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EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS
William P. Tyson, Director

POINTS TO REMEMBER

Witness Security Program

In order for the Office of Enforcement Operations, Criminal Division, to facilitate the processing of a request for entry of an individual into the Witness Security Program, an application form has been designed to cover the information needed to support the request. This form includes a summary of the testimony to be provided by the witness and other information evidencing the witness' cooperation.

To avoid the necessity of making follow-up calls, please note the following:

In order to make certain that each application for entry of a witness into the Program is both appropriate and timely, the witness should, prior to his/her acceptance into the Program, either appear and testify before the Grand Jury or in some other manner have committed himself/herself to providing this testimony at trial (i.e. a written statement, was consensually monitored, etc.).

As you are aware, the Department is obligated to provide for the safety and welfare of the witness long after he/she has testified. The protection and possible relocation of the witness and his/her family are both expensive and complicated. It is imperative, therefore, that the entry of a witness into the Program be made only after it has been determined by the sponsoring attorney that the witness' testimony is credible, significant and certain in coming.

Witness Security Program application forms and instructions are available from the Office of Enforcement Operations, Criminal Division, P.O. Box 7600, Ben Franklin Station, Washington, D.C. 20044-7600.

(Criminal Division)

EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS
William P. Tyson, Director

POINTS TO REMEMBER

Tax Division Memorandum No. 83-30, Judgment and Collection Activities, And Tax Division Directive No. 45, Redelegation Of Compromise Authority

Tax Division Memorandum No. 83-30 sets forth procedures with respect to collection of tax judgments. After the Tax Division completes its initial collection activities, and if the judgment remains unpaid in whole or part, the Tax Division will formally refer the case to the United States Attorney for further collection efforts. Pursuant to Tax Division Directive No. 45, effective June 6, 1983, United States Attorneys are given compromise authority as to judgments formally referred to them after that date, subject to specified monetary and other limitations. The Tax Division's memorandum to the United States Attorneys is included as an appendix to this issue of the United States Attorneys' Bulletin.

(Tax Division)

Retention Of Personnel Records Relative To EEO Complaint Processing

In the past, during the course of processing Equal Employment Opportunity (EEO) complaints, Official Personnel Folders (OPF), other employee records/documents pertaining to administrative procedures, and material (housed in district offices) relevant to the complainant and other individuals implicated or referred to in active EEO cases have been inaccessible to the EEO Office staff, counselors and investigators.

To facilitate the processing of such cases, all OPFs, any records, and other documents pertaining to administrative procedures or issues relative to the complaint, complainant(s), and other individuals implicated or referred to in allegations made in active matters and/or cases lodged in the EEO Office shall be retained by the employee's district (or former district where applicable), any district otherwise implicated, and the

Personnel Office, respectively, until such time as the matter is completely processed and closed, a resolution is obtained and the matter is closed, or until the district is notified the material is no longer required.

It will be the responsibility of the EEO office to notify those offices involved of the time at which their files may be released for proper disposition.

(Executive Office)

OFFICE OF THE SOLICITOR GENERAL
Solicitor General Rex E. Lee

The Solicitor General has authorized the filing of amicus curiae briefs in support of petitioners, on or before July 21, 1983, in Firefighters Local Union No. 1784 v. Stotts, No. 82-206, and Memphis Fire Department v. Stotts, No. 82-229. The issue in both cases is whether a seniority system should be modified to protect minorities from being disproportionately laid off because they were last hired under an affirmative action program adopted to remedy past hiring discrimination.

The Solicitor General has authorized a direct appeal to the Supreme Court and the seeking of a stay pending appeal in Monsanto Co. v. Acting Administrator, Environmental Protection Agency, No. 79-366C(1) (E.D. Mo. Apr. 19, 1983). The district court in this case held that certain provisions of the Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. 136 et seq. (FIFRA), were unconstitutional under the Fifth Amendment because they caused a "taking" of Monsanto's property without just compensation. The property interest "taken" consists of technical data supporting applications for approval of new products. The court permanently enjoined EPA from using Monsanto's data in considering other companies' applications for approval of similar products and also enjoined EPA from releasing Monsanto's data, without Monsanto's permission, to members of the public.

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Assistant Attorney General J. Paul McGrath

Marsh v. Chambers, _____ U.S. _____ No. 82-23 (July 5, 1983). D.J. # 145-11-322.

FIRST AMENDMENT: SUPREME COURT HOLDS THAT NEBRASKA LEGISLATURE'S RETENTION OF CHAPLAIN TO BEGIN SESSIONS DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE.

The Nebraska Legislature begins each session with a prayer by a chaplain who is paid with state funds. A member of the Nebraska Legislature brought suit for injunctive relief under 42 U.S.C. 1983 in the Federal district court claiming that the chaplaincy practice violated the Establishment Clause of the First Amendment. The district court held that the chaplain's practice of leading prayers did not violate the Clause, but that paying the chaplain from public funds did, and enjoined the use of public funds for that purpose. The court of appeals held that the entire chaplaincy practice violated the Clause and entered judgment accordingly. The Supreme Court has just held that no part of the chaplaincy practice violates the Clause. As a matter of historical precedent, the Court stated, the sessions of Congress have always opened with prayer, ever since the First Congress, which drafted the Bill of Rights. The precedent with regard to the First Congress speaks directly to the intent of the framers of the Clause.

Attorneys: Leonard Schaitman (Civil Division)
FTS (633-3441)

Michael Jay Singer (Civil Division)
FTS (633-3159)

Adams v. Bell, _____ F.2d _____ No. 81-1715 (D.C. Cir. June 10, 1983). D.J. # 145-16-372.

TITLE VI: D.C. CIRCUIT ISSUES EN BANC OPINIONS EXPLAINING THE RATIONALE FOR ITS JUDGMENT UPHOLDING THE GOVERNMENT'S TITLE VI SETTLEMENT WITH THE NORTH CAROLINA UNIVERSITY SYSTEM.

This appeal arose from a suit originally instituted by Kenneth Adams and others more than a decade ago to challenge the method chosen by the Department of Health, Education and Welfare

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(now the Department of Education) for obtaining compliance with Title VI of the Civil Rights Act of 1964. As a result of that litigation, the Department instituted an administrative enforcement proceeding against North Carolina in 1979, and promptly became embroiled in a suit filed by the State in the North Carolina district court. In June 1981, Secretary of Education Bell announced the Government's intention to settle its Title VI dispute with the North Carolina university system by filing a consent decree with the district court in North Carolina, subject to that court's approval. The Adams plaintiffs then moved in the D.C. district court for a temporary restraining order and preliminary injunction to prevent Secretary Bell from going forward with the settlement. By order of June 25, 1981, the district court denied the Adams plaintiffs' motions, holding that it no longer retained jurisdiction over the Title VI proceedings involving North Carolina. Plaintiffs then asked the D.C. Circuit for an emergency injunction pending appeal, which the court of appeals denied on June 30. Accordingly, the Department of Education went forward with the North Carolina settlement, which the North Carolina district court approved on July 17, 1981.

More than a year later, on August 24, 1982, a divided court of appeals panel issued a decision that allowed the North Carolina settlement to remain undisturbed. On October 13, 1982, however, the full court granted the Adams plaintiffs' request for an en banc rehearing and vacated the panel's ruling. The parties filed supplemental briefs and the case was reargued on February 2, 1983. The en banc court, on May 19, 1983, announced its judgment affirming the district court. On June 10, 1983, the court filed its majority and dissenting opinions.

Judge Wilkey, writing for a six-judge majority, accepted our main argument that the relief sought by the Adams plaintiffs in this case was beyond the scope of the Adams litigation, which is limited to the informal, voluntary compliance stages of Title VI enforcement efforts. Once a formal administrative enforcement proceeding has been instituted and pursued by the Government against a particular fund recipient, as in the case of North Carolina, the matter is no longer a part of the Adams litigation. Any judicial review arising from that administrative enforcement proceeding must be the subject of a separate action.

Judge Wright, in an 84-page dissent for four members of the court, contended that the majority's holding constituted an improper judicial revision of the statutory enforcement scheme contemplated by Congress in Title VI. In the dissent's view, the district court should have ruled on the merits of the Adams

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plaintiffs' claim for further relief with respect to the propriety of the North Carolina settlement.

Attorneys: William Kanter (Civil Division)
FTS (633-1597)

Michael Jay Singer (Civil Division)
FTS (633-3159)

Otherson v. Department of Justice and INS, ___ ___ F.2d _____
No. 82-1991 (D.C. Cir. June 21, 1983). D.J. # 145-12-5253.

MSPB PERSONNEL ACTION: D.C. CIRCUIT AFFIRMS MSPB'S APPLICATION OF COLLATERAL ESTOPPEL BASED ON EMPLOYEE'S JOB RELATED CRIMINAL CONVICTION.

Jeffrey Otherson, a Border Patrol Agent with the Immigration and Naturalization Service (INS), was convicted on charges of violating and conspiring to violate the civil rights of suspected illegal aliens. After Otherson's conviction, the INS removed him from the Federal service, relying on the same misconduct established in the criminal case. Otherson appealed his removal to the Merit Systems Protection Board (MSPB), arguing that the doctrine of collateral estoppel has no place in MSPB proceedings and, alternatively, that the essential elements of collateral estoppel were not present in his case. He further argued that, assuming arguendo that the doctrine of collateral estoppel was indeed applicable to establish his misconduct, the penalty of removal was unduly harsh. The MSPB upheld Otherson's removal.

Otherson then petitioned the D.C. Circuit for review of the MSPB's decision. He raised the same arguments rejected by the MSPB. We countered by relying on a Third Circuit decision, Chisholm v. Defense Logistics Agency, 656 F.2d 42 (3d Cir. 1981), which held the doctrine of collateral estoppel applicable to MSPB proceedings, and by arguing that the identical question of Otherson's misconduct was "actually litigated" and "necessarily determined" in his criminal case. Finally, we noted that the penalty imposed by the agency could only be overturned if "clearly excessive," and that removal was not clearly excessive in view of Otherson's crimes.

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The D.C. Circuit has now endorsed our position wholeheartedly, holding that the MSPB is indeed entitled to apply the doctrine of collateral estoppel in its proceedings, and that the Board properly did so in this case. The court also rejected as "patently frivolous" Otherson's claim that removal was an inappropriate penalty for his misconduct.

Attorneys: Robert S. Greenspan (Civil Division)
FTS (633-5428)

John S. Koppel (Civil Division)
FTS (633-5684)

Miller v. United States, _____ F.2d _____ No. 79-1605 (10th Cir. June 17, 1983). D.J. # 157-13-407.

FEDERAL TORT CLAIMS ACT: TENTH CIRCUIT HOLDS DISCRETIONARY FUNCTION EXCEPTION TO FEDERAL TORT CLAIMS ACT BARS SUIT FOR DAMAGES FOR INJURIES FROM AN ACCIDENT ON A STATE HIGHWAY THAT RECEIVES FEDERAL FUNDING AND THAT NO PRIVATE CAUSE OF ACTION CAN BE MAINTAINED UNDER THE FEDERAL HIGHWAY SAFETY ACT.

Plaintiffs sued the United States and the Department of Transportation under the FTCA and the Federal Highway Safety Act for personal injuries resulting from an automobile accident on U.S. 6 in Garfield County, Colorado. The highway was constructed with Federal grant-in-aid funds by the State of Colorado with plans approved by the United States.

The court of appeals has just affirmed the district court's dismissal of this suit, holding that the Federal responsibilities with regard to the highways involve policy and competing considerations to such an extent that they are within the discretionary function exception to the FTCA. In addition, the alleged negligence that the Federal Government failed to require a warning of a known dangerous condition also falls within the discretionary function exception in that it goes to the essence of the Secretary's judgment in fashioning a highway in the "best overall public interest" out of the welter of public policy considerations Congress has designated. The court of appeals also held that the district court did not abuse its discretion by denying plaintiffs' right to conduct discovery prior to ruling on the Government's motion for dismissal. The court was "convinced that there are no facts which plaintiffs could arguably develop

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to escape the effect of the statutes and regulations" which fall within the discretionary function exception. Finally, following the factors enumerated in Cort v. Ash, 422 U.S. 66 (1975), the court concluded that no private cause of action could be maintained by the plaintiffs under the Federal Highway Safety Act.

Attorneys: Leonard Schaitman (Civil Division)
FTS (633-3441)

Sandra Wien Simon (Civil Division)
FTS (633-3688)

Treadwell v. Alexander, _____ F.2d _____ No. 81-8019(11th Cir. June 16, 1983). D.J. # 35-20-22.

REHABILITATION ACT: ELEVENTH CIRCUIT HOLDS THAT "OTHERWISE QUALIFIED" HANDICAPPED PERSON WITHIN MEANING OF REHABILITION ACT MEANS ONE WHO CAN PERFORM JOB DESPITE, NOT WITHIN LIMITS OF, THE HANDICAP.

Plaintiff Roger Treadwell is a retired Air Force colonel rated 100% disabled due to a nervous condition and a heart condition. Treadwell brought suit against the Army Corps of Engineers under the Rehabilitation Act of 1973, 29 U.S.C. 791 et seq. (the Act), for failure to hire him as a seasonal park technician. The park technician's job is an arduous patrol of 150,000 acres of rough terrain, and involves a number of strenuous outdoor activities. The district court entered judgment for the Government and the Eleventh Circuit has just affirmed. The court of appeals reasoned that the Act requires that once a plaintiff shows that an employer denied him employment because of physical condition (a fact undisputed here), the burden of persuasion shifts to the Federal employer to show that the criteria used are job related and that plaintiff could not safely and efficiently perform the essentials of the job. The court found that there was sufficient evidence to show that the criteria were job related and that Treadwell could not do the work. In addition, the Eleventh Circuit reaffirmed the teaching of Southeastern Community College v. Davis, 422 U.S. 397 (1979), by stating that the Act's prohibition of employment discrimination against an "otherwise qualified handicapped individual" does not mean, as Treadwell contended, an individual who is "capable of performing the job except for the limitations imposed by the hand-

icap," but rather "one who is able to meet all of a program's requirements in spite of his handicap." 442 U.S. at 406 (emphasis added).

Attorneys: Marc Richman (Civil Division)
FTS (633-5735)

Russell Caplan (Civil Division)
FTS (633-4815)

LAND AND NATURAL RESOURCES DIVISION
Acting Assistant Attorney General F. Henry Habicht, II

Baltimore Gas & Electric Co. v. NRC, Nos. 82-524, 82-545, 82-551 (S.Ct. June 6, 1983), D.J. # 90-1-4-956.

NRC NOT REQUIRED TO CONSIDER DISPOSAL OF NUCLEAR WASTE WHEN IT LICENSES NUCLEAR PLANT.

The NRC adopted a series of generic rules to evaluate the environmental effects of the uranium fuel cycle supporting nuclear power plants. As part of the rules, NRC decided that licensing boards should assume, for purposes of NEPA, that the permanent storage of nuclear wastes would have no significant environmental impact (the zero-release assumption) and should not affect the decision to license individual plants. The Court of Appeals for the District of Columbia Circuit held that the rules violated NEPA because NRC had not factored the consideration of uncertanties surrounding the zero-release assumption into the licensing process so that the uncertainties could affect the outcome of particular decisions to license plants.

The Supreme Court unanimously reversed. The Court agreed "as a general proposition" with the court of appeals' statement that under NEPA, agencies must allow all significant environmental risks to be factored into the decision whether to undertake an action. The Court found, however, that NRC had met this standard. The Court held that NRC's generic approach was an appropriate method of complying with NEPA. It further held that NRC did not act arbitrarily and capriciously in deciding generically that the uncertainty surrounding the zero-release assumption was insufficient to affect any individual licensing decision. Important in this regard were the facts that the zero-release assumption: (1) was made solely for the "limited purpose" of providing a representative release value to be included in EIS's on individual powerplants; (2) was only one part of a larger table of release values which contained compensating conservative assumption; and (3) was within the area of NRC's expertise and "at the frontiers of science."

The court of appeals had vacated two early versions of the fuel cycle rule on grounds that they precluded consideration of health and other effects of the release values listed in the rule. The Supreme Court reversed, finding that such consideration was not clearly precluded by the rules. While there may have been some ambiguity over the scope of preclusion, the Court said, it would be inappropriate to cast doubt on

licensing proceedings where there was no evidence that this ambiguity prevented any party from making a presentation on health effects.

Attorney: David C. Shilton (Land and Natural Resources Division) FTS (633-5580)

Attorney: Jacques B. Gelin (Land and Natural Resources Division) FTS (633-2762)

Watt v. Western Nuclear, Inc., No. 81-1686 (S.Ct. June 6, 1983), D.J. # 90-1-5-1863.

STOCK-RAISING HOMESTEAD ACT'S MINERAL RESERVATION INCLUDES SAND AND GRAVEL.

The Stock-Raising Homestead Act of 1916 ("SRHA"), 39 Stat. 802, 43 U.S.C. 291 et seq., repealed, Section 702, Federal Land Policy and Management Act of 1976, 90 Stat. 2743, 2789, authorized the Secretary of the Interior to classify public lands as chiefly suitable for stockraising purposes and issue patents to entrymen who met the qualifications of the Act. Section 9 of the SRHA, however, stated, that all patents issued under the Act "shall be subject to and contain a reservation to the United States of all the coal and other minerals in the lands so entered and patented, together with the right to prospect for, mine, and remove the same."

Western Nuclear purchased the outstanding interest in certain lands patented under the SRHA and opened a gravel pit to provide a source of gravel for various uses in connection with its nearby uranium mining venture. BLM cited Western Nuclear for trespass and Western Nuclear, in turn, contended that the mineral reservations of Section 9 did not include gravel. The IBLA and the district court upheld BLM, but the Tenth Circuit ruled that gravel was not a "mineral" within the meaning of Section 9.

The Supreme Court reversed in a 5-4 decision. The Court, after reviewing the purposes and legislative history of the SRHA, concluded that there was no reason to suppose that Congress, in enacting the SRHA, intended that gravel should be treated any differently from other "minerals" which are extracted from the subsurface estate. The four dissenters contended, however, that gravel should not be considered a "mineral" for Section 9 purposes because Interior did not

consider it to be a "mineral" within the meaning of the general mining laws at the time that the SRHA was enacted.

Attorney: Robert L. Klarquist (Land and Natural Resources Division) FTS (633-2731)

Attorney: Edward J. Shawaker (Land and Natural Resources Division) FTS (724-5993)

United States v. 329.73 Acres, Greneda and Yalobusha Counties, Mississippi (Benoist), No. 80-3520 (5th Cir. en banc, May 12, 1983). D.J. # 33-25-143-500.

EQUAL ACCESS TO JUSTICE APPLIES TO CONDEMNATION PROCEEDINGS.

The Fifth Circuit, sitting en banc, held that the Equal Access to Justice Act ("EAJA") was applicable to condemnation proceedings, reversing the decision of a panel. The court rejected the Government's argument that the award of attorneys' fees in condemnation proceedings was already covered under 42 U.S.C. 4654 and that EAJA was not intended to replace statutes already providing for fees. Second, the court also rejected the Government's argument that, in condemnation proceedings, the Government was always "the prevailing party."

In finding EAJA applicable, the court noting the testimony of Department of Justice representatives before Congress, stated: "The Government, having lost its case before Congress, attempts now to have the courts undo the rejection by Congress of the Government's claim that it should not be subjected in eminent domain cases to payment of the landowner's attorneys' fees and litigation expenses occasioned because of the Government's unreasonableness in litigation."

In holding EAJA available to landowners in condemnation actions, the Fifth Circuit held that "[t]he Act simply extends authorization for fee awards to cases where the Government has ultimately acquired the property, but the landowners succeeded in winning greater compensation than that offered or urged by the Government." (Emphasis added.) Continuing along these lines, the court concluded that a "prevailing party" in condemnation would clearly include a landowner who had finally obtained more than originally offered by the Government.

Surprisingly, the en banc court also addressed the issue of the statutory six percent interest on deficiencies, although this issue raised by the landowner had been previously briefed and argued before a panel which had declined to award him more than six percent. The court held that six percent under 42 U.S.C. 258a, set a floor rather than a ceiling for determining interest. The court remanded the case to permit the district court to determine interest and to determine whether "the Government's appeal was substantially justified."

Dissenting strongly, the two circuit judges of the original panel plus one additional judge, noted that the Fifth Circuit would allow attorneys' fees incurred on appeal "if the appeal is determined not to be 'substantially justified' even though the appeal is not frivolous * * *." Judge Rubin, writing for the dissent, focused on the fact that the en banc decision would permit a landowner to receive attorneys' fees under EAJA if the just compensation finally awarded was "anything more than the Government deposits * * *." Second, Judge Rubin, in discussing the fact that the Government in acquiring the property, has "prevailed" in the district court, noted that EAJA

> contains no intimation that a litigant who does not prevail in the final judgment has a claim for attorneys' fees based solely on defending against an appeal that sought an even more favorable result for the party who had already succeeded in the trial court and who would still be the prevailing party in the final judgment.

The dissent also objected to the majority's holding that a landowner can recover if he receives more than originally offered. This, the dissent argues, ignores the entire background of condemnation and could, reduced to the absurd, result in a dollar difference determining whether the Government or the landowner was the prevailing party.

Attention: Maria A. Iizuka (Land and Natural Resources Division)
FTS (633-2753)

Attention: Jacques B. Gelin (Land and Natural Resources Division)
FTS (633-2762)

United States v. 57.09 Acres, Skamania County, Washington (Peterson), No. 81-3533 (9th Cir. May 16, 1983). D.J. # 33-49-93-110.

CONDEMNATION: LANDOWNER DEEMED OWNER FOR PURPOSES OF SEVERANCE DAMAGES UNTIL GOVERNMENT FILES DECLARATION OF TAKING.

The United States condemned land over which the appellant had an easement. By stipulated agreement, the landowner received compensation as did the easement holder, Peterson. Peterson, however, asserted that he was entitled to severance damages since he had built a road connecting the easement with a state highway. The United States argued that he was not entitled to claim damages since there was no unity of title on the date the United States filed its complaint in condemnation and the court issued an order of possession. The Ninth Circuit, in reversing, held that the date of filing the D.T., 17 months later, was the significant date and at that time, there was unity of title.

Attorney: Maria A. Iizuka (Land and Natural Resources Division) FTS (633-2753)

Attorney: Dirk D. Snel (Land and Natural Resources Division) FTS (633-4400)

United States v. Mary Dann and Carrie Dann, Nos. 80-4298 and 80-4345 (9th Cir. May 19, 1983). D.J. # 90-2-20-977.

INDIANS: PRIOR TO DISTRIBUTION, INDIAN CLAIMS COMMISSION JUDGMENT NO BAR TO FUTURE LITIGATION.

The United States commenced this action in 1974 by alleging that the Danns were grazing livestock on certain Federal lands in Nevada without having obtained a grazing permit as required by the Taylor Grazing Act, 43 U.S.C. 315 et seq. The Danns admitted grazing stock without a permit, but asserted that such action was legal because the Danns are Western Shoshone Indians and that the Western Shoshone still retain aboriginal title to those lands. After various proceedings, the district court held that aboriginal title to the land had been extinguished on December 6, 1979, the date on which the Clerk of the Court of Claims had certified the final award in Western Shoshone Identifiable Group v. United States, Indian

Claims Commission Docket No. 326-K, to the General Accounting Office for payment. In that action, the Western Shoshone prevailed on their claim that the United States had extinguished aboriginal title to tribal lands in Nevada (including the lands at issue in Dann) and were awarded $26 million by the Court of Claims. In addition, the district court in Dann rejected the Government's arguments that aboriginal title had been earlier extinguished by Government actions inconsistent with continued aboriginal title.

The court of appeals reversed. The court found that, under Section 22 of the Indian Claims Commission Act, 25 U.S.C. 70u(a), a judgment does not become a bar to future litigation until the award is paid. The court further ruled that "payment" for the purposes of Section 22 does not occur when the Court of Claims' judgment becomes final and the award placed in a trust account in the Treasury, but only subsequently when Congress approves a distribution plan for the award. As no distribution plan regarding the Western Shoshone judgment fund has yet been approved, the Indian Claims Commission proceeding does not yet act as a bar to further litigation.

In addition, the court of appeals rejected the Government's arguments that the acts of opening the lands for settlement under the land laws, establishing the Duck Valley Reservation, for the Western Shoshone and including the contested lands within a Tayor Grazing Act grazing district were sufficient, when taken cumulatively, to work an extinguishment of aboriginal title.

Attorney: Robert L. Klarquist (Land and Natural Resources Division) FTS (633-2731)

Attorney: Jacques B. Gelin (Land and Natural Resources Division) FTS (633-2762)

Louisiana Environmental Society v. Dole, Nos. 81-3784 and 82-3042 (5th Cir. May 26, 1983). D.J. # 90-1-4-392.

FEDERAL HIGHWAY ADMINISTRATOR'S SECTION 4(C) DETERMINATION REGARDING BRIDGE THAT CROSSES A RECREATIONAL LAKE SUSTAINED.

This is the third decision of the Fifth Circuit in this litigation, in which plaintiffs have attempted to prevent the

construction of a highway bridge across Cross Lake, a recreational lake in Shreveport, La. The district court, in this latest round, held that the administrative record did not support the determination of the Federal Highway Administration pursuant to Section 4(f) of the Department of Transportation Act that the proposed route minimized harm to the lake more than plaintiffs' favored alignment. The court held that, contrary to our assertions, the administrative record did not disclose that, in calculating the linear feet of shoreline negatively affected by the various alternate routes considered, the limitation of access to the lakeshore resulting from plaintiffs' line was taken into account. Accordingly, the court enjoined the project and remanded the 4(f) determination to the Administrator. The district court also struck numerous allegations raised in plaintffs' amended complaint, on the ground that these claims were outside the scope of the Fifth Circuit's remand in LES II.

The parties cross-appealed. The court of appeals held that the administrative record, read as a whole, disclosed that the limitation of access factor was considered, and that therefore the Administrator's 4(f) determination was valid and the project should not be enjoined. The Fifth Circuit also held that the trial court did not abuse its discretion in striking the claims from the complaint.

Attorney: Thomas H. Pacheco (Land and Natural Resources Division) FTS (633-2767)

Attorney: Dirk D. Snel (Land and Natural Resources Division) FTS (633-4400)

Federal Rules of Criminal Procedure

Rule 35(b). Reduction of Sentence.

Defendant entered into a plea agreement in which the Government agreed not to recommend for or against an executed sentence. After defendant was sentenced to four years in prison and a $5000 fine, he moved for a reduction in sentence pursuant to Rule 35(b). The Government opposed the motion, claiming defendant had shown no mitigating or changed circumstances sufficient to justify a reduced sentence. The court denied the motion and defendant appealed on the ground that the Government had broken the terms of the plea agreement by opposing the motion.

The court of appeals refused to find it implicit in the plea agreement that the parties expected the Government not to oppose a Motion for Reduction of Sentence. The court held that it would not stretch the language of a plea agreement, which is plain on its face, in order to interpret Government opposition to a Rule 35 motion as a recommendation by the Government for the sentence imposed by the judge.

(Affirmed.)

United States v. Frederick Leslie Brooks, No. - 81-C-483 (7th Cir. June 1, 1983).

DEPARTMENT OF JUSTICE

TAX DIVISION

MEMORANDUM NO. 83-30

June 2, 1983

Judgment and Collection Activities

The following procedures with respect to collection of judgments in favor of the United States and amounts due the United States pursuant to compromise will be effective as of May 31, 1983.

I. Collection of Judgments.

The paralegals in the Judgment and Collection Unit will work with the trial attorneys to effect collection of judgments.

A. Initial Collection Efforts.

For approximately a 6-month period after a judgment has been entered, a paralegal will assist the trial attorney in following the collection steps outlined in the Manual for Collection of Tax Judgments.

(1) A demand for payment of a judgment shall be made both by telephone and letter 10 days after judgment has been entered.

(2) If payment is not received within the 21-day period specified in the first demand letter, a second demand letter shall be sent 30 days after the date of the first letter, demanding payment and requesting that taxpayer complete a financial statement on Form 433 within 21 days if he/she is unable to pay the judgment in full.

(3) If the trial attorney has not previously obtained income tax returns (or copies of returns) of the taxpayer, beginning with the year to which the liability relates and going forward to the present, a written request to the Internal Revenue Service for such returns shall be made at the time the second demand letter is sent in cases involving counterclaims and third-party claims, and other cases as appropriate.

(4) If the taxpayer does not respond to the second demand letter, and the period for administrative collection has not expired, the Internal Revenue Service shall be directed to commence collection efforts.

(5) If a financial statement is received, it shall be promptly evaluated and collection undertaken as to indicated assets, including judicial action if appropriate; in most cases if the statement shows no assets or insufficient assets, the Internal Revenue Service shall be requested to verify the statement.

(6) Informal or formal discovery shall also be conducted, as appropriate.

(7) Registration (or recording, docketing, or indexing) of the judgment shall be effected in the district in which judgment is rendered whenever such action is necessary for a judgment lien to attach, under 28 U.S.C., §1962. Registration of a judgment under 28 U.S.C., §1963, shall be effected whenever taxpayer has substantial property in districts other than the district in which the judgment was rendered. Registration of a judgment entered in the Claims Court shall be effected in the appropriate district in accordance with 28 U.S.C., §2508.

(8) If 5 years or more have expired since the assessment of the tax, the Service shall be asked to refile notice of tax lien in accordance with Section 6323(g).

B. Timetable for Action.

The paralegals will begin working with those judgments entered after September 30, 1982, although it is recognized that in many (if not most) cases the trial attorney will already have initiated collection activity.

After the J.C.U. paralegals will have completed their work on judgments entered October 1, 1982 - May 2, 1983, and judgments currently being rendered, they will turn their attention to the older judgments pending in the Civil Trial Sections and Claims Court Section. The J.C.U. paralegals will review the judgments entered prior to October 1, 1982, presently pending in those Sections, and will assist the trial attorneys for approximately a 6-month period to follow the collection steps outlined in the Manual for Collection of Tax Judgments.

II. Closing of Cases.

A. Judgments Entered after September 30, 1982.

After the initial collection activity has been completed or, if later, when all pending litigation in the case has been terminated, the trial attorney, assisted by the J.C.U. paralegal, and subject to the approval of the Chief of the Section, shall take the following steps:

(1) The Special Procedures function of the District Director's office shall be advised that the Tax Division is closing its file on the case, and asked to:

(a) Conduct investigations to determine if a source exists for satisfying the judgment;

(b) Levy on assets that are located, in those cases where the period for administrative collection has not expired;

(c) Request the United States Attorney to effect collection on located assets by procedures in aid of execution;

(d) Advise the Tax Division if litigation is necessary to effect collection of the judgment;

(e) Send the United States Attorney annually a copy of the Investigation Report of Judgment Debtor (Form 3347);

(f) Refile the notice of tax lien, as appropriate;

(g) Request the United States Attorney to extend the judgment lien, where appropriate; and

(h) Advise the Tax Division if there are any problems as to which we might help, including any differences of view that might arise with the United States Attorney's office.

A form of letter to the Special Procedures function is attached as Exhibit A. A list of mailing addresses for Special Procedures' offices is attached as Exhibit B.

(2) The United States Attorney shall be advised that:

(a) The Tax Division is closing its file on the case and the case is being formally referred to them for further collection efforts;

(b) The Internal Revenue Service has been asked to advise the United States Attorney of the existence of potential assets for collection by procedures in aid of execution and to send them annually a copy of the Investigation Report of Judgment Debtor (Form 3347), if one is prepared;

(c) The Internal Revenue Service has been asked to advise the Tax Division if litigation is necessary to effect collection of the judgment, and we may elect to conduct the litigation.

(d) The United States Attorney should advise the Tax Division if there are any problems as to which we might help, including any differences of view that might arise between that office and the Internal Revenue Service.

A form of letter to the United States Attorney is attached as Exhibit C.

B. Judgments Entered prior to October 1, 1982.

After the initial collection activity has been completed or, if later, when all pending litigation in the case has been terminated, the Chief of the Civil Trial Section or Claims Court Section shall determine if a judgment pending in the Civil Trial or Claims Court Section has future collection potential. The Office of Review shall determine if a judgment pending in J.C.U. has future collection potential.

(1) Judgments Having Collection Potential.

(a) If a judgment pending in a Civil Trial Section or the Claims Court Section has future collection potential, the Special Procedures function and the United States Attorney shall be advised as set forth in paragraphs II A(1) and (2).

(b) If a judgment pending in J.C.U. has future collection potential, except in situations described in (c) the prior reference of the case to the United States Attorney shall be confirmed, or, if the case had not previously been referred to the United States Attorney, it shall be so referred as set forth in paragraph II A(2). A form of letter confirming prior referral of a case to the United States Attorney is attached as Exhibit D. The Special Procedures function shall be advised as set forth in Paragraph II A(1).

(c) In those cases where differences of view may have arisen between J.C.U. and the United States Attorney's office concerning the handling of the case, or where for policy or other reasons more extensive Tax Division involvement is necessary, J.C.U. shall refer the case back to the Civil Trial Section, and the United States Attorney shall be so advised.

(2) Judgments Without Collection Potential.

If a judgment does not have future collection potential, the Special Procedures function shall be advised as set forth in Paragraph II A(1). The United States Attorney shall be advised that the judgment appears uncollectible at this time, that office may close the case or place the case in an inactive status, and the Internal Revenue Service will contact them directly if any assets are discovered which can be collected by procedures in aid of execution. See Exhibits C and D.

III. Payments Due Government Pursuant to Compromise.

A. Cases Handled by the United States Attorney's Office.

All payments should be made to the United States Attorney if that office handled the case.

B. Cases Handled by Tax Division Attorneys.

(1) Lump Sum Payments.

All lump sum payments should be sent to the Tax Division.

(2) Installment Payments Due within 6-Months of Acceptance of the Offer.

The Tax Division will retain the function of receiving installment payments under compromises (pre- or post-judgment) of cases handled by Tax Division Attorneys when all payments are due within six months of acceptance of the offer.

(3) Installment Payments Due Beyond 6-Months of Acceptance of the Offer.

Payments under deferred payment arrangements extending over more than six months should be sent by taxpayer directly to the Service Center Collection Branch. If the settlement provides for a lump sum payment and deferred payments extending over more than six months, the lump sum payment should be sent to the Tax Division and the deferred payments to the Service Center.

(4) Payments Due under Future Income Collateral Agreements.

All payments under future income collateral agreements should be sent by taxpayer directly to the Service Center Collection Branch.

C. Notification of J.C.U.

In accordance with existing practice, when an offer is accepted which provides for payment to the United States, one copy each of the acceptance letter and the compromise memorandum shall be sent to J.C.U.

D. Revised Acceptance Letters.

(1) Forms of acceptance letters for a refund suit involving settlement of a counterclaim or third-party claim are attached as Exhibit E.

(2) Forms of acceptance letters for a collection suit are attached as Exhibit F.

(3) A list of Service Center addresses and FTS numbers is attached as Exhibit G.

This memorandum supersedes Tax Division Memorandum No. 76-91, dated September 21, 1976.

GLENN L. ARCHER, JR.
Assistant Attorney General
Tax Division

Title 28 - Judicial Administration

Chapter I - Department of Justice

[Tax Division Directive No. 45]

PART 0 - ORGANIZATION OF THE DEPARTMENT OF JUSTICE

Appendix to Subpart Y - Redelegation of Authority to Compromise and Close Civil Claims

Redelegation of Authority to Compromise and Close Civil Claims

AGENCY: Tax Division, Department of Justice.

ACTION: Final Rule.

SUMMARY: This directive supersedes Tax Division Directive No. 43. The directive gives the United States Attorneys authority to compromise and close judgments referred to them, which do not exceed $50,000, and to reject offers in compromise of judgments referred to them, regardless of amount.

EFFECTIVE DATE: This directive shall become effective on the date of its publication in the Federal Register.

FOR FURTHER INFORMATION CONTACT: Mildred L. Seidman, Tax Division, Department of Justice, Washington, D.C. 20530, 202-724-6567.

SUPPLEMENTARY INFORMATION: The Assistant Attorney General for the Tax Division has determined that this directive is not a rule within the meaning of Executive Order 12291 or the Regulatory Flexibility Act.

In appendix to Subpart Y - Redelegation of Authority to Compromise and Close Civil Claims, Tax Division Directive No. 43 is deleted and Directive No. 45 is added as follows:

By virtue of the authority vested in me by Part 0 of Title 28 of the Code of Federal Regulations, particularly §§0.70, 0.160, 0.162, 0.164, 0.166, and 0.168, it is ordered as follows:

Section 1. The Chiefs of the Civil Trial Sections, the Claims Court Section, and the Appellate Section are authorized to reject offers in compromise, regardless of amount, provided that such action is not opposed by the agency or agencies involved.

Section 2. Subject to the conditions and limitations set forth in Section 7 hereof, the Chiefs of the Civil Trial Sections and Claims Court Section are authorized to:

(A) Accept offers in compromise in all civil cases in which the amount of the Government's concession, exclusive of statutory interest, does not exceed $200,000,

(B) Approve administrative settlements not exceeding $100,000,

(C) Approve concessions (other than by compromise) of civil claims asserted by the Government in all cases in which the gross amount of the original claim does not exceed $100,000,

(D) Accept offers in compromise in injunction or declaratory judgment suits against the United States in which the amount of the related liability, if any, does not exceed $200,000, and

(E) Accept offers in compromise in all other nonmonetary cases,

provided that such action is not opposed by the agency or agencies involved, and provided further that the case is not subject to reference to the Joint Committee on Taxation.

Section 3. Subject to the conditions and limitations set forth in Section 7 hereof, the Chief of the Appellate Section is authorized to:

(A) Accept offers in compromise with reference to litigating hazards of the issues on appeal in all civil cases in which the amount of the Government's concession, exclusive of statutory interest, does not exceed $200,000,

(B) Accept offers in compromise in declaratory judgment suits against the United States in which the amount of the related liability, if any, does not exceed $200,000, and

(C) Accept offers in compromise in all other nonmonetary cases which do not involve issues concerning collectibility,

provided that such action is not opposed by the agency or agencies involved or the chief of the section in which the case originated, and provided further that the case is not subject to reference to the Joint Committee on Taxation.

Section 4. Subject to the conditions and limitations set forth in Section 7 hereof, the Chief of the Office of Review shall have authority to:

(A) Accept offers in compromise in all civil cases in which the amount of the Government's concession, exclusive of statutory interest, does not exceed $500,000,

(B) Approve administrative settlements not exceeding $500,000,

(C) Approve concessions (other than by compromise) of civil claims asserted by the Government in all cases in which the gross amount of the original claim does not exceed $500,000,

(D) Accept offers in compromise in all nonmonetary cases, and

(E) Reject offers in compromise, or disapprove administrative settlements or concessions, regardless of amount,

provided that the action is not opposed by the agency or agencies involved or the chief of the section to which the case is assigned, and provided further that the case is not subject to reference to the Joint Committee on Taxation.

Section 5. Subject to the conditions and limitations set forth in Section 7 hereof, the Deputy Assistant Attorneys General and the Special Counsel to the Assistant Attorney General each shall have authority to:

(A) Accept offers in compromise of claims against the Government in all cases in which the amount of the Government's concession, exclusive of statutory interest, does not exceed $750,000,

(B) Approve administrative settlements not exceeding $750,000,

(C) Accept offers in compromise of claims in behalf of the Government in all cases in which the difference between the gross amount of the original claim and the proposed settlement does not exceed $750,000 or 10 percent of the original claim, whichever is greater,

(D) Approve concessions (other than by compromise) of civil claims asserted by the Government in all cases in which the gross amount of the original claim does not exceed $750,000,

(E) Accept offers in compromise in all nonmonetary cases, and

(F) Reject offers in compromise, or disapprove administrative settlements or concessions, regardless of amount,

provided that such action is not opposed by the agency or agencies involved, and provided further that the case is not subject to reference to the Joint Committee on Taxation.

Section 6. Subject to the conditions and limitations set forth in Section 7 hereof, United States Attorneys are authorized to:

(A) Reject offers in compromise of judgments in favor of the Government, regardless of amount,

(B) Accept offers in compromise of judgments in favor of the Government where the amount of the judgment does not exceed $50,000, and

(C) Terminate collection activity by that office as to judgments in favor of the Government which do not exceed $50,000 if the United States Attorney concludes that the judgment is uncollectible,

provided that such action has the concurrence in writing of the agency or agencies involved, and provided further that this authorization extends only to judgments which have been formally referred to the United States Attorney for collection.

Section 7. The authority redelegated herein shall be subject to the following conditions and limitations:

(A) When, for any reason, the compromise or administrative settlement or concession of a particular claim, as a practical matter, will control or adversely influence the disposition of other claims totalling more than the respective amounts designated in Sections 2, 3, 4, 5 and 6 the case shall be forwarded for review at the appropriate level.

(B) When, because of the importance of a question of law or policy presented, the position taken by the agency or agencies or by the United States Attorney involved, or any other considerations, the person otherwise authorized herein to take final action (or the Chief of the Office of Review, in cases which have been considered by such office) is of the opinion that the proposed disposition should be reviewed at a higher level, the case shall be forwarded for such review.

(C) If the Department has previously submitted a case to the Joint Committee on Taxation leaving one or more issues unresolved, any subsequent compromise or concession in that case must be submitted to the Joint Committee, whether or not the overpayment exceeds the amount specified in Section 6405 of the Internal Revenue Code.

(D) Nothing in this Directive shall be construed as altering any provision of Subpart Y of Part 0 of Title 28 of the Code of Federal Regulations requiring the submission of certain cases to the Attorney General, the Deputy Attorney General, or the Solicitor General.

(E) Authority to approve recommendations that the Government confess error, or make administrative settlements, in cases on appeal, is excepted from the foregoing redelegations.

(F) The Assistant Attorney General, at any time, may withdraw any authority delegated by this Directive as it relates to any particular case or category of cases, or to any part thereof.

Section 8. This Directive supersedes Tax Division Directive No. 43, effective April 19, 1983.

Section 9. This Directive shall become effective on the date of its publication in the Federal Register.

GLENN L. ARCHER, JR.
Assistant Attorney General
Tax Division

APPROVED:

Deputy Attorney General

5/25/83
DATE

U.S. ATTORNEYS' LIST EFFECTIVE June 3, 1983

UNITED STATES ATTORNEYS

DISTRICT	U.S. ATTORNEY
Alabama, N	Frank W. Donaldson
Alabama, M	John C. Bell
Alabama, S	J. B. Sessions, III
Alaska	Michael R. Spaan
Arizona	A. Melvin McDonald
Arkansas, E	George W. Proctor
Arkansas, W	W. Asa Hutchinson
California, N	Joseph P. Russoniello
California, E	Donald B. Ayer
California, C	Stephen S. Trott
California, S	Peter K. Nunez
Colorado	Robert N. Miller
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Delaware	Joseph J. Farnan, Jr.
District of Columbia	Stanley S. Harris
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Iowa, N	Evan L. Hultman
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Minnesota	James M. Rosenbaum
Mississippi, N	Glen H. Davidson
Mississippi, S	George L. Phillips
Missouri, E	Thomas E. Dittmeier
Missouri, W	Robert G. Ulrich

UNITED STATES ATTORNEYS

DISTRICT	U.S. ATTORNEY
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Nebraska	Ronald D. Lahners
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Wisconsin, W	John R. Byrnes
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