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UNITED STATES DEPARTMENT OF JUSTICE

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POINTS TO REMEMBER

New Penalty Provisions, Social Security Act

On October 30, 1972, Congress enacted Public Law 92-603, amending the Social Security Act (Chapter 7, Title 42, United States Code, §§ 301-1396g). The Act amends the penalty provisions of Title 42 in several ways.

Section 130 of the Act adds two sections to 42 U.S.C. 408 which prohibit false statements made in connection with 42 U.S.C. 405(c)(2). That latter section directs the Secretary of Health, Education, and Welfare to keep a record of the earnings of each individual under the Act and (as of the amendment) to assign social security account numbers to various categories of individuals. Section 130 adds subsections (f) and (g) to 42 U.S.C. 408. Subsection (f) prohibits the furnishing of false information to the Secretary with respect to the Secretary's records of earnings. Subsection (g) prohibits the use of a social security account number obtained under false pretenses as well as the use of a false social security account number where these numbers are used to obtain benefits, payments or increased payments from Federally financed programs.

Section 242 inserts a new penalty provision into Subchapter XVIII (42 U.S.C. 1395-1395ll, Medicare). Subchapter XVIII formerly incorporated 42 U.S.C. 408 by reference (in 42 U.S.C. 1395ii). Section 242 deletes reference to 42 U.S.C. 408 and adds a new penalty provision at the end of the subchapter. Subsections (a)(1)-(4) of the new provision are virtually identical to subsections (b)-(e) of 42 U.S.C. 408, except that "knowing and willful" language is added to subsections (a)(1), (2) and (4) of the new provision. Subsection (b) of the new provision prohibits the solicitation, offer or receipt of a kickback, bribe or rebate (in the case of a referral to another person) by a person furnishing items or services under the Act. Subsection (c) of the new provision punishes one who "makes . . . induces" etc. a false statement in order to qualify an "institution or facility" as a "hospital, skilled nursing home, or home health agency" under the subchapter (the terms are defined in 42 U.S.C. 1395x). Violation of subsections (a) and (b) are punishable by a fine up to $10,000 and/or imprisonment up to one year. Violation of subsection (c) is punishable by a fine up to $2,000 and/or imprisonment up to six months.

42 U.S.C. 408 does not have provisions comparable to subsections (b) and (c) of the new section. On the other hand, the new section has no provisions comparable to subsection (a) of 42 U.S.C. 408, (punishing false statements as to wages, net earnings from self-employment and earnings for a particular period) or new subsections (f) and (g) (discussed above).

It appears that 42 U.S.C. 408 can still be used to prosecute fraudulent acts which occurred under Subchapter XVIII prior to its amendment. The general savings statute, 1 U.S.C. 109, nullifies abatement of prosecutions under a repealed statute unless the repealing act expressly provides for such abatement, United States v. Reisinger, 128 U.S. 398 (1888); Pipefitters v. United States, 407 U.S. 385 (1972). The cases limiting 1 U.S.C. 109, United States v. Chambers, 291 U.S. 217 (1934) (repeal through a constitutional amendment), and Hamm v. Rock Hill, 379 U.S. 306 (1964) (repealing law "substitutes a right for a crime") do not appear applicable to the statutory scheme described here.

Section 242 also adds a penalty provision at the end of Subchapter XIX (42 U.S.C. 1396-1396g, Medicaid). This provision is identical to the provision which replaces 42 U.S.C. 408 in Subchapter XVIII.

Section 301 amends all of Subchapter XVI (42 U.S.C. 1381-1385). The subchapter now deals with "Supplemental Security Income for the Aged, Blind and Disabled." A penalty provision (Section 1632) is included which is identical to Subsections (a)(1)-(4) of the penalty provisions in Subchapters XVIII and XIX in all respects save one. Though proscribed conduct is still punishable, by imprisonment up to one year, maximum fine is only $1,000.

(Criminal Division)

ANTITRUST DIVISION
Assistant Attorney General Thomas E. Kauper

DISTRICT COURT

SHERMAN ACT

PROTECTIVE ORDER DENIED DEFENDANT COVERING PLAINTIFF'S RESPONSE TO BILL OF PARTICULARS.

United States v. General Motors Corporation, et al. (Cr. 47-140. January 5, 1973; D.J. 60-107-96)

The Government filed its response for a Bill of Particulars with the clerk of the court on January 2, 1973. In their request, defendants demanded that all documents which supported the responses should be identified, together with the extracts of those portions of the documents that the Government intended to rely on in support of each request. In response, the Government attached some 70 pounds of documents to the Bill of Particulars, underscoring the relevant portions of the document or indicating that the entire document was relied upon. On January 5, 1973, defendants filed a motion to limit the distribution and disclosure of the Bill to counsel, the parties, and accountants, clerks and experts employed by the parties. The court issued a temporary order on January 5, impounding the Bill and attached documents pending a hearing on the motion. Defendants based their motion on:

1. The secrecy of the grand jury would be violated by public disclosure of materials which were orginially before that body;

2. Numerous unindicted prominent persons named in the Bill would be subject to adverse publicity and embarrassment; and

3. Defendants' Sixth Amendment rights to a fair trial and impartial jury would be jeopardized by pretrial publicity.

After an exchange of briefs and oral argument on January 15, 1973, the court issued an order on January 17, 1973 that denied the motion, vacated the temporary order and ordered that the Bill and attached documents be made a part of public record in the clerk's office. The court also filed a written opinion.

In its opinion, the court stated that the situation in Hammond v. Brown, 323 F. Supp. 326 (N.D. Ohio 1971), aff'd, 450 F.2d 480 (6th Cir. 1941), which the defendants cited as their primary authority for the scope of grand jury secrecy,

was neither reasonably analogous to the present situation nor was the relief sought the same. In Hammond, the state grand jury not only returned 30 indictments concerning the Kent State incident, but also the grand jury issued a special report containing conclusions in assessing the blame for the Kent State incident independent of the indictments. In Hammond, the court found that the report was issued illegally under Ohio law and that it deprived indicted persons of rights guaranteed under the Constitution, and, therefore, ordered the physical destruction and expunction of the grand jury report.

In its opinion, the court also held that the definitive specification of charges in the Bill did not violate principles of grand jury secrecy, as in large part the secrecy of a grand jury ends when it returns an indictment and is then discharged.

In rejecting the contention that the Bill should be suppressed because of potential unfavorable publicity to prominent individuals referred to in the Bill as co-conspirators, the court stated that indicted third parties are routinely mentioned in the Bill and there is no reason to adopt a different standard of treatment for prominent people. In support of this, the court cited United States v. American Raditor & Standard Sanitary Corporation, et al., 274 F.Supp. 790, 792-793 (W.D. Pa. 1967), which dealt only with potential adverse publicity for indicted persons. The court stated that this principle was equally applicable to the unindicted individuals in the Bill here.

The court also rejected defendants' contention that pretrial publicity would impair their ability to get a fair and impartial jury. The defendants did not demonstrate that release of the Bill would per se even probably preclude a fair and impartial trial. A voir dire of prospective jurors by counsel will provide an adequate protection to select an impartial jury.

The court listed reasons why criminal cases should be open to the public view, including that citizens should be informed of material which has an impact on them, an aroused public can protect a wrongly accused defendant, citizens may offer constructive criticism, and new evidence might be made available to either side.

The court also stated that it was loath to intrude into any First Amendment rights of the press, stating that:

> A free press cannot be shackled by speculations as to inflammatory publicity. For even if media

coverage should give rise to unwarranted criticism, though, 'it may be designed to harass those whose conduct has been honest and courageous . . . this seems a fair price to pay for a truly open society. ABA Standards Relating to Fair Trial and Free Press, Tentative Draft, pp. 50-51.

Staff: Carl L. Steinhouse, Dwight D. Moore, Robert M. Dixon, Gerald H. Rubin, William T. Plesec and Diane R. Williams (Antitrust Division)

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CIVIL DIVISION
Assistant Attorney General Harlington Wood, Jr.

COURTS OF APPEAL

FEDERAL TORT CLAIMS ACT-FERES DOCTRINE

FERES DOCTRINE APPLIED REGARDLESS OF CLOSENESS OF SERVICEMAN TO DISCHARGE.

Richard V. Henninger v. United States of America (C.A. 9, No. 26,467 January 17, 1973; D.J. #157-11-1519)

This Tort Claims suit was brought by a servicemen injured through medical malpractice by military doctors at a military hospital. The surgery was performed after plaintiff's active duty status was involuntarily extended when military doctors discovered a double hernia during his final discharge physical. The district court dismissed the suit on the ground that it was barred by Feres v. United States, 340 U.S. 135, since the injury was incurred incident to plaintiff's military service. The Ninth Circuit affirmed.

The Ninth Circuit rejected plaintiff's argument that Feres should not apply since the suit could not impair discipline because the injury occurred after plaintiff had completely been processed for discharge. Pointing out that the bringing of suit could prove disruptive of discipline, and that it was more important that "a clear line" be drawn than being able to justify, in every conceivable case, the exact point at which it is drawn, the Court adopted an "absolutistic" reading of Feres. The Court also relied upon plaintiff's receipt of administrative benefits. The Court rejected plaintiff's receipt of administrative benefits. The Court rejected plaintiff's contention that the Government's liability could be based on estoppel because plaintiff had been misled into the operation by military doctors.

Staff: Walter H. Fleischer; Leonard Schaitman (Civil Division)

THE UNIFORM COMMERCIAL CODE

EIGHTH CIRCUIT HOLDS THAT THE TERM "FARM EQUIPMENT" AS USED IN AGRICULTURE'S FHA LOAN AGREEMENT ADEQUATELY DESCRIBES COLLATERAL.

United States v. First National Bank in Ogallala Nebraska (C.A. 8, No. 72-1208, decided January 4, 1973; D.J. #136-45-607)

In 1964 two Nebraska farmers obtained through the Farmers Home Administration a government loan in the amount of $35,000. The farmers, at the request of the FHA, executed a standard Department of Agriculture security agreement to secure the unpaid balance on the loan wherein the collateral was described as "all farm and other equipment . . . now owned or hereafter acquired by the debtor." Thereafter the farmers acquired certain irrigation devices which were attached to a well. The farm with this irrigation equipment annexed was conveyed to the defendant bank in satisfaction of debts. The bank thereafter refused to allow the FHA to remove the equipment, and the government brought suit for its value.

The district court initially held that the security agreement was void for want of consideration. Upon rehearing, the Court ruled that the pre-existing debt constituted consideration, but held that the government had no security interest because the description of the collateral was insufficient to satisfy UCC Section §9-110 and §9-203(1)(b), which read together require for the perfection of a security interest a signed agreement containing a description of the collateral covered. In so holding the court relied primarily upon Mammoth Cave Production Credit Assoc. v. York, 429 S.W. 2d 26 (Ky. 1968), in which it was held that even under the liberalized provisions of the UCC the term "all farm equipment" was too vague and imprecise to identify the collateral, and "seemed more like a provision inserted by an over-anxious lending officer to encompass as much security as possible, rather than an actual agreement that a security interest was to attach to all farm equipment."

The Eighth Circuit reversed, observing that the requirement in Section 9-203 that the collateral be described is not a device for minimizing the amount of collateral a creditor can secure, but that as the Comment to Section 9-100 makes clear, the purpose of a description of the collateral is only to evidence the agreement of the parties and to "make possible the identification of the thing described." The Court criticized Mammoth Cave and cited with approval James Talcott, Inc. v. Franklin Nat'l Bank of Minneapolis, 194 N.W. 2d 775 (Minn. 1972), wherein the Minnesota court upheld a security interest in collateral described as "all goods (as defined in Article 9 of the Uniform Commercial Code) whether now owned or hereafter acquired."

The Eighth Circuit's decision represents an important step in overcoming the belief that a commercial borrower should not be allowed to encumber all his assets present and future and that for the protection not only of the borrower but of his other creditors a cushion of free assets should be preserved. Such hostility has been especially apparent in the field of agricultural

financing even since the advent of the UCC which removes most restrictions upon the pledge of after-acquired farm property.

Staff: Eloise E. Davies (Civil Division)

NATIONAL BANKING ACT

FIFTH CIRCUIT UPHOLDS COMPTROLLER'S AUTHORIZATION OF BRANCH BANK IN UNINCORPORATED AREA.

First National Bank of Southaven v. William B. Camp and Coahoma National Bank, C.A. 5, No. 72-1555; D.J. #145-3-1112

Suit was brought by plaintiff bank to enjoin the Comptroller of the Currency from authorizing the establishment of a rival branch bank in the unincorporated community of Coahoma, Mississippi. Plaintif challenged the Comptroller's action on the grounds that (1) Mississippi law restricts the location of branch banks to municipalities and (2) in any event, the Comptroller's authorization was arbitrary, capricious and inconsistent with the Mississippi standard of promoting public convenience and necessity. The district court granted summary judgment in favor of the Comptroller and the Fifth Circuit affirmed.

While the National Banking Act places no territorial restrictions on branch banks, the Comptroller may only authorize such banks where the statute law of the state would specifically permit a state branch bank to locate. Mississippi law does not specify that branch banks must be located in incorporated areas. However, several sections of the Mississippi Banking Code refer to the location of branch banks in municipalities, which by statutory definition must be incorporated areas. The Court of Appeals accepted the Comptroller's argument that the use of the term "municipality" in these sections is descriptive only, rather than a "term of art." This result is in accord with the recent Seventh Circuit decision in First National Bank of Crown Point v. Camp, 463 F. 2d 595. Additionally, the Court ruled that the Comptroller's approval had not been arbitrary, capricious or inconsistent with the Mississippi standard of promoting public convenience and necessity.

Staff: Judith S. Feigin (Civil Division)

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CRIMINAL DIVISION
Assistant Attorney General Henry E. Petersen

COURT OF APPEALS

COUNTERFEITING AND FORGERY
MILITARY, NAVAL, OR OFFICIAL PASSES - 18 U.S.C. 499

LAW PROSCRIBING FALSE MAKING OR USE OF MILITARY, NAVAL, OR OFFICIAL PASSES, 18 U.S.C. 499, HELD TO HAVE EXTRATERRITORIAL APPLICATION.

United States v. Raymond Birch (No. 72-1376); United States v. Birsen N. Birch (No. 72-1377) (C.A. 4, December 12, 1972; D.J. 47-35-99)

Raymond Birch and his wife, Birsen N. Birch, were convicted in the United States District Court for the District of Maryland on October 18, 1971, on three counts each of various violations of 18 U.S.C. 499. The Government's evidence demonstrated that the Birches, while residing in the Federal Republic of Germany, where he was a civilian employee of the Defense Department of the United States, were convicted in a German court in October 1970 for tormenting and physically abusing a household domestic in their employ. Pending appeal of that conviction, the Birches were released from custody after relinquishing control of their United States passports. Apprehensive about an adverse determination of their appeal, the Birches caused to be made false military documents identifying them as military personnel and authorizing their travel to the United States. Possessing those documents and impersonating the military personnel, the Birches successfully departed Germany. Following their return, they were indicted, successfully prosecuted, and this appeal followed.

The appellate decision upholding the lower court conviction is novel in several respects. It represents the first decision interpreting section 499. Secondly, the Court interpreted the section to have extraterritorial application. As to the former, the Court ruled that an indictment framed in the language of the statute was adequate. Furthermore, the Court held by necessary implication that the element of intent to defraud, a part of the second crime denounced in the section, was satisfied by evidence showing an intent to deceive. Cf. United States v. Lepowitch, 318 U.S. 703 (1943), which similary treated the element of intent to defraud in the predecessor of the current 18 U.S.C. 912.

In regard to the latter aspect, the Court stated that the gravamen of the offenses proscribed by section 499 is the assault upon the integrity of the United States and its official documents.

Congress could logically intend to proscribe conduct of that nature regardless of the locality of its commission. United States v. Bowman, 260 U.S. 94 (1922) The Court concluded that Congress did intend section 499 to apply extraterritorially, and went on to hold that the assertion of jurisdiction was permissible pursuant to the protective principle of international law: a State has jurisdiction to attach legal consequences to conduct occurring outside its borders which threaten its security or the operation of its functions, provided that the conduct in question is recognized as criminal by States having reasonably well developed legal systems. Restatement (Second), Foreign Relations Law of the United States 33.

Staff: United States Attorney George Beal
Assistant United States Attorney Herbert Better
Lucy H. Hummer (Criminal Division)
(District of Maryland)

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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.

JANUARY 1973

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

Natalie Lamken of Washington, D.C. registered as agent of the Soviet Embassy. Registrant performs editorial services in connection with Soviet Life magazine and is compensated at the rate of $5.00 per hour. These services are performed on a part-time basis.

Activities of persons or organizations already registered under the Act:

Alpine Tourist Commission, New York City submitted exhibits in connection with its representation of its parent Commission in Vienna, Austria. Registrant's activities are directed and funded by its European principals which comprise the parent organization, i.e. Austria, France, Germany, Italy, Monaco, Switzerland and Yugoslavia. Registrant's sole purpose in the United States is the promotion of tourist traffic to the Alpine regions of Europe. This is done through promotional campaigns, distribution of tourist literature and advertising.

Ralph E. Becker of Washington, D. C. filed a copy of his revised agreement with the Embassy of Iran. Registrant's agreement began February 14, 1972 and calls for a fee of $1,000 plus disbursements to cover all general legal services. However the above retainer agreement will not cover fees chargeable by the registrant for special matters requiring extensive research or litigation and special fee arrangements are to be made for such cases at the time they occur.

Gleason Associates, Inc. of San Francisco filed exhibits in connection with its representation of the Guatemala Tourism Institute. Registrant is to handle advertising and public relations to encourage tourism to Guatemala.

Wyse Advertising, Inc. of New York City filed exhibits in connection with its representation of the Swiss Federal Railways. Registrant acts as advertising agent for the foreign principal receiving a 15% commission on the cost of the advertising space.

Pace Advertising Agency, Inc. of New York City filed a copy of its agreement with the Government of Kenya Tourist Office. Registrant will act as advertising agency for the foreign principal. Registrant's advertising budget for the period mid-September to the end of 1972 was 27,898.00 which was to provide the principal with a continuous program of exposure in both trade and consumer press as well as to initiate a public relations program to promote tourism to Kenya.

The following persons filed short-form registration statements in support of registrations already on file pursuant to the terms of the Act:

On behalf of Cannon Advertising Associates, Inc. of New York City whose foreign principals are Mexico, Israel and Yugoslavia: Sal A. Lanza, Jr. as creative consultant working on a free-lance basis for fee for job as valued and Albert J. Miller as advertising copywriter, writing advertising, press releases, articles and speeches for a salary of $15,000 per year.

On behalf of the Mexican Government Tourism Department, New York: Manuel Aguilar as Director engaging in the promotion of tourism to Mexico for a salary of $1,000 per month.

On behalf of Inforplan International Inc. of New York City whose foreign principal is Communications Affiliates (Bahamas) Ltd., Government of the Bahama Islands: William O. Connors as public relations counsel engaged in the creation and distribution of general publicity for Bahamas tourism and the Government. Mr. Connors is a regular salaried employee of registrant receiving $25,000 per year.

On behalf of the National Film Board of Canada: Thomas Low Johnston as an officer doing public relations activities for a salary of $16,000 per annum plus Foreign Service allowances.

On behalf of George Ohe Company, Inc. of New York City whose foreign principal is Monimpex Hungarian Foreign Trading Company, Budapest, Hungary: Albert Weening as officer engaged in the sale of paprika on behalf of the foreign principal.

Mr. Weening reports a commission at 5% of FOB value and claimed receipt of $2,027.70 during 1972.

On behalf of the Amtorg Trading Corporation of New York City which is the official purchasing and selling agent of the U.S.S.R.: Nina Nikolaevna Kornakova as interpreter reporting a salary of $371 per month.

On behalf of the Tea Council of the United States, New York City whose foreign principals are the Governments of India, Ceylon, Kenya, Central Africa, Uganda and Mozambique: John M. Anderson as Executive Director reporting a salary of $3,500 per month; Michael L. Friedman as public relations consultant working on special projects for the promotion of tea consumption within the U.S. reporting a fee of $25,200; Beryl Edith Walter as Director of Consumer Services reporting a salary of $1,600 per month; Donald Wiederacht as Public Relations Consultant reporting a fee of $3,000 per month to be paid to his firm, Grey & Davis, Inc. and Kenneth Rapieff as free lance club speaker reporting a fee of $60.00 per speech.

On behalf of Cox, Langford & Brown of Washington, D. C. whose foreign principals are the Governments of Belgium, India, Italy and the Venezuelan Tourist Corporation: J. Edward Day, Philip B. Brown and Robert D. Papkin as partners rendering professional legal services for a share of partnership profits.

On behalf of the Danish National Tourist Office, New YorK; Axel Dessau as Director engaging in public relations and informational activities and receiving a salary of $20,000 per year.

On behalf of the Japan National Tourist Organization, New York; Akira Inaba as Deputy Director engaging in publicity, advertising and informational activities in connection with the promotion of tourism to Japan and receiving a salary of $20,000 per year.

On behalf of Charles von Loewenfeldt, Inc. of San Francisco whose foreign principals are Japan Air Lines, Japan Trade Center, Embassy of Japan, U. S. Japan Trade Council and the Consulate General of Japan: Charles von Loewenfeldt as president acting as advisor to all the principals; Susan Brossy Crosier as Public Relations Counsel doing research and reports on U.S. - Japan economic and cultural relations and Michael Berger as Writer/Research doing reports and TV news features. All are regular salaried employees of registrant.

On behalf of the Turkish Tourism and Information Office, New York City: Adnan Ozaktag as director engaged in public relations, advertising and informational activities and receiving

a salary of $980 per month, Nesil Buyukpamjucu as assistant direcotr and receiving a salary of $640 per month and Yukin Erturk as employee engaaged in general tourist promotion activities.

On behalf of Arnold & Porter whose foreign principals are the Swiss Ambassador, Federation of British Carpet Manuafacturers, Confederarion Internationale des Fabricants de Tapis et de Tissus d'Ameublement, Swiss Cheese Union, Inc, and Switzerland Gruyere Processed Cheese Manufacturers' Association: Daniel M. Lewis as an associate engaged in the general practice of law. Mr. Lewis is a regular salaried employee of registrant.

* * *

LAND AND NATURAL RESOURCES DIVISION
Assistant Attorney General Kent Frizzell

COURTS OF APPEAL

NEPA

APPLICABLITY TO HUD PROJECT APPROVED PRIOR TO EFFECTIVE DATE OF NEPA.

San Francisco Tomorrow, et al. v. Romney, et al. (C.A. 9, No. 72-1969, Jan. 18, 1973; D.J. 90-1-4-428)

Various individuals and environmental organizations brought this suit to enjoin further federal financing of two HUD projects until HUD prepares an environmental impact statement (EIS). The Yerba Buena Center in San Francisco is a conventional federal urban renewal project, while the West Berkeley Industrial Park is federally-funded as a neighborhood development project.

The district court denied the injunctive relief sought, basing its order on its conclusion that the various plaintiffs lacked standing and that HUD was not required to prepare an EIS for these two federal projects since the federal action was essentially complete prior to the effective date of NEPA.

The Ninth Circuit affirmed in part and reversed in part. It agreed with the Government, which had not challenged standing on appeal, that at least some of the parties were sufficiently adversely affected to have standing. It concluded, however, that HUD should not be required to prepare an EIS for the Yerba Buena Project, since the major federal action (HUD signing a loan and grant contract with the San Francisco Redevelopment Agency), took place in 1966, long before the effective date of NEPA, January 1, 1970. Since that date the only federal action had been increased federal funding to meet the rising costs of land acquisition and relocation of residents, and monitoring the project to assure that the local redevelopment agency fulfills its undertakings. The court distinguished this HUD project from various highway cases in which courts have found that an EIS must be prepared for highways planned before NEPA became effective, but where significant federal actions occurred after NEPA's effective date. The touchstone of the distinction is whether any federal approval occurred after the effective date of NEPA.

The court held that HUD must comply with NEPA for the West Berkeley Project, since HUD's agreement with the Berkeley Re-

development Agency took place in February 1970, after the effective date of NEPA.

Staff: Henry J. Bourguignon (Land and Natural Resources Division); Assistant United States Attorney Francis B. Boone (N.D. Cal.)

INDIAN ALLOTMENTS

COLLATERAL ATTACK OF PATENTS: EXHAUSTION OF ADMINISTRATIVE REMEDIES: RES JUDICATA.

Kenneth M. Kale v. United States, et al. (C.A. 9, No. 26020, Jan. 18, 1973; D.J. 90-2-11-6917)

This involves an action by an Indian against the Secretary of the Interior for illegally denying his application for an Indian allotment. In 1962, Everett Cord, as the holder of soldier's scrip, applied to BLM for 275 acres of land in California pursuant to 43 U.S.C. secs. 274 and 278. In 1966, Kenneth Kale, a Chickasaw Indian, applied for an Indian allotment of 160 acres pursuant to 25 U.S.C. sec. 334, of which 95 acres were within Cord's application. In 1967, BLM issued a patent for the 275 acres to Cord who in turn conveyed same to Sea View Estates, Inc. In 1966, Kale moved onto the land later patented to Cord. In 1968, Sea View Estates, Inc., sued Kale in a state court for ejectment and quiet title. Kale then filed this action seeking a stay of the state court proceeding and to quiet title to his Indian allotment. The district court granted summary judgment against Kale.

The Court of Appeals reversed and remanded the case to the Secretary of the Interior holding: (1) that the state court's quiet title judgment was not res judicata as to the federal court's treatment of the Secretary's denial of Kale's Indian allotment claim since federal courts have exclusive jurisdiction over Indian allotments; (2) that Kale's failure to exhaust his administrative remedy was not a bar to the court's consideration of his claim since BLM violated its own regulation designed to aid Indian claimants; (3) that Cord's patent is subject to collateral attack by Kale as issued by BLM through inadvertence of mistake; and (4) that Kale presented sufficient evidence of abuse of discretion by the Secretary to require a trial on the merits.

Staff: Glen R. Goodsell (Land and Natural Resources Division); former Assistant United States Attorney James R. Akers, Jr. (C.D. Cal.)

TUCKER ACT

EMINENT DOMAIN; FIFTH AMENDMENT: TIME OF TAKING AND VESTING OF TITLE.

Murray D. Stringer, et ux. v. United States (C.A. 5, No. 72-1803, Jan. 16, 1973; D.J. 90-1-23-1629)

This involved an action filed by landowners against the United States for a declaratory judgment affirming their ownership of an easement of right-of-way providing access to the Natchez Tract Parkway, and for damages under the Tucker Act for loss of six years' use of the easement as a result of barricades erected across the easement in 1965 by the United States. In 1971, the landowners, on advice of counsel, resorted to self-help by removing the barricades, and thereafter promptly filed this action. The United States filed a counter-claim for damages due to the loss of the barricades and an injunction against future interference with new barricades to be erected on the same place. The district court awarded the landowners $3,000 damages for temporary loss of use of the easement and dismissed the Government's counterclaim.

The Court of Appeals reversed the judgment of the district court and remanded the case, holding that the United States may exercise its eminent domain power consistent with the Fifth Amendment by physically seizing properly without prior notice, hearing or compensation; that taking occurs at the moment of seizure, even though title does not pass until compensation is actually paid; and that the United States is entitled to damages for the wrongful removal of the barricades.

Staff: Glen R. Goodsell (Land and Natural Resources Division); Assistant United States Attorney Joseph E. Brown, Jr. (S.D. Miss.)

ENVIRONMENT

STANDARD OF JUDICIAL REVIEW OF THE DECISION NOT TO FILE AN ENVIRONMENTAL IMPACT STATEMENT.

Save Our Ten Acres v. Kreger (C.A. 5, No. 72-2165, Jan. 16, 1973; D.J. 90-1-4-447)

An organization of United States Army Corp of Engineers employees, in Mobile Alabama, who oppose the transfer of Corps offices from a suburban to a downtown site, brought suit to enjoin construction of the downtown office building pending the

filing of a 102(2)(c) environmental impact statement. The administrative record, consisting primarily of an environmental clearance statement, had concluded that no statement was necessary. The district court, after a trial on the merits, concluded that GSA's decision was not arbitrary, capricious or an abuse of discretion.

The Firth Circuit vacated and remanded, saying that "To best effectuate the Act this decision should have been court-measured under a more relaxed rule of reasonableness, rather than the narrower standard of arbitrariness or capriciousness." The district court must now determine whether the plaintiff has alleged facts which, if true, show that the recommended project would materially degrade any aspect of environmental quality. If so (the circuit court here found that to be the case), the court should proceed to examine and weigh the evidence of both the plaintiff and the agency to determine whether the agency reasonably concluded that the project would not significantly degrade our environmental quality.

Staff: John D. Helm (formerly of the Land and Natural Resources Division); Larry G. Gutterridge and William M. Cohen (Land and Natural Resources Division); United States Attorney Charles S. White-Spunner, Jr. (S.D. Ala.)

DISTRICT COURT

ENVIRONMENT

HIGHWAYS; ENVIRONMENTAL IMPACT STATEMENT NOT REQUIRED FOR APPROVAL OF ACCESS GUARANTEED IN CONTRACT EXECUTED BEFORE JANUARY 1, 1970; STANDARD OF REVIEW.

Citizens Organized to Defend the Environment, et al. v. John Volpe, et al. (S.D. Ohio No. 72-289, Dec. 15, 1972; D.J. 90-1-4-559)

In an exhaustive opinion Judge Joseph P. Kinneary of the Southern District of Ohio has ruled that the Federal Highway Administration was not required to prepare an environmental impact statement in order to approve a crossing of an Interstate Highway by the GEM of Egypt. The approval was required under a 1964 agreement in which the State of Ohio acquired a right-of-way for the highway from the Consolidated Coal Company. In order to avoid severance damages in excess of $8 million it was agreed that Consolidaged Coal Company could move gigantic strip-mining equipment across the highway 10 times in a 40-year period. For each crossing the Federal Highway Administration reserved the

right to approve the specific arrangements made to assure that the crossing would not adversely affect the flow of traffic.

Judge Kinneary held that this limited decision as to effect on traffic (specifically rejecting plaintiffs' contention that the mining activities to follow the crossing must be considered) was not a major federal action significantly affecting the environment. On this basis he held that a NEPA Section 102(2)(C) statement was not required.

Also at issue in the case was the legality of the 1964 decision to permit the crossing in light of 23 U.S.C. 111 and 23 C.F.R. 1.23 which restrict the use of rights-of-way to highway purpose. Judge Kinneary discussed at length the standard of judicial review of the agency decision that the crossings were in the public interest and would not "impair the highway or interfere with the free and safe flow of traffic." Citing United States ex rel. T.V.A. v. Welch, 327 U.S. 546 (1946), and Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971), the court concluded that the agency was entitled to make a common sense adjustment in the face of the large severance damages and that the adjustment, if reasonable, would not be considered arbitrary or capricious.

Staff: Assistant United States Attorney
Gary Brinsfield (S.D. Ohio).

ENVIRONMENT

TRIBE INDISPENSABLE PARTY IN ACTION BY FIVE NAVAJO INDIANS TO PARTIALLY INVALIDATE LEASE USED FOR SITE OF FOUR CORNERS POWER PLANT; TRIBAL SOVEREIGN IMMUNITY.

Yazzie, et al. v. Morton, et al. (D. Ariz., No. 71-601-PHX-WCF; Jan. 15, 1973; D.J. 90-2-4-200)

In 1960 and 1966 the Navajo Tribe leased land to several power companies for the construction of the Four Corners Power Plant. The plaintiffs are members of the Navajo Tribe living in the vicinity of the Four Corners Power Plant and brought this action against the Secretaries of the Interior and HEW. The complaint asserted Interior breached its fiduciary duty to the Navajo Tribe and plaintiffs by approving the 1960 and 1966 leases insofar as certain provisions were concerned. Essentially, these were provisions relating to the control of stack emissions from the power plant. The complaint alleged HEW breached its fiduciary duty to the Navajos by failing to adequately monitor the stack emissions, and by failing to take steps to protect the health and welfare of the Navajos from the emissions.

The federal defendants and intervenor power companies moved for summary judgment. One of the arguments presented was that the Navajo Tribe was an indispensable party. Judge Frey dismissed the complaint on this ground and did not reach any of the other issues argued in the motion papers.

The court viewed the complaint as an effort by members of the Navajo Tribe to overrule a tribal decision represented by the plant site leases. The court analyzed the consequences of the plaintiffs receiving the relief they sought, and concluded that cancellation of the pertinent provisions of the lease would probably invalidate the entire arrangement and leave the Navajo Tribe without the economic and social benefits accruing to it under the plant site lease. Since the Tribe is the entity with the paramount interest in the Reservation lands, the court concluded it was an indispensable party to a suit which would, if successful, negate a tribal decision as to how the Reservation lands should be used.

After deciding the Navajo Tribe was an indispensable party, the court held that the Tribe had sovereign immunity and could not be joined, therefore, the complaint was dismissed. The court considered this to be "an internal tribal matter which can and should be resolved by the tribe without outside interference."

Staff: United States Attorney William C. Smitherman, Assistant United States Attorney Richard S. Allemann (D. Ariz.); David W. Miller and William M. Cohen (Land and Natural Resources Division).

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