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COMMENDATIONS

Assistant United States Attorney PETER A. CHAVKIN, Eastern District of New York, has been commended by Mr. William H. Webster, Director, Federal Bureau of Investigation, Department of Justice, for his outstanding prosecutive efforts in connection with the investigation involving Colm Murphy and Vincent Austain Toner, who were charged with gun smuggling activities for the Irish Republican Army.

Assistant United States Attorney THOMAS M. COFFIN, District of Oregon, has been commended by Mr. George C. Frangullie, Special Agent in Charge, Drug Enforcement Administration, Department of Justice, Seattle, Washington, and awarded the Certificate of Appreciation by the Drug Enforcement Administration for his outstanding work, motivation and agressiveness demonstrated in the Sears/Mann investigation, dealing with Title III wire intercept on an international LSD manufacturing and distribution organization.

Assistant United States Attorney JOHN M. DIPUCCIO, Southern District of Ohio, has been commended by Mr. Terence D. Dinan, Special Agent in Charge, Federal Bureau of Investigation, Department of Justice, Cincinnati, Ohio, for his outstanding professional work and successful prosecution of the John Schultz drug trafficking case.

Assistant United States Attorney GREGORY G. HOLLOWS, Eastern District of California, has been commended by Lt. Colonel John H. Bell, Chief, Contracting Division, United States Air Force, Beale Air Force Base, Sacramento, California, for his outstanding support and expert defense in Four Star Maintenance Corporation v. United States, which involved the establishment of a small business size standard and the prospective effect of size standard rulings made by the Small Business Administration as related to a contract at Beale Air Force Base for maintenance of basic housing.

Assistant United States Attorney FREDERICK W. KRAMER, III, Southern District of Georgia, has been commended by Honorable Dudley H. Bowen, Jr., United States District Court, District of Georgia, and Mr. William H. Webster, Director, Federal Bureau of Investigation, Department of Justice, for his outstanding performance during the investigation and prosecution of a election fraud case in Wheeler County, Georgia, which resulted in teh conviction of former school superintendent William S. Clark and his associates.

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

POINTS TO REMEMBER

Memorandum Of Understanding Between The United States Customs Service (Customs) And The Drug Enforcement Administration

On June 7, 1983, a memorandum was issued to all United States Attorneys from William P. Tyson, Director, Executive Office for United States Attorneys, transmitting a memorandum dated May 2, 1983, and its attachments, from Mr. Francis M. Mullen, Jr., Acting Administrator, Drug Enforcement Administration, regarding support given by the United States Attorneys' offices to the Customs investigations that are in violation of the "Memorandum of Understanding between Customs and the Drug Enforcement Administration". Mr. Tyson emphasized the importance of cooperation and harmonious working relationships among all law enforcement agencies and has requested that the United States Attorneys' offices respect the guidelines which clarify the respective roles of Customs and the Drug Enforcement Administration with regard to narcotic violations. For your information, a copy of this memorandum, which includes the memorandum and attachments from Mr. Francis M. Mullen, Jr., is reproduced as an appendix to this issue of the United States Attorneys' Bulletin.

(Executive Office)

Report On Convicted Prisoners - Form 792

All attorneys for the Government are required to prepare a Form 792, "Report on Convicted Prisoners by United States Attorney" in all cases in which a defendant has been sentenced to a prison term in excess of one year. The completed forms must be submitted to the Chief Executive Officer of the institution to which the defendant will be committed. Completion of the form ensures that the Parole Commission is given a concise and accurate account of the offense which led to the conviction, and of any other circumstances (mitigating or aggravating) which should be made known to the Commission.

It is especially important that the Commission be apprised of the specific data it needs for decision making under its guidelines (dollar values involved, drug amounts, extent of a conspiracy, etc.). Attorneys for the Government should be familiar with the Principles of Federal Prosecution,

USAM 9-27.000, and in particular Part G6 at pages 55 and 56. Part G6 fully sets forth the responsibilities of Federal prosecutors to prepare and submit a completed Form 792.

All prosecuting attorneys should also be familiar with the Parole Commission's guidelines, both in plea negotiations and in completing the Form 792. The Commission's most recent guideline table appears at 28 C.F.R. 2.20 and USAM 9-34.224.

A copy of the current Form 792 appears at USAM 9-34.222 at 7 (11/81). Additional copies are available by requisition.

Note: Normally, the attorney for the Government will be able to determine the institution of which the defendant will be committed by contacting the United States Marshal or the Bureau of Prisons' Community Programs Officer.

(Executive Office)

Changing Federal Civil Postjudgment Interest Rates Under 28 U.S.C. §1961

A Cumulative List of the Changing Federal Civil Postjudgment Interest Rates, as provided for in the amendment to the Federal postjudgment interest statute, 28 U.S.C. §1961, has been published periodically as an appendix to the United States Attorneys' Bulletin. This list has also provided the effective date of each interest rate. Please note that on previously published lists the effective dates of the interest rates for January through May 1983 were incorrect (i.e., the date of the Treasury Department's 52-week bill auction was provided instead of the actual effective date which is the day following the auction). The updated Cumulative List of Changing Federal Civil Postjudgment Interest Rates which is attached as an appendix to this issue of the Bulletin includes the correct effective dates of the interest rates for January through May 1983. Please discard the previously published lists which included incorrect effective dates.

(Executive Office)

OFFICE OF THE SOLICITOR GENERAL
Solicitor General Rex E. Lee

The Solicitor General has authorized the filing of:

A petition for a writ of certiorari on or before July 14, 1983, in Community Health Services of Crawford County v. Califana (3d Cir.). The case raises the issue of estoppel against the Government in the context of the Medicare program. The question is whether the erroneous advice of a "fiscal intermediary" to a provider can estop the Secretary of Health and Human Services from recovering from the provider over payments made under the Medicare program.

A brief amicus curiae with the Supreme Court on or before August 6, 1983, in New York v. Quarles, No. 82-1213. The issues are whether Miranda applies to brief questioning incident to an arrest, and whether nontestimonial fruits of a Miranda violation must be suppressed.

An amicus curiae brief on or before August 15, 1983, in Nix v. Williams, cert. granted, No. 82-1651 (May 31, 1983). The question to be addressed by the United States is whether the Supreme Court should adopt an "inevitable discovery" exception to the exclusionary rule and, if so, what are the appropriate contours of such an exception.

A petition for a writ of certiorari on or before September 3, 1983, in United States v. Yermian. The issue is whether, in a prosecution for making false statements in violation of 18 U.S.C. 1001, the Government must prove that the defendant knew his false statements concerned "a matter within the jurisdiction of the United States."

A petition for a writ of certiorari on or before September 14, 1983, in Ruth Wald v. Donald Regan (1st Cir.). The question presented is whether the Treasury Department's 1982 reinstatement of restrictions on financial transactions involving travel to and within Cuba was authorized under Section 5(b) of the Trading With the Enemy Act pursuant to the "grandfather" clause contained in Pub. L. No. 95-223. The Supreme Court has granted a stay of the court of appeals' adverse decision pending action on the petition.

A petition for a writ of certiorari on or before September 16, 1983, in Community Nutrition Institute v. Block. The issues are whether Congress intended to preclude ultimate consumers from seeking review of milk market orders issued by the Secretary of Agriculture, and whether ultimate consumers have standing to challenge the Secretary of Agriculture's milk market orders that allegedly have the effect of inhibiting lower prices for fluid milk reconstructed from powder.

CIVIL DIVISION
Assistant Attorney General J. Paul McGrath

Indiana Air National Guard and Department of Defense v. Federal Labor Relations Authority, ___ F.2d ___ Nos. 82-1496, 82-1544 (7th Cir. July 19, 1983). D.J. # 35-429, 35-430.

SEVENTH CIRCUIT SETS ASIDE DECISION OF THE FEDERAL LABOR RELATIONS AUTHORITY IN SUIT CONSTRUING THE NATIONAL GUARD TECHNICIANS ACT OF 1968 AND CIVIL SERIVCE REFORM ACT OF 1978.

The FLRA held that there was a duty to bargain over proposals submitted by a union of civilian technicians of the National Guard Bureau which would require the submission to binding arbitration of personnel grievances pertaining to adverse actions. The FLRA also held that the Guard must bargain over a union proposal which required personnel actions involving Guard technicians which are made the subject of a grievance or arbitration to be stayed pending a final decision of the matter. We argued before the FLRA and in the court of appeals that the proposals were outside the National Guard's duty to bargain, because binding arbitration is prohibited by 32 U.S.C. 709(e), of the National Guard Technicians Act, which expressly provides that "[n]otwithstanding any other provision of law," appeals of reductions-in-force, removals and adverse personnel actions "shall not extend beyond the adjutant general" of the State. In addition, we argued that since the Technicians Act bars personnel actions from ever becoming subject to grievance or arbitration proceedings, the stay proposal should also be found nonnegotiable.

Relying on precedent in the Third, Eighth, and Ninth Circuits the court accepted our position totally and held that the Technicians Act was a narrow exception to the Labor Statute and thus, union proposals containing binding arbitration provisions which cover adverse personnel actions are nonnegotiable. The court also concluded concerning the proposal which would stay personnel actions which are the subject of a grievance or arbitration, that it was nonnegotiable insofar as it relates to matters covered by the Technicians Act. The court refused to affirm the FLRA's decision that the proposal was negotiable to the extent that it relates to matters falling outside of the Technicians Act. The court questioned whether such matters exist and left the resolution for another day with other facts.

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CIVIL DIVISION
Assistant Attorney General J. Paul McGrath

Mills v. United States, ___ F.2d ___ No. 82-2583 (7th Cir. July 14, 1983). D.J. # 78-23-141.

SEVENTH CIRCUIT OVERTURNS RESOLUTION OF THE SEVENTH CIRCUIT JUDICIAL COUNCIL WHICH INCREASED CJA FEES PAYABLE TO ATTORNEYS FOR IN-COURT/OUT-OF-COURT TIME.

The Criminal Justice Act (CJA) provides fees for court-appointed attorneys. The section which establishes the fee levels also permits the Judicial Councils of each circuit to modify the rates "not to exceed the minimum hourly scale established by a bar association for similar services rendered in the district." Since the Supreme Court's decision in Goldfarb v. Virginia, 421 U.S. 773 (1975), bar association fee scales have ceased to exist.

In 1981, the Bar Association of the Seventh Federal Circuit, after surveying its practitioners, recommended that the Judicial Council for the Seventh Circuit (which consisted of all the active non-senior judges) adjust the fees from $30 (in-court time) and $20 (out-of-court time) to $55 and $45, respectively. The Judicial Council did so by resolution, and the new rates were to apply to work performed on or after January 1, 1982.

Martha Mills made a claim for services in the new amount. The Administrative Office of the United States Courts, which administers the CJA, rejected the claim at the new rates and, instead, paid Mills at the old rate. Mills then brought this action to compel the Government to pay in accordance with the original claim. In the district court, we argued that a bar association fee schedule was a condition precedent to modifying the CJA fee scale, and that no such fee schedule existed here. Hence, modification of the rates was invalid. Mills argued that the reference to an hourly fee scale was only meant to serve as a limitation on how high the fees could be raised and that, in any event, the bar association's recommendation was an hourly fee scale within the meaning of the CJA. The district court sustained the Government's position. The court also ruled that the Goldfarb decision, which struck down enforceable fee schedules, could not affect the condition precedent (of a minimum hourly scale) so as to expand the authority granted by the statute.

Mills then appealed to the Seventh Circuit. The court assigned three judges to hear the case who had not voted on the council's resolution to raise the fees.

CIVIL DIVISION
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In a 2-1 decision (Judge Swygert dissenting), the court affirmed the district court's decision. The court adopted all of our arguments, ruling that a "minimum hourly scale" was a condition precedent to modifying the CJA's prescribed fees and that by "minimum hourly scales" Congress meant the kind of fee scale which was struck down in Goldfarb. We argued that that kind of fee scale was typical of the fee scales in existence when the CJA provision at issue was enacted (in 1970) and was, without doubt, the sense in which the words "minimum hourly scales" were used. The court also accepted our argument that, although the $30 and $20 fee levels might be considered low, the CJA was never intended to provide full compensation to CJA attorneys because, as the legislative history showed, Congress intended that a lawyer's pro bono publico obligation was also meant to act as incentive for attorneys to accept CJA appointments.

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

United States v. Mitchell, No. 81-1748 (June 27, 1983).
D.J. # 90-2-20-923.

TUCKER ACT PROVIDES CONSENT BY THE UNITED STATES TO SUIT FOR CLAIMS BASED ON STATUTES OR REGULATIONS THAT CREATE RIGHTS TO MONEY DAMAGES.

Respondents (Quinault Indian allottees and the Quinault Tribe) brought suit in 1971 in the Court of Claims, seeking to recover money damages from the United States for alleged mismanagement of timber lands in the reservation, and asserting that such mismanagement constituted a breach of the fiduciary duty owed respondents by the United States as trustee under various statutes and regulations. In 1979, the Court of Claims en banc, held that the General Allotment Act of 1887, 25 U.S.C. 331 et seq., created a fiduciary duty on the United States' part to manage the timber resources properly and thereby provided the necessary authority for the recovery of damages against the United States. See 591 F.2d 1300. In Mitchell I, 445 U.S. 535 (1980), the Supreme Court reversed this holding, stating, id. at 542, that the General Allotment Act created only a limited trust relationship between the United States and the allottees that does not impose any duty upon the Government to manage timber resources. On remand, the Court of Claims en banc, again held the United States subject to suit for money damages on most of the Indians' claims. See 664 F.2d 265 (1981). The court ruled that various Federal statutes governing management of Indian timber, road building and rights-of-way, Indian funds and Government fees, and regulations promulgated thereunder imposed fiduciary duties upon the Government.

In Mitchell II, the Supreme Court, 6-3, affirmed the Court of Claims. The court, in an opinion by Justice Marshall, held that the Tucker Act provides the United States' consent to suit for claims founded upon statutes or regulations that expressly or implicitly create substantive rights to money damages. The court determined that, unlike the "bare trust" created by the General Allotment Act, the provisions at issue in this round of Mitchell clearly give the Government full responsibility to manage Indian resources and land for the Indians' benefit, therefore establishing a fiduciary relationship. Given the existence of a trust relationship, the court concluded, it follows that the Government should be liable in damages for

breach of its fiduciary duties. Justice Powell, Rehnquist and O'Connor dissented.

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

Arizona v. San Carlos Apache Tribe of Arizona, Nos. 81-2147, 81-2188 (July 1, 1983) D.J. # 90-6-2-35.

WATER RIGHTS; FEDERAL COURTS HAD JURISDICTION TO HEAR SUITS BY BOTH THE UNITED STATES AND INDIAN TRIBES.

This case resulted from the consolidation of cases from Arizona and Montana in which the Ninth Circuit held that district courts erred in dismissing (or, in one case, staying) actions requesting the adjudication of Indian reserved water rights in favor of concurrent state-court proceedings. The Supreme Court, 6-3, reversed and remanded.

More specifically, the Court held, in an opinion by Justice Brennan, that the Federal courts had jurisdiction to hear the suits brought by both the United States and the Indian Tribes. The McCarran Amendment, 43 U.S.C. 666, which waived the United States' sovereign immunity as to comprehensive water rights adjudications, removed any limitations which the Enabling Acts (admitting Arizona and Montana into the Union) may have originally placed on state-court jurisdiction over Indian water rights. To the extent that a claimed bar to state jurisdiction is premised on the respective state constitutions, that is a question of state law over which state courts have binding authority. If, as appears to be the case here, the state courts have jurisdiction over the Indian water rights at issue, then the concurrent Federal proceedings are likely to be duplicative and wasteful, and creating the potential for spawning an unseemly and destructive race to see which forum can resolve the Indian right issues first. Here, assuming that the state adjudications are adequate to quantify the Indian rights at issue in the Federal suits, and taking into account the McCarran Amendment policies, the expertise and

administrative machinery available to the state courts, the infancy of the Federal suits, the general judicial bias against piecemeal litigation, and the convenience to the parties, the district courts were correct in deferring to the state proceedings. Justices Marshall, Stevens and Blackmun dissented.

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

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

City of Columbia, So. Car. v. Administrator of EPA, No. 81-1876 (4th Cir. June 20, 1983). D.J. # 90-5-1-6-212.

UNIFORM RELOCATION ASSISTANCE AND REAL PROPERTY ACQUISITION POLICIES ACT APPLIES TO ACQUISITION OF EASEMENTS EVEN WHERE PEOPLE ARE NOT DISPLACED.

In a published decision, the Fourth Circuit reversed the district court ruling that the City of Columbia did not have to comply with the real property acquisition procedures of the Uniform Relocation Assistance and Real Property Acquisition Policies Act, 42 U.S.C. 4601 et seq., in connection with the acquisition of sewer line rights-of-way for a project funded in part by an EPA construction grant.

In the first decision to squarely address the issue, the Fourth Circuit held that the Uniform Act applies to the acquisition of easements even where such acquisition does not result in the displacement of people. The court also held that the "plain language" of the Act requires only that a federally-funded project result in the acquisition of any interest in real property and not that Federal funds will be used to acquire the property. The court rejected the City's argument that, if the Act were found to apply to the easement acquisitions, EPA should be required to pay for the easements themselves rather than, as EPA contended, just the transaction costs necessitated by compliance with the Act. The court found no support for such payment in either the language of the Act or the provisions of the Clean Water Act under which the grant was given.

Finally, the court concluded that the City must comply with the Act's provisions "to the greatest extent legally possible under state law" even if such compliance may be, as the City argued and as the district court found, "uneconomical."

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Bayou des Familles v. United States Corps of Engineers, No. 81-3700 (5th Cir. June 24, 1983), D.J. # 90-5-1-6-202.

CORPS' DENIAL OF PERMITS ON WETLANDS SUSTAINED.

In this case the Corps of Engineers denied permits for the development of certain land in the vicinity of New Orleans. The land was plainly wetland and was also subject to the ebb and flow of the tide. The plaintiffs made a number of arguments claiming that the Corps acted improperly, and also attacking the existence of the Jean Lafitte National Park in the vicinity. All of these arguments were rejected in the well-written opinion of the district court. The court of appeals affirmed, based on the district court's opinion and without further elaboration.

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

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Antoine v. United States, No. 82-1628 (8th Cir. June 29, 1983), D.J. # 90-2-4-497.

INDIANS; UNITED STATES LIABLE FOR FAIR MARKET VALUE OF ALLOTMENT AT TIME OF TAKING.

This allotment case, brought by the great grandchildren of an Indian known as Remains Single, deals with the measure of damages due for loss of an allotment. Antoine claimed that he was entitled to present value of the original tract, compensation for loss of income and interest on the lost income. The district court, however, granted only fair market value of the allotment at the time it was lost in 1887, plus simple interest at 5 percent.

The Eighth Circuit affirmed in part, finding that the Government's actions in 1887 actually constituted a taking of Remains Single's allotment. Thus, the district court was correct in granting only fair market value at the time of taking. The court, however, remanded the case to the district court for reconsideration of the interest rate.

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Nevada v. United States, No. 81-2245 (June 25, 1983). D.J. # 90-1-2-1067.

RES JUDICATA; 1944 ORR DITCH DECREE BARS UNITED STATES FROM RELITIGATING INDIAN WATER RIGHTS.

This is an outgrowth of the Orr Ditch water rights adjudication in the U.S. District Court for the District of Nevada. Orr Ditch's final decree in 1944 determined the rights of thousands to the use of waters of the Truckee River. Specifically, the Orr Ditch decree confirmed a federally reserved water right to irrigate lands within the Pyramid Lake Indian Reservation, and adjacent to Pyramid Lake where the Truckee terminates. The same decree also confirmed an appropriative right to divert Truckee waters at Derby Dam, primarily for irrigation uses in connection with the Newlands Federal Reclamation Project. Both rights were confirmed in the name of the United States. Neither the Pyramid Lake Paiute Tribe, which occupied the Reservation, nor the Project water users or Truckee-Carson Irrigation District (TCID), which administered the Project, were parties in the Orr Ditch case. As the Ninth Circuit later observed, the Tribe and TCID were nonparties whose interests were represented through the United States by the same Government attorneys.

Because of this, the Ninth Circuit, in 1981, allowed the United States in new proceedings to determine whether the Reservation held a federally reserved water right with an 1859 priority to maintain the tribal fishery at Pyramid Lake. Although an irrigation water right was actually claimed and litigated in Orr Ditch, no specific claim was asserted for the fishery. The Ninth Circuit held that the Orr Ditch decree did not, by reason of res judicata, bar fresh adjudication of the fishery claim. However, whatever reserved water right for the fishery might be

awarded could be satisfied only at the expense of other water rights decreed to the United States in Orr Ditch, notably rights for the Newlands Project. The Ninth Circuit forbade impairment of any other water rights, whether adjudicated by the Orr Ditch decree or acquired by appropriation after the decree.

On petitions by TCID and Nevada, and on conditional cross-petition by the Tribe, the Supreme Court reversed. It held that, since the U.S., on behalf of the Tribe, had an opportunity to litigate the fishery claim in the Orr Ditch case, and, having chosen not to do so, was barred by res judicata from prosecuting the same claim in a subsequent proceeding. Although the Tribe and TCID were not arrayed as mutually adverse parties in Orr Ditch (and, indeed, were not named parties at all), the Supreme Court held that mutual adversity between given parties was not necessary to give binding effect to a comprehensive water-rights decree.

If, noted the Court, the United States, in its representation of tribal interests during the Orr Ditch case, violated its obligations to the Tribe, "then the Tribe's remedy is against the Government, not against [such] third parties" as TCID or the Project water users. The Court further noted that "the Tribe has already taken advantage of that remedy," referring to the Tribe's suit before the Indian Claims Commission which terminated in an $8 million settlement in 1973.

Justice Brennan, concurring, wrote the only separate opinion. He joined "the Court's opinion on the understanding that the Tribe has a remedy against the United States for the breach of duty that the United States has admitted."

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Ruckelshaus v. Sierra Club, No. 82-242 (July 1, 1983). D.J. # 11-09-82.

ATTORNEYS FEES AWARDABLE ONLY IF APPLICANT HAD "SOME DEGREE OF SUCCESS ON THE MERITS."

The Supreme Court held that "some degree of success on the merits" was a necessary prerequisite to an award of attorneys'

fees under the "appropriate" standard set out in Section 307(f) of the Clean Air Act, 42 U.S.C. 7607(f). The Court reversed a District of Columbia Circuit order awarding $90,000 in attorneys' fees to two environmental organizations who had unsuccessfully challenged an EPA rulemaking on the theory that the organizations had "substantially contributed" to the goals of the Clean Air Act by litigating "important, complex and novel" issues. Sierra Club v. Gorsuch, 672 F.2d 33 (1982); 684 F.2d 972 (1982).

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Rice v. Rehner, No. 82-401 (July 1, 1983). D.J. # 90-6-4-8.

INDIANS; STATES CAN IMPOSE LICENSING REQUIREMENTS ON INDIANS TRAFFICKING IN LIQUOR ON RESERVATIONS.

The Supreme Court ruled that states are authorized to impose licensing requirements on Indians engaging in liquor transactions on reservations. The Court reversed a court of appeals ruling that 18 U.S.C. 1161 did not grant the states regulatory authority over on-reservation liquor transactions by tribal members or tribes but merely required that state substantive standards be applied. The Supreme Court found a grant of regulatory authority to the states in 18 U.S.C. 1161, despite the ambiguity in the statute because it found no tradition of tribal self-government in liquor regulation and on "historic tradition of concurrent state" jurisdiction over Indian liquor transactions.

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

Kerr-McGee Chemical Corp. v. United States Department of the Interior, Nos. 82-5160, etc. (9th Cir. June 30, 1983). D.J. # 90-5-2-1-404.

STANDING; CHALLENGE TO RECOMMENDATION FOR REDESIGNATION BY INTERIOR DISMISSED FOR LACK OF JURISDICTION.

Under the 1977 Amendments to the Clean Air Act, the states are empowered to change the Prevention of Significant Deterioration (PSD) classifications for Federal lands. Section 164(d) of the Act, however, requires the Federal land manager to recommend appropriate areas for redesignation to Class I, the strictest category, where air quality related values are important. In 1980, the Department of the Interior recommended to California that Death Valley National Monument be redesignated Class I.

Kerr-McGee, which owns a chemical plant near the monument, brought suit claiming that the recommendation was not based on consideration of factors other than air quality related values. The district court ruled that a Federal land managers' recommendation was a "prerequisite" to state redesignation and that Interior had to consider environmental, social, economic and energy factors as well as air quality in making a recommendation. On appeal, the Ninth Circuit reversed. It ruled that a Section 164(d) recommendation was neither a trigger for nor a prerequisite to state redesignation. As the state could act completely independently of the recommendation, Kerr-McGee had suffered no injury from, and had no standing to challenge, the recommendation. The appellate court remanded to the district court with instructions to dismiss for lack of jurisdiction.

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United States v. 79.20 Acres in Stoddard Cty., Mo., No. 82-1859 (8th Cir. July 6, 1983), D.J. # 33-26-412-130.

CONDEMNATION; VALUE OF INTEREST PREVIOUSLY TAKEN INADMISSIBLE; DAMAGES TO LAND OUTSIDE AREA OF TAKING INADMISSIBLE.

The Eighth Circuit ruled that the district court had erred in excluding testimony concerning the amount paid by the Government for an easement on the same land it later condemned in fee. The court also agreed with our contention that the trial court committed error when it admitted testimony about the value of a well which had already been taken and compensated for when the easement was taken. Our assertion that the trial court erred in admitting testimony about damages which occurred after the taking and to land outside the area of the taking was also accepted by

the Eighth Circuit. The court did, however, disagree with our last argument. We had asserted that the trial court should have excluded the landowner's testimony because it was based on sheer speculation, included an impermissible "value-to-me" factor and had no foundation in market values. The court ruled that because there was no showing that the landowner had a special knowledge of his land, his testimony was admissible. The Eighth Circuit reversed and remanded the case for a new trial in accordance with its opinion.

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Free Enterprise Canoe Assn. v. Watt, No. 82-8749 (8th Cir. July 11, 1983), D.J. # 90-1-0-1985.

UNITED STATES HAS POWER TO REGULATE CONDUCT OFF FEDERAL LAND TO PROTECT OZARK NATIONAL SCENIC RIVERWAYS FROM OVERCOMMERCIALIZATION.

An Interior regulation prohibiting delivery or retrieval of rented canoes within the boundaries of the Ozark National Scenic Riverways (ONSR) without a permit was found valid and criminal convictions of Association members upheld. The court found that the U.S. had the power to regulate conduct occurring off Federal land in order to protect the ONSR from over-commercialization. The regulation applied to Association members even though their activities were on state and county roads and the Government was not estopped from enforcing the regulation.

The Association also challenged the validity of the permits that were issued to other canoe renters. The court viewed it as improper to adjudicate the validity of those permits without the participation of the permittees. However, the court stated that the Secretary would not honor the permittees' renewal preference and that the Association members would compete on "equal footing" with the current permittees when contracts were renewed based on the United States' purported representation at oral argument. In fact, the current permittees are entitled to a right of preference for renewal.

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FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 32(c)(3)(A). Presentence Investigation. Disclosure.

As a result of a plea agreement the Government agreed to recommend a maximum sentence of three years and submitted its version of the facts underlying the indictment to the court. An independent presentence investigation was conducted by the probation office, which prepared a report for submission to the sentencing judge. At a hearing, the defendant challenged portions of the presentence report which portrayed him as having a larger role in the crime than did the Government's version, and sought to "correct" the report. The court declined to reconcile the differences between the two reports, and sentenced defendant to the maximum term permissible under the plea agreement. Defendant appealed, arguing that Rule 32(c)(3)(A) required the judge to make findings regarding the disputed facts and correct the presentence report accordingly.

The court of appeals rejected defendant's claim and held that: (1) Rule 32(c)(3)(A) does not require the sentencing judge to make factual findings when the defendant contests the accuracy of a presentence report; (2) Rule 32 and due process considerations require only that the defendant be permitted the means to rebut the information contained in the report; and (3) such opportunity was afforded defendant by the presentencing hearing.

(Affirmed)

United States v. James Michael Stephens, 699 F.2d 534 (11th Cir. March 3, 1983).

U.S. Department of Justice

Executive Office for United States Attorneys

Office of the Director *Washington, D.C. 20530*

JUN 7 1983

MEMORANDUM TO: All United States Attorneys

FROM: William P. Tyson
Director
Executive Office for
United States Attorneys

SUBJECT: Memorandum of Understanding Between the United States Customs Service (Customs) and the Drug Enforcement Administration (DEA)

Please find attached, for your information and for distribution to appropriate Assistant United States Attorneys, a memorandum dated May 2, 1983, and its attachments, from Mr. Francis M. Mullen, Jr., Acting Administrator, Drug Enforcement Administration, regarding support given by the United States Attorneys' offices to Customs investigations that are in violation of the Memorandum of Understanding between Customs and the Drug Enforcement Administration.

Cooperation and harmonious working relationships among all law enforcement agencies should be maintained and encouraged. However, a clear understanding of each agency's jurisdiction is necessary to ensure coordination, elimination of duplication of effort, and prevention of counterproductive or potentially dangerous enforcement activities. The attached guidelines clarify the respective roles of Customs and the Drug Enforcement Administration with regard to narcotics violations. The United States Attorneys' offices should respect these guidelines when dealing with either of these two agencies.

Your cooperation and assistance in this matter will be greatly appreciated.

Attachments

cc: Mr. Francis M. Mullen, Jr.
Acting Administrator
Drug Enforcement Administration

Mr. William von Raab
Commissioner
United States Customs Service

U.S. Department of Justice

Drug Enforcement Administration

Washington, D.C. 20537

Office of the Administrator

May 2, 1983

TO: Mr. William P. Tyson
Director
Executive Office for United
States Attorneys

FROM: Francis M. Mullen, Jr.
Acting Administrator, DEA

In reference to my telephone call this afternoon, enclosed is a copy of the 1975 Memorandum of Understanding between DEA and Customs and a copy of the most recent memorandum from Customs Headquarters to all Assistant Regional Commissioners dated April 21, 1983.

We have had several situations recently where attorneys in various U.S. Attorneys' Offices have approved or prepared applications for Title IIIs and for transponders to support the investigations by Customs personnel. Such investigations by Customs is in violation to the Memorandum of Understanding. We believe that if your office could advise the U.S. Attorneys' Offices around the country of the primary role of DEA and the FBI in narcotics investigations, such situations that developed would no longer happen.

This clarification is necessary especially now with the advent of the OCDETFs.

Regards.

UNITED STATES GOVERNMENT

Memorandum

DEPARTMENT OF THE TREASURY
UNITED STATES CUSTOMS SERVICE

DATE: 21 APR 1983

FILE: INV-4-E:IV:C

TO: Assistant Regional Commissioners
Office of Enforcement

FROM: Assistant Commissioner
Office of Enforcement

SUBJECT: Clarification of the International Cargo Conspiracy Program

It has been brought to my attention that there has been some misunderstanding of the Commissioner of Customs' Memorandum, dated January 28, 1983, re: Narcotic Smuggling Through Cargo Conspiracies. The purpose of that Memorandum is to have the Office of Enforcement share in Customs responsibility for interdicting narcotics.

I would like to emphasize that we will continue to abide by the existing Memorandum of Understanding (MOU) between DEA and U.S. Customs Service signed on December 11, 1975. In that MOU, DEA is recognized as the agency with primary responsibility for investigation and intelligence gathering related to drug smuggling and trafficking.

If, during the course of a cargo conspiracy investigation or interdiction effort, narcotics are discovered, DEA is to be notified immediately. If DEA accepts jurisdiction of the case, no action will be taken by Customs personnel until DEA arrives. This includes removing the narcotics from the original container or vehicle, xeroxing documents, questioning suspects etc.

Also, if Customs comes in possession of any narcotic information, this will be shared with DEA immediately.

Customs is the agency with primary responsibility for interdiction of all contraband, including drugs, at the land, sea, and air borders of the United States. We will refrain from being involved in domestic cases, and never without the concurrence of DEA, which recently occurred in Illinois.

We must ensure the integrity of the movement of cargo while it remains in Customs custody. But this is not to be accomplished by encroaching on another agency's jurisdiction.

The war against crime, and that for which Customs has jurisdictional authority, such as smuggling of contraband, cargo theft, can only be won if we have complete cooperation, open lines of communication, and trust between our agency, DEA and the FBI.

OPTIONAL FORM NO. 10
JULY 1973 EDITION
GSA FPMR 141 CFR 101-11.6

UNITED STATES GOVERNMENT

Memorandum

513
VOL. 31 AUGUST 19, 1983 NO. 16

TO : Principal Field Offices DATE: 12/11/75
(U.S. Customs Service/Drug Enforcement Administration)

FROM : Commissioner of Customs/Acting Administrator,
Drug Enforcement Administration

SUBJECT: Memorandum of Understanding Between U.S. Customs Service/Drug Enforcement Administration

As the Commissioner of Customs and the Acting Administrator, Drug Enforcement Administration, we wish to assure all personnel of both agencies that this Memorandum of Understanding was signed in good faith by both parties and it is our intention to insure that the relationships between our agencies are conducted according to these operational guidelines in both a coordinated and professional manner.

It is of the utmost importance that the U.S. Customs Service and the U.S. Drug Enforcement Administration work together in an atmosphere of harmony and efficiency in combating the illegal importation and trafficking in illicit drugs. It is essential that each agency complement and support the other in fulfilling their respective obligations.

The attached policy guidelines have been established between the Drug Enforcement Administration and the U.S. Customs Service for the purpose of clarifying the respective operations of each agency in regard to drug related enforcement activities. It is anticipated that the guidance established in this agreement will promote and insure that the inter-agency relationships are in the best interests of the United States and will result in effective and efficient law enforcement.

A copy of this memorandum and the attached Memorandum of Understanding is being sent directly to all field offices of both agencies so that all personnel will be immediately aware of the agreed upon operational guidelines. We expect all principal field offices to insure that meetings are arranged at the earliest date between U.S. Customs Service and Drug Enforcement Administration counterparts at the various managerial and working levels to develop the closest possible working relationships within these operating guidelines.

Attachment

Vernon D. Acree
Commissioner of Customs

Henry S. Dogin
Acting Administrator
Drug Enforcement Administration

12/11/75

MEMORANDUM OF UNDERSTANDING

Between

The Customs Service and the Drug Enforcement Administration on Operating Guidelines

The purpose of this memorandum is to emphasize and clarify the roles and the need for cooperation between the respective agencies. Under the broad guidelines of Reorganization Plan No. 2, the Drug Enforcement Administration has been assigned the primary responsibility for "....intelligence, investigative and law enforcement functions....which relate to the suppression of illicit traffic in narcotics, dangerous drugs or marihuana...." Under the plan and delegations, Customs retains and continues to perform those functions "....to the extent that they relate to searches and seizures of illicit narcotics, dangerous drugs, marihuana or to the apprehension or detention of persons in connection therewith at regular inspection locations at ports-of-entry or anywhere along the land or water borders of the United States..." However, Customs is required to turn over to DEA "any illicit narcotics, dangerous drugs, marihuana or related evidence seized and any person apprehended or detained...."

Both agencies have vital roles to perform within the Federal drug enforcement program. Customs, as part of its overall responsibility for interdicting the smuggling of contraband, retains the full responsibility for searching, detecting, seizing smuggled narcotics, and arresting suspected smugglers of any contraband. DEA has the full responsibility for any narcotic-related follow-up investigation as well as for providing Customs with information related to narcotics interdiction. Clearly, for the Federal effort to accomplish its enforcement goals related to reducing narcotics trafficking, both agencies must cooperate and provide appropriate mutual assistance in performing their respective functions. It is mutually agreed that an employee who willfully violates the intent and conditions of this agreement will be subject to firm disciplinary action.

To implement the above, the Commissioner of Customs and the Administrator of the Drug Enforcement Administration jointly approve the following guidelines for dealing with specific operational problems.

1) Operational Roles of Customs and DEA

- Customs is the agency with primary responsibility for interdiction of all contraband, including all drugs at the land, sea, and air borders of the United States.

- DEA is the agency with primary responsibility for investigation and intelligence gathering related to drug smuggling and trafficking.

- The Drug Enforcement Administration will notify the U.S. Customs Service of information from its narcotic investigations which

indicates that a smuggling attempt is anticipated at or between an established port-of-entry as soon as possible after the information is received. Such information may result in a cooperative joint interdiction effort but shall in no case result in uncoordinated unilateral action.

- Within the limitations of its resources, Customs will cooperate when requested to support DEA operations and ongoing investigations, including interception of aircraft suspected of drug smuggling and convoys.

- For purposes of this agreement an ongoing investigation includes only those cases in which information indicates a seizure and/or arrest should not occur at the initial point of contact in the United States, but should continue as a convoy to the final delivery point. The mere fact that a suspect or vehicle is known to DEA does not constitute an ongoing investigation.

2) Law Enforcement Coordination

- Whenever Customs has information on any person, aircraft, vessel, etc., that is involved in or suspected of being involved in drug smuggling or trafficking, DEA will be the first agency contacted by Customs. DEA will then have primary responsibility for the coordination of all investigative efforts.

- Whenever DEA has information on any person, aircraft, vessel, etc., that is involved in or suspected of being involved in the smuggling of contraband, Customs will be the first agency contacted by DEA. Customs will then have primary responsibility for interdiction if a seizure or arrest is to occur at the initial point of contact in the United States except in those cases under the control of DEA.

3) Placing of Transponders on Aircraft and Transponder Alerts

- Transponders will not be utilized by Customs in drugs related activity without prior advice to DEA of the aircraft's identity and suspects involved. If DEA has an ongoing investigation, DEA will make the tactical decision as to the course of action to be taken.

- Both agencies will expeditiously advise each other of all transponders placed on aircraft, and immediately upon receiving signals therefrom.

- Customs will normally respond to all specially coded transponder alerts crossing the border. DEA will be given immediate notification whenever Customs responds to a drug-related transponder alert.

4) Combined Seizures of Narcotics and Other General Contraband

- Where both narcotics and general contraband are seized in the same case, the Customs Office of Investigations is to be notified and they will coordinate with DEA on a joint investigation.

- Investigative efforts will be dependent upon the magnitude of the violation and/or the value of the general merchandise seized.

5) Violations to be Reported to the U.S. Attorney

- DEA case reports will include any customs reports related to the drug violation. Customs will furnish their reports to DEA in an expeditious manner. DEA will present the violations to the concerned prosecutor for determination of charges.

6) International and Domestic Drug Intelligence Gathering, Coordination

- DEA is the agency with primary responsibility for gathering intelligence on drug smuggling and trafficking, including air trafficking.

- Customs has primary responsibility for intelligence gathering of smuggling activities and also a supportive role to DEA in drug smuggling and trafficking. Nothing in this agreement precludes Customs from gathering information from the air and marine community related to the smuggling of contraband. Customs will continue to maintain liaison and gather information from foreign Customs services on all smuggling activities.

- Customs will expeditiously furnish all drug-related information to DEA. DEA will expeditiously furnish drug smuggling intelligence to Customs. Unless immediate action is required, such drug smuggling intelligence collected will not be subjected to enforcement action prior to coordination between Customs and DEA.

- DEA and Customs will refrain from offering or lending support to any derogatory remarks regarding the other agency. When dealing with other law enforcement agencies, Federal, state and local officials should not be mislead as to DEA and Customs respective responsibilities.

- Neither Customs nor DEA will discourage potential sources of information from working for the other agency. The promising of rewards to informants for intelligence shall not be competitively used to increase the price of information and knowingly encourage the source of information to "Agency Shop."

- Under no circumstances will Customs officers employ a participating informant for drug-related matters unless prior agreement and concurrence is obtained from DEA. Both agencies recognize that the identity of an informant may have to be revealed in court and that the informant may have to testify.

- In those drug smuggling cases involving a DEA confidential source, Customs will be promptly notified of the role of the informants so that the safety of the cooperating individual is not jeopardized. Customs officers will not attempt to debrief DEA informants.

- None of the foregoing is intended to limit total resource utilization of DEA and Customs law enforcement capabilities, but rather to insure coordination, elimination of duplication of effort, and prevention of counter-productive or potentially dangerous enforcement activities.

- At the field level, Customs and DEA offices will identify specific persons or organizational units for the purpose of information referral and to coordinate enforcement matters.

7) Procedures to be Followed When DEA has Information that an Aircraft, Vehicle, Vessel, Person, etc., will Transit the Border Carrying Narcotics

- For criminal case development purposes, DEA may request that such persons or conveyances be permitted to enter the United States without enforcement intervention at that time. These requests will be made by DEA supervisory agents at the ARD level or above to District Directors or their designated representative. Such requests will be rare and made only when DEA intends to exploit investigations of major traffickers.

- Customs officers will participate in the enforcement actions until the initial seizure and arrest. The number of Customs personnel and equipment needed will be decided by the Customs supervisor with input from the DEA Case Agent, subject to the limitations of available Customs resources, not to exceed the number recommended by the DEA Case Agent.

- On drug-related joint enforcement actions, no press releases will be made by Customs or DEA without the concurrence of each other.

8) Drug Seizure Procedures

- Customs responsibility for interdiction of contraband, including illegal drugs, remains unchanged. Using every enforcement aid and technique available to them, Customs officers will continue to search for illicit drugs. Each time any drugs are discovered, they will be

seized and the nearest DEA office will be immediately notified unless otherwise locally agreed upon. Questioning of arrested violators will be limited to obtaining personal history and seizure information for Customs forms. Further questioning is the responsibility of DEA. Chain of custody forms or receipts are required for transfers of all seized items.

- Customs will take every step possible to preserve all evidentiary material and not remove suspected drugs from original containers when such action compromises evidentiary and investigative potential

- In those instances where DEA will not accept custody of detained persons or seizure of drugs due to U.S. Attorney prosecutive policy, DEA will notify local enforcement authorities for prosecutive consideration. Otherwise DEA will request Customs to notify these authorities. When local enforcement authority declines, Customs will proceed to assess administrative and civil penalties, as appropriate. Otherwise, administrative and civil penalties should be held in abeyance until local prosecution is completed.

9) Convoy Operations After Customs Seizures

- In those instances where DEA decides to convoy the contraband seized by Customs to the ultimate consignee, Customs personnel will fully cooperate, and will withhold publicity. All seized vehicles or conveyances will be included in a chain of custody receipt.

- The weighing of the contraband may be waived when the method of concealment makes it impractical. At the termination of the convoy, an accurate weight will be supplied by DEA to the originating district director, and the chain of custody will be annotated with the correct weight. Customs officers will not normally participate in this type of convoy operation.

- At the termination of this type convoy operation, involved vehicle or conveyance shall be released to the custody of the nearest district director of Customs.

10) Disposition of Vehicles, Vessels, Aircraft and Seizures in Joint Enforcement

- All vehicles, vessels, and aircraft involved in joint smuggling cases will be seized and forfeited by Customs. Final disposition of the conveyance will be determined by a joint Headquarters review board comprised of Customs and DEA personnel. Guidelines governing disposition will be developed.

- Upon prior DEA request in writing, Customs will not administratively dispose of seized aircraft or other conveyances until it is no longer

--required for evidence by the courts or termination of DEA investigation.

11) Referral to Other Agencies (Chain of Custody and Laboratory Sampling)

- Customs will continue, in the case of seized heroin and cocaine, weighing two ounces or more, to take samples not to exceed 7 grams. However, the Customs laboratory will not perform the quantitative and qualitative analysis until completion of the prosecutive action except for special contingencies.

12) DEA Access to Customs Personnel and Controlled Areas

- Designated Customs areas are not normally accessible to others. Access to Customs controlled areas and Customs personnel on an as needed basis will be obtained from the officer-in-charge of the Customs facility in each instance. Customs will honor such requests, provided that DEA personnel in no way interfere in examination and inspection processes.

13) Procedures When Discovery of Drugs is Made Before Actual Violators Have Been Identified and Goods or Conveyances are Still in Customs Custody

- When Customs officers discover the presence of concealed drugs in imported goods, and the goods or conveyances are still under Customs custody or control, and they have not been claimed by a consignee or reached their ultimate destination, Customs shall maintain control of the drugs, but DEA will be notified immediately. Customs officers will cooperate with DEA and be guided by DEA's tactical decisions regarding investigative development, arrest and seizure.

14) Any representation made to Federal, state or local prosecutors for mitigation of sentence or other consideration on behalf of a defendant who has cooperated in narcotic cases or investigations will be made by DEA. DEA will bring to the attention of the appropriate prosecutor cooperation by a narcotic defendant who has assisted Customs.

There are existing DEA/Customs agreements not covered in this document that pertain to cross-designation of DEA agents, mail parcel drug interdiction and other matters. DEA and Customs mutually agree to review each of these and amend where appropriate for consistency with the cooperative intent of this agreement.

No guidelines are all encompassing and definitive for all occasions. Therefore, the appropriate field management of both agencies are

directed to establish communication with their respective counterparts to better coordinate their respective operations. Similar cooperation and harmonious working relationships should be implemented at all subordinate levels. It must be recognized that good faith as well as mutual respect for the statutory responsibilities of our agencies and for the employees are the cornerstones upon which full cooperation must be established. To this end, Customs and DEA personnel must take the appropriate affirmative actions to minimize conflict and develop a combined program which adequately serves the interests of the United States of America and its citizenry.

Henry S. Dogin
Acting Administrator
Drug Enforcement Administration

12/1/75

Vernon D. Acree
Commissioner
U.S. Customs Service

CUMULATIVE LIST OF CHANGING FEDERAL CIVIL POSTJUDGMENT INTEREST RATES

(as provided for in the amendment to the Federal postjudgment interest statute, 28 U.S.C. §1961, effective October 1, 1982)

Effective Date	Annual Rate
10-01-82	10.41%
10-29-82	9.29%
11-25-82	9.07%
12-24-82	8.75%
01-21-83	8.65%
02-18-83	8.99%
03-18-83	9.16%
04-15-83	8.98%
05-13-83	8.72%
06-10-83	9.59%
07-08-83	10.25%

NOTE: When computing interest at the daily rate, round (5/4) the product (i.e., the amount of interest computed) to the nearest whole cent.

U.S. ATTORNEYS' LIST EFFECTIVE July 29, 1983

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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
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