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COMMENDATIONS

Assistant U. S. Attorney Joseph A. Fisher, Eastern Dist. of Virginia was commended by the Legal Medicine Section, Armed Forces Institute of Pathology for his diligence in connection with the defense of Christina N. Spangler v. U.S.

ANTITRUST DIVISION
Assistant Attorney General Thomas E. Kauper

DISTRICT COURT

SHERMAN ACT

INDICTMENT AND COMPLAINT CHARGING SECTION 1 OF SHERMAN ACT VIOLATION AGAINST BAKING COMPANIES.

United States v. Gonnella Baking Co., et al. (72 CR 769; October 4, 1972; DJ 60-70-76)

United States v. Gonnella Baking Co., et al. (72 C 2484; October 4, 1972; DJ 60-70-85)

On October 4, 1972, a grand jury in the Northern Distict of Illinois, sitting in Chicago, returned an indictment against two baking companies and three individuals charging them with a violation of Section 1 of the Sherman Act.

Named in the indictment as defendants were Gonnella Baking Co., its president Louis L. Marcucci, and its treasurer George D. Marcucci. Also named as defendants were Torino Baking Co. and its treasurer Lawrence L. Marcucci, Jr. Defendants Gonnella and Torino are respectively the largest and second largest bakers and sellers of Italian, French and Vienna bread in the greater Chicago area with combined sales in 1970 of approximately $8 million.

The indictment charges that defendants, and their co-conspirators, beginning at least in the 1930's and continuing thereafter up to the date of the indictment, have engaged in a combination and conspiracy consisting of a continuing agreement to suppress, restrict, eliminate and exclude competition in the sales and distribution of Italian, French and Vienna bread in the greater Chicago area. The indictment charges that in furtherance of the conspiracy defendants and their co-conspirators have done the following things, among others:

(1) refrained from soliciting or accepting business from each other's wholesale customers;

(2) fixed the wholesale and retail selling prices for Italian, French and Vienna bread; and

(3) used threats, coercion and persuasion to prevent the solicitation or acceptance of business from each other's wholesale customers and to require adherence to the wholesale and retail prices agreed upon.

A companion civil suit alleging a violation of Section 1 of the Sherman Act was filed in the district court for the Northern District of Illinois at Chicago on October 4, 1972 against Gonnella Baking Co. and Torino Baking Co. This suit seeks injunctive relief against the above alleged conduct.

Staff: Thomas S. Howard, Ronald L. Futterman and James J. Kubik (Antitrust Division)

* * *

CIVIL DIVISION
Assistant Attorney General Harlington Wood, Jr.

COURTS OF APPEAL

EFFECT OF ERRONEOUS INJUNCTION

FIRST CIRCUIT HOLDS THAT AIR FORCE OFFICER DID NOT OBTAIN A SANCTUARY AGAINST INVOLUNTARY RELEASE BY VIRTUE OF AN IMPROPERLY ISSUED INJUNCTION.

Pauls v. Seamans (C.A. 1, No. 72-1208, decided October 12, 1972. D.J. 145-14-793)

Captain Pauls was originally scheduled to be released from active duty in the Air Force in June 1970 under a budgetary program called Project 703. In an earlier proceeding, the district court enjoined that scheduled release upon its finding of certain procedural errors committed by the Air Force Board for Correction of Military Records, and, in March 1972, the First Circuit reversed that injunction as having been improperly granted. Pauls v. Secretary, etc., 457 F.2d 294 Subsequently, Pauls asserted that since he had attained 18 years of active duty service during the pendency of the earlier district court injunction, he was--for that reason--entitled to a "sanctuary" from involuntary release, as provided by statute, to enable him to complete the 20 years' service necessary for retirement purposes. The Secretary, however, concluded that Pauls was not entitled to such a sanctuary since he had reached 18 years of active service only by means of the earlier district court injunction which had been reversed on appeal. Thereupon, Pauls sought and obtained a second injunction from the district court prohibiting his release on the ground that he was entitled to a sanctuary as a matter of law. Acting on our motion for summary reversal, the First Circuit has now reversed the district court's second injunction and has held that Pauls did not accrue sanctuary rights through the service he rendered by virtue of the earlier injunction. Relying upon cases dealing with the equitable remedy of restitution the court ruled that "the only means of correcting that which has been wrongfully done is not to count for purposes of the [the sanctuary provisions] such active duty time as was obtained solely through an improperly issued restraining order and injunction."

The Court of Appeals' ruling should be very helpful to the government in future cases since it flatly rejects reliance upon an improperly issued injunction as the basis for assertion of newly accrued rights.

Staff: William Kanter (Civil Division)

NATIONAL WOOL ACT

ADMINISTRATIVE FINDINGS OF FACT MADE "FINAL AND CONCLUSIVE" UNDER THE NATIONAL WOOL ACT OF 1954 ENTITLES THE UNITED STATES WITHOUT ADDITIONAL PROOF TO A SUMMARY JUDGMENT IN A SUIT TO RECOVER IMPROPER SUBSIDY PAYMENTS.

United States v. Blackwell (C.A. 5, No. 72-2115, decided October 17, 1972; D.J. 120-76-147)

For the period 1966-1968, the defendants received incentive payments for wool and mohair under the National Wool Act of 1954, 7 U.S.C. 1781 et seq., in excess of $60,000. Thereafter, when irregularities appeared concerning the payments, the Office of the Inspector General of the Department of Agriculture investigated the defendants' entitlement to the payments. Based upon irregularities found by the Inspector General, the defendants were notified that they had to repay the amounts received in accordance with a regulation which provides that if it is subsequently determined administratively that the applicant was not entitled to the subsidies the amount of payment becomes immediately due and repayable. Defendants then exhausted their administrative remedies, which consisted of informal hearings by the Department of Agriculture at the local and state levels, and in Washington.

When repayment of the subsidy payments was not forthcoming, the United States brought suit. Thereafter, the United States filed a motion for summary judgment supported by the administrative record, which consisted primarily of the report of the Inspector General. The district court granted the government's motion on the ground that the administrative finding of non-entitlement was supported by the administrative record.

The district court's decision was upheld on appeal, but on a more fundamental ground. The Fifth Circuit noted that the administrative fact findings were "final and conclusive", 7 U.S.C. 1785, and not subject to judicial review. Since the government pleaded the findings and the defendant "did not dispute that they were the [administrative] findings," there was not material issue of fact, thereby entitling the government to a summary judgment.

The holding is significant because it involved an offensive use of the policy of non-judicial review. Thus, without submitting any proof in the district court, other than the administrative record, the government was awarded a judgment of more than $60,000. This is even more significant when considered in light of the fact that the administrative proceedings were very informal and the record consisted primarily of the investigative report.

Staff: Thomas G. Wilson (Civil Division)

OFFICIAL IMMUNITY

D.C. CIRCUIT HOLDS THAT THE BARR v. MATTEO OFFICIAL IMMUNITY DOCTRINE APPLIES TO SUIT AS WELL AS LIABILITY.

Donofrio v. Camp (C.A.D.C. No. 71-1075, decided Ocotober 18, 1972, D.J. 145-3-1012)

Thomas Donofrio sued the Comptroller of the Currency, William B. Camp, for libel alleging that the Comptroller told various bankers and an SEC attorney that Donofrio's name "was linked with Underworld and Cosa Nostra members." The Comptroller denied that the communication had been made and moved for summary judgment, relying on the official immunity doctrine. His motion was supported by an affidavit that even if the alleged statement had been made, it was made in the course of official duties.

Following plaintiff's request for a second continuance in order to depose the SEC attorney (the first continuance was granted 5 months previously), the district court granted the Comptroller's motion for dismissal. The Court of Appeals treated the dismissal as a grant of summary judgment and affirmed. After holding that the district court had erred in refusing to permit the discovery process to go indefinitely, the court held:

> There is nothing in the record to suggest that even if the purported Ross-Camp exchange had taken place, it was not privileged under the doctrine of official immunity. Donofrio's allegations described a communication in which one federal agency passing on information obtained in performing its regulatory functions to another whose investigations concerned the same subject.

The Court of Appeals considered that a "federal official's immunity is to suit as well as liability . . . " and that prolonged discovery would contravene the purposes of the official immunity doctrine announced in Barr v. Matteo, 360 U.S. 564.

Staff: Walter H. Fleischer (Civil Division)

* * *

CRIMINAL DIVISION
Assistant Attorney General Henry E. Petersen

COURTS OF APPEAL

EXTORTIONATE EXTENSIONS OF CREDIT
(18 U.S.C. 892)

"EXTORTIONATE EXTENSION OF CREDIT" REQUIRES ONLY A MUTUAL COMPREHENSION OF, AND NOT AN EXPRESS AGREEMENT CONCERNING, THE POSSIBLE DELETERIOUS CONSEQUENCES OF DEFAULT OR DELINQUENCY.

United States v. Annoreno (C.A. 7, May 26, 1972, 460 F.2d 1303; Cert. denied October 10, 1972, ____U.S. _____; D.J. 176-23-4. See also 321 F. Supp. 957)

On October 10, 1972, the Supreme Court denied certiorari in United States v. Annoreno, 460 F.2d 1303 (C.A. 7), a major decision interpreting 18 U.S.C. 892. The defendants in that case--who included the chief loan shark for the Fiore Buccieri organization of Chicago and his main subordinates--received sentences ranging up to fifteen years' imprisonment on their one count convictions for conspiring to make extortionate extensions of credit.

In affirming their convictions, the Seventh Circuit established the following principles: (1) The statutory definition (18 U.S.C. 891(6)) of an "extortionate extension of credit" as one in which it is "the understanding of the debtor and the creditor" that default or delinquency could result in the use of violence or other criminal means requires only a mutual comprehension of, and not an express agreement concerning, the possible deleterious consequences of default or delinquency ;there is therefore, no necessity of establishing that explicit threats were made by the creditor at the time that a loan was contracted (460 F.2d at 1308-1309); (2) in determining whether a debtor has a reasonable basis to fear that default or delinquency will result in deleterious consequences, language used by the creditor is to be evaluated in the context in which it is used and measured by the common experience of the society to which the debtor and creditor belong. In this respect, the circumstances in which the loan is contracted, the rate of interest, and the places at which repayments are to be made provide the relevant context (460 F.2d at 1309); (3) where a conspiracy to make extortionate extensions of credit is charged, it is necessary to show only that the defendants planned and intended that those to whom they made loans would understand the possible deleterious consequences of default or delinquency, and not that specific borrowers actually possessed such an understanding (460 F.2d at 1309, n. 7); (4) for the foregoing reason, defendants who are charged with conspiring to make extortionate extensions of credit are not entitled to a

bill of particulars specifying the persons to whom extortinate loans were allegedly made (460 F.2d at 1310); and (5) where defendants engage in a continuing conspiracy to make extortionate extensions of credit which commenced prior to the operative date of the statute, evidence of pre-enactment transactions is properly admitted; such evidence is relevant to establish both post-enactment scienter in individual defendants and the understanding of the consequences of default or delinquency which defendants intended post-enactment borrowers to have (460 F.2d at 1307).

Staff: United States Attorney James R. Thompson
Assistant United States Attorney Anton R. Valukas Marshall Tamor Golding (Criminal Division) (N. D. Illinois)

NARCOTICS AND DANGEROUS DRUGS

JURISDICTION OVER DEFENDANT NOT AFFECTED BY MANNER IN WHICH HE IS BROUGHT BEFORE COURT.

United States v. James D. Vicars and Joaquin Him Gonzales (C.A. 5 September 21, 1972; No. 71-1995; D.C. 12-73-309)

Joaquin Him Gonzales, a Panamanian involved in this international cocaine smuggling case and who was convicted on only the conspiracy counts, claimed he should not have been tried because he was illegally arrested in the Panama Canal Zone and brought to the United States. The Court of Appeals held that once a court had jurisdiction of a criminal case, its right to try a person is not impaired by the manner in which the accused is brought before the court. It does not matter if there was forcible abduction, premature arrest, false arrest, or extradition arising out of an offense other than that for which he is being tried.

The Court also found that even if all Gonzales' acts done in furtherance of the conspiracy were done in the Republic of Panama, "a United States court has jurisdiction over violations of narcotics statutes of the sort involved here, (conspiracies to sell and receive cocaine after importation, 26 U.S.C. 4705(a), 21 U.S.C. 174.) whose effectiveness necessarily depends on extraterritorial jurisdiction." (Parenthetics supplied.)

Staff: United States Attorney Frank D. McCown
Assistant United States Attorney Cecil W. Emerson (N.D. Texas)

POSSESSION OF STOLEN MAIL MATTER

CONVICTION FOR KNOWING POSSESSION OF CHECKS STOLEN FROM MAIL BASED UPON INSTRUCTION OF "RECENT POSSESSION INFERENCE" UPHELD.

United States v. James Edward Barnes, (C.A. 9, August 22, 1972: D.J. 48-12C-589)

Barnes appealed his jury conviction, on charges of forging endorsements upon and uttering U. S. Treasury checks (18 U.S.C. 495) and possessing stolen mail (i.e., the checks) (18 U.S.C. 1708).

He argued that the district court erred in instructing the jury that it might infer, from the fact that Barnes possessed recently stolen checks, that he knew they had been stolen. He urged that his Fifth Amendment due process rights were violated because the allowed inference not only shifted the burden of proof on the issue of knowledge from the Government to him, but also that it does not reflect the required nexus between the fact proved and the fact inferred. United States v. Leary, 395 U.S. 6 (1969). He also urged that his privilege against self-incrimination was infringed because the jury was permitted to infer guilt from his silence.

Although the Court noted that Barnes' latter contention is supported by United States v. Cameron, 460 F.2d 1394 (5th Cir., 1972), it rejected his arguments because the Ninth Circuit has established a contrary rule and because the challenged instruction and the inference it permits have been generally approved. United States v. Gardner, 454 F.2d 534 (9th Cir., 1972). See also McAbee v. United States, 434 F.2d 361 (9th Cir., 1970).

In the Cameron case, the Fifth Circuit reversed the conviction of knowing possession of currency stolen from a federally insured bank, holding that the challenged instruction permitted the jury to infer the fact of knowledge (an element of the offense) from the fact of possession (the other element of the offense) and improperly infringed the defendant's privilege against compulsory self-incrimination. (One judge, specially concurring, stated that in his view the charge did not infringe the appellant's privilege against compulsory self-incrimination under the Fifth Amendment).

Staff: United States Attorney William D. Keller
Assistant U. S. Attorney Eric A. Nobles
Assistant U. S. Attorney Richard A. Stilz
(C.D. Calif.)

* * *

Internal Security Division

Assistant Attorney General A. William Olson

FOREIGN AGENTS REGISTRATION ACT

OF 1938, AS AMENDED

The Registration Section of the Internal Security Division administers the Foreign Agents Registration Act of 1938, as amended, (22 USC 611) which requires registration with the Attorney General by certain persons who engage within the United States in defined categories of activity on behalf of foreign principals.

OCTOBER 1972

During the last half of this month the following new registrations were filed with the Attorney General pursuant to the provisions of the Act:

John Scott Fones, Inc. of New York City registered as public relations counsel for the Tea Council of the USA, Inc. and the British Virgin Islands Tourist Board. Registrant is assigned specific public relations projects without formal contracts or agreements with a fee of $1,000 per month plus reimbursement of expenses. Registrant reports receipts to date of $3,000 from the British Virgin Islands and $33,060.52 from the Tea Council. John Scott Fones filed a short-form statement as Public Relations Executive working directly on the foreign accounts.

E. Del Smith of Washington, D. C. registered as agent of the Republic of Korea. Registrant will render public relations services to the Ambassador including the drafting of speeches and the scheduling of speaking engagements. Registrant's agreement is for a six month period of time beginning October 1, 1972 and calls for a fee of $1,500 per month plus expenses.

Ketchum, MacLeod & Grove, Inc. of Pittsburgh registered as agent of the Jamaica Industrial Development Corporation, Kingston. Registrant will perform publicity and public relations services to promote and encourage industrial development in Jamaica by American investors. Registrant's agreement covers a one year period beginning July 1, 1972 and calls for an annual retainer fee of $40,200.

David N. Webster of Washington, D. C. registered as agent of the Government of Liberia. Registrant will render legal services on behalf of the foreign principal; such services may involve discussions with the United States Government. Registrant will

bill the foreign principal on a fee plus expenses basis. Earl C. Dudley, Jr. filed a short-form statement as an associate on the Liberian account.

John T. Costello registered as the head of the Pittsburgh chapter of the Irish Northern Aid Committee, Bronx, New York. The Pittsburgh chapter organizes local rallies mostly among Irish and Irish-American people and forwards the proceeds from the rallies to the Bronx chapter for transmittal to the Northern Aid Committee, Belfast, Northern Ireland.

Activities of persons or organizations already registered under the Act:

Louise S. Ansberry filed a copy of her retainer agreement with the Japan Trade Center, New York. Registrant is to do research on international and domestic trade and economy of the United States; contact opinion leaders to obtain current information on prevailing attitudes and coming events in the economic and trade fields and to arrange meetings between the foreign principal & various U.S. opinion leaders. Registrant's fee is in the amount of $1,000 per month with reimbursement for special entertainment and travel.

Development Counsellors International, Ltd. of New York City filed exhibits in connection with its representation of the Trinidad & Tobago Tourist Board. Registrant is to conduct advertising, sales promotion and public relations to promote tourism to Trinidad & Tobago. The agreement is for a one year period ending December 31, 1972 and calls for total operating budget for DCI of $250,000 with actual fees to the registrant amounting to $39,000.

The Costa Rican Board of Trade of New York City filed exhibits in connection with its representation of the Textile Association of Costa Rica and Camara de Azucareros. Registrant will engage in and attend all meetings of both national and international organizations concerned with sugar and textiles; will analyze new rulings from the Administration and will forward suggestions and procedures to the foreign principal, as well as participate in all Hearings called by Congress or any branch of the Government. Registrant is financially dependent on its yearly agreement with the foreign principals through which fees, expenses and salary of the executive director are paid.

Myron Solter of Washington, D. C. filed copies of his agreement with a new foreign principal, Taiwan Asparagus Canners' Export Corporation. Registrant's agreement covers the period September 1, 1972 to January 31, 1973 and calls for a retainer fee of $12,000 plus an authorized sum of $1,000 for reimbursement of expenses.

Registrant will provide the foreign principal with advice and assistance with respect to present and anticipated problems concerning the importation of canned asparagus from Taiwan into the United States including representation of the principal before the U.S. Tariff Commission and various other U.S. Government agencies.

* * *

LAND AND NATURAL RESOURCES DIVISION
Assistant Attorney General Kent Frizzell

COURT OF APPEALS

TUCKER ACT; APPEALS

DISTRICT COURT'S FINDINGS, DENYING TUCKER ACT CLAIMANTS' ASSERTION OF A TAKING OF PROPERTY, HELD NOT CLEARLY ERRONEOUS WHERE PROOF OF "SUBSTANTIAL" GOVERNMENT INTERFERENCE WITH PROPERTY WAS LACKING.

Billy C. Harris, et al. v. United States (C.A. 8, No. 72-1067, Oct. 18, 1972; D.J. 90-1-23-1606)

This was a Tucker Act "inverse condemnation" claim brought in a federal district court under 28 U.S.C. sec. 1346(a)(2). The claimants alleged that the United States, by installing Lock and Dam 13 on the Arkansas River, had elevated the river and caused water to collect and remain in their sandpit a half-mile away from the riverbank.

After trial to the district judge, who also viewed the sandpit, the court entered its findings that, "as a matter of fact," there was not a taking of the claimants' sandpit. Judgment was entered for the United States.

The Court of Appeals affirmed, per curiam. Its opinion detailed the conflicting evidence of the cause of water accumulation in the claimants' sandpit. Testimony elicited by the Government plus a photographic exhibit revealed standing water had accumulated in the sandpit over a year before the government dam began operating. On this record, the Court of Appeals held as follows (Slip Op. 4):

> * * * we cannot say that we are left with the definite and firm conviction that [the district judge] . . . was mistaken in his findings . . .

Rule 52(a), F.R.Civ.P., was cited.

The Court of Appeals additionally held (Slip Op. 5) that:

> . . . a distinction is to be drawn between mere tortious invasion of one's property rights and an appropriation of sufficient magnitude to amount to a taking . . . . Although there is no concise rule readily applicable to all cases, a taking must at least amount to a substantial

> interference with the property so as to destroy or lessen its value . ... And it is such an injury that the trial court failed to find present in this case.

Because of this deficient proof, the Court of Appeals did not discuss the possible relevance of the federal navigational servitude to this case.

The claimants, who had commenced this appeal, waived oral argument.

Staff: Dirk D. Snel (Land and Natural Resources Division); Assistant United States Attorney Robert E. Johnson (W.D. Ark.)

DISTRICT COURT

CONDEMNATION

EVIDENCE; ADMISSIBILITY OF VALUE OF CONCRETE PANELS INTENDED TO BE ATTACHED TO BUILDING.

United States v. 25.02 Acres, Etc. (Civil No. C-1443, D. Colo., Sept. 21, 1972; D.J. 33-6-402-103)

The Government filed a motion in limine to restrict the landowner from introducing into evidence the value of some concrete slabs or panels which were stored on its property but were never affixed to an unfinished building.

The landowner argued that the panels were acquired for the construction of a building which was only partially completed at the time of the threat of condemnation, that the panels weighed several tons, were a special purpose material which could only be used for their particular building and were useless for any other purpose. In addition, the owner stated that the cost of removal far exceeded the Government's removal allowance.

The Government contended that since the panels were not affixed to the building, they were personal property, that the cost of removal was not compensable, and that the general rule requiring just compensation to be determined by fair market value should not be circumvented by the facts in this case.

The court held that the panels were not part of the realty and were not compensable items in this action. Admittedly, the panels had value: but the existence of value alone does not generate interests protected by the Constitution against diminution by the Government. Reichelderfer v. Quinn, 287 U.S. 315, 319:

United States v. Cox, 190 F.2d 293, 295 (C.A. 10, 1951) the Constitution requires only that the sovereign pay just compensation for that which it takes, not for opportunities which the owner may lose. United States ex rel. T.V.A. v. Powelson, 319 U.S. 266, 282 the trade fixture cases cited by the defendant are not applicable. To be compensable, trade fixtures require fine line determinations as to manner of annexation to the building, use, size, intention of the parties, and leasehold relationships, if any. In addition, the court held that the feasibility, or lack thereof, of moving the panels is not a consideration in this case. Having no relationship to the value of the property taken at trial, removal costs are not admissible evidentiary matters nor proper elements of damages.

The court ordered that the case proceed under rules of evidence appertaining to eminent domain for the value of the property taken and excluding consideration for the panels, moving costs and unfinished improvements on the property.

Staff: B. Richard Taylor, Trial Attorney, Land and Natural Resoureces Division (S. Colo.)

CONDEMNATION

BENEFITS ARISING FROM A PROJECT PRECLUDE DETERMINATION OF A TAKING: SUBSEQUENT DETRIMENT ARISING FROM A PROJECT ARE OFF-SET BY OVER-ALL BENEFITS.

John B. Hardwicke Company and Charles E. Pratt v. United States (C.Cls. No. 97-68, Oct. 13, 1972; D.J. 90-1-23-1393)

The plaintiffs acquired approximately 830 acres of land in the lower Rio Grande Valley of Texas between 1961 and 1962. The land was situated within the natural flood plain and riverward of a set of levees constructed in the 1930's to protect the inland. The International Boundary and Water Commission, pursuant to authority from Congress and in accordance with a treaty entered into with Mexico, constructed Falcon Dam upstream on the Rio Grande which was placed in operation in 1952. The treaty and legislation contemplated the construction of a downstream diversion dam, Anzaldusa Dam, below the location of plaintiffs' property. Construction of Anzalduas Dam was delayed until a treaty agreement could be worked out relative to the division of the Rio Grande waters between Mexico and the United States. Anzalduas Dam was constructed in 1959 and placed in operation in 1960. One of the functions of Anzalduas Dam was to control the flow of the Rio Grande downstream to protect Brownsville-Matamoros from flooding. When used for flood control, Anzalduas Dam would be closed and the waters of the Rio Grande would backup and be diverted across plaintiffs' land into a natural

old floodway called Mission Inlet from where it flowed to the Gulf of Mexico through a floodway constructed for that purpose.

After plaintiffs purchased their property in 1961, they developed it for intensive irrigated cultivation. In 1967, because of the threat of a flood to Brownsville-Matamoros, Anzalduas Dam was closed and plaintiffs' property was flooded by the excess flow of the Rio Grande which was diverted into Mission Inlet.

The plaintiffs alleged that the operation of Anzalduas Dam constituted a taking. The evidence showed that plaintiffs' land was subject to flooding at approximately two-year intervals prior to the construction of Falcon Dam. As a result of the construction of Falcon Dam, the incidence of flooding was reduced to once every 10 years. By reason of operation of Anzalduas Dam, the incidence of flooding was increased to once every seven or eight years. The court held that the over-all benefits derived from the construction of Falcon Dam exceeded the detriment caused by the operation of Anzalduas Dam and therefore there was no taking. The court said that United States v. Miller, 317 U.S. 369, held that no compensation need be paid for value which the condemnor creates by the establishment of a project and that, "The same principle is for application when, in a flooding case, the question is whether the property is taken at all."

Staff: Howard O. Sigmond (Land and Natural Resources Division)

ENVIRONMENT

PREPARATION OF A 102(C) STATEMENT NOT REQUIRED WHERE FINDING OF NO SIGNIFICANT EFFECT OF PROJECT ON HUMAN ENVIRONMENT IS NOT ARBITRARY OR CAPRICIOUS.

Maryland-National Capital Park and Planning Comm. v. U.S. Postal Service (Civil No. 1855-72 D. D.C.; D.J. 90-1-4-569)

In 1970, the former Post Office Department authorized construction of a bulk mail facility on 63 acres of industrially zoned land near the Beltway in Prince George's County, Maryland. Upon inquiry by the Maryland-National Capital Planning Commission, the County and the Maryland-National Planning Commission expressed objections based on possible sewer connection problems, run-off difficulties, etc., which would be categorized as environmental. Basically, however, the County did not want the project because it would take land off the tax rolls and would exacerbate what Prince George's County considered a federal policy of putting white-collar projects in Montgomery County and blue-collar projects in Prince George's County.

The Post Office Department responded to the environmental objections but made no specific finding that they were of no significance. In 1971, the newly established U.S. Postal Service named the Corps of Engineers as its construction agent. The Corps entered into a grading and foundation contract in October 1971, and a steel-work contract shortly thereafter. When the Corps developed regulations for this new type of responsibility, the District Engineer, in June 1972, prepared an environmental assessment which concluded that a 102(C) statement was not required. In September, the Maryland-National Capital Park and Planning Commission brought this action to enjoin further construction on the grounds that failure to prepare a 102(C) statement violated NEPA and on the ground that the defendants had not complied with Executive Order No. 11512. At the time the suit was filed, the grading and foundation contract had been completed and one-third of the steel had been erected.

On October 13, 1972, the court denied plaintiff's application for a preliminary injunction, holding the conclusion of the Post Office Department and the Corps of Engineers that the building would have no significant effect on the environment was not arbitrary and capricious, that the plaintiff was unlikely to prevail on a final hearing. On this point, see Hanly v. Mitchell, 460 F.2d 640-644 (C.A. 2, 1972); Save Our Ten Acres, et al, v. Rod Kreger, et al., Civil No. 7080-72-T (S.D. Ala. 1972); Citizens for Reid Park v. Laird, 336 F.Supp. 783 (D. Maine 1972).

The ruling will be appealed.

Staff: Thos. L. McKevitt (Land and Natural Resources Division)

PUBLIC LANDS; TITLE

TRESPASS ACTION CANNOT BE MAINTAINED AGAINST UNITED STATES AND PARK OFFICIALS FOR OCCUPANCY OF LAND CLAIMED AS PART OF NATIONAL PARK; SOVEREIGN IMMUNITY; STATUTE OF LIMITATIONS.

Jean H. Mims v. United States, et al. (W.D. Va., No. 70-C-26-C, Oct. 2, 1972; D.J. 90-1-4-217)

Plaintiff sought to adjudicate title to 8.58 acres that the National Park service asserts is part of the Shenandoah National Park. The action originally seeking a declaratory judgment was dismissed. Mims v. United States, 324 F.Supp. 489 (1971)

The complaint was amended to allege a negligent trespass seeking compensatory damages of $2,000. Jurisdiction was alleged to be based solely under the Federal Tort Claims Act, 28 U.S.C. 1346(b). Defendants were the United States, the Secretary of the Interior and the Park Superintendent.

Plaintiff's claim of title was based upon alleged deficiencies in the condemnation proceeding employed by the State of Virginia when it acquired the land for the Shenandoah National Park in 1934. The court described the title controversy but expressly disclaimed any intent to decide the issue. The court noted, however, that "certain evidence indicated that she has a good claim to it." Notwithstanding this observation, the court held that on several grounds the suit could not be maintained.

The court held that 28 U.S.C. 1346(e) did not provide jurisdiction, because of the exception contained in 28 U.S.C. 2680(a) for discretionary functions. The court stated that the "assumption of ownership of the land in question by the United States Government, represented by the defendants," is a discretionary function.

The court further held that the plaintiff's claim arose when the state condemnation proceeding became final in 1934 and was barred by the statute of limitations. The court rejected the contention that the occupancy of the land constituted a "continuing trespass."

Finally, the court found that this was a suit against the United States without its consent. Without citing Simons v. Vinson, 394 F.2d 732 (C.A. 5, 1968), the court held that the doctrine stated in Larson v. Domestic & Foreign Corp., 337 U.S. 682 (1949), and Malone v. Bowdoin, 369 U.S. 643 (1972), barred this action.

Staff: Assistant United States Attorney James G. Welsh (W.D. Va.)

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