the course of Poe's conversations, no questions as to whether assets would be classified as business personal property were ever discussed. [R. 18, p. 660] Poe's engagement by CRNF was specifically limited to tax year 2005, and she acknowledged that she made no agreement that the County Appraiser would never reclassify the property. [R. 26, Ex. 87, p. 692; R. 18, p. 666]

As the expiration date of the tax exemption in 2007 approached, the County decided in the summer of 2006 to retain professional expertise in the appraisal of the adjacent refinery. Then County Appraiser Robert Kline, obtained permission from the County Commission to hire an appraiser to appraise the adjacent refinery for 2007 and 2008. [R. 28, Ex. 112, p. 113] Kline retained Bob Lehn, an appraiser with experience in appraising similar property, to conduct a fair market value appraisal of the refinery. [R. 25, Ex. 22, p. 510; R. 28, Ex. 113, p. 509; R. 28, Ex. 121] Lehn also provided Kline

an appraisal of the fertilizer plant for 2007 even though it was still on exemption. [R. 25, Ex. 19, p. 1000] Kline passed away in late 2007. [R. 19, p. 1091] Lehn provided an updated appraisal and classification of the fertilizer plant to the County for 2008 classifying the improvements constructed on the property as real property fixtures and valuing them as part of the real estate. [R. 25, Ex. 23, p. 1183; R. 22, p. 1886] The plant was then placed on the tax rolls as real property and valued at $270,038,660 for real property and $65,911 for personal property. [R. 28, Ex. 132E, p. 274; R. 28, Ex. 134D, p. 6152; R. 28, Ex. 135D, p. 1159]

In light of CRNF's challenge to the 2008 valuation, the County hired Watson to classify the subject property as real or personal property (discussed above) and obtained a second appraisal of the 2008 value for tax assessment purposes from Hadco International, Inc., a firm specializing in appraisal of commercial property and improvements, in addition to businesses, machinery, and equipment. [R. 31, Ex. 210] Hadco relied on a cost approach to valuation, using primarily data supplied by Taxpayer. [R. 31, Ex. 210, p. 2830-31] Hadco originally estimated the total fair market value of the fertilizer plant's real property (including fixtures, but excluding certain items, including buildings, railroad tracks, loading docks, roads, and land) by the cost approach at $303,379,000 as of January 1, 2008, plus or minus five percent. [R. 21, p. 1570; R. 31, Ex. 210, p. 2824] After submitting the April 15, 2010 report, Duke Coon, the lead appraiser for Hadco, discovered that a few items originally classified as real property were capital spares that should have been classified as personal property. [R. 21, pp. 1577-78] Coon also learned that he made a transposition error in entering a value for Hadco's January 1, 2008 valuation, and as a result, the valuation was $1 million lower than it should have been.

[R. 21, pp. 1568-70] Coon revised his estimate of fair market value to remove the value assigned to the capital spares and to correct the transposition error. [R. 21, pp. 1577-79] Hadco's revised valuation of the fertilizer plant's real property is $302,589,080. [R. 21, p. 1579]

CRNF retained its own experts to testify in this proceeding, but they limited their testimony to criticism of Hadco's methodology and did not offer any opinion of their own as to the fair market value of the subject property. CRNF's witnesses acknowledged a construction cost of $263 million. [R. 17, p. 382; R. 20, pp. 1218, 1233-34] CRNF's Chief Operating Officer testified in 2006 before the Kansas Legislature Select Joint Committee on Energy that the estimated cost to replace the facility would be more than $600 million. [R. 20, p. 1217; R. 31, Ex. 394, p. 4538] Cost approach appraisals on the property utilized by CRNF and its predecessor to obtain financing established values of $263,000,000, $272,700,000 and $367,800,000 for June 11, 2000, April, 2004, and June 24, 2005, respectively. [R. 47, Ex. 644, p. 7339; R. 47, Ex. 645, p. 7396; R. 47, Ex. 646, p. 7450]

Taxpayer's Proposed Comparison Properties.

As a part of its equalization claim, CRNF also presented evidence concerning the classification of ten purported comparison properties. The proposed comparison properties in Montgomery County were: (1) the TKI sulfur recovery unit, which makes various sulfur-based fertilizer products; (2) the Linde (formerly BOC) air separation unit, which creates nitrogen, oxygen, and argon; (3) the Acme Foundry facility, which makes gray iron castings; (4) the Heartland Cement plant, which made cement before it was shut down; (5) the Cessna plant, which assembles small aircraft; (6) the John Deere Funk

plant, which manufactures off-road equipment for John Deere; (7) the Morrow Foundry, which makes copper; and (8) the American Insulated Wire (now Southland Wire) facility, which manufactures insulated wire. [R. 19, p. 876-77]

Taxpayer called Linde and TKI employees to highlight some similarities between their facilities and Taxpayer's plant, [R. 17, pp. 478-79; R. 18, pp. 549-50], but Taxpayer did not present evidence regarding the construction, annexation, adaptation or intent of the owners with respect to such facilities. Karl Wiseman, the tonnage business manager for the Linde facility, offered limited testimony about the general makeup and configuration of the Linde facility, as well as whether the property at such facility was classified as real or personal. [R. 17, pp. 478-90, 495-99] Similarly, Ed Golden, the plant manager of the TKI facility, testified that the assets at the TKI facility are similar in size and nature to the subject property at Taxpayer's plant. [R. 18, pp. 549-60] He admitted, however, that Taxpayer's facility is much larger than TKI's facility and that Taxpayer's coke silo is larger than any asset at TKI's facility. [R. 18, pp. 566-68] Golden also clarified that the assets at the TKI facility were classified as personal property in 2008 but were re-classified as real property in 2010. [R. 18, pp. 561-65] CRNF did not present any evidence of owner intent or any engineering report, expert opinion, or similar other evidence that would enable the Court to classify the TKI or Linde facilities.

John Jenkins, an engineer retained by CRNF, reviewed some photographs and the personal property renditions for each of the other six comparison properties in Montgomery County and offered his opinion that some assets at such facilities were of a similar type to those of the fertilizer plant. [R. 19, pp. 876-82] Jenkins did not visit the

facilities or interview their owners or operators. [R. 19, pp. 885-86] Jenkins did nothing to determine how the assets at such facilities are attached to their foundation or how they are integrated into the operations of the facility. [R. 19, pp. 885-86] Jenkins stated that intent regarding affixation to real estate is beyond the scope of his expertise, and, therefore, he did not consider the intent of the parties annexing assets at the proposed comparison facilities. [R. 19, p. 856]

Taxpayer employee Neal Barkley also testified that some equipment owned by these other taxpayers is similar to the subject property at the CRNF plant. [R. 16, pp. 218-220; R. 17, pp. 241-242, 250-52, 272-74, 279-81] Barkley said he had looked up their classification for tax purposes and found them to be classified as personal property. [R. 16, p. 229; R. 17, pp. 272, 276, 281] Other than stating that some of the assets at the comparison facilities are heavy and are bolted to foundations, [*E.g.*, R. 19, p. 863], CRNF did not present evidence regarding the construction, annexation, adaptation, or intent of the owners with respect to the comparison facilities in Montgomery County.

The proposed comparison facilities outside of Montgomery County are the former Farmland fertilizer plant in Lawrence, Kansas, and a fertilizer plant in Dodge City, Kansas. [Brief of Appellant, p. 14] Taxpayer offered the testimony of Kamyar Manesh, the trust administrator program manager for the assets of the former Farmland fertilizer plant in Lawrence, Kansas. [R. 17, p. 408] Manesh testified that the assets at the Lawrence plant were historically classified as personal property. [R. 17, pp. 426-31] But the Lawrence plant was shut down in 2001. [R. 17, p. 410] Portions of the plant were salvaged, sold, and removed from the premises beginning in 2004, including the plant's urea and ammonia plants. [R. 17, pp. 416-17] The plant was not operational in 2008 (the

tax year at issue), and its remaining components were not similar to a working nitrogen-based fertilizer plant or to a chemical processing plant of any kind. [R. 17, pp. 411-12, 416-20] In 2008, the assets remaining at the Lawrence plant were classified as personal property by Douglas County. [R. 17, p. 431]

CRNF employee Barkley, a former plant manager of the Dodge City plant, testified about the Dodge City plant. [R. 17, pp. 270, 272] The plant is powered by natural gas and does not have the massive gasifier structures for use of coke that are an integral part of the CRNF facility. [R. 33, Ex. 452; R. 17, pp. 310-11] Like the other witnesses who testified about the comparison properties, Barkley offered general statements comparing the size of the assets at the Dodge City plant, and its production systems and processes, with the assets and processes at Taxpayer's plant. [R. 17, pp. 270, 272] And he testified that the machinery and equipment used to make fertilizer at the Dodge City plant was classified by Ford County as personal property in 2008. [R. 17, p. 272] But CRNF did not present any evidence regarding the owner's intent or any other facts that may have been supplied to Ford County to justify the classification.

The County presented evidence that the assets of the Frontier Oil refinery in El Dorado (Butler County), which are similar to the fertilizer plant assets, are classified as real property, and oil refineries have historically been treated as 90% real property in Kansas. [R. 47, Ex. 643; *see* R. 16, p. 91; R. 18, pp. 653-54, 743-45]

After hearing the evidence, COTA issued its Order on January 13, 2012, finding (1) that the traditional three-part test should be applied to determine whether property should be classified as real or personal for purposes of ad valorem taxation; (2) that the County's classification of the fertilizer plant as real estate was supported by substantial

evidence and was in accordance with applicable law; (3) there was no evidence of an agreement requiring the County to classify the assets in dispute as personal property, and (4) real property/personal property classification is determined by the facts of the particular case, and the evidence did not support a finding in this case of whether the classification of another property was correct or incorrect and could not render a factually and legally supported classification in this case unconstitutional. [R. 13, p. 42-53] COTA further found that there was substantial evidence to support the County's valuation of $303,066,836 and no substantial evidence to the contrary. [R. 13, p. 58]

SUMMARY OF ARGUMENTS

As far back as case law exists, the principle has been established that personal property permanently affixed to real estate becomes part of the real estate. This principle logically has been applied to classification and valuation of property for ad valorem taxation. When property is so affixed to the real estate that it is likely to remain with the real estate and be bought and sold with the real estate, its value and the real estate's value becomes the unitary value of the real estate as improved. As a practical matter, this is fair because the benefits afforded by, and burdens to, local government are not short-term, as might be the case for transient, easily mobile personal property but are long term and enjoyed for decades and continue even after the property is no longer in use. *In re Equalization Appeals of Total Petroleum*, 28 Kan. App. 2d 295, 16 P.3d 981 (2000) ("*Total Petroleum"*).

The evidence that CRNF's fertilizer plant has become a permanent part of Montgomery County's landscape is overwhelming. The extent of the annexation and adaption to the real estate are plainly depicted in the photographs included in the foregoing Statement of Facts and are amplified by the witnesses' testimony and

additional exhibits. The massive improvements were configured for the particular location and set in tons of concrete foundations and structures. They are anchored, not casually or temporarily, but intentionally and permanently to 40-foot piers resting on bedrock. COTA properly applied the established three-part test and ruled that the fertilizer plant was affixed to real estate and properly valued as such. *Id*.

Because COTA's decision is based on substantial evidence, CRNF has no viable appeal on any issue of fact. *See* K.S.A. 77-621(a)(7) (fact determinations, express or implied, will not be overturned if supported by substantial evidence). Therefore, CRNF attempts, as it must, to turn fact questions into legal error by contending that COTA applied erroneous legal tests in determining fact questions. This fails for two reasons. First, CRNF's legal arguments are themselves incorrect. Second, the alleged errors, properly viewed in context, are not prejudicial reversible error. *See* K.S.A. 77-621(c) (stating that the harmless error rule applies).

Taxpayer's principal argument for reversal is what Taxpayer calls the "trade fixtures rule." This "rule" does not contradict the traditional three-part test for determining whether property is real or personal but is an application of the third prong of the three part fixtures test (*i.e.*, intent). It has no implication here. *Black's Law Dictionary* defines "trade fixture" as "[r]emovable personal property that a tenant attaches to leased land for business purposes, such as a display counter." p. 713 (9th Ed. 2009). The so-called "trade fixtures" rule applies only when the tenant or an easement holder has a limited right to occupy and use the premises for a portable trade or business purpose that is inconsistent with one or more elements of the three-part test for permanent affixation. CRNF is not a temporary business tenant but enjoys all attributes of

ownership under a lease agreement which is a "lease in name only" and which indicates that CRNF is to be treated as the owner. The "trade fixtures" cases come predominantly from the late 19th and early 20th centuries. They are radically different and have no application or relevance here. COTA properly applied the traditional fixtures test and came to a factual conclusion supported by the evidence that CRNF could and did affix the fertilizer plant to the real estate with intent that the improvement was not temporary or impermanent. COTA correctly applied the relevant test, and its conclusion was a permissible exercise of discretion and fact finding. There is no error of law.

CRNF next argues that the County entered into a binding contract to forever classify assets of the fertilizer plant in accordance with CRNF's 2005 rendition. But there is no evidence of any such agreement. Ms. Poe, the tax accountant and CRNF's witness, conceded that there was no such agreement and that she never even discussed classification with employees of the County. Moreover, there can be no such agreement because the law does not allow it. A county appraiser has no authority to bind future holders of the office in regard to taxation. *See Hall v. Wichita*, 115 Kan. 656, 658, 223 P. 1109, 1110 (1924); *Beach v. Shoenmaker*, 18 Kan. 147, 149 (1877). *See also Gilleland v. Schuyler*, 9 Kan. 568, 580 (1872).

CRNF also argues that its constitutional right of equalization has been violated by the classification of the plant as real property. But the classification of property as real or personal has always been constitutionally permissible, and "the determination can only be made from a consideration of all the individual facts and circumstances attending the particular case." *Kansas City Millwright Co. v. Kalb*, 221 Kan. 658, 664, 562 P.2d 65, 70 *modified* 221 Kan. 752, 564 P.2d 1280 (1977). If there is substantial evidence to support

the classification under the law applicable to the determination, CRNF does not have a legal right to a different classification. The fact that CRNF believes some differently classified property is analogous does not rule out material differences in the underlying facts. COTA properly found that there was not a sufficient basis in the evidence to determine whether the classifications of other properties were comparable. The facts and law involved in the classification of other properties were not the subject of any judicial opinions or administrative appeals. There were no findings of fact or conclusions of law that would reveal the factual or legal basis for the classification of other properties or provide anything of value as precedent. COTA's decision is consistent with the precedent established by this court in *Total Petroleum*.

Finally, CRNF makes a perfunctory argument concerning the evidentiary support for the County's appraisal. But CRNF witnesses only critiqued methodology; they offered no opinion as to any different value. The harmless error rule applies, and there is no basis in the record for concluding that any error in the appraisal methodology of the County's witness resulted in prejudice to CRNF. There is evidence in the record of much higher values placed on the property by persons acting on behalf of CRNF. There is no substantial evidence in the record to support a lower valuation as real property.

ARGUMENTS AND AUTHORITIES

I. COTA APPLIED THE CORRECT THREE-PART TEST TO CLASSIFY THE SUBJECT PROPERTY.

A. Standard of Review.

CRNF does not dispute COTA's findings of fact but contends that COTA incorrectly interpreted K.S.A. 79-102 and applied an incorrect three-part fixtures text.

The County agrees with CRNF that issues of law are reviewed *de novo*. The Taxpayer, as appellant, bears the burden of demonstrating that COTA erred. K.S.A. 77-621(a)(1).

B. No Trade Fixtures Rule Applies to this Case, and the Three-Part Fixtures Test Should be Applied.

For property tax classification purposes, real property includes fixtures. K.S.A. 79-102. To determine whether an item is a fixture, Kansas courts apply the three-part fixtures test, which provides that an item is a fixture if it is (1) annexed to real property; (2) adapted to the use of that part of the realty to which it is attached; and (3) the party attaching the item to the realty intended to make such annexation permanent. *In re Equalization Application of Total Petroleum*, 28 Kan. App. 2d 295, 299, 16 P.3d 981, 985 (2000).

After acknowledging that the three-part fixtures test is used to determine whether an item is a fixture, CRNF argues that the so-called "trade fixtures rule" effectively renders the three-part fixtures test an incorrect, or at least inapplicable, test. [Brief of Appellant, pp. 18-23] On the contrary, the three-part test always applies, and the so-called "trade fixtures" cases are simply applications of traditional principles in a specific fact context that is not present here.

As the term is generally used, a "trade fixture" is an item of personal property that is installed by a tenant on leased premises that are used by the tenant to carry on a trade or business. 35A Am. Jur. 2d *Fixtures* § 34 (Westlaw 2010); *Lawson v. Southern Fire Ins. Co.*, 137 Kan. 591, 591-93, 600, 21 P.2d 387 (1933) (airplane hangar erected on leased premises by tenant was trade fixture for purposes of coverage under tenant's insurance contracts); *Farmer v. Golden Rule Oil Co.*, 130 Kan. 803, 803, 287 P. 706, 706-07 (1930) (improvements installed by tenant under a comparatively short-term lease

for purposes of trade were in the nature of personal property). *Black's Law Dictionary*, p. 713 (9th Ed. 2009), defines "trade fixture" as "[r]emovable personal property that a tenant attaches to leased land for business purposes, such as a display counter." Trade fixtures cases typically involve property disputes between lessors and lessees. *See, e.g.*, *Lawson*, 137 Kan. 591, 21 P.2d 387 (finding airplane hangar erected on real property leased by lessee is trade fixture). The same rule has been applied in railroad cases to improvements built on rights-of-way or easements that may be lost by termination or abandonment. *E.g.*, *Harvey v. Missouri Pac. R.R.*, 111 Kan. 371, 207 P. 761, 762-63 (1922).

The Kansas Supreme Court has held that where both the land and the property affixed to the land are owned by the same person, the trade fixtures rule does not apply. *Union Pac. R.R. v. Board of Comm'rs of Jefferson County*, 114 Kan. 156, 161, 217 P. 315, 317 (1923). CRNF admits that, for all intents and purposes, it is the owner of the land. [R. 20, pp. 1195-98] Thus, COTA did not err in refusing to apply the trade fixtures rule.

As explained by the Kansas Supreme Court:

> This "trade fixtures" rule frequently arises over clashing interests of landlord and tenant and situations analogous thereto. It was a convenient, equitable, and highly necessary rule to apply to the unusual situation presented where the title to the realty of the right of way was in one owner and the railway improvements or fixtures belonged to another owner who had no valid claim to the realty. Otherwise an indispensable segment of a railway track would become the property of a successful claimant to a strip of real estate occupied by the railway, and the public convenience in railway travel might be interfered with. That was the potential situation in the Nyce Case. ***But where the dominant estate in the land over which the railway is constructed is in the same owner as the railway improvements or fixtures thereon, there is no occasion for the application of the "trade fixtures" rule.*** Indeed, for railway purposes, the rails, ties, culverts, signals, etc., are trade fixtures only in the same sense

> as the land on which they are constructed. Ordinarily the only right in the land which inheres in the owner of the railway is the right to use it for railway purposes (*Harvey v. Railroad Co.*, 111 Kan. 371, 207 Pac. 761), and, with some unimportant exceptions, a railway corporation can hold land in fee or in special ownership for no other purpose.

Union Pacific, 114 Kan. at 161, 217 P. at 317 (emphasis added). If the owner of the personal property is also the owner of the real property, the trade fixtures doctrine does not apply. *Id.*; *Young Elec. Sign Co. v. Erwin Elec. Co.*, 477 P.2d 864, 867 (Nev. 1970) (citing *Cusack v. Prudential Ins. Co.*, 134 P.2d 984 (Okla. 1943); *Willcox Boiler Co. v. Messier*, 1 N.W.2d 130 (Minn. 1941); *Frost v. Schinkel*, 238 N.W. 659 (Neb. 1931)); *see also Farmer*, 130 Kan. at 805, 287 P. at 707 ("As between landlord and tenant, the law is extremely indulgent to the tenant with respect to removal of structures annexed for purposes of the tenancy.")

The two cases principally relied upon by CRNF are creditor's rights cases. In *Dodge City Water & Light Co. v. Alfalfa Land & Irrigation Co.*, 64 Kan. 247, 67 P. 462 (1902), the property in question was water pipe that had been dug up and stockpiled by the water company. The pipe originally was laid by a Mr. Soule who owned a controlling interest in the water company and some land he had platted into lots and blocks for a new development on the edge of town. Soule's development did not develop, and he died. The water pipe was claimed by creditors of the water company under chattel mortgages, and by Soule's heirs, who claimed it had become a fixture on the land they had inherited. The Kansas Supreme Court cited and applied the three-part fixture test to determine whether Soule had intended to install the pipe as an extension of the water of his water company's service lines or as an improvement to his real estate. The court said: "From all of the facts and circumstances, we are inclined to the belief that Mr. Soule, when he

laid the pipe in question, did it with the view of enlarging the utility and capacity of the water-works system, of which he was at the time the principal if not the sole owner. The pipe was laid along the streets of his platted and proposed addition, and the vacation of this plat thereafter by the legislature could not interfere with the rights of any one then having any interest in the waterworks system." *Dodge City Water & Light*, 64 Kan. at 251, 67 P. at 463. In other words, the water pipe was a trade fixture installed by the water company on a right-of-way on land it did not own. The rationale of the court is not so much a rule of law as a finding of the facts the court was "inclined to believe" (an arguably improper ground of appellate decision). The court applied the three-part test and found that intent to permanently affix was rebutted by the facts. *Id*. at 252-53, 67 P. at 464.

CRNF also cites the creditor's rights case of *Stock Yards Petroleum Co. v. Bedell*, 128 Kan. 549, 278 P. 739 (1929), which is not a trade fixtures case but an interpretation of the old Bulk Sales Act, K.S.A. 58-101 (1923). The act provided that "[t]he sale or disposal *of any part or the whole of a stock of merchandise or the fixtures pertaining thereto*, otherwise than in the ordinary course of his trade or business, shall be void as against the creditors of the seller," unless the purchaser takes the steps prescribed by the statute to put the seller's creditors on notice and to apply the proceeds of the sale to the payment of debts properly asserted. *Stock Yards*, 128 Kan. at 552, 278 P. at 740 (emphasis added). *Stock Yards* is not a standard case applying the trade fixtures rule or even the three-part fixtures test, and it has no application in this case. Quite the contrary, the court acknowledged that the term "fixture," as used in the Bulk Sales Act, refers to

the "nontechnical definition" of the term, meaning chattel affixed to the real estate "whether permanently attached or removable." *Id.*

Even if the Court determines the trade fixtures rule applies, property is not automatically classified as a trade fixture simply because it was attached to the leasehold by the tenant. The fact that property is annexed by a tenant and used for business purposes might suggest an intent for the property to remain personal property, but modern authorities still apply the full three-part fixtures test when determining whether an item is a fixture (and thus real property) or a trade fixture (and thus personal property). *See U.S.D. No. 464 v. Porter*, 234 Kan. 690, 695-96, 676 P.2d 84, 89 (1984); *Total Petroleum*, 28 Kan. App. 2d at 299, 16 P.3d at 985. That is, the three-part fixtures test is used to determine the intent for which property is attached to the real estate and to determine whether such property is a trade fixture. Of the other cases Taxpayer cites to support Taxpayer's claim that the trade fixtures rule applies, three do not even mention the term "trade fixture." *See U.S.D. No. 464*, 234 Kan. 690, 676 P.2d 84; *Bromich v. Burkholder*, 98 Kan. 261, 158 P. 63 (1916); *Atchison, Topeka & Santa Fe R.R. v. Morgan*, 42 Kan. 23, 21 P. 809 (1889). Rather, they apply the three-part fixtures test discussed above. The Court therefore should apply the three-part fixtures test to the subject property as set out in *Total Petroleum* without regard to the trade fixtures rule.

Taxpayer also claims that processing equipment of refineries, natural gas liquids extraction plants, and anhydrous ammonia plants should be automatically classified as personal property without first applying the three-part fixtures test. [Brief of Appellant, pp. 21-22] The Property Valuation Division ("PVD") of the Kansas Department of Revenue published a memorandum in 1988 attempting to impose such an automatic

classification. PVD Memorandum dated December 2, 1988 (attached hereto as Appendix 1). But PVD rescinded such Memorandum in 1992 after COTA (then BOTA) questioned the memorandum as an attempt to modify the well-settled Kansas law governing the fixtures test. *In re Appeal of National Helium Corporation*, Docket No. 1989-5326-EQ (Kan. Bd. of Tax App. 1989) (attached hereto as Appendix 2); PVD Memorandum dated April 25, 1991 (attached hereto as Appendix 3). CRNF's contention, without citation or proof, that the substance of the 1988 PVD Memorandum still applies today is mistaken and contrary to the law as established in the statutes and cases.

II. COTA PROPERLY APPLIED THE THREE-PART TEST AND CONCLUDED BASED ON SUBSTANTIAL EVIDENCE THAT THE SUBJECT PROPERTY WAS REAL PROPERTY.

A. Standard of Review

Although COTA's interpretation of law is reviewed *de novo*, "review of [COTA's] findings of fact is restricted to determining whether the findings are supported by substantial competent evidence." *In re CIG Field Services Co.*, 279 Kan. 857, 866-67, 112 P.3d 138, 146 (2005); *In re Johnson County Appraiser*, 47 Kan. App. 2d 1074, 283 P.3d 823, 832 (2012).

Each prong of the fixtures test required COTA to make findings of fact. Most modern authorities recognize the practical difficulties in formulating a comprehensive principle for determining what are fixtures and hold that the determination can only be made from a consideration of all the individual facts and circumstances attending the particular case. *Total Petroleum*, 28 Kan. App. 2d at 300, 16 P.3d at 985. As discussed above, the assets in dispute are fixtures if the assets are annexed to the real estate, adapted to the real estate, and the person who annexed the assets to the real estate intended that the assets become permanent fixtures. Thus, the Court must determine whether COTA's

findings are supported by substantial competent evidence. *See id.* at 299-301, 16 P.3d at 985-86 (analyzing whether substantial competent evidence supports the court's finding that the assets are fixtures).

Substantial evidence is that which possesses both relevance and substance and which furnishes a substantial basis of fact from which the issues can reasonably be resolved. *In re Johnson County Appraiser*, 47 Kan. App. 2d 1074, 283 P. 3d at 832. "[T]he adequacy of the evidence in the record before the court to support a particular finding of fact shall be judged in light of all the relevant evidence in the record cited by any party that detracts from such finding as well as all of the relevant evidence in the record . . . cited by any party that supports such finding, including determinations of veracity by the presiding officer . . . ." *Id.* When reviewing findings of fact, the Court "does not reweigh the evidence or engage in de novo review." *Id.*

Our appellate courts have consistently stated that to find a lack of substantial evidence to support a COTA action, the decision must be so wide of the mark as to be outside the realm of fair debate. *In re Tax Appeal of Horizon Tele–Communications, Inc.*, 241 Kan. 193, 203, 734 P.2d 1168, 1175 (1987); *In re Tax Refund Application of Affiliated Property Services, Inc.*, 19 Kan. App. 2d 247, 250, 870 P.2d 1343, 1345 (1993).

B. COTA Did Not Err in its Application of the Fixtures Test.

After identifying the three-part fixtures test, COTA found that the assets in dispute are sufficiently annexed to the real estate, are particularly adapted to the use to which the land has been devoted, and were annexed with the intent that they remain permanently affixed to the real estate. [R. 13, pp. 44-49] COTA therefore found that the assets were properly classified as real property. [R. 13, p. 50] Taxpayer relies on multiple cases to persuade the Court that COTA erred in applying the fixtures test. [Brief

of Appellant, pp. 23-31] But Taxpayer's reliance on such cases is anecdotal. The cases are merely examples of the application of the fixtures test to a narrow set of facts. Each such case applies the fixtures test to unique assets that bear little semblance to the subject property. [Brief of Appellant, pp. 23-31 (citing *Dodge City Water & Light Co. v. Alfalfa Land and Irrigation Co.*, 64 Kan. 247, 67 P. 462, 464 (classifying a waterworks system); *U.S.D. No. 464 v. Porter*, 234 Kan. 690, 691-96, 676 P.2d 84, 86-89 (classifying a propane storage tank); *Bromich v. Burkholder*, 98 Kan. 261, 158 P. 63 (classifying a boiler))] Such cases do not establish that the subject property should be classified as personal property.

Total Petroleum, on the other hand, is remarkably similar to this case and establishes that COTA's classification of the subject property as real property was not erroneous. In *Total Petroleum*, this court considered whether COTA (then BOTA) erred in classifying oil refinery property as real property. The subject property in that case consisted of various tanks and towers that measured as high as 120 feet tall, weighed as much as 175,000 pounds, were built as deep as 20 feet into the ground with concrete foundations, and were designed to withstand 100-mile-an-hour winds. *Total Petroleum*, 28 Kan. App. 2d at 297, 16 P.3d at 984. The district court held, and this Court affirmed, that COTA's classification of the subject property as real property was supported by substantial competent evidence. *Id.* at 298, 300-01, 16 P.3d at 984, 985-86.

1. COTA Did Not Err in Applying the Annexation Prong.

As CRNF noted, the annexation inquiry asks "whether the attachment to the land is such that one would infer that the placement of the asset reflects an intent for it to become a permanent fixture to the land." [Brief of Appellant, p. 24] After weighing the evidence, COTA found that the subject property is sufficiently annexed to the real

property because it is attached (directly or indirectly) to concrete structures formed to support such assets and is interconnected to function as a working system. [R. 13, p. 45]

CRNF highlights the fact that "most of the assets in dispute are movable, are equipped with design features that make them movable and are in fact moved from time to time." [R. 13, p. 45] However, if the assets were not designed to be moved – with lifting lugs and brackets – they could not be installed in the first place. [R. 17, p. 328] Further, the lifting lugs and brackets are there so that CRNF "could get access to them to maintain them or repair them if they needed to be maintained or repaired." [R. 17, pp. 328-29] The fact that an asset can be moved does not mean it is automatically personal property. *See Atchison, Topeka & Santa Fe*, 42 Kan. at 29, 21 P. at 812. CRNF ignores the fact that even the typical fixtures in a house, such as faucets, HVAC, and toilets, can be and readily are moved and that most everything, no matter what the size – a house, an apartment building, a skyscraper – is moveable by some method. [R. 17, pp. 293-94]

In fact, CRNF's witnesses acknowledged that moving the plant and erecting it at a new site would require massive permanent changes to the new site to accommodate the plant and would take two years. [R. 20, pp. 1204-05, 1210; *see also* R. 21, pp. 1400-01] CRNF claims that "[t]he fact that machinery and equipment is integrated with other machinery and equipment to form a production process is not evidence that the assets are 'attached' to or part of the real estate." [Brief of Appellant, p. 24] Such fact, alone, may not prove that the assets are fixtures, but it is certainly relevant. Integration into a production process is usually considered in connection with assets that are not actually affixed to the real estate. *See* 35A Am. Jur. 2d *Fixtures* § 10 (citations omitted)

("Constructive annexation may be found when the object, although not itself attached to the realty, comprises a necessary, integral, or working part of some other object which is attached."). In *Green v. Chicago R. I. & P. R.R.*, 8 Kan. App. 611, 56 P. 136, 137 (1899), for example, the court found that a heavy lathe not fastened to ground was a fixture because it was an essential part of the machinery of a factory as originally planned and operated. Thus, integration tends to show that assets actually attached to the real estate were attached with the intent that they become permanent fixtures to the land.

Further, COTA's finding that the annexation prong of the fixtures test has been satisfied was not based solely on the fact that the assets are interconnected to function as a working system, as CRNF implies. Several other facts indicate the subject property is sufficiently annexed to the real estate:

> Each asset is attached, directly or indirectly, to massive concrete structures specifically formed to support the assemblage. Construction of these below- and above-grade support structures required considerable engineering work and millions of pounds of concrete and steel.
>
> The assets in dispute were attached to the freehold on January 1, 2008 (the effective date of this appeal), and they remain so attached to this day.

[R. 13, p. 45]

2. COTA's Application of the Adaptation Prong Was Not Erroneous.

The focus of the adaptation prong is whether the subject property is particularly adapted to the use to which the land is devoted. *Total Petroleum*, 28 Kan. App. 2d at 299, 16 P.3d at 981. The analysis depends on both the adaptation of the subject property, as well as the use to which the land is devoted. *Id.* In addition, courts often consider the extent to which the asset is essential to the permanent use of the real property. *See id.* at 301, 16 P.3d at 986; 35A Am. Jur. *Fixtures* § 11. CRNF claims COTA has the adaptation

analysis backward. COTA did not get the analysis backward. Instead, COTA found "a manifest interdependence between the production assets and the land and improvements supporting them." [R. 13, p. 47] Not only was the land adapted to the subject property, but the subject property was designed and constructed to accommodate the use to which the land was devoted. The fact that the land is modified to make the assets usable further establishes the use to which the land is devoted.

CRNF does not contest the fact that the land was designed and adapted to accommodate the assets. And the record is replete with evidence that the subject property was modified and adapted for use at the subject facility. For example, the main gasification section depicted under construction in County Exhibit 502 [R. 35] was significantly modified and reduced in height from 349.5 feet (demonstration plant) to 265 feet (fertilizer plant). [R. 31, Ex. 209, p. 3376] In *Total Petroleum*, the court specifically noted that the assets in question had been "adapted" to the use of the land as a refinery. 28 Kan. App. 2d at 301, 16 P.3d at 986. The same is true here. The land was substantially changed with millions of tons of excavations and concrete to its use as a fertilizer plant. The assets in dispute were adapted to that use with the land. Thus, the subject property satisfies the adaptation element.

CRNF also attempts to show COTA's adaptation analysis rests solely on the fact that the subject property is attached to specially poured foundations. While the fact that the assets are attached to unique foundations supports the finding that the subject property is real property, it is not the deciding factor. COTA correctly considered other factors including the following: (1) the entire facility is adapted to the land upon which it is built; (2) the production assets and the land and improvements supporting them are

interdependent; and (3) the assets in dispute "would not be of comparable utility on another site without considerable site preparation and extensive engineering work at the new location." [R. 13, p. 47] CRNF failed to establish that COTA's findings regarding the particular adaptation of the subject property are not supported by substantial competent evidence.

3. COTA Did Not Err in its Application of the Intent Prong.

The third prong of the fixtures test is whether the annexing party intended to make the subject property a permanent part of the real estate. *Total Petroleum*, 28 Kan. App. 2d at 299, 16 P.3d at 985. "Based on the weight of the evidence, [COTA found] an absence of proof that Farmland annexed the assets in dispute with the intention that they retain their character as items of personal property." [R. 13, p. 49] COTA further found that "the weight of the evidence suggests instead that Farmland intended for the assets to remain in place until they either wore out or became obsolete." [R. 13, p. 50]

CRNF cites the Head Lease between Farmland and the City of Coffeyville as evidence that Farmland intended for the subject property to be classified as personal property. [Brief of Appellant, p. 29] When such agreement was entered into, however, the subject property actually was personal property because it was not yet annexed to the real property. [R. 25, Ex. 1, pp. 1418-19] The use of the term personal property was merely to describe the property subject to the Head Lease. COTA correctly found that the Head Lease did not indicate that Farmland or CRNF intended for the subject property to remain personal property. [R. 13, p. 49]

CRNF also points to Farmland's IRB exemption application, the IRB exemption order, and subsequent claims for exemption as evidence that Farmland intended for the subject property to be personal property. [Brief of Appellant, p. 29] The issue of

classification, however, was not relevant to the exemption order. The IRB exemption statute, K.S.A. 79-201a, *Second*, does not specify a particular type of property – real or personal – that qualifies for exemption. Since the exemption application met all of the statutory requirements, COTA would have granted the exemption, regardless of whether the property was classified as real or personal. *Id.* Thus, COTA correctly found that the IRB exemption application and exemption order should not be used as a basis for determining Farmland or CRNF's intent.

Indeed, substantial evidence shows that Farmland had no intention of moving the subject facility at the time the subject property was annexed to the land:

- CRNF has no documents from the planning or construction of the subject facility containing any discussion of or plan for building the facility in a manner that would make it easier to move or dismantle [R. 17, p. 333];
- CRNF has no documents that contain any discussion of moving any components of the subject facility to another location [R. 17, pp. 333-34];
- The subject facility is operating in its original location; and
- Farmland had no plans at the time the subject facility was built to operate it for only a few years and move it [R. 17, p. 329].

Substantial evidence also shows CRNF intends that the subject facility will stay put for the foreseeable future:

- CRNF has no plans to move the subject facility [R. 17, pp. 329, 331-32];
- CRNF has not evaluated the cost of moving the subject facility to another location [R. 17, pp. 332-33]; and
- CRNF has no documents in its possession "that contain any discussion of or plan for building the [subject facility] in a manner that would make it movable or in any way easier to dismantle and move" [R. 17, p. 333].

Furthermore, substantial evidence shows that large industrial plants like the subject facility are intended to remain in place for long periods of time through their useful life:

- The Dodge City fertilizer plant has operated in its current location for over 40 years and is still in operation [R. 17, p. 288];
- The Lawrence fertilizer plant had been in operation for about 50 years (with upgrades and modifications) when it was shut down [R. 17, p. 289]; and
- The Coffeyville refinery has been operated in the same location since 1906 (with upgrades and modifications) and is still in operation [R. 17, p. 335].

Finally, of course, the physical facts strongly support the inference that the annexation to the real estate was intended to be permanent. The improvements were not merely placed on a concrete slab, but embedded in concrete or attached to steel and concrete structures that require foundations set on pillars deep into the ground to bedrock. COTA correctly observed that there was effectively no evidence that Farmland had installed the fertilizer plant improvements with any intent to ever remove them from the real property.

Thus, CRNF failed to prove that COTA's findings are not supported by substantial competent evidence, and this Court should uphold COTA's classification of the subject property.

III. CLASSIFYING PROPERTY AS REAL OR PERSONAL BASED ON THE FACTS AND CIRCUMSTANCES OF THE PARTICULAR CASE DOES NOT VIOLATE THE EQUALIZATION CLAUSE.

A. Standard of Review.

CRNF claims COTA improperly refused to equalize the classification and valuation of the subject property with comparison facilities in Kansas. [Brief of Appellant, pp. 34-35] CRNF contends its arguments present a question of law, but that is simply not the case. The question of whether a particular item of property is classified as

a fixture or personal property can only be made from a consideration of all the individual facts and circumstances attending the particular case. *Total Petroleum*, 28 Kan. App. 2d at 300, 16 P.3d at 985. "[R]review of [COTA's] findings of fact is restricted to determining whether the findings are supported by substantial competent evidence." *In re CIG Field Services Co.*, 279 Kan. at 866-67, 112 P.3d at 146; *In re Johnson County Appraiser*, 47 Kan. App. 2d 1074, 283 P.3d 823, 832. Thus, this Court must determine whether CRNF failed to present substantial competent evidence that would permit COTA to classify the proposed comparison properties. *See Total Petroleum*, 28 Kan. App. 2d at 300-01, 16 P.3d at 985-86 (determining that substantial competent evidence supports the court's finding that the assets are fixtures).

B. CRNF Failed to Establish that the County Violated the Uniform and Equal Clause of the Kansas Constitution.

CRNF's claim that the County classified its property in violation of the Uniform and Equal Clause of the Kansas Constitution is supported by citation to two cases, *Colorado Interstate Gas Co. v. Beshears*, 271 Kan. 596, 24 P.3d 113 (2001), and *Board of County Comm'rs of Johnson County v. Greenhaw,* 241 Kan. 119, 734 P.2d 1125 (1987). [Brief of Appellant, pp. 33, 35] By its citation signals "see generally" and "see," CRNF acknowledges that these cases do not directly support its position, but are instructive. It is necessary, therefore, to ascertain the principles for which these cases stand and then determine whether and how they might apply to the present case.

In *Colorado Interstate*, the Secretary of Revenue entered into an agreement to settle a property tax discrimination lawsuit filed by several railroads against the State. The terms of the settlement required the State to enter into federal court consent decrees under which the complaining railroads were granted an 80% personal property tax

exemption. The pipelines were not permitted the same 80% tax exemption, which they argued discriminated against them as "public utilities." The Kansas Supreme Court held that "the protection granted by uniform and equal rate of assessment and taxation provision found in Article 11, Section 1 of the Kansas Constitution is virtually identical to the protection granted under the Equal Protection Clause" of the U.S. Constitution. *Colorado Interstate,* 271 Kan. at 609, 24 P.3d at 123. For the standard to be applied, the Kansas court cited U.S. Supreme Court precedent holding that "[i]ntentional systematic undervaluation by state officials of other taxable property in the same class contravenes the constitutional right of one taxed upon the full value of his property." *Id.* at 609, 24 P.3d at 123, *quoting Allegheny Pittsburgh Coal Co. v. Webster County*, 488 U.S. 336, 342-43, 109 S. Ct. 633 (1989). The Kansas Supreme Court found that the pipelines were being discriminated against by not receiving the same treatment as the railroads, but held they were not entitled to relief under the equalization clause, because: "We are not dealing with a 'deliberately adopted system' which intentionally discriminates, but, instead, we are dealing with the 'settlement of a lawsuit.'" *Colorado Interstate*, 271 Kan. at 612, 24 P.3d at 124.

In *Greenhaw*, the taxpayer owned unimproved real estate used for agricultural purposes, which had been taxed as agricultural real estate. 241 Kan. 119, 120, 734 P.2d 1125, 1127. The taxpayer entered into a long-term lease of the property which the court found was the equivalent of a transfer of ownership. The new owner/lessee also owned other nearby and adjoining property, which he had assembled for purposes of future development. In the meantime, the agricultural use continued. Based on the lease, however, the County reclassified the property from agricultural use to commercial leasing

and reappraised the value far in excess of 28 nearby comparable properties used for agricultural purposes. The court found that because a long-term lease is the equivalent of a transfer of ownership, Greenhaw was not engaged in commercial leasing and his property should not have been reappraised as a result of the lease transaction. "Uniformity in taxation does not permit a systematic, arbitrary, or intentional higher valuation than that placed on other similar property within the same taxing district." *Greenhaw,* 271 Kan. at 127, 734 P.2d at 1131. The court found that grossly discriminatory treatment for identical, unimproved land "destroyed uniformity and equality in the manner of fixing the assessed valuation and was illegal." *Id.*

The "uniform and equal" clause is not violated by a fact-based decision on classification of property as real or personal. The evidence supports COTA's determination that CRNF did not prove systematic, intentional discrimination. The property of the other taxpayers, whom CRNF suggests were getting a better deal, is not identical – nothing is. Neither the counties nor COTA, nor the appellate courts, for that matter, can assure that no litigant can ever second guess a fact-based determination in another person's case.

CRNF cited the assets of TKI and Linde as the two facilities in Montgomery County most similar to the subject property. [R. 16, pp. 215-20; R. 17, p. 241] Like CRNF's property, however, TKI and Linde's facilities were exempt, in whole or in part, from property taxation for a period of ten years ending with tax year 2009. [R. 29, Ex. 169, p. 1908; R. 33, Ex. 430, p. 4771] As discussed in Part II.B.3, above, the classification of the assets at such facilities was irrelevant for purposes of the IRB exemption. The County properly classified both properties as real property in 2010 after

the IRB exemptions expired. [R. 17, pp. 500-01; R. 18, p. 565] Thus, the TKI and Linde facilities received the same treatment as the subject facility.

As for the other comparison properties, CRNF's evidence was wholly inadequate. CRNF's expert, Jenkins, reviewed personal property renditions and photographs of other plants in Montgomery County and concluded that the assets are similar and, therefore, must be classified the same as the subject property. [R. 19, pp. 875-85] The analysis of whether an asset is a fixture is not that simple. If the County had come into court to prove CRNF's assets in this case were real property with nothing more than a personal property rendition and a few photographs, CRNF would have told COTA that this was wholly inadequate to establish the classification of the assets as real property. Yet, that is all CRNF did to try and establish the classification of these other properties before COTA.

Jenkins admitted that he did not even consider the intent prong of the fixtures test, [R. 19, p. 856], the prong which CRNF highlights as the most significant prong [Brief of Appellant, p. 18]. Furthermore, Jenkins testified that the classification test he applied is directly contrary to the test applied in *Total Petroleum*, 28 Kan. App. 2d 295, 16 P.3d 981 (classifying assets at a closed oil refinery in Cowley County as real property). [R. 19, pp. 900-01] He acknowledged that his test, if applied to the assets considered in *Total Petroleum*, would yield a different result than the findings in *Total Petroleum*. [R. 19, pp. 900-01] *Total Petroleum* is binding authority that CRNF cannot simply ignore.

The testimony of Neal Barkley regarding the Dodge City plant resembled Jenkins' testimony. Barkley testified that the Dodge City plant includes assets both larger and smaller than the assets in dispute, that the assets at the Dodge City plant are

bolted to large foundations, and that the Dodge City plant has systems and processes that are similar to the systems and processes at CRNF's facility. [R. 17, p. 272-74] CRNF did not present any real evidence concerning whether the assets at the Dodge City plant could easily be removed from the real estate or whether such assets are particularly adapted to the real estate. Further, CRNF did not present any evidence regarding whether the party affixing the assets to the real estate intended for the assets to become permanently affixed to the real estate or whether such party owned the real estate. Without such evidence, COTA had no method of determining whether the assets at such facility should have received the same classification as the assets at the subject facility.

The question of whether a particular item of property is classified as a fixture or personal property can only be made from a consideration of all the individual facts and circumstances attending the particular case. *Total Petroleum*, 28 Kan. App. 2d at 300, 16 P.3d at 985. Indeed, a court could conclude, after thorough analysis, that the same asset classified as real property at the subject facility is personal property at another plant. CRNF cannot establish that assets at other plants are valid comparison properties without presenting all the facts and circumstances pertaining to such assets. CRNF failed to present such evidence, so COTA did not err in refusing to equalize the assets in dispute with the assets at the proposed comparison facilities.

IV. COTA'S DETERMINATION OF VALUE WAS NOT ERRONEOUS.

A. Standard of Review.

CRNF claims COTA's determination of the value of the subject property is based on improper statutory construction, [Brief of Appellant, p. 37], but in reality CRNF is challenging COTA's findings as to the valuation of the subject property as not "supported by evidence that is substantial when viewed in light of the evidence as a whole." K.S.A.

77-621(c)(7). Thus, this Court must determine whether substantial evidence supports COTA's findings that the Hadco appraisal substantially complied with generally accepted appraisal standards. *See In re Protests of City of Hutchinson*, 221 P.3d 598, 602-03 (Kan. Ct. App. 2009). Perfect adherence to Uniform Standards of Professional Appraisal Practice (USPAP) is not required, so long as any deviations from USPAP are not materially detrimental to the appraiser's opinion of value. *In re Equalization Proceeding of Amoco Production Company*, 33 Kan. App. 2d 329, 337, 102 P.3d 1176, 1184 (2004). CRNF, as the appellant, bears the burden of demonstrating that COTA erred in giving credence to the Hadco appraisal. K.S.A. 77-621(a)(1).

B. The County's Valuation is Supported by Substantial Evidence.

Hadco's appraisal is to be evaluated in light of the entire record, which corroborates that the evidence is substantial and any error is harmless. CRNF's own witnesses acknowledged an original construction cost of $263 million. [R. 17, p. 382; R. 20, pp. 1218, 1233-1234] Taxpayer's COO testified in 2006 before the Kansas Legislature Select Joint Committee on Energy that the estimated cost to replace the facility would be more than $600 million. [R. 20, p. 1217; R. 31, Ex. 394, p. 4538] Cost approach appraisals on the property utilized by Taxpayer and its predecessor to obtain financing established values of $263,000,000 for June 11, 2000, and subsequent additional costs increased the value to $272,700,000 in April 2004 and $367,800,000 in June 2005, respectively. [R. 47, Ex. 644, p. 7339; R. 47, Ex. 645, p. 7396; R. 47, Ex. 646, p. 7450]

The Hadco appraisal as of 2008 was performed by Duke Coon, who was shown to be qualified by education, experience, and professional certifications. [R. 31, Ex. 210; R. 47, Ex. 629] Hadco valued the fertilizer plant's real property (including fixtures, but

excluding certain items, including buildings, railroad tracks, loading docks, roads, and land) at $302,589,080. [R. 21, p. 1579] CRNF called its own expert, David Lennhoff, to rebut the County's valuation of the subject property. [R. 21, pp. 1674-75] Lennhoff provided examples of methods he would have used to value the subject property. [*E.g.*, R. 21, p. 1696] But contrary to CRNF's assertions, Lennhoff failed to establish that the Hadco appraisal violated a specific USPAP standard. And, even if the appraisal violated USPAP, CRNF failed to establish that any such violation materially affected Hadco's appraisal (*i.e.*, that it resulted in a higher amount than the actual value of the subject property). CRNF did not offer an opinion as to the value of the subject property. Lennhoff testified that Hadco's determination of replacement cost new and Hadco's depreciation analysis were material but that any other errors were insignificant. [R. 21, pp. 1679-81] Indeed, Lennhoff acknowledged that he was not testifying that Hadco's conclusion regarding the value was wrong, and he conceded that a valuation performed using his proposed methodology might result in a higher value. [R. 22, pp. 1775; R. 13, p. 22] Thus, CRNF failed to establish that any violation of USPAP committed by Hadco materially affected Hadco's appraisal of the subject property.

Perfect adherence to USPAP is not required, so long as any deviations from USPAP are not materially detrimental to the appraiser's opinion of value. *In re Equalization Proceeding of Amoco Prod. Co.*, 33 Kan. App. 2d 329, 337, 102 P.3d 1176, 1184. This rule is similar to the rule of harmless error. In reviewing COTA orders, due account shall be taken by this Court of the rule of harmless error. K.S.A. 77-621. The rule of harmless error states that "[i]f the agency error did not prejudice the parties, the agency's action must be affirmed." *Farmland Indus., Inc. v. State Corp. Comm'n of State*

of Kansas, 25 Kan. App. 2d 849, 852, 971 P.2d 1213, 1217 (1999).

CRNF failed to establish that any violation of USPAP by Hadco was materially detrimental to the appraisal because a valuation using Lennhoff's methodology could result in a higher value and because CRNF did not present any evidence supporting its own value of the subject property.

1. Reproduction Cost New.

CRNF claims Hadco's use of cost data provided by CRNF was impermissible. Standards Rule 1-4(b) provides that a real property appraiser, when conducting a cost approach valuation, must: "collect, verify, analyze, and reconcile: (1) such comparable cost data as are available to estimate the cost new of the improvements (if any); and (2) such comparable data as are available to estimate the difference between cost new and the present worth of the improvements (accrued depreciation) . . . ." Appraisal Standards Board, *Uniform Standards of Professional Appraisal Practice*, Standards Rule 1-4(e) (2012). The County served specific discovery on CRNF requesting cost information, and Hadco determined the cost of the assets using the cost data provided by CRNF. [R. 20, pp. 1219-20; R. 31, Ex. 253] Since the cost data reflected construction costs in 2000, Hadco used inflation factors to determine what the 2000 construction costs would be as of January 1, 2008. [R. 21, pp. 1531-32] Coon testified that "there is just no higher source or better source to obtain information from than the actual fixed asset listing that we've been given . . . ." [R. 21, p. 1513] COTA found that "the weight of the evidence reinforces the reasonableness of Hadco's reliance on that [cost] data." [R. 13, p. 25] Indeed, the County used the best source of cost data available, and the County's use of such cost data was appropriate.

Furthermore, Coon testified that he tested the cost data with Hadco's database to

confirm the accuracy of the cost data. [R. 21, pp. 1544-49] Hadco's database incorporates the Marshall Swift cost guide and Hadco's body of work over the past 29 years. [R. 21, pp. 1546]

CRNF concludes that the effect of Hadco's methodology for utilizing original cost data to determine value in 2008 was to cause "credibility" of his opinion to be open to challenge. [Brief of Appellant, p. 41] Credibility determinations are left to the court that heard the witness testify in light of all of the evidence. CRNF did not offer an opinion as to the value of the subject property. CRNF's witness, David Lennhoff, acknowledged he was not qualified as an appraiser of machinery and equipment and had no experience with appraisal of facilities like the subject property. [R. 22, p. 1795] Lennhoff suggested other methods Hadco could have used to estimate the cost of the assets for purposes of the appraisal, [*E.g.*, R. 21, p. 1696], but Lennhoff could not point to any legal authority indicating Hadco's costing methodology violated a specific USPAP standard. In fact, CRNF offered no evidence casting any doubt on credibility of the cost data used by Hadco. Lennhoff actually conceded that a valuation performed under his proposed methodology might in fact result in a *higher* value. [R. 22, pp. 1775] Thus, CRNF failed to establish that Hadco's use of such cost data was inappropriate or materially affected Hadco's overall opinion of value.

2. Depreciation.

CRNF claims that Hadco erred in calculating the depreciation applied to the subject property. [Brief of Appellant, pp. 42-43] COTA, however, found that any errors in the depreciation adjustments and obsolescence analysis "do[] not materially affect Hadco's overall opinion of value." [R. 13, p. 58]

CRNF claims that Barkley provided uncontroverted testimony that the assets from the Coolwater plant were not effectively new when they were installed at the subject facility in 2000. [Brief of Appellant, p. 42] But Coon testified that when items have been used at another facility, they have to be re-certified, re-manufactured, and inspected to ensure they meet certain engineering standards. [R. 22, pp. 1634-35] The assets have to be put in a new condition or re-inspected state to function properly at the subject facility. [R. 22, p. 1635] Because the assets are put in a like-new condition, it is absolutely appropriate to treat them as having the same useful life as the new assets. [R. 22, p. 1635] Barkley's assertion that a significant amount of substantially worn components, already materially depreciated, were used in constructing the facility was disputed and was simply not credible.

CRNF claims that Coon's determination of useful life was improper, [Brief of Appellant, p. 42], but this is a semantic, insubstantial argument. CRNF failed to establish that Coon's determination of useful life was incorrect and that any such error was material. Coon used the data provided by CRNF, which included the book life of the subject property. [R. 22, p. 1635] Coon adjusted the book life for those assets he deemed appropriate. [R. 22, p. 1633] Coon did not make unsupported assumptions about the remaining life of the subject property. Coon used the data provided by CRNF. [R. 22, p. 1635] CRNF had previously used such data for its federal income tax return. [R. 17, p. 301] Barkley's testimony confirmed that he created the cost and depreciation data using the best information available to ensure the data was accurate enough to submit to the federal government for income tax purposes. [R. 17, p. 302] So, Coon's reliance on such data was not based on unsupported assumptions or premises, and CRNF

failed to establish that COTA's acceptance of Hadco's useful life estimates was erroneous.

CRNF suggests that Hadco's finding that the subject property suffered no external or functional obsolescence violated USPAP, but CRNF could not point to a specific USPAP standard. Coon stated that based upon his experience and his study of the subject facility, "the plant was operating to its functional capacity." [R. 21, p. 1646]

CRNF provided only one example that the subject facility suffered from functional or external obsolescence. [Brief of Appellant, p. 43] CRNF claims the gasifiers are not state of the art because they operate at a lower pressure than new gasification equipment (*i.e.*, they suffer functional obsolescence). [R. 22, pp. 1829-30] COTA found that any such obsolescence did not materially affect Hadco's valuation, [R. 13, p. 58], and CRNF failed to establish that COTA's finding was not supported by substantial competent evidence.

3. Assemblage.

CRNF claims Hadco used a summation approach to value the subject property. [Brief of Appellant, p. 44] This assertion is incorrect and unsupported by evidence. The summation approach involves assigning a value to multiple parcels, components, or estates, such as separate buildings, water rights, and mineral rights, and adding those values to establish an overall value. *See, e.g.*, *Saline County Bd. of County Comm'rs v. Jensen*, 32 Kan. App. 2d 730, 88 P.3d 242 (2004). In *Jensen*, Saline County valued each of 30 separate multi-family fourplexes, and aggregated the value of each unit to determine a single value for the subject property. This Court held that because Saline County added the values of various estates (*i.e.*, the separate buildings), the USPAP standards required Saline County to test the effect on value of the assemblage of the

separate buildings. *Jensen*, 32 Kan. App. 2d at 735-36, 88 P.3d at 246. Similarly, in *In re Protests of City of Hutchinson*, 221 P.3d at 602-03, Reno County valued ten separate buildings, which were used for ten specific purposes, by valuing each of the buildings separately and summing their values. Again, the Court concluded that the County improperly relied on a summation approach without testing the effect on value of the assemblage. 221 P.3d at 602-03.

Hadco did not add the values of various estates or components as contemplated by Standards Rule 1-4(e). Rather, Hadco performed a cost approach analysis to determine the value of the subject facility. [R. 21, p. 1539] In performing the cost approach, Hadco added the input costs for all improvements to the subject facility to determine the cost new of the subject facility.

Even if this Court determines the approach used by Hadco involved the type of assemblage contemplated by USPAP Standard 1-4(e), such assemblage is not fatal to the appraisal. USPAP Standard 1-4(e) provides that "[w]hen analyzing the assemblage of the various estates or component parts of a property, an appraiser must analyze the effect on value, if any, of the assemblage." Appraisal Standards Board, *Uniform Standards of Professional Appraisal Practice*, Standards Rule 1-4(e) (2012). Hadco considered the effect of assemblage on the value of the assets, [R. 31, Ex. 210, pp. 2837-38], and Hadco added an assemblage factor of 3% to the value of the subject facility [R. 31, Ex. 210, pp. 2837-38, 2871-2908; R. 21, p. 1527]. Coon testified that he compared this appraisal with Hadco's database of past appraisals, of which there are thousands, and determined that the 3% assemblage factor was appropriate. [R. 21, p. 1642] Coon further testified that the 3% assemblage factor is a "very conservative factor." [R. 21, p. 1642] Thus,

Hadco sufficiently analyzed the effect on value of the assemblage.

Further, COTA found that the value assigned to the subject facility by Hadco "is supported by other indications of value contained in the record." [R. 13, p. 58] For example, a comparison with a June 2005 appraisal of the subject facility, conducted by Nexant, Inc., supports the Hadco value. [R. 47, Ex. 646] The Nexant appraisal, also based on the cost approach, valued the subject facility at $367,800,000 as of June 24, 2005. [R. 47, Ex. 646, p. 7479] The value, determined approximately 2.5 years before the Hadco appraisal, was more than $64 million (21.2%) higher than the Hadco appraisal. This confirms, as Coon stated, that the assemblage factor was a conservative factor.

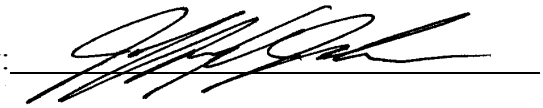
CRNF failed to establish that any deviation from USPAP Standards Rule 1-4(e) was materially detrimental to the Hadco appraisal. Perfect adherence to USPAP is not required, so long as any deviations from USPAP are not materially detrimental to the appraiser's opinion of value. *In re Equalization Proceeding of Amoco Prod. Co.*, 33 Kan. App. 2d 329, 337, 102 P.3d 1176, 1184 (2004). Lennhoff identified two aspects of Hadco's valuation methodology that he believed were materially detrimental to Hadco's valuation of the fertilizer plant: the cost numbers Hadco used in its cost approach and the depreciation analysis performed by Hadco. [R. 21, p. 1680] Lennhoff found that any other errors in Hadco's valuation, which would include any alleged deviation from USPAP Standard 1-4(e), were insignificant. [R. 21, pp. 1679-81] Indeed, Lennhoff acknowledged that he was not testifying that Hadco's conclusion regarding the value was wrong, and he conceded that a valuation performed using his proposed methodology might result in a higher value. [R. 22, pp. 1775] Thus, COTA did not err by accepting the County's valuation.

When reviewing decisions under the Kansas Judicial Review Act, K.S.A. 77-601, *et seq.*, this Court shall give due account to the rule of harmless error. K.S.A. 77-621(e). The rule of harmless error states that "[i]f the agency error did not prejudice the parties, the agency's action must be affirmed." *Farmland Industries*, 25 Kan. App. 2d 849, 852, 971 P.2d 1213, 1217. CRNF failed to establish that any error made by COTA materially affected the Hadco valuation.

CONCLUSION

For the reasons stated herein, this Court should affirm the COTA order.

Respectfully submitted,

By: 

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that two true and correct copies of the above and foregoing Brief of Appellee were deposited in the United States Mail, postage prepaid, on November 26, 2012, to the following:

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APPENDICES

1. PVD Memorandum dated December 2, 1988;

2. *In re Appeal of National Helium Corporation*, Docket No. 1989-5326-EQ (Kan. Bd. of Tax App. 1989);

3. PVD Memorandum dated April 25, 1991;

4. Select photographs of the subject property (some during construction and some after completion of construction), including Exhibits 500, 501, 504, 506-507, and 509-512 [R. 35], Exhibit 550, pages 231, 275, and 283 [R. 36], and Exhibit 552, pages 204 and 205 [R. 36].

KANSAS DEPARTMENT OF REVENUE
Division of Property Valuation
Robert B. Docking State Office Building
Topeka, Kansas 66612-1585

M E M O R A N D U M

TO: All County Appraisers

FROM: Terry D. Hamblin, Director

DATE: December 2, 1988

SUBJECT: Valuation of special purpose industrial properties and,

Concerning Class 2E property per Article 11 - Finance & Taxation, Paragraph b, Kansas Constitutional amendment, 1985 as implemented per KSA 79-1439, 1988 Session Laws of Kansas, Chapter 375.

The referenced subject relates to property assessment and taxation of commercial and industrial machinery and equipment commencing with the 1989 tax year.

Class 2E is not definitive concerning industrial uses such as crude oil refineries, natural gas liquids extraction plants, anhydrous ammonia plants, and various other processes concerning the treatment of process fixtures as realty or personalty.

Therefore we are instituting the following policy procedures in our directive to county appraisers and industry representatives concerning these properties:

1. Land and buildings used for administration, maintenance, and similar general purpose structures are to be appraised and assessed as real property.

2. Processing equipment, such as refinery equipment used to effect a chemical change in the molecular structure of a crude oil feedstock through such refinery processes as cracking, reforming, platforming or alkylation, is to be defined as tangible personal property subject to assessment and taxation as Class 2E property. Other processing equipment would be treated likewise, such as natural gas plants that extract liquids into commercial products such as liquified petroleum gas (LPG) or natural gasoline.

TDH:jd

APPENDIX 1

Phone (913) 296-2365

BEFORE THE BOARD OF TAX APPEALS OF THE STATE OF KANSAS

IN THE MATTER OF THE APPEAL OF
NATIONAL HELIUM CORPORATION FROM
THE DECISION OF THE COUNTY BOARD
OF EQUALIZATION OF SEWARD
COUNTY, KANSAS

Docket No. 89-5326-EQ

O R D E R

Now, on this 13th day of February, 1991, the above captioned matter comes on for consideration and decision by the Board of Tax Appeals of the State of Kansas.

This Board conducted a hearing in this matter on October 23, 1990. After considering all of the evidence presented therein, and being fully advised in the premises, the Board finds and concludes as follows:

1. National Helium received a Change of Value Notice and filed consecutive appeals with the County Appraiser, County Board of Equalization and State Board of Tax Appeals. Each of the appeals were perfected following the statutory procedure outlined in K.S.A. 79-1601 et. seq.

2. The subject matter of this tax equalization appeal is described as follows:

> Real estate, improvements and processing equipment commonly known as National Helium's gas extraction plant in Seward County, Kansas, also known as Parcel ID# 088-106-23-0-00-00-007.00-0.

FINDINGS OF FACT

3. The action which precipitated this appeal was a Memorandum issued by the Director of the Division of Property Valuation (Director) dated December 2, 1988. A copy of the Memorandum was submitted as evidence and is attached as Exhibit A. It considered property owned by refineries, natural gas liquids, anhydrous ammonia and other processing plants. The substance of the Memorandum instructed county appraisers to appraise general purpose structures as real property and processing equipment as personal property.

4. The Memorandum was distributed at a meeting held in Great Bend, Kansas.

5. The Seward County Appraiser (then Cindy Simons, now Gary Post) received the Memorandum.

APPENDIX 2

6. Seward County appraised and assessed the processing equipment located at the National Helium plant as real estate or as a real estate fixture. The appraisal and classification of the processing equipment was not changed during 1989 or 1990.

7. Concurrent with these actions by Seward County, National Helium discovered Seward County's intent to assess their processing equipment as real estate. They contacted the Division of Property Valuation (PVD) and held a series of discussions in response to the county's decision.

8. The Director took no action to enforce the Memorandum vis-a-vis Seward County save to intervene in this action. The Director did not call or cause anyone in the Seward County Appraiser's Office to be called regarding the Memorandum. The Director understood that he had authority to enforce the Memorandum and exercise general supervision over county appraisers.

9. There is no record within the Board of Tax Appeals' Office that Seward County appealed the Memorandum pursuant to K.S.A. 74-2438.

10. Cindy Simons visited the plant site prior to appraising the processing equipment as real estate. Mr. Post also visited the plant site, but subsequent to the appraisal as real estate.

11. County appraisers in other counties appraised and assessed processing equipment as personal property.

12. Substantially all of the processing equipment originally installed at the plant remains on the plant site. Some additions to plant equipment have been made since construction. Some of the equipment is not used, but remains on site.

CONCLUSIONS OF LAW

13. This appeal is filed pursuant to K.S.A. 79-1609. We note that National Helium appealed and participated in each hearing scheduled by Seward County and timely filed and appeal to the State Board. We also note that this appeal is not filed pursuant to K.S.A. 79-1409 and is not an appeal of the Director's Memorandum filed under K.S.A. 74-2438.

14. The Board notes its jurisdictional parameters commensurate with an equalization appeal filed under K.S.A. 79-1609. We are statutorily authorized to consider appeals from the respective County Boards of Equalization and determine whether the property is appraised equally with other properties within the county. The appeal does not directly

challenge value among counties as is provided in K.S.A. 79-1409. Neither is this appeal a direct challenge to the Director's Memorandum as an appeal was not filed under K.S.A. 74-2438.

The December 2, 1988, Memorandum

15. The parties spent a significant amount of time and proffered witnesses bearing on the character of the Memorandum. Mr. Hamblin and Mr. Hagemann both testified that they intended and considered the Memorandum to be implemented as written. We find this generally to be an appropriate exercise of the Director's authority pursuant to K.S.A. 79-1401 et. seq. in so far as it constitutes assisting the county appraiser with assessing property or supervising the performance of their duties. See also Salina Airport Authority v. Board of Tax Appeals, 13 Kan. App. 2d 80, 761 P.2d 1261 (1988).

16. However, we also find considerable evidence from the former Director's own testimony which indicates that the county appraiser retains and is intended to possess discretion in the enforcement of the Memorandum. Mr. Smith questioned Mr. Hamblin about whether the Memorandum was intended to overturn or modify the law of fixtures existing as part of Kansas case law. Mr. Hamblin specifically stated that the Memorandum was not issued to change the law but rather to interpret its provisions. (Transcript, p. 57) Mr. Hamblin also acknowledged that the determination of real and personal property is a question of fact. He stated: " You have to look at each piece individually and make a determination." (Transcript, p. 49) "When you get into a ... real versus personal fixtures type case...its a factual determination..." (Transcript, p. 55) Lastly, Mr. Hamblin considered it the county appraiser's duty to examine the particular property at issue and decide whether the facts supported classification as real or personal property. (Transcript, p. 56)

17. The law of fixtures is well settled in Kansas. See Board of Educ., Unified School Dist. No. 464 v. Porter, 234 Kan. 690, 676 P.2d 84 (1984) and Dodge City Water & Light Co. v. Alfalfa Land & Irr. Co., 64 Kan. 247, 67 P. 462 (1902) These decisions reflect the accepted standard that property must be first affixed to the real estate; its application is consistent with the use of the real estate; and, the intent of the party making the annexation is that it be permanent. As we review the testimony of Mr. Hamblin and the general law of fixtures, we find no conflict among the two. The essential element in any determination continues to involve a question of fact, which we conclude is primarily within the county appraiser's purview. Were we to interpret the Memorandum as an absolute directive without discretion, we

could well be forced to declare it void as an attempt to change the law rather than to interpret it. Those functions are reserved exclusively for the legislative, not executive, branch. See State, ex. rel., v. State Office Building Commission, 185 Kan. 563, 345 P.2d 674 (1959).

18. We also find collateral evidence supporting a permissive interpretation of the Memorandum. The Director knew from his conversations with National Helium that Seward County did not intend to assess the processing equipment as personal property. (Transcript, p. 52) He was also aware of his ability to challenge an appraiser's decision and enforce the dictates of his instructions, assuming the Memorandum was intended as an absolute mandate. Yet, the Director did not institute any action designed to enforce an alleged violation of the Memorandum's tenets. (Transcript, pp. 52-53) He did petition this Board to intervene in the instant cause, but also withdrew the intervention after his participation had been allowed.

19. The county appraiser's decision to treat processing equipment as a real estate fixture is also supportable on another ground. K.S.A. 79-1476 specifically allows the appraiser to deviate from a guide or directive promulgated by the PVD if he/she finds just cause to do so. In light of the fact that both the former and current county appraiser personally inspected the site and reviewed the equipment present, we find prima facia evidence that they considered the facts unique to the equipment and exercised proper judgement in making the classification. The testimony is replete with descriptions of property which is large, affixed to permanent foundations and was even left on site after National Helium discontinued its use. Seward County's rejection of the personal property rendition (Tab 1, Taxpayer's Exhibit 1) filed by National Helium was appropriate.

Equalization and Discrimination in Classification

20. National Helium contends that the Seward County Appraiser's decision to classify their processing equipment as real estate violates constitutional and statutory provisions guaranteeing uniformity of assessment within a class of property. In support of their position, National Helium offered the testimony of Mr. Hagemann and the Depositions of three other county appraisers whose counties contained processing equipment. The substance of each piece of evidence established that the county appraiser had classified and appraised processing equipment in their respective counties as personal property.

21. We note that this is an appeal filed pursuant to K.S.A. 79-1609 and not an equalization appeal under K.S.A. 79-1409.

K.S.A. 79-1409 is the statutory procedure allowing challenges to the appraisal of property among counties. It specifically grants the State Board of Tax Appeals authority to consider and equalize values for property between counties. K.S.A. 79-1609 provides an appeal from a county board of equalization, whose jurisdiction is inherently limited to the county in which they preside. In our view, the appropriate statute governing appeals for inter-county equalizations is K.S.A. 79-1409, not K.S.A. 79-1609. We find that it would be appropriate to disregard the evidence presented with respect to appraisal methods in other counties as it concerns property beyond the jurisdiction of the Seward County Board of Equalization. Having thus excluded this evidence, there is no other relevant evidence which would justify relief for the issue framed by National Helium.

22. Even though the jurisdictional issue may be dispositive with respect to the inequality of appraisal in other counties, it is also true that the substance of the Memorandum does not require a different result in this case. It is clear that the Memorandum did not advocate a departure from fixture law and did require the county appraiser to exercise judgement in appraising processing equipment. Determination as to what property should be classified as real and personal remains the function of each county appraiser. While K.S.A. 79-1401 et. seq. allows the Director to supervise county appraisers, assist them in their assessment duties, and enforce the directives propounded, no such challenge was made by either party. We conclude that the Memorandum was intended as a guide to county appraisers and nothing more.

23. We conclude that the actions of both Seward County Appraisers were justified in light of the facts shown in the record. We conclude that the Appraiser exercised discretion based on the facts unique to this property which resulted in the appraisal made. We find that exercise appropriate and supported by inspection of the equipment existing on site. The fact that a different result occurred is justified by the facts and should not be disturbed.

IT IS THEREFORE, BY THE BOARD OF TAX APPEALS OF THE STATE OF KANSAS, CONSIDERED AND ORDERED that the processing equipment was properly valued by Seward County for 1989 and should be sustained. IT IS FURTHER ORDERED that the relief requested regarding unequal assessment or appraisal is denied.

If any party to this appeal feels aggrieved by this decision, they may file a written request for a rehearing with this Board. The written request for rehearing shall set forth specifically and in adequate detail the particular and specific respects in which it is alleged that the Board's order is unlawful, unreasonable, capricious, improper or unfair. A copy of the request, together with all documents

submitted therewith, shall be mailed to the opposing party at the same time the request is mailed to the Board. Failure to notify the opposing party shall render any subsequent order voidable. The written request must be received by the Board within fifteen (15) days of the certification date of this order. If, at the end of fifteen days the Board has not received a written request for a rehearing, this order will become a final order from which no further appeal is available.

IT IS SO ORDERED.

SEAL

VICTOR ELLIOTT, CHAIRMAN

ATTEST:

CONRAD MILLER, JR., MEMBER

CHARLES F. LAIRD, MEMBER

JAMES P. DAVIDSON,
ATTORNEY & ACTING SECRETARY

MAYBELLE MERTZ, MEMBER

JAYNE ANNE AYLWARD, MEMBER

CERTIFICATION

I, James P. Davidson, Acting Secretary of the Board of Tax Appeals of the State of Kansas, do hereby certify that a true and correct copy of the order in Docket No. 89-5326-EQ was placed in the U.S. Mail on this date. IN TESTIMONY WHEREOF, I have hereunto subscribed my name at Topeka, Kansas, this _____ day of _____, 19____.

James P. Davidson
Acting Secretary

EXHIBIT "L"

KANSAS DEPARTMENT OF REVENUE
Division of Property Valuation
Robert B. Docking State Office Building
Topeka, Kansas 66612-1585

MEMORANDUM

TO: COUNTY APPRAISER FOR COUNTIES OF BUTLER, MCPHERSON, COWLEY, MONTGOMERY, AND SEDGWICK, AND TO TEXACO, INC., NCRA, TOTAL PETROLEUM, INC., AND THE COASTAL CORPORATION

FROM: DAVID C. CUNNINGHAM, DIRECTOR
DIVISION OF PROPERTY VALUATION

DATE: APRIL 25, 1991

RE: 1991 VALUATION GUIDELINES: KANSAS CRUDE OIL REFINERIES

As a result of the decision of the Kansas State Board of Tax Appeals concerning the December 2, 1988 memorandum issued by this office relating to personal property (Class 2E property per KSA 79-1439) and the law of fixtures that differentiates between personal property and real estate (copy attached) I have decided to re-instate the method used prior to tax year 1989 regarding the valuation of crude oil refineries in Kansas utilizing the following method for the 1991 tax year:

1.) Land --real estate
2.) Personal property: motor vehicles, construction equipment, etc.
3.) Refinery process equipment, administrative buildings, auxiliary buildings, and tank farm to be appraised by utilizing rated complexity factor x $60 per barrel per unit of complexity x throughput percentage x capacity with allocation of the total to real estate at 90% plus land value assessed at 30% and personal property at 10% to be assessed at 20%.

APPENDIX 3

Example:

Complexity Factor	9
$/Bbl per Unit of Complexity	x $60
$/Bbl Unit Value =	$540
Capacity: 68,000 @ 90%=	x 61,200 bbls
Total:	$33,048,000
Personal Property @ 10%=	$3,304,800
Real Estate @ 90%	$29,743,200
Land Value: 400 ac @ $800=	$ 320,000

Summary: Real Estate= $29,743,200
Land Value= 320,000
Total= $30,063,200
Personal Property = $ 3,304,800
Plus other Pers Prop= $

This method is intended to provide uniformity for this property category. Adjustments to the final estimate of value may be made for just cause but must be thoroughly documented.

APPENDIX
4

Coke To Ammonia
Under Construction

CFP-0283
CONFIDENTIAL

Utilities - Service & Demin Water Tanks Under Construction

CFP-0275
CONFIDENTIAL

EXHIBIT
500
(MG CO)

Barkley
CG
EXHIBIT NO. 500
9-22-10
APPINO & BIGGS

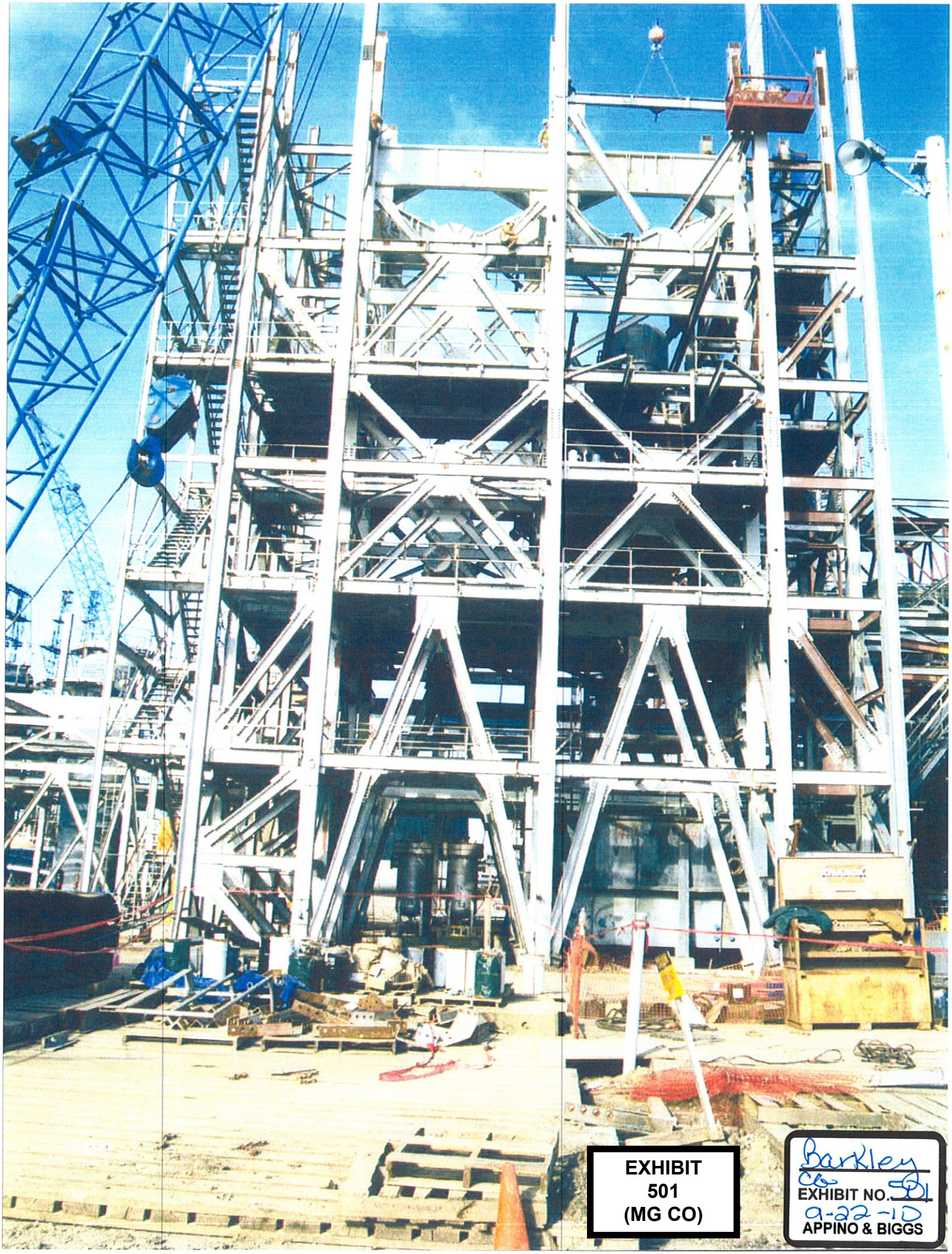
EXHIBIT
501
(MG CO)
Barkley
CO
EXHIBIT NO. 501
9-22-10
APPINO & BIGGS

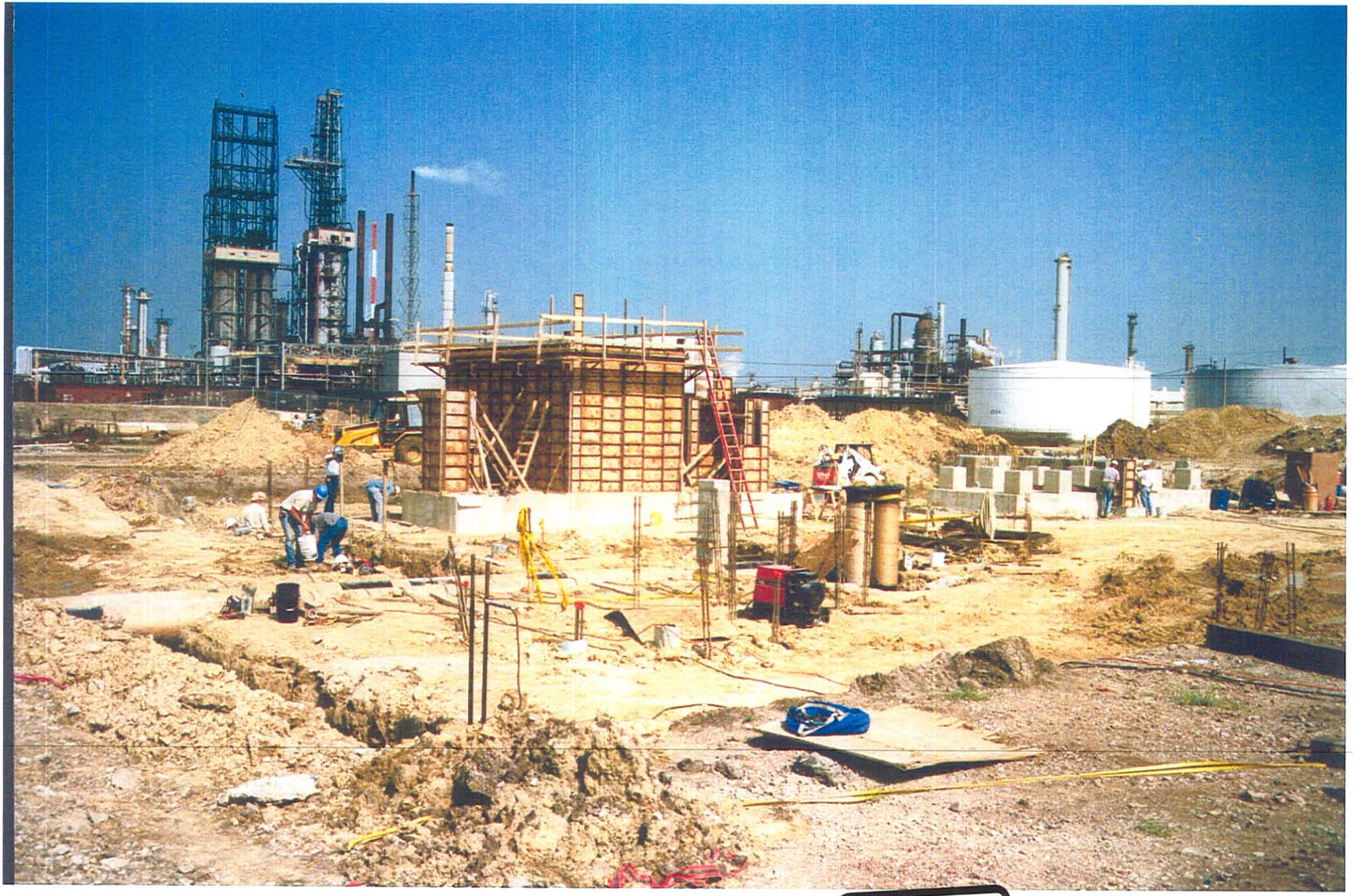

EXHIBIT
504
(MG CO)

Barkley
CO
EXHIBIT NO. 504
9-22-10
APPINO & BIGGS

CFP-0618
CONFIDENTIAL

EXHIBIT
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(MG CO)

Barkley
CE
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9-22-10
APPINO & BIGGS

CFP-0576
CONFIDENTIAL

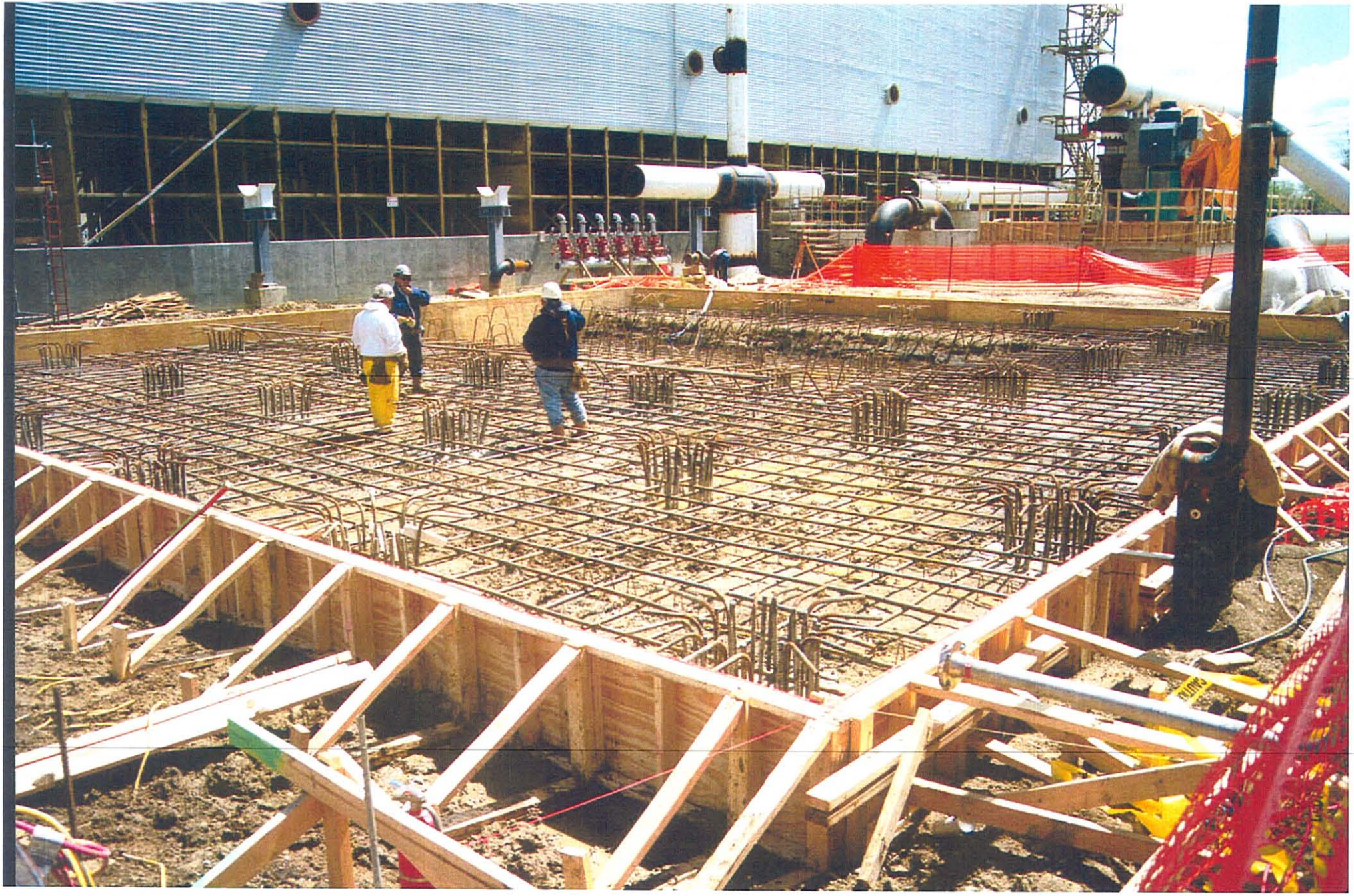

EXHIBIT
507
(MG CO)

Barkley
CA
EXHIBIT NO. 507
9-22-10
APPINO & BIGGS

CFP-0348
CONFIDENTIAL

EXHIBIT
509
(MG CO)

Barkley
CG
EXHIBIT NO. 509
9-22-10
APPINO & BIGGS

CFP-0214
CONFIDENTIAL

EXHIBIT
510
(MG CO)

Barkley
CO
EXHIBIT NO. 510
9-22-10
APPINO & BIGGS

CFP-0215
CONFIDENTIAL

EXHIBIT
511
(MG CO)

Barkley
CG EXHIBIT NO. 511
9-22-15
APPINO & BIGGS

CFP-0205
CONFIDENTIAL

EXHIBIT
512
(MG CO)

Barkley
CB
EXHIBIT NO. 512
9-22-10
APPINO & BIGGS

CFP-0204
CONFIDENTIAL

Storage - Foundation For UAN Tank


CAT