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UNITED STATES DEPARTMENT OF JUSTICE

Vol. 22 June 28, 1974 No. 13

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POINTS TO REMEMBER

REFERRAL OF COMMITMENTS TO DETERMINE COMPETENCY TO STAND TRIAL 18 USC 4244

The number of cases during the first four months of 1974 referred to the United States Medical Center for Federal Prisoners, Springfield, Missouri, under Title 18 U.S.C. 4244 is the highest total for the past five years. The total number of competency cases admitted during the first four months of 1974 is 109 -- the previous high for this period was in 1972 when there were 98 such admissions.

In previous issues of this Bulletin it was pointed out that these examinations could be accomplished more expeditiously and economically with the use of local psychiatric services, preferably on an out-patient basis. Therefore, local examinations are to be used whenever possible. Only in those cases where local resources are unavailable or security requirements dictate confinement to a secure institution should a commitment be made to Springfield under 18 U.S.C. 4244.

In addition, in order to provide quality services to the Federal Courts in those cases where commitments to Springfield are necessary, it is important that the limited staff and facilities available at the Medical Center not be overburdened.

COMMENDATIONS

Mr. Paul R. Boucher of the Criminal Division and Assistant U.S. Attorneys Daniel G. Knauss and Ronald A. Lebowitz of Arizona have been commended by Clarence M. Kelley, Director, F.B.I., for the outstanding assistance rendered by each in connection with a case involving Joseph A. Zappia, Jr., and others. As a result of this investigation, approximately $2 million and 100 military vehicles were recovered and four individuals have been found guilty of violating the Conspiracy Statute. Successful prosecution in this case is directly attributable to the dedication, hard work and trial expertise of Messrs. Boucher, Knauss, and Lebowitz.

Messrs. Eldon L. Webb and John M. Compton, Eastern District of Kentucky, have been commended by R. Hicks Elmore, Director, Food Stamp Program, Department of Agriculture, for their excellent handling of two food stamp cases. Mr. Webb's handling of the Ova Bear Grocery case and Mr. Compton's handling of the Lorene Grubb Grocery case greatly aid the cause of voluntary compliance with Food Stamp Program regulations.

United States Attorney Eugene E. Siler, Jr., Eastern District of Kentucky, has been commended by Clarence M. Kelley, Director, F.B.I., for the outstanding manner in which he handled witnesses testifying before a Federal Grand Jury regarding Donald Douglas Faulkner and others. The achievements resulting from the Grand Jury action were due in no small measure to his skillful and diligent efforts.

Assistant U.S. Attorney Edward J. Boyd, V, has been commended by Clarence M. Kelley, Director, F.B.I., for his outstanding performance in connection with prosecution of the case involving the Grumman Aerospace Corporation which resulted in guilty pleas of 27 persons.

ANTITRUST DIVISION
Assistant Attorney General Thomas E. Kauper

DISTRICT COURT

SHERMAN ACT

SEPARATE INDICTMENTS INVOLVING BID RIGGING, PERJURY, AND OBSTRUCTION OF JUSTICE.

United States v. American Building Maintenance Corp., et al., (Cr. 74-170; May 16, 1974; DJ 60-337-15)

United States v. Samuel S. Usdin, (Cr. 74-171; May 16, 1974; DJ 60-337-18)

United States v. Samuel Turen, (Cr. 74-172; May 16, 1974; DJ 60-337-19)

United States v. American Building Maintenance Corp., et al., (Civ. 74-719; May 16, 1974; DJ 60-337-17)

On May 16, 1974, a federal grand jury in Trenton, New Jersey, returned three indictments: a one count indictment charging twelve companies and five individuals with violating Section 1 of the Sherman Act; a one count indictment against one individual for perjury; and a two count indictment against one individual for conspiracy and obstruction of justice.

The antitrust indictment charges twelve companies and five individuals with a Sherman Act Section 1 conspiracy, beginning in 1967, the purpose of which was to allocate customers and rig bids. The indictment charges that the defendants allocated customers, rigged bids, and imposed compensation requirements on building maintenance companies who failed to conform to the terms of the conspiracy.

As a result of the conspiracy, competition in the building maintenance industry has been suppressed and restrained, customers of maintenance companies have been deprived of free and open competition, and prices have been fixed, stabilized and maintained at artificial and non-competitive levels.

The defendant companies perform services principally within New Jersey but also work in New York and Pennsylvania. Their total revenues in 1972 from the sale of building maintenance services exceeded $25,000,000.

Samuel S. Usdin, named in the antitrust indictment,

was also charged in a separate indictment with making false material declarations under oath before a grand jury in New Jersey. Usdin was charged with a violation of Title IV of the Organized Crime Control Act of 1970, specifically 18 U.S.C. Section 1623(a). The indictment charges that Usdin made false declarations when testifying about his knowledge of and participation in the practice of building maintenance contractors exchanging money because of the loss of accounts. Usdin declared that he had no knowledge of the practice, nor had his company received any money because of the loss of accounts. The maximum penalty for the violation alleged in the perjury indictment is five years in prison and a $10,000 fine.

In a separate indictment Samuel Turen, vice-president of Bloomfield Window Cleaning Company, Inc., was charged with conspiracy to obstruct justice in violation of 18 U.S.C. Section 371 and obstruction of justice in violation of 18 U.S.C. Section 1503. The first count charged Turen with conspiring with an unindicted co-conspirator, Richard Meyers, President of Alexander Meyers Corporation, to destroy original company records which were subpoenaed by the grand jury, and to submit fabricated records in their place. The company records related to the practice of building maintenance firms receiving compensation from competitors who had taken their accounts. The second count charges Turen with actual obstruction of justice by carrying out the conspiracy. Turen was also named as a defendant in the indictment alleging Section 1 Sherman Act violation. The maximum penalty for the conspiracy and obstruction of justice violations charged in the indictment is ten years in prison and a $15,000 fine.

A companion civil case was filed along with the Sherman Act indictment.

All four cases have been assigned to District Court Judge George H. Barlow.

Staff: William J. Curran, Roger L. Currier, and Norman E. Greenspan

* * *

CIVIL DIVISION
Assistant Attorney General Carla A. Hills

SUPREME COURT

AID TO EDUCATION

SUPREME COURT HOLDS THAT PRIVATE SCHOOL CHILDREN MUST RECEIVE EDUCATIONAL PROGRAMS "COMPARABLE" TO THOSE FURNISHED TO PUBLIC SCHOOL CHILDREN PURSUANT TO TITLE I OF THE ELEMENTARY AND SECONDARY EDUCATION ACT OF 1965.

Wheeler, et al. v. Barrera, et al., (U.S. Sup. Ct. No. 73-62, June 10, 1974; D.J. 166-43-4)

Title I provides federal funds to states for special educational programs for disadvantaged public and private school children. Respondents, the parents of Missouri private school children, brought this suit against state educational officials, alleging that private school children were being denied educational services "comparable" to those provided in public schools, in violation of Title I. Specifically, respondents contended that Title I funds are being used in Missouri for reading programs furnished on public school premises during regular school hours, and that respondents' children were being denied a remedial reading program of equal effectiveness. The district court dismissed the complaint, and the court of appeals reversed and remanded. The state's petition for certiorari was granted by the Supreme Court, with the United States appearing at amicus curiae in support of the respondent private school children.

The Supreme Court affirmed the decision of the court of appeals, holding that Title I requires that private school children receive services "comparable" in effectiveness to those provided in public schools, and that such equivalent programs were not being furnished by Missouri. The Court further ruled that it was unnecessary at this time to reach the First Amendment question, i.e., whether the state constitutionally could provide Title I programs on the premises of private schools during regular school hours, because alternative teaching methods for providing the services involved had not yet been explored.

Staff: Robert Greenspan (Civil Division)

COURT OF APPEALS

BANK HOLDING COMPANY ACT

FOURTH CIRCUIT SUSTAINS THE FEDERAL RESERVE BOARD'S INTERPRETATION OF "GRANDFATHER" PRIVILEGES UNDER THE BANK HOLDING COMPANY ACT.

Cameron Financial Corporation v. Board of Governors of the Federal Reserve System, (C.A. 4, No. 73-2001, June 4, 1974; D.J. 145-105-74)

In a case of first impression involving a narrow issue of statutory construction, but with broad ramifications, the Fourth Circuit has concurred with the Federal Reserve Board that a one bank holding company cannot, under the "grandfather" clause of the Bank Holding Company Act Amendments of 1970 "spin-off" banking activities in which it was engaged prior to June 30, 1968 through a subsidiary bank and expand these activities without Board regulation.

The Bank Holding Company Act was amended in 1970 to apply for the first time to "one bank" holding companies. A "grandfather clause" included in the amendments permits a one bank holding company to engage indefinitely "in those activities in which directly or through a subsidiary ... it was lawfully engaged on June 30, 1968 ... and has been continuously engaged since June 30, 1968". The Board may terminate "grandfathered" activities only if, after a hearing, it finds termination necessary to prevent undue competition or unsound bank practices. Without the benefit of the "grandfather" clause, a holding company's expansion into non-banking activities requires prior Board approval.

The bank holding company here involved, Cameron Financial Corporation, prior to June 30, 1968, controlled one bank, the First Union National Bank of North Carolina. The bank operated limited courier services as a part of its banking activities, under the general supervision of the Comptroller of the Currency. After June 30, 1968, Cameron "spun-off" the courier services to a wholly owned non-banking subsidiary, Courier Express, and Courier expanded its services into five neighboring states. Cameron contended that these courier services were "grandfathered" because it had been lawfully engaged in operating similar services through a subsidiary bank prior to June 30, 1968. The Board contended that the term "subsidiary" in the context of the grandfather clause did not include a subsidiary bank, although the term "subsidiary" is defined, for other purposes, to include both banking and non-banking subsidiaries. The Fourth Circuit found that the language of the statute was ambiguous, but concluded that "to prevent the formerly regulated activities of a banking

subsidiary to escape regulation through transfer of such activities to a non-banking subsidiary seems a persuasive reason for declining to extend 'grandfather' privileges to the activities conducted prior to June 30, 1968, by a banking subsidiary".

Staff: Eloise E. Davies (Civil Division)

LABOR MANAGEMENT REPORTING AND DISCLOSURE ACT

CADC UPHOLDS LABOR SECRETARY'S APPROVAL OF MERGER REFERENDUM INVOLVING FORMER UMW DISTRICT 50 AND STEELWORKERS UNION.

Brennan v. International Union of District 50, (C.A.D.C., No. 72-1494, June 3, 1974; D.J. 155-15-178)

Following an election for union officers of District 50, Allied and Technical Workers (formerly District 50, UMW), the losing faction (Angelo Cafalo, et al.) initiated with the Secretary of Labor a complaint against the winning faction (Elwood Moffett, et al.), on the basis of violations of Title IV, Labor Management Reporting and Disclosure Act, and the Secretary ordered a new election. Meanwhile, Cefalo commenced a Title V action against Moffett for breach of fiduciary duties by Moffett in attempting to have the Union's convention approve a proposed merger with the Steelworkers union, prior to any re-election of officers. After initial litigation, the Secretary recommended that the proposed merger be submitted to a referendum of the membership in order to resolve the union's leadership and future at one time. This proposal was adopted by the district court, over Cefalo's objection, and the merger referendum went ahead, resulting in approval of the merger. The court of appeals affirmed the district court's exercise of discretion, holding that the merger referendum was an "appropriate vehicle for resolving the then most crucial issues concerning the union's future."

Staff: Michael Kimmel and Michael Stein (Civil Division)

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CRIMINAL DIVISION
Assistant Attorney General Henry E. Petersen

COURT OF APPEALS

DEPORTATION

QUESTIONABLE LEGALITY OF ORIGINAL ARREST BY LOCAL POLICE DOES NOT OPERATE TO TAINT SUBSEQUENT DEPORTATION PROCEEDINGS IN ABSENCE OF RELIANCE ON EVIDENCE SEIZED AT TIME OF ARREST; MERE PHYSICAL PRESENCE AT DEPORTATION HEARINGS OF ALIENS ORIGINALLY DETAINED UNDER QUESTIONABLE CIRCUMSTANCES DOES NOT CONSTITUTE "FRUIT OF THE POISONED TREE."

Alfredo Guzman-Flores, et al. v. Immigration and Naturalization Service and Pedro Castellanos-Castillo v. Immigration and Naturalization Service, (7th Cir., No. 73-1313, and No. 73-1525, respectively, May 28, 1974. D.J. No's 39-23-772 and 39-23-777)

These cases were consolidated for argument and decision by the court since they raised the same legal issue of appeal and involved similar factual situations. Petitioners all challenged the orders of deportation issued against them by questioning the validity of the deportation proceedings on the grounds that their arrests by local police without probable cause were unconstitutional and rendered all subsequent proceedings invalid as being the "fruit of the poisoned tree."

All petitioners, at their respective deportation hearings, admitted their deportability. Counsel for the petitioners moved in each instance to terminate deportation proceedings on the grounds that their arrests by local police officers in each instance were illegal and thus tainted the proceedings. Petitioners in the Guzman-Flores case alleged that they were stopped by officers of the Summit Police Department without probable cause other than suspicion of their alienage, questioned concerning their alienage and taken into custody and held overnight without any charged being filed by the local authorities. In Castellanos-Castillo, petitioner alleged an arrest by the Palatine Police Department under similar circumstances with the same results. All petitioners were turned over to the Immigration Service the morning following their overnight detention by local authorities. The INS immigration judges rejected petitioners' contentions and denied their motions for termination of the deportation proceedings. In response to counsel's subsequent offer of proof of the illegality of the arrests, the immigration judge in each case ruled that he was without authority to inquire into the legality of an arrest by

local police officers. This ruling was affirmed by the Board of Immigration Appeals, which also found "clear, convincing and unequivocal" evidence to support the deportation order.

In affirming the Board's decision the Court noted that the record in these cases did not disclose any "evidence", obtained as a result of any search or arrest, which was used against petitioners to establish their deportability. It rejected petitioners' argument that their physical presence constituted the evidence to be suppressed on the ground that such presence was obtained illegally, thus becoming "the fruit of the poisoned tree." Declining to apply the exclusionary rule to require the termination of court proceedings because of an alleged illegal arrest, the court cited its previous decisions in Huerta-Cabrera v. Immigration and Naturalization Service, 466 F.2d 759 (7th Cir. 1972), and Vlissidis v. Anadell, 262 F.2d 398, (7th Cir. 1959), and a recent Supreme Court decision in United States v. Calandra, 94 S. Ct. 613 (1974). It applied the Calandra interpretation of the exclusionary rule as a judicially-created remedy designed to safeguard Fourth Amendment guarantees by utilizing the technique of suppression of evidence to achieve deterrence rather than a rule to safeguard personal constitutional freedoms. Quoting from Calandra, at 620, the Court in Guzman-Flores pointed out that the need for the rule is "strongest where the Government's unlawful conduct would result in imposition of a criminal sanction on the victim of the search."

Staff: Mary Jo Grotenrath, Attorney
Government Regulations Section
Criminal Division

NARCOTICS

CONSCIOUS AVOIDANCE AND STUDIED IGNORANCE OF FACT AS A DEFENSE; SELF-IMPOSED IGNORANCE AS THE EQUIVALENT OF FULL KNOWLEDGE.

United States v. Carlos Joly (C.A. 2, No. 775, decided March 12, 1974)

United States v. Reinaldo Olivares-Vega (C.A. 2, No. 772, decided April 3, 1974)

In Joly, the defendant was arrested in the course of passing through Customs at Kennedy Airport in New York. A search of his person disclosed 330 grams of cocaine secreted under his belt. At trial, Joly claimed that a man named "miguel" whom he had met on the airplane gave him $100 to

carry the package through Customs and that Joly did not know what it contained. The government, in trying to demonstrate Joly's knowledge of the contents of the package, relied heavily on the package being concealed, Joly's possession of it, and the unbelievability of Joly's story. Joly had admitted at his arrest that he was probably doing something wrong, but did not know what it was.

In instructions to the jury, the trial judge had stated that actual knowledge that the defendant was bringing cocaine into the country was an essential element of the charge and that that knowledge could be circumstantially shown by the defendant's conduct. The trial judge further charged in part:

> "The defendant has flatly testified that he had no such knowledge. Now, in this connection bear in mind that one may not willfully and intentionally remain ignorant of a fact, important and material to his conduct, in order to escape the consequences of the criminal law.
>
> If you find from all the evidence beyond a reasonable doubt that the defendant believed that he had cocaine and deliberately and consciously tried to avoid learning that there was cocaine in the package he was carrying in order to be able to say, should he be apprehended, that he did not know, you may treat this deliberate avoidance of positive knowledge as the equivalent of knowledge.
>
> In other words, you may find the defendant acted knowingly if you find that either he actually knew he had cocaine or that he deliberately closed his eyes to what he had every reason to believe was the fact. I should like to emphasize, ladies and gentlement, that the requisite knowledge cannot be established by demonstrating merely negligence or even foolishness on the part of the defendant."

No objection was taken to the instruction and the jury, rejected Joly's claim of ignorance, returned a guilty verdict. Joly appealed from that verdict.

The argument on appeal for Joly contended that although "studied ignorance" of a fact may in some limited circumstances, constitute an awareness of so high a probability of the existence of the fact as to justify the inference of knowledge of it, e.g., Turner v. United States, 396 US.. 398, 416 and

n. 29 (1970 and Leary v. United States, 295 U.S. 6, 46 n. 93 (1969) such circumstances were not present in this case. Joly argued that the inference of knowledge could be drawn only when there were two alternative possibilities e.g., narcotics have been imported into the United States or have not been imported, but could not be drawn when the alternatives multiply, say in this case, where appellant could well, in his ignorance, have been carrying gold, watches, jewelry, or myriad other items.

The court rejected appellant's argument, stating that possession of the package raised a legitimate inference that the possessor knew its contents. It is more probable than not that a person knows what he is concealing. Other evidence, such as appellant's denial of knowledge, or a showing that some third party planted the package, or that the package was small enough to contain a watch, or jewelry, or some other valuable small item, may weaken the inference or knowledge, but the legitimacy of the basic inference does not automatically disappear because other evidence arguably points the other way. On these facts the jury was properly allowed to infer Joly's knowledge that he possessed cocaine.

In Oliveras, the defendant was similarly arrested while attempting to bring narcotics through Customs. His story was that he had been paid $300 to bring suitcases to New York and deliver them to an unidentified and unidentifiable man in New York. He claimed he had no knowledge of the contents of the suitcases, 12.7 pounds of cocaine. After an instruction almost identical to that in Joly, supra, the jury returned a guilty verdict.

On appeal, Oliveras argued that the instruction was erroneous because it relieved the jury of the obligation of affirmatively finding knowledge. Additionally, the multiple alternatives argument used in Joly was brought in in an attempt to distinguish Turner and Leary. The arguments were rejected, citing Joly as controlling, and holding that the instruction did not relieve the jury from affirmatively finding knowledge on the part of Oliveras, and that the multiple alternatives argument did not automatically dispose of the presumption of knowledge arising from Olivers" possession of the cocaine, but merely served to weaken the presumption.

Staff: Acting United States Attorney Edward John Boyd, V
Assistant U.S. Attorneys John Wehrum, Joan S. O'Brien, and L. Kevin Sheridan

NARCOTICS

BORDER PATROL USE OF ELECTRONIC SENSORS DEVICES TO DETECT ILLEGAL BORDER CROSSINGS IS VALID AND PROMPT INSPECTION OF THE FIRST AUTOMOBILE TO APPEAR ON HIGHWAY AFTER SENSOR ALARM WAS PROPER.

United States v. Angel Mora-Chavez (C.A. 9, No. 73-3444, decided April 26, 1974)

At about six o'clock on a Sunday morning two automobiles were stopped by a vehicular border patrol when they appeared in the vicinity of a recent sensor-detected border crossing at a remote area. After the automobiles were stopped, the first driver revealed that he was an alien. He was arrested and the ensuing search of his vehicle incident to the arrest uncovered 634 pounds of marihuana.

The court recognized the well known practice of aliens crossing the border and smugglers "back-packing contraband" across the border at remote areas. In addition it recognized the shortage of border patrol personnel to maintain constant watch along all such areas. The court held that the prompt inspection of the first auto to appear on the highway after officers received the sensor alarm was not only well-advised but was based on a founded suspicion. The officers knew some person or persons had recently crossed the border illegally and that the two autos stopped were the only ones known to have been in the sensor-surveillance area near the time of the sensor alert. The trial court was able to find from the government's explanation of the sensor technique adequate foundation for a decision to stop the automobiles in this case. Thus the stop and subsequent search were proper.

FOREIGN AGENTS REGISTRATION ACT

OF 1938, AS AMENDED

The Registration Unit of the Criminal Division administers the Foreign Agents Registration Act of 1938, as amended, (22 U.S.C. 611) which requires registration with the Attorney General by certain person who engage within the United States in defined categories of activity on behalf of foreign principals.

JUNE 1974

During the first half of this month the following new registrations were filed with the Attorney General pursuant

to the provisions of the Act:

The Irish Export Board (Coras Trachtala) of New York City registered as agent of its parent in Dublin. Registrant obtains trade and market information, supplies information regarding Irish products available for export, assists in expanding the sale of Irish products in the U.S. market. Donal Scully filed a short-form registration as General Manager reporting a salary of $27,240 per year, Edward Donaghy filed as Marketing Adviser reporting a salary of $21,684, Peter Bennett filed as Marketing Adviser reporting a salary of $21,250, and David Phillips filed as Manager, Los Angeles Office, reporting a salary of $1,612.77 per month.

Chester A. Nagle of Washington, D.C. registered as agent of the Sultan of Oman, Muscat. Registrant is to serve as advisor on defense matters and to act as liaison between the Government of Oman and the Government of the United States. No fees or expenses are contemplated at the time of registration.

LKP International, Ltd. of New York City registered as agent of the Netherlands National Tourist Office, the Hague. Registrant acts as advertising agency in the preparation and production of creative materials for ultimate inclusion in various print and broadcast media or for sales promotion material and preparation and production of creative concepts and designs for various trade shows in the United States. Registrant receives a fee of $2,000 per month and bills the principal for media costs net of commissions as well as out-of pocket expenses. Stanley H. Katz filed a short-form registration statement as Advertising Agency President reporting a salary of $100,000 per year, Marilyn M. Kravit filed as copywriter reporting a salary of $12,200 per year, Judith O. Tipton filed as Art Director reporting a salary of $18,00 per year and Lawrence Silverstein filed as sales promotion director reporting a salary of $35,00 per year.

Linda Jane Bell of Lorton, Virginia, registered as agent of the Embassy of the U.S.S.R., Washington, D.C. Ms. Bell edits Novosti Press Agency materials as well as occasional government communiques and treaties for the Information Department and reports a salary of $830.75 per month.

Martin Ryan Haley & Associates, Inc. of New York registered as agent of the Tunisian-American Friendship Society, Tunis. Registrant was retained from October 1973 to December 23, 1973 to organize a one week study tour for American and Canadian thought leaders to inaugurate the use of a new Tunis Air jet from Paris to Tunis for the

purpose of providing educators, business leaders, government staff personnel, journalists and other thought leaders with a better understanding of the social, economic and political structure and conditions of Tunisia. Registrant's fee for this project was $37,500 and expenses. Martin R. Haley filed a short-form registration statement as Public Affairs Consultant working directly on the Tunisian account.

Activities by persons and organizations already registered under the Act:

Ruder & Finn, Inc. of New York filed exhibits in connection with its representation of Mission Interministerielle pour l'amenagement du littoral Touristique De La Cote Aquitaine, Paris. Registrant will act as public relations counsel to the principal in arranging for the head of the principal and other colleagues to visit the United States for the purpose of meeting with U.S. real estate investors and resort operators to learn how U.S. resorts are operated. Registrant's fee and reimbursement of expenses will total $9,090 for this project.

Samuel E. Stavisky & Associates, Inc. of Washington, D.C. filed a copy of its new agreement with the Pan American Coffee Bureau. Registrant renders public relations services and counsel to the principal at a fee of $5,000 per month plus out-of-pocket expenses. Total amount not to exceed $60,000 for the period October 1, 1973 through March 31, 1975.

Ronald A. Capone of Washington, D.C. filed exhibits in connection with his representation of the Committee of European and Japanese National Shipowners' Associations, London. Registrant will render legal services to the principal and on occasion will confer with cognizant officials of the U.S. Government on matters of concern to the principal. Registrant's annual retainer is $20,000 plus out-of-pocket expenses.

International Public Relations Co., Ltd. of New York filed exhibits in connection with its representation of the Japan Whaling Association, Tokyo. Registrant will act as general public relations and research counsel for the foreign principal and will receive $15,000 plus expenses for the period April 1 - June 30, 1974.

Roy Duffus Associates Inc. of New York filed exhibits in connection with its representation of the National Federation of Coffee Growers of Colombia. Registrant will act as public relations counsel to help improve Colombia's image in the U.S.; encourage investment in Colombia; promote Colombian exports and tourism and educate U.S. residents on the

culture and economic life of Colombia. For these services registrant is to receive an annual fee of $5,000 plus expenses.

Edlow International Company of Washington, D.C. filed exhibits in connection with its representation of Aktiebolaget Atomenergi, Sweden. Registrant will act as adviser to the principal on changes in USAEC policy regarding uranium enriching services and research on reactor fuel, the safeguarding and transporting of such materials and all other information regarding U.S. policy which concerns the foreign principal. Charges to the foreign principal are to be $50 per hour for time used, $40 per hour for travel time plus miscellaneous expenses at cost.

The Japan Trade Center of Los Angeles filed exhibits in connection with its representation of Tokyo Metropolitan Government, Tokyo; Hokkaido Prefectural Government, Sapporo; Nagano Prefectural Government, Nagano; Shizuoka Prefectural Government, Shizuoka and Kanagawa Prefectural Government, Yokohoma. Registrant is engaged in the promotion of trade for these principals and each principal makes an annual contribution of funds to the registrant.

Short-form registrations filed in support of registrations already on file:

On behalf of the Eastern Caribbean Tourist Association of New York: Anthony Ronald Cools-Lartibue as Executive Director engaged in tourist promotion and reporting a salary of $1,300 per month.

On behalf of the Australian Tourist Commission of New York: John Ivor Richardson as North American Marketing Director engaged in tourist promotion and reporting a salary of $3,300 per year.

On behalf of Ruder and Finn of New York whose foreign principals Japan External Trade Organization and Mission Interministerielle pour L'Amenagement due Littoral Touristique De La Cote Aquitaine: Edwin Simon engaged in public relations and reporting a salary of $750 semi-monthly.

On behalf of IDA-Ireland (Industrial Development Authority): Robert J. McDermott as Consultant-Public Relations reporting a fee of $1,958 per month, Grace J. Finley as Consultant-Research reporting a fee of $1,500 per month and Edward J. Kelly as Industrial Officer reporting a salary of $18,000 per year. All are engaged in the registrant's compaign to interest U.S. companies in establishing manufacturing facilities in Ireland.

On behalf of the Italian Government Travel Office

of Chicago: Leonardo Labia as informational service employee engaged in the promotion of tourism and reporting a salary of $862.45 per month plus yearly bonus of $431.22.

On behalf of the Curacao Tourist Board of New York: Eitel C. Hernandez as sales representative engaged in tourist promotion and reporting a salary of $13,000 per year.

On behalf of the World Zionist Organization - American Section, Inc. of New York whose foreign principal is the Executive of the World Zionist Organization, Jerusalem: Mordecai S. Chertoff as Director of Public Information. Mr. Chertoff will serve as press officer in the preparation of press releases and other material for distribution in publicizing the programs and statements of the foreign principal. Mr. Chertoff reports a salary of $20,000 per year.

On behalf of the Package Express & Travel Agency, Inc. of New York whose foreign principal is Vneshposyltorg, Moscow: Behden Uchacz as associate engaged in the sending of gift parcels to recipients in U.S.S.R. and reporting a fee of $6.25 per parcel.

On behalf of Shearman & Sterling of New York City whose foreign principals are Societe de Transport et de Commercialisation des Hydrocarbons, Societe Nationale de Recherches Energy of Algeria, ASA Limited (South Africa): Grayson Murphy, Charles Goodwin, Jr. and Robert H. MacKinnon. All render general legal services to the registrant and report a general share in partnership profits.

On behalf of the Malaysian Tourist Information Centre of San Francisco: Sheikh Salim Abod as Manager engaged in tourist promotion and reporting a salary of $900 per month plus dwelling allowance.

On behalf of the Cayman Islands Department of Tourism of Florida: David E. Richardson, Susan J. Wincher and Georgene E. Somin as Representatives engaged in tourist promotion.

On behalf of the Australian Tourist Commission of New York: Stephanie Willis as Senior Travel Counsellor reporting a salary of $13,600 per year and Peter Goulding as Manager, Eastern Region reporting a salary of $27,080 per year. Both are engaged in tourist promotion.

On behalf of A.F. Sabo Associates of New York whose foreign principal is the Government of Jamaica: Lee Rutherford as Public Relations Executive. Mr. Rutherford will direct and participate in financial community relations on behalf of Jamaica and reports a salary of $2,000 per month.

William R. Baker as Public Relations Executive responsible for preparing print radio and television material directed to the financial community, news, television, radio and elected and appointed U.S. Government officials. Mr. Baker reports a salary of $17,000 per year.

On behalf of Warren Weil Public Relations of New York whose foreign principals are the Colon Free Zone and the Republic of Panama: Andrew Weil as Public Relations Consultant engaged in public relations to convince representatives of U.S. industry that they can be more competitive in Latin America by using the Colon Free Zone as a distribution center. Mr. Weil reports a fee of $1,600 per month plus $800 per month for rent and secretarial services.

On behalf of Globe Parcel Service of New York whose foreign principal is Vneshposyltorg, Moscow: Taras Kachnykewych as agent engaged in the transmission of gift parcels to recipients in the U.S.S.R. and reporting a commission of 50% of service charges collected.

On behalf of Patricia Ryan Public Relations of New York whose foreign principal is Saint John Port and Industrial Development Commission: Judy McCarthy as writer engaged in public relations activities and reporting a fee of $6.75 per hour.

On behalf of United States Navigation, Inc. of New York whose foreign principal is the Federal Republic of West Germany: Peter Richters as Vice President-Operations engaged in arranging for and directing transportation of military equipment from U.S. ports to German North Sea ports and supervises the loading of such equipment and ammunition on board German vessels.

On behalf of the Amtorg Trading Corporation of New York which is the official Soviet purchasing agent in the United States: Nikolai N. Voronkov and Ninel A. Peksheva as Senior Engineers reporting salaries of $655 per month.

On behalf of China Books & Periodicals of San Francisco whose foreign principals are Guozi Shudian, People's Republic of China and Zunhasaba, Hanoi, Democratic Republic of Vietnam: Mimi Arioli, Gary Bulmer, Tom Fergoda and Helmut Kapczynski. All assist in the importation, wholesale and retail distribution of books and periodicals from the foreign principals and report salaries ranging from $110 to $120 per week.

On behalf of the Finnish National Tourist Office of New York: Raimo K. Lahti as Director reporting a salary of $1,675 per month.

On behalf of the Mexican National Tourist Council of New York: Miguel A. Lopez Lecube as Assistant Director reporting a salary of $1,500 per month and Luis Suarez Del Solar as Press Officer reporting a salary of $1,200 per month. Both are engaged in the promotion of tourism to Mexico.

On behalf of the Korea Trade Promotion Center of New York: Sung Ho Cho as Deputy Director and reporting a salary of $1,000 per month.

On behalf of A.F. Sabo Associates of New York whose foreign principal is the Government of Jamaica: Marion H. Smoak as attorney engaged in the supervision and direction of the principal in its dealings with Congress and other U.S. Government agencies and U.S. aluminum companies. Mr. Smoak reports a retainer of $1,200 per month and Richard Wool as Public Relations Executive engaged in the dissemination of news releases, speeches, scripts, etc. to all news media and will serve as government special projects representative to inform political candidates running in districts in which aluminum industries have prime facilities. Mr. Wool reports a salary of $18,000 per year.

LAND AND NATURAL RESOURCES DIVISION
Assistant Attorney General Wallace H. Johnson

SUPREME COURT

ENVIRONMENT

CONSENT DECREE IN ORIGINAL JURISDICTION CASE; CONTINUING COURT SUPERVISION OF SETTLED CASES UNDESIRABLE; ARTICLE III JUDICIAL POWER DOES NOT EXTEND TO COURT SUPERVISION OF SETTLEMENTS WITHOUT THERE BEING ADJUDICATION OF LEGAL OR FACTUAL ISSUES.

Vermont v. New York & IPC (No. 50, Original, June 3, 1974; D.J. 90-5-1-1-313)

The State of Vermont sought to invoke the original and exclusive jurisdiction of the Supreme Court by moving for leave to sue the State of New York and the International Paper Company for alleged pollution of the interstate waters of Lake Champlain. Leave to file the complaint was granted in April of 1972. 406 U.S. 186. A petition of the United States for leave to intervene was granted thereafter by the Special Master appointed by the Court to hear the case. After 75 trial days, the taking of over 15,000 pages of testimony, and approximately six months of settlement negotiations, the parties agreed to compromise the case in a manner described by the Special Master in his report to the Court as achieving "a reasonable result consistent with the public interest, and acceptable on the basis of the evidence thus far presented."

The proposed consent decree, to have been entered without findings of fact or conclusions of law, would have imposed a timetable and numerous requirements on IPC for controlling both air and water pollution emanating from its new mill on the shore of Lake Champlain north of Ticonderoga, New York. In addition, the proposed decree would have required a $500,000 payment from IPC to Vermont to be used in connection with pollution control studies of the waters of Lake Champlain. In turn, the company would have been released by the State of Vermont for any liability for damages from past air emissions and water discharges. Having taken the position in the lawsuit that removal from the lake of accumulated deposits from past paper mill operations would be more environmentally harmful than allowing their natural in-place decomposition, the United States would have released the company after five years for responsibility for such deposits, save for costs arising out of

remedial action taken as a consequence of the needs of anchorage or navigation.

The proposed decree would have provided a "South Lake Master" to hear both disputes relating to effectuation of the decree and petitions for modification or termination of any of the decree provisions. In short, continuing jurisdiction of the Court was specifically contemplated.

The Court declined to approve the proposed decree, reasoning, first, that there was no precedent for continuing jurisdiction over a decree entered without findings of fact or conclusions of law and, second, that the Court's "judicial power" under Article III of the Constitution does not extend to supervision of such a consent decree. Two alternative means of settlement were suggested: (1) an interstate compact, or (2) an agreement of the parties leading to dismissal of the complaint.

Staff: James R. Moore and Patrick A. Mulloy (Land and Natural Resources Division).

COURTS OF APPEALS

MINES AND MINERALS

PRUDENT MAN RULE SATISFIED ONLY BY ACTUAL DISCOVERY OF VALUABLE MINERAL DEPOSIT, NOT BY SHOWING OF ISOLATED VALUES JUSTIFYING FURTHER EXPLORATION.

Barton v. Morton (C.A. 9, No. 71-1991, May 30, 1974; D.J. 90-1-18-849)

Barton applied to the Department of the Interior for patents to two lode mining claims. The Department held the claims void for lack of discovery and Barton filed suit to obtain judicial review of the Secretary's determination. The district court entered summary judgment in favor of the Secretary and dismissed the action. The court of appeals affirmed.

The evidence showed that Barton had exposed veins on both claims, containing some gold and silver, together with base metals. Experts testified that the exposed veins justified tunneling along the veins in search of similar chutes or pockets. Barton argued that, as he had exposed sufficient veins to justify further work, he had satisfied the prudent man test. Interior contended that, as Barton had not yet discovered a mineral deposit but was only searching for one, he had not made a discovery.

The court of appeals agreed. A mineralized vein is not the equivalent of a deposit of a mineable one. Barton's findings of samples did not support a finding of a valuable deposit. No difference exists between a showing of isolated mineral values not occurring in a vein, which only suggests the existence of a valuable mineral deposit within the limits of the claims, and the showing of isolated values occurring in a vein which only suggests the possible existence of a valuable mineral deposit in the course of the vein. In either case what is called for is further exploration.

In explaining why prudent prospectors, unlike prudent mine developers, are not entitled to a patent, the court wrote: "A patent passes ownership of public lands into private hands. So irrevocable a diminution of the public domain should be attended by substantial assurance that there will be a compensating public gain in the form of an increased supply of available mineral resources. The requirement that actual discovery of a valuable mineral deposit be demonstrated gives weight to this consideration."

In conclusion, the court noted that denial of a patent did not bar a claimant from continuing the search for a valuable mineral deposit; it only withholds passage of title until that discovery is made.

Staff: Jacques B. Gelin (Land and Natural Resources Division); former Assistant United States Attorney Michael L. Morehouse (D. Ore.).

ENVIRONMENT

CLEAN AIR ACT, STATE EMISSION PERMITS NOT REQUIRED FOR FEDERAL FACILITIES.

Commonwealth of Kentucky et al. v. Ruckelshaus, et al. (C.A. 6, June 5, 1974; D.J. 90-5-2-3-94)

Affirming the district court, the court of appeals held that Section 118 of the Clean Air Act, 84 Stat. 1689, 42 U.S.C. sec. 1857f, should not be construed so as to require federal officers to apply for and obtain state air pollution emission permits as a prerequisite to operating federal facilities within the various States. The court noted that Section 304 of the Act, the applicable waiver of sovereign immunity, provides that the instrumentalities of the United States may be sued to enforce violations of

substantive emission limitations and timetables of compliance.

The court further stated that Section 304 did not authorize suits to compel the administrator of the Environmental Protection Agency to bring enforcement actions against alleged pollutors because maintenance of such actions is committed to the discretion of the Administrator.

Staff: Robert L. Klarquist (Land and Natural Resources Division); James Glasgow (formerly of the Land and Natural Resources Division).

ENVIRONMENT

NEPA; ADEQUACY OF IMPACT STATEMENT.

Environmental Defense Fund v. Froehlke (C.A. 8, No. 74-1011, June 3, 1974; D.J. 90-1-4-452)

EDF challenged the adequacy of the impact statement prepared by the Corps of Engineers in connection with the Harry S. Truman Dam in Missouri. The district court found the EIS to be adequate. The district court also found the Corps' decision to proceed with the project not to be arbitrary or capricious. The court of appeals affirmed "on the basis" of the district court's opinion.

Staff: Assistant United States Attorney David Proctor (W.D. Mo.); Eva R. Datz and Irwin Schroeder (Land and Natural Resources Division).

ENVIRONMENT

ENVIRONMENTAL IMPACT STATEMENTS REQUIRED FOR GOVERNMENT RESEARCH AND DEVELOPMENT PROGRAMS INVOLVING SUBSTANTIAL COMMITMENT OF RESOURCES.

Scientists Inst. for Pub. Info., Inc. v. Atomic Energy Com'n (C.A. D.C. No. 72-1331, June 12, 1973, 481 F. 2d 1079; D.J. 90-1-4-315)

The issue in this case is whether NEPA requires the Atomic Energy Commission to prepare an environmental impact statement on its Liquid Metal Fast Breeder Reactor

Program (LMFBR) while this program is still in its research and development stage. The LMFBR project is a long-range program designed to produce plutonium, which is a necessary fuel for atomic power plants.

The AEC first argued that NEPA requires detailed statements only for particular facilities, and that no separate NEPA analysis of an entire research and development program is required. The AEC asserted that any broad analysis of the entire program takes place of necessity whenever a statement is prepared on a specific facility. But in seeming contradiction to this legal position the AEC was currently engaged in a broad "environmental survey," not in the form of an EIS, which purported to examine the environmental impact of the entire LMFBR program. Secondly, the AEC argued that correct timing of an EIS on the overall program would dictate its preparation at a later date.

The district court decided that no EIS was required because the program was still in a research and development state and no specific implementating action which would affect the environment had yet been done.

The court of appeals reversed and remanded. The court held that, because of the existence of a definite program and the actual commitment of vast sums, the AEC was required to issue an EIS while the LMFBR was still in a research and development stage. It was pointed out that the AEC was embarking on a program to develop a technology which would ultimately have a great impact on the environment, and that environmental costs and alternatives should therefore be weighed early, especially since technological advances, as forms of capital investment, have a strong momentum for application once commercial feasibility is reached. Even though the effects of the LMFBR program may not be felt for many years, the court reasoned that NEPA contemplates consideration of the long-range implications of such a major federal action. The existence of a "program" is emphasized. The AEC had developed a carefully planned and detailed schedule for the LMFBR program through 1980, it had prepared an elaborate cost-benefit analysis of the program, and substantial government investment had already taken place.

The court recognized some degree of flexibility and agency discretion in determining the scope and amount of detail necessary for impact statements, and applied a rule of reason in judging when anticipated future environmental effects should be included in the statement. The Commission

therefore can satisfy Section 102(C) of NEPA if it makes a good faith effort to describe the reasonably foreseeable impact of the program, alternatives to the program and their reasonably foreseeable environmental impact, and the irreversible and irretrievable commitment of resources the program involves. In addition, the court felt that such a broad-ranging impact statement, as a practical matter, should be issued separately and distinct from an impact statement applying to a single AEC project.

In relation to the AEC's second argument, that the correct time for an EIS would be later in the program, the court stated that the following factors should be weighed against the dangers of a premature, imperfectly researched EIS: the likelihood of the technology to prove commercially feasible, how soon this will occur, how much information is presently available on the effects of application of the technology, to what extent irretrievable commitments are being made as the development program progresses, and how severe will be the environmental effects if the technology does prove commercially feasible. The court decided that the agency should weigh these factors using their own expertise, but that a form of judicial review should exist which would require the agency to provide a framework for principled decisionmaking, and procedures for periodic evaluation of whether the time for drafting a NEPA statement has arrived. Most important, the agency would be required to state reasons if it decided that an EIS was not yet necessary. In the instant case, the court found that the Commission could have no rational basis for deciding that the time was not yet ripe for drafting an impact statement on the overall LMFBR program. Substantial sums of money had already been expended on the LMFBR, the schedule for the program had been worked out in great detail, and various agency documents showed substantial prior research into the environmental impact of the program.

Consequently, the court determined that a broad-ranging EIS was timely for such a research and development program.

Staff: Peter R. Steenland (formerly of the Land and Natural Resources Division); Edmund B. Clark (Land and Natural Resources Division).

CONDEMNATION

DISCOVERY OF APPRAISER'S REPORTS ON THIRD PARTY LANDS.

United States v. 25.02 Acres in Douglas County, Colorado, and Chez Ami Lounge, Inc. (C.A. 10, No. 73-1702, April 29, 1974; D.J. 33-6-402-103)

Landowners appealed from an order quashing that portion of their subpoena which sought to compel the Government's expert witness to produce all appraisal reports he had prepared for the use of other private property owners in the vicinity. The court of appeals affirmed, holding that in passing on evidentiary matters a district court has wide discretion. The Government's expert had not relied on these appraisal reports as a basis for his valuation testimony. The landowners sought the appraisal reports solely to impeach the appraiser's credibility.

Staff: Peter R. Steenland (formerly of the Land and Natural Resources Division); United States Attorney James L. Treece (D. Colo.).

INDIANS

CORPORATE LESSEE DEFAULTS ON LEASE WITH LESSOR INDIANS; INDIANS DID NOT WAIVE THEIR RIGHT TO TERMINATE LEASE.

Sessions, Inc. v. Morton (C.A. 9, No. 72-3062, Jan. 31, 1974, 491 F. 2d 854; D.J. 90-2-4-191)

Sessions, Inc., a California corporation and lessee of certain Indian lands, brought this action seeking review of the Secretary of the Interior's decision cancelling its lease, and a declaration of its rights against the Indian lessors under the Declaratory Judgment Act, 28 U.S.C. sec. 2201 (1970).

The lease in question required the lessee to develop and improve certain parcels of land, for which plans were required to be submitted by January 27, 1963, construction completed by January 27, 1966. This timetable was not followed by Sessions, which apparently did not submit its plans until March 24, 1966. However, the March 24, 1966, plans provided for the dedication of a part of the land to the city for two streets, a substantial departure from the

terms of the lease. Nevertheless, Sessions argued that the timetable was extended and its default excused when the Bureau of Indian Affairs did not fulfill its duties under the lease to either approve or disapprove the March 27, 1966, plan.

The district court sustained the Secretary's cancellation of the lease (348 F. Supp. 694) and Sessions appealed.

The court of appeals affirmed, holding that this dedication of land was a substantial departure from the terms of the lease, unintended by the lessors, and therefore the Bureau of Indian Affairs was not required to approve or disapprove the land and could terminate the lease.

The court also held that the Indians were not required to approve of the street dedications because of any implied obligation in the lease to perform everything which the contract presupposed, since it was clear that the Indians never intended to dedicate any of this land. Also, it was decided that the Indians did not waive their right to claim a breach of the lease's terms by accepting rent since the time of Sessions' default, since waiver demands the knowing relinquishment of a right, and such an intent was not shown in this case. Finally, the court relied on Rule 52(a), F.R.C.P., and accepted the decision of the district court since it was not shown to be "clearly erroneous."

Staff: Peter R. Steenland (formerly of the Land and Natural Resources Division); Assistant United States Attorney Philip S. Malinsky (C.D. Cal.).

PUBLIC LANDS

ADVERSE POSSESSION; TEXAS STATUTES.

United States v. Adria Smith Stanton (C.A. 5, No. 73-2266, June 10, 1974; D.J. 90-1-5-1163)

The district court held that the United States failed to establish title by adverse possession to an undivided interest to 77 acres in the Sabine National Forest in Texas. The court held that the possession of the United States was not adverse because special use permits issued

by the Forest Service contained the clause "This permit is subject to all valid claims."

The court of appeals reversed, holding that under Texas law "recognition of another's interest in land sufficient to bar adverse possession must not only be clear and unequivocal but also such recognition must be specific as to whose interest is acknowledged." There was no evidence that indicated that the United States had specifically acknowledged any other interest, so as to bar adverse possession.

Staff: Eva R. Datz (Land and Natural Resources Division); Assistant United States Attorney Nancy James (E.D. Texas).

DISTRICT COURTS

ADMINISTRATIVE LAW

JUDICIAL REVIEW OF ADMINISTRATIVE ACTION; POWER OF DISTRICT COURT TO REQUIRE SECRETARY TO EXERCISE DISCRETIONARY ACTION WHICH IN TURN WILL BE SUBJECT TO JUDICIAL REVIEW.

Sierra Club v. Department of the Interior, Rogers C. B. Morton (Civil No. C-73-0163 WTS, N.D. Cal., May 13, 1974; D.J. 90-1-4-754)

This case was originally instituted under the Freedom of Information Act, 5 U.S.C. sec. 552(a)(3), to secure copies of several reports prepared for the Secretary relative to the condition of the Redwood National Park and the need to protect the Park from the possible effects of stream erosion resulting from threatened clear cutting of the timber in the watershed above the Park boundaries. The information requested was freely given plaintiff. Thereafter, plaintiff amended its complaint seeking injunction and declaratory relief and mandamus asking that the court require the Secretary to report to the court a plan to protect the Park from erosion and to see that the plan was implemented. Defendant moved to dismiss for lack of jurisdiction and, in the alternative, for summary judgment on the grounds the complaint failed to state a cause of action.

The Redwood National Park was created by statute (16 U.S.C. sec. 79a) in which a designated area was acquired by legislative taking. The statute also provided:

> In order to afford as full protection as is reasonably possible to the timber, soil, and streams within the boundaries of the park, the Secretary is authorized, by any of the means set out * * * to acquire interests in land from, and to enter into contracts and cooperative agreements with, the owners of land on the periphery of the park and on watersheds tributary to streams within the park designed to assure that the consequences of forestry management, timbering, land use, and soil conservation practices conducted thereon, or of the lack of such practices, will not adversely affect the timber, soil, and streams within the park as aforesaid. * * * No acquisition other than by donation shall be effectuated and no contract or cooperative agreement shall be executed by the Secretary pursuant to the provisions of this subsection until sixty days after he has notified the President of the Senate and the Speaker of the House of Representatives of his intended action and of the costs and benefits to the United States involved therein.

The court held that it had jurisdiction of this case under the Administrative Procedure Act (5 U.S.C. secs. 701-706) and also under the Mandamus Act (28 U.S.C. sec. 136). The court reviewed the statute creating the Redwood National Park (omitting reference to the need to report back to Congress before acquiring any interest in property) and also the National Park Systems Act (16 U.S.C. sec. 1) which places an obligation on the Secretary to protect national park property. The court cited cases for the proposition that the Administrative Procedure Act precludes judicial review only where Congress clearly intended to preclude review and the fact that the statute is couched in terms of discretion does not necessarily indicate an intent to preclude review. The court quoted the circuit court as saying, "* * * this court can see no valid distinction between the public official who has a statutory duty to act and does not and the one who has a duty not to act and does. This was clearly the view of

Congress in enacting the Administrative Procedure Act, since it provides that a reviewing court should "compel agency action unlawfully withheld."

The court concluded that even though it could not substitute its judgment for that of the Secretary it has the duty to make a finding on whether the Secretary's action or inaction is arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law. Observing that issues of material fact remained outstanding, the court denied defendant's motion to dismiss and for summary judgment.

Staff: Assistant United States Attorneys Rodney H. Hamblin and Paul E. Locke (N.D. Cal.).

ENVIRONMENT

NEPA; HIGHWAY; LACHES; PRELIMINARY INJUNCTION.

Steubing v. Brinegar (W.D. N.Y., Civil 1973-576, May 20, 1974; D.J. 90-1-4-828)

Plaintiffs brought this action in 1973 to enjoin the federal and state highway departments from constructing a bridge over Lake Chautauqua in New York State. Among other violations alleged, plaintiffs claimed that an environmental impact statement prepared pursuant to Section 102(2)(C) of the National Environmental Policy Act (NEPA) should have been prepared prior to the commencement of construction. Though work on the ground did not begin until 1973, the bridge was initially authorized prior to the enactment of NEPA in 1970. In 1973 the Federal Highway Administration granted PS&E approval for construction of the bridge substructure and following such approval the State awarded a $14,700,000 contract for construction of the substructure of the bridge alone. The cost of the completed bridge will be about $29,000,000.

As to equitable considerations such as the defense of laches, the matter was referred to a magistrate who recommended that laches did not apply because there was no unconscionable delay on the part of the plaintiffs and that a preliminary injunction should issue. The court adopted the magistrate's recommendation and issued a preliminary injunction pending compliance with NEPA.

With respect to laches, the court noted that the significant date was that of the PS&E approval of the substructure of the bridge and "the delay between P.S.&E. approval (May 9, 1973) and the filing of this lawsuit (November 23, 1973) is not unreasonable" (Slip op. 10). The court observed (Slip op. 9-10):

> Plaintiff had no right, let alone obligation, to bring suit until the FHWA's sponsorship * * * reached the point of a "proposal for * * * major Federal action" within the ambit of * * * N.E.P.A., 42 U.S.C. 4332(2)(C) * * *. I-291 Why? Association v. Burns, at 19 (D.C. Conn.) (Feb. 7, 1974). In considering when a highway project has become federal for purposes of N.E.P.A., it is necessary to consider that in federal highway planning there are discrete stages and that federal approval is necessary at each stage: (1) a state's highway "system," (2) a particular highway location, (3) its design, (4) P.S.&E., (5) construction.

The court refused to offset the fact that no EIS was prepared for this project with equitable considerations (slip op. 18):

> That no Environmental Impact Statement as defined in N.E.P.A. was prepared by any federal agency is admitted. In the court's opinion, this admission is critical. The court refuses, as a matter of law, to give weight to either the total highway project or the private reliance upon the bridge's completion.

Staff: Assistant United States Attorney C. Donald O'Connor (W.D. N.Y.); William M. Cohen (Land and Natural Resources Division).

ENVIRONMENT

NEPA; ADEQUACY OF AN EIS FOR HIGHWAY.

George and Mary Daly, et al. v. John A. Volpe, et al. (Civ. No. 9490, W.D. Wash., May 20, 1974; D.J. 90-1-4-283)

This opinion is the second installment in a protracted controversy over the construction of the I-90 by-pass around the City of North Bend, Washington; see Daly v. Volpe, 350 F. Supp. 252 (W.D. Wash. 1972). The earlier decision rejected as inadequate the EIS prepared for the by-pass and enjoined construction until state defendants prepared a revised EIS which detailed the environmental harm, presented alternatives completely, discussed the relationship between short-term uses of man's environment and long-term productivity, and listed all irretrievable or irreversible commitments of resources.

Believing there was division within the circuit as to the proper standard of EIS review, the court reviewed the EIS under the standards set forth in both subsections (2)(a) and (2)(d) of 5 U.S.C. 706 (but see Lathan v. Volpe, 4 ELR 20083 (C.A. 9, 1973)), and found it to be adequate.

The court also held that, in regard to the necessity or desirability of the project, it could not substitute its judgment for that of the Administrator.

In rejecting plaintiffs' attack on the EIS and dissolving the injunction, the court concluded that the seven mile by-pass had not been unreasonably segmented, that the discussion of alternatives viewed under a reasonableness standard was satisfactory, and that the final EIS properly considered or balanced environmental costs as well as technical and economic benefits.

Staff: Assistant United States Attorney Stan Pitken (W.D. Wash.); Howard O. Sigmond (Land and Natural Resources Division)

DISTRICT COURTS

ENVIRONMENT

NEPA; ADEQUACY OF ENVIRONMENTAL IMPACT STATEMENT; HERBICIDES; FEDERAL INSECTICIDE, FUNGICIDE AND RODENTICIDE ACT.

Lee v. Callaway (No. 72-382-Civ-J-S, M.D. Fla.; D.J. 90-1-4-512)

The plaintiffs brought this suit against officials of the Environmental Protection Agency and the Corps of Engineers to enjoin the Corps from using the herbicide 2, 4-D to control the growth of water hyacinths on waterways in the State of Florida, alleging in essence violations of the National Environmental Policy Act (NEPA), 42 U.S.C. sec. 4321 et seq., and the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), 7 U.S.C. sec. 136 et seq.

Initially plaintiffs sought a preliminary injunction because no environmental impact statement had been prepared. The court ordered the preparation of the statement, but did not issue an injunction on the grounds that NEPA did not require a moratorium on programs that were in effect when NEPA was enacted until an impact statement could be prepared. Lee v. Resor, 348 F. Supp. 389 (M.D. Fla. 1972). The court further noted that a request for a preliminary injunction requires a balancing of the equities and the harm to the public from an injunction here would outweigh the harm to the plaintiffs from the use of the herbicide.

When the Corps completed the environmental impact statement, plaintiffs challenged its adequacy and alleged that the defendants did not comply with FIFRA with respect to the registration and usage of the herbicide. The district court entered judgment for the defendants.

The court found that the statement was adequate and "more than 'sufficient to enable those who did not have a part in its compilation to understand and meaningfully consider the factors involved.' Environmental Defense Fund v. Corps of Engineers (Tombigbee) (C.A. 5, No. 72-2874, decided April 19, 1974) ((492 F. 2d 1123))."

With regard to FIFRA, the court stated:

> Plaintiffs are precluded from challenging the defendants' actions under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), 7 U.S.C. 136 et seq., since enforcement of FIFRA is left to the Environmental Protection Agency and the Attorney General. The legislative history supports this view and shows that Congress rejected an amendment which would have provided for citizens' civil actions for injunctive relief to enforce the provisions of FIFRA. See the recent decision in People for Environmental Progress v. Leisz (C.D. Cal., No. 73-1405-LTL, decided March 25, 1974), and the legislative history therein cited, holding that enforcement of FIFRA lies with EPA and the Attorney General and alleged violations are not the proper subject of civil actions by citizens. Plaintiffs do not have standing to challenge defendants' actions under FIFRA. A number of courts have rendered decisions similar to that in People for Environmental Progress with respect to private attempts to enforce the Rivers and Harbors Act and the Refuse Act. E.g., Bass Anglers Sportsman Soc. v. United States Steel Corp., 324 F. Supp. 412 (Ala., 1970), aff'd. per cur. 447 F. 2d 1304 (C.A. 5, 1971); Guthrie v. Alabama By-Products Co., 328 F. Supp. 1140 (N.D. Ala., 1971), aff'd. 456 F. 2d 1294 (C.A. 5, 1972), cert. den. 410 U.S. 946 (1973); Gerbing v. ITT Rayonier, Inc., 332 F. Supp. 309 (M.D. Fla., 1971); Connecticut Action Now, Inc. v. Roberts, 457 F. 2d 81 (C.A. 2, 1972). The rationale of these decisions is equally applicable to the case at hand.

The court further found that the Corps' decision document on continuation of its program and impact statement "demonstrate that the Corps utilized procedures which assured that environmental considerations were incorporated into its decisionmaking." The court then concluded that the "decision of the Corps of Engineers is reviewable under the Administrative Procedure Act and is not 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.' 5 U.S.C. 705(2)(A)."

Staff: William M. Cohen (Land and Natural Resources Division).

* * *

TAX DIVISION
Assistant Attorney General Scott P. Crampton

Roger Kent, et al. v. North. Cal. Reg. Office of American Friends Service Committee and the United States (C.A. 9 - Nos. 72-1093 & 72-1094)

A large number of persons subject to the federal telephone excise tax decided to use the tax as a fulcrum for litigating the constitutionality of the United States' participation in the Southeast Asian conflict. The link between the tax and the participation, they allege, was that the tax was enacted to support that participation. Realizing that the courts had previously rejected frontal assaults on the tax -- via refund suits -- on that basis, the taxpayers attempted a novel procedure for litigating their tax liability, and hopefully for litigating the constitutionality of the United States' participation. Rather than paying their taxes, the taxpayers paid the taxes into a trust fund under the terms of which the United States was entitled to the corpus if the participation were constitutional and the American Friends Service Committee was entitled to the corpus if the participation were not. The trustee then, as expected from the beginning, brought this interpleader action, joining the United States and the American Friends Service Committee as competing claimants to the trust corpus. The District Court dismissed the action with prejudice. The Court of Appeals affirmed that dismissal, holding: (1) Interpleader jurisdiction was not present because, as required by 28 U.S.C. Section 1335, the competing claimants were not parties of diverse citizenship; (2) permitting the action would be an abuse of the interpleader procedure; (3) the action was an impermissible "hybrid" method for contesting federal tax liability; (4) the trustees lack standing to request an injunction against tax collection activities against the taxpayers; and (5) injunction would in any event be improper because it is not certain that the United States could not ultimately prevail in sustaining the tax against the taxpayers.

Perhaps the broadest impact of the decision lies in its holding that such trumped-up interpleader actions are impermissible. Obviously any issue could, if such interpleader suits were permitted, be litigated in this manner. For example, one could create a trust making X a beneficiary if Joe Blow were a philanderer and Y a beneficiary if Joe Blow is not. The trustee could then interplead X and Y and have them fight out the merits of Joe Blow's extra-curricular activities. Moreover, permitting such trumped-up interpleader actions would permit forum shopping of the worst sort because of the expanded interpleader service provisions.

Staff: John A. Townsend (Tax Division)