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June 20, 2016

BY OVERNIGHT DELIVERY
Irene Kim Asbury, Secretary
New Jersey Board of Public Utilities
44 South Clinton Avenue, 3rd Floor – Suite 314
Trenton, NJ 08625-0350

RE: NJ Land, LLC - Petition for Declaratory Relief – "On-Site" Generation
Response to JCP&L's Motion to Intervene and Comment
BPU Docket No. QO16040382

Dear Secretary Asbury:

The undersigned represents NJ Land, LLC ("NJ Land"). NJ Land hereby replies to the Motion to Intervene and Response to Motion Seeking Declaratory Relief or Waiver (the "Motion") submitted by Jersey Central Power & Light Company ("JCP&L") to the Board of Public Utilities (the "Board").

Intervention by JCP&L should be denied as untimely.

By its pleadings, JCP&L acknowledges receipt of NJ Land's Petition. The cover letter with the Petition was dated April 22, 2016. JCP&L's counsel received the letter and petition by e-mail on April 23, 2016 and on April 25, 2016 by overnight delivery. The cover letter and petition were received in the Board's mail room on April 25, 2016 and filing occurred shortly thereafter. JCP&L submitted its Motion via cover letter mailed on June 10, 2016. In essence, the Motion by JCP&L was submitted a month and a half after receipt of NJ Land's Petition.

JCP&L cites N.J.A.C. 1:1-16.3(a) regarding the factors to be taken into account by the decision-maker in granting or denying a motion to intervene. NJ Land respectfully notes that N.J.A.C. 14:1-6.2 deals with matters before the Board. While the timing may be extended at the discretion of the Board or the Secretary of the Board, the timeframe for submitting an answer or motion to intervene is twenty (20) days from service. That timeframe lapsed in mid-May 2016.

JCP&L does not present new factual matters to this case. In fact, JCP&L concedes that NJ Land's property is only one street away from Joint Base McGuire-Dix-Lakehurst (the "Joint Base"). It raises its concern about how the Joint Base property does not fit into JCP&L's view of the definition of property under N.J.S.A. 48:3-51's provisions regarding "on-site generation facility." But the interpretation of such provisions is the Board's to make and JCP&L has no expertise to provide in legal interpretation that is not possessed by the Board.

JCP&L could have submitted its papers by mid-May 2016. The interconnection application was

submitted July 1, 2015. NJ Land respectfully submits that, if allowed, this belatedly filed Motion does delay this matter.

Given that NJ Land has laid out the facts and JCP&L does not dispute the location of the NJ Land site and the one-street crossing to enter the Joint Base on which the customer's facilities exist – and also given that JCP&L had ample time to seek to intervene in a timely manner and the Board is the entity charged with making the legal determination sought in NJ Land's Petition – NJ Land respectfully submits that intervention by JCP&L should be denied as untimely.

Summary of NJ Land's Response to JCP&L's Discussion/Legal Interpretation.

In the event that the Board permits intervention by JCP&L, NJ Land makes the following comments in response to JCP&L's discussion as presented in its June 10, 2016 submission.

1. JCP&L concedes that the NJ Land site is across one street from the Joint Base. JCP&L also concedes that customers to be served by the NJ Land solar projects are on the Joint Base.

2. JCP&L seeks to impose its own physical limitations on the size of the contiguous property on which a customer is located. No limitation on the size of the contiguous property on which a customer is located exists in the applicable statute, nor in its supporting regulations.

3. JCP&L seeks to impose its own physical limitations on the distance traveled across the contiguous property on which a customer is located to reach the customer's meter. No limitation on the distance traveled across the contiguous property on which a customer is located to reach the customer's meter exists in the applicable statute, nor in its supporting regulations.

4. JCP&L seeks to impose its own limitations to lot and blocks and municipalities associated with the property on which a customer is located. No limitation regarding lot, block and/or municipality regarding the contiguous property on which a customer is located exists in the applicable statute, nor in its supporting regulations. The reference to tax map legal boundaries set forth in the regulations applies to the generation site – not to the contiguous s property on which the customer is located.

5. JCP&L's assertions regarding property within the Joint Base do not withstand scrutiny and the uniqueness of the military's ownership of the property on which the customer and the customer's meter operate.

6. JCP&L's fears regarding eroding requirements about contiguous property are unfounded, as the NJ Land solar projects relate to a unique property: the Joint Base.

7. JCP&L appears to accept a waiver by the Board of its regulations, but not of statutory requirements. The statutory requirement goes back to the definition of "on-site generation" facility and said statutory definition permits a declaratory judgment that the NJ Land solar projects from its site to customers on the Joint Base be confirmed to be SREC-eligible if completed as outlined in NJ Land's Petition.

POINT I. PROPERTIES ARE CONTIGUOUS. JCP&L has confirmed what NJ Land has verified in its Petition: the NJ Land site where the solar electricity will be generated is contiguous to the Joint Base – separated by one street (Saylors Pond Road). United Communities –the customer to be served by the first project – is located on the Joint Base. McGuire's internal distribution lines – the customer for the second project identified in the Petition – is by definition located on the Joint Base. Accordingly, there is not dispute as to contiguity.

POINT II. THE SIZE OF PROPERTY ON WHICH THE END USER IS LOCATED IS NOT LIMITED BY STATUTE OR REGULATION. The fact that JCP&L apparently has not accepted is that, despite its size, the Joint Base is one property. But the size of a property is not up to JCP&L. NJ Land provided evidence of the Joint Base's unification (see Exhibit D to the Petition) that JCP&L cannot dispute. NJ Land also provided a review of title by an expert (See Exhibit I to the Petition). JCP&L does not dispute the borders of the Joint Base or the powers of the military. Instead it complains about the size of the property as not contemplated by the statute or regulations. But here is exactly what the statute and regulations say:

> **"On-site generation facility" means a generation facility, and equipment and services appurtenant to electric sales by such facility to the end use customer located on the property or on property contiguous to the property on which the end user is located. An on-site generation facility shall not be considered a public utility. The property of the end use customer and the property on which the on-site generation facility is located shall be considered contiguous if they are geographically located next to each other, but may be otherwise separated by an easement, public thoroughfare, transportation or utility-owned right-of-way."** N.J.S.A. 48:3-51.

In short, there are no words in the statutory definition that limit the size of the property on which the end user is located.

As for the regulations, they state as follows:

> **(b) For the purposes of this subchapter, class I renewable energy that meets all of the following criteria shall be deemed to be generated on the customer's side of the meter:**
> **1. The renewable energy generation facility is located either:**
>
> **i. Within the legal boundaries of the property, as set forth within the official tax map, on which the energy is consumed; or**
>
> **ii. Within the legal boundaries of a property, as set forth within the official tax map, that is contiguous to the property on which the energy is consumed. The property on which the energy is consumed and the property on which the renewable energy generation facility is located shall be considered contiguous if they are geographically located next to each other, but may be**

> **otherwise separated by an existing easement, public thoroughfare, or transportation or utility-owned right-of-way and, but for that separation, would share a common boundary. The fact that a public thoroughfare may be encumbered by third-party easements does not alter a determination as to whether two properties would be considered contiguous; ... (Emphasis added).** N.J.A.C. 14:8-4.1(b).

In short, there are not words in the regulations that limit the size of the property on which the end user is located. NJ Land respectfully notes that, on information and belief, the BPU Staff drafted the regulations in consultation with the State's attorneys and the Board passed them. Contrary to the implication made by JCP&L, a limitation on the size of the property on which the end user is located cannot be imposed as an afterthought. Nothing in the regulations proscribes the size of the contiguous property on which the end user is located.

POINT III. THE LENGTH OF SEPARATE SOLAR POWER DISTRIBUTION WIRE TO THE CUSTOMER'S METER IS NOT LIMITED BY STATUTE OR REGULATION. JCP&L also raises an objection to the wire running for several miles on the Joint Base as not being in keeping with properties being contiguous. Again, as noted in Point 2 above, NJ Land notes that the statute and the regulations could have limited, but do not limit, the length traveled. The United States military has declared the Joint Base to be one property. The fact that this property is large is not the deciding factor on what is contiguous. JCP&L already has conceded that NJ Land's property is contiguous to the Joint Base.

POINT IV. TAX LOT, BLOCK, AND/OR TAX MAP LIMITATIONS DO NOT APPLY TO THE PROPERTY ON WHICH THE END USER IS LOCATED. JCP&L seeks to impose a limitation based on lot, block, tax map and municipality upon the contiguous property on which the end user is located. This is a misreading of the regulations. The focus of N.J.A.C. 14:8-4.1(b) is on identifying the location of the renewable energy generation facility. NJ Land has confirmed that the generation facility is on property contiguous to the property on which the energy is consumed. In that case, (b)(ii) applies – which means that NJ Land had to verify that its property was within the legal boundaries of its property identified on the Tax Map of Springfield Township, Burlington County and that such property was contiguous to the Joint Base. It did verify this location and JCP&L has conceded that the NJ Land site is across one street (Saylors Pond Road) from the Joint Base.

The key misreading of the regulation has to do with the end user's property. Under N.J.A.C. 14:8-1(b)(ii), when the generation facility property and the end user's property are not the same, the focus is on identifying the generation facility property's tax map reference. There is nothing in the regulation limiting the end user's contiguous property to one tax lot or block or tax map. In fact, there is no tax map discussion in (b)(ii) regarding the end user's contiguous property. The words "tax map" in (b)(ii) apply only to the generation facility property. The words "tax map" were not repeated after (and thereby did not limit or restrict): "the property on which the energy is consumed." Again, the regulations could have been drafted with a limitation, but they were not. Indeed, such a limitation would be contrary to the statutory provisions for "on-site generation facility." Also, NJ Land notes that the Board has proposed amendments to its existing regulations including, but not limited to, adding a regulatory definition for "on-site generation facility" that parallels the statutory provision. The pending regulation does not restrict the end user's contiguous property to a size, a measurement, a tax lot, a tax block, or a municipality.

Finally, the Board's Order in the Six Flags petition dated February 11, 2015 (Docket No. QO14080885) dealt with a large piece of property consisting of "several different tax lots." The Six Flags petition approved SRECs for the facility and confirmed no issue with multiple lots. (Also noteworthy was that the utility in that matter also was JCP&L and, post-construction, it would continue to receive payment for exclusive use of certain of its distribution wires from the customer). NJ Land reiterates that the customers for its projects will still have the equivalent of a standby fee based on highest 15-minute usage – against meaning that these solar projects are more income friendly to the utility and thereby the ratepayers. Together with the fact that these projects are serving Joint Base constituents, the regulatory precedent exists to complement state policy backing approval in this matter.

POINT V. THE JOINT BASE PROPERTY AND PROPERTY RIGHTS ARE CONTIGUOUS AND PERMIT NJ LAND'S PROJECTS TO BE ON-SITE GENERATION. JCP&L's assertions regarding property within the Joint Base do not withstand scrutiny and the uniqueness of the military's ownership of the property on which the customer and the customer's meter operate. As noted in the title expert's report (See Exhibit I), the Joint Base is consolidated. It is the United States Department of Defense's property. Exhibit D confirms that the property was consolidated into one property. The fact that local governments have assigned tax lot and blocks for this federal government property is irrelevant. The military has declared it one property.

Through the title expert's report, NJ Land pointed out the power of the military over the property makes any party's property or other rights associated with or on a military base subject to control and denial by the military. Property ownership involves the power to exclude others from the property. Property rights of JCP&L are not absolute. It is the other way around: it is the military that has the right and power to exclude JCP&L. Exhibit I noted the military power and federal statute on point. NJ Land further notes that this military power regarding property and rights was upheld in the 2014 United States Supreme Court case of United States v. Dennis, 133 S. Ct. 1144 (2014). (A copy of the decision is attached hereto as Exhibit A). Among other things, the United States Supreme Court confirmed that the military does not need to have exclusive possession and control of property within its bases to execute authority, bar people from its military basis, and prosecute them for trespass.[1] Accordingly, JCP&L property interests on the Joint Base are not absolute.

Moreover, it is important to note that JCP&L's ownership of the land in question is by way of quitclaim deed. (See Exhibit B attached hereto: the opening pages of the 1979 deed and its quitclaim limitation). As stated in the Deed:

> IT BEING UNDERSTOOD and agreed that the Grantor is only quitclaiming all its rights, title and interest of, in and to those portions of the parcel of land hereinbefore described which was acquired by the

[1] "Where a place with a defined boundary is under the administration of a military department, the limits of the 'military installation' for purposes of §1382 are coterminous with the commanding officer's area of responsibility. Those limits do not change when the commander invites the public to use a portion of the base for a road, a school, a bus stop, or a protest area, especially when the commander reserves authority to protect military property by, among other things, excluding vandals and trespassers." Id. at 1153. The Joint Base and Vandenburg AFB both have areas where the military does not have exclusive possession, but can exercise same.

> Pemberton & Hightstown Railroad Company (a predecessor of the Grantor herein) under and by virtue of the following deeds...

This means that ownership is subject to the title issues and state of facts associated with the railroad, which was started in the second half of the 19th century and became subject to the United States government's establishment of the military base in 1917).[2] In short, JCP&L's claims are subject to the military's ownership of the Joint Base both by federal statutory control as discussed in the prior paragraph, as well as by creation of the Joint Base – and its guards and military equipment. For purposes of the Board's review, NJ Land confirms that its delivery wires will cross one street, go immediately on to the Joint Base, follow the same path, while remaining within the outer boundaries of the Joint Base, and deliver power to two end users on that contiguous property – the Joint Base.

POINT VI. UNIQUE CIRCUMSTANCES DO NOT ERODE REQUIREMENTS OF STATUTE OR REGULATIONS. JCP&L has expressed concern about eroding statutory and regulatory restrictions. First, the restrictions do not exist, as NJ Land is in compliance with the on-site generation statutory provision and the Board's regulations. In short, an accurate reading of the previously referenced statute and regulatory provisions confirms that NJ Land's projects are within the definition of "on-site generation" facilities. But, on top of that, the facts of this situation are unique. NJ Land is proposing to serve customers on an unusual property. The Joint Base is unique in its size and in the State's defined desire to promote its continued existence with the assistance of renewable energy projects and the resiliency they offer. NJ Land also notes the Board's July 18, 2012 Order with respect to KDC Solar's project on Kirby Farm in Bedminster (again with JCP&L as the local utility) (BPU Docket No. EO12030209V) as an example of approval of a solar project with unique real estate components and road crossings and the Board's support for net-metered projects. The Board's ruling would only apply to NJ Land's solar projects seeking to serve end users on the Joint Base. State policy favors renewable energy projects that support the Joint Base. (See Exhibit C to the Petition). (Indeed, JCP&L tacitly acknowledges this in its Motion).

POINT VII. ALTERNATIVE RELIEF IN THE FORM OF A WAIVER IS NOT OPPOSED AND IS PERMITTED BY THE STATUTE'S ON-SITE GENERATION DEFINITION. JCP&L does not take a position on a waiver of the Board's regulations to permit SRECs for NJ land's projects. Here, NJ Land notes that the statutory provision has no discussion that limits the contiguous property on which the end user is located to a particular size, dimension, measurement, tax lot, tax block, municipality, or the like. The reality is that the NJ Land site is contiguous to the Joint Base and the end users for the proposed solar projects are located on the Joint Base. Hence, as alternative relief, the Board can grant waivers for the NJ Land projects. Given the State's policies as noted in the Petition, waivers would be appropriate and supported in this matter. That being said, it is NJ Land's position that NJ Land's two proposed solar projects are entitled to the Board's to the declaratory relief sought; i.e. that the projects constitute on-site generation facilities that, as outlined in the Petition, are entitled to SRECs if and when completed in accordance with the existing solar energy project requirements applicable to all behind-the-meter solar energy projects.

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[2] A quitclaim deed contains no title covenant and thus offers the grantee no warranty as to the status of the property title; the grantee is entitled only to whatever interest the grantor actually possesses at the time the transfer occurs. (See Black's Law Dictionary, p. 1126 (5th ed. 1979).

Conclusion. For the reasons set forth above, NJ Land respectfully submits that JCP&L's Motion to intervene and comment should be denied and the relief sought by NJ Land in its Petition be granted.

Respectfully submitted,

RUSSO TUMULTY NESTER
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Enclosures
c. Gregory Eisenstark, Esq. and Gabrielle A. Figueroa, Esq.
Windels Marx Lane & Mittendorf, LLP
Stefanie Brand, Esq. NJ Rate Counsel
Kenneth J. Sheehan, Esq., BPU Chief of Staff
Richard G. DeRose, BPU Deputy Chief of Staff

Exhibit A

SUPREME COURT OF THE UNITED STATES

UNITED STATES, Petitioner v. JOHN DENNIS APEL

No. 12-1038

December 4, 2013, Argued February 26, 2014, Decided

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[*1145] **[**77]** Vandenberg Air Force Base has been designated a "closed base," meaning that civilians may not enter without express permission. The Air Force has granted an easement over two areas of the Base, with the result that two public highways traverse the Base. Adjacent to one of those highways is an area that the Government has designated for peaceful protests. The Base commander has enacted several restrictions to control the protest area and has issued an advisory stating that anyone who fails to adhere to the protest area policies may be barred from entering the Base.

Petitioner Apel was barred from the Base for trespassing and vandalism, but continued to enter the protest area. A Magistrate Judge convicted him of violating **18 U. S. C. §1382** , which makes it a crime to reenter a "military. . . installation" after having been ordered not to do so "by any officer or person in command." On appeal, the Federal District Court rejected Apel's defense that §1382 does not apply to the designated protest area. The Ninth Circuit reversed. It held that because the easement through Vandenberg deprived the Government of exclusive possession, §1382 did not cover the portion of the Base where Apel's protest occurred.

Held: A "military. . . installation" for purposes of §1382 encompasses the commanding officer's area of responsibility, and it includes Vandenberg's highways and protest area. Pp. ___ - ___, *188 L. Ed. 2d* , at 81-85.

(a) Contrary to Apel's argument, §1382 does not require exclusive possession and control. The statute is written broadly to apply to many different kinds of military places, and nothing in its text defines those places in terms of the access granted to the public or the nature of the Government's possessory interest. See *United States* v. *Albertini*, **472 U. S. 675** , 682 , **105 S. Ct. 2897** , **86 L. Ed. 2d 536** . Nor have military places been defined historically as land withdrawn from public use.**[*1146]** The common feature of the places described in §1382 is that they have defined boundaries and are subject to the command authority of a military officer. This conclusion is confirmed by *United States* v. *Phisterer*, **94 U. S. 219** , 222 , **24 L. Ed. 116** , *12 Ct. Cl. 98* , which defined the term "military station" as a place "where military duty is performed or military protection afforded." And while some Executive Branch documents have

said that §1382 requires exclusive possession, those opinions are nonbinding, and this Court has never held that the Government's reading of a criminal statute is entitled to any deference. Pp. ___ - ___, *188 L. Ed. 2d*, at 82-83.

[78]** (b) Section 1382 applies to any place with a defined boundary that is under the command of a military officer. Apel contends that the highways and protest area are outside the Base because they lie outside fenced areas on the Base, but this argument assumes the conclusion. The United States has placed the entire Vandenberg property under the administration of the Air Force. The Air Force's choice to secure a portion of the Base more closely **[***2]** does not alter its boundaries or diminish its commander's jurisdiction. Apel's further contention that the highways and protest area are uncontrolled spaces where military operations are not performed is contrary to the record: The Base commander has enacted rules to restrict the manner of protests in the designated area and has publicly stated that persons barred from Vandenberg may not enter the Base to protest; the District Court found that the Government exercises substantial control over the protest area; the easement itself reserves to the Base commander the authority to restrict access to the entire Base when necessary and reserves to the United States rights of way for all purposes; and the Base commander has occasionally closed the highways to the public for security purposes or when conducting a military launch. In any event, §1382 does not require base commanders to make continuous, uninterrupted use of a place within their jurisdiction, lest they lose authority to exclude certain individuals. Such a use-it-or-lose-it rule would frustrate the administration of military facilities, raise difficult questions for judges, and discourage commanders from opening portions of their bases for public convenience. Pp. ___ - ___, *188 L. Ed. 2d*, at 83-85.

(c) Apel's argument that the statute was unconstitutional as applied was not reached by the Ninth Circuit and, thus, is not addressed here. P. ___, *188 L. Ed. 2d*, at 85.

676 F. 3d 1202, vacated and remanded.

Vacated and remanded.

Benjamin J. Horwich argued the cause for petitioner.

Erwin Chemerinsky argued the cause for respondent.

Roberts, C. J., delivered the opinion for a unanimous Court. Ginsburg, J., filed a concurring opinion, in which Sotomayor, J., joined. Alito, J., filed a concurring opinion.

Roberts

[*1147] Chief Justice **Roberts** delivered the opinion of the Court.

Federal law makes it a crime to reenter a "military . . . installation" after having been ordered not to do so "by any officer or person in command." **18 U. S. C. §1382**. The question presented is whether a portion of an Air Force base that contains a designated protest area and an easement for a public road qualifies as part of a "military installation."

I
A

Vandenberg Air Force Base is located in central California, near the coast, approximately 170 miles northwest of Los Angeles. The Base sits on land owned by the United States and administered by the Department of the Air Force. It is the site of sensitive missile and space launch facilities. The commander of Vandenberg has designated it a "closed base," meaning **[**79]** that civilians may not enter without express permission. Memorandum for the General Public Re: Closed Base, from David J. Buck, Commander (Oct. 23, 2008), App. 51; see also **32 CFR §809a.2** (b) (2013) ("Each [Air Force] commander is authorized to grant or deny access to their installations, and to exclude or remove persons whose presence is unauthorized").

Although the Base is closed, the Air Force has granted to the County of Santa Barbara "an easement for a right-of-way for a road or street" over two areas within Vandenberg. Department of the Air Force, Easement for Road or Street No. DA-04-353-ENG-8284 (Aug. 20, 1962), **[***3]** App. 35. Pursuant to that easement, two state roads traverse the Base. Highway 1 (the Pacific Coast Highway) runs through the eastern part of the Base and provides a route between the towns of Santa Maria and Lompoc. Highway 246 runs through the southern part of the Base and allows access to a beach and a train station on Vandenberg's western edge. The State of California maintains and polices these highways as it does other state roads, except that its jurisdiction is merely "concurrent" with that of the Federal Government. Letter from Governor Edmund G. Brown, Jr., to Joseph C. Zengerle, Assistant Secretary of the Air Force (July 21, 1981), App. 40. The easement instrument states that use of the roads "shall be subject to such rules and regulations as [the Base commander] may prescribe from time to time in order to properly protect the interests of the United States." Easement, App. 36. The United States also "reserves to itself rights-of-way for all purposes" that would not create "unnecessary interference with . . . highway purposes." Id., at 37.

As relevant to this case, Highway 1 runs northwest several miles inside Vandenberg until it turns northeast at a 90 degree angle. There Highway 1 intersects with Lompoc Casmalia Road, which continues running northwest, and with California Boulevard, which runs southwest. In the east corner of this intersection there is a middle school. In the west corner there is a visitors' center and a public bus stop. A short way down California Boulevard is the main entrance to the operational areas of the Base where military personnel live and work. Those areas are surrounded by a fence and entered by a security checkpoint. See Appendix, *infra* (maps from record).

[*1148] In the south corner of the intersection is an area that has been designated by the Federal Government for peaceful protests. A painted green line on the pavement, a temporary fence, Highway 1, and Lompoc Casmalia Road mark the boundaries of the protest area. Memorandum for the General Public Re: Limited Permission for Peaceful Protest Activity Policy, from David J. Buck, Commander (Oct. 23, 2008), App. 57-58. The Base commander has enacted several restrictions to control the protest area, including reserving the authority "for any reason" to withdraw permission to protest and "retain[ing] authority and control over who may access the installation, including access to roadway easements for purposes other than traversing by vehicle through the installation." *Ibid.* A public advisory explains other rules for the protest area: demonstrations "must be coordinated and scheduled with **[**80]** [B]ase Public Affairs and [Base] Security Forces at least two (2) weeks in advance"; "[a]nyone failing to vacate installation property upon advisement from Security Forces will be cited for trespass pursuant to [**18 U.**

S. C. §1382]"; and "[a]ctivities other than peaceful protests in this area are not permitted and are specifically prohibited." U. S. Air Force Fact Sheet, Protest Advisory, App. 52-53.

The advisory states, consistent with federal regulations, that anyone who fails to adhere to these policies may "receive [***4] an official letter barring you from entering Vandenberg." Id., at 55; see also 32 CFR §809a.5 ("Under the authority of 50 U. S. C. [§]797 , installation commanders may deny access to the installation through the use of a barment order"). And for any person who is "currently barred from Vandenberg AFB, there is no exception to the barment permitting you to attend peaceful protest activity on Vandenberg AFB property. If you are barred and attend a protest or are otherwise found on base, you will be cited and detained for a trespass violation due to the non-adherence of the barment order." Protest Advisory, App. 54.

B

John Dennis Apel is an antiwar activist who demonstrates at Vandenberg. In March 2003, Apel trespassed beyond the designated protest area and threw blood on a sign for the Base. He was convicted for these actions, was sentenced to two months' imprisonment, and was barred from the Base for three years. In May 2007, Apel returned to Vandenberg to protest. When he trespassed again and was convicted, he received another order barring him from Vandenberg, this time permanently, unless he followed specified procedures "to modify or revoke" the order. Memorandum for John D. Apel Re: Barment Order (Oct. 22, 2007), App. 63-65. The only exception to the barment was limited permission from the Base commander for Apel to "'traverse', meaning to travel . . . on [Highway] 1 and . . . on [Highway] 246 . . . . You are not authorized to deviate from these paved roadways onto [Vandenberg] property." Id., at 64. The order informed Apel that if he reentered Vandenberg in violation of the order, he would "be subject to detention by Security Forces personnel and prosecution by civilian authorities for a violation of [18 U. S. C. §1382]." *Ibid.*

Apel ignored the commander's order and reentered Vandenberg several times during 2008 and 2009. That led the Base commander to serve Apel with an updated order, which informed him:

"You continue to refuse to adhere to the rules and guidelines that have been put in place by me to protect and preserve order and to safeguard the persons and property under my jurisdiction by failing to remain in the area approved by [*1149] me for peaceful demonstrations pursuant to [50] U. S. C. § 797 and 32 C. F. R. § 809a.0 -[809]a.11 . You cannot be expected or trusted to abide by the protest guidance rules based upon this behavior. I consider your presence on this installation to be a risk and detrimental to my responsibility to protect and preserve order and to safeguard the persons and property under my jurisdiction. You are again ordered not to enter onto [Vandenberg] property, as provided in the October 22, 2007 order. The content and basis of that order is hereby incorporated by reference herein, EXCEPT that your barment [**81] will be for a period of three (3) years from the date of this supplemental letter." Memorandum for John D. Apel Re: Barment Order Dated Oct. 22, 2007 (served Jan. 31, 2010), App. 59-62.

Apel ignored this barment order too, and on three occasions in 2010 he reentered Vandenberg to protest in the designated area. Each time Vandenberg security personnel reminded him of the barment order and

instructed him to leave. Each time [***5] Apel refused. He was cited for violating §1382 and escorted off Base property.

A Magistrate Judge convicted Apel and ordered him to pay a total of $355 in fines and fees. Apel appealed to the Federal District Court for the Central District of California. The District Court rejected Apel's defense that §1382 does not apply to the designated protest area, holding that the military "has a sufficient possessory interest and exercises sufficient control over" the area. App. to Pet. for Cert. 14a. The court also concluded that Apel's conviction would not violate the **First Amendment** . Id., at 13a.

The United States Court of Appeals for the Ninth Circuit reversed, holding that the statute does not apply. Based on Circuit precedent, the Ninth Circuit interpreted §1382 to require the Government to prove that it has "the exclusive right of possession of the area on which the trespass allegedly occurred." **676 F. 3d 1202** , **1203**(2012) (citing *United States* v. *Parker*, **651 F. 3d 1180** (CA9 2011)). The court found that the easement through Vandenberg deprived the Government of exclusive possession of the roadway, so it concluded that §1382 does not cover the portion of the Base where Apel's protest occurred.

We granted certiorari, **569 U. S. ___** , **133 S. Ct. 2767** , **186 L. Ed. 2d 218** (2013), and now vacate the judgment.

II

Section 1382 provides in full:

"Whoever, within the jurisdiction of the United States, goes upon any military, naval, or Coast Guard reservation, post, fort, arsenal, yard, station, or installation, for any purpose prohibited by law or lawful regulation; or
"Whoever reenters or is found within any such reservation, post, fort, arsenal, yard, station, or installation, after having been removed therefrom or ordered not to reenter by any officer or person in command or charge thereof—
"Shall be fined under this title or imprisoned not more than six months, or both."

Apel does not dispute that he was "found within" the lawful boundaries of Vandenberg, "within the jurisdiction of the United States," after having been "ordered not to reenter" by the Base commander. §1382 . And certainly Vandenberg would naturally be described as a "military installation": it is an Air Force base, which a military commander has closed to the public (with limited exceptions), located on land owned by the United States and under the jurisdiction of the Air Force, [*1150] where military personnel conduct sensitive missile operations.

Against this straightforward interpretation, Apel insists that §1382 applies only where the military exercises*exclusive* possession and control, which, he contends, does not include land subject to a roadway easement. Apel further argues that the fence [**82] enclosing Vandenberg's operational facilities marks the *real* boundary of the Base and that Vandenberg's commander lacks authority to control the rest, or at least the designated protest area. We take his arguments in turn.

A

Apel asserts that the Ninth Circuit's exclusive possession and control requirement "derives directly from the text of §1382 ." Brief for Respondent 23. It does not. **Section 1382** is written broadly to apply to many different kinds of military places: [***6] a "reservation, post, fort, arsenal, yard, station, or installation." Nothing in the text defines those places in terms of the access granted to the public or the nature of the Government's possessory interest. See *United States* v. *Albertini*, **472 U. S. 675** , **682** , **105 S. Ct. 2897** , **86 L. Ed. 2d 536**(1985) ("The language of the statute does not limit §1382 to military bases where access is restricted").

Apel contends that the listed military places have historically been defined as land withdrawn from public use. Not so. Historical sources are replete with references to military "forts" and "posts" that provided services to civilians, and were open for access by them. See, *e.g.*, R. Wooster, Soldiers, Sutlers, and Settlers 64 (1987) ("The frontier forts of Texas were not simply army bases occupied solely by military personnel. They were often bustling communities that attracted merchants, laborers, settlers, and dependents"); Davis, The Sutler at Fort Bridger, 2 Western Hist. Q. 37, 37, 40-41 (Jan. 1971) (describing a 19th-century post in southwestern present Wyoming which included a "sutler," a civilian merchant who set up shop inside the fort and sold wares both to soldiers and to civilians from outside the base).

The common feature of the places described in §1382 is not that they are used exclusively by the military, but that they have defined boundaries and are subject to the command authority of a military officer. That makes sense, because the Solicitor General has informed us that a military commander's authority is frequently defined by the boundaries of a particular place: When the Department of Defense establishes a base, military commanders assign a military unit to the base, and the commanding officer of the unit becomes the commander of the base. Tr. of Oral Arg. 6-7.

Apel responds by invoking our decision in *United States* v. *Phisterer*, **94 U. S. 219** , **24 L. Ed. 116** , **12 Ct. Cl. 98** (1877), which held that the term "military station" (in a different statute) did not include a soldier's off-base home. But *Phisterer* only confirms our conclusion that §1382 does not require exclusive use, possession, or control. For there we interpreted "military station" to mean "a place where troops are assembled, where military stores, animate or inanimate, are kept or distributed, where military duty is performed or military protection afforded,—where something, in short, more or less closely connected with arms or war is kept or is to be done." **Id., at 222** , **24 L. Ed. 116** , **12 Ct. Cl. 98** . To describe a place as "more or less closely connected" with military activities hardly requires that the military hold an exclusive right to the property. Rather, "military duty" and "military protection" are synonymous with the exercise of *military jurisdiction*. And that, not coincidentally, is precisely how the term "military [*1151] installation" is [**83] used elsewhere in federal law. See, *e.g.*, **10 U. S. C. §2687(g)(1)** (defining "military installation" as a "base . . . or other activity under the jurisdiction of the Department of Defense"); **§2801(c)(4)** (defining "military installation" as a "base . . . or other activity under the jurisdiction of the Secretary of a military department"); **32 CFR §809a.0** ("This part prescribes the commanders' authority for enforcing order within or near Air Force installations [***7]under their jurisdiction and controlling entry to those installations").

Apel also relies on the fact that some Executive Branch documents, including the United States Attorneys' Manual and opinions of the Air Force Judge Advocate General, have said that §1382 requires

exclusive possession. Brief for Respondent 44-47. So they have, and that is a point in his favor. But those opinions are not intended to be binding. See Dept. of Justice, United States Attorneys' Manual §1-1.100 (2009) ("The Manual provides only internal Department of Justice guidance. It is not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal"); 2 Civil Law Opinions of The Judge Advocate General, United States Air Force 1978-1983 (Preface) (opinions of the Judge Advocate General "are good starting points but should not be cited as precedence [sic] without first verifying the validity of the conclusions by independent research"). Their views may reflect overly cautious legal advice based on division in the lower courts. Or they may reflect legal error. Either way, we have never held that the Government's reading of a criminal statute is entitled to any deference. See *Crandon* v. *United States*, **494 U. S. 152** , **177** , **110 S. Ct. 997** , **108 L. Ed. 2d 132** (1990) (SCALIA, J., concurring in judgment).

Today, as throughout our Nation's history, there is significant variation in the ownership status of U. S. military sites around the world. Some are owned in fee, others are leased. Some are routinely open to the public, others are open for specific occasions or purposes, and no public access whatsoever is permitted on others. Many, including such well-known places as the Washington Navy Yard and the United States Air Force Academy, have roads running through them that are used freely by the public. Nothing in **§1382** or our history suggests that the statute does not apply to a military base under the command of the Air Force, merely because the Government has conveyed a limited right to travel through a portion of the base or to assemble in a particular area.

B

Section 1382 is most naturally read to apply to places with a defined boundary under the command of a military officer. Apel argues, however, that Vandenberg's commander has no authority on the highways running through the Base or, apparently, in the designated protest area. His arguments more or less reduce to two contentions: that the highways and protest area lie "outside the entrance to [a] closed military installation[ ]," Brief for Respondent 22, and that they are "uncontrolled" spaces where "no military operations are performed," id., at 23. Neither contention is sound.

First, to say that the highway and protest area are "outside" the Vandenberg **[**84]** installation is not a legal argument; it simply assumes the conclusion. Perhaps recognizing as much, Apel tacks: He suggests that because Vandenberg's operational facilities are surrounded by a fence and guarded by a security checkpoint, the Government has determined that it does **[*1152]** not control the rest of the Base. The problem with this argument **[***8]** is that the United States has placed the *entire* Vandenberg property under the administration of the Air Force, which has defined that property as an Air Force base and designated the Base commander to exercise jurisdiction. Federal law makes the commander responsible "for the protection or security of" "property subject to the jurisdiction, administration, or in the custody of the Department of Defense." **50 U. S. C. §§797(a)(2)** , **(4)** ; see also **32 CFR §809a.2(a)** ("Air Force installation commanders are responsible for protecting personnel and property under their jurisdiction"). And pursuant to that authority, the Base commander has issued an order closing the entire base to the public. Buck Memorandum Re: Closed Base, App. 51; see also **32 CFR §809a.3** ("any directive issued by the commander of a military installation or facility, which includes the parameters for authorized entry to or exit from a military installation, is legally enforceable against all persons"). The fact that the Air Force chooses to secure a portion of the Base more closely—be it with a fence, a checkpoint, or a painted

green line—does not alter the boundaries of the Base or diminish the jurisdiction of the military commander.

As for Apel's claim that the protest area specifically is uncontrolled, the record is conclusively to the contrary. The Base commander "at all times has retained authority and control over who may access the installation," including the protest area. Buck Memorandum Re: Protest Activity, App. 58. He has enacted rules to restrict the manner of protests in the designated area. Protest Advisory, App. 53. In particular, he requires two weeks' notice to schedule a protest and prohibits the distribution of pamphlets or leaflets. Id., at 52-53. The Base commander has also publicly stated that persons who are barred from Vandenberg—for whatever reason—may not come onto the Base to protest. Id., at 54. And the District Court found, after hearing testimony, that "the Government exercises substantial control over the designated protest area, including, for example, patrolling the area." App. to Pet. for Cert. 14a-15a. Apel has never disputed these facts.

Instead Apel tells us that, by granting an easement, the military has "relinquished its right to exclude civilians from Highway 1," Brief for Respondent 36, and that the easement does not "permit[ ]" use by the military, id., at 43. But the easement itself specifically reserves to Vandenberg's commander the authority to restrict access to the entire Base, including Highway 1, when necessary "to properly protect the interests of the United States," and likewise "reserves to [the United States] rights-of-way for all purposes." Easement, App. 36. We simply do not understand how Apel can claim that "[n]othing in the easement contemplates, or even permits, military use or occupation; it provides for exclusive civil use and occupation." Brief for Respondent 43. Moreover, the Base commander, in an exercise of his command authority, has notified the public that use of the roads is "limited to . . . vehicular **[**85]** travel activity through the base," which does not include Apel's protest activity. See Buck **[***9]** Memorandum Re: Closed Base, App. 51.

Apel likewise offers no support for his contention that military functions do not occur on the easement highways. The Government has referred us to instances when the commander of Vandenberg has closed the highways to the public for security purposes or when conducting a military launch. Reply Brief 12, and n. 5; Tr. of Oral Arg. 8-9. In any event, there is no indication that Congress intended **§1382** to require base commanders to **[*1153]** make continuous, uninterrupted use of a place within their jurisdiction, lest they lose authority to exclude individuals who have vandalized military property and been determined to pose a threat to the order and security of the base.

In sum, we decline Apel's invitation to require civilian judges to examine U. S. military sites around the world, parcel by parcel, to determine which have roads, which have fences, and which have a sufficiently important, persistent military purpose. The use-it-or-lose-it rule that Apel proposes would frustrate the administration of military facilities and raise difficult questions for judges, who are not expert in military operations. And it would discourage commanders from opening portions of their bases for the convenience of the public. We think a much better reading of **§1382** is that it reaches all property within the defined boundaries of a military place that is under the command of a military officer.

III

Much of the rest of Apel's brief is devoted to arguing that **§1382** would be unconstitutional as applied to him on this Base. But the Court of Appeals never reached Apel's constitutional arguments, and we decline to do so in the first instance. Apel also attempts to repackage his First Amendment objections as a statutory interpretation argument based on constitutional avoidance. See Brief for Respondent 54 ("the statute should be interpreted . . . not to apply to peaceful protests on a public road outside of a closed military base over which an easement has been granted and that has been declared a protest zone"). But we do not "interpret" statutes by gerrymandering them with a list of exceptions that happen to describe a party's case. "The canon [of constitutional avoidance] is not a method of adjudicating constitutional questions by other means." *Clark* v. *Martinez*, **543 U. S. 371** , **381**, **125 S. Ct. 716** , **160 L. Ed. 2d 734** (2005). Whether **§1382** is unconstitutional as applied is a question we need not address.

* * *

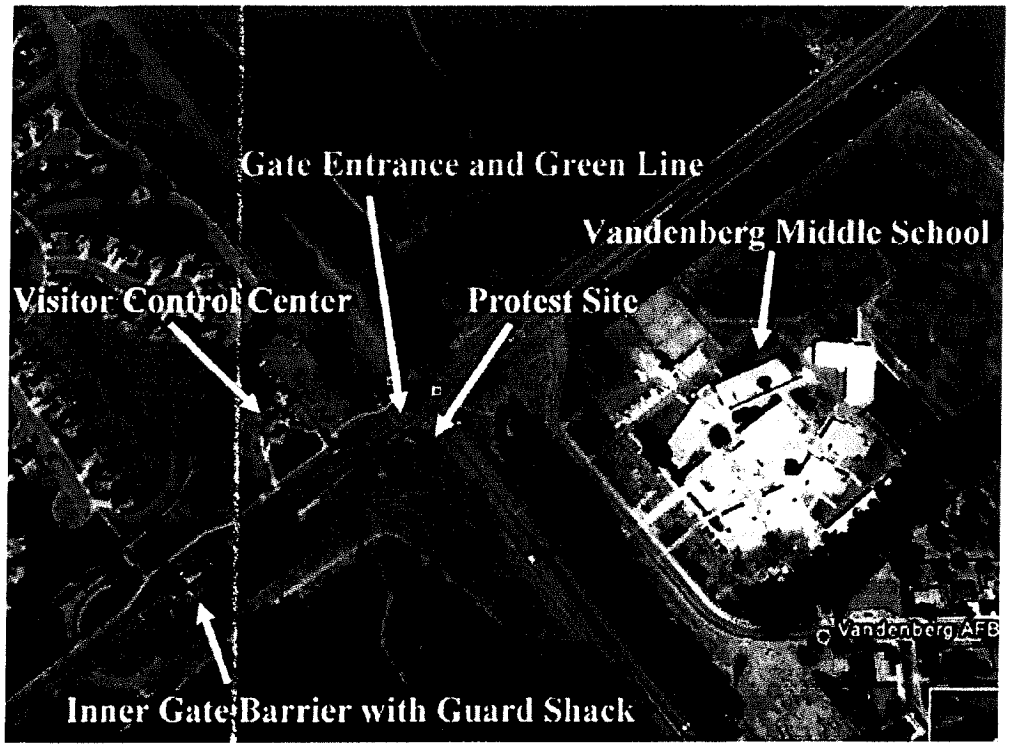
Where a place with a defined boundary is under the administration of a military department, the limits of the "military installation" for purposes of **§1382** are coterminous with the commanding officer's area of responsibility. Those limits do not change when the commander invites the public to use a portion of the base for a road, a school, a bus stop, or a protest area, especially when the commander reserves authority to protect military property by, among other things, excluding vandals and trespassers.

The judgment of the Court of Appeals is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

[86]** APPENDIX

[*1154] Santa Maria-Highway 1 Gate **[***10]** to Vandenberg Air Force Base


Gate Entrance and Green Line
Vandenberg Middle School
Visitor Control Center
Protest Site
Vandenberg AFB
Inner Gate Barrier with Guard Shack


County Rd 20
Cabrillo Hwy
Cabrillo Hwy
1
1
1

Exhibit B

Bargain and Sale Deed - New Jersey

COUNTY OF BURLINGTON
CONSIDERATION 400,000.00
REALTY TRANSFER FEE 1,460.00
DATE 7-2-79 BY KD

THIS DEED made the 12th day of April

in the year of our Lord one thousand nine hundred and seventy-nine (1979).

BETWEEN PENNSYLVANIA AND ATLANTIC RAILROAD COMPANY, a New Jersey corporation, having an office at 1700 Market Street, Philadelphia, Pennsylvania 19103,

hereinafter referred to as the Grantor, and JERSEY CENTRAL POWER & LIGHT COMPANY, a New Jersey Corporation, having an office at Madison Avenue at Punch Bowl Road, Morristown, New Jersey 07960,

hereinafter referred to as the Grantee;

WITNESSETH: That the said Grantor, for and in consideration of the sum of FOUR HUNDRED THOUSAND DOLLARS ($400,000.00)- - - - - - - - lawful money of the United States of America, unto the said Grantor well and truly paid by the said Grantee, at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, does by these presents, grant, bargain, sell, release, convey and confirm unto the said Grantee, the heirs or successors and assigns of the said Grantee, the premises described in Schedule "A" attached hereto and made a part hereof., without warranty or covenant, express or implied, of any kind whatsoever.

Rec 7-2-79

D.M.
RC

SCHEDULE "A"

ALL THAT PROPERTY situate in the Townships of New Hanover and North Hanover, Borough of Wrightstown in the County of Burlington, the Township of Plumsted in the County of Ocean and the Township of Upper Freehold in the County of Monmouth, being all of the land and right-of-way of the Shrewsbury Secondary Branch of railroad of The Pennsylvania and Atlantic Railroad Company, described as follows; VIZ:

BEGINNING at a line extended at right angles across the right-of-way of said abandoned railroad through a point in the centerline thereof at valuation survey station 1091+51, said line being the northeasterly line of land that transferred to Consolidated Rail Corporation, extending thence in a general northeasterly direction, following along said abandoned portion of the Shrewsbury Secondary Branch of railroad approximately 14.66 miles to a line extended at right angles across the right-of-way of said abandoned railroad through a point in the centerline thereof at valuation survey station 317+50 said point being at the distance of 640 feet, more or less, measured northeasterly along the centerline of the Shrewsbury Branch of railroad from the northerly line of Shrewsbury Road, said last mentioned line across the right-of-way being the southerly line of land of Jersey Central Power and Light Company.

EXCEPTING thereout and therefrom the following two parcels of land:

THE FIRST THEREOF:

ALL THAT CERTAIN tract or parcel of land and premises situate in Township of Plumsted, County of Ocean, and State of New Jersey being bounded and described as follows:

BEGINNING at an iron pin set for a corner at the intersection of the Easterly line of Evergreen Road (formerly New Eqypt-Allentown Road) (33 feet wide) and the Southeasterly right-of-way line of the now or formerly Pennsylvania and Atlantic Railroad, said point being distant 33 feet measured southeastwardly at right angles to the centerline of the main stem railroad track of the said railroad company; thence (1) along said lands now or formerly of the Pennsylvania and Atlantic Railroad parallel with said conterline and distant 33 feet measured southeastwardly therefrom, North 57 degrees 15 minutes 00 seconds east, a distance of 519.01 feet to an iron pipe set for a point of curvature in said line; thence (2) along the same on a line parallel and concentric with said centerline and distant 33 feet measured radially and southeastwardly therefrom along a curve curving to the left having a radius of 2,897.79 feet an arc distance of 825.15 feet, said curve having a chord bearing and distance of North 49 degrees 05 minutes 33 seconds East 822.37 feet to an iron pipe set for a corner in the non-tangent, nonradial line of lands now or formerly of Dorothy Mount, said point being distant 33 feet measured radially and southeastwardly from the said centerline of railroad track; thence (3) along said line of lands now or formerly of Dorothy Mount South 09 degrees 30 minutes 40 seconds west a distance of 165.05 feet to an iron pipe set for a corner to lands now or formerly of Norman Bright, Inc.; thence (4) along said lands South 54 degrees 30 minutes 40 seconds West a distance of 349.14 feet to an iron pipe set for an angle point in said line of lands; thence (5) along the same South 41 degrees 00 minutes 40 seconds West a distance of 216.48 feet to an iron pipe set for an angle point in said line of lands; thence (6) along the same South 45 degrees 34 minutes 16 seconds West a distance of 157.73 feet to a certain white oak tree (3 feet in diameter with railroad spikes driven into the north, south, east and west sides thereof) and situate on the westerly bank of a small tributary flowing southwardly into Stonyford Brook, for an angle point in the said line of lands; thence (7) along the same South 49 degrees

54 minutes 51 seconds West a distance of 99.16 feet to an iron pin set for an angle point in said line of lands; thence (8) along the same South 62 degrees 21 minutes 30 seconds West a distance of 466.10 feet to an iron pin set for a corner in the easterly line of Evergreen Road (formerly New Egypt-Allentown Road) (33 feet wide); thence (9) along the same North 01 degree 43 minutes 30 seconds West a distance of 100.09 feet to an iron pin at the point and place of beginning.

BEING ALSO DESCRIBED as Part of Lot 2, Block 500 on the Sheet 10-2 of the Tax Maps of the Township of Plumsted, Ocean County, New Jersey.

CONTAINING 117,048.39 square feet or 2.687 acres, be the same, more or less.

THE SECOND THEREOF:

ALL THAT CERTAIN tract or parcel of land and premises situate in the Borough of Wrightstown, County of Burlington and State of New Jersey, being bounded and described as follows:

BEGINNING at an iron pipe set at the point of intersection of the southeasterly line of Fort Dix Street (49.50 feet wide) formerly known as Wrightstown and Pemberton Road and the northwesterly line of other lands now or formerly of the Pennsylvania and Altantic Railroad, said point being set distant 3 feet measured northwestwardly and at right angles to the centerline of the main track of the said railroad company; thence (1) along the southeasterly line of Fort Dix Street North 11 degrees 21 minutes 30 seconds East a distance of 237.06 feet to a drill hole with wings set for a corner to lands now or formerly of Sophia Georges; thence (2) along the same South 71 degrees 00 minutes 00 seconds East a distance of 80.96 feet to an iron pipe set for a corner; thence (3) along lands now or formerly of Sophia Georges, Angelo Galepis (c/o John Marks), R. Ivler-B.R. Sigman-M.J. Singer, Louis and Ethel Apell and Grover and Jacqueline Pagano, North 54 degrees 45 minutes 00 seconds East a distance of 447.48 feet to a found iron marker in the southwesterly line of East Main Street (66 feet wide) formerly known as the Wrightstown and Cooktown Road; thence (4) along the same South 72 degrees 09 minutes 00 seconds East a distance of 106.47 feet to an iron pipe set for a corner to other lands now or formerly of the Pennsylvania and Atlantic Railroad, said point being set distant 15 feet measured northwestwardly and at right angles to the centerline of the main track of the said railroad company; the following three courses distances being along the lines of other lands of the said railroad company; thence (5) South 54 degrees 45 minutes 00 seconds West a distance of 511.41 feet to a point; thence (6) South 35 degrees 15 minutes 00 seconds East a distance of 12.00 feet to a point, said point being set 3 feet measured Northwardly and at right angles to the centerline of said main track; thence (7) South 54 degrees 45 minutes 00 seconds West a distance of 219.56 feet to a point in the southeasterly line of Fort Dix Street the point and place of beginning.

B. 402 L10 + 10.01

BEING KNOWN as Lot 10, Block 402 and part of Lot 4, Block 2000 on Sheet 4 of the Tax Map of the Borough of Wrightstown, County of Burlington and State of New Jersey.

CONTAINING 58,932.00 square feet or 1.352 acres be the same, more or less.

RESERVING, however, to the Grantor, all railroad trackage and salvageable materials located on the premises together with the right by Grantor, its successors, assigns or contractors to enter upon so much of the premises, as may be required, for a period of six months from the date from the delivery hereof to complete removal of all railroad trackage and salvageable materials.

SUBJECT, however, to (1) any easement, encumbrance, right or benefit that may have been created or recognized in or by that certain deed from the Grantor herein to Consolidated Rail Corporation, designated

as Document No. P&A-CRC-RPI-1 in the certification, as amended, of United States Railway Association to the Special Court pursuant to Section 209(d) of the Regional Rail Reorganization Act of 1973, as amended, said deed not yet having been recorded; (2) such state of facts that an accurate survey or a personal inspection of the premises may disclose; and (3) rights of the public in those portions of the premises within the beds of any and all public highway crossings.

IT BEING UNDERSTOOD and agreed that the Grantor is only quitclaiming all its rights, title, and interest of, in and to those portions of the parcel of land hereinbefore described which was acquired by the Pemberton & Hightown Railroad Company (a predecessor of the Grantor herein) under and by virtue of the following deeds from: John L. Hulme, et ux, dated December 1, 1866 and recorded in Book 41, Page 22; William H. Hartshorn, et ux, dated November 2, 1866 and recorded in Book 41, Page 15, and John L. Hulme, et ux, dated December 1, 1866 and recorded in Book 41, Page 47.