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

CLEARINGHOUSE

Immigration And Naturalization Service Litigation Handbook

The Office of General Counsel of the Immigration and Naturalization Service has prepared a detailed handbook regarding their structural organization and prosecution policies. Single copies of the handbook were sent to each United States Attorney's office, and additional copies can be obtained from the Legal Services Section, Executive Office for United States Attorneys (633-4024). Please ask for publication CH-1.

(Executive Office)

Ethics Standards For Department Of Justice Employees

The Office of Legal Counsel has prepared an outline for use by employees of the Department of Justice in making decisions about their professional conduct. The outline is broken down into four sections: Principal Sources of Governing Law; Areas Subject to Regulation; Reporting Misconduct; and Sources of Advice. This outline is not an exhaustive compilation of sources governing professional conduct. Employees should continue to refer to relevant statutes and regulations. A copy of the outline is included in the appendix of this issue of the United States Attorneys' Bulletin.

(Executive Office)

COMMENDATIONS

Assistant United States Attorneys PATRICK J. FOLEY, Northern District of Ohio, DANIEL G. KNAUSS, District of Arizona, JOHN S. LEONARDO, District of Arizona, and DON J. SVET, District of New Mexico, have each received Special Achievement Award Certificates and cash awards for their continuing outstanding contributions as volunteer evaluators of United States Attorneys' offices. The awards, approved by William P. Tyson, Director, Executive Office for United States Attorneys, and signed by the Attorney General, give recogniton to their professionalism, competence and dedication in evaluating United States Attorneys' offices.

Assistant United States Attorneys TED L. MCBRIDE and REED A. RASMUSSEN, District of South Dakota, have been commended by Mr. Allan C. Nickels, Program Director, Family Nutrition Programs, Food and Nutrition Service, United States Department of Agriculture, Denver, Colorado, for the successful prosecution of United States v. Clyde Hudson, involving food stamp programs violations.

Assistant United States Attorney DAVID H. MILLER, Northern District of Indiana, has been commended by Mr. J.D. Nichols, Regional Inspector General for Investigations, United States Department of Labor, for his thorough preparation and professional presentation of the Government's case in the successful prosecution of a C.E.T.A. fraud case, United States v. Nedberg.

Assistant United States Attorney RANDALL B. MILLER, Middle District of Louisiana, has been commended and awarded the Secret Service Plaque of Appreciation by Mr. John R. Simpson, Director, United States Secret Service, Department of the Treasury, for his outstanding cooperation and skill in the Dr. Billy Cannon counterfeiting case, involving the first wiretap ever authorized in the Middle District of Louisiana.

Assistant United States Attorneys DONALD P. MOROZ and EVAN M. SPANGLER, Northern District of Indiana, have been commended and awarded the Secret Service Plague of Appreciation by Mr. John R. Simpson, Director, United States Secret Service, Department of Treasury, for their outstanding and agressive prosecution in the United States v. John Evans counterfeit case.

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

POINTS TO REMEMBER

Partisan Political Activity By Federal Employees In The United States Attorneys' Offices

By memorandum dated May 26, 1983, Attorney General William French Smith reiterated the importance of the Department of Justice and its employees refraining from participation in partisan political activities. The Attorney General also reissued his memorandum of July 9, 1982, setting forth the policy of the Department of Justice in this regard.

A copy of these two memoranda, and a copy of a pamphlet prepared by the Office of the Special Counsel, Merit Systems Protection Board, entitled "Political Activity and the Federal Employee," were distributed to all United States Attorneys by memorandum dated August 1, 1983, from Ms. Susan A. Nellor, Assistant Director, Executive Office for United States Attorneys. This information is to be used for the general guidance of all United States Attorneys' offices employees, including Special Assistant United States Attorneys, and temporary and part-time employees.

Specific questions regarding political activity should be directed to the Legal Services Section of the Executive Office for United States Attorneys (633-4024) prior to engaging in the political activity.

(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 with the Supreme Court on or before October 25, 1983, in United States v. James Connors Karo, et al. The issues are whether the warrantless installation of a beeper in a can of chemicals, with the consent of the owner and before delivery to one of the suspects in a drug scheme, violates the Fourth Amendment, and whether the warrantless monitoring of a beeper to ascertain its presence within a home or other private area violates the Fourth Amendant.

A writ of certiorari with the Supreme Court on or before November 4, 1983, in United States v. Abel. The issue is whether the Government can impeach a defense witness based on the witness' membership in a group whose members agree to commit perjury on each others' behalf.

A writ of certiorari with the Supreme Court on or before November 9, 1983, in United States v. Wilson. The issue is whether, in a quiet title action brought by the United States as trustee for the Indians, sovereign immunity bars the defendant trespassers from asserting a counterclaim against the United States for the value of the improvements they placed upon the lands in issue during the time were wrongfully in possession.

A writ of certiorari with the Supreme Court on or before December 29, 1983, in Jerry T. O'Brien, Inc. v. SEC. The issue is whether the SEC must notify the target of an investigation concerning third-party subpoenas.

The Solicitor General has recently filed a petition for a writ of certiorari with the Supreme Court in Lehman v. Trout, No. 83-706. The issue is whether, in light of the Supreme Court's subsequent decision in United States Postal Service Board of Governers v. Aikens, No. 81-1044 (Apr. 4, 1983), the court of appeals erred in affirming the judgment of the district court despite concluding that the statistical analysis upon which that court had relied in finding discrimination in violation of Title VII of the Civil Rights of 1964 included data that could not form a basis for imposing liability.

CIVIL DIVISION
Assistant Attorney General J. Paul McGrath

Wheeler v. Heckler , _____F.2d _____ Nos. 82-6310, 6324, 6328 (2nd Cir. Oct. 11, 1983). D.J. # 181-78-42.

SECOND CIRCUIT HOLDS THAT SECRETARY OF HHS NEED NOT APPLY A "MEDICAL IMPROVEMENT" STANDARD IN HER REVIEWS OF THE DISABILITY STATUS OF INDIVIDUALS GRANDFATHERED INTO FEDERAL DISABILITY PROGRAMS FROM THEIR FORMER STATE PROGRAMS.

These cross-appeals arose out of the judgment of the district court, in an action originally brought as a class action, in which the court imposed a "medical improvement" standard on the Secretary in terminating disability benefits of those previously found disabled under state (here, Vermont) law. In imposing the medical improvement standard, the district court was persuaded by the plaintiffs to adopt the rationale and holding of the Ninth Circuit in Finnegan v. Mathews, 641 F.2d 1340 (9th Cir. 1981). We appealed from the ruling imposing the medical improvement standard. Plaintiffs cross-appealed the denial of their motion for class certification and an injunction.

The Second Circuit reversed the district court and rejected the medical improvement standard. The court held that the "grandfather" provision of the disability law only grandfathered into law the former state criteria for disability, not the disabling condition itself. Thus, the Second Circuit ruled that grandfatherees could be terminated from the disability rolls if their current condition did not qualify as disabling either under their former state plan or, if more lenient than the state's plan, under the current Federal criteria.

As to the district court's denial of class certification, the Second Circuit affirmed. The court ruled that plaintiffs could not surmount the threshold barrier -- the filing of a claim -- imposed by the non-waivable jurisdictional requirement of 42 U.S.C. 405(g). The court ruled that the requirement of presenting an administrative claim is not met simply by a recipient's response to a disability questionnaire. Since there was no allegation that the unnamed plaintiffs had done more than respond to the questionnaires, the court affirmed the denial of class certification.

Finally, the court ruled on the question of whether plaintiffs who prevailed at the administrative level could maintain this action. In reversing the district court, the Second Circuit held that plaintiffs who prevailed at the administrative level, either before filing their complaint in district court or even as late as before seeking class certification, must have their causes of action dismissed as moot.

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

Howard S. Scher (Civil Division)
FTS (633-4820)

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

County of Missoula v. Johnson, No. 82-3088 (9th Cir. Aug. 8, 1983). D.J. # 90-1-4-2341.

DENIAL OF PRELIMINARY INJUNCTION SUSTAINED.

This was an appeal from the denial of a motion for preliminary injunction brought by several counties and individuals in Montana. Plaintiffs sought to prevent the construction by the Bonneville Power Administration of electrical transmission lines from generating plants being built at Colstrip, Montana, by a consortium of utilities, across Montana to join with the exising BPA transmission system at Spokane, Washington. The Ninth Circuit affirmed the district court's denial of the injunction. Initially, the court held that the district court had applied the appropriate legal standard to the review of the request for an injunction. It rejected appellants' claim that the district court erred in exercising its equitable discretion where a violation of Federal law had occurred. However, the basis for this conclusion was that appellants had failed to show that any violation of Federal law had occurred. The court did not address the Government's claim that, under Romero-Barcelo, the court must apply equitable considerations even where a violation of Federal law has occurred. Instead, the court held that this case did not present the exceptional circumstances present in prior cases supporting the appellants contention in this regard. The court also found that appellants had failed to show a likelihood of success on the merits.

Finally, the court generally affirmed the district court's balancing of the hardships in favor of defendants. It held that the district court had not clearly erred in finding that delay of the project would create a possible power shortage and cost consumers a great deal of money.

Attorneys: Janet L. Steckel (Land and Natural Resources Division) FTS (633-2956)

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

Oregon Environmental Council v. Kunzman, No. 82-3232 (9th Cir. Aug. 30, 1983). D.J. # 90-1-4-2447.

NEPA; EIS ON USE OF PESTICIDE INADEQUATE.

The State of Oregon proposed to spray carabaryl over a 6,400-acre area in South Salem, Oregon, to combat gypsy moth infestation. The spraying was to be from airplanes. Funds for the spraying were made available by the Federal Government. Plaintiffs claimed that this aerial application of the pesticide would violate the conditions for use set forth on the label, and this would constitute a violation of the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), and would jeopardize the health of the residents of the area. The United States and the State of Oregon contended that the fact that the pesticide was registered under FIFRA indicated that it was safe for use, that the pesticide was being used in accordance with the instructions on the label, that the environmental impact statement was adequate, and that in any event, FIFRA precluded the maintenance of the lawsuit (since FIFRA contemplated that any challenge to the use of a registered pesticide would be by way of one proceeding challenging its registation, and not by way of a multiplicity of separate actions challenging its use in individual cases). The district court held that the use of the pesticide did not violate FIFRA, and that the environmental impact statement was adequate. The court of appeals agreed that the pesticide was not used in a way which violated FIFRA, but held that the environmental impact statement was inadequate, since it did not address in sufficient detail the effects of the spraying upon the specific area involved. The court stated that in view of its conclusion that FIFRA was complied with, it need not address the question whether Congress has foreclosed the bringing of suits based upon FIFRA. The court rejected the Federal Government's contention that the licensing of a pesticide under FIFRA reflects a conclusion that the pesticide is safe for use, if used as stipulated on the label, and in directing that a "more specific and appropriate" environmental impact statement be prepared, the court observed that "one agency cannot rely on another's examination of environmental effects under NEPA."

Attorneys: Martin Green (Land and Natural Resources Division) FTS (633-2813)

Peter R. Steenland, Jr. (Land and Natural Resources Division) FTS (633-2748)

Davis v. United States, No. 82-1423 (4th Cir. Sept. 14, 1983).

CLEAN WATER ACT NOT ENFORCEABLE BY SUIT UNDER FEDERAL TORT CLAIMS ACT.

This was an appeal from the dismissal of Davis' claim for damages in the district court. Davis had brought an action for damages against the Air Force under the Federal Tort Claims Act. The basis for Davis' claim was that sewage discharges from Langley Air Force Base into the Back River in Virginia violated the Clean Water Act and caused the closing of the river, damaging Davis seafood business. Davis had previously sued the Air Force under the citizen suit provision of the Clean Water Act. In that case, a consent decree was entered dismissing the action based on the Air Force's efforts to bring Langley into compliance with the Clean Water Act. The Fourth Circuit affirmed the district court's dismissal of Davis' action for damages. It held that, under Middlesex County, Davis could not seek to enforce the Clean Water Act through an action under the Tort Claims Act. The court noted that Davis' sole cause of action under the Tort Claims Act was its claim that the Air Force had violated the Clean Water Act. Therefore, Davis had failed to state a cause of action under the Tort Claims Act, which allows such actions to be based only on negligence or wrongful conduct by the government.

Attorneys: Janet L. Steckel (Land and Natural Resources Division) FTS (633-2956)

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

Mobil Oil Corporation v. United States Environmental Protection Agency, No. 83-1047 (7th Cir. Sept. 14, 1983). D.J. # 1-10-03.

SECTION 308 OF THE CLEAN WATER ACT ALLOWS EPA TO TAKE SAMPLES FROM INTERNAL WASTE STREAMS.

Section 308(a) of the Clean Water Act, provides, among other things, that the Administrator or his authorized representative may "sample any effluents which the owner and operator of such source are required to sample * * *." Mobil operates a refinery near Joliet, Illinois, from which it discharges wastewaters into the Des Plaines River pursuant to a NPDES permit which requires it to sample its wastewaters prior to discharge. EPA inspectors arrived at Mobil's facility and requested to

take samples of Mobil's untreated or partially treated wastewaters at various locations within the facility. Mobil declined to allow the inspectors to sample anything except the final treated effluent. EPA then obtained a warrant from a magistrate which authorized it to take samples from Mobil's internal wastestreams. The district court sustained issuance of the warrant and Mobil appealed.

The court of appeals rejected Mobil's argument that Section 308 only authorizes EPA to sample wastewaters after final treatment and immediately prior to discharge into the navigable waters. The court noted that Section 308 was broadly formed so as to enable EPA to obtain the data and information needed to carry out the purposes of the Act. The court then observed that the information which the agency had attempted to obtain from sampling the internal wastestreams was essential to EPA's duties, while, on the other hand, the sampling occasioned only a most limited intrusion upon Mobil's legitimate interests. The court concluded that Section 308 authorizes EPA, upon issuance of a warrant, to sample the internal wastestreams of point sources.

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

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

United States v. Brandt, No. 82-5436 (6th Cir. Sept. 15, 1983) D.J. # 90-8-3-5.

REGULATIONS PROMULGATED UNDER MIGRATORY BIRD TREATY ACT SUSTAINED.

Defendants were cited for violations of regulations promulgated pursuant to the Migratory Bird Treaty Act, 16 U.S.C. 703 et seq., which regulation prohibited the hunting of migratory birds over a baited area, except in situations where seed or feed "has been distributed or scattered as the result of bona fide agricultural operations or procedures * * *." Defendants alleged that the regulation was unconstitutionally vague but the district court upheld its validity. The court of appeals affirmed. The court first stated that the purpose of the regulation was to prohibit persons from deliberately attempting to lure birds for hunting. The court then recognized that a visiting hunter might not be aware that a field was baited by a landowner. The court found, however, that scienter was not an element of the offense and that a subjectively "innocent"

person could be validly convicted. The court concluded that a hunter "must determine the intent of the individual who seeded the area before undertaking the hunt and, if he errs in that determination, he is criminally responsible."

Attorneys: Sidney J. Blackmen (Land and Natural Resources Division) FTS (724-7355)

Donald A. Carr (Land and Natural Resources Division) FTS (724-7353)

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

Commonwealth of Massachusetts v. Watt, No. 83-1258 (1st Cir. Sept. 16, 1983). D.J. # 90-1-4-2565.

EIS ON SALE 52 HELD INADEQUATE.

The First Circuit affirmed a preliminary injunction against OCS Lease Sale 52 in the North Atlantic. The district court had enjoined the sale on the grounds that NEPA, CZMA, the Endangered Species Act, and the OCSLA had probably been violated. The court of appeals affirmed solely on the NEPA ground reasoning that Interior's decision not to file a supplemental EIS was unreasonable when the oil and gas resource estimates for the sale area had changed drastically. The court also ruled that a preliminary injunction based upon a NEPA violation was an appropriate balancing of the equities because the purposes of NEPA could not be vindicated by a post-sale cure. The court expressed no opinion concerning the other statutory violations found by the district court but directed the trial court to "consider the issues anew" if the merits of the case are heard.

Attorneys: Anne S. Almy (Land and Natural Resources Division) FTS (633-4427)

Peter R. Steenland, Jr. (Land and Natural Resources Division) FTS (633-2748)

Huerfano-Pinon Coalition, Inc. v. Marsh, No. 82-1517 (10th Cir. Aug. 19, 1983). D.J. # 90-1-5-2123.

CONDEMNATION; AUTHORITY OF SECRETARY OF THE ARMY TO ACQUIRE LAND FOR ADDITION TO FORT CARSON SUSTAINED.

In this appeal, plaintiff Coalition challenged the constitutionality of 10 U.S.C. 2663, whereby the Secretary of a military department may have proceedings brought in the name of the United States to acquire by condemnation any interest in land needed for the site, construction, or operation of military training camps. In 1977, officials of the Department of the Army determined that additional land was needed for military training purposes at Fort Carson, Colorado. The Secretary of the Army had recommended to Congress that 244,000 acres be acquired in the Pinon Canyon area. The Coalition asserted that (1) the delegation to the Secretary, set forth in 10 U.S.C. 2663, and the standards governing his selection of land were unconstitutional; (2) condemnation of the Coalition's land deprived its members of their constitutionally protected interests under the Fourth, Fifth and Fourteenth Amendments; (3) 10 U.S.C. 2663 is unconstitutionally vague and lacking in guidelines or standards. The court of appeals affirmed the district court's determination that the statute is constitutional finding no merit whatever to the Coalition's claims.

Attorneys: Robert N. Miller (United States Attorney, D. Colo.) FTS (327-2081)

Arthur E. Gowran (Land and Natural Resources Division) FTS (633-2754)

Celeste C. Grynberg v. Watt, No. 81-1315 (10th Cir. Sept. 21, 1983). D.J. # 90-1-18-1526.

OIL AND GAS LEASING PROGRAM; TRUSTEES' VIOLATION OF MULTIPLE-FILING REGULATIONS WARRANTED REJECTION OF LEASE OFFERS.

This appeal involved review of a favorable Colorado district court judgment, wherein summary judgment was granted to the Department of the Interior's Bureau of Land Management (BLM). Drawing entry cards had been filed in an oil and gas lease drawing by three child support trusts, managed by co-trustees one of whom was the children's mother, and by the

parents individually. One trust received first priority in the drawing. The BLM and the Interior Board of Land Appeals (IBLA) rejected all lease offerings as violative of the regulatory prohibitation against multiple filings. The district court upheld the BLM and IBLA.

The court of appeals affirmed and determined that the trustees were competing with the trusts in the drawing. They breached their fiduciary duty to the trust, the court stated, because they entered into competition with the interests of the beneficiary. The successful trust in the drawing received an increased probability of obtaining a lease in violation of the regulatory prohibition against multiple filings.

Attorneys: Arthur E. Gowran (Land and Natural Resources Division) FTS (633-2754)

Kathryn A. Oberly (Land and Natural Resources Division) FTS (633-4063)

June Oil and Gas, Inc. v. Watt, No. 81-1178 (10th Cir. Sept. 23, 1983). D.J. # 90-1-1-2617.

OIL AND GAS LEASING PROGRAM; WHERE CORPORATE OFFERS BREACH FIDUCIARY DUTIES BY FILING OFFERS ON BEHALF OF OTHER CORPORATIONS, INTERIOR CAN REJECT OFFERS.

This appeal involved review of a favorable Colorado district court judgment, wherein summary judgment was granted to the Department of the Interior's Bureau of Land Management (BLM). Two corporations had filed drawing entry cards in identical and simultaneous oil and gas lease drawings on two parcels of land located in Colorado. Each of the companies sought to obtain oil and gas leases on the lands. The directors in each of the two corporations had authority to file offers and execute leases on behalf of the other corporation. The two corporations had similar articles of incorportion, maintained the same business address, and shared business facilities and personnel.

The court of appeals affirmed the IBLA and district court decisions, holding that the corporate officers were fiduciaries in each other's corporation. Corporate officers,

the court stated, breach their fiduciary duty to a corporation when they file lease offers on behalf of other corporations.

Attorneys: Arthur E. Gowran (Land and Natural Resources Division) FTS (633-2754)

Kathryn A. Oberly (Land and Natural Resources Division) FTS (633-4063)

Conway v. Watt, No. 82-2025 (10th Cir. Sept. 21, 1983). D.J. # 90-1-18-3420.

FAILURE TO DATE CARD INSUFFICIENT GRANT TO INVALIDATE OIL AND GAS LEASE OFFER.

Rejection of a simultaneous oil and gas drawing card because it was undated was held to be arbitrary and capricious and inconsistent with congressional intent. The court doubted that Congress would condone the Secretary's decision not to award a lease simply because of the inadvertent omission of the date. The court reasoned that the justification for the per se rule -- preventing fraud -- was not relevant because there was no evidence of fraud in this case. (Conway submitted 147 cards on the same day. All cards, except the one chosen, were dated.) The court asserted that the courts have typically held that absence of a date is a trival defect and non-substantive errors are inappropriate grounds for finding cards defective. Rehearing is being considered.

Attorneys: Ellen J. Durkee (Land and Natural Resources Division) FTS (633-3888)

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

United States v. 101.80 Acres in Idaho County, Id. (Schwartz); United States v. 35.54 Acres in Idaho County, Id. (Hazelbaker), Nos. 82-3044 and 82-3046 (9th Cir. Sept. 23, 1983). D.J. # 33-13-509.

EQUAL ACCESS TO JUSTICE ACT APPLIES TO CONDEMNATION.

Reversing the district court in these consolidated cases, the Ninth Circuit followed the Fifth Circuit's en banc decision

in U.S. v. 329.73 Acres of Land, 704 F.2d 800 (1983), and held that condemnees in eminent domain proceeding are "prevailing parties" where the Government's ability to take was not actively litigated and the awards of just compensation substantially exceeded the amounts deposited by the Government. Accordingly, the condemnees are entitled to an award of costs, fees, and expenses under 28 U.S.C. 2412, as amended by the Equal Access to Justice Act.

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

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

Avoyelles Sportsmen's League v. Marsh, Nos. 79-2653 and 82-3231, (5th Cir. Sept. 26, 1983). D.J. # 62-33-69.

CLEAN WATER ACT; PRIVATE LANDOWNERS' DISCHARGED MATERIAL WAS "TILL MATERIAL" REQUIRING A PERMIT UNDER SECTION 404.

This case was brought by environmental groups pursuant to the Clean Water Act, against the Corps of Engineers, the EPA, and private landowners. The district court enjoined the clearing of certain privately-owned lands in the absence of a permit from the Corps of Engineers under Section 404 of the Act. The injunction was based on the court's determination that the lands in question were largely wetlands, expanding somewhat the extent of the wetlands as determined by the EPA. The district court likewise found that the activities taking place constituted a discharge of pollutant, within the meaning of the Act.

The court of appeals issued a long opinion, holding that the district court erred in substituting its own wetlands determination for the EPA's determination, that the EPA's wetland determination was not arbitrary and capricious, and that the private landowners' land clearing activities could not be carried on without a dredge-and-fill permit from the Corps of Engineers. In the latter conclusion, the appeals court determined that the discharged material was "fill material" and therefore required a permit under Section 404 of the Act. It declined to decide whether the removal of vegetation, without discharge, comes within the scope of the Act.

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

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

Zuckerman v. Watt, No. 81-1323 (10th Cir. Oct. 6, 1983). D.J. # 90-1-18-3044.

OIL AND GAS LEASING; FAILURE TO SIGN DEC NOT FATAL TO FILING.

Plaintiffs filed several simultaneous oil and gas drawing entry cards with the BLM offices. The DECs of Zuckerman were drawn with first priority for three parcels.

Each of the plaintiffs' first-drawn DECs was signed and otherwise complete except for omission of a date next to the signature box on the card. On the basis of this omission, various local offices of the BLM rejected plaintiffs' lease offers because their DECs were not "fully executed." This decision was affirmed by the IBLA and the district court. On plaintiffs' appeal, the Tenth Circuit reversed, consistent with its decision in Conway v. Watt, stating that the drawing program ought not to be a search for the slightest error whereby the first contestant is frequently eliminated, and the absence of a date should not render this DEC per se defective.

Attorney: Edward J. Shawaker (Land and Natural Resources Division) FTS (633-5993)

United States of America and the Confederated Tribes and Bands of the Yakima Indian Nation, et al. v. States of Washington and Oregon, No. 82-3556 (9th Cir. Oct. 12, 1983). D.J. # 90-2-0-642.

MOOTNESS; INDIAN FISHING DISPUTE CAPABLE OF REPETITION, YET EVADING REVIEW.

This decision is the latest in the ongoing dispute between four Indian tribes and the States of Washington, and Oregon as to fishing rights in the Columbia River. (see Sohappy v. Smith, 302 F. Supp. 899 (D. Ore. 1969) ("Belloni decision")). In this cross-appeal, the Ninth Circuit held the appeal was not moot even though the run in question was long over under the "capable of repetition, yet evading review" doctrine. On

the merits, the court rejected both the positions of the States (limitations on Indian fishing rights are permissible when necessary to enhance the population of wild salmon ("brights")) and the Tribes (limitations are permissible only when the brights are deemed an endangered species). The court of appeals, in acknowledging the "substantial latitude" of the district court in its oversight posture, held that "the court must accord primacy to the geographical aspect of the treaty rights and invoke only such limits as required by the 'comfortable margin' that sound conservation practices dictate."

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

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

Schwenke v. Secretary of the Interior, Nos. 82-3132 and 82-3175 (9th Cir. Oct. 14, 1983). D.J. # 90-1-12-479.

EXECUTIVE ORDER ESTABLISHES WILDLIFE PRESERVATION OVER LIVESTOCK GRAZING WITHIN CHARLES M. RUSSELL NATIONAL WILDLIFE REFUGE.

Plaintiffs, ranchers holding grazing permits on the Charles M. Russell National Wildlife Refuge (CMR) in Montana, sued the Secretary, claiming that (1) livestock grazing is entitled to equal priority with wildlife preservation on CMR and (2) such grazing should be administered under the Taylor Grazing Act (TGA), 43 U.S.C. 315, not under the National Refuge System Administration Act (Refuge Act), 16 U.S.C. 668dd-ee. The district court (Judge Battin, D. Mont.) ordered that CMR be so administered. The Ninth Circuit vacated the district court's decision. The court of appeals held that: (1) Executive Order 7509, issued in 1936, establishes a priority for wildlife over livestock in access to CMR forage resources. The wildlife entitled to this priority is defined in E.O. 7509 as a maximum of 400,000 sharptail grouse, 1,500 antelope, and that number of secondary nonpredatory species reasonably necessary to maintain a balanced wildlife population. Beyond those limits, the court held, wildlife and livestock have equal priority in access to CMR forage; (2) Pub. L. No. 94-223, which amended the Refuge Act in 1976, did not revoke the priority scheme for access to CMR resources established by E.O. 7509; and (3) Pub. L. No. 94-223 transferred control of grazing on CMR from the Bureau of Land Management to the Fish and Wildlife Service. The decision could

affect the administration of at least three other "game ranges" in the National Wildlife Refuge System (besides CMR) where livestock grazing is permitted.

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

Martin W. Matzen (Land and Natural Resources Division) FTS (633-4426)

United States v. 30.16 Acres (Brunswick County, North Carolina), No. 82-1648 (4th Cir. Oct. 20, 1983). D.J. # 33-34-479-1.

PROJECT'S AUTHORIZATION UNIMPAIRED EVEN THOUGH WHEN CONSTRUCTION BEGAN COSTS EXCEEDED "ESTIMATED FEDERAL FIRST COST."

A Corps of Engineers dredging project was approved by relevant committees of the House and Senate in 1972 under a statute which authorizes such committee approval for projects which have an "estimated Federal first cost" of less than $15 million. By the time construction began in 1980 the estimated project cost had risen above $15 million. The condemnees claimed that the original authorization was therefore without effect. The court of appeals rejected this argument in an unpublished opinion. The court held that only the estimated cost at the time of approval need be under the limit, since a contrary reading would lead to disruption of ongoing projects, and since Congress can control cost over-runs through the appropriations process. The court also rejected an argument that Brunswick County lacked authority to enter into a cooperative agreement with the Corps. The court ruled that North Carolina law did not require the County to submit the agreement to the electorate for approval. Finally, the court ruled that the district court had not abused its discretion in refusing to set aside the jury verdict on just compensation. The court rejected the landowner's argument that the jury must adopt the estimate of either the government's or the landowner's expert where those estimates are based on different assumptions regarding access, rather than a figure falling between the two estimates.

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

Anne S. Almy (Land and Natural Resources Division) FTS (633-4427)

FEDERAL RULES OF EVIDENCE

Rule 403.	Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion or Waste of Time.
Rule 804(b)(1).	Hearsay Exceptions; Declarant Unavailable; Hearsay Exceptions. Former Testimony.

Before Defendants' retrial for conspiracy to possess marijuana with intent to distribute, the Government's key witness was killed. The Government sought to introduce his prior testimony under Rule 804(b)(1). Defendants objected, alleging that cross-examination of the witness at the first trial was limited by the trial judge and arguing further that the testimony should be excluded under Rule 403 as defendants would be unfairly prejudiced since the testimony could not be effectively impeached. The district court held that the testimony was admissible under Rule 804(b)(1) but excluded it under Rule 403.

The court agreed that the testimony met the two step inquiry necessary for admissibility under Rule 804(b)(1): the witness was unavailable and the opportunity to cross-examine had been "adequate" or "meaningful." The prior cross-examination need not have been unbounded.

While Rule 403 may be used to exclude any admissible evidence, the court determined that the trial judge abused his discretion in this instance. The Rule's exclusionary remedy should be used sparingly. Evidence should be excluded only when unfair prejudice substantially outweighs the probative value. Since the Government had no case without the prior testimony of this witness, the probative value was as high as it possibly could have been, while the danger of unfair prejudice was de minimis.

(Reversed and remanded.)

United States v. King, 713 F.2d 627 (11th Cir. August 29, 1983).

FEDERAL RULES OF EVIDENCE

Rule 804(b)(1). Hearsay Exceptions; Declarant Unavailable; Hearsay Exceptions. Former Testimony.

See Rule 403, this issue of the Bulletin for syllabus.

United States v. King, 713 F.2d 627 (11th Cir. August 29, 1983).

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Ethics Standards for Department of Justice Employees

The following outline is intended as a summary reference to ethics and professional standards that apply to Department of Justice employees in a variety of situations. The outline is not exhaustive, and should not be used by employees as an exclusive guide in making decisions about their professional conduct or as a substitute for reading the relevant statutes and regulations.

I. PRINCIPAL SOURCES OF GOVERNING LAW

A. Federal Statutes

1. Bribery and Conflict of Interest - 18 U.S.C. §§ 201-209.

2. Disclosure of Information - 5 U.S.C. §§ 552, 552a; 18 U.S.C. §§ 798, 1905; 5 U.S.C § 783.

Some of the restrictions set forth in this memorandum do not apply to certain short-term or part-time employees who are designated "special government employees." Special government employees should contact their Deputy DAEOs to determine whether any particular rule described in this memorandum or a more relaxed standard will apply to them in any given case.

3. Political Activities - 5 U.S.C. § 7324, 18 U.S.C. §§ 601-603.

4. Financial Disclosure - 5 U.S.C. App. §§ 201-211.

B. Federal Regulations and Executive Orders

1. Department of Justice Standards of Conduct - 28 C.F.R. Part 45.

2. Disclosure of Information - 28 C.F.R. Part 16.

3. Political Activities - 5 C.F.R. Part 733.

4. Financial Disclosure - 5 C.F.R. Part 734 and 28 C.F.R. § 45.735-22.

5. Post-Employment Restrictions - 5 C.F.R. Part 737.

6. Executive Order 11222 - Prescribing Standards of Ethical Conduct for Government Officers and Employees, 30 Fed. Reg. 6469 (1965).

C. Department of Justice Policy Statements

1. The most comprehensive collection of Departmental policy statements can be found in the United States Attorneys' Manual.

2. Various other policy statements are published at 28 C.F.R. Part 50.

3. DOJ Orders on specific subjects can be obtained through the Library.

D. Codes of Professional Responsibility

1. The American Bar Association Model Code has been incorporated by reference into the Department's Standards of Conduct. See 28 C.F.R. § 45.735-1.

2. State Codes are frequently incorporated by reference into the rules of procedure of federal courts.

3. Employees should consult with the Department, pursuant to Section IV, infra, whenever a provision of a Code of Professional Responsibility appears to conflict with their responsibilities as federal employees.

II. AREAS SUBJECT TO REGULATION

A. Acceptance of Things of Value from Outside Sources

1. 18 U.S.C. § 201 - Prohibits the acceptance of anything of value a) with the intent to influence an official act or b) for or because of an official act.

2. 18 U.S.C. § 203 - Prohibits the acceptance or sharing of fees derived from a matter involving the federal government when the fee is based on any person's representation before a Department or agency during the period of the employee's government service.

3. 18 U.S.C. § 209 - Prohibits the acceptance of any salary or supplementation of salary for services rendered to the government. The section permits the acceptance of some types of payments from a former employer (such as bona fide severance and retirement payments), but other payments (such as moving expenses) are prohibited. The section has been read to prohibit the acceptance of anything of value offered because of one's government position, such as below-market-rate loans, moving expenses, and free vacations.

4. Gifts

a) 28 C.F.R. § 45.735-14 - Employees may not solicit or accept gifts or other things of value, for themselves or others, from persons or entities that have business with the Department of Justice. The regulation contains exceptions governing 1) gifts from

friends and family, 2) certain food and refreshments, 3) loans from banks, and 4) unsolicited advertising or promotional material.

b) 5 U.S.C. § 7342 - Contains rules governing the acceptance of gifts from foreign governments. See also 28 C.F.R. § 45.735-14(d).

c) 5 U.S.C. § 7351 and 5 C.F.R. § 735.202(d) - Prohibit the acceptance of gifts from subordinates except on certain specified occasions.

5. 5 U.S.C. App. § 210 - Places an annual limit on outside earned income for Presidential appointees of 15% of their federal salaries.

6. 28 C.F.R. § 45.735-12(a) - Prohibits the acceptance of an honorarium for any speech or appearance that is part of an employee's official duties.

7. 2 U.S.C. § 44li - Prohibits the acceptance of honoraria (for non-official speeches or appearances) beyond $25,000 per year and/or $2,000 per event.

8. 28 C.F.R. § 45.735-14a(d) - Permits the acceptance of awards from certain types of organizations, but employees should consult with their Deputy DAEOs before accepting awards that have any relationship to their government employment.

B. Representational Activities

1. 18 U.S.C. § 205 - Prohibits employees from representing any other person or business before any court or agency of the federal government in any matter in which the Federal or District of Columbia government is a party or has an interest. There are exceptions for certain personnel administration, family, and personal matters.

2. 28 C.F.R. § 45.735-9 - Prohibits the private practice of law and other outside professional practice by employees. Teaching is not considered outside professional practice, see Section IIE(2), infra. There are exceptions for certain pro bono activities, and the representation of certain close relatives. Other exceptions may be granted by the Deputy Attorney General.

C. Financial Interests

1. 5 U.S.C. App. §§ 201-211 - Requires the filing of public financial disclosure reports by employees paid at the level of a GS-16 or above.

2. 18 U.S.C. § 208 - Prohibits employees from taking any action in a governmental matter that involves or affects a financial interest of themselves, their spouses, minor children, partners, private employers, persons or organizations with whom they are negotiating or have any arrangement concerning prospective employment, or entities in which they serve in a fiduciary capacity. The prohibition applies no matter how small the interest may be, but in cases of insubstantial interests, waivers of the prohibition may be granted by the Deputy Attorney General. See 28 C.F.R. § 45.735-5.

3. 28 C.F.R. § 45.735-11 - Prohibits investments that conflict with an employee's official responsibilities or that are made on the basis of inside information. See also 28 C.F.R. § 45.735-10.

D. Use of Government Property

1. 28 C.F.R. § 45.735-16 - Permits the use of federal property for officially approved purposes only. This regulation is read to prohibit the use of almost any federal property or personnel for personal purposes (e.g. the use of

FTS telephones or the services of support staff). See also 18 U.S.C. § 641 (theft of government property). There are also more specific statutes governing the personal use of government vehicles, 31 U.S.C. § 1344, and the franking privilege, 18 U.S.C. § 1719.

2. DOJ Order No. 2710.8 - Deals with the removal of "official records" by Department employees. While the definition of "official records" is broad, it does not include copies of records. Accordingly, copies of records (e.g. in a personal chronological file) may be removed by an employee so long as they do not contain classified information, other statutorily protected information or other information that could reveal or prejudice the interests of the United States in litigation. See also ABA Code, Canon 4.

E. Fundraising, Speeches, Publications and Teaching

1. 28 C.F.R. § 45.735-12(d) - Generally prohibits participation in fundraising activities if the employee's position in the Department is a significant element of the event or the invitation. Fundraising for charitable organizations (i.e. organizations exempt from taxation pursuant to 26 U.S.C. § 501(c)(3)) is permitted. Political fundraising is discussed in IIG, infra.

2. Generally the Department encourages employees to engage in speeches, lectures, publications and teaching so long as the activity (1) does not interfere with an employee's official responsibilities and (2) meets the criteria set forth in 28 C.F.R. § 45.735-12. These criteria can be summarized as follows:

a) No fees may be accepted if the activitiy is part of the employee's official duties.

b) No compensation may be accepted if the subject matter is devoted substantially to the activities or positions of this Department. But see IIF, infra (governing the acceptance of travel reimbursement).

c) Non-public information may not be used without the permission of the Deputy Attorney General.

When an honorarium is not precluded by a) or b) above, it may be accepted within the confines of IIA(5-7), supra.

3. Persons with access to Sensitive Compartmented Information (SCI) are required to sign a specific agreement accepting additional obligations relating to publications, speeches or lectures.

5. 18 U.S.C. § 798 and 50 U.S.C. § 783 - Contain rules governing the disclosure of classified information.

6. 18 U.S.C. § 1905 - Contains restrictions on the use of certain confidential information such as trade secrets.

7. 5 U.S.C. § 552a - Sets forth restrictions on the use of information about individuals when such information is contained in a system of records. See also 28 C.F.R. § 16.40 et seq.

8. 28 C.F.R. § 50.2 - Sets forth the Department's policy concerning statements to the press on matters in litigation. See also ABA Code of Professional Responsibility, DR 7-107 (Trial Publicity).

9. 28 C.F.R. §§ 16.21-22 - Sets forth rules governing the response to subpoenas and other demands for Department of Justice information.

F. Travel - 28 U.S.C. § 45.735-14a

1. Official travel must be paid for by the Government (which in most cases will mean by the Justice Department). There is an exception to this rule that permits charitable organizations (i.e. those that are tax exempt under 26 U.S.C. § 501(c)(3)) to pay for travel to training sessions or meetings. See 5 U.S.C. § 4111 and 5 C.F.R. § 410.702. Bar associations are seldom tax exempt pursuant to § 501(c)(3), and accordingly may not reimburse employee expenses for official travel. Official travel in private conveyances must be reimbursed by the Department pursuant to the Department's travel regulations. DOJ Order No. 2200.1.

2. Non-official travel may be reimbursed by outside sources so long as it does not otherwise create a conflict of interest. See IIA, supra.

3. Whether travel is official or non-official is essentially a question of judgment, which in close cases should be exercised in conjunction with your immediate supervisor or Deputy DAEO.

4. On certain limited occasions, the Department's travel regulation permits employees to accept travel reimbursement from certain types of organizations for the expenses of an accompanying spouse. § 45.735-14a(e). This regulation is presently under review and reconsideration by the Department and the Office of Government Ethics. For this reason, employees should consult with their Deputy DAEOs before accepting spousal expenses pursuant to this regulation.

G. Political Activities

1. Hatch Act, 5 U.S.C. § 7324(d) - Prohibits taking an active part in partisan political management or campaigns.

Prohibited conduct includes stuffing envelopes, working at a phone bank, canvassing or holding a position in a partisan political organization. See generally 5 C.F.R. § 733.121 for a list of prohibited conduct. Permissible activities include voting, making contributions (but see limitations below), being a member of a political organization and attending events. See generally 5 C.F.R. § 733.111. In many of the local jurisdictions in the D.C. area, employees may actively participate in partisan elections, so long as they do so as, or on behalf of, an independent candidate. See 5 C.F.R. § 733.124. There are other exemptions to the Hatch Act for certain types of employees (e.g. most Presidential appointees), but the Attorney General has directed that all DOJ employees should conduct themselves as if they fall within the purview of the Hatch Act. See Memorandum from the Attorney General to all Offices, Boards, Divisions and Bureaus, July 9, 1982.

2. 18 U.S.C. §§ 600 and 601 - Make it illegal to promise to give, to deny or to threaten to deny federal employment or other federal benefits on the basis of a person's political contributions or lack thereof.

3. 18 U.S.C. § 602 - Prohibits one federal employee from soliciting a political contribution from another employee.

4. 18 U.S.C. § 603 - Prohibits employees from making political contributions to their employer or employing authority.

H. Leaving Government Service

1. 18 U.S.C. § 208 - Prohibits taking official action on any matter that involves the financial interests of any

party with whom the employee is negotiating, or has an arrangement concerning, prospective employment.

2. 18 U.S.C. § 207

a) Subsection (a) prohibits all employees from ever acting as agent or attorney for anyone (other than the U.S.) in any particular matters in which they participated personally and substantially while in government.

b) Subsection (b) prohibits all employees for a period of two years from acting as agent or attorney for anyone (other than the U.S.) in any particular matters that were under their official responsibilities during their last year of government service.

c) Subsection (c) prohibits certain senior level employees from having any business contact with the Justice Department or certain of its component offices, boards, divisions or bureaus for a period of one year after they leave government service. Generally employees below the level of Deputy Assistant Attorney General are not covered by this restriction, but all emloyees are encouraged to consult with their Deputy DAEOs for post-employment advice at the time that they decide to leave government service. At that time they can be advised concerning whether, and to what extent, Section 207(c) will restrict their contacts with the Department.

3. ABA and State Codes of Professional Responsibility

a) DR 5-104(D) - Imputes to an entire law firm any disqualification of a single lawyer that is required by the Code. This imputed disqualification can be lifted in the case of former government employees upon adequate screening of the disqualified lawyer and waiver by the government.

b) DR 9-101(B) - Prohibits virtually the same conduct as 18 U.S.C. § 207(a). See IIH(2)(a), supra.

c) Canon 4 - Requires lawyers to keep the confidences and secrets of their clients (including the United States Government).

4. See IID, supra, concerning the removal of government papers and files.

I. Miscellaneous Provisions

1. Nepotism, 5 U.S.C. § 3110 - Prohibits employees from appointing or recommending certain relatives to positions in the employee's own department or agency.

2. Lobbying, 18 U.S.C. § 1913 - Places restrictions on the use of appropriated funds (including personnel paid with such funds) to "lobby" Congress. The prohibition is generally read to prohibit only grass roots lobbying such as urging citizens or private groups to contact their Representatives or Senators about a particular issue.

3. Merit System Abuses, 5 U.S.C. §§ 2301-2302 - Prohibit certain personnel practices including, but not limited to, discrimination in employment on the basis of race, color, religion, sex, national origin, age, handicapping condition, marital status or political affiliation.

4. Foreign Agents, 18 U.S.C. § 219 - As a general matter, employees may not act as agents of foreign principals within the meaning of the Foreign Agents Registration Act of 1938, as amended.

III. REPORTING MISCONDUCT

A. Crimes, 28 U.S.C. § 535 - Federal employees are required to report to the Attorney General potential violations of the federal criminal laws by other federal employees. Within this Department, referrals of potential criminal matters involving federal employees should be made to the Criminal Division, Public Integrity Section. It is particularly important that referrals of matters concerning officials covered by the Special Prosecutor Act, 28 U.S.C. § 591 et seq., be made promptly because of the investigative time limits imposed by that Act.

B. Misconduct by Department of Justice Employees - Allegations of misconduct by Department employees may be sent to the Office of Professional Responsibility. See generally 28 C.F.R. § 0.39a. Allegations of criminal misconduct may also be referred to the Public Integrity Section of the Criminal Division.

IV. SOURCES OF ADVICE

1. The most direct and available source of advice for Department employees on matters of ethics or professional conduct is their Deputy DAEOs.

2. The Administrative Counsel, Justice Management Division is available to consult on ethics matters with any Deputy DAEO or with Department officials for whom no Deputy DAEO is available.

3. The Office of Legal Counsel also is available to consult on legal questions that cannot be resolved elsewhere in the Department.

4. The Office of Government Ethics is available to give ethics advice to this Department, but employees should first consult with their Deputy DAEOs, the Administrative Counsel or the Office of Legal Counsel before contacting the Office of Government Ethics.

3. Hatch Act Advice may be obtained from a Deputy DAEO or from the Special Counsel to the Merit Systems Protection Board. 653-7143.

5. Advice about prohibited personnel practices may be obtained from the Special Counsel to the Merit Systems Protection Board. 653-8968.

6. Department of Justice lawyers should not submit professional ethics questions to their local bar counsel without first consulting with the Office of Legal Counsel.

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