United States Attorneys

Bulletin

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UNITED STATES DEPARTMENT OF JUSTICE

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COMMENDATIONS

Assistant United States Attorney William A. Brown, District of Massachusetts, has been commended by Curtis C. Crawford, Acting Chairman, United States Parole Commission, for the successful results he has achieved in a series of cases involving prisoner attempts to seek review of parole decisions. The court decisions have sustained the position of the Parole Commission and the Criminal Division that challenges to parole decisions may be properly brought only pursuant to 28 U.S.C. §2241 in the district in which prisoners are confined.

Assistant United States Attorney Stephen I. Goldring, Western District of Pennsylvania, has been commended by Clarence M. Kelley, Director, Federal Bureau of Investigation, for his outstanding work in the successful prosecution of a complex gambling case.

Assistant United States Attorneys Ray Carpenter and George Metcalf, Eastern District of Virginia, have been commended by Kenneth S. Giannoules, Special Agent in Charge, United States Secret Service, and William B. Cummings, United States Attorney, for their efforts in the coordination of a complex Federal and local investigation which lead to the successful prosecution of defendants for the counterfeiting of Federal Reserve Notes.

Assistant United States Attorney Stephen E. Kravit, Eastern District of Wisconsin, has been commended by Donald Kennedy, Commissioner, Food and Drug Administration, Department of Health, Education, and Welfare, for his excellent work in the successful prosecution of United States v. An Article of Food ***, etc.

POINTS TO REMEMBER

UNITED STATES ATTORNEY APPOINTMENTS

The following Presidentially-appointed United States Attorneys have entered on duty. The Executive Office staff takes this opportunity to extend its hearty welcome.

DISTRICT	UNITED STATES ATTORNEY	ENTERED ON DUTY
Vermont	William B. Gray	9/6/77
Wyoming	Charles E. Graves	9/2/77

(Executive Office)

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UNITED STATES ATTORNEYS' MANUAL--BLUESHEETS

The following "bluesheets" have been sent to press in accordance with USAM 1-1.550 since the last issue of the Bulletin.

Date	Affects USAM	Subject
8/16/77	9-27.000	Amendments to the Federal Rules of Criminal Procedure--H.R. 5864
8/30/77	1-9.000	Case Processing by Teletype with Social Security Administration
9/8/77	6-3.356	Judicial Review of Jeopardy Assessment Procedures

(Executive Office)

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JURIS

In early 1977, the Executive Office for U. S. Attorneys installed a JURIS computer terminal to assist the U. S. Attorneys' staffs that do not have a JURIS terminal in their offices. Such offices are encouraged to request computer-assisted legal research from the Executive Office terminal by calling FTS 739-5011. Insufficient use of the JURIS terminal may warrant discontinuance of this service. Requests for information will be processed as received as expeditiously as possible. We would suggest that requests be made as far in advance as possible to allow for mailing the search results.

(Executive Office)

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AGAI COURSE INSTRUCTORS

During FY 1979, the Attorney General's Advocacy Institute is expecting to double the number of sessions held annually. Therefore, an increasing number of instructors and judges will be needed. The Institute would like to receive the names of all United States Attorneys, Assistant U.S. Attorneys, legal division attorneys and federal judges who are interested in helping to insure the continued success of the Institute's Criminal Trial Advocacy Course, Civil Trial Advocacy Course, or Appellate Advocacy Course.

The civil and criminal trial courses, each lasting five days, both consist of small group workshops, lectures, discussions, demonstrations, and a full mock trial before a Federal District Court judge. They are designed to teach newly appointed AUSAs and division attorneys the rudiments of trial practice; how to prepare and examine witnesses, introduce documents into evidence, use exhibits and demonstrative evidence, make objections, and give effective opening statements and closing arguments. Instructors are asked to critique the students as they conduct portions of a civil or criminal case and occasionally give lectures on such diverse topics as opening statements, direct examination, cross examination, closing arguments, exhibits and demonstrative evidence, trial preparation, civil discovery, depositions, expert witnesses, TRO's and Injunctions, use of the grand jury, plea agreements, and selection of a jury.

The appellate course is an intensive three day program designed to teach the basics of brief writing and oral advocacy to AUSAs and division attorneys who have no appellate experience. Prior to the commencement of the course, students are asked to draft a brief and a case statement for the United States as

appellee based upon a criminal appeal specially chosen for the course. These two written assignments are submitted to the course instructors who are expected to thoroughly critique them and discuss their comments and suggestions with the students when they arrive in Washington. Instructors also critique the oral arguments of their students before a panel consisting of themselves, a federal appellate judge, and a DOJ appellate attorney or law professor.

All those who are interested in teaching at any of the above courses should send their resumes to Mr. Geoffrey L. Beauchamp, Acting Director, Attorney General's Advocacy Institute, Rm. 1335, Department of Justice, 10th & Pennsylvania Ave., N.W., Washington, D.C. 20530. In addition to your general educational background and job experience, please indicate the following:

1) How many years have you been a member of the bar and the United States Attorney's Office.

2) Nature of practice - Whether criminal trial, civil trial, or appellate cases. Please list particular types of cases in which you have developed considerable expertise.

3) Whether you have done any teaching at the law school or college level.

Since we realize that federal judges will not necessarily see this notice, it would be appreciated if you will suggest the names of any judges who you believe might be interested.

If you have any questions, please call Mr. Beauchamp at FTS 739-4104.

(Executive Office)

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UNITED STATES ATTORNEYS' MANUAL--TRANSMITTALS

The following United States Attorneys' Manual Transmittals have been issued to date in accordance with USAM 1-1.500. This monthly listing may be removed from the Bulletin and used as a check list to assure that your Manual is up to date.

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1	1	8/20/76	8/31/76	Ch. 1,2&3
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	2	3/17/77	1/11/77	Ch.10 to 12
	3	6/22/77	4/5/77	Revisions to Ch. 1 - 8

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* This Transmittal will be distributed to Manual Holders in 3-4 weeks.

(Executive Office)

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CIVIL DIVISION
Assistant Attorney General Barbara Allen Babcock

Barnes v. Costle, ____ F.2d ____ (C.A.D.C., No. 74-2026, decided July 27, 1977). DJ. 170-16-93.

Civil Rights Act - Title VII Sex Discrimination.

The D.C. Circuit, reversing the district court, has ruled that a female employee's claim that she was subjected to adverse employment consideration because she repulsed the sexual advances of a male superior, states a cause of action for sex discrimination within the meaning of Title VII of the Civil Rights Act of 1964. Although on appeal the government originally defended the district court holding of no sex discrimination, we subsequently advised the court of appeals that the Civil Service Commission--the agency primarily responsible for administering Title VII in the federal area--had reconsidered its position, and that it was now the Commission's view that the conduct complained of by plaintiff was covered by Title VII. The court of appeals noted that the Commission's current position "lends powerful support to the identical conclusion we have reached."

Attorney: Mary-Elizabeth Medaglia (Assistant U.S. Attorney D. D.C.), FTS 376-2667.

Dellums v. Powell, ____F.2d____ (C.A.D.C., Nos. 75-1974, 1975, 2117, and 76-1418, 1419, decided August 4, 1977). DJ 145-12-1620.

Official Immunity - Civil Rights Suit.

These are five consolidated appeals from a twelve million dollar jury verdict against, inter alia, the Chief of the Capitol Police. The principal claims concern violations of Fourth Amendment rights arising out of arrests made at the Capitol on the third day of the May Day demonstrations in 1971. The court of appeals held that the jury had properly found Fourth Amendment violations and rejected Chief Powell's argument that he was entitled to a directed verdict on grounds of good faith and reasonable belief that the arrests were valid. The court also held that there is a cause of action for violation of First Amendment rights. The court, however, ordered a new trial concerning damages.

Attorney: Dennis Linder (Civil Division), FTS 739-3442.

Goodman's Furniture Co. v. United States Postal Service, ____ F.2d ____ (C.A. 3, No. 76-2438, decided July 28, 1977). DJ 145-5-4138.

Garnishment.

The Third Circuit has now joined the Seventh and Eighth Circuits in holding that the "sue and be sued" clause of the Postal Reorganization Act waives the Postal Service's immunity from garnishment suits. We had argued that the Postal Service was immune from suit because it has not been "launched into the commercial world," and that to subject the agency to garnishment proceedings for possible debts of thousands of employees would impose a grave interference with the Postal Service's exclusively governmental functions.

Attorney: Richard A. Olderman (Civil Division), FTS 739-5325.

Halperin v. Department of State, ____ F.2d ____ (C.A.D.C., No. 76-1528, decided August 17, 1977). DJ 145-2-188.

Freedom of Information Act; National Security.

Morton H. Halperin requested under the FOIA that the State Department release a transcript of a "background" press briefing given by Secretary of State Kissinger following the Vladivostok SALT TWO discussions between President Ford and Gen. Sec. Brezhnev. The State Department claimed that portions of the transcript were classified and could not be made public because attribution to the Secretary of State "could damage the national security." The district court held that the requested portions were not properly classified, and ordered their disclosure. The D.C. Circuit has affirmed the holding that the transcript portions were not properly classified. The court of appeals remanded the case, however, to allow the government to show that release would damage the national security so seriously that judicial restraint outside specific FOIA exemptions should be exercised to prevent disclosure.

Attorneys: Irwin Goldbloom (Civil Division), FTS 739-3309; Frank A. Rosenfeld (Civil Division), FTS 739-5325.

Loral Corporation v. McDonnell Douglas Corp., ____ F.2d ____ (C.A. 2, Nos. 77-7311, 77-3034, decided July 29, 1977). DJ 145-14-1233.

Classified Material and Jury Trial; Federal Magistrates.

Loral Corporation, a subcontractor designing classified equipment for the Air Force, sued McDonnell Douglas, the prime contractor. The district court struck Loral's demand for a jury

trial because of the necessity for protecting much of the classified material essential to the trial. The Second Circuit denied Loral's petition for mandamus. The court, accepting the position of the United States as amicus, held that while the judge, magistrate, lawyers and supporting personnel could be cleared for access to the classified material, that a similar process was inappropriate for potential jurors. Additionally, the court determined that the district court's referral of the case to a magistrate, even without the consent of both parties, was within the expanded powers of the court under the Federal Magistrate's Act of 1968, 28 U.S.C. § 631 et seq., given the complexity of the case and the fact that classified material was involved.

Attorney: John Seibert (Civil Division), FTS 739-4267.

McCarthy v. Kleindienst, ____ F.2d ____ (C.A.D.C., No. 76-1054, decided August 10, 1977). DJ 145-12-1726.

Class Certification Proceedings; Statute of Limitations.

In this damage action arising from the arrests of "May Day," 1971, plaintiffs did not move to have the case certified as a class until more than three years after the complaint had been filed. The district court denied certification for untimeliness and nonpredominance of common questions. When, on the day following denial of certification, 266 named members of the class then sought to intervene, the district court denied the motion as untimely. The court of appeals reversed and remanded, holding that the motion to intervene was timely since the rationale of American Pipe & Construction Co. v. Utah, 414 U.S. 538 (1974), required tolling of the statute of limitations during the pendency of the class certification.

Attorney: Barbara L. Herwig (Civil Division), FTS 739-3427.

Rodriguez v. Ritchey, ____ F.2d ____ (C.A. 5, No. 75-1362, decided en banc August 3, 1977). DJ 145-12-2036.

Constitutional and Common Law Torts; Federal Officers.

The FBI, in attempting to identify a woman overheard on a wiretap of a known gambler, received erroneous information at several stages, all of which led to plaintiff's mistakenly being identified as the woman overheard. As a result, plaintiff was indicted by a grand jury and arrested pursuant to a warrant issued following the indictment. When the mistake was discovered, the indictment was dismissed. She then brought this action against the investigators involved, alleging they were negligent in conducting the investigation. The Fifth Circuit, splitting 6-2-6 on rehearing en banc, has held that the allegation is not sufficient to state a cause of action for violation of the Fourth

Amendment or federal common law. The plurality found no cause of action since the indictment had been issued by a grand jury. Two judges, specially concurring, would have found a cause of action if the agents had acted maliciously or in bad faith in seeking the indictment, but they agreed with the plurality that there was no evidence to that effect here.

Attorney: Barbara L. Herwig (Civil Division), FTS 739-3427.

Carroll v. Department of Health, Education and Welfare, ____ F.2d ____ (C.A. 6, No. 76-2158, decided August 23, 1977). DJ 145-16-836.

Federal Aid to Education; School Busing.

As part of the Louisville busing case, the Governor of Kentucky sued HEW in an attempt to secure Federal aid-to-education money to pay for court ordered desegregation busing. Three statutes prohibit the use of Federal education money for desegregation busing, 20 U.S.C. § 1228 and § 1652(a) and Pub. L. 94-94, § 315, 89 Stat. 468. The Governor asserted that these statutes were unconstitutional. The government argued that there was no case or controversy as to the validity of these statutes. Even if the statutes were invalid, no other grant statute would be available as a source of funds for busing, since Federal education money can only be spent on supplemental programs, rather than routine and mandatory school programs such as court ordered busing. The Sixth Circuit has just adopted the Secretary's position.

Attorney: Frank H. Rosenfeld (Civil Division), FTS 739-5325.

United States v. Gish, ____ F.2d ____ (C.A. 9, No. 76-3046, decided August 23, 1977). DJ 105-6-165.

Small Business Administration; Deficiency Judgments.

The Small Business Administration made a loan to defendants secured by a deed of trust containing a power of sale. Upon default, SBA exercised the power of sale but then sued to recover the additional remainder of the loan balance. Defendants resisted on the basis of a state statute that bars the recovery of a deficiency judgment after a non-judicial foreclosure. The district court ruled for defendants, relying on the Ninth Circuit's unanimous en banc decision in United States v. MacKenzie, 510 F.2d 39 (9th Cir. 1975), which held that SBA transactions were subject to state debtor protection statutes. The Ninth Circuit has just reversed, accepting our

arguments that, unlike MacKenzie, a federal statute, administrative regulations, and terms of the loan agreement all authorize recovery by SBA of a deficiency judgment. This decision will be of major assistance to the SBA in insuring the success of its vast loan programs.

Attorneys: William Kanter and Harry R. Silver (Civil Division), FTS 739-2689.

University of Texas Medical Branch v. United States, ____ F.2d ____ (C.A. 5, No. 75-2767 decided August 12, 1977). DJ 61-20285.

Rivers and Harbors Act; Limitation of Liability.

A research ship owned by the University of Texas collided with a Norwegian tanker which then collided with a dredge belonging to the Army Corps of Engineering causing the dredge to sink. The wreck posed a danger to shipping in one of the busiest waterways on the Gulf Coast. The United States spent $3,000,000 removing the wreck. The University filed a complaint seeking to limit its liability to the value of their vessel pursuant to the Limitation of Liability Act of 1851. 46 U.S.C. §§ 181-89. The United States argued that under the Rivers and Harbors Act of 1899, 33 U.S.C. § 401 et seq., the University, because of its alleged negligence, would be liable in personam for the entire expense for removal of the wreck, notwithstanding the Limitation of Liability Act. The Fifth Circuit, adopting our argument, has just ruled that the Limitation of Liability Act does not limit the in personam liability of a party whose negligence was responsible for a wreck which had to be removed.

Attorney: Emmett B. Lewis, III (Civil Division), FTS 739-3476.

Linebarger v. Federal Bureau of Investigation, ____ F.Supp. ____ (N.D. Cal., No. C-76-1826-WWS, decided August 1, 1977).

Freedom of Information Act; Exemption 7, Definition of "Law Enforcement."

The Northern District of California has just held that the term "law enforcement," for purposes of Exemption 7 of the Freedom of Information Act, 5 U.S.C. §552, applies to F.B.I. documents which do not indicate a suspected or incipient violation of law when there is a sufficient nexus between the conduct of the investigation and legitimate concern for national and internal security so as to warrant the classification of the documents as being for law enforcement

purposes. The Court acknowledged that, while the 1974 FOIA amendments were intended to overrule the holding in Weisberg v. Department of Justice, 489 F.2d. 1195 (D.C. Cir., 1973), cert. denied, 416 U.S. 993 (1974) (e.g., since the F.B.I. is an arm of the Justice Department, its investigatory activities are a fortiori conducted for law enforcement purposes), the meaning of the term "law enforcement" nevertheless remained unchanged. Page 3, slip opinion, citing Mezines, Stein & Gruff, Administrative Law, Sec. 10.08[3], p. 10-199.

The Court also held that the codes employed by the F.B.I. for identification of persons who are sources are exempt pursuant to 5 U.S.C. §552(b)(2) as being "related solely to the internal personnel. . .practices of the agency. . ." The Court declined to rule as to the extent of the application of Exemption (b)(7)(D) since other exemptions were clearly applicable to the documents.

Attorney: Robert Marsel (Special Assistant U. S. Attorney, N. D. Calif.), FTS 556-1126

CRIMINAL DIVISION
Assistant Attorney General Benjamin R. Civiletti

United States v. Louis J. Pomponio, Jr., ____ F.2d ____,
No. 76-1885 (4th Cir., July 27, 1977) D.J. 122-79-101.

Fraud

The Fourth Circuit affirmed the conviction of the defendant on two different counts of 18 U.S.C. §2314. The court concluded that Pomponio, a Northern Virginia real estate barron, counterfeited his own corporation's original stock certificates numbered 1, 2, and 3 (which represented the total shares of the corporation) by his executing a second duplicate set of certificates bearing the same numbers. Pomponio then transported these counterfeit stock certificates in interstate commerce.

In addition the Court upheld the ITSP conviction relating to a $2,000,000 cashier's check taken by fraud. The cashier's check representing part of the proceeds of a loan from a Philadelphia bank, was given to the defendant by the bank after the defendant fraudulently had obtained the endorsement of the victim, John McShain, a prominent builder in Philadelphia and Washington, D.C. areas, on the promissory note. The endorsement guaranteed the note which was given to the bank by the defendant as security for the loan. The bank would not have made the loan without the victim's endorsement as the bank did not know the defendant. The note itself, was not transported in interstate commerce. The defendant argued that since the check was not obtained from the victim but from the bank, the interstate transportation of this check could not violate the first paragraph of 18 U.S.C. §2314. The court relying upon the opinion of Judge Learned Hand in United States v. Walker, 176 F.2d 564, 566 (2d Cir. 1949) was not disposed to apply such a restrictive interpretation of 18 U.S.C. §2314. It noted that the language of the statute did not require that the security be directly taken from the person who was defrauded. The Court also considered the Congressional intent of 18 U.S.C. §2314 as stated in United States v. Sheridan, 329 U.S. 379, 384 (1946) to aid the states to punish criminals who use the channels of interstate commerce to make a successful getaway in fraudulent schemes. Furthermore, the court decided that the defendant had not consummated his fraudulent scheme until he gained possession of the cashier's check which he subsequently transported in interstate commerce, thereby avoiding the necessity to reach the issue of whether the ITSP statute covers the situation where the illegally obtained proceeds have been converted into different instruments than those originally obtained.

Attorneys: Joseph A. Fisher III and Frank W. Dunham, Jr. (E.D. Va.) FTS 557-9100
Stephen M. Weglian (Criminal Division) FTS 739-2670

G.M. Griekspoor, as Master of the M/V MAYA v. United States, _____F.Supp._____, No. 74-162-Civ-T-K, (M.D. Fla., decided March 3, 1977) D.J. 12-17M-69.

Fines, Penalties and Forfeitures

After seizure by the Customs Service, the plaintiffs were assessed a penalty of $348,000 for violation of 19 U.S.C. §1584 -- failure to manifest some 870 pounds of marijuana which was seized after being unladen from the MAYA. A petition for administrative relief from the penalty was filed pursuant to 19 U.S.C. §1618 and while Customs found no evidence to establish willful noncompliance, it nonetheless did consider petitioner negligent of performing at least perfunctory searches of his vessel and of failing to hire trustworthy guards. Accordingly, the penalty was mitigated to $69,600.

Plaintiffs paid the mitigated amount and then brought an action to recover the payment, asserting that the penalty was unconstitutionally exacted in violation of the due process clause and the Freedom of Information Act because Customs did not disclose to petitioners all of the facts in its possession, including reports of the Master's alleged active involvement in smuggling, and -- even though Customs disclaimed such reports, since they were unconfirmed -- took into consideration certain suspicions of such involvement in making their ultimate decision.

The District Court ruled that (1) the Notice of Penalty, by specifying the law violated, the time, place, and manner of the violation in sufficiently concise terms, the amount of the penalty, and the right of the aggrieved party to petition for remission or mitigation of penalty, was amply sufficient to meet the requirements of due process; (2) that Customs' exoneration of the Master, as set forth in internal memoranda, sufficiently negated plaintiffs' claim that such suspicion was carried over into the mitigation process; (3) that the Administrative Procedure Act affords no remedy by way of review of denials of petitions for remission or mitigation of such penalties; and (4) that the sole discretion to act on petitions for remission or mitigation under 19 U.S.C. 1618 lies with the executive branch of government.

Attorney: Martin H. Sachs (Criminal Division)
FTS 739-5282

Halperin v. Kissinger, _____F.Supp._____, No. 1187-73 (D.D.C., decided August 5, 1977) D.J. No. 145-1-271.

Damages, Injunctive, and Declaratory Relief

This action sought damages for a warrantless electronic surveillance conducted from May 9, 1969, to February 10, 1971. Plaintiffs are former national security council advisor Morton Halperin and his family. Defendants include Richard M. Nixon, Henry A. Kissinger, H.R. Haldeman, John Ehrlichman, General Alexander Haig, John N. Mitchell, Robert C. Mardian, Clarence M. Kelley, William Sullivan, James Stewart Magruder, and the C & P Telephone Company. The Department represents all defendants except Mr. Magruder and the C & P.

On December 16, 1976, the court found that former President Richard Nixon, his White House assistant H.R. Haldeman, and former Attorney General John N. Mitchell, had violated the Fourth Amendment rights of plaintiffs by subjecting them to the 21-month telephone surveillance. Halperin v. Kissinger, 424 F. Supp. 838 (1976). The court left open the question of monetary and equitable relief.

Plaintiffs sought monetary damages measured by the $100.00 a day standard set forth in Title III of the Omnibus Crime Control & Safe Streets Act, 18 U.S.C. §2520; compensatory damages; punitive damages; a declaratory judgment stating that the defendants violated the plaintiffs' First and Fourth Amendment rights; an injunction against the defendants from unlawfully intercepting the plaintiffs' conversations, and for disclosing the information concerning past surveillances; further injunctive relief with respect to the disposition of the records of the surveillance; and amendments to Halperin's security file.

In the memorandum and order of August 5, 1977, the district court ruled that (1) the provisions of the Organized Crime Control & Safe Streets Act, 18 U.S.C. §2520, and its attendant damage provisions, did not apply; (2) that there was no demonstrable injury, and therefore, compensatory damages were inapplicable; that the plaintiffs did not qualify for punitive damages because "[t]here was justifiably grave concern in early 1969 over the leaking of confidential foreign policy information"; (3) that an injunction enjoining the defendants from unlawfully intercepting future conversations was unnecessary as Haldeman and Mitchell are presently incarcerated, and Nixon is prohibited by the Twenty-second Amendment from

ever again regaining the office of President; (4) the court did order that Nixon, Haldeman and Mitchell were liable, jointly and severally, to each of the plaintiffs for nominal damages in the amount of one dollar; (5) that plaintiffs were granted relief with respect to the disposition of the original logs, summary letters and authorizations; (6) that all the defendants were enjoined from making any future use or disclosure of the intercepted communications; (7) and, that with the consent of the government, corrections are to be placed in Halperin's security file.

Attorneys: George W. Calhoun, D. Jeffrey Hirschberg, and Lubomyr M. Jachnycky (Criminal Division) FTS 739-2361

LAND AND NATURAL RESOURCES DIVISION
Acting Assistant Attorney General James W. Moorman

John L. Boyd and Maryellen Boyd v. United States, ___ F.2d ___ (C.A. 10, 76-1398, July 18, 1977). DJ 33-37-268-1407.

Condemnation.

In an unpublished opinion, the court of appeals ruled that the Corps of Engineers was not bound by a memorandum agreement for the exchange of property which lacked the statutorily required authorization of the Secretary of the Army. The exchange arose in connection with the acquisition of lands for the Keystone Dam Project on the Arkansas River in Oklahoma. The Corps' attorney who arranged the proposed exchange, acting without authority to bind the Government, could not, the court said, effect a loss of government property.

Attorney: Maryann Walsh (Land and Natural Resources Division) FTS 739-5053.

Colorado River Water Conservation District v. United States, ___ F.2d ___ (C.A. 10, No. 76-1383, July 18, 1977). DJ 90-1-2-1024.

Water Rights.

In affirming summary judgment for the Government, the court of appeals held that the Bureau of Reclamation is not required at this time, under the "rational basis" test, to prepare an EIS for a water carriage contract negotiated with an eastern slope water district. The court ruled that the contract, giving the water district any surplus transmission capacity of an existing federal diversion project, was simply the basis for planning a new water project and that the time for the filing of an EIS would be when that proposed project becomes definite.

Attorneys: Carl Strass and Peter R. Steenland (Land and Natural Resources Division) FTS 739-2770/2813.

Citizens Action for Safe Energy, Inc. v. United States ex rel. Nuclear Regulatory Commission, ___ F.2d ___ (C.A. 10, No. 77-1136, June 21, 1977). D.J. 90-1-4-1590.

Jurisdiction; Petition for Review.

A court of appeals lacks jurisdiction over a petition for review of order to construct two nuclear reactors near Tulsa, Oklahoma, by NRC's Atomic Safety and Licensing Board, upheld by its Atomic Safety and Licensing Appeal Board, still pending before its Licensing Board, because the orders are "interlocutory" and not "final" within the meaning of 28 U.S.C. 2342(4) and 42 U.S.C. 2239.

Attorney: Dirk D. Snel (Land and Natural Resources Division), FTS 739-2769.

Buffalo River Conservation and Recreation Council v. National Park Service, ____F.2d____ (C.A. 8, No. 76-2029, August 3, 1977). D.J. 90-1-4-540.

Injunction.

A group of landowners along the Buffalo River in Arkansas brought suit to enjoin operation of the Buffalo National River Park, a newly created component of the National Park System. At the time the lawsuit was initiated, approximately 60 percent of the land within the park boundaries had been acquired by the Government, but the remainder was in private ownership in a checkerboard pattern. According to the landowners, visitors to the park had trespassed on the intermingled private lands to such an extent that an unconstitutional taking had occurred. The district court dismissed the landowners' claims and also ruled that a public prescriptive easement had been established on this nonnavigable portion of the river so that private riparian landowners could not prevent visitors from traveling down the river. On appeal the Eighth Circuit affirmed the lower court decision, holding that no substantial constitutional question had been raised requiring a three-judge district court, that the landowners' sole remedy would be a Tucker Act suit, and that a public prescriptive easement did exist.

Attorney: Michael A. McCord (Land and Natural Resources Division) FTS 739-2774.

L'Enfant Plaza Properties, Inc. v. District of Columbia Redevelopment Land Agency, ___ F.2d ___ (C.A. D.C. Nos. 76-1715 and 76-1721, August 10, 1977). D.J. 90-1-4-972.

Modification of Urban Renewal Plan in District of Columbia Requires Consent of Purchasers and Lessees Whose Property Might Be Consequentally Affected.

The District of Columbia Redevelopment Act of 1945, 60 Stat. 790, as amended, D.C. Code sec.5-11, provides that any modification of urban renewal plans "as it may affect an area or part thereof which has been sold or leased shall not become effective thereof * * *." The court of appeals rejected our argument (accepted by the district court) that only the consent of owners or lessees whose property is directly affected by a plan change was required, because to require the consent of all purchasers and lessees whose property might be consequentially affected would render that part of the Act unconstitutional as being too vague a delegation of legislative power. The court remanded to the district court for discovery and trial concerning the RLA's early administration of that Section of the Act and the Agency's representations to purchasers.

Attorney: Anne S. Almy (Land and Natural Resources Division) FTS 739-2855.

Tayton-Tahoe Properties v. Tahoe Regional Planning Agency, ___ F.2d ___ (C.A. 9, No. 1608, August 5, 1977). D.J. 90-1-23-1959.

Tahoe Regional Planning Agency Not Agency of the United States for Purposes of Waiving Sovereign Immunity.

TRPA is an agency with zoning authority created by an interstate compact between California and Nevada. One nonvoting member to represent the United States was appointed by the President. Plaintiffs sued TRPA and its individual members, the two States, and the United States, claiming that certain zoning ordinances amounted to an "inverse condemnation" of their property. The court held that TRPA was not an agency of the United States and that there was nothing in the compact waiving sovereign immunity. Certain other aspects of the case were remanded to ascertain whether the nonfederal individual members were acting in a legislative or executive capacity.

Attorney: George R. Hyde (Land and Natural Resources Division) FTS 739-2731.

Sierra Club v. Train ___ F.2d ___ (C.A. 5, No. 75-4028, August 12, 1977). D.J. 90-5-1-217.

Federal Water Pollution Control Act; Administrator's Duty to Issue Pollution Abatement Orders Thereunder Is Discretionary.

Sierra Club filed suit under the Federal Water Pollution Control Act Amendments to compel the Administrator to institute a court action or to issue an abatement order against two privately owned coal strip-mining companies. The two companies were also named as parties. The district court found that it lacked jurisdiction as against the Administrator because prosecution of polluters is discretionary and 33 U.S.C. section 1365(a)(2) precludes suits seeking to compel performance of a discretionary duty.

Attorney: Eva R. Datz (Land and Natural Resources Division) FTS 739-2827.

Carlson v. United States, ___ F.2d ___ (C.Cls. No. 308-75, May 18, 1977). D.J. 90-1-23-2046.

Tucker Act.

Plaintiffs sued in inverse condemnation claiming that a cloud placed on their title by an Indian tribe, coupled with their inability to sue to quiet that title (28 U.S.C. 2409a(a)) worked a "taking" by the United States of their land. The Court of Claims dismissed the petition holding that an adverse claim made by an Indian tribe is not an act of a federal agency, and the Government may rely on its sovereign immunity without thereby risking liability in inverse condemnation.

Attorney: C. David Redmon (Land and Natural Resources Division) FTS 739-2713.

A. Campbell King v. United States, ___ F.Supp. ___ (D.N.C., Civ. No. B-C-74-139, August 22, 1977). D.J. 90-1-5-1450.

Quiet Title, 28 U.S.C. 2409a.

The district court, in reversing the report of a Special Master, held that the 12-year statute of limitations in 28 U.S.C. 2409a was jurisdictional, and need not be pleaded in the Government's answer. The district court also held that plaintiffs had constructive notice of the Government's claim by reason of issuance of timber logging permits

by the Forest Service to third parties to remote sections of the disputed tracts.

Attorney: Assistant United States Attorney Keith S. Snyder (W.D. N.C.) FTS 672-0652.

Environmental Defense Fund v. Andrus, ___ F.Supp. ___ (D. D.C., Civ. No. 76-2324, June 30, 1977). D.J. 90-1-18-1206.

Indispensable Parties.

Plaintiffs sued to enjoin the Secretary of the Interior from deferring bonus payments on prototype oil shale leases in Utah without complying with the Mineral Leasing Act, NEPA and the APA. The court granted the defendant's motion to dismiss on the ground that the lessees were indispensable parties and could all be joined in Utah.

Attorney: Herbert Pittle (Land and Natural Resources Division) FTS 739-2785.

Phillips Petroleum Co. v. Andrus, ___ F.Supp. ___ (D. Utah, Civ. No. C-77-165, July 1, 1977). D.J. 90-1-18-1226.

Mines and Minerals.

Phillips and others purchased prototype oil and gas leases in Utah which require very substantial annual payments, which can be credited on development. The State of Utah has selected the lands under its statehood act. Another company has sued the State of Utah claiming that it has filed oil and gas lease applications on the same lands within the State, and is entitled to a lease if it is determined the State owns the land. Prior to 1920, placer mining claims were located covering the same lands. Interior is contesting the validity of the placer claims. The court suspended the annual payments required by the prototype leases until the validity of the placer claims is determined.

Attorney: Gerald S. Fish (Land and Natural Resources Division) FTS 739-2847.

Natural Resources Defense Council v. Hodel, ___ F.Supp. ___ (D. Ore., Civ. 75-344, July 1, 1977). D.J. 90-1-4-1170.

National Environmental Policy Act.

The Bonneville Power Authority is increasing capacity to serve the three northwestern States. Phase 1 was implemented some time ago. Contracts with various power, utility and commercial companies for phase 2 were entered into December 1974. This is accomplished through a regional planning organization. The court held that, for phase 2, a programmatic NEPA statement is required. Statements on each project under the master plan were held not sufficient. Presumably, Bonneville must now prepare a statement which shows the effect of increased power development in the northwest, including the participation by some 126 utilities and many other commercial concerns.

Attorney: Assistant United States Attorney Thomas C. Lee (D. Ore.) FTS 423-2153.