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COMMENDATIONS

Assistant United States Attorney SUSAN B. BEVILL, Middle District of Alabama, has been commended by Mr. Robert M. Creswell, Resource Manager, Corps of Engineers, Department of the Army, for her successful efforts in the case of United States v. Hammonds.

Assistant United States Attorney, LOUIS DEMAS, Eastern District of California, has been commended by Ms. Carol E. Dinkins, Assistant Attorney General, Land and Natural Resources Division, for his contribution in the case of Pit River Home & Agricultural Coop. Association v. Watts. This litigation involves a long-standing and complex dispute between Pit River Agricultural Association and the Pit River Tribe over entitlement to the benefits of the so-called XL Ranch.

Assistant United States Attorney MAURICE FLYNN, District of Massachusetts, has been commended by Mr. Lawrence Sarhatt, Special Agent in Charge, Federal Bureau of Investigation in Boston, Massachusetts, for his work done in the convictions of Kenneth Guarino from Providence, R.I., and others who were charged with Interstate Transportation of Obscene Matter and Conspiracy to Transport Obscene Matter Interstate.

Assistant United States Attorney JOHN G. HAWKINS, District of Arizona, has been commended by Mr. L. O. Poindexter, Postal Inspector in Charge, United States Postal Service in Los Angeles, California, for his successful prosecution in the Dr. Michael J. Septer case dealing with mail fraud.

Assistant United States Attorneys GREGORY J. LEONARD and ELIZABETH CONLIN, Middle District of Georgia, have been commended by Major General L. F. Sullivan, Commanding Officer of The Marine Corps Logistics Base in Albany, Georgia, for their efforts in the case of Maddox v. Claytor. Maddox was only the third Title VII suit (the second concerning racial discrimination) tried on behalf of the Department of the Navy, and a first for the Middle District of Georgia.

Assistant United States Attorney HERBERT J. LEWIS, III, Northern District of Alabama, has been commended by Mr. Jeffrey Axelrad, Director of the Torts Branch, Civil Division, for his effort and performance in the defense of three noteworthy Federal Tort Claims Act cases. Each instance (Vera Gentry Kilpatrich v. United States, Nevada Key v. United States, and Donald Joe Martin v. United States), concerned FTCA claims involving alleged negligent regulatory enforcement activities of federal agencies.

Assistant United States Attorneys MARY ANNE MASON and NANCY K. NEEDLES, Northern District of Illinois, have been commended by Mr. Louis A. Cox, General Counsel, United States Postal Service in Washington, D.C., for their fine work in The Peoples Gas Light and Coke Company v. Postal Service.

Assistant United States Attorney JACK O'DONNELL, Western District of Texas, has been commended by Mr. George H. Vuilleumier, Jr., Assistant Regional Inspector for Internal Security, IRS in Dallas, Texas, for his excellent prosecution activity in the Michele Lee Carmichael case involving the violation of Title 18 U.S.C., Section 641, Embezzlement.

Assistant United States Attorneys SHIRA A. SCHEINDLIN and ROBERT STOLZ, Eastern District of New York, have been commended by Mr. William H. Webster, Director, Federal Bureau of Investigation in Washington, D.C., for their outstanding efforts in the prosecution of Anthony Tortorello and others involved in a large-scale, organized crime-controlled auto theft ring.

Assistant United States Attorney ABRAHAM Y. SKOFF, Eastern District of New York, has been commended by Mr. Joseph F. Connelly, Deputy, Defense Logistics Agency, Department of Defense, for his representation of the Defense Contract Administration Services Region- New York (DCASR-NY) in several law suits with Metadure Corporation, a government contractor whose contracts this Region administers.

Assistant United States Attorneys ROBERT W. TARUN, VINCENT J. CONNELLY, and KEITH C. SYFERT, Northern District of Illinois, have been commended by Mr. Carl E. Lawrence, Regional Chief Postal Inspector, United States Postal Service in Chicago, Illinois, for their grand jury investigation and prosecution of a mail fraud and extortion case, involving the submission of fraudulent invoices for repair work on Chicago Police Department vehicles.

Assistant United States Attorney ROBERT P. WEIDNER, District of Arizona, has been commended by Mr. L. O. Poindexter, Postal Inspector in Charge, United States Postal Service in Los Angeles, California, for his dedication and professionalism displayed in the Paul H. Broadwell case, which resulted in a guilty verdict for securities fraud and mail fraud.

Assistant United States Attorneys EDWARD G. WILLIAMS and CATHY R. SILAK, Southern District of New York, have been commended by Vice Admiral J. D. Johnson, United States Navy, for their fine work in connection with their representation of the interests of the Commanding Officer and crew of USS AYLWIN.

Special Assistant United States Attorney LYNN ZUSMAN, District of Columbia, and Assistant United States Attorneys JOHN O. BIRCH, A. CARLOS CORREA, R. CRAIG LAWRENCE, and DAVID H. SHAPIRO, District of Columbia, have been commended by Mr. Daniel J. Boorstin, The Librarian of Congress, for their efforts in the continuous litigation of the Cook and Perry v. United States cases in which Messrs. Cook and Perry have engaged the Library of Congress over the past years.

SPECIAL NOTICE TO UNITED STATES ATTORNEYS IN THE SIXTH CIRCUIT

We wish to direct your attention to United States v. W.R. Walters, 638 F. 2d 947 (6th Cir. January 20, 1981). The Sixth Circuit there held that for future cases a party's failure to file objections with the district court to a magistrate's recommended decision will constitute a waiver of the right to appeal to the court of appeals. Many government cases -- particularly Social Security benefits cases -- are now being referred to magistrates. It is essential that the government's right to appeal adverse decisions be protected. Therefore, if objections to the magistrate's recommended decision cannot be prepared and filed within the 10-day time limit, 28 U.S.C. 636(b)(1), an extension of time to file such objections should be sought. Your office may wish to develop a standard motion for such cases since the 10-day period may nearly have expired before your office learns of the magistrate's recommendation. For further information on this matter please contact Anthony J. Steinmeyer (FTS 633-3388) of the Appellate Staff, Civil Division.

CIVIL DIVISION
Acting Assistant Attorney General Thomas S. Martin

Universities Research Ass'n. v. Coutu, Sup. Ct. No. 78-1945 (April 6, 1981) D.J. # 145-19-45

DAVIS-BACON ACT; NO IMPLIED PRIVATE ACTION: SUPREME COURT HOLDS THAT THE DAVIS-BACON ACT DOES NOT CONFER A PRIVATE RIGHT OF ACTION FOR BACK WAGES UNDER A CONTRACT ADMINISTRATIVELY DETERMINED NOT TO BE SUBJECT TO THE ACT.

The Davis-Bacon Act requires that contracts for federal construction projects in excess of $2,000 contain a provision stating the minimum wages to be paid laborers and mechanics, which wages must be those determined by the Secretary of Labor to be prevailing in the locality. In this case the Department of Energy entered into a contract with Universities Research Association in connection with the construction, alteration and repair of a high energy physics research facility, which was determined by DOE not to call for Davis-Bacon work and did not contain Davis-Bacon wage stipulations. An employee who worked under the contract brought a class action seeking damages, alleging that he and other employees performed Davis-Bacon type work and were paid less than prevailing wages. The district court granted summary judgment for the Association on the ground that there were no wage stipulations to be enforced. The Seventh Circuit reversed, holding that if Coutu and his class actually performed Davis-Bacon work, they were entitled to the prevailing wages. We filed an amicus brief in the Supreme Court urging reversal on the ground that the Act afforded no private right of action in favor of the employees.

The Supreme Court has reversed in a unanimous decision by Justice Blackmun. The Court reasoned that the Act is "phrased as a directive to federal agencies" and does not authorize suits for back wages; that no contrary inference can be drawn from the legislative history; and that to imply a private right of action would destroy the careful balance the Act strikes between contractors and their employees and would introduce substantial uncertainty into government contracting.

Attorneys: Harriet Shapiro (Solicitor General's Office)
Eloise E. Davies (Civil Division)
FTS 633-3547

Page v. Bolger, C.A. 4 No. 78-1792 (April 2, 1981) D.J. # 35-79-121

TITLE VII; REQUIREMENT OF INJURY CAUSED BY DISCRIMINATION: FOURTH CIRCUIT EN BANC AFFIRMS DISMISSAL OF TITLE VII ACTION ON GROUND THAT POSTAL SERVICE SUCCESSFULLY REBUTTED PLAINTIFF'S PRIMA FACIE CASE.

The district court entered judgment for the Postal Service in this Title VII promotion discrimination case, holding that the Postal Service had rebutted plaintiff's prima facie case by showing the promotion panels had found him not to be the best qualified for the jobs. A divided panel of the Fourth Circuit reversed and entered judgment for the plaintiff. Although there was no finding that plaintiff was the most qualified applicant for the challenged promotions, the court nevertheless awarded plaintiff front and back pay on the grounds that since the Postal Service had not complied with its affirmative action guidelines (by having a woman or minority on the promotion panels), the process had been tainted.

We petitioned for rehearing en banc. The full court of appeals, by a 7-3 vote, affirmed the district court. It held that the district court had properly applied the four point test for making out a prima facie case found in McDonnell Douglas v. Green, and, in so doing, had correctly focused on whether there was discrimination in the ultimate employment decision (the failure to promote) rather than in the mediate decision (the composition of the promotion panel). In so holding, the court noted that Congress did not intend to have government affirmative action undertakings define the standards for compliance with Title VII's antidiscrimination provisions.

Attorney: Marleigh D. Dover (Civil Division)
FTS 633-3442

A.F.G.E., AFL-CIO, et al. v. Stetson, C.A. 5 No. 79-1065 (Decided March 25, 1981) D.J. # 145-14-888

FIFTH CIRCUIT RULES THAT FORMER CIVIL SERVICE EMPLOYEES LACK STANDING TO CHALLENGE WAGE-RATE DETERMINATIONS UNDERLYING A SERVICE CONTRACT.

Former custodial workers at an Air Force base in Texas, who were RIFed when the base "contracted out" the janitorial work, challenged the service contract on several grounds. The district court's judgment for the Secretary has been affirmed by the Fifth Circuit, which ruled: first, that this contract was sanctioned and properly granted under the Service Contract Act as a money-saving measure; second, that the RIF was properly conducted

so as to provide plaintiffs with the process of law due them in the circumstances; and three, that plaintiffs lack standing to challenge the Labor Department's wage-rate determinations incorporated into the contract, since plaintiffs' interests are antithetical to the civilians receiving those wages, who would be fired if plaintiffs were successful in invalidating the contract.

Attorneys: Jan Pack (Civil Division)
FTS 633-5459
Joseph Scott (Formerly of Civil Division)
Robert Greenspan (Civil Division)
FTS 633-3180

Garcia v. Califano, C.A. 10 Nos. 78-1005 and 78-1006 (Decided March 18, 1981) D.J. # 137-77-59

APPELLATE JURISDICTION; ORDERS REQUIRING AN AGENCY TO CONDUCT FURTHER HEARINGS: TENTH CIRCUIT RULES THAT REMAND TO SECRETARY OF HHS FOR ALTERATION OF STANDARD NOTICE PROCEDURES IS APPEALABLE UNDER COLLATERAL ORDER DOCTRINE.

Plaintiff, a Social Security benefits claimant, asserted that he had been denied his right to counsel in the administrative proceedings. He argued that he had not knowingly waived this right, since he had not understood the agency's standardized notices and had not realized the significance of the hearing, at which the ALJ (without discussion or explanation) asked him whether he intended to proceed without counsel. The district court concluded that the agency's notices and the ALJ's actions were inadequate; the case was remanded to the Secretary with directions for changes in the procedures. On our appeal, the Tenth Circuit has reversed, holding first that this remand order is appealable under the collateral order doctrine as most recently interpreted by the Supreme Court in Firestone Tire & Rubber Co. v. Risjord, and second, that the Secretary' procedures were more than adequate guarantees of plaintiff's right to counsel.

Attorney: Jan Pack (Civil Division)
FTS 633-5459

CIVIL RIGHTS DIVISION
Acting Assistant Attorney General James P. Turner

Liddell, et al. v. Board of Education of the City of St. Louis, No. 72-100-C(4) (W.D. Mo.) DJ 169-42-36

School Desegregation

On April 1, 1981, the district court entered an order regarding one of the defendant school districts. The Special School District of St. Louis County (SSD) had filed a new motion requesting the court to vacate an earlier finding that the SSD's creation by the State of Missouri was part and parcel of its failure to take affirmative steps to eliminate the dual school system it had mandated for the City of St. Louis. The court severely criticized the SSD for its "repetitive confrontation and resistance to the (court's) orders and rulings," noted that it was considering a range of sanctions against the SSD, and denied the district's latest motion. A hearing is set for May 11, 1981, on the future of the SSD.

In another development regarding this case, on April 3, 1981, the United States, the State of Missouri, and the St. Louis Board of Education filed a joint interim progress report on the development of a plan for voluntary interdistrict desegregation. Although the joint report only indicated agreement on general outlines, it represents the first time since last August that these three parties have agreed on anything regarding the voluntary plan. (The State is currently seeking a stay from Justice Blackmun so as not to have to continue the planning process.)

Attorneys: Thomas Keeling (Civil Rights Division)
FTS 633-4716
Craig Crenshaw (Civil Rights Division)
FTS 633-2192
Jeremiah Glassman (Civil Rights Division)
FTS 633-4739

Association Against Discrimination in Employment v. City of Bridgeport, No. 79-7650 (D. Conn.) DJ 170-14-33

Title VII of the Civil Rights Act
Revenue Sharing Act

On April 8, 1981, the Court of Appeals for the Second Circuit issued its decision in this case, an employment discrimination suit concerning hiring in the Bridgeport, Connecticut

Fire Department. The court affirmed the district court's rulings that Bridgeport had violated Title VII since March 24, 1975, and the Revenue Sharing Act since January 1, 1973. The court also upheld the basic structure of the relief ordered by the district court on liability but reduced the number of minority job offers and back pay positions because it ruled that the City's liability began in March 1972, rather than January 1971 as the district court had ruled. We participated as amicus curiae arguing that the district court's rulings on liability were correct and that its order was an appropriate exercise of its discretion.

Attorney: Steven Rosenbaum (Civil Rights Division)
FTS 633-3749

Dudley, et al v. The City of Macon and Buckholtz, et al v. The City of Macon, CA No. 76-190-MAC DJ 170-19M-30

Title VII of the Civil Rights Act
Revenue Sharing Act

On April 9, 1981, we filed a motion to intervene as plaintiffs and a proposed consent decree in these consolidated cases. Upon the stipulation of the other parties, the motion to intervene was granted. The consent decree was provisionally approved and a fairness hearing was set on it for June 9, 1981. As brought by private plaintiffs, the suits allege that the City's employment practices discriminate on the basis of race in violation of Title VII and the Revenue Sharing Act. The decree provides for interim and long-term hiring and promotion goals.

Attorney: Mark Shaffer (Civil Rights Division)
FTS 633-3861

United States v. Chicago Board of Education, CA No. 80C5124 (N.D. Ill.) DJ 169-23-31

School Desegregation

On April 16, 1981, District Court Judge Milton I. Shadur ordered the Board "to adopt a set of principles to underlie the student assignment aspect of desegregation and submit it to the Court on or before April 29, 1981." The court prefaced the order with a statement describing the form of comment it would receive, from interested third parties and the general public, after the Board files its plan. The Board, at its public meeting held on April 15, 1981, adopted the educational components of its desegregation plan but failed to take a vote on a set of principles

to guide its planners in drawing up a detailed student reassignment plan. The full plan had been required (after previous extensions) by April 15, pursuant to the consent decree entered September 24, 1980.

Attorney: Alexander Ross (Civil Rights Division)
FTS 633-2303

LAND AND NATURAL RESOURCES DIVISION
Assistant Attorney General Carol Dinkins

San Diego Gas & Electric Co. v. City of San Diego, ____ U.S. ____, No. 79-678 (S.Ct., March 25, 1981) DJ 90-1-24-26.

Jurisdiction; Dismissal for lack of final judgment; inverse condemnation.

In 1966, the utility bought a 412-acre parcel within the city limits of San Diego as a possible site for a nuclear power plant. The city rezoned 214 acres for open space. The utility filed suit in Superior Court for damages and mandamus relief, alleging that by rezoning the city had taken its property in violation of the federal and state constitutions. The Superior Court awarded damages, but dismissed a mandamus. The California Court of Appeal affirmed. The California Supreme Court, on the authority of Agins v. City of Tiburon, 24 Cal. 3d 366, 598 P.2d 25, aff'd on other grounds, 447 U.S. 255 (1980), vacated the judgment and retransferred the case to the Court of Appeal. That court then reversed the trial court's judgment, holding that the utility could not recover compensation through inverse condemnation and that, because the record represented factual disputes not covered by the trial court, mandamus and declaratory relief would be available if the utility wanted to retry the case. The California Supreme Court denied review, and the utility appealed to the U.S. Supreme Court, arguing that the Fifth and Fourteenth Amendments required compensation be paid whenever private property is taken for public use.

Justice Brennan, writing for three other justices, filed a dissent saying that there was a final state court judgment and that there was a taking any time a property owner can show that a local ordinance has resulted in the taking of property. He argued that regulatory takings are similar to other types of takings, and that each triggers the Just Compensation Clause's mandate of compensation, regardless of the government's intent in enacting the measure, if the measure is later ruled unconstitutional.

Attorneys: S.G. Staff; Richard J. Lazarus, Ann P. Gailis, E. Robert Wright, Edward J. Shawaker (Land and Natural Resources Division) FTS 633-1443/1443/2813

Montana v. United States, ____ U.S. ____, No. 79-1128 (S.Ct., March 24, 1981) DJ 90-2-11-7021.

Indians; Title to riverbed which flows through reservation passed to state upon admission, hence Tribe cannot regulate hunting and fishing by non-members.

A majority of the Court ruled that title to the bed of the Big Horn River, which flows through the Crow Tribe Reservation, passed to the state upon admission to statehood and that the Tribe may not regulate hunting and fishing by non-members on lands within the reservation no longer owned by the Tribe or its members. The majority favored the presumption that riverbed title is held in trust by the United States for future states over the familiar presumptions favoring construction of treaties, statutes, etc., in favor of Indians and concluded that nothing in the reservation treaty was sufficiently explicit to overcome the favored presumption. Tribal "inherent sovereignty" was found unavailing as to the precise issues, as unnecessary to protect tribal self-government or internal relations. The dissent was limited to the riverbed title question.

Attorneys: S.G. Staff; Steven E. Carroll and Robert L. Klarquist (Land and Natural Resources Division) FTS 633-2068/2731

NRDC v. NRC and Westinghouse Electric Co., ____ F.2d ____, No. 80-1477 (D.C. Cir., March 30, 1981) DJ 90-1-5-1450.

NRC held not required to consider environmental effects of exporting nuclear reactor to Philippines.

In a case involving the export of a nuclear reactor to the Philippines, the D.C. Circuit affirmed (2-0) the decision of the NRC not to consider possible health, safety and environmental effects within the Philippines. Judges Wilkey and Robinson wrote separate opinions, while Judge Ginsburg took no part in the disposition of the case. Both Wilkey and Robinson undertook extensive analyses of the Atomic Energy Act of 1954 (AEA) and the Nuclear Non-Proliferation Act of 1978 (NNPA). They agreed that neither the language nor legislative history of these Acts mandated consideration of health, safety, or environmental impacts of reactor exports within the recipient nations, or impacts upon United States citizens or military bases within such nations. They also agreed that NRC's consistent interpretation of the

Acts to not require such consideration should be given deference. Judge Wilkey also rested his holding on principles of non-interference with the sovereignty of foreign nations. Judge Robinson disagreed that such principles were applicable. He stated that, were he deciding the matter de novo he would require NRC to examine technical safety aspects of the proposed reactor exports, as well as "unusual circumstances" such as proximity to volcanoes or American bases. However, he felt "constrained" to uphold NRC's decision not to consider such matters because of the deference due agency interpretations of the statutes they administer.

With regard to NEPA, both judges found that an EIS on impacts within the Philippines was not required, though for different reasons. Wilkey found that Section 102(2)(F) of NEPA, which directs agencies to support international cooperative efforts "where consistent with the foreign policy of the United States," was critical. That subsection effectively "engaged" the foreign policy decision in the NNPA not to require intrusive unilateral reviews of reactor exports beyond a few specified non-proliferation criteria. Requiring an EIS would run counter to that policy and might intrude on the sovereignty of foreign nations. Judge Robinson, on the other hand, found that the situation here was "analogous" to that in the Flint Ridge case, where a clear conflict in statutory authority made preparation of an EIS impossible. Robinson focused on the difficulties NRC would have in completing an EIS within the strict time frames for export licensing set out in the NNPA. Both judges found that NEPA generally gave very little guidance on the extraterritoriality issue, and emphasized that their decisions were limited to the field of nuclear exports. The United States and the NRC filed separate briefs.

Attorneys: David C. Shilton and Peter R. Steenland, Jr. (Land and Natural Resources Division) FTS 633/2737/2748

A. Campbell King v. United States, ____ F.2d ____, No. 80-1145 (4th Cir., March 19, 1981) DJ 90-1-5-1450.

Quiet Title Act; Statute of Limitations.

The Fourth Circuit, by unpublished memorandum, affirmed the district court's determination that the Kings' action under 28 U.S.C. 2809a to quiet title to a number of tracts of forest

land in Jackson County, N.C., was barred by the Act's 12-year statute of limitations, and that the government had superior title to several tracts of mountain lands deeded to it for inclusion in a national forest.

Attorneys: A. Donald Mileur, Jacques B. Gelin and Edward J. Shawaker (Land and Natural Resources Division) FTS 633-2762/2813

The National Organization for the Reform of Marijuana Laws (NORML) v. United States Department of State, ____ F.2d ____, No. 80-1981 (D.C. Cir., March 26, 1981) DJ 90-1-4-2077.

Spraying herbicides on poppies and marijuana sustained.

In a paragraph per curiam decision, the court rejected the contention that the providing of assistance to Mexico for the spraying of opium poppies with herbicides was in violation of any law or the Constitution, even though the Mexican government, in pursuance of its own programs, also used the U.S. assistance to spray marijuana plants with paraquat, a substance allegedly causing harm to those who might ingest or smoke it.

Attorneys: Martin Green, James T. Draude and Dirk D. Snel (Land and Natural Resources Division) FTS 633-2827/3796/4400

In Re Permanent Surface Mining Regulation Litigation, ____ F.2d ____, No. 80-1308 (D.C. Cir., April 1, 1981) DJ 90-1-18-1280.

Surface Mining Control and Reclamation Act; Interior's authority to require surface mine operators to submit information sustained.

Affirming the district court and reversing the original panel decision, the court of appeals sitting en banc held that Interior's authority under the Surface Mining Control and Reclamation Act to require the submission of information from surface mine operators was not restricted to only those informational elements expressly set forth in Sections 507 and 508 of the Act. The court, however, did not reach any issues concerning the validity of any of the numerous specific reporting requirements established by the Secretary's regulations; each of

those requirements must be individually reviewed to determine whether they exceed the scope of the Secretary's authority under the Act. Four judges dissented.

Attorneys: Michael A. McCord and Peter R. Steenland, Jr. (Land and Natural Resources Division) FTS 633-2748

United States v. Mueller, ____ F.2d ____, No. 79-3063 (9th Cir., March 25, 1981) DJ 90-1-5-1685.

United States property immune from sale.

The court of appeals affirmed the district court's judgment quieting title in the United States to a house owned by H.U.D., which the City of Los Angeles had sold to pay a delinquent special assessment bond. The court held that, although other remedies may be available to the purchaser of the property or to the City to recover the money owed on the bond, the City lacked the power to sell United States government property.

Attorneys: Anne S. Almy, Carl Strass and Edward J. Shawaker (Land and Natural Resources Division) FTS 633-4427/4353/2813

National Wildlife Federation v. Appalachian Regional Commission, ____ F.2d ____, No. 79-2349 (D.C. Cir., March 9, 1981) DJ 90-1-4-1914.

National Environmental Policy Act; Programmatic EIS not required for substantially completed highway project.

National Wildlife Federation filed suit for a declaratory judgment that NEPA requires the Appalachian Regional Commission and its federal co-chairman to prepare a programmatic EIS on the Appalachian highway development project authorized by the Appalachian Regional Development Act of 1965. These highways were conceived in 1965, well before the passage of NEPA, and are now about 80 percent completed. All new highways will be constructed only after preparation of site specific EISs. The district court granted summary judgment in favor of the ARC. The court of appeals affirmed, holding that under these facts a programmatic EIS would be largely retrospective,

and its preparation would not be necessary to satisfy NEPA's "rule of reason."

Attorneys: James T. Draude and Jacques B. Gelin (Land and Natural Resources Division) FTS 633-3796/2762

United States v. 179.26 Acres in Douglas County, Kansas (Walter), ____ F.2d ____, No. 79-1576 (10th Cir., March 26, 1981) DJ 33-17-247-316.

Condemnation; Valuation of limestone deposits in ground sustained.

The United States appealed from the final judgment of the district court in this condemnation case, arguing that the method used to value in-ground limestone (in the absence of comparable sales of property) was unduly speculative. The court of appeals, essentially ignoring our argument, treated the appeal as a factual matter and affirmed.

Attorneys: Edward J. Shawaker and Jacques B. Gelin (Land and Natural Resources Division) FTS 633-2813/2762

Dorothy Cole v. United States, ____ F.2d ____, No. 80-2021 (7th Cir., March 11, 1981) DJ 90-1-5-2036.

Sovereign immunity bars suit for former landowner against the United States.

Cole appealed from the dismissal of her suit challenging the right of the United States to possess and occupy land condemned in 1966. Cole had not appealed from the original judgment and award. In 1980, however, appellant sued the United States in an Indiana state court alleging trespass. Upon motion by the United States, the case was removed to the federal district court and dismissed for lack of jurisdiction in the state court; an injunction was granted the United States, as ancillary relief to preserve the 1966 condemnation judgment. The court of appeals, in affirming, held that the suit was barred on the grounds of sovereign immunity and that ancillary relief was proper.

Attorneys: AUSA Bradley Williams (S.D. Ind.), Maria Iizuka and Anne S. Almy (Land and Natural Resources Division) FTS 633-2772/4427

Save the Bay v. U.S. Army, ____ F.2d ____, No. 79-2154 (5th Cir., February 23, 1981) DJ 90-5-1-7-499

Mootness.

The court of appeals dismissed, for lack of jurisdiction, the appeal by Save the Bay in an action challenging the adequacy of an EIS prepared by the ICC for the construction of a railroad line from Gulfport, Miss., to a DuPont facility 13 miles away. Because the rail line was complete and in operation at the time of argument, the court concluded that the issue of construction was moot.

Attorneys: Nancy B. Firestone and Dirk D. Snel (Land and Natural Resources Division) FTS 633-2757/4400

United States v. Bedford Associates, ____ F.2d ____, Nos. 80-6105 and 6107 (2nd Cir., March 31, 1981) DJ 90-1-1-2598.

Quiet Title Act held to authorize joinder of United States, as lessee, as a defendant in mortgage foreclosure action.

The district court had held that GSA had not entered into a valid contract to lease office space in a building owned by Bedford because certain essential terms were never agreed to by the parties and because GSA had used unconscionable tactics during the lease negotiations. The district court also held, in a consolidated action, that Bedford was in default on its mortgage payments to the Bowery Savings Bank and granted foreclosure to Bowery. The government appealed and the Second Circuit affirmed in part and reversed in part. The court of appeals ruled that the parties had agreed upon all essential lease terms and that a valid contract was in effect. The court further held that GSA's conduct was not so onerous as to void the lease and preclude damages, although it was sufficiently questionable to deny the government's request for specific performance. The court of appeals, however, went on to hold that the Quiet Title Act, 28 U.S.C. 2409a, authorizes a party to join the United States as a defendant in a mortgage foreclosure action when the government holds a leasehold interest and that Bowery's foreclosure operated to cut off the government's lease. Accordingly, the Second Circuit remanded the case for a determination concerning whether the government will exercise its right under the Quiet Title Act to retain possssion and, if so, to determine the rental value of

the premises. The United States Attorney has recommended that the government seek a rehearing en banc.

Attorneys: AUSA's Harvey J. Wolkoff and William J. Brennan (S.D.N.Y.) and Robert L. Klarquist and Dirk D. Snel (Land and Natural Resources Division) FTS 633-2731/4400

Andrus v. P-Burg Coal Co., Inc., ____ F.2d ____, No. 80-1916 (7th Cir., April 1, 1981) DJ 90-1-18-1472.

Surface Mining and Reclamation Act; warrantless inspections of mine sites not barred by Fourth Amendment.

This action involved a coal company's challenge to the constitutionality of a provision of the Surface Mining and Reclamation Act which permits warrantless inspections of mine sites. The company also challenged the ability of Congress to regulate a mine which sells all of its coal within the state where it is mined. On the first issue the district court upheld the warrantless search, finding that coal strip mines fell within the "pervasively-regulated industry" exception to the Fourth Amendment warrant requirement. On the second issue the district court found that wholly intrastate mining operations, considered cumulatively can have a significant impact on interstate commerce, and also that water pollution from such mines can easily cross state borders. Hence, Congress may regulate such mines under the Commerce Clause. The court of appeals agreed with both holdings, and adopted the district court's opinion as its own.

Attorneys: David C. Shilton and Dirk D. Snel (Land and Natural Resources Division) FTS 633-2737/4400

OFFICE OF LEGISLATIVE AFFAIRS
Acting Assistant Attorney General Michael W. Dolan

SELECTED CONGRESSIONAL AND LEGISLATIVE ACTIVITIES

APRIL 16, 1981 - APRIL 29, 1981

CONGRESSIONAL RECESS - Both Houses of Congress reconvened on Monday, April 27, 1981.

Debt Collection. On Monday, April 27, 1981, Kenneth Mighell, the United States Attorney for the Northern District of Texas, and Stuart E. Schiffer, Deputy Assistant Attorney General, Civil Division, testified before the House Subcommittee on Government Information and Individual Rights of the Government Operations Committee. The subject of the hearing was the government's debt collection efforts. Mr. Mighell and Mr. Schiffer discussed the Department's role in this area.

S. 823 - Tris. The Subcommittee on Separation of Powers of the Senate Committee on the Judiciary has scheduled a hearing on S. 823, a bill to provide for payment of losses incurred as a result of the use of the chemical Tris in apparel. The Department is reviewing this legislation.

Authorization-Antitrust Division. On Wednesday, April 29, 1981, the House Subcommittee on Monopolies and Commercial Law of the Judiciary Committee held a hearing concerning the section of the Department's authorization bill dealing with the Antitrust Division. Assistant Attorney General William Baxter testified.

S. 995. On April 22, 1981, William Baxter, Assistant Attorney General, and Abbott B. Lipsky, Jr., Deputy Assistant Attorney General of the Antitrust Division, testified before the Senate Judiciary Committee on S. 995, legislation which would provide for contribution among defendants in antitrust litigation.

S. 816 - Pfizer. On April 20, 1981, William Baxter, Assistant Attorney General, Antitrust Division, testified before the Senate Judiciary Committee concerning S. 816, legislation which would limit the circumstances in which foreign governments may bring suit for violations of the antitrust laws.

DOJ Authorization. Chairman Rodino's House Judiciary Subcommittee on Monopolies and Commercial Law will markup his version of the DOJ Authorization bill, H.R. 3111, on May 6. The full committee markup is set for May 12.

The full Senate Judiciary markup of the DOJ Authorization bill, S. 951, is scheduled for May 5.

Special Prosecutor Statute. The Department has been invited to testify on the special prosecutor provisions of the Ethics in Government Act of 1978 in hearings which are scheduled for May 20 before the Senate Governmental Affairs Subcommittee on Oversight of Government Management. Subcommittee Chairman William Cohen is interested in the Department's experience in operating under the terms of the Act, any recommendations for changes in the Act, and the constitutionality of the special prosecutor provisions. Senator Cohen will also invite former Attorneys General and special prosecutors to testify.

Legislative Veto. On April 23, Theodore Olson, Assistant Attorney General, Office of Legal Counsel, testified before the Senate Judiciary Subcommittee on Agency Administration. The subject of the hearing was S. 890, a Schmitt-Grassley bill containing a legislative veto device. Mr. Olson testified that, in the view of the Department of Justice, the legislative veto device is unconstitutional. This is a legal view; one strongly held by the Department. Questioning of Mr. Olson was very pointed by Senators Grassley, Schmitt and Hatch. Mr. Olson kept his remarks to the specific legislation under consideration.

Federal Effort to Combat Crime. The House Judiciary Subcommittee on Crime, chaired by William Hughes of New Jersey, is holding a series of hearings in early May on the federal effort to combat crime and assistance to states and localities. On May 5, Rudolph Giuliani, Associate Attorney General Designate, will testify for the Department, and on May 11, FBI Director, William Webster will testify.

Nominations. On April 27, 1981, the United States Senate confirmed the nomination of Rudolph W. Giuliani to be Associate Attorney General.

VOL. 29 May 8, 1981 NO. 10

Federal Rules of Evidence

Rule 801(d)(2)(E). Hearsay. Definitions. Statements Which Are Not Hearsay. Admission by Party-Opponent.

Defendant appealed his conviction of a narcotics offense, contending, inter alia, that the trial court had failed to follow the proper procedures in admitting certain coconspirators' statements into evidence under Rule 801(d)(2)(E). The trial judge had presided over the separate trials of two other members of the same alleged conspiracy, and was thus already familiar with the government's evidence of the existence of the conspiracy and of the roles played by the various members of it. The judge held that this knowledge obviated any need for a pretrial extra-jury hearing on the admissibility of the statements under United States v. James, 590 F.2d 575 (5th Cir. 1979), the leading case in the Fifth Circuit as to the standards to be applied in determining the admissibility of coconspirators' statements under Rule 801(d)(2)(E). The defendant argued that such a hearing is a constitutionally mandated procedure, essential to due process, and the judge's failure to grant defendant's motion for a hearing was thus reversible error.

The Court discussed at length the history and holding of the James case, and noted that in subsequent cases courts have come to use hearings held outside the hearing of the jury, so-called "James hearings", in applying the James rule. However, such hearings are used merely to inform the trial judge as to whether the proponent of coconspirator statements has sufficient evidence that they are statements of coconspirators with the defendant, made during the conspiracy, and made in furtherance of the conspiracy to warrant their being taken into evidence over objection. Noting that there was no contention that there was insufficient evidence to support the admission

of the statements and that the judge was already aware of the evidence without a hearing, the Court held that refusal of defendant's motion that a "James hearing" be held before trial was not per se error.

(Affirmed.)

United States v. James W. Ricks, 639 F.2d 1305 (5th Cir. March 19, 1981)