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I. Introduction

The Public Power Council submits these comments for your consideration in determining the questions put forward by BPA in the Direct Service Industry (DSI) Lookback process, and the questions put to BPA by the Ninth Circuit in its recent "*PNGC I*"[1] and "*PNGC II*"[2] opinions. Through the DSI Lookback process, BPA is seeking to determine whether and how it will recoup payments it made to the DSIs under contracts that were found unlawful in *PNGC I* and *II*. During the "first phase" of the process, BPA proposes to resolve questions about whether any payments are owed and are recoverable.[3] BPA proposes a "second phase" to determine any amounts owed.[4] Because these comments are intended to aid BPA in its first phase, they are limited to the subject of whether amounts are owed and recoverable, and we will reserve our analysis about the amounts owed until the next phase.

In its Draft Record of Decision on the DSI Lookback ("Draft ROD"), BPA proposes to forego any attempt to recover money from the DSIs that they unlawfully received from BPA. This result is disappointingly consistent with the agency's persistent efforts to preserve for the DSIs the unlawful benefits it has provided them.[5] We view BPA's proposal in the Draft ROD as founded on its policy toward the DSIs, rather than on an objective view of the law.

As described below, BPA has both the authority and the obligation to seek to recover money unlawfully paid to the DSIs, and BPA is not estopped from doing so. PPC submits that

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[1] *Pac. Northwest Generating Coop., et al. v. Bonneville Power Admin.*, 580 F.3d 792, 819 (9th Cir. 2009) *amending* 550 F.3d 846 (9th Cir. 2008) *upon denial of reh'g*.
[2] *Pac. Northwest Generating Coop., et al. v. Bonneville Power Admin.*, 596 F.3d 1065, 1080 (9th Cir. 2010) *amending* 580 F.3d 828 (9th Cir. 2009) *upon denial of reh'g*.
[3] June 22, 2009 Letter to Regional Customers, Stakeholders, and Other Interested Parties, p. 1.
[4] *Id.*
[5] For example, until now BPA has repeatedly and, in PPC's view, unnecessarily delayed the DSI Lookback process. It has also recently signed an agreement with Alcoa that contains provisions designed to prevent itself from being required to recover money from Alcoa in the event the Court holds the contract unlawful.

the obvious course of action for BPA is to pursue a recovery of the funds it has paid out unlawfully. Good policy and adherence to the law requires BPA to do so; an apathetic or intentional approach of leaving the funds with the DSIs runs headlong into fundamental requirements placed on the executive branch.

II. BPA Has a Duty to Seek to Recover Money It Has Unlawfully Distributed.

BPA spends much of its discussion in the Draft ROD speculating about defenses the DSIs could potentially raise if BPA sought recovery of unlawfully paid funds. That speculation is addressed below. At the outset, however, it is important to clarify that BPA, without question, has a duty to diligently seek to recover money unlawfully paid.

A. BPA Failed to Adequately Consider Case Law Establishing Its Duty to Recover Unlawful Payments.

The duty of federal agencies to seek to recover unlawfully paid funds is described in several cases. *See, e.g. Maryland Small Business Development Financing Authority v. U.S.,* 4 Cl. Ct. 76 (1983) (describing unequivocal rule that when the United States pays money illegally or erroneously, it may and must sue to recover such money); *Fansteel Metallurgical Corp.* v. *U.S.*, 172 F.Supp. 268, 270 (Ct. Cl. 1959) ("When a payment is erroneously or illegally made it is in direct violation of article IV, section 3, clause 2, of the Constitution. Under these circumstances it is not only lawful but the duty of the Government to sue for a refund thereof.") (citations omitted). These cases also explain that this duty is founded at least in part on the principle that Congress, not the executive branch, is the only branch of the government that can direct how money is spent. In other words, a federal agency may not decide to spend money contrary to the law or allow it to be retained because doing so would transfer the appropriations power to the executive branch, in contravention of the Constitution.

In a footnote in the Draft ROD, BPA at least acknowledges the *Fansteel* case described above,[6] but it attempts to discredit the case's application to BPA. First, BPA states that it is not clear that the case upon which *Fansteel* relied (*Royal Indemnity Co. v. U.S.*, 313 U.S. 289 (1941)) held that the government is duty bound to seek restitution for payments.[7] However, as noted above, other cases have held that the government is so bound, and thus BPA's unconventional interpretation of *Royal Indemnity* is undermined. *See, e.g., Maryland Small Business Development Financing Authority*, 4 Cl. Ct. 76 (finding a duty on the government, and relying on *Wurts v. U.S.*, 303 U.S. 414, 415 (1938) for its holding); *Maryland Dep. of Human Res. v. USDA*, 976 F.2d 1462, 1482 (4th Cir. 1992) (where payment violated Food Stamp Act, the government must be able to recoup such funds or else funds would be transferred without appropriation by Congress).

Second, BPA argues that the duty described in *Fansteel* does not apply to BPA because "payments made by BPA from the BPA Fund do not implicate the constitutional considerations

[6] Draft ROD, p. 25, n. 43.
[7] *Id*.

cited in *Fansteel*."[8] PPC is unclear precisely what BPA intends by this statement, but assumes that BPA is asserting that because it funds its operations through revenues received from ratepayers, the Constitutional declaration that only Congress can direct funding does not apply to BPA. If this is the argument BPA is making, it is entirely unsupportable.

While it may be true that BPA has a somewhat unique ability to receive large revenues through the sale of federal power, it is not true that BPA is released from the constitutionally-imposed oversight of its spending by Congress. To the contrary, Congress itself established the BPA Fund in the Treasury, and directed how and when it could be used. *See* 16 U.S.C. § 838i(a). Rather than *relinquishing* its duty under the Constitution to determine government spending, Congress *exercised* its appropriations power to establish a BPA Fund.

Congress established the BPA Fund in the Federal Columbia River Transmission System Act of 1974, where it declared that:

> The [BPA] Administrator may make expenditures from the fund, which shall have been included in his annual budget submitted to Congress, without *further* appropriation and without fiscal year limitation, but within such specific directives or limitations as may be included in appropriations acts, *for any purpose necessary or appropriate to carry out the duties imposed upon the Administrator pursuant to law* . . . 16 U.S.C. § 838i(b) (emphasis supplied).

Thus, it is clear that the BPA Fund was created through a congressional appropriation, and that Congress limited its use to those purposes "necessary or appropriate to carry out the duties imposed on the Administrator pursuant to law." *Id*.

No law authorized the payments to the DSIs reviewed in *PNGC I* and *II*—indeed that was the express finding of the Court. Thus, in unlawfully paying the DSIs in contravention of Congress's direction, BPA violated the Northwest Power Act. And, in allowing the DSIs to retain those payments, BPA would be violating the Appropriations Clause of the Constitution, as described in *Fansteel* and other cases.[9]

Other Supreme Court case law clarifies that BPA cannot be considered a "special case" when it comes to having a duty to recover payments made contrary to law. In *Office of Personnel Management v. Richmond*, 496 U.S. 414 (1990), the Supreme Court held that the

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[8] *Id*.

[9] The Transmission Act's directives on BPA spending list several examples of the activities for which the Administrator may spend money from the BPA Fund. None of them would be applicable to making payments to the DSIs found to be unauthorized under law. To the contrary, the only potentially applicable provision describes "making such payments, as shall be required to carry out the purposes and provisions of the [Northwest Power Act]." 16 U.S.C. § 838i(b)(12). Again, the Court expressly held that the DSI payments were not *allowed* under the Northwest Power Act, much less *required*.

Navy could recover unlawfully made payments, even though those funds were paid from a distinct Treasury fund, similar to the BPA Fund.

The *Richmond* court recited the well-established principle that "[m]oney may be paid out only through an appropriation made by law; in other words, the payment of money from the Treasury must be authorized by statute." *Id*. at 424. It then closely examined the relevant appropriation language that had established the "Civil Service Retirement and Disability Fund" from which the funds were paid. The Court explained:

> The point [that the unlawfully received payments cannot be retained] is made clearer when the appropriation supporting the benefits sought by respondent is examined. In the same subchapter of the United States Code as the eligibility requirements, Congress established the Civil Service Retirement and Disability Fund. That section states in pertinent part: "The Fund . . . is appropriated for the payment of . . . benefits *as provided by* this subchapter. . . ." The benefits respondent claims were not 'provided by' the relevant provision of the subchapter; rather, they were specifically denied. It follows that Congress has appropriated no money for the payment of the benefits respondent seeks, and the Constitution prohibits that any money 'be drawn from the Treasury' to pay them. Our cases underscore the straightforward and explicit command of the Appropriations Clause. 'It means simply that no money can be paid out of the Treasury unless it has been appropriated by an act of Congress.'

Id. at 424 (citations omitted) (emphasis in original).

The *Richmond* case makes clear that BPA must find support in its appropriation language for a payment in order for it to be retainable by the payee. In the case of the DSI payments, there was no such authority.

The *Richmond* court also made clear that the fact that BPA deposits revenues into its fund in the Treasury does not mean that BPA may then spend those revenues without strict regard to the limits placed on BPA spending through congressional appropriations (*e.g*. the Transmission System Act). The *Richmond* court explained, quoting Justice Story:

> The object [of the Appropriations Clause] is apparent upon the slightest examination. It is to secure regularity, punctuality, and fidelity, in the disbursements of the public money. As all the taxes raised from the people, *as well as revenues arising from other sources*, are to be applied to the discharge of the expenses, and debts, and other engagements of the government, it is highly proper, that *congress should possess the power to decide how and when any money should be applied* for these purposes. If it were otherwise, the executive would possess an unbounded power over the public purse of the nation; and might apply all its moneyed resources at his pleasure. The power to control and direct the appropriations constitutes a most useful and salutary check upon profusion and extravagance, as well as upon corrupt influence and public peculation. . . .

Id. at 427 (quoting 2 Commentaries on the Constitution of the United States § 1348 (3d ed. 1858)) (emphasis added).

In sum, BPA, like the rest of the executive branch, is bound by the rule that "public funds will be spent according to the letter of the difficult judgments reached by Congress as to the common good and not according to the individual favor of Government agents." *Richmond*, 496 U.S. at 428. As set forth in numerous cases, BPA has a duty to recover funds unlawfully paid, and is not excused from that duty merely because it has the pleasure of using a "BPA Fund" within the Treasury.

B. BPA Failed to Consider Statutory Provisions That Place Upon It a Duty to Seek Recovery of Unlawfully Paid Amounts.

In addition to the above-described case law (and related constitutional considerations) that establish BPA's duty to recoup unlawfully paid funds, the U.S. Code also places this duty on BPA. 31 U.S.C. § 3711(a)(1) provides that each "head of an executive . . . agency shall try to collect a claim of the United States Government for money or property arising out of the activities of, or referred to, the agency."

Additionally, federal regulations establish the standard to which agencies are held when seeking to recover claims. The Federal Claims Collections Standards state that "[e]ach federal agency shall take *aggressive action, on a timely basis with effective follow-up*, to collect all claims of the United States for money or property arising out of the activities of, or referred to, that agency." 4 C.F.R. § 102.1(a). BPA's issuance of a Draft ROD that attempts to make the DSIs' arguments for them as to why BPA should not recover unlawfully made payments falls far short of this standard.

C. BPA Erroneously Asserts that the PNGC I and II Court Found that BPA Was Relieved of Its Duty to Recover Unlawful Payments.

In a further attempt to distance itself from a duty to recover unlawful payments made to the DSIs, BPA resorts to language in the *PNGC I* case, which it asserts "suggests" that there is no legal or equitable doctrine that would require BPA to seek repayment from the DSIs.[10] Specifically, BPA recites the Court's statement that the issue before the Court is whether BPA "is *permitted* to seek restitution, not whether it is 'required' to do so."[11]

For multiple reasons, BPA's reliance on the *PNGC I* opinion to escape its duty is unavailing. First, as demonstrated above, BPA has a clear duty under statute and case law construing the Constitution to seek recovery from the DSIs. The Court did not consider these provisions of law when deciding the *PNGC I* case—indeed the issues were not briefed in that case, which dealt with the legality of the DSIs' contracts.

Second, the statements of the Court upon which BPA relies are not the Court's characterization of the law. Rather, the Court was describing that it did not have before it the agency's interpretation of the waiver clause or severability clause in the DSI contracts, and thus it could not judge whether the agency's interpretation comported with the law. A more straight-forward reading of the Court's statement would be that the Court was directing BPA to decide, in

[10] Draft ROD, p. 7.
[11] *Id*. (citing *PNGC I*, 580 F.3d at 827).

the first instance, whether it thought it was permitted under the contracts to recover from the DSIs, and that this determination would then be judged against the relevant law on the topic (including the law described above).

In short, BPA cannot escape its duties under the law by pointing to a statement of the *PNGC I* Court that was made, not as an analysis of the law, but rather, in the context of remanding certain determinations back to the agency for its initial determination.

III. BPA Has the Authority to Seek Recovery.

It should be evident that if BPA has a *duty* to recover money unlawfully paid to the DSIs, then it has the *authority* to do so. However, in the Draft ROD, BPA appears to question this.

BPA states: "Alcoa did not breach any obligation to BPA under the Amendment, so it is not clear a legal claim for money, in the form of damages or otherwise, could be pursued by BPA under the contract . . ."[12] BPA's hesitation about its authority to pursue a claim against Alcoa appears somewhat feigned, since it acknowledges in another section of the Draft ROD that "the government has the 'inherent authority' to recover sums illegally or erroneously paid."[13]

Case law on this topic unquestionably establishes that BPA has the authority to seek recovery of unlawful payments, and that BPA does not need to search its contract for that authority or prove that Alcoa breached the contract or acted in bad faith. *See U.S. v. Wurts*, 303 U.S. 414, 415 (1938) ("The Government's right to recover funds, from a person who received them by mistake and without right, is not barred unless Congress has 'clearly manifested its intention' to raise a statutory barrier."); *Old Republic Ins. Co. v. Fed. Crop Ins. Corp.*, 746 F.Supp. 767, 770 (N.D. Ill. 1990) ("The only time a government agency is barred from exercising its right to recover overpayments is when Congress has clearly manifested its intention to raise a statutory barrier."); *U.S. v. Incorporated Village of Island Park*, 888 F.Supp. 419, 453 (E.D.N.Y. 1995) (the government has right to recover payments made under erroneous belief which was material to its decision to pay those funds, regardless of whether the recipient of those funds was innocent of any wrongdoing); *American Nat. Bank and Trust Co. v. U.S.*, 23 Cl. Ct. 542 (1991) (any question concerning contractor's assignee's good faith or intent was not material to decision in which the government was seeking to recover erroneous progress payments received by contractor's assignee); *Housing Auth. v. Pierce*, 701 F.Supp. 844, 848 (D.C. Cir. 1988) *vacated in part in* 711 F.Supp. 19 (government has common law right to recover unlawful payments).

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[12] Draft ROD, p. 19.

[13] *Id*., p. 26, n. 43 (citing *Aetna Casualty v. U.S.*, 526 F.2d 1127 (Ct. Cl. 1975) and *U.S. v. Wurts*, 303 U.S. 414 (1938) for the proposition that the government can 'by appropriate action recover funds which its agents have wrongfully, erroneously, or illegally paid' and that no separate statutory authority to do so is required.").

IV. The "Waiver" Provisions in the DSI Contracts Do Not Prevent BPA From Recovering Unlawful Payments to the DSIs.

A. The Waiver Provisions in the 2007 Contracts Are Not Enforceable.

In the Draft ROD, BPA argues that it has waived its rights to recover payments to the DSIs because of provisions contained in section 16(c) of the 2007 Block Contracts. That provision states:

> In the event the Ninth Circuit Court of Appeals or other court of competent jurisdiction issues a final order that declares or renders this Agreement void or otherwise unenforceable, no Party shall be entitled to any damages or restitution of any nature, in law or equity, from any other Party, and each Party hereby waives any right to seek such damages.

BPA states that this provision remains valid (even in light of the *PNGC I* case's holdings), that it prevents BPA from recovering money from Alcoa, and that it is enforceable against BPA.[14]

First, PPC notes how disappointing it is for BPA to be taking the position that it has successfully prevented itself from collecting payments it unlawfully made. Indeed, BPA is not asserting that it is prevented from recovering the money due to some unfortunate mistake by the agency. Rather, it is arguing that its very intent was to tie its own hands, and that it believes it has succeeded. Even more disheartening is that when it signed its most recent contract with Alcoa, BPA once again did so with the full intent of tying its hands to prevent its rights to collect money back from Alcoa.[15]

Regardless of PPC's disagreement with BPA's policy decision to insert the waiver provision in the contracts, the law will not allow the waivers to be enforced. Indeed, allowing an agent of the government (the Administrator) to pay out money in contravention of an appropriation runs wholly against the Constitution's vesting of the spending power in the legislative branch.[16]

Moreover, PPC does not believe that BPA can separate the clause from the illegal purpose of the contract. The waiver provision, if enforced, would have the effect of implementing the very deal the Court found unlawful. *See* RESTATEMENT (SECOND) OF CONTRACTS § 183, cmt. a. (1981) (severing one part of an agreement from another part is allowable only when the severed provision "does not materially advance the improper purpose").[17]

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[14] Draft ROD, p. 11.

[15] *See Power Sale to Alcoa, Inc., Commencing December 22, 2009, Administrator's Record of Decision*, pp. 27-30 (Dec. 21, 2009).

[16] *See infra* Section II.

[17] Although the Court remanded to BPA to determine the interpretation of the severability clause, this does not mean that the Court decided BPA had the latitude to interpret it either way. Indeed,

B. The 2009 Alcoa Amendment Contained No Waiver Provisions, and BPA Is Not Prevented from Recouping Those Payments From Alcoa.

Despite any questions about whether the waiver provisions in the 2007 DSI contracts are severable and enforceable, there is no contractual bar to BPA's recovery from Alcoa of the payments it made under the 2009 Amendment of Alcoa's contract.

In its filings with the Ninth Circuit, BPA has already established its position that nothing in the Alcoa Amendment would prevent BPA from recovering money from Alcoa. In response to PPC's request that the Court review the Alcoa Amendment on an expedited basis in the *PNGC II* case, BPA argued that there was no need to expedite review, because BPA could recover money from Alcoa if PPC ultimately prevailed in the litigation. BPA asserted that because it could recover the money, PPC would experience no irreparable harm from having to wait for judicial review under a standard briefing schedule. BPA stated:

> [E]ven if the Court found the 2009 Alcoa Amendment improper, any potential monetary injury to Petitioners could be remedied . . . Specifically, the 2009 Alcoa Amendment *removed* the damages waiver provision that had appeared in the prior version of the contract. Accordingly, there are no contractual barriers to compensatory or corrective relief in the ordinary course of this litigation to remedy Petitioners' alleged monetary injury.[18]

Thus, regardless of whether the waiver provisions in the 2007 contracts are enforceable, they act as no impediment to BPA's recovery of funds paid to Alcoa under the 2009 Amendment.

V. BPA Is Not Estopped from Pursuing Recovery.

In several places in the Draft ROD, BPA reasons that it should not pursue recovery of the payments to the DSIs because it would likely be estopped from collecting those amounts in any event. BPA's analysis of this issue is flawed.

A. Case Law Firmly Establishes the Unavailability of Estoppel Against the Government in Cases Such as This.

As BPA even acknowledges in its Draft ROD,[19] case law establishes a firm rule against allowing private parties to assert the defense of estoppel against the government when trying to secure or retain unlawful payments from federal agencies. *See, e.g. Federal Crop Ins. Co. v. Merrill*, 332 U.S. 380, 383-84 (1947); *see also Office of Personnel Management v. Richmond*, 496 U.S. 414 (1990) (erroneous advice given by a government employee cannot estop the

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the very purpose for remanding the question to BPA was so that BPA's determination could be judged as to whether it squared with the law.

[18] *BPA's Motion to Reconsider and Vacate Order Granting Petitioners' Motion to Expedite Proceedings and to Stay These Proceedings*, p. 14, Case No. 09-70228 (Feb. 11, 2009).

[19] Draft ROD, pp. 27-28.

government from denying benefits not otherwise permitted by law); *See Sulit v. Schiltgen*, 213 F.3d 449, 454 (9th Cir. 2000) (estoppel against the government is unavailable where petitioners have not lost any rights to which they were entitled); *McQuerry v. U.S. Parole Comm'n*, 961 F.2d 842, 846 (9th Cir. 1992) (mistake of law is not enough to estop government); *Falso v. Office of Personnel Management*, 116 F.3d 459, 460 (Fed. Cir. 1997) (government cannot be estopped from denying benefits that are not permitted by law, even where claimant relied on mistaken advice of government official or agency).

Despite this firm rule, however, BPA attempts in the Draft ROD to develop and rely on a vague rule from Ninth Circuit case law. BPA asserts that "the Ninth Circuit is more amenable to estoppel claims against the government in cases where it is acting in its proprietary capacity . . . [and that] [t]herefore, even if the Block Contracts are void and each of its provisions, including the waiver provisions, are of no force or effect, the DSIs may have grounds to successfully estop BPA from attempting to recover any overpayments . . ."[20]

In making this assessment, BPA relies on hints from several Ninth Circuit cases.[21] As explained below, however, these cases do not support the conclusion that estoppel would be available as a defense to the DSIs.

B. The Supreme Court Has Clarified That Estoppel Cannot Result in Payments Being Made Contrary to Congressional Appropriation.

BPA's analysis of the case law in the Ninth Circuit allowing estoppel is outdated and came before the Supreme Court's decision in *Office of Personnel Management v. Richmond*, 496 U.S. 414 (1990). In that case, the Court expressly sought to put to rest speculation by lower courts about when estoppel may be available against the government. The Court stated,

> The proposition about which we did not 'stop to inquire'[(that estoppel may be available against the government in some circumstances)] . . . has since taken on something of a life of its own. . . . The language in our decisions has spawned numerous claims for equitable estoppel in the lower courts. . . In sum, Courts of Appeals have taken our statements as an invitation to search for an appropriate case in which to apply estoppel against the Government, *yet we have reversed every finding of estoppel that we have reviewed*.

Id. at 421-22 (emphasis added).

BPA's position that it could be estopped by the DSIs[22] is a stretch in light of the possibility for that as articulated by the Supreme Court. It explained in *Richmond*:

> Whether there are any *extreme circumstances* that might support estoppel *in a case not involving payment from the Treasury* is a matter we need not address. As for monetary

[20] Draft ROD, p. 13-14.
[21] See cases cited in Draft ROD, pp. 13-14, 28-30.
[22] Draft ROD at pp. 14, 34.

> claims, it is enough to say that this Court has never upheld an assertion of estoppel against the Government by a claimant seeking public funds.

Id. at 434 (emphasis added).

As quoted above, the Supreme Court has clarified that it would be an "extreme circumstance" where estoppel succeeded against the government. Additionally, it described that as being a potential outcome only where a payment did not involve payment from the Treasury. As described above in Section II, the payments to the DSIs came from the Treasury in reality, and for all relevant purposes under the law. Thus, BPA's efforts to derive a fragile and accommodating rule out of Ninth Circuit precedent that would allow estoppel by the DSIs is unavailing, and ignores the clear rule set out by the Supreme Court.

Moreover, even if the "proprietary vs. sovereign" distinction that BPA makes so much of were still relevant after the Supreme Court's opinion in *Richmond*, BPA errs in deciding that the contracts with the DSIs were executed while BPA acted in its proprietary capacity. BPA apparently categorizes its actions as "proprietary" because it is acting in its "commercial role as marketer" when selling to the DSIs instead of its more defined role of implementing a statutory construct, such as when BPA administers the Residential Exchange Program.[23] However, as the Court clearly described in *PNGC I* and *PNGC II*, BPA's service to the DSIs is, in fact, defined by and confined by the Northwest Power Act. Not only do specific rate provisions apply, but also a test about whether such an action can be justified as being in accordance with sound business principles. *PNGC I*, 580 F.3d 792, 807 (9th Cir. 2009); *PNGC II*, 596 F.3d 1065, 1069 (2010).

Generally, the government is considered to be acting in its proprietary role when it is "acting as a private concern would," rather than "carrying out its unique governmental functions." *United States v. Georgia-Pacific Co.*, 421 F.2d 92, 101 (9th Cir. 1970). In serving the DSIs under the specific provisions set forth in the Northwest Power Act, BPA is not "acting as a private concern," but is instead attempting to discharge its unique agency role, and as such is not subject to concerns about estoppel based on its proprietary actions.[24]

C. The Elements of Estoppel Have Not Been Met In Any Event.

As described above, BPA is not subject to the defense of estoppel by the DSIs when seeking to recover unlawfully paid money. And, even if it were subject to that defense, the traditional elements could not be successfully proven in this case.

In order to state a claim for traditional estoppel, plaintiffs must allege 1) the existence of a promise, 2) that the agency expected plaintiffs to rely on a promise by taking definite and

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[23] Draft ROD, p. 13.

[24] *See Emery Min. Corp. v. Secretary of Labor*, 744 F.2d 1411 (10th Cir. 1984) (Courts invoke doctrine of estoppels against the government with great reluctance; application of the doctrine against the government is justified only where it does not interfere with underlying government policies or unduly undermine the correct enforcement of a particular law or regulation, and equitable estoppel may not be used to contradict a clear congressional mandate).

substantial action or by forbearing from such action, 3) that the plaintiff actually and detrimentally relied on the promise, and 4) that the promise must be enforced to avoid injustice. *Morris v. Runyon*, 870 F.Supp. 362, 373 (D. D.C. 1992).

From the Draft ROD, it is difficult to determine what "promise" BPA alleges it made to the DSIs that could be enforced under the doctrine of estoppel. PPC assumes that BPA is characterizing the DSI power sales agreements as a "promise" to give money to the DSIs. However, what BPA overlooks is that the promise to pay money took the form of a "contract" that turned out to be unlawful.

BPA is making a legal error when it assumes that estoppel can "revive" an unlawful contract by re-characterizing the contract as a promise. Said differently, estoppel is a quasi-contractual theory—asserted in the *absence* of a contract—not a remedy or defense in the event a contract is found unlawful. If estoppel could be used in this manner, it could almost always result in unlawful contracts being enforced, since a party could often easily prove that it relied on the unlawful contract.

BPA's erroneous application of the doctrine of estoppel manifests itself most clearly when evaluating the fourth element of estoppel described above. The fourth element—that the promise must be enforced to avoid injustice—cannot possibly be satisfied where the "promise" took the form of an unlawful contract. To make this finding, a Court would have to decide that it was necessary to violate the law in order to avoid injustice. PPC does not believe that BPA can reasonably assume such a contorted result would occur in this case.[25]

BPA also describes in the Draft ROD that estoppel against the government requires proving additional elements beyond the traditional elements. Those include: 1) that the government acted with "affirmative misconduct,"[26] and 2) that "justice and fair play require" a promise to be enforced.[27] Again, even if an estoppel claim by the DSIs were otherwise available, these elements are not satisfied.

Case law demonstrates that "affirmative misconduct" in the context of estoppel requires more than mere negligence,[28] and that it requires an "affirmative misrepresentation or affirmative concealment of a material fact by the government."[29] BPA did not affirmatively misrepresent or conceal material facts that it knew of in the context of the DSI contracts. Moreover, "justice and fair play" cannot be used to justify a contract that has been found unlawful. As described above,

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[25] PPC also notes that it would not be reasonable to assume that Alcoa "relied" on BPA's representations that the 2007 contracts were lawful. After all, Alcoa filed suit on those contracts, arguing that they were unlawful. *See also, Kelley v. NLRB*, 79 F.3d 1238 (1st Cir. 1996) (Generally, those who deal with the Government are expected to know the law and may not rely on conduct of Government agents contrary to law).

[26] Draft ROD, p. 28 (citing *Heckler v. Cmty. Health Servs. Of Crawford County*, 467 U.S. 51, 6 (1984)).

[27] *Id*., p. 30 (citing *U.S. v. Lazy FC Ranch*, 481 F.2d 985, 988 (9th Cir. 1973)).

[28] *See, e.g. Pauly v. U.S.*, 348 F.3d 1143, 1150 (9th Cir. 2001).

[29] *Watkins v. U.S.*, 875 F.2d 699, 707 (9th Cir. 1989).

it would be a stretch indeed for a court to find that "justice" requires the enforcement of a contract that violates the law.

VI. The Record Clearly Establishes that BPA Overpaid the DSIs.

Although BPA indicated in its June 22, 2010 letter that any questions about the amount of DSI Lookback owed would be reserved for the "second phase" of the process,[30] it edges into that subject in the Draft ROD, asserting that "the record supports a conclusion that there were no overpayments to or underpayments" to the DSIs.[31] This conclusion denies the facts, and rests on BPA's recreation of history.

At the time the 2007 Block Contracts were signed, the IP rate (applicable to the DSIs) was set for the 2007-2009 period at around 45 mills. BPA has not explained in the Draft ROD how a payment equal to the difference between 45 mills and the market could have been equal to or greater than the nearly $59 million it paid under the contracts each year. Moreover, BPA has provided no explanation for why it could have justified such a payment as in accordance with sound business principles. Indeed, the Court has yet to find BPA's discretionary provision of money or power to the DSIs as comporting with this requirement. So it is pure arbitrary (and unlawful) speculation for BPA to assert that it did not overpay the DSIs because it "would have provided the aluminum companies with $59 million in benefits" under some lawful mechanism, yet-to-be determined.[32]

In short, PPC is unsure what alternative history BPA is trying to justify when it determines that it would have found a lawful way to provide a benefit to the DSIs, despite the Court's ruling that in reality the agency did not. BPA is not authorized to assume that it could have done something lawfully and thereby deny the preference customers a remedy for the harm that has actually been proven. The real facts are that no valid contract existed under which BPA could have provided the DSIs a benefit during the periods relevant to the DSI Lookback.

V. Conclusion

For all of the reasons described above, BPA's proposal in the Draft ROD on the DSI Lookback should be abandoned. The agency has 1) overlooked its duty to recover payments unlawfully provided to the DSIs, 2) improperly assumed that it could waive that duty to the detriment of its preference customers, 3) misapplied theories of estoppel against the government, and 4) arbitrarily determined, contrary to the facts, that the record demonstrates that BPA did not overpay the DSIs under the unlawful contracts.

[30] June 22, 2010 Letter to Regional Customers, Stakeholders, and Other Interested Parties, p. 1.
[31] Draft ROD, p. 14.
[32] *Id*., p. 16.