

LITTLE ROCK, ARKANSAS



Differing Site Conditions: Problems in Hiding

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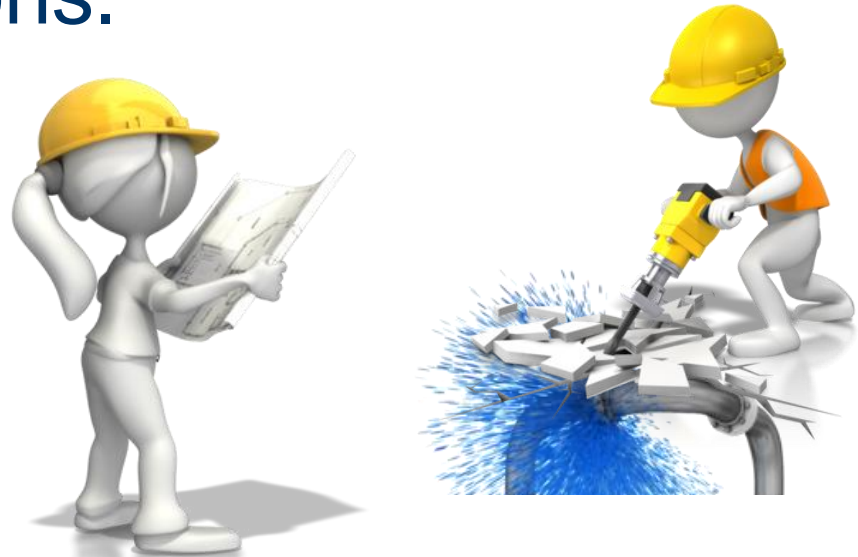
- 30 years experience
- Professional Engineer
- Analyst, Scheduler,
Expert Witness, Author,
Instructor



What is a differing site condition?

As currently used, the phrase
“differing site condition” comes from the
title of the clause in the Federal
Acquisition Regulations known as the
“Differing Site Conditions” clause.

Before differing site conditions clauses were included in contracts, contractors were often at risk for the cost of performing their contractual obligations despite encountering unforeseen conditions.



In 1926, the Federal Board of Contracts and Adjustments required the inclusion of a Differing Site Conditions clause in all Federal construction contracts;

“The Board’s action was taken to reduce or eliminate the contingency factor for subsurface conditions and to limit the latent costs incurred by contractors for pre-bid subsurface explorations.”

Geotechnical Engineering Notebook, Geotechnical Guideline No. 15,
Geotechnical *“Differing Site Conditions”*

FHWA summarized the history of the Differing Site Conditions clause in Federal contracts in the Geotechnical Engineering Notebook, *Geotechnical Guideline No. 15, Geotechnical “Differing Site Conditions.”*

1. In 1926, the Federal Board of Contracts and Adjustments started requiring a Changed Conditions clause in all Federal construction contracts.
2. The original Changed Conditions clause included only conditions that differed materially from indicated conditions.

3. In 1935, the clause was modified to include, “...situations where the contract is silent regarding subsurface conditions but the contractor encounters unforeseen, unusual conditions which differ materially from conditions ordinarily encountered.”
4. In 1963, the title of the Changed Conditions clause was changed to “Differing Site Conditions.”

The Code of Federal Regulations

From 23 CFR:

§ 635.109 Standardized changed condition clauses.

(a) Except as provided in paragraph (b) of this section, the following changed conditions contract clauses shall be made part of, and incorporated in, each highway construction project approved under 23 U.S.C. 106:

The Code of Federal Regulations

23 CFR 635.109 required the use of three types of standardized changed condition clauses:

- (1) Differing Site Conditions
- (2) Suspensions of Work Ordered by the Engineer
- (3) Significant Changes in the Character of the Work

The Code of Federal Regulations

(1) *Differing site conditions.* (i) During the progress of the work, if subsurface or latent physical conditions are encountered at the site differing materially from those indicated in the contract...

The Code of Federal Regulations

...or if unknown physical conditions of an unusual nature, differing materially from those ordinarily encountered and generally recognized as inherent in the work provided for in the contract...

The Code of Federal Regulations

...are encountered at the site, the party discovering such conditions shall promptly notify the other party in writing of the specific differing conditions before the site is disturbed and before the affected work is performed.

The Code of Federal Regulations

(ii) Upon written notification, the engineer will investigate the conditions, and if it is determined that the conditions materially differ and cause an increase or decrease in the cost or time required for the performance of any work under the contract, an adjustment, excluding anticipated profits, will be made and the contract modified in writing accordingly. The engineer will notify the contractor of the determination whether or not an adjustment of the contract is warranted.

The Code of Federal Regulations

- **(iii)** No contract adjustment which results in a benefit to the contractor will be allowed unless the contractor has provided the required written notice.
- **(iv)** No contract adjustment will be allowed under this clause for any effects caused on unchanged work. (This provision may be omitted by the STD's at their option.)

Types of Differing Site Conditions in Federal Contracting:

- 1926 –Type 1: Subsurface or latent physical conditions at the site which differ materially from those indicated in the contract.
- 1935 –Type 2: Unknown physical conditions at the site of an unusual nature.

Type 1 DSC

...if subsurface or latent physical conditions are encountered at the site differing materially from those indicated in the contract...

Type 2 DSC

...or if unknown physical conditions of an unusual nature, differing materially from those ordinarily encountered and generally recognized as inherent in the work provided for in the contract...

- Establishing the existence of a differing site condition involves a careful reading of the contract and some understanding of important case law.
- Case law is helpful because it gives us some sense of how someone else might look at the issue and what tests they might apply to verify that you encountered a differing site condition.
- For this course, we're going to focus on a case known as *Weeks Dredging & Contracting Inc. v. United States*, 13 Cl. Ct. 193, 218 (1987).

1. The condition existed prior to contract formation
2. The condition is physical
3. The condition is at the site
4. The condition differed materially from the conditions expressly represented in the contract documents or implied from the language or contents of the contract documents

5. The contractor's interpretation of the contract documents was reasonable
6. The contractor relied on the contract documents' representation and such reliance was reasonable
7. The conditions encountered were unforeseeable
8. Proper notice was given
9. The contractor suffered damage caused by the condition

1. The condition existed prior to contract formation
2. **The condition is physical**
3. The condition is at the site
4. The condition differed materially from the conditions expressly represented in the contract documents or implied from the language or contents of the contract documents

- A differing site condition is a physical condition other than the weather, climate, or act of God.
- Some conditions encountered on a construction site have been specifically excluded from the differing site conditions clause by administrative and court decisions.
- These conditions are considered to not be physical conditions as stated in the differing site conditions clause.
- Conditions not included are:
 - Weather conditions
 - Acts of God (e.g. fires, floods, hurricanes, earthquakes, etc.)

Turnkey Enterprises, Inc. v. United States, 597 F.2d 750 (Ct. Cl. 1797);

Increased costs incurred as a consequence of unusually severe rainfall, hurricanes, flooding, rough sea conditions created by wind or tide, frozen ground conditions caused by unusually severe weather, etc., do not provide the basis for relief for differing site conditions.

Roen Salvage Co., ENG BCA 3670, 79-2 B.C.A. ¶13,882;

The contractor expected to work in a half foot of water, but in fact had to work in water three to four times deeper.

Inundation by surface flooding following heavy rains is one of the hazards of the undertaking a contractor assumes when he enters into a contract.

Acts of God:

Arundel Corp. v. United States, 103 Ct. Cl. 688, 711-12 (1945) (hurricane);

- The DSC clause requires a latent condition at the time the contract was entered into, not one occurring thereafter
- Neither party is responsible to the other for losses from acts of God
- DSC clause did not apply to hurricanes, which was an act of God

Acts of God:

Hardeman-Monier-Hutcherson v. United States, 458 F.2d 1364, 1370-71, (Ct. Cl. 1972) (adverse sea and wind conditions);

- Weather no matter how severe does not, by itself, constitute a changed condition so as to entitle the contractor to relief under the Changed Conditions clause.
- The court thus holds that plaintiff is not entitled to relief based upon the Changed Conditions clause.

Case Law related to Weather in Differing Site Conditions Clauses

Weather examples:

- Groundwater at a higher level than is shown on the geotechnical report, which was caused by unusually heavy rain before bid day, is not a differing site condition; but...
- Higher groundwater which was caused by an upstream dam overflowing before bid day could be a differing site condition, even if the overflow was caused by unusually heavy rain.

The information provided to the bidders is often called the “Bid Package” or the “Proposal Package.” It typically contains the plans, the specifications, the general provisions, and other documents describing exactly what the owner wants the contractor to build. The contractor uses this package of information to prepare its bid price.

The bid package may sometimes reference or contain other information describing the site of work:

- Boring logs
- Geotechnical reports
- As-built drawings

- Exculpatory language in a contract is language that exculpates or excuses a contracting party from responsibility for something.
- For example, a no-damage-for-delay clause excuses the owner from responsibility for the contractor's damages in the event that the owner causes a critical project delay.

Many contracts contain exculpatory language that relieves the owner of responsibility for the subsurface information provided in the bid package.

The records of subsurface investigations are not a part of the bid package or contract, but are available to all bidders for informational purposes only. There is no warranty or guaranty, either expressed or implied, that the subsurface investigation records disclose the actual conditions that will be encountered during the performance of the work...Using or relying on Department subsurface investigations is at the bidder's risk. The bidder must perform and rely on its independent subsurface evaluation made before submitting a bid proposal. Submittal of a bid is an affirmative statement that an independent subsurface evaluation was made and Department subsurface investigations were not relied on. Individual test boring log data included in the Department's subsurface investigation records apply only to that particular boring taken on the date indicated.

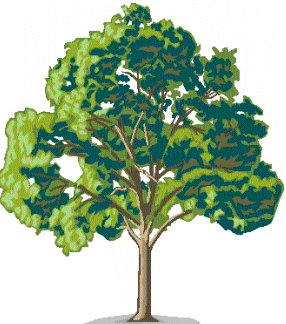
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- The example clause was taken from a contract that also has a differing site conditions clause.
- Isn't an exculpatory clause like the one quoted in the previous slides in conflict with the differing site conditions clause?

Not necessarily

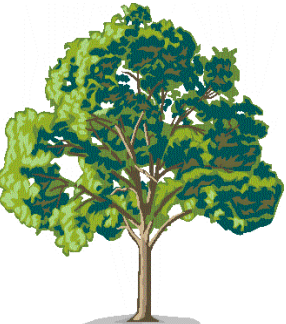


Surface

Boring 1

Boring 2





Surface

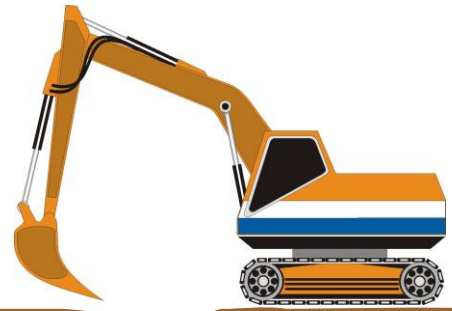
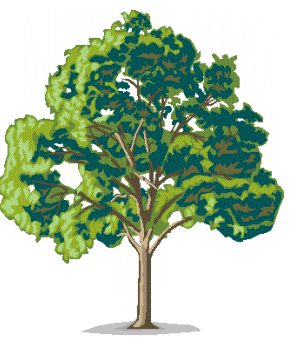
Rock

Rock

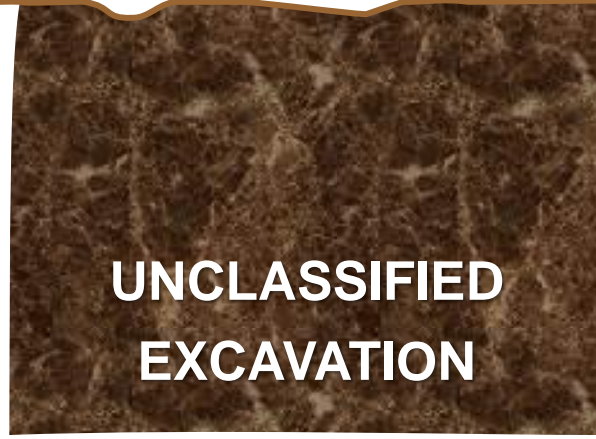
Boring 1

Boring 2





Surface



**UNCLASSIFIED
EXCAVATION**

Rock



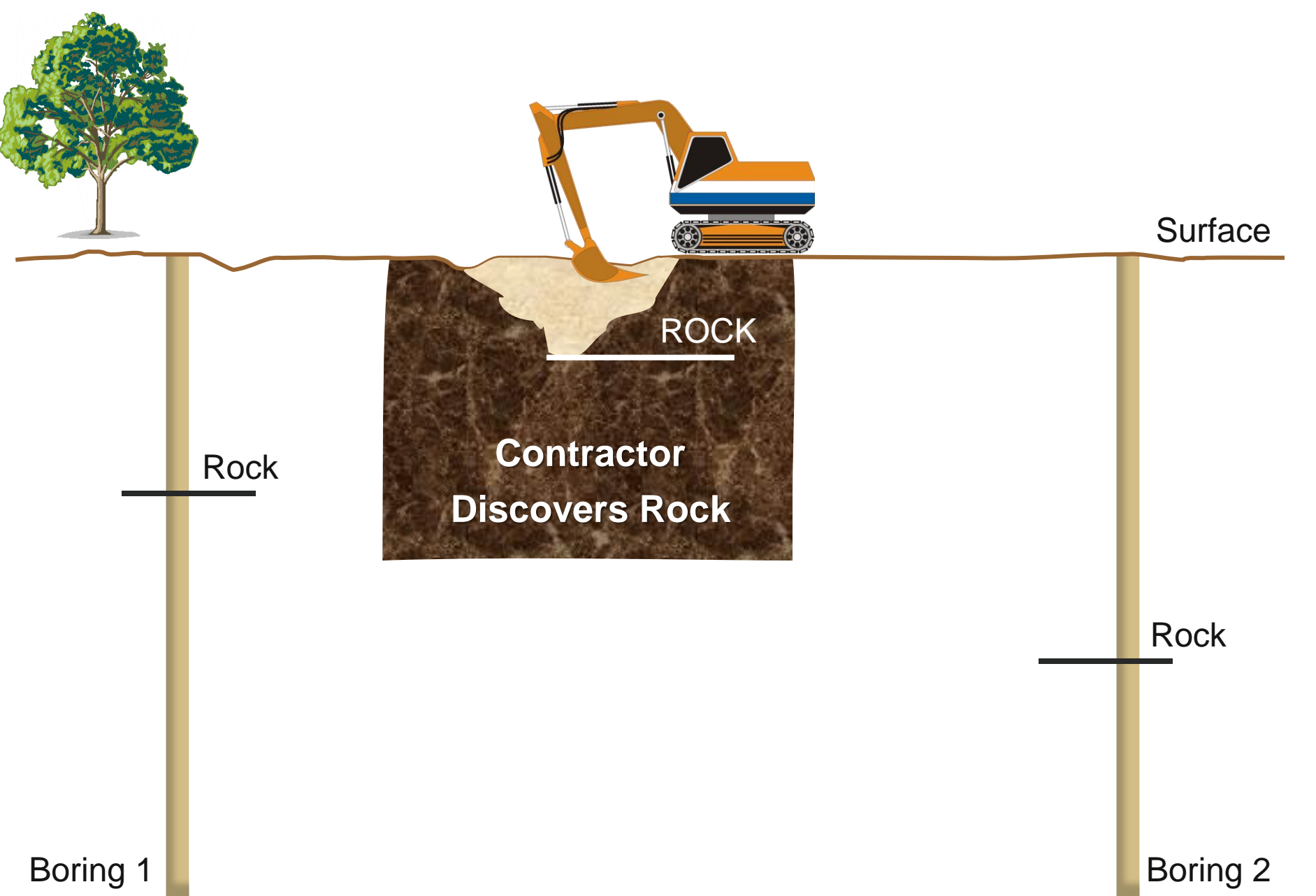
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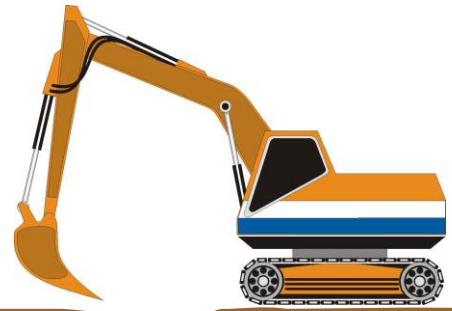
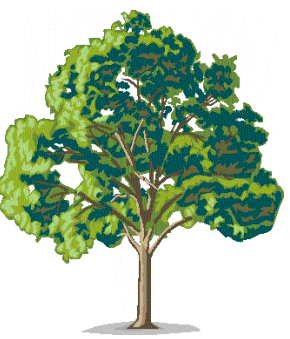


Boring 1



Boring 2





Surface



ROCK

Rock

Rock

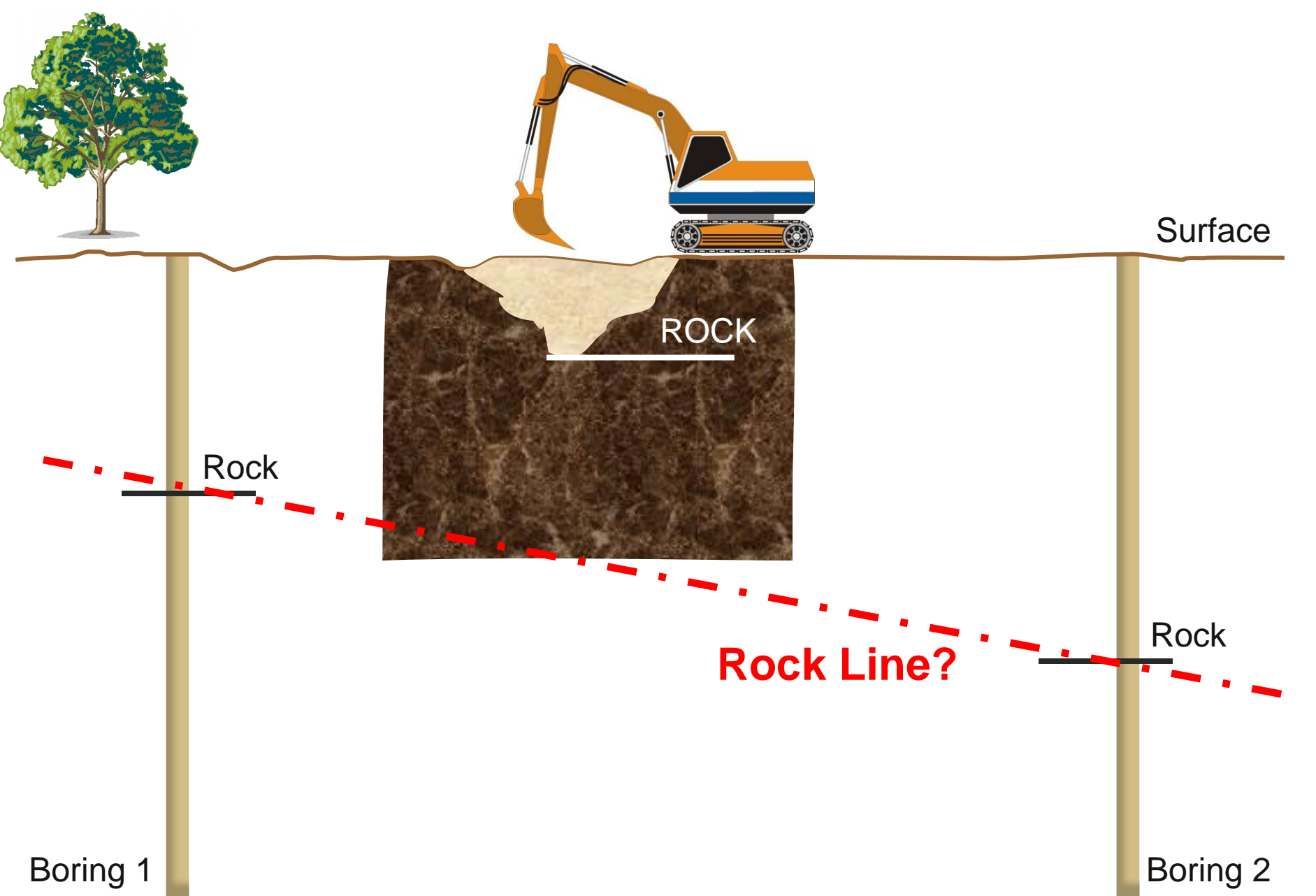
Rock Line?



Boring 1

Boring 2





- Exculpatory language may also be difficult to enforce when the contractor can show superior knowledge.
- Superior knowledge is information possessed by the owner prior to the time of bid that is not shared with the contractor and would have significantly affected the contractor's bid price.

The best defense against a superior knowledge argument is to fully disclose all subsurface information. This includes geotechnical reports and as-built drawings related to facilities that previously occupied the site.

Notice

...the party discovering such conditions shall promptly notify the other party in writing of the specific differing conditions before the site is disturbed and before the affected work is performed...

...No contract adjustment which results in a benefit to the contractor will be allowed unless the contractor has provided the required written notice...

Purpose of Notice

- To give the owner an opportunity to **INVESTIGATE.**
- To give the owner an opportunity to **MITIGATE.**
- To give the owner an opportunity to **DOCUMENT.**

If the contractor fails to provide timely notice, the owner's right to mitigate its damages may be prejudiced.



Are notice
provisions
enforceable?

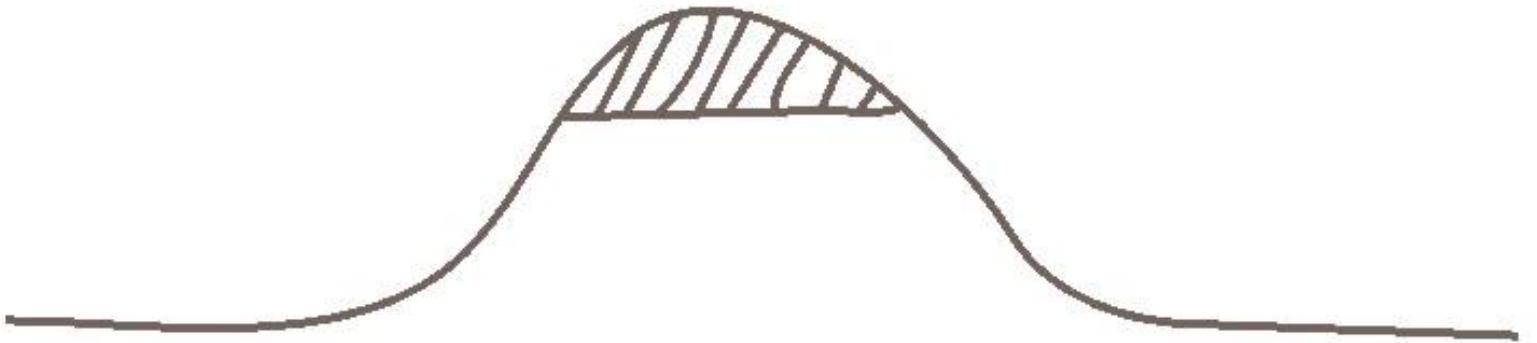
Yes, but not
necessarily
reliably so.

- Was formal, written, and timely notice provided in accordance with the contract?
- If not, did the owner have timely, constructive notice and actual knowledge of the differing conditions?
- If not, were the owner's rights prejudiced by the contractor's failure to provide timely notice?

Project:

To construct a test stand for test-firing of the submarine-based Trident missile rocket motor.





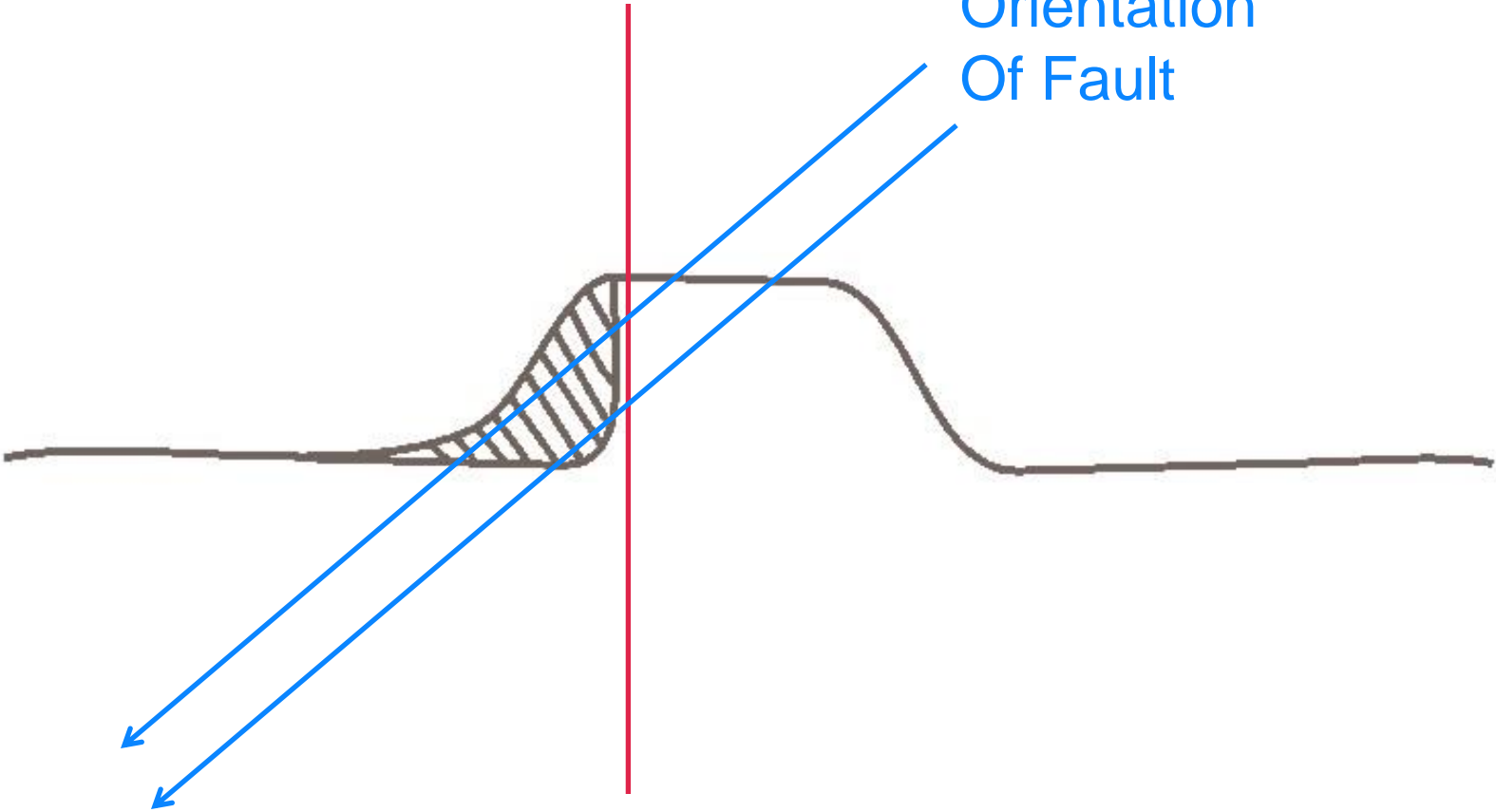




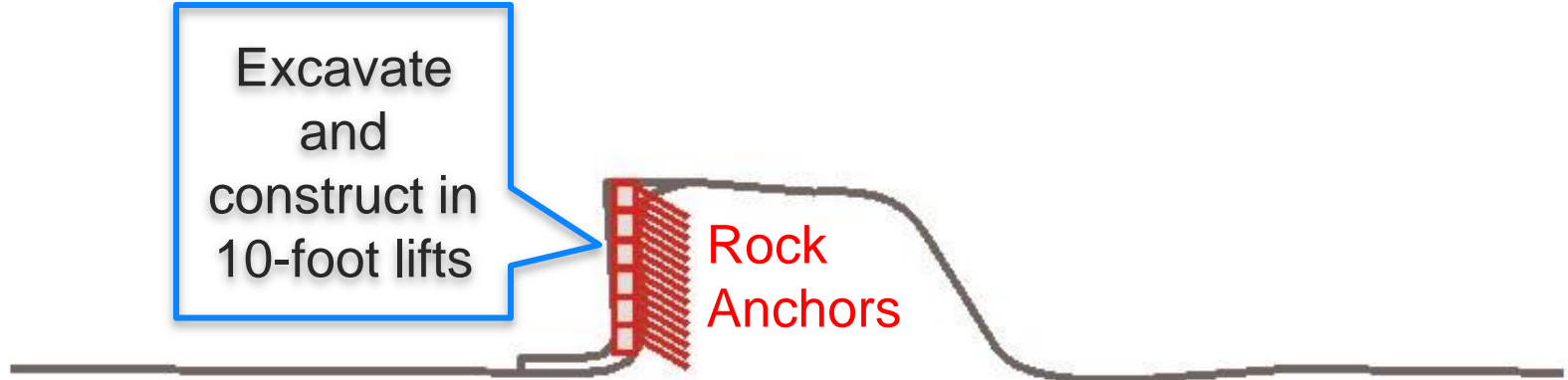


Fault

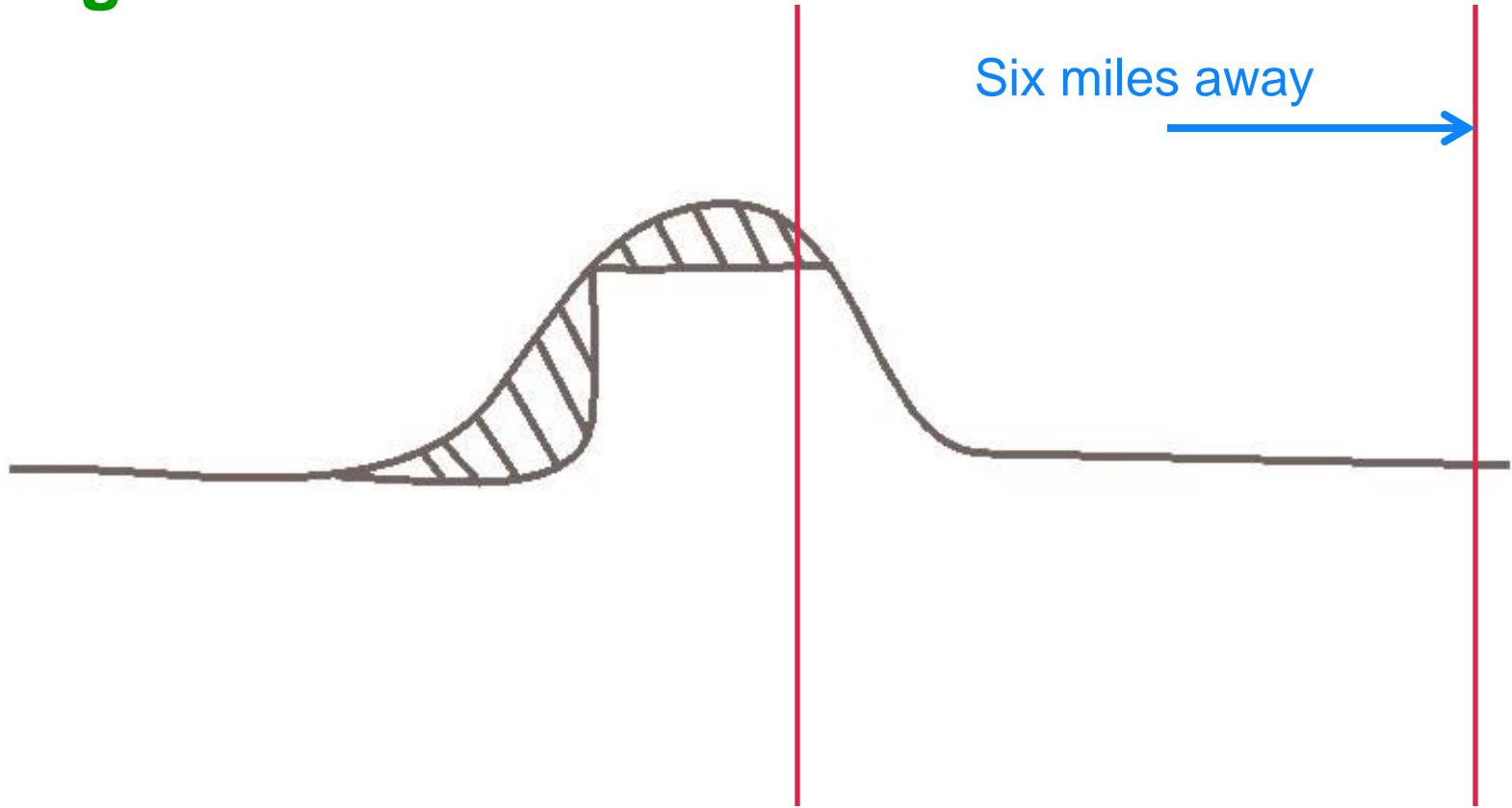
Orientation
Of Fault



Solution:



Borings:



Contractor's Position:

1. The existence and orientation of the fault was a differing site condition.
2. The assumption that pre-split blasting could be used was reasonable.
3. The assumption that the wall could be excavated and constructed in one, 100-foot lift was reasonable.

Owner's Position:

1. The contractor's site investigation should have revealed both the existence and the orientation of the fault.
2. Aerial photos showed the existence of the fault.
3. A bilateral change order was executed, providing full and complete compensation to the contractor for the DSC.

Resolution:

1. There was a differing site condition.
2. The contractor is not required to be a geologist.
3. The aerial photos were not available to bidders.
4. The change order resolved the issue; the contractor was not entitled to additional compensation or a time extension for the DSC.

Project:

The clearing and grubbing of the site and construction of a rest area.

Contractor's Position:

1. A site inspection was conducted.
2. No large “boulders” were noted on the ground surface; they were covered with snow.
3. No “boulders” were noted on plans.
4. “Boulders” were discovered upon mobilization.
5. This was a differing site condition.

Owner's Position:

1. “Boulders” should have been discovered during a thorough site investigation.
2. Contract documents did not represent that boulders were or were not present.
3. “Boulders” on the surface were a known geological formation.
4. No differing site condition.

Contract requirements regarding site inspections:

102.05 Examination of Plans, Specifications, Special Provisions, Proposal, and Project Site. The Bidder is expected to examine carefully the proposed Project Site, and Proposal Form before submitting a Proposal. The bidder is responsible for all site conditions that should have been discovered had a reasonable site investigation been performed. The submission of a Proposal will be considered conclusive evidence that the bidder is satisfied with the conditions to be encountered in performing the requirements of the proposed Contract. It will be assumed that the Bidder has also investigated and is satisfied with the sources of supply for all materials.

Establishing the Existence of a Differing Site Condition:

1. The condition existed prior to contract formation.
2. The condition is physical.
3. The condition is at the site.
4. The condition differed materially from the conditions expressly represented in the contract documents or implied from the language or contents of the contract documents.

Establishing the Existence of a Differing Site Condition:

5. The contractor's interpretation of the contract documents was reasonable.
6. The contractor relied on the contract documents' representation and such reliance was reasonable.
7. The conditions encountered were unforeseeable
8. Proper notice was given.
9. The contractor suffered damage caused by the condition.

Conclusion:

This was a differing site condition. No contractors plowed the site to investigate surface conditions and it was unreasonable for the owner to expect such a site investigation.

Want more information?

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