Fossil Beds National Monument. The Monument is closed to operation of the public land laws, including the mining, mineral leasing, and other mineral entry laws.

Dated: April 25, 1997.

Bob Armstrong,

Assistant Secretary of the Interior.

[FR Doc. 97–12066 Filed 5–8–97; 8:45 am]

BILLING CODE 4310–JB–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[NV–930–1430–01; N–61415]

Notice of Proposed Withdrawal and Opportunity for Public Meeting; Nevada; Correction

AGENCY: Bureau of Land Management, Interior.

ACTION: Correction.

SUMMARY: This action corrects an error in the land description published as FR Doc. 97–10276 in the **Federal Register,** 62 FR 19601, April 22, 1997, for a proposed United States Geological Survey withdrawal.

On page 19601, column 2, line 6 from the bottom, which reads ''T. 15 S., R. 20 E.,'' is hereby corrected to read ''T. 15 N., R. 20 E.,''.

Dated: April 29, 1997.

William K. Stowers,

Lands Team Lead.

[FR Doc. 97–12070 Filed 5–8–97; 8:45 am]

BILLING CODE 4310–HC–M

DEPARTMENT OF THE INTERIOR

Bureau of Reclamation

Interim Renewal Contracts for Friant Division Contractors

AGENCY: Bureau of Reclamation, Interior.

ACTION: Notice.

SUMMARY: Notice is hereby given for the negotiation of interim renewal contracts with 14 of the Friant Division contractors, Central Valley Project, California, who are parties to long-term water service contracts, which were recently declared invalid by the United States District Court, effective March 1, 1998. The total annual quantity of water allocated pursuant to these contracts is in excess of 1.3 million acre-feet. These contracts will be replaced with interim renewal contracts negotiated pursuant to the Central Valley Project Improvement Act, Title XXXIV of Pub. L. 102–575.

FOR FURTHER INFORMATION CONTACT: Jon Anderson, Supervisory Repayment Specialist, Bureau of Reclamation, South-Central California Area Office, 2666 North Grove Industrial Drive, Suite 106, Fresno, California 93727–1551; telephone 209–487–5041.

Dated: May 5, 1997.

Robert F. Stackhouse,

Regional Resources Manager, Mid-Pacific Region.

[FR Doc. 97–12142 Filed 5–8–97; 8:45 am]

BILLING CODE 4310–94–M

DEPARTMENT OF JUSTICE

Response to Comments to Department of Justice Proposed Reforms to Affirmative Action in Federal Procurement

AGENCY: Department of Justice.

ACTION: Notice.

SUMMARY: On May 23, 1996, the Department of Justice published its Proposed Reforms to Affirmative Action in Federal Procurement. 61 FR 26042. The Department reviewed over 1,000 comments. This report discusses the observations and concerns most frequently expressed, and describes the changes to the proposal that were made in response to those comments. In addition, the Federal Acquisition Regulatory Council is today publishing for comment proposed amendments to the Federal Acquisition Regulation that will implement the contracting mechanisms described in the Justice Department proposal.

FOR FURTHER INFORMATION CONTACT: Mark Gross, Civil Rights Division, P.O. Box 66078, Washington, D.C. 20035–6078, telefax (202) 514–8490.

Introduction

On May 23, 1996, the Department of Justice published its Proposed Reforms to Affirmative Action in Federal Procurement. 61 FR 26042. These reforms will ensure that the use of affirmative action in federal procurement complies with the strict scrutiny standard discussed in the Supreme Court's decision in *Adarand Constructors, Inc.* v. *Pena,* 115 S. Ct. 2097 (1995).

The Justice Department received more than 1,000 individual responses to the proposal; many of those contained a number of different and lengthy comments. We greatly appreciate the time and effort so many individuals, companies, private organizations, and government personnel from cities, states, and federal agencies, took to respond to the proposal. The comments raised many of the difficult issues that were considered during the preparation of the proposal, as well as many new ones.

This report will not summarize all the comments that were received, but rather, will discuss those observations and concerns most frequently expressed. The report will identify the changes we have made to the reform proposal both in response to the comments and as a result of our continuing work on the proposal, and those issues that remain under consideration.

The Federal Acquisition Regulatory Council is publishing today the proposed amendments to the Federal Acquisition Regulation (FAR) necessary to implement the proposed reforms, including procedures to implement Section 7102 of the Federal Acquisition Streamlining Act (FASA) and to further implement 10 U.S.C. 2323. These statutes permit federal agencies to allow competitive advantages, including price and evaluation credits, in awards involving small businesses owned and controlled by socially and economically disadvantaged persons (SDBs). The regulation explains how consideration of social and economic disadvantage will be made in the contracting process. The Small Business Administration (SBA) will be publishing regulations that describe the new process by which firms can be determined to be SDBs.

I. Eligibility and Certification

A. Determination of Social and Economic Disadvantage

Many of the comments expressed concern that the proposal could permit each federal agency to determine whether firms are owned and operated by individuals who are socially and economically disadvantaged. The primary concern was inconsistent decisions by different agencies, leading to forum shopping, where firms would search to find the agency with the most lenient standards. While that possibility is less of a concern for persons who belong to minority groups statutorily presumed to be socially and economically disadvantaged,[1] the

[1] Both FASA and 10 U.S.C. 2323 (which, in language similar to that in FASA, permits the Department of Defense, NASA, and the Coast Guard to use less than full and open competition in order to aid SDBs) incorporate by explicit reference the definition of social and economic disadvantage contained in Section 8(d) of the Small Business Act. Pursuant to Section 8(d), members of designated groups are presumed to be both socially and economically disadvantaged; those presumptions are rebuttable. By contrast, under the separate program established under Section 8(a) of the Small Business Act (the 8(a) program), members of identified groups are rebuttably presumed to be

concern expressed in quite a few comments was that individual agency determinations could lead to inconsistent results when persons who are not members of ''presumed groups'' seek to be determined to be socially and economically disadvantaged. The comments almost universally suggested that determination of social and economic disadvantage be made exclusively by the SBA, which already makes similar determinations under the 8(a) program.

The proposal stated that while agencies could perform this function themselves, it also stated that an agency might wish to assign this responsibility to SBA. Consistency is a critical feature, and the SBA is in the best position to ensure consistent application of standards on social and economic disadvantage. As a result, the SBA has been assigned responsibility for developing procedures and standards that will govern federal determinations of social and economic disadvantage, and will be assigned to do determinations of social and economic disadvantage. A system will be developed that will ensure that SBA has resources to support this effort.

B. Certification of Ownership and Control

A number of comments also questioned the proposal's decision to rely on private, state and local organizations to make certifications that a firm is owned and controlled by socially and economically disadvantaged individuals. Those comments urged the government to permit SBA to make that certification, noting that this approach would be more efficient for SDBs. As stated in the original proposal, however, there already is an exhaustive system of private, state and local certifiers of ownership and control in place, and creation of a federal structure to perform this process seems unnecessary and wasteful.

C. Re-certifications

A number of comments stated that it was unnecessarily expensive to require SDBs to provide updated certifications of ownership and control every three years. The comments urged the government to permit SDBs simply to update their certifications and to keep the certification for a longer period, perhaps five years.

The interval between certifications will remain at three years. The effort to meet strict scrutiny requires that the benefits of affirmative action go only to those individuals and firms that truly qualify for competitive advantages. One way is to ensure that firms that are determined to be SDBs continue to be eligible for that status. While annual updates will help that process, many firms undergo significant changes within three years of operation. Recertification of ownership and control every three years will help to ensure the accuracy of the list of eligible SDBs, and thereby help to ensure that the government's programs meet the standards of strict scrutiny. Every effort has been made to balance the potential impact of the certification process and the need to ensure the validity of the certification.

D. Use of the Preponderance of the Evidence Standard for Social and Economic Disadvantage of Individuals Who Do Not Qualify for a Presumption of Disadvantage

As explained in the proposal, under FASA and 10 U.S.C. 2323 members of designated minority groups seeking to participate in SDB programs fall within the statutorily mandated presumption of social and economic disadvantage established in Section 8(d) of the Small Business Act. Individuals who do not fall within the statutory presumption can qualify for SDB status by proving that the individuals who own and control the firm are socially and economically disadvantaged. Under current SBA practice for certifying individuals under the 8(a) program, those individuals who are not members of presumed groups must prove social and economic disadvantage by clear and convincing evidence. The proposal would change that standard of proof to a preponderance of the evidence.

Many comments urged us not to change the standard of proof. Generally, the comments asserted that lowering the standard could permit companies owned by individuals who are not truly socially and economically disadvantaged to qualify as SDBs and to win contracts that should go to legitimate SDBs. Those comments stated that the relatively small number of federal procurement contracts that now go to firms owned by minorities pursuant to affirmative action initiatives should not be reduced by awards going to non-deserving firms owned by non-minorities.

There is significant legal support for the use of the preponderance of the evidence when an agency is determining what is essentially a question of civil law. The Supreme Court has held that the preponderance of the evidence standard is appropriate for most inquiries made in civil litigation, including questions of discrimination. *Price Waterhouse* v. *Hopkins*, 490 U.S. 228, 252–255, 261 (1989). See also *Herman & MacLean* v. *Huddleston*, 459 U.S. 375, 389–390 (1983), in which the Court indicated that the clear and convincing evidence standard should be limited to those civil questions in which ''particularly important individual interests or rights are at stake,'' and cited as examples termination of parental rights, involuntary civil commitment, and deportation. The SBA's inquiry as to social and economic disadvantage is most comparable to the discrimination inquiry in *Price Waterhouse*, which was subject to the preponderance of the evidence standard.

Furthermore, changing the standard of proof should not permit persons who are not truly socially and economically disadvantaged to receive determinations of eligibility they do not deserve. The burden of proof to show that one is socially and economically disadvantaged remains with the applicant. Careful scrutiny of applications under proper standards will result in rejection of undeserving applicants that fail to prove to SBA that they are actually socially and economically disadvantaged. The SBA will review these applications rigorously to ensure that only truly deserving candidates are determined to be SDBs.

Finally, some comments cautioned that if more non-minority firms became SDBs as a result of the lower standard of proof, reporting all SDB contracts as part of the utilization of minority firms will over-state the number of contracts actually awarded to minority-owned firms. In the event that occurs, the General Services Administration (GSA) and other governmental agencies will explore methods to ensure that only contracts that are awarded to minority-owned firms are reported as such when the utilization figure is compiled and compared with the benchmark.

E. Timing of Certifications

At least one inquiry asked whether an SDB needed to have its formal determination of eligibility before it could respond to a solicitation as an SDB, or whether it would be sufficient if the SDB had secured its determination of eligibility by the time the contract actually was awarded. A middle ground will be adopted.

Requiring all SDBs to have final determinations of eligibility in hand before being able to respond in any way to a solicitation might encourage firms to seek eligibility on the assumption

socially disadvantaged, but must establish that they are economically disadvantaged.

that they might want to use it at some point in the fiscal year. It is clear that, at least at the beginning of this program, there will be a large number of firms seeking to be eligible SDBs, and it is important that people not be encouraged to seek that status if they are unsure whether they would ever have occasion to use it.

The proposed regulation amending the FAR states that the contracting officer will specify in the solicitation the date by which each SDB must have official determination of eligibility. That date will be early enough in the process to allow offerors a reasonable opportunity, consistent with the needs of the procurement, to obtain a determination of SDB status before the contract award process is completed. The award of a contract will not be delayed to permit a firm to secure SDB status after the date specified by the contracting officer.

II. Benchmark Limits

A. Use of SMOBE Data

The proposal states that the system will rely primarily on Census data to determine the capacity and availability of minority-owned firms. A number of comments stated that the Census Department's SMOBE (Survey of Minority-Owned Business Enterprise) data are incomplete. The comments stated that SMOBE may not count certain types of corporations and has other reporting problems. A number of comments stated that the government should focus on those firms that are ''ready, willing and able'' to participate in government contracting when determining whether present methods of contracting unfairly exclude minority-owned firms, and that SMOBE or other similar data may not accurately describe the universe of such firms.

The Commerce Department has addressed a number of ways to fill in information not contained in SMOBE, and is refining those data. The Commerce Department has also been working to determine the appropriate database, or combination of databases, to measure the availability and capacity of existing minority-owned firms for purposes of establishing the benchmark figure for minority capacity.

B. Use of Two-Digit SIC Codes

The proposal stated that benchmarks would be established in each two-digit Standard Industrial Classification (SIC) code. A number of comments asserted that two-digit SIC codes were too broad to be used for this purpose. Some comments stated that the use of two-digit SIC codes runs the risk of yielding an erroneous vision of a particular industry. For example, one comment stated that where minority firms in one four-digit SIC code within the larger two-digit classification were very successful, the government might be receiving an erroneous impression of the state of minority contracting in other activities within that two-digit SIC code and assume incorrectly that minority firms in those activities were successful.

The proposal used two-digit SIC codes for several reasons. First, available Census data would not support capacity estimates at the four-digit level. Second, were the necessary data available, it would be extremely burdensome to implement benchmarks for all the four-digit SICs in which federal contracting takes place.

However, a Department of Commerce analysis using the Federal Procurement Data System indicates that 40 four-digit SIC codes accounted for approximately 80% of dollars awarded under prime contracts above $25,000 in FY 1995. Thus, a suitably expanded Survey of Minority-Owned Business Enterprises could support future use of four-digit SIC codes in these industrial activities.

C. Areas With Little Minority Availability and Capacity

Several comments stated that, by tying benchmarks to the existing availability and capacity of minority-owned firms, the government could be continuing to exclude minority-owned firms from industrial areas in which they have had little success.

While the benchmark will be based in large part on the existing capacity and availability of minority-owned firms, consideration will also be given to the extent to which the effects of racial discrimination have impeded the ability of minority individuals to become entrepreneurs, and the ability of minority-owned firms to grow. The consideration of the effects of discrimination, as applied in these and other circumstances, may increase the benchmark beyond the estimates of the present existence of minority-owned firms, particularly in those areas in which there is little minority activity. The Commerce Department is still working to develop the statistical assessment of these effects of racial discrimination.

D. Exclusion of Small Firms From the Benchmarks

The proposal stated that we were considering, when establishing the benchmarks, excluding those firms that are simply too small to have competed for and won federal contracts. Several comments stated that excluding such small firms would freeze the effects of discrimination on those firms, as discrimination has limited the ability of many minority firms to grow and compete for federal contracts.

This comment may be addressed in three ways. In particular industries, it may be appropriate to forego any adjustments in recognition that discrimination has suppressed firm size. In others, the phenomenon may be addressed by the assessment of the effects of racial discrimination on minority business development. And, finally, as a practical matter, the Commerce Department, during its analysis of benchmarks, has identified industrial areas in which very small firms have won contracts, and so there may not be a reason to exclude any firms when the benchmarks are calculated in some SIC codes. It is not clear, at this time, whether there will be SIC codes in which federal contracts or subcontracts are always so large that an exclusion of small firms is appropriate. That determination will be made as final benchmarks are established in all SIC codes.

E. Benchmarks Should Consider Discrimination by the Private Sector

A number of comments urged consideration of the fact that discrimination has limited participation by minority-owned firms in the private sector. Those comments stated that considering curtailing or eliminating affirmative action when federal contracting has reached or exceeded those benchmarks ignores the broad discrimination occurring in the private sector.

The effects of private discrimination will be reflected in the assessment of the extent to which discrimination has impeded the development and growth of minority-owned firms. This factor will be critical when the assessment is made in any SIC code to curtail or even eliminate the use of price or evaluation credits. While affirmative action in federal procurement is not a means to make up for opportunities minority-owned firms may have lost in the private sector, it is intended to ensure that federal procurement is a means for minority-owned firms to secure full and fair treatment, which may well translate into more success for those firms in private commercial efforts.

F. Evidence of the Effects of Discrimination

The proposal stated that a statistical calculation representing the effect discrimination has had on suppressing minority business development and capacity would be made, and that

calculation would be factored into benchmarks. The Department of Commerce continues to work to develop this calculation.

Regardless of the outcome of that statistical effort, the effects of discrimination will be considered when utilization exceeds the benchmark and it is necessary to determine whether race-conscious measures in a particular SIC code should be curtailed or eliminated. Before race-conscious action is decreased, consideration will be given to the effects discrimination has had on minority business development in that industrial area, and the need to consider race to address those effects.

III. Interaction of Benchmarks and Mechanisms

A. Reservation of Contracts

The proposal stated that the authority to reserve contracts for bidding by SDBs would not be invoked for at least two years after implementation of the proposed system. The purpose of that waiting period was to allow evidence to accumulate regarding the effectiveness of the new system. The proposal contemplated that after two years the system would be evaluated to consider whether reservation of contracts might be appropriate if the system clearly was unable to remedy persistent and substantial underutilization of minority firms in particular industries resulting from past or present discrimination.

Numerous comments suggested that this two-year evaluation period was too inflexible. While, as stated in the proposal, we believe that the new system should make reservation of contracts unnecessary, we also believe a modification of the proposal is appropriate. The determination whether to consider reservation of contracts in any industry should turn not on the lapse of any particular period of time, but on the amount and strength of the evidence regarding the effectiveness of the new system in that industry. Thus, where the Department of Commerce, in consultation with the Department of Justice, the General Services Administration, and the Small Business Administration, finds substantial and persuasive evidence of (1) a persistent and significant underutilization of minority firms in a particular industry, attributable to past or present discrimination, and (2) a demonstrated incapacity to alleviate the problem by using the proposed system, then the agencies may be authorized to reserve contracts. This is a rigorous standard, and contracts will not be reserved until it is met.[2]

B. Counting 8(a) Contracts Toward the Benchmark Limits

A number of comments asserted that the government should not include contracts awarded pursuant to the SBA's 8(a) program when determining the amount of money that has been awarded to minority-owned firms in each SIC code. The reason, many asserted, was that the 8(a) program is not based on racial considerations, but rather is a race-neutral business development program. Therefore, the comments stated, race should not be considered to have been a factor in the award of those contracts. The comments also stated that, if achievement of a benchmark is an indication that there is less of a need for affirmative action programs, we should not count 8(a) contracts because those developing firms are not fully competitive, and the award of an 8(a) contract is not an indication that the minority-owned firm would fare as well in open competition.

First, while the 8(a) program is a business development program, the race of the owner of a firm is a factor in the manner in which a firm may become certified as eligible for an 8(a) contract. Therefore, 8(a) is not an entirely ''race-neutral'' program. Second, and more importantly, these comments may reflect a misunderstanding of the assessment that will be made at the end of each fiscal year. As explained in the proposal, the benchmark figure will represent the extent to which the government would expect contract dollars in particular industrial activities to be awarded to minority-owned firms in the absence of discrimination or its effects. The reason to measure the extent to which minority-owned firms have received federal contracts is to determine whether race-conscious programs, like price or evaluation credits, continue to be needed to ensure that firms owned by minorities have a fair opportunity to compete for and win federal contracts.

This assessment must count *all* contracts awarded to minority-owned firms, whether through race-conscious programs or through free and open competition. Only by determining the extent of minority participation in contracting, and then by determining whether that participation has been achieved through full and open competition, race-conscious action programs, or by a combination of the two, can we determine whether race-conscious programs continue to be needed in that SIC code. Therefore, when a contract is awarded to a minority-owned firm through the 8(a) program, it must be counted towards the benchmark. It must be counted simply because the firm that was awarded the contract is owned and operated by a minority individual or individuals.

This does not mean, however, that the fact that the contract was awarded pursuant to the 8(a) program is irrelevant to the question whether the use of race-conscious action in a particular SIC code should continue, be curtailed, or even be eliminated. If the amount of federal contract money awarded to minority-owned firms in a particular SIC code exceeds the benchmark, the determination of the extent to which race-conscious measures may be permissible in the next year will consider how the awards were made. If the benchmark is significantly exceeded in an SIC code, but a large percentage of minority contracts would not have been awarded to minority-owned firms without the use of 8(a) and/or price or evaluation credits, that might indicate that the use of price credits, or even of the 8(a) program, should be cut back, but not eliminated.

Accordingly, the fact that an award made to a minority-owned firm pursuant to 8(a) is counted towards the benchmark does not ignore the purposes of the 8(a) program. The proposal contemplates continued use of the 8(a) program as an effective means to develop small socially and economically disadvantaged businesses.

C. Counting Subcontracts Awarded Pursuant to a Prime Contractor's Subcontracting Plan Toward the Benchmark

Other comments raised a similar point; subcontracts awarded to minority-owned firms should not count toward the benchmarks if they were awarded pursuant to the subcontracting plan that Section 8(d) of the Small Business Act requires of prime contractors. The comments stated that they should not be counted because race is not a factor in the award of the subcontract. For the same reasons that contracts awarded to minority-owned firms pursuant to 8(a) must be counted toward the benchmark, subcontracts to minority-owned firms—whether awarded through race-based measures or direct competition—must be counted as well.

[2] This discussion does not apply to the 8(a) program, which, as described in the proposal, has unique indicia of narrow tailoring.

D. When Achievement of the Benchmark in an SIC Code Will Result in Curtailment or Elimination of Race-Conscious Action in that SIC Code

A number of comments requested clarification of precisely when achievement of a benchmark would result in curtailment or elimination of affirmative action measures. Some of these comments suggested a misunderstanding of the proposal.

Achievement of a benchmark in a particular SIC code does not automatically mean that race-conscious programs, or the use of 8(a) contracts, will be eliminated in that SIC code. The purpose of comparing utilization of minority-owned firms to the benchmark is to ascertain when the effects of discrimination have been overcome and minority-owned firms can compete equally without the use of race-conscious programs. Full utilization of minority-owned firms in an SIC code may well depend on continued use of race-conscious programs like price or evaluation credits. Where utilization exceeds the benchmark, the Office of Federal Procurement Policy (OFPP) may authorize the reduction or elimination of the level of price or evaluation credits, but only after analysis has projected the effect of such action.

E. Ensuring That Prime Contractors Actually Use SDB Subcontractors

A few comments asserted that many non-minority prime contractors commit to use SDBs as subcontractors in order to be awarded a prime contract, but do not actually use the SDBs, or use SDBs to a lesser extent than proposed.

The proposal addresses this problem in a number of ways. First, the extent of an evaluation credit given to a prime contractor increases as the commitment to SDBs becomes more firm. Prime contractors who present written, enforceable subcontracting commitments to specific SDBs will receive more consideration in an evaluation context than those who simply promise to find SDBs as subcontractors during the course of the contract. The more enforceable the commitment to SDBs, the higher the evaluation credit. Second, the extent to which a prime contractor has honored a commitment to subcontract to SDBs may be a factor when the prime contractor bids on a subsequent contract.

Some comments stated that it would be very difficult for prime contractors to assign an SIC code to subcontracting opportunities at the bidding stage. The proposal has a provision that will significantly ease the administrative burden of reporting subcontracting. The prime contractor may report subcontracts based on the predominant SIC code of the subcontractor. The subcontracting firm need only report to the prime contractor the SIC code in which it does most of its work, and the prime may then report that SIC code for purposes of reporting subcontracting.

Several comments stated that it would be a hardship for prime contractors to help secure determinations of eligibility for those SDBs it will use as subcontractors. These comments may reflect a misunderstanding of the proposal. No prime contractor is responsible for issuing determinations of eligibility, or for helping to establish the eligibility of an SDB it proposes to use as a subcontractor. That is the responsibility of the SDB. In order to receive a price or evaluation credit based on subcontracting, however, the prime contractor must demonstrate that its commitment is to eligible SDBs. The prime, therefore, while not involved in the process of determining or securing determinations of eligibility for SDBs, must ensure that when it submits a bid that seeks a price or evaluation credit based on subcontracting to SDBs, the firms it identifies as SDBs have been determined eligible.

Finally, a number of comments urged the government to use mentor-protégé programs aggressively. The proposal mentions mentor-protégé programs as one of the outreach and technical assistance programs the government seeks to use to increase participation of SDBs in federal contracting. Mentor-protégé programs have been an effective way of increasing participation of minority-owned firms in federal contracting, and we are hopeful that such programs will continue.

F. Joint Ventures

A number of comments stated that joint ventures of non-minority and minority-owned firms provide the minority-owned firm an opportunity to secure a share of federal contracts. Under the proposed amendments to the FAR, joint ventures will be eligible for price credits.

G. Contracts for Commercial Items

Several comments noted that it would be very difficult to assess or evaluate subcontracting opportunities under contracts for commercial items. While there are difficulties, commercial items are covered.

IV. Miscellaneous Comments

A. Funding of the 7(j) Program

Many comments expressed a concern that while the proposal relies significantly on the SBA's 7(j) program that provides technical and management assistance to qualifying individuals, Congress has not funded that program. That concern is legitimate, and the Administration is exploring measures to keep the program viable.

B. Women-Owned Firms

A number of comments expressed concern that the government appeared to give no consideration in this proposal to firms owned and operated by women, despite the fact that many women entrepreneurs had endured the effects of discrimination similar to that suffered by minorities.

Some portions of the proposal, such as the lowering of the standard of proof for non-minority firms as SDBs to preponderance of the evidence, could affect women-owned firms. Plainly, the portions of the proposal that address the manner in which race-conscious measures are permissible do not address women-owned firms not owned by minorities. The proposal concentrates on firms owned and operated by minorities because the regulation will implement Section 7102 of FASA and 10 U.S.C. 2323, and those statutes do not authorize affirmative action for women. Section 7102 permits the federal government to take affirmative action, including granting price and evaluation credits, for ''small business concerns owned and controlled by socially and economically disadvantaged individuals * * *.'' That provision refers to subsection (d)(3)(C) of Section 8 of the Small Business Act (15 U.S.C. 637), which in turn defines social disadvantage in terms of ''racial or ethnic prejudice or cultural bias.'' Women are not so designated, and therefore these portions of the proposal are limited to implementing affirmative action for the minority groups designated under FASA.

While women-owned firms, per se, are not eligible for the price and evaluation credit program enacted by FASA or 10 U.S.C. 2323, there are other avenues by which the federal government tries to ensure that women-owned firms have an equal opportunity to compete for and win federal contract dollars. The Small Business Act requires agencies to set annual goals for participation in contracting by women-owned firms. Women-owned firms may be certified under the 8(a) program by demonstrating to the SBA that the firm is owned and operated by a woman or women, and that the individual women who operate the firm have suffered social and economic disadvantage similar to that suffered by members of minority groups. The *Adarand* decision

applies strict scrutiny to actions of the federal government that use race. Actions taken with respect to gender, however, are scrutinized by a lesser standard of review, and thus the same requirements we propose to ensure that race-conscious programs are narrowly tailored should not necessarily also apply to programs for women.

C. Compelling Interest for the Use of Race-Conscious Measures

A few comments questioned the federal government's ability to use race-conscious action in procurement. Those comments stated that there was an insufficient record of discrimination by the government in procurement to support race-conscious activity.

When the proposal was published in the **Federal Register**, it was accompanied by an appendix titled ''The Compelling Interest for Affirmative Action in Federal Procurement: A Preliminary Survey.'' 61 FR 26050. That report documented the effects public and private discrimination has had on business formation and development, and the way discrimination has hindered the ability of minority-owned firms to compete for and win federal contracts. The report demonstrated that race-conscious means are still necessary to ensure that minority-owned firms have the ability to compete fairly for federal procurement dollars.

Subsequently, the Urban Institute published ''Do Minority-Owned Businesses Get A Fair Share Of Government Contracts,'' its survey of the results of numerous state and local disparity studies. The Urban Institute found generally that ''minority-owned businesses receive far fewer government contract dollars than would be expected based on their availability,'' and made extensive findings similar to those published in the **Federal Register**. The appendix to the procurement reform proposal, and the Urban Institute's study, demonstrated that a compelling interest warranting race-conscious efforts in federal procurement remains.

Mark L. Gross,

Deputy Chief, Appellate Section, Civil Rights Division.

[FR Doc. 97–12190 Filed 5–8–97; 8:45 am]

BILLING CODE 4410–13–P

DEPARTMENT OF JUSTICE

Antritrust Divsion

United States v. Jeff Mulkey, et al., Civ No. 97–234 MA; Response of the United States to Public Comments Concerning the Proposed Consent Decree

Pursuant to Section 2(d) of the Antritrust Procedures and Penalties Act, 15 U.S.C. § 16(d), the United States publishes below the written comments received on the proposed Consent Decree in *United States* v. *Jeff Mulkey, et al.*, Civil Action No. 97–234 (MA), United States District Court for Oregon, together with its response thereto.

Copies of the written comments and the response are available for inspection and copying in Room 3235 of the Antitrust Division, United States Department of Justice, Tenth Street and Constitution Avenue, N.W., Washington, D.C. 20530 (telephone 202/514/2481) and for inspection at the Office of the Clerk of the United States District Court for the District of Oregon, United States Courthouse, Madison & Broadway, Portland, Oregon.

Rebecca P. Dick,

Deputy Director of Operations.

In the United States District Court for the District of Oregon

State of Oregon, *ex rel..*, Attorney General Hardy Myers State of Washington, *ex rel.*, Attorney General Christine O. Gregorie, State of California, *ex rel.*, Attorney General Daniel Lungren, United States of America, Plaintiffs, v. Jeff Mulkey, Jerry Hampel, Todd Whaley, Brad Pettinger, Joseph Speir, Thomas Timmer, Richard Sheldon, Dennis Sturgell, Allan Gann and Russell Smotherman, Defendants. Civil Action No. CV 97 234–MA United States' Response to Public Comments Filed: May, 1997.

I. Background

On February 11, 1997 the United States jointly filed with the states or Oregon, California and Washington a complaint to prevent and restrain the defendants from violating Section One of the Sherman Act (15 U.S.C. § 1). At the same time, a Stipulation was filed in which the parties agreed that the Consent Decree, lodged with the Court in conjunction with the filing of the Stipulation, may be filed and entered by the Court at any time after the expiration of the sixty (60) day period for public comment provided by the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16 (b)–(h). The sixty day public comment period terminated on April 25, 1997.

Under the Antitrust Procedures and Penalties Act notices were published in the **Federal Register** and the Portland Oregonian directing anyone who wished to comment on the Consent Decree to send their comments to the United States Department of Justice Antitrust Division's San Francisco Office. The Antitrust Division has received comments from the following:

1. Peter G. Heckes—Oysterville, Washington.
2. T.J. Lindbloom—Roseburg, Oregon.
3. Lyle Hartzell—Westlake, Oregon.
4. Dorothy Nicholson—Florence, Oregon.
5. Rita J. Sellers—Reedsport, Oregon.
6. Katy Ellis—Roseburg, Oregon.
7. Debbie Coffman—Eugene, Oregon.
8. Travis Wolf—Florence, Oregon.
9. Bill Bradbury—Bandon, Oregon.
10. Jim Edson—South Beach, Oregon.
11. Nick Furman—Coos Bay, Oregon.

The United States Department of Justice's Antitrust Division has carefully reviewed the comments from the above individuals and has prepared this response to address issues raised in those comments.

II. Response to Public Comments

The Comments fall into two principal categories: (1) There was insufficient evidence to support the allegations in the Complaint; and (2) it was not fair for the plaintiffs to name only the defendants in this matter since there were hundreds of other fishermen who participated in the alleged tie-up and this type of conduct has long been commonplace in the industry. The comments criticize the actions and behavior of the plaintiffs in bringing this case. None of the comments discuss the terms or impacts of the decree and, thus, do not discuss whether entry of the Consent Decree is in the public interest. Collectively, they indicate that commercial crab fishermen have violated the antitrust laws for more than just the charged 1995–96 season. In short, they support, rather than attack, a finding that entry of the Consent Decree is in the public interest.

The comments reflect in part a misunderstanding of the antitrust laws and the limited exemptions granted fishermen from the antitrust laws by the Fishermen's Collective Marketing Act (''FCMA'') (15 U.S.C. §§ 521–522). As pointed out in the Competitive Impact Statement filed in this matter, the FCMA provides protection from the antitrust laws only if fishermen jointly make marketing decisions as members of a fish marketing association formed pursuant to the terms of the FCMA. The FCMA does not protect fishermen who are not members of a fish marketing association and it does not protect fish marketing association members who