



United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, DC 20240

APR 26 2012

DEBARMENT DETERMINATION

CERTIFIED MAIL RETURN RECEIPT

Mr. Charles Penn Lindsey

Colorado Springs, Colorado 80904-1007

Re: Proposed Debarment of Charles Penn Lindsey, DOI Case No. 12-0003-00

Dear Mr. Lindsey:

This is to provide you with my written decision as Debarring Official for the U.S. Department of the Interior (DOI) regarding your proposed debarment. Upon consideration of all information contained in the official record, I conclude that your debarment from Federal nonprocurement and procurement activities for a one year period is presently warranted.

I. Brief Procedural History.

DOI proposed to debar you under the provisions of 2 C.F.R. Part 180, implemented by DOI through 2 C.F.R. Part 1400, by Notice dated January 27, 2012. The Notice proposed debarment from Federal non-procurement and procurement program activities for a three (3) year period. The Notice relied upon information provided in an Action Referral Memorandum (ARM) from the DOI Office of Inspector General (OIG). DOI based the action on the fact of your June 17, 2009, criminal conviction in the United States District Court for the District of Colorado.

You timely contested the Notice of Proposed Debarment, by brief email correspondence dated February 2, 2012, followed by a narrative response with three attachments by email correspondence dated February 8, 2012. Your letter requested the opportunity for an oral presentation of matters in opposition meeting (PMIO) as part of the proceedings.

By email correspondence to you dated February 8, 2012, David Sims, the DOI Debarment Program Manager, established a case schedule in response to your contest letters. The schedule accorded you the opportunity to submit any supplemental written information including any information addressing the mitigation and remedial factors considered in reaching a decision on imposition of debarment, found at 2 CFR 180.860, by close of business February 22, 2012.

You elected not to avail yourself of that opportunity. Mr. Stanley Stocker, the DOI case representative, provided written observations regarding your submission, by memorandum dated March 15, 2012, a copy of which he provided to you. By email of March 20, 2012, Mr. Stocker provided a copy of superseding Information to which you pled guilty.

The PMIO, tape recorded as part of the record, occurred on March 21, 2012. Following the PMIO, by email dated March 22, 2012, you provided information which you offered as clarification of certain statements you made during the PMIO. By email correspondence dated March 30, 2012, copied to you, Mr. Stocker provided a post PMIO response memorandum. By email dated April 2, 2012, copied to you, Mr. Stocker provided a list of the items returned to you out of those seized from you by investigators in the course of the criminal investigation. By email dated April 4, 2012, you provided a written reply to Mr. Stocker's March 30th memorandum. With receipt of your April 4th submission the matter is ready for decision.

II. Discussion.

Debarment is an administrative action taken to shield the Government from individuals and entities who, because of waste, fraud, abuse, noncompliance or poor performance, threaten the integrity of Federal funded procurement and non-procurement activities. Debarment addresses present responsibility.

A. Preliminary Issue.

During the PMIO you contended that you are not a "participant" within the meaning of 2 CFR Part 180, and that therefore debarment is not appropriate. Debarment is a prospective remedy to avoid future business risk by precluding eligibility for future awards. The misconduct need not arise in performance under a Federal award. When presented with information indicating a lack of business honesty or integrity, or poor performance, the government need not wait until it is actually harmed in the course of performance under a Federal nonprocurement or procurement award before acting to exclude a person from future award eligibility. It is incumbent on the debarring official when presented with such information to evaluate the necessity for imposition of the protection of debarment.

Under 2 C.F.R. § 180.980, "participant" is defined as "any person who submits a proposal for or enters into a covered transaction, including an agent or representative of a participant." The provisions of 2 C.F.R. § 180.120 make it clear that application is not limited to matters arising under an actual award. The scope of "participant" is also prospective. Section 180.120(a) states that the provisions of Part 180 are applicable if one is a "person who has been, is, or may *reasonably be expected to be*, a participant or principal in a covered transaction." (Italics added).

The government is a funder and consumer of an extremely broad range of goods and services. The record indicates that you have law investigation and enforcement investigator experience. You stated at the PMIO that for 25 years you were employed by the State of Colorado Gaming Commission as a criminal investigator with responsibilities focusing on conducting background checks. As a collateral responsibility you served as a reserve deputy sheriff. You state that you are retired and do not anticipate seeking federally funded work. However, your current retirement status and intentions with respect to seeking federally funded work can readily change. Absent imposition of the protection of debarment the decision to participate in or otherwise seek federally funded work would remain entirely within your control.

Considering your employment background it is reasonable to anticipate that you may seek to participate in federally funded work, directly or indirectly, or as an agent or representative of another contractor or assistance recipient. Accordingly, as a general matter you properly fall within the regulatory definition of "participant" at 2 C.F.R. §§ 180.820 and 180.980. It is also noted that based upon your work experience you also properly falls within the regulatory definition of "contractor" under Federal Acquisition Regulation debarment rules at 48 C.F.R. § 9.403.

B. Cause for Debarment.

The presence of past misconduct is the requisite starting point for evaluation. The ARM's information presents a clear and rational basis for concern. You pled guilty to and were convicted of a misdemeanor violation of the Archeological Resources Protection Act (ARPA), at 16 U.S.C. § 470ee(b) "Trafficking in Archeological Resources, the Excavation or Removal of Which Was Wrongful under Federal Law." It is an offense under ARPA to knowingly illegally excavate, remove, or transport from public lands an archeological resource.

At the PMIO you contended that your offense does not provide cause for debarment because it is not one of the specifically enumerated offenses at 180.800(a) (1) through (3). You collaterally urged that your offense also does not fall within the more broadly worded ambit of 180.800(a) (4).

Cause for debarment under 2 CFR Part 180 are intentionally broadly stated. The provisions of § 180.800(a) (1) through (a) (4) are designed to cover broad kinds of illegal conduct reflecting a lack of honesty and integrity rather than narrowly prescribed specific statutory offenses. For example, the offense categories listed at 180.800 (a) (3) include, but are not limited to, embezzlement, theft, receiving stolen property, forgery, falsification or destruction of records, making false statements, making false claims, and obstruction of justice. Section 180.800(a) (4), "any other offense indicating a lack of business integrity or business honesty that seriously and directly affects...present responsibility" is intended as a broad catch all provision intended to ensure capture of types of offenses which may somehow not clearly fall within subsections (a) (1), (2), or (3).

The essential nature of your offense, the illegal removal of archeological resources from public lands - whether committed on a small or large scale - is one of theft. The offense of which you are convicted readily falls within the parameters of both subsections (a) (3) and the more generally worded provision of § 180.800(a) (4). The offense inherently reflects adversely on your honesty and integrity. The conviction is a matter of record. The fact of the conviction establishes the existence of cause for debarment under 2 C.F.R. §§ 180.800 (a) (3), and (a) (4).

C. Mitigation Factors and Remedial Measures.

Debarment, both by its nature and as a matter of regulation, is not an automatic result of establishing the existence of cause for debarment. Debarment is used to protect government procurement and nonprocurement program interests only where truly warranted, rather than additional punishment for past misconduct. Consequently, in reaching a decision the Debarring Official considers along with the seriousness of the past misconduct any information presented by a Respondent persuasively indicating mitigating factors, altered circumstances, remedial measures, or other actions taken that address present responsibility. The information of record is given careful review and evaluation in connection with that provided by OIG against the criteria applicable here.

1. Fulfillment of the Court Imposed Sanctions.

An inherent degree of ameliorative impact may attach to the experience of criminal or civil prosecution and the fulfillment of court imposed sanctions. The record establishes that the Court sentenced you to six months of unsupervised probation. You stated at the PMIO that you have completed your sentence. The record contains no information to the contrary. This information is considered and weighed for value in light of the information presented for the record. Generally, the mere fact of proceeding towards involuntary completion of a court imposed judgment, without more buttressing mitigation information, does not provide persuasive evidence of an altered present attitude regarding business honesty and integrity to assure voluntary adherence to appropriate standards of business conduct and a conclusion that the protection provided by imposition of a period of debarment is unnecessary.

2. Self-disclosure of Misconduct and the Level of Cooperation with the Prosecution.

The act of voluntary self-disclosure of misconduct and extraordinary cooperation with an ensuing investigation and legal proceedings can speak to a person's present conformance with ethical standards of business conduct. You acknowledged at the PMIO that you did not self-disclose the misconduct. The record also is devoid of information indicating any extraordinary level of cooperation with the investigative and prosecuting authorities once the investigation began that could be weighed in terms of evidencing an altered standard of business ethics.

3. The Seriousness of the Offense and Level of Relative Culpability.

The debarment remedy serves different objectives than that of the criminal justice process. Debarment, an administrative remedy, focuses on responsibility and accountability as to the potential for assessment of business risk to government transactions posed by potential transaction participants rather than liability and punishment for criminal conduct.

The maximum statutory penalty under 16 U.S.C § 470ee(b), is one year imprisonment, a fine of \$10,000, or both. The offense is one of criminal conduct and thus inherently serious. The illegal removal of an artifact from its site of discovery can irrevocably impair or destroy the scientific worth of the artifact to speak to the culture and environment that produced it. The Court utilizing Federal criminal sentencing guidelines imposed a sentence at the lower end of the penalty scale.

The Court did not impose a jail term. Instead the Court sentenced you to six months unsupervised probation and the forfeiture of a number of items seized from you by Federal investigators. The forfeiture included a number of cultural, paleontological and other items rather than just the pot shard specifically referenced in the plea agreement and Information in your court case. The sentencing information indicates an assessment by the Court under the criminal law sentencing guidelines of a relative low level of culpability.

As stated above, these debarment proceedings focus on accountability and responsibility rather than criminal punishment. The Court imposed a penalty at the lower end of the punishment scale. For purposes of this debarment assessment, the record provides a mixed picture.

It is significant that the record indicates you initiated the illegal conduct. You were not an ancillary, or minor, participant in a scheme conceived and directed by others. Additionally, at the time you were a law enforcement official. At the PMIO you stated that in your line of work you did not receive training on ARPA and its purposes. However, as a general premise, a higher standard of care and obligation attaches to the conduct of a public official and law enforcement representative with regard to attitude regarding compliance with laws of the land.

On the alternative side of the ledger, there is no indication of previous or subsequent civil or criminal prosecutions. Nor is there information showing previous or subsequent exclusions or disqualifications from Federal non-procurement or procurement programs, or any administrative agreements with the government based on conduct similar to that underlying your criminal adjudication.

You emphasize in your information in opposition to debarment that you pled to the illegal removal of only one artifact, a pot shard, from Lake Powell, a part of the Glen Canyon National Recreation Area. The record indicates that in the course of search warrant execution items, including the pot shard, in lots bearing control numbers from 1 to 93 were seized from your residence. At least 25 control number item lots were seized from the residence of your mother. At the conclusion of prosecution the government returned to you only 72 of the item lots taken from your residence and only 21 of the item lots seized from your mother's

residence. The forfeited items included cultural, paleontological and geological artifacts from locations other than Lake Powell. Under the terms of the plea agreement and sentence imposed by the Court you forfeited the items not returned - a list that far exceeds the single pot shard identified as taken in the factual recitations of your plea.

You contend that you obtained the forfeited items in question legally or by gift but decided not to litigate the forfeiture for financial reasons. You offer in your March 22nd email an uncorroborated identification of the acquisition origin of at least some of the items. This assertion is made outside of the criminal proceeding forum and in the absence of the prosecuting attorney. The fact of record is that you agreed to the forfeiture as part of your plea. It is evident from this fact that the prosecutors hold a contrary view as to the provenance of the listed artifacts. Plea agreements are often entered to avoid the possibility of conviction on more serious charges. It is possible you agreed to the seizure as part of the plea merely to avoid the cost of challenging the seizure. But a reasonable inference here is that you agreed to forfeiture as part of your plea because the items were not legally obtained.

On balance, the information presented regarding the nature of the offense and level of relative culpability presents a mixed picture. The information does not support a conclusion that debarment is presently unwarranted. However, a degree of ameliorative value attaches to the fact of absence from the record of prior or subsequent judicial or administrative action. That is factored into the determination to impose a period of debarment less than the three years initially proposed in the DOI Notice.

4. Acknowledgement of the Seriousness of the Misconduct and Acceptance of Responsibility.

Whether a person acknowledges the seriousness of past misconduct and truly accepts responsibility factors into the decision on whether a potential business risk presently remains. You consented to enter a guilty plea to resolve the criminal case without trial. The fact that you chose to plead guilty is considered with respect to its potential mitigation value in this debarment proceeding. Taken in context with other information of record, such an action can contribute to indices of acceptance of responsibility for illegal conduct and commitment to altered future conduct. However, without other persuasive supporting indicia of altered business attitude the action may reflect no more than self-interest in limiting the potential for significantly greater liability attendant on proceeding to trial.

Your reasons for entering guilty plea appear to be motivated principally by personal familial concerns rather than a true acceptance of responsibility for the illegal removal from public lands of a cultural artifact and understanding of why the conduct is prohibited. The offense for which you were convicted in 2009, occurred in 2005. This debarment proceeding comes approximately three years after your conviction and seven years after the offense. A substantial amount of time has elapsed since then to permit your reflection upon the misconduct. Notwithstanding the passage of time, your written submissions and statements during the PMIO focus on the punitive consequences of the criminal conviction rather than demonstrate a present understanding of the purposes of the ARPA and the threat posed by violations of the law.

You stated at the PMIO that you had learned from the experience of criminal prosecution and would not engage in the illegal removal of cultural artifacts from public lands in the future. You stated that "it is wrong to loot a site and I would never do that." But when asked for understanding of the potential harm attendant upon illegal removal of cultural or other artifacts from public lands - answered essentially in terms of the attendant punishment rather than disruption to the relationship of the artifact to its physical location and attendant destruction of ability to the value of what the artifact can teach about the past.

At the PMIO you were asked whether you had ever explained to your son that taking the pot shard was wrong. You indicated you could not remember. Following the PMIO, by email dated March 22, 2012, you state that you "were sure that he understood." However, you refer only to a statement that may have been made to him regarding whether you or he would go to jail. This response fails to explain whether you informed him about the harm to cultural or historical understanding inherent in removing cultural or other artifacts from the site where they were found.

Your submissions and statements in this proceeding do not express a clear and genuine understanding on your part that removal of cultural artifacts from the location found destroys the artifact's scientific value with respect to how it relates or speaks to the site or how the site relates to the artifact. You focus throughout this debarment proceeding on the fact you were permitted to plead to the minimal removal of one pot shard which you assert was found on a beach at Lake Powell. You also suggest that the shard was not taken from an archeological site.

In your email of April 4th, you state "[a]t the time I believed picking up an isolated pot shard, not associated with any site, and was different from excavating and looting a site on government land and that doing so in a national park was even worse." Presuming this as your understanding, you nevertheless then removed an artifact found at a National Monument, concluding, apparently in your judgment, that the artifact somehow had no relevance to its location and therefore was fair game even if taken from public land. These statements indicate a lack of understanding or acknowledgement that the presence of the shard on the "beach" may itself have archeological relevance or value.

On balance, I cannot satisfactorily conclude from the nature of your responses that you truly recognize the seriousness of your criminal conduct and the threat such conduct poses to the integrity of government program operation and public confidence in them so as to provide assurance of altered attitude and future conduct. This assessment factors heavily into the determination that a period of debarment remains warranted.

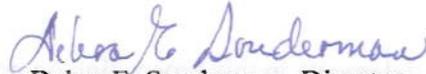
III. Conclusion.

The DOI action notice proposed a three (3) year debarment, the general time period provided under the rules. The record establishes the presence of cause for debarment. The record contains limited information with mitigation value. Based on the information presented imposition of a period of debarment is warranted.

Prescribing the appropriate length of time of that debarment is not a precise science. Balancing the information presented for the record and discussed above, and taking into account your fulfillment of court imposed sanctions and the lower level of relative culpability reflected in the sentence imposed by the Court, a one year period of debarment provides the appropriate degree of remedial protection for the government's non-procurement and procurement program interests. Under 2 C.F.R. § Part 180, the period of debarment imposed measures from the date of this determination.

As stated previously in this decision, debarment is a present, protective, remedy. In the event of changed circumstances, reversal of the criminal conviction upon which debarment is based, or other new relevant information about remedial or mitigation actions, Respondent may at any time petition in writing for reinstatement, as provided under 2 C.F.R. § 180.880.

Sincerely,



Debra E. Sonderman, Director
Office of Acquisition and Property Management

cc: David M. Sims, PAM
Jim Weiner, SOL
Lori Vassar, OIG
Stanley Stocker, OIG
Official Case File