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POINTS TO REMEMBER

Air Piracy -- Interference with Flight Crew Members or Flight Attendants (49 U.S.C. 1472(j)) is Lesser Included Offense of Aircraft Piracy (49 U.S.C. 1472(i))

The recent case of United States v. Juan Miguel Borges Guerra (S.D. Fla.) redemonstrated the necessity of a statement concerning the offenses to be charged in an air piracy incident. Guerra had been charged with 49 U.S.C. 1472(i) (Air Piracy) and (j) (Interference with Flight Crew) for the September 3, 1971, hijacking of an Eastern Airlines flight enroute to Miami from Chicago's O'Hare International Airport. The district court judge accepted Guerra's guilty plea to the (j) offense and, over the government's objection, dismissed the (i) charge on his own motion.

Parallel problems have occurred with the dual charge of (i) and (j) where United States Attorneys' offices have accepted pleas to the (j) offense and have pressed for dismissal of the Air Piracy charges.

The Department has always advocated severe penalties for aircraft hijackers as a deterrent to future like acts. Further, one must remember that 49 U.S.C. 1472(i) carries with it a mandatory minimum sentence of twenty years imprisonment. No such mandatory minimum obtains with regard to 49 U.S.C. 1472(j). Where only air piracy is clearly indicated, charging the (j) offense as a separate count may well result in a dismissal of or acquittal on the (i) charge and a resultant sentence of less than the twenty year minimum which would have been required had a guilty plea to the (i) charge been taken.

Therefore, it is recommended that in those cases where an actual air piracy is indicated, a separate charge of Interference with Flight Crew is not deemed necessary.

Questions concerning individual prosecutive decisions may be discussed with General Crimes Section attorneys at Departmental extensions 2609, 3752, or 3765.

Notice to Consul of Alien's Arrest or Detention

The United States, pursuant to the provisions of many consular conventions, is required to inform immediately the nearest appropriate consular officer whenever a national of his country has either been arrested or detained in custody anywhere in this country. Some conventions require such notification only upon the demand of the detainee. Copies of these conventions are

available in most research libraries.

Your responsibility is restricted to federal violations. The Department of State has the duty to advise state authorities of their obligations. At the recommendation of the Department of State, we suggest that, should you be in doubt as to your exact responsibility, the detainee be advised of his right to have his consul informed of his whereabouts, but do not contact the consul unless requested to do so by the alien. If assistance is needed, contact the Administrative Regulations Section of the Criminal Division on extension 2665.

(Criminal Division)

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ANTITRUST DIVISION
Acting Assistant Attorney General Walker B. Comegys

DISTRICT COURT

SHERMAN ACT

GENERAL ELECTRIC CHARGED WITH VIOLATING SECTION 1 OF THE SHERMAN ACT BY RECIPROCAL PURCHASING ARRANGEMENTS

United States v. General Electric Co. (N. D. N. Y. Civ. 72-CV-255; May 18, 1972; D. J. 60-9-194)

On May 18, 1972 the United States filed a civil complaint in the Northern District of New York charging GE with using reciprocal purchasing in violation of Section 1 of the Sherman Act.

The complaint charges that since at least as early as 1965 GE has purchased materials and services from various suppliers upon the understanding that such suppliers, or their suppliers, would purchase the products of GE or its customers.

Specifically, the complaint alleges that GE has utilized purchase and sales data to determine from whom it would buy, has discussed with suppliers and customers their sales and purchase positions with GE, and has purchased from particular suppliers on the understanding that such suppliers would reciprocate.

The complaint asks that GE be enjoined from entering into or continuing any reciprocal purchasing arrangements, from communicating to suppliers that they will receive preference if they purchase from GE, from compiling statistics which compare its purchases from companies with its sales to such companies, and from communicating such statistics to suppliers and customers.

The complaint also asks the court to order GE to abolish any duties or functions assigned to any of its officials or employees which relate to reciprical purchasing, and to notify each of its suppliers and customers that it will not enter into reciprocal purchasing arrangements.

GE is the nation's largest manufacturer of electrical equipment and related products. Its total sales in 1970 were about $8. 7 billion, making it the fourth largest industrial company in the United States.

Staff: Margaret H. Brass, Donald H. Mullins and William G. Kelly, Jr. (Antitrust Division)

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CIVIL DIVISION

Acting Assistant Attorney General Harlington Wood, Jr.

COURTS OF APPEALS

FEDERAL TORT CLAIMS ACT -- DAMAGES

NINTH CIRCUIT HOLDS UNIFORM CONTRIBUTION ACT REQUIRES REDUCTION OF DAMAGES BY AMOUNT OF PLAINTIFF'S SETTLEMENT WITH NON-PARTY.

Shields A. Layne v. United States (C.A. 9, Nos. 71-1958, 71-2627; May 11, 1972; D.J. 157-6-183)

This case arose out of an automobile accident that occurred in the midst of a dust cloud created by Army tanks. The tanks were operating on an unpaved trail adjacent to an Alaskan highway upon which Layne was driving. Layne drove into the dust cloud and slowed down. His car was then hit from behind by another car, causing him serious injury. Layne settled with the other driver for $50,000 and sued the Government for $250,000.

From a $174,000 district court judgment in Layne's favor, the Government appealed on the issues of contributory negligence and the amount of damages. The Ninth Circuit ruled that the district court's finding of no contributory negligence was not clearly erroneous. It also refused to consider whether the amounts awarded for future medical expenses and loss of future earnings should be discounted to present value because that issue had not been raised below.

The court did, however, reduce the award in two respects. First, it held that the Uniform Contribution Among Tortfeasors Act required the $50,000 settlement to be subtracted from the award. Rejecting Layne's argument that the Act was inapplicable because the district court had found the accident resulted solely from the Government's negligence, the court of appeals held "there can be but one satisfication for the same injury, whether or not the released party is in fact jointly liable with the defendant against whom a judgment is rendered * * *." The court also reduced the post-judgment interest from 6 percent to 4 percent, the rate specified in 28 U.S.C. 2411(b).

Staff: Greer S. Goldman (Civil Division)

PROCUREMENT

COURT OF APPEALS FOR DISTRICT OF COLUMBIA SETS MINIMUM DUE PROCESS REQUIREMENTS FOR SUSPENSION OF CONTRACTOR.

Horne Brothers, Inc. v. Melvin R. Laird, et al. (C.A. D.C., No. 72-1392; May 17, 1972; D.J. 61-16-109)

The Navy conducted an investigation of the conduct of Horne Brothers, a Navy contractor, and concluded that there was "substantial reason to believe" that for a period of years Horne Brothers had been giving gratuities and favors to Naval personnel assigned to official duties concerning its contracts. As a result of this investigation and without a hearing, the Navy suspended Horne Brothers in December 1971 from participation in bidding on Government contracts.

Meanwhile, the Navy was soliciting bids on a ship repair contract. Horne Brothers, subsequent to its suspension, submitted a low bid which the Navy refused to consider. Horne Brothers first protested to the GAO. Then, when the successful bidder began work under the contract, Horne Brothers brought suit in the district court to enjoin performance of the contract. On April 13, 1972, the district court entered a preliminary injunction ordering cessation of work on the contract until GAO decided the bid protest.

On appeal, the Court of Appeals reversed the district court's preliminary injunction and remanded the cause to the district court. The Court of Appeals held that due process requires that a suspended contractor either be given a hearing at which the evidence justifying its suspension is presented or else be explicitly advised by a high ranking Government official of the reasons why such evidence cannot be revealed to it. However, the court indicated that such a hearing need not be held for one month after the suspension action; in the present case, since Horne Brothers had bid on the contract within one month of the suspension action, the court found that the lack of a hearing would not invalidate the bidding on the contract.

Staff: Robert E. Kopp (Civil Division)

SOCIAL SECURITY

TENTH CIRCUIT REVERSES DISTRICT COURT JUDGMENT GRANTING DISABILITY BENEFITS TO CLAIMANT WHO, DESPITE A SEVERE IMPAIRMENT, HELD A FULL-TIME JOB.

Ray O. Hedge v. Elliot L. Richardson (C.A. 10, No. 71-1497; May 10, 1972; D.J. 137-60-109)

Acting under 42 U. S. C. 423(d) (4) and 20 C. F. R. 1534(b), the Secretary denied disability benefits to a claimant who, despite a severe leg impairment, had held a full-time job earning more than $400 a month. The district court reversed on the ground that the mere fact that a claimant works while disabled does not prevent him from being disabled under the Act. On the Government's appeal, the Court of Appeals upheld the Secretary's decision, pointing out that under the Act and regulations a claimant earning more than $140 a month, though otherwise disabled, is deemed able to engage in substantial gainful activity unless there is affirmative evidence to the contrary. The Court found that substantial evidence supported the Secretary's determination that claimant's job was substantial gainful activity.

Staff: James Hair (Civil Division)

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CIVIL RIGHTS DIVISION

Assistant Attorney General David L. Norman

DISTRICT COURT

INVOLUNTARY SERVITUDE AND PEONAGE

United States v. Alphonso J. Campbell, Jr. and James Harrison
(CR No. 72-92; May 4, 1972; D. J. 50-67-42)

On May 4, 1972, the two defendants were convicted by a jury in federal district court in Greenville, South Carolina, on two counts of violating 18 U. S. C. 1584 (involuntary servitude); one count of violating 18 U. S. C. 1581 (peonage); and two counts of violating 18 U. S. C. 371 (conspiracy to violate section 1584 and 1581).

The case arose out of a migrant labor situation in which the defendants - a crew leader and his assistant - used force, threats of force, and intimidation to prevent several workers in a peach orchard near Spartanburg, South Carolina from leaving their employment.

Judge J. Robert Martin instructed the jury that involuntary servitude means a condition of enforced compulsory service of one to another and that peonage is a condition of compulsory service or involuntary servitude based upon a real or an alleged indebtedness.

This case represents the first conviction under the involuntary servitude or peonage statutes since 1964. In announcing the sentence of three years imprisonment for each defendant, Judge Martin warned those employing migrant workers that anyone holding such workers against their will would be risking a federal penitentiary sentence.

Staff: John Hoyle, James Schermerhorn, Michael Ferguson
(Civil Rights Division)

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INTERNAL SECURITY DIVISION
Acting Assistant Attorney General A. William Olson

SUPREME COURT

SELECTIVE SERVICE

DISTRICT COURT HAS JURISDICTION UNDER 28 U.S.C. SECTION 2241 TO DECIDE HABEAS CORPUS APPLICATION FILED WHERE PETITIONER IS DOMICILED AND WHERE APPLICATION FOR DISCHARGE WAS PROCESSED.

Strait v. Laird (S. Ct., No. 71-83; May 22, 1972; D. J. File 25-11-494)

In a 5-to-4 decision, the Supreme Court reversed a Ninth Circuit opinion and held that an unattached, inactive reservist could successfully bring suit where he was domiciled, and a federal court would have jurisdiction to issue a petition for a writ of habeas corpus.

Applying a "presence - through - meaningful - contact" theory, Mr. Justice Douglas held that as long as a petitioner could demonstrate the presence within the court's jurisdiction of someone in the military with whom he ahd contact, then the federal court would have jurisdiction to decide on application for habeas corpus relief. Thus, although Strait's custodian was located in Indiana, the district court in the Northern District of California did have jurisdiction in light of the fact that his custodian had enlisted the aid of armed forces personnel in California in processing Strait's application for a conscientious objector discharge.

Mr. Justice Rehnquist, speaking for the dissent pointed out that the Court's decision "emasculates Schlanger v. Seamans . . . by permitting habeas corpus when the custodian against whom the writ must run is not within the forum judicial district."

Staff: Robert L. Keuch, George W. Calhoun
(Internal Security Division)

COURTS OF APPEALS

TRADING WITH THE ENEMY ACT

THIRD CIRCUIT, UPHOLDS CONSTITUTIONALITY OF THE LICENSING PROGRAM UNDER THE FOREIGN ASSETS CONTROL REGULATIONS WHICH IMPLEMENT THE TRADING WITH THE ENEMY ACT.

Veterans and Reservists for Peace in Vietnam v. Regional Commissioner of Customs, Region 11 and Secretary of the Treasury of the United States, (C.A. 3, May 4, 1972; D.J. File 146-1-51-20885)

Pursuant to the Trading with the Enemy Act, 50 U.S.C. App. (1964), Section 5(b), and the Foreign Assets Control Regulations, 31 C.F.R. Part 500 (1968), the Regional Commissioner of Customs, notified plaintiff (appellant) that a package containing printed matter published in and forwarded from North Vietnam was being detained and would not be released to appeallant unless a license was applied for and procured from the Office of Foreign Assets Control, Treasury Department. Instead of applying for a license, appellant instituted this suit for injunctive relief challenging the constitutionality of the Act and Regulations. The District Court granted defendants' (appellees') motion for summary judgment. The Court of Appeals (C.A. 3) affirmed, holding that the TWEA and the Regulations are constitutional both facially and as applied.

The regulations under attack required that a license be obtained in order to import into the United States publications originating in mainland China, North Korea and North Vietnam, and required the importer, in order to obtain such license, to (a) pay the purchase price into a blocked account, or (b) demonstrate that the shipment is a bona fide gift which not result in financial benefit to the country of origin.

The Court of Appeals rejected appellant's arguments that the statute and regulations are repugnant to the United States Constitution, in that they constitute an overbroad grant of power to the President without any standards; they deprive appellant of property without affording Fifth Amendment due process; and they abridge First Amendment rights of free speech and free press. The Court emphasized that the obvious purpose of the TWEA is to prevent countries such as North Vietnam and Communist China from deriving any economic benefit from transactions with person subject to the jurisdiction of the United States; and that, considering the state of our relationship with North Vietnam, and that money is an important weapon in any international struggle, the Congressional design of the Act is wholly proper.

Staff: Robert L. Keuch and Lee B. Anderson
(Internal Security Division)

REMOVAL FROM GOVERNMENT SERVICE

REMOVAL FROM FEDERAL CIVILIAN EMPLOYMENT FOR DELIBERATE FALSIFICATION OF MATERIAL FACT IN CONNECTION WITH EMPLOYMENT NOT IMPROPER.

Rodriguez v. Seamans, Secretary of the Air Force, et al. (C. A. D.C., No. 24, 599, April 3, 1972; D. J. File 145-14-622)

Defendant was dismissed from his federal civilian employment for falsely representing, on his 1963 applications for employment and for security clearance, that he had never belonged to the Communist Party, U. S. A., or any Communist organization, or any organization designated by the Attorney General under Executive Order 10450. He admitted under oath that during 1934-36 he had belonged to the Young Communist League (YCL) and the American Labor Party (ALP), and that he then considered the Communist Party and the YCL "synonymous." It was conceded arguendo that had he answered truthfully he would not have been barred from employment or from security clearance.

Appellant argued that the inquiries were unconstitutionally overbroad. The Court of Appeals rejected his argument, holding on the basis of Dennis v. United States, 384 U.S. 855 (1966), and Kay v. United States, 303 U.S. 1 (1938), that his deliberate falsification denied him standing to raise the constitutional question.

The Court held that the commanding officer of the installation where appellant was employed did not violate the controlling agency regulation (Air Force Regulation 40-712) in ordering his removal. That regulation permitted removal for deliberate falsification of a material fact in connection with employment, but prescribed a lesser penalty for other kinds of misrepresentation. Citing Garner v. Board of Public Works, 341 U.S. 716, 720, rehearing denied, 342 U.S. 843 (1951) with approval, the Court held that inquiries relating to truthfulness and to past loyalty were "material" within the meaning of the regulation. The Court also held that although appellant's job performance had been exemplary, his removal did not violate the Veteran's Preference Act, 5 U.S.C. §7512, which permits dismissal only for such cause as will promote the efficiency of the service, since the efficiency of the service is promoted by discharging employees who make false statements. Judge Wright dissented in a separate opinion.

Staff: Robert L. Keuch, Richard S. Stolker
(Internal Security Division)

CONGRESSIONAL COMMITTEE SUBPOENAS

SUIT FOR INJUNCTIVE AND DECLARATORY RELIEF AGAINST CONGRESSIONAL COMMITTEE ISSUING SUBPOENA DUCES TECUM, JUSTICIABLE, BUT PREMATURE.

Thomas W. Sanders, et al. v. John D. McClellan, et al., (C.A. D.C., Nos. 24,507 and 24, 728, April 19, 1972; D.J. File 146-1-73-76)

The Senate Permanent Subcommittee on Investigations of the Senate Committee on Government Operations issued to plaintiff a subpoena duces tecum seeking certain back issues of a magazine he published, and other documents, in order to determine the identity of the author of several articles concerning "how to accomplish sabotage and terrorism, suggest[ing] various targets, and explain[ing] how to manufacture explosives." Plaintiff brought an action in the United States District Court for the District of Columbia for injunctive and declaratory relief to prohibit the execution of the subpoena, on grounds that it infringed the freedom of the press and cast a chilling effect upon the exercise of first amendment rights.

Citing Pauling v. Eastland, 109 U.S. App. D.C. 342, 288 F.2d 126 (1960) as controlling authority, the district court denied plaintiff's motion for a temporary restraining order. On expedited appeal the court of appeals stayed enforcement of the subpoena and ordered the district court to proceed expeditiously. Subsequently the district court granted the government's motion to dismiss, relying upon Pauling v. Eastland, supra, holding that no justiciable issue was presented.

On appeal of the merits, the court of appeals affirmed the district court's order and opinion, but for different reasons. Noting that "there is presented now a claim of an individual that his constitutionally protected freedom is invaded by definite action taken under governmental authority," the Court held that the issue was justiciable. However, since appellant had not exhausted his opportunity to first present his claim to the Committee, he had deprived the Committee of an opportunity either to accept or reject his claim of objection. Should the Committee reject his contentions and institute a contempt proceeding, appellant could assert his constitutional objections by way of defense. In its present posture, the Court held, the claim was premature, and to grant the relief sought would violate the separation of powers doctrine.

Staff: Robert L. Keuch, Benjamin C. Flannagan
(Internal Security Division)

GRAND JURY WITNESS IMMUNITY FROM PROSECUTION

IT WAS AN ABUSE OF DISCRETION TO REQUIRE A SHOWING IN OPEN COURT OF THE SUBJECT OF THE GRAND JURY'S INVESTIGATION.

United States of America v. Colin Neiberger and Terry Taube (C.A. 7, No. 71-1880; May 2, 1972; D. J. File 146-1-37-4491)

During the course of a grand jury investigation, the government applied for a grant of immunity to two witnesses under 18 U. S. C. section 2514. In support of the application the United States Attorney submitted a sworn affidavit that the subject of the grand jury's investigation was related to the investigation of crimes enumerated in section 2514.

The district judge held that the government was required to make a "modest showing" in open court in an adversary hearing that the grand jury was actually investigating the crimes referred to in the affidavit. The government declined to do so, and the district court refused to grant the immunity applications.

In reversing the district court, the Ninth Circuit held "[t]he statute pertaining to a grant of immunity places much of the responsibility for determining whether or not such a motion should be made upon the United States Attorney General and his agents. See 18 U. S. C. §2514 (1970). Further, the sworn affidavit of the United States Attorney that the investigation pertained to crimes covered by that statute stood completely unrebutted by any cross-affidavit before the District Court. While we recognize that any statute which empowers a judge to issue an order automatically conveys some discretion (particularly in this instance related to preventing inappropriate immunity baths) we see nothing in this proceeding which called for lifting of the veil of secrecy which should generally surround grand jury proceedings."

Staff: Robert L. Keuch, George W. Calhoun
(Internal Security Division)

DESTRUCTION OF GOVERNMENT PROPERTY

JUSTIFICATION DEFENSE REJECTED IN PROSECUTION FOR DESTRUCTION OF GOVERNMENT PROPERTY; NO ERROR IN REFUSING TO INSTRUCT JURY OF POWER TO ACQUIT DESPITE BELIEF IN DEFENDANT'S GUILT.

United States v. John William Simpson (C.A. 9, No. 71-1790, May 4, 1972; D. J. File 52-11-1761)

After a jury trial, defendant was convicted on two counts of destroying government property and on one count of interfering with the administration of the Selective Service System. The evidence was that he gained access to

a local board office in San Jose, California, opened a file drawer, spilled gasoline into it, and set the contents on fire. He remained in the building and was arrested.

On appeal, defendant argued that the trial court improperly excluded and instructions as to whether his conduct was justified in that he allegedly sought to avert criminal acts in Indochina and to defend property and persons in the war zone. Affirming his conviction, the court held that a defense of justification did not excuse defendant's conduct which, it held, was unreasonable since his acts could have no significant effect upon the alleged ills he sought to remedy.

The court of appeals also rejected defendant's argument that the jury should have been instructed that it was empowered to acquit him regardless of his guilt, holding that although juries often reach such "conscience" verdicts without being instructed of their power to do so, to so instruct the jury would usurp the court's function in determining questions of law.

Staff: United States Attorney James L. Browning, Jr., Assistant United States Attorneys F. Steele Langford and John G. Milano (N. D. California)

* * *

LAND AND NATURAL RESOURCES DIVISION
Assistant Attorney General Kent Frizzell

COURTS OF APPEALS

PUBLIC LANDS; INDIANS

FEDERAL LAW CONTROLS FEDERAL PATENTS; CONSTRUCTION OF FEDERAL SURVEYS AND PATENTS OF LANDS BORDERING NAVIGABLE WATERS; LANDS OMITTED FROM SURVEY; INAPPLICABILITY OF STATE ADVERSE POSSESSION LAWS AND OF COLOR OF TITLE ACT TO INDIAN RESTRICTED LANDS; INDIAN RESTRICTED LANDS ARE NOT "PUBLIC LANDS."

United States v. Schwarz, et al. (C.A. 7, No. 71-1392, May 3, 1972; D. J. 90-2-5-362)

The United States and its Indian patentee prevailed in a quiet-title action against an adjoining landowner, under the following circumstances: In 1854, the United States concluded the Chippewa Treaty, 10 Stat. 1109, 1110, by which certain land in Wisconsin was ceded by the Indians to the United States in trust for the Lac du Flambeau Indian Reservation. The treaty also provided that such reservation land could be allotted and conveyed by federal patent to individual Chippewa Indians. Two lots, north and south of each other and bordering a navigable lake to the east, were officially surveyed and platted by the Government in 1965. Shortly thereafter title to each lot was conveyed by federal patents to different Chippewa Indians.

The north lot is attached to a peninsula which projects into the lake. On the official government plat, the peninsula is depicted as an eastward stub of the north lot. But the peninsula actually encloses more acreage and projects south into the lake opposite the south lot.

The owners of the south lot claimed title to that part of the peninsula that faced it, built a road into the peninsula, and occupied it. Thereafter, the United States commenced this suit.

After trial to the district judge without a jury, the district court concluded that the peninsula was owned by the patentee of the north lot and found, on testimony of the Government's geological expert, that the peninsula was morphologically part of the north lot and that at all pertinent times the arm of the lake separating the peninsula from the south lot was deep enough to float logs and boats, i.e., was navigable. The district court also found that the peninsula, though not accurately depicted in the 1865 government survey, was not intentionally omitted from it.

The Court of Appeals held that federal, and not state, law controlled the disposition of cases involving the scope of federal patents and interests retained by the Federal Government. Hughes v. Washington, 389 U.S. 290, 291-293 (1967). The federal rule concerning government platting of meandered bodies of water depicted on government plats is that the lot boundaries follow the actual shoreline on the ground rather than the exact course of meander lines platted on paper, which merely symbolize the actual shoreline. As applied, this rule excluded the peninsula from the south lot and connected it to the north lot. The fact that sizeable portions of the peninsula had been omitted from depiction on the government plat of survey did not change this result, absent proof that the survey was fraudulent. The Court of Appeals further held that the fact that the owner of the south lot had occupied the peninsula for several years afforded them no rights under the Wisconsin adverse possession laws. The Indians owning the north lot remained under the disability imposed by their restricted-fee title requiring that Presidential consent precondition any conveyance of their lot, and the statute of limitations could not begin to run before this restriction was removed. Furthermore, Board of Commissioners v. United States, 308 U.S. 343 (1939), established that state limitation statutes do not apply to Indians or the Government suing in their behalf.

Nor did the special procedures of the Color of Title Act, 43 U.S.C. sec. 1068, conferring certain acquisition rights to occupants of public land, apply here. The land was no longer "public," having been conveyed by patent. Even if the peninsula remained partly unconveyed, it would be part of an Indian reservation and likewise not "public land" within the statute.

Staff: Dirk D. Snel (Land and Natural Resources Division); United States Attorney John O. Olson (W.D. Wis.)

INDIANS; APPEALS

ATTORNEY GENERAL NOT REQUIRED TO REPRESENT INDIANS UNDER 25 U.S.C. SEC. 175 OR TO PROVIDE SECURITY UNDER RULE 65(c), F.R.Civ.P.; FINALITY--APPELLATE JURISDICTION OF LEGAL REPRESENTATION DECISION.

Rincon Band of Mission Indians, et al. v. Escondito Mutual Water Co., et al. (C.A. 9, No. 26124, Apr. 19, 1972; D.J. 90-2-2-152)

The Indians sued the Escondito Mutual Water Co., the Secretary of the Interior, and others over water rights. The Indians sought to compel the Attorney General to represent them under 25 U.S.C. sec. 175. The Attorney General declined, pointing to Indian Claims Commission litigation where the United States is defending a suit by the same Indians over the same water rights.

The Ninth Circuit, reaffirming previous decisions, ruled that 25 U.S.C. sec. 175 is discretionary and that the Attorney General could, especially in these circumstances, decline to represent the Indians or to furnish security under Rule 65(c), F.R.Civ.P.

The Court also explored the finality of the district court's decision on Indian representation, concluding that the decision was appealable as a final order, even though the bulk of the water rights litigation remained in the district court:

> The decision was not tentative, informal or incomplete; it was not a step toward a final judgment in which it would be merged. It did not involve the merits, and it would be too late for effective review if one were to await the final dispositive judgment on the entire case.

Staff: Carl Strass and Donald W. Redd (Land and Natural Resources Division)

DISTRICT COURT

TUCKER ACT

FAILURE OF PROOF TO SHOW GOVERNMENT DAM BLASTING AND RAILROAD RELOCATION "TOOK" PLAINTIFFS' SUBIRRIGATION SYSTEM.

Earl I. Meier, et ux. v. United States (D. Mont., Civil No. 1958, Apr. 6, 1972; D.J. 90-1-23-1617)

A complaint was filed under the Tucker Act, 28 U.S.C. sec. 1346(a)(2), charging that the United States had taken certain water rights and destroyed the utility of plaintiffs' lake. The issue actually tried was whether blasting and a railroad cut made by the United States in connection with the railroad relocation required by the construction of the Libby Dam destroyed a system of subirrigation on plaintiffs' land, adjoining the above-mentioned lake, for which they sought damages.

The plaintiffs' experts were of the opinion that the blasting in 1967-1969 ruptured the seals in sedimentary aquifiers beneath the Meier land, which would otherwise have gradually released its water during late summer months, and instead drained into the railroad cut. The government experts were of the opinion that the water levels on plaintiffs' land as reflected by the levels on the Meier lake were cyclical, dependent upon general weather conditions.

The judge's decision for the Government was based upon the plaintiffs' failure to sustain their burden of proof. The judge did not accept the plaintiffs' expert testimony because, although more extensively trained than those of the defendant, the plaintiffs' expert had visited the land when the land was covered with snow and all the still water was frozen. He based his estimations upon observations of water running below the ice, with velocity of the flow gaged from "arm movements" by Mr. Meier. His conclusions were also based in part upon interviews with the plaintiffs and off the record consultations with another geologist. It was impossible to determine exactly what representations made by the plaintiffs led to their expert's ultimate conclusions. The defendant's experts, however, had extensive experience in the geographical area. The Meier lake, said by the plaintiffs' expert to be an index of what occurs underground, was almost if not completely dry in July 1963, prior to any blasting, and yet in July 1970 and 1971 it contained substantial amounts of water. This confirmed the expert opinion of government witnesses that factors other than blasting or the railroad cut accounted for the water levels on and under the Meier land.

Staff: Assistant United States Attorney Eugene A. Lalonde (D. Mont.); John H. Germeraad (Land and Natural Resources Division)

STATE COURT

INDIANS

INDIAN OFF-RESERVATION TREATY RIGHTS TO FISH ARE SUBJECT TO STATE REGULATIONS ANNUALLY DETERMINED TO BE NECESSARY TO THE CONSERVATION OF FISHERY, PROVIDED REGULATIONS DO NOT DISCRIMINATE AGAINST INDIANS; SUPREMACY OF TREATY RIGHTS; BURDEN OF PROVING NECESSITY AND REASONABLENESS OF REGULATIONS; FEASIBILITY OF GUARANTEEING SHARE OF FISH TO INDIANS.

The Departments of Game and Fisheries, State of Washington v. The Puyallup Tribe, Inc. (S. Ct. Wash., No. 41822, May 4, 1972; D.J. 90-2-0-604)

This appeal arose from a decree of the state trial court after remand from the Supreme Court of Washington in the case of Department of Game v. Puyallup Tribe, Inc., 70 Wash. 2d 245, 422 P. 2d 754 (1967), following affirmance by the United States Supreme Court in Puyallup Tribe v. Dept. of Game, 391 U.S. 392 (1968). The Supreme Court of the State of Washington directed the trial court on remand to enter a judgment and decree predicated on the proposition that the Puyallups do have treaty rights which are subject to conservation regulations which are reasonable and necessary to preserve the fishing; and that the decree as reframed should reflect that, if

a defendant is a member of the Puyallup Tribe and is fishing at one of the usual and accustomed fishing places, he cannot be restrained or enjoined from doing so, unless he is violating a statute or regulation of the Departments of Game or Fisheries which has been established to be reasonable and necessary for the conservation of the fishery. On remand, the trial court dissolved the temporary injunction which had been placed on the Puyallups' fishing, finding that neither the Department of Game nor the Department of Fisheries had shown either violation of existing regulations or irreparable harm and were not entitled to injunctive relief. The court also found that the Department of Game was not entitled to relief because its regulations admittedly failed to recognize Puyallup treaty rights under the Treaty of Medicine Creek. Both Departments filed notices of appeal.

The Supreme Court of the State of Washington agreed that state law must yield to Indian treaty fishing rights, that the right to fish at usual and accustomed places "in common with other citizens" was a greater right than other citizens had, that new regulations taking into account the treaty rights must be promulgated yearly, and finally, that the burden of proof shifted to the State to prove the regulations were necessary to preserve the fishery once the Indians raised the treaty right defense. The court rejected as unfeasible our argument that commercial and sport fishing in Puget Sound should be restricted to permit a fair share of the fish to go to the Indians. Two of the nine judges (one did not participate) dissented, reasoning that on-reservation treaty fishing rights were intended to be exclusive, but not off-reservation rights; the 14th Amendment ended off-reservation treaty rights; and the Puyallup Tribe ceased to exist as a tribal entity.

Staff: Thomas L. Adams, Jr. (Land and Natural Resources Division); Assistant United States Attorney Jerald E. Olson (W.D. Wash.)

ENVIRONMENT; INJUNCTIONS

DENIAL OF PRELIMINARY INJUNCTION; DISCRETION; ONGOING PROJECT COMPLIANCE WITH NEPA; ADEQUACY OF ENVIRONMENTAL IMPACT STATEMENT; CONSIDERATION OF ALTERNATIVES.

Conservation Council of North Carolina, et al. v. Froehlke, et al. (M.D. N.C., No. C-184-D-71, Feb. 14, 1972; C.A. 4, No. 72-1276, May 2, 1972; D.J. 90-1-4-358)

This action, filed in August 1971, sought to enjoin the New Hope Dam project in North Carolina, because of alleged violations of the NEPA which was effective January 1970. The project was authorized by Congress in 1963. Construction began in late 1970. By September 1971, 54% of the land needed for the project had been acquired and construction was 22% complete.

In denying a preliminary injunction, the district court commented as follows: (1) There is no dispute that the project must comply with the NEPA's requirements as to future action even though the dam was authorized seven years prior to the NEPA. (2) The NEPA's requirements provide only procedural remedies instead of substantive rights, and the function of the court is to insure that the requirements are met. (3) The court cannot substitute its opinion as to whether the project should be undertaken, nor resolve the experts' conflicting opinions. (4) The environmental impact statement here, in three volumes, satisfies the NEPA requirement of disclosing "to the fullest extent possible" all environmental factors, assessing adverse environmental effects, and discussing alternatives to the proposed agency action. The impact statement included the depositions of the plaintiffs' expert witnesses, and presented every matter plaintiffs alleged or argued was either wrong or omitted, including the cost-benefit ratio (which the court said was a matter for Congressional determination). (5) Impact statements for other subsequent projects (two nuclear power plants and an interstate highway) should consider their relationship with this project. (6) The seven-page consideration of alternatives to the project (most of them had been suggested and discussed over the years) is adequate. The impact statement need not represent the agency's complete analysis of the alternatives.

The Fourth Circuit affirmed, per curiam, stating only that the district judge did not abuse his discretion in denying the preliminary injunction.

Staff: Stuart B. Schoenburg, Edmund B. Clark, and Raymond N. Zagone (Land and Natural Resources Division); United States Attorney William L. Osteen (M. D. N. C.)

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