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COMMENDATIONS

Assistant U.S. Attorney Stephen Muehlberg, District of Nebraska, has been commended by Ivan L. Onnan, Assistant Regional Counsel, Internal Revenue Service, in the matter of shareholders of Hartford Fire Insurance Company commonstock, summons enforcement.

Assistant U.S. Attorney Paul Madgett, District of Nebraska, has been commended by Merrill D. Beal, Regional Counsel, National Park Service for his handling of the Agate Springs Ranch condemnation case.

* * *

POINTS TO REMEMBER

EXTRADITION

Many United States Attorneys have questioned the exact procedure and requisites sought by the Government Regulations Section of the Criminal Division before authorizing a request for the provisional arrest for extradition of a fugitive. The procedure and requisites, developed from experience and from recommendations by foreign prosecutors, are set forth below:

Provisional arrest should only be requested in emergency situations. Many treaties require the formal extradition documents to be translated and in the possession of the foreign court within 30 days of an arrest. Judges in many countries are reluctant to confine fugitives for a lengthy period of time pending arrival of formal extradition documents.

All requests for provisional arrest are to be directed to the Section within the Criminal Division responsible for supervising the prosecution. No request is to be made by an investigative agency. No arrest for extradition is to occur outside the United States without the approval of the Department. Documents requisite for the perfection of a provisional arrest are to be in the Department within seven days after an arrest.

Information requisite for a provisional arrest request:

(1) Necessity for provisional arrest (e.g. - evidence of continued flight)

(2) Exact whereabouts of fugitive and source of information

(3) Identifying data

  (a) Biographical (including complete name, aliases date and place of birth)

  (b) Physical description (including sex, height, weight)

(4) Details of Offense

  (a) Court and case number

  (b) Code violations and description of offense(s) from indictment or complaint or judgment of conviction

(c) Date indicted or date complaint filed; date warrant issued and name of issuing judge

(d) Whether fugitive was in United States in connection with offense.

(5) If not convicted, analysis of evidence to establish probable cause to believe fugitive committed offense(s), i.e., based upon statements of witnesses and/or laboratory analysis

(6) Availability of non-hearsay evidence (i.e. Grand Jury minutes, witnesses)

(7) Other information

(a) Other pending federal charges

(b) If in custody, why; expiration date, if known

(c) Prior trial(s) for similar offense(s) in foreign country

(d) Importance of fugitive and case

Upon approval of a request for provisional arrest, the appropriate section chief will forward the request in writing to the Government Regulations Section with, if at all possible, a copy of the indictment (or complaint) and warrant of arrest attached. The pertinent documents can be transmitted to the Criminal Division by telex or telecopier.

* * *

ANTITRUST DIVISION
Assistant Attorney General Thomas E. Kauper

DISTRICT COURT

CLAYTON ACT

GROCERY CHAIN CHARGED WITH VIOLATING SECTION 7 OF THE CLAYTON ACT.

United States v. Albertson's Inc., et al., (civ. 1-74-66; April 19, 1974; DJ 60-4-037-9)

On April 19, 1974, a complaint was filed in the District of Idaho charging that the June 13, 1972, acquisition of Mountain States Wholesale Company from Di Giorgio Corporation by Albertson's Inc. violated Section 7 of the Clayton Act. The complaint names both Albertson's, the acquiring company and Di Giorgio, the seller, as defendants. The complaint alleges that, prior to the acquisition, Albertson's had been a principal customer of Mountain States in the Southern Idaho-Eastern Oregon market area. In 1972 Albertson's had total sales of more than $550 million through a chain of more than 250 supermarkets. Moreover, it is the largest grocery store chain operating in the Southern Idaho-Eastern Oregon market area. Wholesale distribution of a general line of groceries and related products in this market area is performed principally by three companies, whose 1972 sales were about $124 million, with the acquired firm, Mountain States, accounting for about $53 million, or 43%. Albertson's 1972 purchases from Mountain States amounted to approximately $22 million, or about 18% of all purchases from such wholesalers in the market area.

The complaint charges that the acquisition has substantially lessened competition in the wholesale distribution of a general line of groceries and related products in the market area in that (1) competitors of Mountain States have been foreclosed from access to Albertson's as a customer; (2) competitors of Albertson's may be foreclosed from access of Mountain States as a supplier; and (3) barriers to entry into the market have been raised.

Prior to the acquisition, Mountain States sponsored a group of approximately 30 so-called "voluntary" retail grocery stores which competed with other retail grocery stores, including Albertson's. In the Boise, Idaho market total grocery store sales were about $51 million. Of that total, Albertson's accounted for sales of $12 million, or 24%, and Mountain States affiliated stores accounting for $3 million, or 6%.

Retail distribution of a general line of groceries and related products in both the Boise, Idaho and the Southern Idaho-Eastern Oregon market areas is concentrated, with a trend toward increasing concentration. For example, in 1972 there were only 6 retail grocery chains (2 of which operated essentially "convenience" stores) competing for total retail grocery store sales of $250 million in the Southern Idaho-Eastern Oregon market area. Of that total, Albertson's accounted for $36 million, or 14%, and Mountain States' affiliated stores accounted for $10 million, or 4%. The complaint alleges that for many years Albertson's has actively sought to open new grocery stores in this area and that, at the time of the acquisition, Mountain States was in the process of expanding its group of affiliated stores throughout the same area.

The complaint charges that the acquisition has also substantially lessened competition in the retail distribution of a general line of groceries and related products in that (1) competition between Albertson's and Mountain States' affiliated stores in the Boise, Idaho market area has been permanently eliminated; (2) competition among all retail grocery stores in said area has been substantially lessened; (3) concentration in the retail distribution of a general line of groceries and related products has been substantially increased; (4) competition between Albertson's and Mountain States to establish new retail outlets in the market area has been eliminated; and (5) concentration in the number of companies capable of competing for new sites and retail grocery store outlets has been substantially increased.

The complaint requests that (1) Albertson's be required to divest itself of Mountain States; (2) Albertson's and Di Giorgio be required to restore competition in the retail sale of groceries and related products; and (3) that Albertson's be enjoined from acquiring any company engaged in the Wholesale or retail distribution of a general line of groceries and related products in the Southern Idaho and Eastern Oregon market areas.

Staff: William S. Farmer, Jr., Gary R. Spratling and John F. Young (Antitrust Division)

* * *

CIVIL DIVISION
Assistant Attorney General Carla A. Hills

COURT OF APPEALS

AID TO EDUCATION - SCHOOL DESEGREGATION

CADC INVILIDATES HEW REGULATIONS PERMITTING EMERGENCY SCHOOL AID TO DISTRICTS WHICH CONTINUE TO MAKE RACIALLY MOTIVATED FACULTY ASSIGNMENTS.

Kelsey v. Weinberger, (C.A.D.C., No. 73-1960, May 14, 1974; D.J. 137-16-597).

The Emergency School Aid Act prohibits federal aid under the Act to school districts which have engaged in racial discrimination after June 23, 1972, but provides for the Secretary of HEW to waive this ineligibility upon a showing that the school district has ceased so to discriminate. In this case the court of appeals invalidated an HEW regulation permitting districts which had made racially motivated faculty assignments to receive aid so long as they undertook to integrate their faculties within two years. The court, relying upon recent Supreme Court decisions ordering an immediate cessation of discriminatory practices, ruled that the statute, in requiring the cessation of discriminatory practices, required immediate faculty desegregation. The court reasoned that a construction of the statute which would validate the regulation would place in doubt the constitutionality of the statute.

Staff: Michael H. Stein (Civil Division)

AVIATION

NINTH CIRCUIT HOLDS THAT IN VFR CONDITIONS THE PRIMARY DUTY FOR SAFE OPERATION OF AIRCRAFT RESTS WITH PILOTS, NOT CONTROLLERS.

Alec S. Hamilton, Jr., et al. v. United States of America, (C.A. 9, No. 72-1346, 72-1348, 1335, 1349, May 19, 1974; D.J. 157-11-1549, 1553, 1625, 1559)

Two aircraft negligently placed themselves in close proximity to each other. A controller issued instructions designed to separate the two planes, but at least one of the planes disregarded the instructions and they crashed. Visibility was four miles and Visual Flight Rules (VFR) were in effect. The district court found that the controllers were not negligence of each aircraft. In affirming, the Ninth Circuit decided several legal issues which should be of considerable future assistance to the government in

air crash litigation.

First, the court held that in VFR conditions, the duty to exercise care rests concurrently on pilots and controllers, but that the primary responsibility for the safe operation of the aircraft rests upon the pilots.

Second, the court held that, in the circumstances of this case, the controllers were not under any duty to warn the aircraft that an emergency existed. While noting that a controller obviously has no obligation to act when an emergency exists, the court held that where a controller must make a split second decision, it is more important that he try to avoid the collision by issuing instructions to that effect than warn the pilots that an emergency exists.

Third, the court held that in VFR conditions controllers are not under any duty to warn aircraft in the same vicinity of each other's position. In this connection, the court relied on the existence of the radio system which enables pilots to hear the position reports of all other aircraft in communication with the tower.

Finally, the court reaffirmed United States v. Miller, 303 F. 2d 703 (9th Cir. 1962) which holds that before a VFR pilot flies into an area where he might be expected to find conflicting traffic, he must clear the area to insure that no collision will occur.

Staff: Raymond D. Battocchi (Civil Division)

FINAL JUDGMENTS - RULE 54(b)

NINTH CIRCUIT REQUIRES STRICT COMPLIANCE WITH RULE 54(b) - FINAL JUDGMENT IN CASES INVOLVING MULTIPLE CLAIMS OR PARTIES.

Floyd A. Demanes v. United States, (C.A. 9, No. 73-1898; D.J. 157-11-1851).

In this case the Ninth Circuit sua sponte dismissed an appeal from an order granting summary judgment for only one party in a case involving multiple parties on the ground that the order did not comply strictly with the requirements of Rule 54(b), F.R.Civ.P. The appellant's experience is typical of that recently being encountered by appellants in the Ninth Circuit. The Ninth Circuit is apparently reviewing all cases to insure that the judgments have no technical defects and sua sponte dismissing those that do. Accordingly, all United States Attorneys should check carefully to be certain that the district courts enter judgments that meet all technical requirements of the

Federal Rules of Civil Procedure.

Staff: Eloise E. Davies (Civil Division)

* * *

CIVIL RIGHTS DIVISION
Assistant Attorney General J. Stanley Pottinger

COURTS OF APPEAL

EQUAL EMPLOYMENT OPPORTUNITY

MISSISSIPPI HIGHWAY PATROL ORDERED TO "EFFECTIVELY INTEGRATE" ITS FORCE.

Morrow, et al. v. Crisler, et al. (C.A. 5, No. 72-1136, March 27, 1974, D.J. 170-41-47)

On March 27, 1974, the Court of Appeals rendered its decision en banc in Morrow, et al. v. Crisler, et al., a suit originally brought by private black plaintiffs charging racial discrimination in the employment practices of the Mississippi State Highway Patrol. The Department of Justice entered the case as amicus curiae in April 1971.

The district court for the Southern District of Mississippi entered a declaratory and injunctive decree in favor of plaintiffs, but denied any numerical goals or other affirmative hiring relief. On appeal, a panel of the Fifth Circuit affirmed by divided vote. The Department of Justice had filed an amicus brief in support of the plaintiff's position that the lower court erred in failing to require affirmative hiring relief.

On rehearing en banc, the Court of Appeals held that the relief granted by the district court was insufficient to remedy past racially discriminatory practices. In his opinion for the Court, Judge Gewin noted that in the time since the case had first been argued before the Court in June 1972, the Highway Patrol had only increased the number of black patrolmen from four to six, during a period when 91 patrolmen were added to a total force of about 500 troopers.

The Court of Appeals remanded the case with the directions that the district court order affirmative hiring relief which is to remain in effect until the Patrol is "effectively integrated."

Judge Gewin's opinion, which was joined by eight of the other circuit judges, did not specify what type of affirmative relief should be ordered, but did specify that the relief must have the certain result of increasing the number of blacks on the Patrol. It stated that the district court "may, within the bounds of discretion, order temporary one-to-one or one-to-two hiring, the creation of hiring pools or a freeze on white hiring or any other form of

affirmative hiring relief...."

Judge Clark concurred with the result on the basis of decisions in other circuit courts ordering affirmative relief.

Judges Brown and Wisdom concurred without reservation but noted additionally, in response to Judge Clark's concurrence, that the relief here is "not new and startling" and speaking for the judges of the Fifth Circuit, stated, "Rather than followers we have been in the van. We are not Johnny-come-latelys to the eradication of racial discrimination through race conscious means."

Judges Roney, Bell and Ainsworth concurred specially, stating that hiring goals and timetables may be considered by the district court in fashioning relief, but rejecting any portion of the majority opinion which indicates approval of a temporary hiring quota.

Judge Coleman dissented on the grounds that the majority opinion would delete the necessary qualifications for a patrol officer. Judge Gee concurred in part and dissented in part, disclaiming any approval of a hiring quota or freeze on white hiring.

Staff: David L. Rose, Chief, Employment Section
William B. Fenton, Employment Section

FIFTH CIRCUIT AFFIRMS ORDER REQUIRING THE ALABAMA STATE HIGHWAY PATROL TO INSTITUTE AFFIRMATIVE ACTION PLAN FOR HIRING BLACK TROOPERS.

NAACP and United States v. Allen, et al. (C.A. 5, No. 72-1796, April 19, 1974, D.J. 170-2-26)

On April 19, 1974, the Court of Appeals for the Fifth Circuit entered a decision in NAACP and United States v. Allen, affirming the order of Judge Johnson which called for the "one-for-one" hiring of blacks and whites for the Alabama State Highway Patrol.

The District Judge had found a pervasive pattern of employment discrimination against blacks in the hiring of state troopers. Although leaving the patrol's unvalidated test and subjective interview procedures intact, the district court had ordered statewide recruitment and advertising programs aimed at hiring one qualified black trooper or support person for each white hired until 25% of the troopers and support personnel were black. The defendants appealed on the grounds that the relief ordered by the District Judge constituted unconstitutional discrimination against

white applicants.

In its unanimous decision by Judge Clark, the Fifth Circuit affirmed, accepting the premise that it is the obligation of the courts to correct, insofar as posssible, the effects of past discrimination as well as to prevent discrimination in the future.

Finding that no prior decision had "adequately rationalized the constitutional problems raised by affirmative hiring relief," the court set forth its reasoning in this decision. The court noted that considerations of race, although a suspect classification which requires rigorous judicial scrutiny, have never been held to be unconstitutional as such, but indeed must be considered in formulating a remedy for prior constitutional violations. The court noted that there was no constitutional right to public employment and that the relief contemplated by the lower court did not call for the hiring of unqualified persons. The court ruled that it is the collective interest, governmental as well as social, to end unconstitutional racial discrimination and its effects, and that that interest justified a temporary, carefully circumscribed resort to racial criteria, when that represents the only rational, nonarbitrary means of eliminating past discrimination.

For precedents the court relief upon Swann v. Board of Education, its recent en banc decision in Morrow v. Crisler (the Mississippi State Highway Patrol case), and the decisions of eight other circuits. The court went on to note that the record in this case, including the supplemental record made on remand to the district court, provided "unusual" confirmationn of the "feasibility, wisdom and efficacy" of the district court's decree.

Staff: David L. Rose (Chief, Employment Section)
Douglas B. Huron (Employment Section)

DISTRICT COURTS

EQUAL EMPLOYMENT OPPORTUNITY

NINE MAJOR STEEL COMPANIES SIGN LANDMARK EQUAL EMPLOYMENT OPPORTUNITY AGREEMENT WITH FEDERAL GOVERNMENT WHICH INCLUDES $31 MILLION IN BACK PAY.

United States v. Allegheny - Ludlum Industries, et al. (N.D. Ala., No. 74-P-339, April 15, 1974, D.J. 170-64-23)

On April 12, 1974, suit on behalf of the United States and the Equal Employment Opportunity Commission was filed against nine of the nation's largest steel companies and

the United Steelworkers of America. The companies are Allegheny-Ludlum Industries, Armco Steel, Bethlehem Steel, Jones & Laughlin, National Steel, Republic Steel, United States Steel, Wheeling-Pittsburgh Steel, and Youngstown Sheet & Tube. The complaint was filed under both Executive Order 11246 and Title VII of the 1964 Civil Rights Act and alleged discrimination in employment against minorities and females.

Simultaneously with the filing of the complaint, two consent decrees were filed concluding this litigation. The consent decrees, among other terms of relief, contained provisions requiring: (1) $30,940,000 in back pay to be distributed to approximately 34,500 black and Spanish-surnamed American males and to approximately 5,600 females; (2) a 50% goal for minorities and females into all future trade and craft vacancies, a 20% goal for females among all new hires into P&M (blue collar) jobs, a 15% goal for minorities among all new hires into clerical and technical jobs and a 25% goal for minority and females into management positions; (3) complete revision of the seniority systems in 249 facilities to provide for the use of plant seniority for all purposes of promotion, demotion, layoff, recall, transfer and schedulings; and (4) the right to transfer with earnings protection. In addition, the decrees provide for the study of all existing lines of promotion and their restructuring or merger where necessary in order to provide greater promotional opportunities to minorities and females.

This suit, and the accompanying consent decrees, cover approximately 75% of all employees in the basic steel industry and represent a major step in this Division's efforts to insure equal employment opportunity in this industry, which efforts were begun in 1968 and have been steadily pursued since that date.

Staff: Robert T. Moore (Deputy Chief, Employment Section)
K. William O'Connor (Deputy Assistant Attorney General)
Elaine Afable (Attorney, Employment Section)

CITY OF JACKSON, MISSISSIPPI SIGNS CONSENT DECREE WITH JUSTICE DEPARTMENT OPENING UP ALL MUNICIPAL JOBS TO MINORITIES AND WOMEN ON A NONDISCRIMINATORY BASIS.

United States v. City of Jackson, Mississippi (S.D. Miss., No. J 74-66 (n), March 25, 1974, D.J. 170-41-60)

On March 25, 1974, a consent decree was entered in United States v. City of Jackson, a case filed on March 22, 1974, involving discriminatory employment practices by the City of Jackson. The decree requires the City to hire and promote more black persons and women for virtually all

municipal government jobs, including the police and fire departments.

Specifically, the decree provides for immediate upgrading of incumbent black employees who are members of the affected class, with the only qualifying standard being ability to do the job. All employment testing is to be eliminated except tests of actual job content or tests of psychological stability in the police and fire departments. Current promotional exams are permitted in the police and fire departments at those levels where blacks are not in competition, and the City is obliged to develop a new, non-discriminatory promotional system in those departments.

Hiring is to be done on a one-for-one basis in all city departments, except the fire department where the first 15 vacancies are to be filled by blacks and thereafter, two-thirds of all future vacancies, until the proportion of blacks to whites in city employment equals those proportions in the city's population (approximately 40%). Females are to be hired into one-third of all vacancies in formerly male-dominated classifications. The City will institute a recruiting program designed to attract the applicants necessary to meet these goals.

The decree also provides for back pay to members of the affected class (blacks hired and assigned to low opportunity jobs) which will amount to an estimated $250,000.

Staff: David L. Rose (Chief, Employment Section)
Michael A. Middleton (Attorney, Employment Section)

FAIR HOUSING

CALHOUN, GEORGIA PUBLIC HOUSING AUTHORITY AGREES TO END RACIALLY SEGREGATED ASSIGNMENT POLICIES.

United States v. The Public Housing Authority of Calhoun, Georgia, et al. (N.D. Ga., No. C74-43-R, March 22, 1974, D.J. 175-19-92)

On March 22, 1974, a Title VIII complaint and consent decree were filed and entered in United States v. The Public Housing Authority of Calhoun, Georgia, et al. The defendants operate a 200-unit public housing authority. Our complaint alleges that the Calhoun Housing Authority originally constructed and operated its housing projects on a racially segregated basis and has continued to do so through racially discriminatory tenant assignment.

The consent order enjoins defendants from all violations of the Fair Housing Law and requires that all applicants be

assigned to housing on a "first-come, first-served" basis according to the size unit appropriate for the applicant's family. The order further provides that in order to disestablish the dual system, each applicant must be offered a unit in a project in which his race is in the minority, if such unit is available. An applicant may refuse to accept any units offered in those projects in which his race predominates without losing his place of priority on the waiting list. Similarly, any present tenant may apply to transfer to a project where his race does not predominate, and the CHA shall provide facilities and manpower to accomplish the move when a unit becomes available.

Staff: Warren Dennis (Attorney, Housing Section)
Carl W. Gabel (Deputy Chief, Housing Section)

CITY OF UPPER ARLINGTON, OHIO, AGREES TO REPEAL ORDINANCE PROHIBITING "TESTING" TO UNCOVER RACIALLY DISCRIMINATORY HOUSING PRACTICES.

Jones and United States v. City of Upper Arlington (S.D. Ohio, No. 73-304, April 26, 1974, D.J. 175-58-40)

On April 26, 1974, the case of Jones and U.S. v. City of Upper Arlington was settled and dismissed by stipulation of all parties.

This case was brought as a class action to challenge the City's antitesting ordinance. The United States and the Ohio Civil Rights Commission subsequently entered the case as plaintiffs-intervenors.

The ordinance in question made it unlawful for persons to use testing procedures as a means of determining if housing discrimination had occurred. Criminal penalties applied to violations of the ordinance.

The settlement of the case was based upon repeal of the ordinance, and the adoption of an amended ordinance which makes discrimination in housing unlawful and provides for civil rather than criminal remedies.

Upper Arlington is the third municipality to repeal its antitesting ordinance as a result of legal action by the Justice Department.

Staff: Michael L. Barrett (Attorney, Housing Section)
Frank E. Schwelb (Chief, Housing Section)

INDIAN RIGHTS

HOSPITAL IN ANADARKO, OKLAHOMA AGREES TO END DISCRIMINATORY

TREATMENT OF AMERICAN INDIAN PATIENTS.

United States v. Board of Trustees of Anadarko Municipal Hospital, et al. (W.D. Okla., No. 74-300-D, March 22, 1974, D.J. 168-60-2)

On March 22, 1974, a complaint and consent decree were filed and entered in U.S. v. Board of Trustees of Anadarko Municipal Hospital, et al. This is the first Title III (CRA 1964 - Nondiscrimination in Public Facilities) lawsuit filed by the Division which alleges discrimination against Indians by a hospital.

The complaint alleged that the defendant have systematically discriminated against American Indians in the operation of the AMH and that the hospital staff has refused to treat Indian patients in the emergency room on the same basis as non-Indian patients. We contend that emergency room referral policies of AMH have discouraged Indian patients from seeking emergency treatment at AMH.

After three months of negotiation the United States and defendants agreed to the entry of a consent decree. The decree permanently enjoins defendants from discriminatory treatment of American Indians or any other persons and prohibits them from making, printing or publishing any notice or statement which indicate a preference based on race, color, religion or national origin.

With respect to affirmative action, the defendants have agreed to take steps which will insure that services are provided to all persons on the same basis. These steps include: (1) implementing objective and reviewable written standards and procedures for the receiving, treating and/or referral of all patients; (2) notifying all employees and agents (including physicians) of the provisions and obligations of the decree; (3) acquainting the American Indian community in the Anadarko Area of the policy of nondiscrimination; and (4) maintaining for review racial records of all emergency and in-patients and their referrals.

Anadarko, which is located 70 miles southwest of Oklahoma City, has a population of 6,682 in 1970, of whom 21 percent was American Indian.

Staff: Carl Stoiber (Director, Office of Indian Rights)
Philip S. Fuoco (Attorney, Office of Indian Rights)

SAN CARLOS, ARIZONA APACHE TRIBE AGREES TO POSTPONE TRIBAL ELECTIONS UNTIL VOTING IRREGULARITIES ARE CORRECTED.

United States v. San Carlos Apache Tribe (D. Ariz., No. 74-52-TUC (JAW), April 12, 1974, D.J. 180-8-2)

On April 12, 1974, U.S. District Court Judge Walsh ordered into effect a consent decree in United States v. San Carlos Apache Tribe. The consent decree held that the district court had jurisdiction and that the Tribe had violated certain equal protection and due process rights of its members in connection with a tribal election. We had filed our complaint in this case on March 29, 1974, and Judge Walsh had entered a temporary restraining order on the same day enjoining that holding of tribal elections until such time as the court should otherwise order.

The court also ordered that the elections scheduled for April 2, 1974, be rescheduled within 60 days of the decree and that the Tribe: (1) hold another nominating convention for selecting candidates for chairman; (2) take steps to assure the security of the ballot boxes, ballots and other election materials; (3) take steps to make the voters' list more accurate and to give persons whose names were deleted an opportunity to show cause why their names should not be deleted; (4) make uniform their district councilmen selection procedure; (5) maintain the current tribal council until their successors are elected; and (6) report to the court within six months of the Tribe's progress in bringing its constitution, by-laws, ordinances and administrative procedures into line with the Indian Bill of Rights. If the Tribe fails to revise its tribal voting ordinances, then the court will order its own plan into effect until the Tribe does take affirmative steps. The court retains jurisdiction over the matter until all provisions of the decree are complied with and for one year thereafter.

This case is significant because the court recognized, in effect, that the Department of Justice has the authority to bring civil suit under the Indian Bill of Rights (Title II, 1968 Civil Rights Act), even though the legislation does not contain explicit statutory authority for Departmental enforcement.

Staff: Dennis Ickes (Deputy Director, Office of Indian Rights)
Philip S. Fuoco (Attorney, Office of Indian Rights)

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LAND AND NATURAL RESOURCES DIVISION

Assistant Attorney General Wallace H. Johnson

COURTS OF APPEALS

ENVIRONMENT

EPA REGULATIONS REQUIRING GAS STATIONS TO SELL UNLEADED GASOLINE FOR PROTECTION OF EMISSION CONTROL DEVICES UPHELD.

Amoco Oil Company, et al. v. Environmental Protection Agency (C.A. D.C. Nos. 73-1117, 73-1118, 73-1150, May 1, 1974; D.J. 90-5-2-3-111, 90-5-2-3-109, 90-5-2-3-112).

These cases involved direct review of regulations of the EPA requiring gasoline retailers of a certain size to sell one grade of "unleaded" gasoline of at least 91 research octane by July 1, 1974. "Unleaded" gasoline contains less than .05 gms. of lead per gallon. The regulations were promulgated so that catalytic converter emission control systems for cars, which will be used in the 1975 model year and which are ruined by gasoline lead additives, would be feasible. Petitioners questioned whether the regulations were authorized under Section 211 of the Clean Air Act, 42 U.S.C. sec. 1857f-6c(c); whether the EPA made the findings required by the Act; whether the .05 gms./gallon limit was justified; whether provisions holding refiners liable for contaminated gasoline irrespective of actual fault were justified; and whether an environmental impact statement was required under the National Environmental Policy Act, 42 U.S.C. sec. 4332(2)(C). The court upheld the regulations on all points except that of vicarious liability, which was construed to give the refiners a defense if their employees were not at fault and if the contamination could not have been prevented by contractual means. In addition, the opinion states that, where agency decisions are made in an area of uncertain scientific data, the courts will give considerable deference to the agency's judgment as to the interpretation of the data.

Staff: Edward J. Shawaker (Land and Natural Resources Division).

PUBLIC LANDS

ACCESS EASEMENTS THROUGH FEDERAL LANDS; ESTOPPEL AGAINST THE UNITED STATES.

United States v. Rogers, et al. (C.A. 9, Nos. 72-2148, 72-2456 (consolidated), Apr. 26, 1974; D.J. 90-1-10-928).

This case was brought to enjoin a trespass on lands of the United States. The Rogers' fee property is surrounded by National Forest lands but for years they have had access through the forest lands by way of an old wagon trail. In 1964, without a special use permit (36 C.F.R. sec. 251.1(a)(1)), they commenced construction of an improved road parallel to the wagon trail. The district court entered summary judgment in favor of the United States, restrained construction and maintenance of the new road, and required restoration of the traversed land.

The court of appeals affirmed, refusing to sanction the higher intensity of use (the pre-existing access over the wagon trail was not at issue). The court rejected the Rogers' assertions that a disputed assent to the construction by a Forest Ranger estopped the United States. The court reaffirmed the rule that ordinarily the United States is not estopped by the acts of its agents and found no circumstances in this which would remove it from the general rule.

Staff: Larry G. Gutterridge (formerly of the Land and Natural Resources Division); Assistant United States Attorney Ernestine Tolin (N.D. Cal.).

ENVIRONMENT

D.C.R.L.A. MUST SUBMIT DRAFT E.I.S. ALONG WITH ITS PROPOSED PROGRAMS; NON-FEDERAL AGENCIES CAN BE ENJOINED FROM SPENDING FEDERAL FUNDS WRONGLY AWARDED THEM.

Jones v. D.C.R.L.A., et al. (C.A. D.C., Nos. 73-1507, 73-1638 and 73-1754, Apr. 26, 1974; D.J. 90-1-4-603).

The court ruled that, in the District Neighborhood Development Program, RLA must submit a draft EIS to NCPC along with its proposed action year program. NCPC may modify the EIS as needed, and forward the resulting documents to the City Council for approval. The court also ruled that RLA, as all state agencies, could be enjoined in federal court from spending federal funds which had improperly been given them by a federal agency, if the federal agency could have been enjoined from providing the funds. The court noted that a violation of NEPA did not necessitate injunctive relief if the district court were satisfied with agency efforts to remedy the situation, and the interests of NEPA would be better served without an injunction. Compliance with the Uniform Relocation Assistance Act will be determined on remand.

Staff: Larry G. Gutterridge (formerly of the Land and Natural Resources Division); Assistant United States Attorney Nathan Dodell (D. D.C.).

DISTRICT COURTS

PUBLIC LANDS

MINING CLAIMS; ESTOPPEL AGAINST UNITED STATES.

Oil Shale Corporation v. Morton (No. C-8680, et al., D. Colo., Mar. 15, 1974; D.J. 90-1-18-668).

In 1961, the Secretary of the Interior denied numerous applications for mining patents on the grounds

(1) that all of the claims involved had been declared invalid, in the late 1920's or early 1930's, and (2) that they had not been maintained by annual assessment work. Three of the cases in this consolidated action were brought to challenge that decision.

At trial, in 1967, the plaintiffs contended (a) that the earlier Interior Department decisions were void because the Secretary had no jurisdiction to declare mining claims invalid for failure to do assessment work, (b) that all of the earlier decisions had been cancelled by exercise of the Secretary's supervisory powers in a decision handed down, in 1935, entitled The Shale Oil Company, 55 I.D. 287, and (c) that a rule of practice had been established in the Interior Department, from 1935 to 1960, to the effect that the earlier contest decisions were void and that rule could not be retroactively applied as a basis for denying the patent applications.

The district court ruled in favor of the plaintiffs on the first point and did not reach the remaining two. The court of appeals affirmed on the same ground. In 1970 the Supreme Court reversed, Hickel v. Oil Shale Corporation, 400 U.S. 48, holding that the Secretary did have jurisdiction and that the United States could challenge mining claims for substantial failure to do assessment work. The case was remanded for consideration on the remaining issues.

On December 17, 1973, the district court ruled in favor of the plaintiffs on the two remaining issues holding that:

(1) All contest decisions invalidating oil shale claims for nonperformance of assessment work were vacated by the Interior Department in The Shale Oil Company, 55 I.D. 287 (1935), and

(2) The Interior Department may not retroactively reverse its official position on the validity of old

contest decisions and apply them as a basis for rejecting a patent application.

In addition, the court held that the processing of plaintiffs' patent applications was procedurally defective because of a lack of a hearing and a violation of "the doctrine of separation of functions." The court did not decide another issue, i.e., whether TOSCO, which had not applied for patents, could obtain direct judicial review of the old decisions.

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

NAVIGABLE WATERS

UNPERMITTED DISCHARGE OF FILL MATERIAL INTO WATERS ABOVE MEAN HIGH WATER LINE MADE ILLEGAL BY FWPCA.

United States v. W. Langston Holland (No. 73-623 Civ. T-K, M.D. Fla., Mar. 15, 1974; D.J. 90-5-1-1-363).

The United States sought injunctive relief against a developer for unlawful land filling operations in mosquito canals connected to Papy's bayou, a navigable water of the United States, and in adjacent mangrove wetlands. Violations of 33 U.S.C. secs. 403, 407 and 1311(a), were alleged.

In granting a preliminary injunction, the court ruled that the developer's activity contravened Section 301(a) of the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. sec. 1311(a), because the prohibition of that section is not limited by the traditional notions of "navigable waters of the United States," but, rather, extends to controlling polluting discharges into "waters of the United States." The developer's filling

activities on land above the mean water line--which land was only periodically innundated by tidal waters--constituted the discharge of pollutants into "waters of the United States."

Staff: Assistant United States Attorney Anthony J. LaSpada (M.D. Fla.); James R. Moore (Land and Natural Resources Division).

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