UNITED STATES BANKRUPTCY COURT
DISTRICT OF ALASKA

In re GOLD KING MINES, INC., Debtor(s)	Case No. 3-84-00175-HAR In Chapter 7 MEMORANDUM DECISION REGARDING TRUSTEE'S § 506(c) CLAIM AGAINST THE ATKINSONS AND OTHER FEE ISSUES[1]

Contents Page

[1] Concurrent with the filing of this memorandum, the court will file a table as a map to assist the tracking of the extensive briefing in the fee matters and the related attack by the trustee against the secured creditors claims under 11 USC § 502(d) because of an alleged preference. See, Order Dismissing Trustee's § 502(d) Defense to Proofs of Claims Nos. 41-45 [Atkinsons], Docket Entry 648.

1. INTRODUCTION- The main asset in this case was remote Alaska gold mining claims, which the trustee, after 18 years of diligent effort, finally converted to cash in the amount of about $679,000. The Atkinsons, whose secured claims were about $240,000 when the case was filed in 1984, now total over $900,000 due to accruing interest. They would have been paid in full had the claims been liquidated in the early years. Now, after 20 years, they would only receive about $252,000 if the fees and costs of the trustee's attorney (about $392,000) and fees of the accountant, the trustees and the US Trustee (about $34,000 total) are allowed as a surcharge against the sale proceeds.

The secured creditors argue that: (a) the trustee's fees are not reasonable, necessary, or beneficial, (b) they did not consent to the representation of their interest by the trustee so as to justify the allowance of attorney fees under 11 USC § 506(c), and (c) the trustee was working for the unsecured creditors, not the secured creditors.

The trustee's attorneys' fees and costs will be partially allowed under § 506(c) in an amount of about $233,000. The attorneys efforts in litigating a quiet title action and with the government for just compensation in condemnation, and in settling with the government, were necessary steps in disposing of the mining claims and directly benefitted the secured creditors. The attorneys have also established that the efforts in the early years at obtaining legislation to extend the statute of limitation on inverse condemnation and validation of the claims was beneficial to the secured creditors. The attorneys have not, however, been able to sustain the difficult burden of proof of establishing that their creative efforts to reach a political or administrative resolution in their early years of representation

were a benefit to the secured creditors, who, had they obtained possession of the property, might well not have incurred those expenses, but played a waiting game.

Even though the trustee initially hoped to benefit the unsecured creditors, the passage of time and the accrual of interest on the secured claims made this impossible, but the trustee nonetheless preserved the mining claims and the secured creditor would have likely incurred many of the same expenses had it owned the claims outside bankruptcy.

I will allow or disallow surcharges with respect to the several trustees and the estate's accountant as follows:

Bennie Leonard, chapter 11 trustee from 1987-1997 . . . . . $750.00
William Barstow, chapter 11 and chapter 7 trustee from 1997 . . . . . $8,324.22
Russ Minkemann, accountant for the trustee $0.00

2. FACTUAL AND PROCEDURAL BACKGROUND-[2]

2.1 Description of Chapter Proceedings, Trustees, Attorney, and Sale of Principle Asset-

Date	Event
July 19, 1984	Chapter 11 case filed by Wieler brothers as shareholders of debtor
November 25, 1984	Bennie Leonard appointed as chapter 11 trustee
June 6, 1988	Cabot Christianson appointed as successor attorney for trustee
July 2, 1997	William Barstow appointed as successor chapter 11 trustee

[2] For an extensive exposition of the facts surrounding this two decade saga in bankruptcy court, see the MEMORANDUM DECISION [Bennie Leonard, Paul Wieler, Eric Wieler, Marianne Pilant, Lisa Rogers] in the Adversary Proceeding No. 3-84-00175-001-HAR, Bennie Leonard, Trustee, Plaintiff v Eric E. Wieler, Paul R. Wieler, Estate of John H. Wieler, Estate of Mark F. Rogers, Terry A. Chase, Estate of Barbara Rogers, Robert A. Kuhner, Arley R. Taylor, Carl C. Wikstrom, Continental Cascade, Inc., Glen Explorations, Inc., Northwest Associates, Estate of Scott Wieler, Sharon Wieler, Loretta Wieler, Glen Creek Mining Venture, Harvey Wieler, Mary Anne Wieler, Lisa Wieler, and All Others Claiming an Interest in Gold King Claims No. 1-15, Defendants, dated July 22, 1996. This opinion is reported in the Alaska Bankruptcy Reporter, 4 ABR 372, found on the court's website, http://www.akb.uscourts.gov. The Alaska Bankruptcy Reporter index to search for case, using the search term,"Gold King," is found at: http://www2.akb.uscourts.gov/index.htm. See, also, Trustee's Exhibit 62.

Date	Event
October 21, 1998	Case converted to chapter 7 (Barstow and Christianson remain as trustee and attorney)
2002	Receipt from sale of principal asset for $678,492, in global settlement with National Park Service to buy mining claims, after sharing $1,000,000 sale price with co-owners.

2.2. Overview of the Case- A good summary of why it took 18½ years in bankruptcy to accomplish the sale of the major asset of the estate is a provided by the trustee:[3]

> As described in the trustee's counsel's first fee application, Docket #604, and discussed in more detail herein, the key events in this case have been:
>
> - In 1988-90, the trustee testified in administrative proceedings, and argued in numerous meetings with federal agencies, Congress and interest groups from whom he solicited support, that the National Park Service should adopt an acquisition program for mining claims located within the Kantishna Mining District. The trustee was the lone claim owner arguing for an acquisition program in those early years. In 1990, the Park Service announced an official policy for acquisition of such claims;
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> - In 1990, the trustee secured legislative language from the United States Congress clearly identifying a December 31, 1999 statute of limitations for an inverse condemnation claim against the government;
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> - In the early 1990's, the trustee secured three federal appropriations totaling $12 million for the Park Service acquisition program, in order to enable the Park Service to acquire the Gold King claims;
>
> - In 1990, the trustee led a group of Alaska mining interests which persuaded the United States Interior Appropriations Committees to adopt a buyout mechanism for Kantishna mining

[3] Trustee's Motion to Authorize Payment of Trustee's Commission and Fees, U.S. Trustee Fees, and Trustee's Attorneys' and Accountant's Costs and Fees Pursuant to Section 506(c), at 5-6, Docket Entry 623.

claims which mandated the Park Service to offer to purchase such claims if requested by the owner, with the purchase price to be determined by a three-person arbitration-type panel. The Park Service subsequently refused to follow the valuation procedure set forth in the 1990 legislation, claiming that the statute was an unconstitutional delegation of executive authority;

- The trustee secured "hardship status" for the Gold King claims so that the Park Service would put the Gold King claims at the top of its acquisition priority list;

- In 1990, the trustee secured a written statement from the Park Service tentatively valuing the Gold King claims at $1.2 million, a statement and figure which was used in the successful settlement and sale of the claims in 2002;

- The trustee bird-dogged the Park Service from 1988 until through 1991 to complete its validity determination of the Gold King claims. The final Mineral Report, which was transmitted finally in February 1992, concluded that all 15 of the Gold King claims were valid, which was a necessary condition of any sale or patent of the claims;

- The trustee filed and litigated a quiet title action with the Wieler sisters through to the Ninth Circuit;

- In 1994, the trustee prepared and filed a patent application for the Gold King claims. Patent would increase the desirability of purchasing the claims to the government an[d] the public.

- The trustee secured language in Section 120, the legislation that led directly to the successful sale, that was specific to the situation of a bankruptcy trustee selling claims despite non-consenting co-owners;

- In 1997, the trustee filed an action, Adversary 003, against the government which sought to sell the claims to the government under Section 120 and also included an inverse condemnation claim;

- The trustee settled Adversary 003 by negotiating and closing the sale, including prevailing in appeals by unsecured creditor Steve Oliver to the federal district court and the Ninth Circuit.

During the course of this case, the court has heard many estimates of value, from about $4.5 million to less than nothing:

DOWL Engineering valuation (1984)	$4,558,000
Lohr lease option to purchase (1983)	$2,500,000
Bankruptcy schedules (1984)	$2,300,000
NPS letter in 1990	$1,200,000
NPS offer in 1994 ($267,000, less $462,000 remediation)	($195,000)
Settlement in 2002	$1,000,000

In a case tried in the district court in about 2000 before Judge Singleton, Kantishna Mining Co. v Babbitt,[6] involving claims similar to the Gold King mining claims, he found the cost of an accurate appraisal or valuation cost prohibitive due to the remoteness and uniqueness of the property. In other words, it is difficult to know or prove what the fair market value of the claims is, especially in a changing climate involving mining and environmental regulation. In that case, I have been advised, plaintiffs argued for a value of $6 million, and the government offered a lowball $98,000. The court awarded $700,000 after trial, plus interest, to bring the judgment to about $1 million. An experienced law firm for plaintiff, Patton Boggs, had amassed fees on an hourly basis (although they probably had the case on some kind of contingency) and costs of several million dollars. One of the biggest contributions of the trustee may have been not to follow the Atkinsons' suggestion that the Gold King mines issues with the government be prosecuted by Patton Boggs.

One of the Atkinsons' witnesses at the § 506(c) hearing was Larry Alberts, who had a similarly disappointing trial experience in the United States District Court in Anchorage for

[6] F98-007-CV-JKS in the United States District Court for the District of Alaska.

other Kantishna mining property owners. This leads the court to surmise that the trustees did not do a bad job after all for the Atkinsons, despite the cost of this case.

2.3. Summary of the Fees and Costs Sought as § 506(c) Surcharge- The attorneys have broken down their billing for fees and costs totaling $369,724.83 through October 30, 2002,[7] and $25,391.54, from November 1, 2002 through January 16, 2004,[8] in the following categories:

Billing Matter	Description of Attorney Fees by Matter (Italicized data is from second fee application)	Fees	Costs
01	Wieler quiet title adversary No. 001- trial	80,831.50	7,048.24
02	Wieler quiet title adversary No. 001 - appeals	59,723.00	0.00
03	General administration	19,120.50	10,175.91
03	General administration	6,474.00	606.54
04	Negotiation with gov't: legislative, administrative and sales efforts	54,281.50	663.46
05	Mining plans	2,800.50	0.00
06	Preservation of mining claims	2,544.50	1,377.82
07	Adversary No. 003 - suit against USA	12,089.00	300.00
08	Dealing with personal property on Gold King claims	5,553.50	0.00
09	Silver King claims	0.00	0.00
10	Settlement and 2002 sale of Gold King claims	26,838.00	0.00
10	Settlement and 2002 sale of Gold King claims	1,771.50	0.00
11	Claims analysis and objections	4,288.50	0.00
12	Taking claim; inverse condemnation case in US District Court	13,416.50	33.70
13	Validity determination; appraisal process; patent application	68,190.00	448.70
14	Section 506(c) Issue	13,470.50	0.00
15	Objection to Atkinson Claim	0.00	0.00

[7] See, trustee's attorneys' first fee application and table at page 4, Docket Entry 604, filed November 14, 2002.

[8] See, trustee's attorneys' second fee application and table at page 2, Docket Entry 654, filed January 20, 2004.

Billing Matter	Description of Attorney Fees by Matter (Italicized data is from second fee application)	Fees	Costs
	Totals for fees and costs from June 1988 to October 30, 2002	349,677.00	20,047.83
	Totals for fees and costs from November 1, 2002 to January 16, 2004	21,716.00	606.54
	Grand total for fees and costs from June 1988 to January 16, 2004	371,393.00	20,654.37

The fees and costs for other professionals and the trustees, totaling $34,733.86, and the U.S. Trustee's fees, are:

Trustees	Fees	Costs
Trustee's commission (William Barstow)	7,669.42	
Costs of former trustee, Bennie Leonard (POC No. 31)		13,947.90
Costs of current trustee (William Barstow)		654.80
Total	7,669.42	14,602.70
United States Trustee's Fees	Fees	
Chapter 11 fees (POC No. 28)	1,750.00	
Accountant	Fees	Costs
Russ Minkemann (Approved at Docket Entry 603)	10,447.50	264.24

The total sought for the attorneys, the trustees, the accountant and the US Trustee is:

	Fees	Costs	Totals
Attorneys	371,393.00	20,654.37	392,047.40
Trustees	7,669.42	14,602.70	22,272.12
US Trustee	1,750.00	0.00	1,750.00
Accountant	10,447.50	264.24	10,711.74
Totals	391,259.92	35,941.31	421,781.26

2.4. The Background of the § 506(c) Fee Dispute- The present proceeding is a dispute between the trustees (past and present) and their professionals on the one hand, and the Atkinsons on the other, as to how much can be surcharged against the proceeds of the Atkinsons' secured claim. The only funds in the estate come from a sale of the collateral, which did not produce enough to pay the secured claims of the Atkinsons in full.

Over the years, the judgment liens of the Atkinsons have accrued interest at the rate of 10.5% per year, and have gone from $240,000 when the case was filed in 1984,[9] to over $897,000 today.[10] Likewise, the total costs and fees of the trustees and their professionals have gone from $0 to over $425,000 at the present time.[11]

The Gold King mining claims were finally sold to the National Park Service in 2002 for $1,000,000, but about a one-third of that amount went to co-owners of the claims, the Pilant group.

The amount available to pay both the Atkinsons' secured claim and any fees which might be awarded under 11 USC § 506(c) for the reasonable, necessary and beneficial expenses of the trustee in preserving the mining claims is substantially deficient, as summarized in the following table:

Sale Proceeds and Deductions	Amount
Proceeds from sale to National Park Service	1,000,000.00
Less, share of Pilant, et al	(321,058.00)
Sale proceeds going to the estate	678,942.00
Trustee and professional fees claimed under § 506 (c) (approximate)	427,000.00
Amount trustee proposes to pay to Atkinsons (approximate)	251,000.00

The Atkinsons want the most of $678,058 – I am not sure how much the Atkinsons would concede, although they have consented to the trustee's attorneys receiving a $180,000 advance of fees and costs,[12] subject to disgorgement if the trustee does not prevail on his 506(c) argument, and might not contest a surcharge for fees of trustee Barstow and

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[9] Per trustee's attorneys' first fee application, Docket Entry 604, filed November 14, 2002, at 5-6.

[10] Per the Atkinsons' objection to the trustee's attorneys' first fee application. Docket Entry 610, at 1.

[11] See, section 2.4 of this memorandum.

[12] See, order at Docket Entry 211.

accountant Minkemann, if they are contained within a $180,000 maximum surcharge for everyone.

The trustee and the professionals wants to surcharge the $678,058 under § 506(c) to the tune of about $427,000 as the fees and costs necessary to sell the claims.[13] The Atkinsons have received a payment of $200,000 pending the final decision on the surcharge issue.[14]

2.5. The Injunction and the Long Legislative and Legal Battle for Just Compensation from the Government- The trustee set out the details of its 18 year contest with the federal government, mainly the National Park Service (NPS), in its motion for a § 506(c) surcharge against the Atkinsons, and in the declarations of Cynthia Christianson, an expert land attorney employed by the trustee, and Cabot Christianson, attorney for the trustees.[15]

The fees involved in these matters are found generally in the attorneys' billing codes, Matter 04 (Negotiations with government; legislative & adminstrative & sales efforts) for $59,723 in fees and $663.46 in costs and Matter 13 (Validity determination; appraisal process; patent application), for $68,190 in fees and $448.70 in costs, a total of $123,583.70.[16]

The trustee's attorneys ask the court to take a long view of the struggle to gain just compensation from the government. The Atkinsons ask the court to analyze the attorneys endeavors like the proverbial blind man trying to describe an elephant by addressing small pieces at a time.

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[13] See, section 2.4 of this memorandum.

[14] See, order at Docket Entry 624, filed January 23, 2004.

[15] See, discussion in Trustee's Motion to Authorize Payment of Trustee's Commission and Fees, U.S. Trustee Fees, and Trustee's Attorneys' and Accountant's Costs and Fees Pursuant to Section 506(c), at 12-29 Docket Entry 623; the three declarations of Cynthia Christianson (Docket Entries 662, 678 and 679); and, the declaration of Cabot Christianson (Docket Entry 659).

[16] See, section 2.4 of this memorandum.

The trustee, from 1988 through some time in the early to mid-1990s, tried to get the NPS to purchase the property. The trustee identified three options to dispose of the claims: (1) a private sale; (2) trying to use the federal "quick take" process; or (3) an inverse condemnation.

He determined that a private sale was not practical given the type of land involved and governmental road blocks to using it as mining property, the only practical commercial use. The government had no history of buying unpatented mining claims and the NPS might pay lip service to buying the property, but were heavy handed in dealing with parcels like the Gold King Mines' claims.

A quick take had many drawbacks, including the fact that the government could back out of the process if it did not like the price.

An inverse condemnation suit would have been costly and the estate had no funds with which to litigate. On the other hand, the NPS did have funds to litigate and was, by reputation, a nasty litigator. Plus, an inverse condemnation would have caused the government to stop the process of validating the claims – a process which was a predicate to patent, which the trustee thought might be necessary to ever get the government to buy the claims.

A worry was the possibility that the government might claim that the Gold King mining claims had been inversely condemned in the 1980s when the federal injunction against mining was in force. The trustee was instrumental in getting legislation approved which extended the statute to 1999. Without that, the claims might have been lost as a valuable asset in the early 1990s.

The Atkinsons treat this period, from 1988 to about 1993 as dead time because the government did not buy the claims. They argue they should not have to pay for the trustee's unsuccessful attempt to sell the claims to the government. The trustee points out that the

process of getting the government to ultimately buy the claims was a dynamic one of constant pressure, moves, thrusts and parries, involving the bankruptcy law, lobbying, politics and litigation, and that the actions of the trustee were a big factor in the final purchase by the government.

The Atkinsons offered the testimony of a staffer in Senator Stevens office, Lisa Sutherland, who was familiar with the mining claims and the Wielers.[17] She was also a friend since high school of one of the Atkinsons.

The tenor of her testimony was that others, instead of the trustee's attorneys (in particular, Cynthia Christianson), were mainly responsible for the NPS buying the claims. She did not seem to recall Ms. Christianson's involvement throughout the years as being very instrumental in the resolution.

I found Ms. Sutherland to be a biased witness, who offered, paraphrasing, that "the Atkinsons should not have to lose the value of their secured claims to the trustee's greedy attorneys." Her memory was faulty since she did have a number of contacts with Ms. Christianson.

One thing was very consistent with most of the witnesses in this case – the NPS was an overly aggressive litigator and sometimes disregarded the apparent will of Congress that people like the Wielers and the trustees in this bankruptcy be dealt with fairly.

The Atkinsons also offered the testimony of Larry Albert,[18] a mining law attorney and expert in lands matters in Alaska. While Mr. Albert had a slightly different historical prospective about the travails of the Kantishna miners in dealing with the government, he went out of his way to avoid any criticism of Ms. Christianson's manner of dealing with the case.

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[17] Declaration of Lisa Sutherland, Docket Entry 673 and cross-examination to trial.

[18] Declaration of Lawrence V. Albert [Under Seal], Docket Entry 672, and cross-examination at trial.

Throughout this long bankruptcy, the Atkinsons have not filed for relief from stay. They did not specifically ask the trustee to represent them, but my impression is that they were using the trustee, to a degree, to avoid direct involvement with a possible environmental hazard claim, and to derive the benefits of a trustee's powers under the bankruptcy code. In fairness, they also probably believed that a sale of the mining claims would pay their secured claims in full, but my overall impression is that they promoted the handling of this case by the trustees for the Atkinsons personal benefit. The Atkinsons did not, however, expressly authorize the trustee to represent its interests or agree to a carve out from its collateral interest.

The trustee's attorneys worked this case in various court, administrative and legislative venues, in Anchorage and Washington, DC. They visited the mining claims in the Alaska bush.

Though the trustees and their attorneys had hoped for many years to be able pay a dividend to unsecured creditors, their endeavors necessarily benefitted the Atkinsons, also.

2.6. The Battle With the Wieler Brothers and Sisters Over Title to the Claims- The court will not dwell on the problems caused by the Wieler brothers, and ultimately their sisters, who late in the game became co-owners of about a third of the Gold King claims. The facts surrounding these matters, which are mainly covered in trustee's attorneys' billing codes as: Matter 01 (Adversary 001-trial) for $80,831.50 in fees and $7,048.24 in costs, and Matter 02 (Adversary 001-appeals) for $59,723 in fees, for a total of $147,602.70.

The facts involving these endeavors, at least at the trial level, are set forth in a lengthy memorandum and judgment in Leonard v Wieler, et al, Adv. No. 3-84-00175-001-HAR, as described in footnote 2.

2.7. The Inverse Condemnation Suit and the Sale of the Gold King Claims- In 1997, a bill was passed in Congress, Public Law195-83, that specially provided for the trustee to force

the government to buy the Gold King mining claims for just compensation. The trustee's attorneys were instrumental in drafting Section 120 which allowed the trustee to do this even though he was only part owner of the claims after the results were known in Adv. No. 001.

These fees and costs are identified as Matter 07 (Adversary 003) for $12,089 in fees and $300 in costs and Matter 10 (Settlement and 2002 sale of claims) for $28,609.50 in fees, for a total of $40,998.50.[19]

The matter was removed to district court before Judge Holland and, in a settlement conference before Judge Singleton, eventually settled for $1,000,000. This involved substantial negotiations with the recently discovered co-owners, Maryann Pilant and her sister.

3. LEGAL ISSUES TO BE DECIDED- The broad issue is whether the fees and expenses sought by the trustees and their professionals (the accountant and the attorneys), are allowable from the funds received from the sale of the Gold King Mines mining claims, under § 506(c), from the balance due to the Atkinsons. Were the fees sought reasonable and necessary and did their activities benefit the Atkinsons in a direct, quantifiable way? Finally, did the Atkinsons expressly or impliedly consent to the work the trustees and their professionals did to preserve the mining claims?

4. LEGAL ANALYSIS-

4.1. The § 506(c) Framework in General- 11 USC § 506(c) provides:

> The trustee may recover from property securing an allowed secured claim the reasonable, necessary costs and expenses of preserving, or disposing of, such property to the extent of any benefit to the holder of such claim.

The purpose of § 506(c) is to codify "the equitable principle that a lienholder may be charged with the reasonable costs and expenses incurred by the estate that are necessary to

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[19] See, section 2.4 of this memorandum.

preserve or disposing of the lienholder's collateral to the extent the lienholder derives a benefit as a result. [citation omitted]" This is not a broad authorization to charge administrative expenses to a secured creditor[20]

The expenses must be "necessary" to preserving or disposing of the property. These may include "appraisal fees, auctioneer fees, advertising costs, moving expenses, storage charges, payroll of employees directly and solely involved with the disposition of the subject property, maintenance and repair costs, and marketing costs. ・・・ In order to be recovered as a 'necessary' expense, however, each item must (i) have been incurred to preserve or dispose of the secured creditor's collateral, and (ii) must have been necessary under the circumstances of the case. An expense is not 'necessary' if it bears no relation to the collateral or was not essential to preserve or increase the value of the collateral. [citations omitted]"[21] The expenses must also be "reasonable."[22]

The most troublesome prerequisite is the determination of whether the expense confers a "benefit" on the lienholder. The two lines of authority, one strict and the other more generous, are identified in Colliers:[23]

> In general, courts disagree over whether the requisite "benefit" must arise directly from some specific act taken with respect to the specific collateral (e.g., a repair of the collateral that enhances its value), or whether the requisite "benefit" may also arise from actions that are undertaken to enhance the value of the collateral, but that do not necessarily succeed in doing so (e.g., the debtor's genuine but

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[20] 4 Collier on Bankruptcy , ¶ 506.5[1] (15th Ed Rev 2004); Bear v Coben (In re Golden Plan of California, Inc.), 829 F2d 705, 713 (9th Cir 1986).

[21] 4 Collier on Bankruptcy , ¶ 506.5[3] (15th Ed Rev 2004).

[22] 4 Collier on Bankruptcy , ¶ 506.5[4] (15th Ed Rev 2004) .

[23] 4 Collier on Bankruptcy , ¶ 506.5[5] (15th Ed Rev 2004); In re Flagstaff Foodservice Corp., 739 F2d 73 (2nd Cir 1984) ["Flagstaff I"]and In re Flagstaff Foodservice Corp., 762 F2d 10 (2nd Cir 1985) ["Flagstaff II"]; and, United States v Boatman's First National Bank, 5 F3d 1157 (8th Cir 1993), overruled on other grounds, Hartford Underwriters Ins. Co. v. Magna Bank, N.A. (In re Hen House Interstate, Inc.), 177 F3d 719 (8th Cir 1999) (en banc), aff'd, 530 US 1, 120 S Ct. 1942, 147 L Ed 2d 1 (2000).

> unsuccessful attempt to reorganize at the behest of the secured creditor, and for the sake of preserving the value of the secured creditor's collateral). The leading cases requiring the demonstration of an actual, direct benefit are General Electric Credit Corp. v. Levin & Weintraub and General Electric Credit Corp. v. Peltz (In re Flagstaff Foodservice Corp.), two decisions arising from the same failed reorganization case in the Second Circuit. The leading case for the view premised on the creditor's "ambition" of a benefit is the Eighth Circuit's opinion in United States v. Boatmen's First National Bank . [citations omitted].

The Flagstaff cases adopt a narrow view regarding the allowability of § 506(c) surcharges. In Flagstaff I, a secured creditor whose collateral was sought to be surcharge objected to having to pay the fees of the trustee's professionals. The creditor had gone from being oversecured when the chapter 11 case started to being undersecured when the surcharge was sought. The case was administratively insolvent. The creditor held a superpriority lien for postpetition financing, and was thus entitled to a claim superior to general administrative claimants. The court also rejected the argument that the professional fees were justified because the creditor hoped to recover its claim through a successful reorganization, and actually received some repayment of the prepetition debt during the case. In rejecting the argument, the court noted that the benefit was "incidental" and that had the creditor been given its collateral at the beginning of the case it would have been fully secured.

In Flagstaff II, debtor sought to recover as a surcharge funds to cover unpaid payroll taxes for which debtor's officers might be personally liable. The court rejected the argument that the attempt to preserve the going concern value of the debtor was compensable under § 506(c). It held that to be compensable under § 506(c) the funds were expended "primarily for the benefit of the creditor and that the creditor directly benefitted from the expenditure."[24]

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[24] In re Flagstaff Foodservice Corp., 762 F2d at 12.

Colliers indicates the results were correct under the facts in the Flagstaff cases (the link between the preservation of the collateral and the expenses was weak), but found the reasoning overly narrow.[25]

The 8th Circuit, in United States v Boatmen's First National Bank, took a more lenient view. It allowed a surcharge for unpaid postpetition payroll taxes on the grounds that, though the creditor did not expressly consent that its collateral could be used for administrative expenses, the secured creditor would have itself incurred such expenses if it had taken over the business and attempted to preserve the going concern value of the collateral.

Colliers rationalizes the differing results as follows:[26]

> Ultimately, the different outcomes in the Boatmen's decision and the two Flagstaff cases are perhaps best explained by reference to the very different facts of these cases. Significantly, the debtor's attempt to reorganize in Flagstaff actually placed the secured creditor in a worse position than it had occupied before the debtor filed for chapter 11 relief. In contrast, the secured creditor's position in Boatmen's appears to have been enhanced by the fact that the debtor's ability to maintain its operations preserved the going concern value of the debtor's stores, which value would have been lost in liquidation. Moreover, Boatmen's may be an example of a case in which the secured creditor with a lien on virtually all of the debtor's operating assets tacitly encouraged the debtor to file for chapter 11 relief essentially in order to conduct an orderly liquidation. As section 506(c) makes plain, a secured creditor should not be entitled to reap all of the benefits of an orderly liquidation of its collateral, yet avoid the necessary expenses that made the orderly liquidation possible. By analogy, in the nonbankruptcy receivership context, all of the expenses of the receivership are typically paid from the collateral before the secured party receives anything. To the extent that an administrative claimant contributes to the reorganization effort in a chapter 11 case, and enhances or preserves the secured creditor's recovery as a result, the claimant's expense should be paid from the

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[25] 4 Collier on Bankruptcy , ¶ 506.5[5][a] (15th Ed Rev 2004).

[26] 4 Collier on Bankruptcy , ¶ 506.5[5][b] (15th Ed Rev 2004).

> secured creditor's collateral pursuant to section 506(c) to the extent that the expense was also necessary and reasonable.

Finally, a secured creditor who expressly consents to the payment of specific administrative expenses as a surcharge will have that agreement enforced against it to allow the agreed upon administrative expenses to be paid out of the collateral.[27]

As will be seen in the following section 4.2 of this memorandum, the 9th Circuit hews more closely to the narrower Flagstaff Foodservice line of cases than those circuits which follow United States v Boatmen's First National Bank.

4.2. An Outline of Ninth Circuit Holdings Under § 506(c)- The 9th Circuit has issued a number of opinions interpreting § 506(c). Some of the key holdings are:

- The surcharge is not, per se, for the payment of administrative expenses, but is an assessment against a lienholder's recovery for a benefit conferred to the lienholder.[28] Generally, administrative expenses cannot be charged against the collateral without a showing that they were: (a) reasonable; (b) necessary, and (c) beneficial to the secured creditor. The party seeking the surcharge has the burden of showing that it provided a quantifiable benefit to the secured creditor.[29] The surcharge is limited to the benefit actually proved.[30] Conversely, if the benefit is merely incidental, or do not directly benefit the secured creditor, a surcharge will be denied.[31]

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[27] 4 Collier on Bankruptcy , ¶ 506.5[5][c] (15th Ed Rev 2004).

[28] In re Debbie Reynolds Hotel & Casino, Inc., 255 F3d 1061, 1067 (9th Cir 2001).

[29] In re Debbie Reynolds Hotel & Casino, Inc., 255 F3d at 1068; In re Cascade Hydraulics and Utility Service, Inc., 815 F2d 546, 548 (9th Cir 1987); In re Choo, 273 BR 608, 612 (9th Cir BAP 2002).

[30] In re Compton Impressions, Ltd., 217 F3d 1256, 1261-62 (9th Cir 2000); In re Cascade Hydraulics and Utility Service, Inc., 815 F2d at 548.

[31] In re Glaspy Marine Industries, Inc., 971 F2d 391, 393-94 (9th Cir 1992)

- Mere cooperation by the secured creditor with the debtor or trustee does not create liability for a surcharge. Consent to some expenses as a surcharge from the collateral is not a blanket consent to additional expenses being a charge on the collateral.[32]
- It is not necessary that the expenses have been incurred with the best interests of the secured creditor in mind, but rather need only be reasonable, necessary costs and expenses of preserving or disposing of collateral.[33]

4.3. A Trustee's Focus on Paying Unsecured Creditors Does Not Waive the Right to a Surcharge Under § 506(c)- The Atkinsons argue that the attorneys and trustees are debarred from recovery under § 506(c) because they have often stated that their motivation was to pay a dividend to the unsecured creditors from the proceeds of the mining claims, as opposed saying they were trying to protect the Atkinsons' interests.[34] As it turned out, however, the trustee's work was primarily for the Atkinsons because of the time it took to liquidate the mining claims, and the accruing interest on the Atkinsons' secured claims at 10.5% per year over more than 18 years. The trustee and his professionals should not be punished for their optimism and lack of a crystal ball.

The Atkinsons rely in particular on In re Proto-Specialties, Inc., in which an Arizona bankruptcy judge came up with the following test for when a trustee could start relying on a § 506(c) surcharge. "What is required is is a manifested, objective act by the Trustee to establish a cleavage date after which the Trustee's efforts went only to preserving the assets

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[32] In re Cascade Hydraulics and Utility Service, Inc., 815 F2d at 548-49.

[33] In re Choo, 273 BR 608, 611-12 (9th Cir BAP 2002).

[34] E.g., see, Atkinson Trial Brief [Corrected/Updated], Docket Entry 680 [referred to in this memorandum as "Atkinson Trial Brief"], at 6-8, citing numerous cases from other circuits.

that were to go to the lienholders."[35] This concept has found no support in the 9th Circuit or elsewhere, and is called into question by other cases from this circuit. The 9th Circuit held, In Palomar Truck Corp.,[36] that

> The Code does not require that the claimant have the best interests of the secured creditors in mind, but only that the expenditures be "reasonable, necessary costs and expenses of preserving, or disposing of, such [secured] property." 11 U.S.C. § 506(c).

The focus should be on whether the collateral is protected or disposed of in a way that benefits the secured creditor, without regard to whether the trustee states that was the primary subjective motivation.[37]

4.4. Fees and Costs of Attorneys Clearly Within § 506(c) [$205,973.80 Allowed]- The three items that are perhaps clearest in my mind as qualifying under § 506(c) are:[38]

- the attorneys conduct of the adversary proceeding to quiet title and the handling of the appeal of the bankruptcy court's judgment to the district court and 9th Circuit; these are encompassed in Billing Matters 001 and 002, for a total of $147,602.70 for costs and attorney fees;
- the conduct of Adversary Proceeding No. 003, the inverse condemnation suit and the ultimate settlement with the government on the Wieler sisters, consummated in the sale of the Gold King Mining claims; these are encompassed in Billing Matters 07, 10, and 12, for a total of $54,448.70 for costs and attorney fees; and,

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[35] In re Proto-Specialties, Inc., 43 BR 81, 83 (Bankr D Ariz 1984).

[36] In re Palomar Truck Corp., 951 F2d 229, 232 (9th Cir 1991), cert den 506 US 821 (1992). The case has been overruled by Hartford Underwriters Ins. Co. v Union Planters Bank, N.A., 530 US 1 (2000) on the principle that § 506(c) can only be invoked by the trustee.

[37] In re Choo, 273 BR 608, 611-12 (9th Cir BAP 2002).

[38] See, table of billing matters in section 2.4 of this memorandum.

- the preservation of the mining claims; these are encompassed in Billing Matter 06 for a total of $3,922.32 for costs and attorney fees.

These three items total $205,973.80 for attorneys fees and costs.

The claims would have never been sold without the trustee's undertaking the arduous task of clearing title to the claims. The facts are referred to in section 2.6 of this memorandum which point the reader to the bankruptcy court's lengthy adversary proceeding opinion in the quiet title action, which ultimately was upheld on appeal all the way to the circuit. The Atkinsons argue that their judgment was against Gold King Mines and the Wieler brothers, and that they received no benefit as far as the suit sought to judicially estop the Wieler brothers' postpetition attempt to claim title to the mining claims in their individual names. They say they could have merely executed on the Wielers' alleged ownership interest or their shares in Gold King and the judicial estoppel suit was not necessary to protect their interests.[39]

First, the judicial estoppel portion of the quiet title action was a "slam-dunk" issue. A relatively small portion of the fees and costs applied to litigating it. Second, the trustee and George Atkinson did consider a scenario where Atkinson would acquire the Wieler's interest to take that troublesome duo out of the picture and allow the trustee and Atkinson to work in concert to dispose of the claims or attempt (whether for show or for real) to undertake a mining operation and thus force the government's hand. For some reason, the execution against the Wieler's shares and the Wielers themselves never happened, and the Wielers filed their own chapter 7 later.

There was a clear benefit in the trustee resolving the issue of the Wielers' interest at nominal cost in the same suit as the Wieler sisters interest was litigated. Until the status of

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[39] Atkinson's Trial Brief at 39-41.

title was resolved, the government had a built-in excuse to drag its feet in dealing with the just compensation issue.

The quiet title occurred in the middle third of the eighteen year saga. The costs were ones that the Atkinsons would have had to bear, and there is no challenge as to the reasonableness of the costs in general. The resolution of the title issues set matters up for the final third of the case, the closing gambit – proving up on just compensation and/or selling the land to the government. These are costs which the Atkinsons would have borne in one-form-or-another, and thus they benefitted from attorneys service in incurring them.[40] Both sides agreed that the NPS was aggressive and unfair in its dealings with mining claimants, and acknowledge clearing title to the mining claims was a necessary, critical step to sell them to the government.

With regard to the end-game fees, I find them to be reasonable, necessary and beneficial to the Atkinsons, and not just incidental to the recovery. Glaspy Marine held that property taxes did not qualify for § 506(c) treatment based on the argument that they provided police and fire safety benefits to the debtors because such benefits were "incidental" and did not directly protect or preserve the collateral.[41] The benefits in our case are quantifiable because the attorneys' endeavors provided the pot of money, such as it is, to pay the claims.[42] These costs are not seriously challenged.

The preservation of the mining claims concerned the attorneys making sure that the annual labor and related filings were done to preserve an ongoing interest in the claims on a yearly basis. This had to be done with the aid of the adversarial Wieler brothers. The value

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[40] In re Compton Impressions, Ltd., 217 F3d 1256, 1261-62 (9th Cir 2000).

[41] In re Glaspy Marine Industries, Inc., 971 F2d 391, 393-94 (9th Cir 1992).

[42] In re Cascade Hydraulics and Utility Service, Inc., 815 F2d 546, 548 (9th Cir 1987); In re Debbie Reynolds Hotel & Casino, Inc., 255 F3d 1061, 1067-68 (9th Cir 2001); In re Compton Impressions, Ltd., 217 F3d 1256, 1262 (9th Cir 2000).

to preserving the Atkinsons' collateral is self-evident. If the mining claims were lost through improperly doing and recording the annual labor, the value of the Atkinsons' collateral would have been lost.

4.5. Fees and Costs of Attorneys Clearly Outside § 506(c) [$0.00 Allowed]- The three items that are clearest in my mind as not qualifying under § 506(c) are:[43]

- the attorneys dealing with the disposition of personal property on the Gold King claims; these are encompassed in Billing Matter 08, for a total of $5,553.50 for costs and attorney fees;
- the claims analysis and objections; these are encompassed in Billing Matter 11 for a total of $4,228.50 for costs and attorney fees; and,
- the section 506(c) issue; these are encompassed in Billing Matter 14 for a total of $13,470.50 for costs and attorney fees.

These three items total $23,312.50.

Although the trustee has rationalized the need or desirability remove the heavy equipment from the mining to facilitate a sale of the claims and minimize environmental claims, I find that the matter still relates to personal property and is incidental to the secured claims of the Atkinsons. The value to the secured creditors is not quantifiable.[44] I.e., I am not sure the sale of the personal property was a predicate to selling the claims.

The claims objections process did not benefit the Atkinsons directly. In fact, since the allowance of unsecured claims would not effect the distribution, which will be to the Atkinsons or to various § 506(c) claimants, the claims objection process was largely superfluous.

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[43] See, table of billing matters in section 2.4 of this memorandum.

[44] In re Debbie Reynolds Hotel & Casino, Inc., 255 F3d at 1068; In re Cascade Hydraulics and Utility Service, Inc., 815 F2d 546, 548 (9th Cir 1987); In re Choo, 273 BR 608, 612 (9th Cir BAP 2002).

The matter identified as the "Section 506(c) Issue" appears to be an attempt to surcharge the Atkinsons for their failure to concede on the issue and requiring the trustee to brief it. While an attorney representing the estate can normally bill for the cost of doing the fee application,[45] this is obviously something more than that. I am confident billing the Atkinsons for the § 506(c) dispute would be an "American Rule" matter, with the trustee's attorneys bearing their own attorney fees.[46] In any event, there is no benefit to the Atkinsons in the trustee litigating with them, which is what Matter 14 seems to be about.

4.6. Fees and Costs of Attorneys in the Gray Area § 506(c) [$26,860.50 Allowed]- There are four items in the gray area:

- the attorneys charge for general administrative tasks; these are encompassed in Billing Matter 03, for a total of $36,376.95 for costs and attorney fees;
- the attorneys charge for negotiation with the government; legislative, administrative and sales efforts; these are encompassed in Billing Matter 04, for a total of $54,944.96 for costs and attorney fees;
- the attorneys charge for mining plan; these are encompassed in Billing Matter 05, for a total of $2,800.50 for costs and attorney and,
- the attorneys charge for validity determination; appraisal process; patent application; these are encompassed in Billing Matter 13, for a total of $68,638.70 for costs and attorney fees.

The total of these four items is $162,761.10. Generally, these matters relate to the first third (or a few years longer, to about 1993) of the 18 years. The court can see obvious benefit in the trustee and his attorneys endeavors to overcome obstacles that allowed the government to ignore or stonewall the trustee in an attempt to sell the mining claims. But,

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[45] In re Smith, 317 F3d 918, 927 (9th Cir 2002).

[46] Matter of Sparkman, 703 F2d 1097, 1099 (9th Cir 1983).

had the parties known what they know now, the trustee would have bargained for consensual carveouts or abandoned the property.

The court cannot assume that the attorneys activities necessarily benefited the Atkinsons by these endeavors. Had the Atkinsons recovered the claims at the beginning of the case, they would not have had the same imperative to liquidate the mining claims in the same manner as did the trustee. Indeed, if they knew in hindsight, that the they would have had to pay over $400,000 to realize only about $250,000, they would probably have not gambled the $400,000 in transaction expenses.

On the other hand, the Atkinsons would not have recovered as much as the trustee did without someone doing the spade work that the attorneys did in the early years:

- to assure that the claims were not lost because of the running of a six year statute of limitation in about 1990 based on a possible government argument that there was an inverse condemnation in 1984 which started the statute running;
- the NPS would never have gotten around to validating the claims, a predicate to paying fair value, but for the hounding of the attorneys;
- an appraisal would likewise not have been accomplished without pressure from the attorneys, and even though the NPS would not allow a decent appraisal process to evolve, the political pressure to do so or resolve the matter was supplied by attorneys,

Against these apparent benefits conferred by the attorneys is the stringent case law applicable to § 506(c) in this circuit. For example, in Flagstaff I, the court pointed out that an oversecured claim at the commencement of a case, which turns unsecured during the course

of an attempted reorganization, should not geneally be subject to a § 506(c) surcharge to add insult to the injury of the secured creditor.[47]

The question boils down to "on whose back does the monkey ride?" I.e., who takes the fall when there is not enough money to pay everyone. In this circuit, its pretty hard to get the monkey off the back of those seeking a surcharge.

I have tried to analyze the three large billing matters in this catagory and determined I would make a Solomonic cut and award 15% of the requested surcharges for Matter 03 (General Adminstration), Matter 04 (Negotiations with the Government, et al), and Matter 13 (Validity Determination, et al). This is conservative enough to allow for the recognition of the work the attorneys did which assisted in the end-game (see, section 4.5 of this memorandum), but not so generous as to offend the stringent law regarding allowance of § 506(c) awards in the 9th Circuit. The line items for these 15% allowances can be seen on the table in the next section, and they total $24,060.00 for the three billing matters.

With respect to Matter 05 (Mining Plans), there is enough evidence to find the Atkinsons consented to these costs during the negotiations to trump the obstreperous Wieler brothers, so I will allow the entire $2,800.50.[48]

The total for this section is $26,860.50.

4.7. Table Summarizing Attorneys § 506(c) Allowance [$232,834.30 Allowed]- The court will allow attorney fees of $222,289.50 and costs of $10,544.76 to the attorneys, for a total of $232,834.30, as summarized on the following table:

Billing Matter	Description of Attorney Fees by Matter (Italicized data is from second fee application)	Fees Claimed	Costs Claimed	Fees Allowed	Fees Allowed
01	Wieler quiet title adversary No. 001-trial	80,831.50	7,048.24	80,831.50	7,048.24
02	Wieler quiet title adversary No. 001 - appeal	59,723.00	0.00	59,723.00	0.00

[47] See, discussion in section 4.1 of this memorandum.

[48] In re Cascade Hydraulics and Utility Service, Inc., 815 F2d at 549.

Billing Matter	Description of Attorney Fees by Matter (Italicized data is from second fee application)	Fees Claimed	Costs Claimed	Fees Allowed	Fees Allowed
03	General administration	19,120.50	10,175.91	2,900.00	1,525.00
03	General administration	6,474.00	606.54	975.00	90.00
04	Negotiation with gov't: legislative, administrative and sales efforts	54,281.50	663.46	8,150.00	100.00
05	Mining plans	2,800.50	0.00	2,800.50	0.00
06	Preservation of mining claims	2,544.50	1,377.82	2,544.50	1,377.82
07	Adversary No. 003 - suit against USA	12,089.00	300.00	12,089.00	300.00
08	Dealing with personal property on Gold King claims	5,553.50	0.00	0.00	0.00
09	Silver King claims	0.00	0.00	0.00	0.00
10	Settlement and 2002 sale of Gold King claims	26,838.00	0.00	26,838.00	0.00
10	Settlement and 2002 sale of Gold King claims	1,771.50	0.00	1,771.50	0.00
11	Claims analysis and objections	4,288.50	0.00	0.00	0.00
12	Taking claim; inverse condemnation case in US District Court	13,416.50	33.70	13,416.50	33.70
13	Validity determination; appraisal process; patent application	68,190.00	448.70	10,250.00	70.00
14	Section 506(c) Issue	13,470.50	0.00	0.00	0.00
15	Objection to Atkinson Claim	0.00	0.00	0.00	0.00
Totals for fees and costs from June 1988 to October 30, 2002		349,677.00	20,047.83		
Totals for fees and costs from November 1, 2002 to January 16, 2004		21,716.00	606.54		
Grand total for fees and costs from June 1988 to January 16, 2004		371,393.00	20,654.37	222,289.50	10,544.76

4.8. Fees and Costs of Accountant and Present and Former Trustee Under § 506(c)- William Barstow- There is a split of authority as to whether a trustee can recover his or her statutory fees.[49] Given the background of this case and the fact that the trustee is being paid at the old 1% rate, I am confident that Mr. Barstow provided at least the $7,669.42 in benefits to the Atkinsons for statutory fee and $654.80 in costs that he is seeking for his services in the final third of this case.[50] A surcharge under § 506(c) in the amount of $8,324.22 is justified.

[49] Compare, Matter of Stable Mews Associates, 49 BR 395, 405 (Bankr SDNY 1985) [in favor, "no trustee is expected to work for free"],with In re Dinsmore Tire Center, Inc., 81 BR 136, 138 (Bankr MD Fla 1987) [against].

[50] Docket Entry 658.

Bennie Leonard- Most of Mr. Leonard's costs appear to be related to US Trustee quarterly fees for the chapter 11 phase of the case.[51] These did not benefit the Atkinsons; I kept the case in chapter 11 to specifically allow Mr. Leonard to remain as a trustee in one of the final cases of his distinguished service as a trustee.

There are a few costs which appear justified, such as the patent application fee of $500, and the cost of lodging, etc., related to his trip to the mining claims. These costs are in the range of $750, they were beneficial in moving the case towards ultimate liquidation of the mining claims. Therefore, a $750 surcharge is allowed.

Russ Minkemann- Mr. Minkemann's application shows most of his work was preparing past due corporate income tax returns.[52] He did some claims work, but I have denied the claims analysis and objection work by the trustee's attorneys as a basis for a § 506(c) surcharge,[53] and must do so also for Mr. Minkemann.

5. CONCLUSION- An order will be entered allowing a surcharge pursuant to § 506(c) against the proceeds of the sale of the Gold King Mines mining claims as follows:

- Cabot Christianson (per the various law firms involved) $232,834.30
- William Barstow . . . . . $8,324.22.
- Bennie Leonard $750.00
- Russ Minkemann $0.00

The order will provide for a 30 day grace period to file an appeal or tolling motion.

I encourage the parties to try and compromise with respect the items in section 4.6, the gray area. It is the trustee's burden to prove entitlement to a surcharge. I have allowed a low-ball estimate for the three larger billing matters in section 4.6 (Billing Matters 03, 04,

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[51] Docket Entry 657.

[52] Docket Entry 581.

[53] See, section 4.5 of this memorandum discussing attorneys' Billing Matter 11.

and 13) in order to allow the attorneys some of the compensation which I felt was justified, but not to reward them more generously when the proof (or, the way it was presented) was not sufficiently itemized so that the court could make a more accurate determination.

DATED: September 27, 2004

HERB ROSS
U.S. Bankruptcy Judge