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COMMENDATIONS

Assistant United States Attorney GARLAND E. BURRELL, Eastern District of California, was commended by Colonel Arthur E. Williams, Corps of Engineers, Department of the Army, for his success in Roath v. United States. This litigation arose out of the construction of the New Melones Dam, and involved comprehending a number of very technical engineering and construction concepts.

Assistant United States Attorney MIRIAM W. DUKE, Middle District of Georgia, was commended by Mr. Lawrence K. York, Special Agent in Charge, Federal Bureau of Investigation, for the successful conspiracy presecution trial of United States v. Charles Luther Kersey, Jr. and Richard Ashley Collins, a case involving the attempted theft of microfilm containing the specifications for the United States Air Force F-5E fighter aircraft.

Assistant United States Attorney J. MICHAEL FITZHUGH, Western District of Arkansas, was commended by Mr. William H. Brown, Jr., Senior Assistant Regional Labor Counsel, United States Postal Service, for a job well done in Young v. United States Postal Service.

Assistant United States Attorney IRA F. GROPPER, Southern District of Florida, was commended by Assistant Attorney General Glenn L. Archer, Jr., for his outstanding service to the Department. Mr. Grooper consistently handled a large number of civil tax cases with unusual skill and success.

Assistant United States Attorney PATRICK M. MCLAUGHLIN, Northern District of Ohio, was commended by Mr. Earl L. Rife, United States Marshal, Northern District of Ohio, for his outstanding support and assistance with 28 U.S.C. 2243 cases.

Assistant United States Attorney FRANCES C. HULIN, Central District of Illinois, was commended by Mr. James B. Zagel, Director, Department of Law Enforcement, State of Illinois, and awarded a Certificate of Appreciation for her efforts and superior performance in a complex narcotic investigation.

United States Attorney PETER K. NUNEZ, Southern District of California, and his staff were commended by Assistant Attorney General Glenn L. Archer, Jr., Tax Division, for the successful prosecution of United States v. Ronald Farnsworth, a case where six individuals were involved in a widespread scheme to market an illegal tax shelter.

Assistant United States Attorney PATRICK K. O'TOOLE, Southern District of California, was commended by Mr. W. K. Barker, Acting State Director, Bureau of Land Management, Department of Interior, for an outstanding job in United States v. Howard Boyer Jones.

Assistant United States Attorney ANN C. ROWLAND, Northern District of Ohio, was commended by Mr. Richard T. Lind, Supervisory Special Agent, Federal Bureau of Investigation, for the successful prosecution of United States v. Sonny Wilcox, a narcotics matter, and for the quality fashion in which she presented the government's case.

Assistant United States Attorney JACK C. WONG, was commended by Assistant Attorney General F. Henry Habicht, II, Land and Natural Resources Division, for his excellent work in United States v. 35.96 Acres of Land. The jury returned a verdict in the exact amount of the government's valuation testimony of $204,000.00, rejecting the land owner's testimony of $546,000.00.

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

CLEARINGHOUSE

Relations With Congress

This office recently requested the Assistant Attorney General for the Office of Legislative Affairs to clarify the policy regarding communications with the Congress. The present policy is stated in the United States Attorneys' Manual, at Titles 1-8.000 and 10-6.310. In response to this request, the Office of Legislative Affairs redrafted Title 1-8.000 to more fully enunciate the policy regarding contacts with members of the Congress. That redraft, which has been reprinted in full as an appendix to this Bulletin, will be incorporated in the United States Attorneys' Manual in the near future. Questions regarding this matter should be directed to Ms. Susan A. Nellor, Assistant Director for Legal Services, at FTS 633-4024.

Attorney General's Advisory Committee Of United States Attorneys

On December 6, 1983, Attorney General William French Smith announced the appointment of the following five new members to the Attorney General's Advisory Committee of United States Attorneys:

Kenneth W. McAllister, Middle District of North Carolina (Greensboro)

John E. Lamp, Eastern District of Washington (Spokane)

James M. Rosenbaum, District of Minnesota (Minneapolis)

Rudolph W. Giuliani, Southern District of New York (New York)

Daniel K. Hedges, Southern District of Texas (Houston)

Other members of the committee are:

Sarah Evans Barker, Southern District of Indiana (Indianapolis)

Richard A. Stacy, District of Wyoming (Cheyenne)

Dan K. Webb, Northern District of Illinois (Chicago)

A. Melvin McDonald, District of Arizona (Phoenix)

John W. Gill, Jr., Eastern District of Tennessee (Knoxville)

Richard S. Cohen, District of Maine (Portland)

Peter K. Nunez, Southern District of California (San Diego)

J. Alan Johnson, Western District of Pennsylvania (Pittsburgh)

Salvatore R. Martoche, Western District of New York (Buffalo)

Joe D. Whitley, Middle District of Georgia (Macon)

Joseph E. diGenova (ex officio), District of Columbia (Washington, D.C.)

The newly elected officers of the Advisory Committee are:

J. Alan Johnson, Chairman

Salvatore R. Martoche, Vice Chairman

Daniel K. Hedges, Secretary

Personnel Changes

Office Of The Attorney General:

On January 23, 1984, the President accepted the resignation of Attorney General William French Smith effective upon the confirmation of his successor. The President intends to nominate Edwin Meese III to be Attorney General. The President also announced his intention to appoint William French Smith, upon his resignation as Attorney General, to the President's Foreign Intelligence Advisory Board.

Office Of The Deputy Attorney General:

On January 24, 1984, Deputy Attorney General Edward C. Schmults submitted his resignation to the President effective February 3, 1984. Mr. Schmults will be going to GTE in Stamford, Connecticut.

United States Attorneys:

Effective January 23, 1984, Jim J. Marquez resigned his position as United States Attorney for the District of Kansas to take another position with the government. As of January 25, 1983, the court has not appointed an interim United States Attorney.

Executive Office for United States Attorneys:

On December 27, 1983, Ms. Grace L. Mastalli joined the Executive Office as an Assistant Director for the Legal Education Institute, Office of Legal Education.

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

POINTS TO REMEMBER

Federal Tort Claims Act--Administrative Claims Against United States Attorneys

Individuals seeking damages under the Federal Tort Claims Act must first file their claim with the agency which is alleged to be responsible for the loss or injury. The agency responsible where the claim involves the acts or omissions of United States Attorneys or Assistant United States Attorneys is the Department of Justice through the Civil Division (28 C.F.R. 0.172(b)). The procedure to be followed upon receipt of a claim (Standard Form 95, entitled "Claim for Damage, Injury, or Death") filed under the Federal Tort Claims Act is to forward the claim directly to the Assistant Attorney General, Civil Division, Attention: Director, Torts Branch. The claim should be accompanied by a background statement prepared by the United States Attorney's office describing all the relevant facts concerning the claim.

Inquiries regarding this procedure may be directed to Ms. Susan A. Nellor, Assistant Director, or Mr. Christopher Taffe, Legal Services Section, at FTS 633-4024.

Internal Revenue Service Criminal Investigation Personnel Appearances At Media Events Announcing Indictments

On October 11, 1983, we advised United States Attorneys' offices by teletype of the Internal Revenue Service policy prohibiting personnel of the Criminal Investigation Division (CID) of the Internal Revenue Service from appearing with United States Attorneys, or their delegates, when an indictment is announced to the news media. A copy of the teletype is attached as an appendix to this Bulletin.

Please notify all Assistant United States Attorneys of this policy by the Internal Revenue Service. Questions regarding this policy should be directed to Mr. Ralph Pierce, Tax Division, at FTS 633-5155.

Victim And Witness Protection Act Of 1982--Law Enforcement Coordinating Committee (LECC) Subcommittee On Crime Victims

The United States Attorney's office for the Northern District of Georgia recently created an LECC Subcommittee on Crime Victims. In addition to federal and state representatives, members of the subcommittee include representatives from the Metropolitan Atlanta Crime Commission, a victim and witness assistance organization serving Fulton County and Cobb County, Georgia.

The creation of an LECC subcommittee to focus on victim and witness assistance can be a useful technique for receiving information from local prosecutors and law enforcement offices about established victim and witness assistance programs, as well as for maintaining current records on local social service agencies and state victim compensation legislation. A similar LECC subcommittee was created in the United States Attorney's office for the Southern District of Texas.

Teletypes To All United States Attorneys

As a service to United States Attorneys, future issues of the Bulletin will contain a listing of teletypes sent to all United States Attorneys during the preceding two weeks. A listing of the teletypes sent during the period from January 13 through January 27, 1984, is attached as an appendix to this issue of the Bulletin. If a United States Attorney's office has not received one or more of these teletypes, copies may be obtained by contacting Ms. Theresa Bertucci, Chief of the Communications Center, Executive Office for United States Attorneys, at FTS 633-1020.

OFFICE OF THE SOLICITOR GENERAL
Solictor General Rex E. Lee

The Solicitor has authorized the filing of:

A direct appeal to the Supreme Court on or before January 20, 1984, in United States v. Madison D. Locke. The issues are whether Section 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. 1744, is unconstitutional on the ground that it violates procedural due process requirements by creating an irrebuttable presumption of abandonment based on failure to file a timely annual assessment work notice; and whether plaintiffs "substantially complied" with the filing requirements of Section 314 so as to avoid loss of their mining claims.

A petition for a writ of certiorari with the Supreme Court on or before January 21, 1984, in NLRB v. International Association of Bridge, Structural and Ornamental Ironworkers, Local 480, AFL-CIO. The issue is whether a court can modify a Board order awarding back pay for unfair labor practices because of delay by the Board in preparing back pay specifications.

A brief amicus curiae with the Supreme Court on or before January 26, 1984, in Ralph Davis v. Gregory Scott Scherer, No. 83-490. The issues are whether a Florida statute and its implementing regulations, which provide for post-termination hearings for discharged state employees, violate the due process clause of the 14th amendment; and whether, in an action for damage under 42 U.S.C. 1983, the violation of a state administrative regulation abrogates a qualified immunity defense even though the conduct in question did not violate clearly established federal constitutional law.

A petition for a writ of certiorari with the Supreme Court on or before January 29, 1984, in Velde v. National Black Police Association. The issue is whether an action can be brought seeking personal damages from former Justice Department officials on the ground that they failed to terminate LEAA funds to local police departments that discriminated on the basis of race or sex.

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

Town of Orangetown v. Gorsuch, No. 83-6035 (2d Cir., Sept. 21, 1983) D.J. # 90-1-4-2313.

EPA'S DECISION NOT TO PREPARE EIS FOR SEWER CONSTRUCTION GRANTS UPHELD.

The Town of Orangetown appealed from the dismissal of its complaint challenging EPA's environmental processing of two applications under EPA's sewer construction grant program. In particular, the Town challenged EPA's finding of no significant impact and alleged EPA's failure to assess adequately the project's impact on wetlands, floodplains and land use. The court of appeals affirmed the dismissal of the complaint, and ruled that the EPA's decision not to prepare an EIS was not arbitrary, capricious, or an abuse of discretion since (1) the record revealed that the sewer district redesigned the plant's specification to comply with EPA's insistence on reducing wetlands impacts and that remaining areas were not designated by the state to be wetlands or of unusual local importance; (2) the affected floodway area involved only a small portion of two buildings which in no way "adversely affected a floodway;" and (3) there was insufficient evidence to indicate an adverse affect on land use. The court of appeals also upheld the dismissal of challenges to plant design and procedural compliance with the grant program, as well as claims of nuisance and noncompliance with state environmental quality requirements.

Attorney: Assistant United States Attorney
Thomas D. Warren (S.D.N.Y.) FTS
662-1958

Begay v. Albers, Nos. 81-1926, et al. (10th Cir., Nov. 14, 1983) D.J. # 90-2-4-646.

INDIAN ALLOTTEES OF RESTRICTED LAND ENTITLED TO SUE TO RECOVER PROPERTY CONVEYED BY FORGED DEED.

Appellees Begay, et al., were, prior to 1946, allottees of restricted trust lands in Oklahoma. In 1946, purportedly with the allottees' consent, the restricted lands were conveyed to the appellants, Albers, et al. In 1961, the exchange was approved by the Bureau of Indian Affairs. Begay sued to recover title and possession of the property, claiming that the exchange deed was a forgery. She also sought damages for the rental

value of the allotment. The district court found that the deed was forged and therefore Begay had never properly consented to the exchange. Because title had never left the United States, the district court reasoned that the defenses of adverse possession, laches, estoppel, and waiver were not available to the Albers defendants. The court ordered return of the property to Begay but found that she had failed to prove any damage and so declined to award money damages against the Albers. On appeal of the Albers, et al., the case was consolidated with two other similar cases. The United States did not appeal and did not file a brief in the court of appeals.

The Tenth Circuit affirmed the district court's decision, rejecting the appellants' arguments that the BIA's approval of the exchange terminated the trust status of the property or, alternatively, that the allottees' consent for an exchange was unnecessary. Because the allottees did not properly consent to the exchange, the court found that title to the allotment lands remained in the United States as trustee for the individual Indians.

Attorney: Claire L. McGuire (Land and Natural Resources Division) FTS 633-2855

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

Naartex Consulting Corp. v. Watt, No. 82-1979 (D.C. Cir., Nov. 29, 1983) D.J. # 90-10-2-63.

DISMISSAL OF SUIT BY ASSIGNEE OF UNSUCCESSFUL OFFEREE UNDER SIMULTANEOUS OIL AND GAS LEASING PROGRAM SUSTAINED.

Naartex, assignee of an unsuccessful offeree under the Department of the Interior's simultaneous oil and gas leasing program sued for $50 million in damages against the private defendants and for mandamus relief against the government to order cancellation of the lease. The district court dismissed for lack of personal jurisdiction over the private defendants; lack of venue in the District of Columbia; inability to join indispensable parties; no private cause of action under the Mineral Leasing Act; the Anti-Assignment laws; Naartex assignee, Huff, should not be permitted to intervene; and lack of standing. Naartex Consulting Corp. v. Watt, 542 F. Supp. 1196 (D. D.C. 1982).

The D.C. Circuit, in a comprehensive opinion, affirmed. It held the district court lacked personal jurisdiction over the private defendants who were indispensable parties; venue did not lie in this district; and the district court was not obliged to transfer the action to another district because Naartex's claims suffer from serious substantive defects. The court also held that Naartex's claims ran afoul the federal anti-assignment statutes and that joinder of Huff to avoid the anti-assignment prohibition would have been futile because the Mineral Leasing Act and regulations preclude cancellation of a producing lease except by judicial proceedings instituted by the Attorney General in the district where the leased land is located. Finally, on substantive grounds, the court ruled that the Mineral Leasing Act does not create an implied right of action against private defendants, that the district court did not abuse its discretion when it failed to address plaintiff's common law fraud claim which was without merit.

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

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

Attorney: Gerald S. Fish (Land and Natural Resources Division) FTS 633-2831

Southern Oregon Citizens Against Toxic Sprays, Inc. (SOCATS) v. Clark, Nos. 83-3562, 83-3655 (9th Cir., Dec. 2, 1983) D.J. # 90-1-4-2101.

BLM MAY NOT RELY ON EPA'S REGISTRATION OF HERBICIDE PURSUANT TO FIFRA TO EVALUATE HUMAN HEALTH IMPACTS CAUSED BY SPRAYING.

This case involves a challenge to the Bureau of Land Management's proposal to spray various herbicides in Western Oregon for forest management purposes. The BLM, prior to spraying, prepared a programmatic EIS and a site-specific environmental analysis examining the environmental impacts of the spraying. SOCATS challenged the proposal arguing that the environmental assessment was inadequate since it failed to include a worst case analysis, required by CEQ regulation 40 C.F.R. 1502.22, on the human health impacts caused by the spraying. The BLM argued that (1) a worst case analysis was

not required for an impact which was neither likely nor probable; and (2) a worst case analysis was not required in an environmental assessment. The BLM supported its conclusion that the spraying was not likely to cause an adverse impact on human health through a review of published scientific literature on health effects caused by herbicides and on the fact that registration of an herbicide by EPA amounts to a determination that use of the herbicide does not amount to an unreasonable environmental risk.

The district court enjoined spraying until BLM prepared a worst case analysis. The court stated that any potential health impact constitutes a significant adverse effect. The court then concluded that since there was scientific uncertainty surrounding the question of the impact of herbicides on human health, the regulation, 40 C.F.R. 1502.22, requires a worst case analysis.

The Ninth Circuit affirmed the district court, finding that when scientific uncertainty about whether a potential impact will indeed occur the agency must prepare a worst case analysis. The court also stated that the analysis should be placed in the site-specific environmental analysis since the EA must support the reasonableness of the agency's decision not to prepare a new or supplemental EIS. Finally, in what amounts to a complete mischaracterization of BLM's argument on appeal, the court stated that BLM may not rely upon EPA's registration of the herbicide pursuant to FIFRA to evaluate the human health impacts caused by the spraying. The court then stated that BLM must independently assess the safety of the herbicides it uses.

Attorney: Albert M. Ferlo, Jr. (Land and Natural Resources Division) FTS 633-2774

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

Rodgers v. Watt, No. 80-3482 (9th Cir., Dec. 16, 1983) D.J. # 90-1-18-1296.

RULE 60(h) ALLOWS COURT TO EXTEND TIME FOR FILING OF NOTICE OF APPEAL.

After this case, an appeal from an adverse decision on unpatented mining claims, had been briefed and argued, the court of appeals asked for supplemental briefing on the issue

whether the court had jurisdiction, given the fact that the district court had vacated the original judgment and reentered it as of a later date, thereby permitting Rodgers to take a timely appeal. Counsel for Rodgers had not been advised by the district court of the entry of an adverse decision and, in periodic checks of the docket sheet, counsel's secretary had not noticed the misplaced entry of final judgment on the sheet. The panel had held that the district court had abused its discretion in granting the 60(b)(1) motion and held it lacked jurisdiction. Rodgers' petition for rehearing en banc was granted, and the court has now reversed and remanded to the original panel for a determination on the merits. The en banc court held that while Fed. R. Civ. P. 77(d) provides that "[l]ack of notice of the entry by the clerk does not affect the time to appeal * * *," Fed. R. App. P. 4(a)(5) provides "an escape hatch from the rigidity of amended rule 77(d)" (slip op. at 5). Under Fed. R. App. P. 4(a)(5), a district court may, upon a showing of excusable neglect, extend the time for filing a notice of appeal where the motion is filed within 30 days after the expiration of the appeal period. Since the 4(a) relief was unavailable here, the court held that 60(b) relief was "available in situations where the excusable neglect does not arise until after the sixty day period" (slip op. at 6), and the court enunciated the criteria for allowing the relief under 60(b). The court nevertheless held that lack of notice in and of itself would not be ground for a finding of excusable neglect.

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

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

Kennerly v. United States, No. 82-3196 (9th Cir., Dec. 15, 1983) D.J. # 90-2-4-720.

INDIANS; PAYMENTS FROM IIM ACCOUNT WITHOUT A HEARING WAS A DENIAL OF DUE PROCESS.

Appellant Leo Kennerly was a member of the Blackfeet Tribe who borrowed money from the Tribe between 1943 and 1957, securing the loans with assignments of income from his Individual Indian Money Account. Some of the assignments were approved by the Bureau of Indian Affairs as required by regulation.

In 1977, the Tribe began to collect all old debts owed to the Tribe, including Kennerly's. They sent him letters and asked him to meet with the tribal council to arrange repayment but he refused, claiming that collection was barred by the statute of limitations or that he did not owe the money. The Tribe then asked the BIA to withhold money from Kennerly's IIM account in accordance with the assignments and Interior regulations.

Kennerly protested the withholding, claiming he did not owe the money the Tribe was trying to collect. He asked for a hearing, but his request was denied. The IBIA upheld the payments to the Tribe of all moneys secured by an assignment. Kennerly appealed, and the district court affirmed, finding the IBIA decision not arbitrary or capricious. The district court found it unnecessary to reach the constitutional question of whether a hearing was necessary prior to withholding money from Kennerly's account and also found it unnecessary to decide whether the case should proceed as a class action. During the district court proceedings, Leo Kennerly died.

The personal representative of Kennerly's estate, his son, appealed. He argued that the payments from his father's IIM account without a hearing was a denial of due process and a breach of trust. The court of appeals agreed, and remanded for a determination of what damages were due for the breach of trust. The court specifically noted the lack of a tribal court judgment establishing the validity of the debt and held that the BIA could not rely solely on the Tribe's word that the money was owed when the debtor challenged the existence of the debt. The court also remanded for possible intervention by other class members. The Tribe was found immune from suit as were the individual members of the Tribe named in Kennerly's complaint.

Attorney: Claire L. McGuire (Land and Natural Resources Division) FTS 633-2855

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

Hoover & Bracken Energies, Inc. v. U.S. Department of the Interior, No. 82-1074 (10th Cir., Dec. 28, 1983) D.J. # 90-6-8-25.

OIL AND GAS; VALUE OF GAS PRODUCED ON FEDERAL OR INDIAN LAND MAY INCLUDE AMOUNT OF STATE SEVERANCE TAX.

The government appealed from a district court order overruling a decision of the Interior Board of Land Appeals which had held that, for purposes of computing royalties for natural gas produced on federal and Indian lands, the "value" of the gas may include the amount of state severance tax levied on the land. The Board upheld the Secretary's royalty valuation methods over objections that it violated Section 110(a) of the Natural Gas Policy Act of 1978, 15 U.S.C. 3320(a) (NGPA), which allows sellers of natural gas to charge above the maximum ceiling price for gas to the extent necessary to recover state severance taxes. Because the federal or Indian royalty share of natural gas produced within a communitized unit is exempt from state severance taxes, Hoover & Bracken, a gas producer, argued that the Secretary's method results in a value figure, for royalty computation purposes, which exceeds the maximum ceiling price. The district court agreed, distinguishing an earlier Board decision, Wheless Drilling Co., 13 IBLA 21 (1973), which upheld the Secretary's method on the ground that it was decided before the enactment of the NGPA.

The Tenth Circuit, however, found that the Natural Gas Policy Act (2-1), did not affect the applicability of the Wheless decision and reversed. The district court's reasoning was found not to "justify reversal of a well-reasoned opinion of an administrative agency." The court found no inconsistency with the Secretary's valuation method and the NGPA, noting that since gas producers benefit from the communitization agreements, there is no reason why communitized lands should be segregated for the purpose of computing royalties for federal and Indian gas production.

Attorney: Blake Watson (Land and Natural Resources Division) FTS 633-2772

Attorney: Anne S. Almy (Land and Natural Resources Division) FTS 633-2727

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

Ada-Cascade Watch, Inc. v. Cascade Resource Recovery, Inc., Nos. 81-1253, 83-1327 (6th Cir., Nov. 3, 1983) D.J. # 90-7-5-1.

ABSTENTION BASIS FOR DISMISSAL OF CITIZENS SUIT UNDER RESOURCE RECOVERY ACT.

Ada-Cascade Watch brought this RCRA citizen's suit against Cascade Resource Recovery's hazardous waste disposal facility alleging the facility was not entitled to "interim status" under RCRA, 42 U.S.C. 6925(e), since it did not have all the necessary state permits. The district court found that all the permits had been acquired and dismissed the complaint. On appeal, the Sixth Circuit, sua sponte, questioned whether the case should be dismissed for Ada-Cascade's failure to provide the 60-day notice required under the citizen's suit provision, 42 U.S.C. 6972, and invited the United States to submit an amicus curiae brief on the issue. In our brief, we argued that the 60-day notice provision was a jurisdictional prerequisite, and that failure to provide the 60-day notice should result in dismissal of the complaint. The court never reached this issue however. It remanded the case to the district court with instructions to dismiss the complaint on the grounds of abstention. In a dissenting opinion, Judge Merritt stated that he agreed with the position presented by the United States, and would dismiss the complaint for failure to comply with the 60-day notice provision.

Attorney: Albert M. Ferlo, Jr. (Land and Natural Resources Division)
FTS 633-2774

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

Geosearch, Inc. v. James G. Watt, Nos. 83-1407, 83-1405 (10th Cir., Nov. 7, 1983) D.J. # 90-1-18-3583.

OIL & GAS LEASING; SECOND DRAWEE CANNOT CONTEST ISSUANCE OF LEASE.

The court of appeals held that Geosearch and the second (unsuccessful) drawees in oil and gas leasing drawings could not contest the issuance of leases to the first drawees. The

disclaimer signed by RSC, the filing company representing the first drawees, was found effective to cure the apparent violation of BLM regulations inherent in the agreement between RSC and its clients. Alternatively, the court went on, even if the disclaimer had been held invalid, the rights of bona fide purchasers from the first drawees cut off any rights Geosearch might have had to contest the issuance of the leases to the first drawees.

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

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

Hero Lands Co. v. United States, No. 83-839 (Fed. Cir., Nov. 10, 1983) D.J. # 90-1-23-2365.

STATUTE OF LIMITATIONS BARS TAKING CLAIM BASED ON AIRPLANE OVERFLIGHT.

Hero, the owner of several tracts located near the New Orleans Naval Air Station (NAS NO) claimed that an increase in flights and changes in air operations over Hero's tracts in 1978-1979 gave rise to a taking, for which Hero sought $15 million in compensation. The Claims Court held, inter alia, that Hero's claims were barred by the statute of limitations of 28 U.S.C. 2501 because any taking claim accrued more than 6 years before Hero sued in 1979, and the changes in operations at NAS NO in 1978-1979 were not sufficient to give rise to a fresh taking. The federal circuit, in a one paragraph unpublished decision, affirmed the decision below on the statute of limitations ground.

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

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

United States and Klamath Indian Tribe v. Ben Adair, et al., Nos. 80-3229, 80-3245, 80-3246, 80-3257 (9th Cir., Nov. 15, 1983) D.J. # 90-1-2-723.

INDIANS; TRIBE RETAINED HUNTING AND FISHING RIGHTS AS OPPOSED TO ALLOTTEES AND THEIR SUCCESSORS.

In 1864, the United States and the Klamath Indian Tribe entered into a treaty whereby the federal government confirmed to the Tribe a reservation in south-central Oregon. The reservation included the Klamath Marsh, a traditional Indian hunting and gathering area consisting of extensive wetlands supplied with waters by the Williamson River. The 1864 Treaty confirmed the Tribe's on-reservation hunting and fishing rights and also provided certain funds for the Indians to "advance them in civilization, and especially agriculture." Over the years, certain reservation lands were allotted to Indians and certain of these allotments subsequently passed into non-Indian ownership. In 1954, Congress enacted the Klamath Termination Act, 68 Stat. 718, 25 U.S.C. 564 et seq., to provide for termination of the reservation and federal supervision over the Tribe. The Act, however, provided that the statute would not abrogate any water rights of the Tribe or its members. In addition, the Ninth Circuit has ruled that the Act did not abrogate treaty hunting and fishing rights. Kimball v. Callahan, 590 F.2d 769 (9th Cir. 1979). By an amendment to the Termination Act, Congress provided that the federal government would purchase approximately 15,000 acres of marshland in the former reservation for use in newely-established Klamath Forest National Wildlife Refuge. Various other former reservation lands were added to the Winema National Forest.

In 1975, the United States filed an action seeking a declaration of its water rights within the area of the former reservation. The Klamath Tribe intervened, claiming that it retained a water right for hunting and fishing purposes. The State of Oregon also intervened, and moved to dismiss, asserting that the controversy should be litigated only in the Oregon state courts. The district court handed down an opinion favorable to the Tribe. United States v. Adair, 478 F. Supp. 336 (D. Ore. 1980). The district court found that the Tribe retained a water right sufficient to effectuate its hunting and fishing right and that this right prevailed over the rights of the allottees and their successors. In view of this disposition, the court found no reason to reach the question of what water rights are now held by the federal government.

The court of appeals affirmed, with one significant exception. First, the court found that the trial judge had not abused his discretion by declining to dismiss the federal suit in favor of a related state proceeding, especially as the state water rights proceeding has not moved forward since the motion to dismiss was filed. Second, the court ruled that the Tribe retained a reserved water right to such waters as may be needed to effectuate its treaty hunting and fishing rights. This water right has a priority date of time immemorial and takes precedent over any other water rights. Third, regarding the Indian allottees and their non-Indian successors, the Ninth Circuit ruled that, by virtue of the treaty, both classes of water claimants have a reserved right to such waters as are necessary to irrigate their lands, with an 1864 priority date. These rights, however, are subordinate to the Tribe's hunting and fishing water right and are subject to the requirement of reasonable diligence. Finally, reaching out to decide a question upon which the district court had reserved judgment, the court of appeal held that tribal water rights for hunting and fishing purposes are nontransferable and, consequently, the United States did not acquire any portion of the Tribe's right when it bought out the Indians' beneficial interest in the lands now within the national wildlife refuge.

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Federal Rules of Criminal Procedure

Rule 44(c). Right to and Assignment of Counsel. Joint Representation.

Defendant and co-defendant, both charged with conspiracy to steal goods moving in interstate commerce, retained joint counsel. On three separate occasions prior to trial the court, in compliance with Rule 44(c), inquired and personally advised each defendant of his right to separate counsel and of the potential problems of joint representation. On appeal, defendant asserts that a conflict of interest existed in the joint representation because of the different degrees of culpability between himself and his co-defendant. Defendant further asserts that the court did not adequately inform him of the dangers of joint representation or require him to make a narrative response to court inquiries as required by the Rule.

The Court of Appeals held that the defendant had waived his 6th Amendment right to separate counsel when, after being adequately informed of the potential dangers of joint representation, defendant voluntarily, intelligently, and knowingly chose to retain joint counsel. With regard to Rule 44(c), the Court rejected the defendant's interpretations and held that the drafters did not intend to adopt any particular procedure for the type of inquiry or response when interrogating a defendant on his understanding of the problems of joint representation. The Court pointed to a section in the Advisory Committee's notes which stated that, "Rule 44(c) does not specify what particular measures must be taken. It is appropriate to leave this within the court's discretion, for the measures which will best protect each defendant's right to counsel may well vary from case to case." The Court further noted that failure to comply with Rule 44(c) does not mandate reversal if the defendant is unable to demonstrate an actual conflict and the different degrees of culpability did not present a conflict.

(Affirmed).

United States v. William Bradshaw, 719 F.2d 907 (7th Cir., October 19, 1983)

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TO: ALL UNITED STATES ATTORNEYS
(INCLUDING OVERSEAS)

FM: WILLIAM P. TYSON
DIRECTOR
EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS

BY: SUSAN A. NELLOR
ASSISTANT DIRECTOR

RE: INTERNAL REVENUE SERVICE CRIMINAL INVESTIGATION PERSONNEL APPEARANCES AT MEDIA EVENTS ANNOUNCING INDICTMENTS

DOES NOT AFFECT TITLE 10

THE INTERNAL REVENUE SERVICE HAS DETERMINED THAT PERSONNEL OF THE CRIMINAL DIVISION OF THE INTERNAL REVENUE SERVICE SHALL NOT APPEAR WITH UNITED STATES ATTORNEYS OR THEIR DELEGATES AT THE TIME OF THE ANNOUNCEMENT OF AN INDICTMENT IN THE PRESENCE OF THE MEDIA.

PLEASE NOTIFY ALL ASSISTANT UNITED STATES ATTORNEYS IN YOUR OFFICE OF THIS POLICY BY THE INTERNAL REVENUE SERVICE. QUESTIONS REGARDING THIS POLICY SHOULD BE DIRECTED TO MR. RALPH PIERCE, TAX DIVISION (FTS 633-5155).

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

Teletypes To All United States Attorneys

01/17/84--From Acting Assistant Attorney General Richard W. Willard, Civil Division, re: "Award Of Attorneys' Fees In Prevailing Government Defendant In Federal Employment Discrimination Cases."

01/19/84--From Edward H. Funston, Assistant Director for Collections, Executive Office for United States Attorneys, re: "Change In Federal Civil Postjudgment Interest Rate."

UNITED STATES ATTORNEYS' MANUAL
TITLE 1 -- GENERAL

1-8.000 RELATIONS WITH THE CONGRESS

Subject to the general supervision of the Attorney General and the direction of the Deputy Attorney General, liaison between the Department and the Congress is the responsibility of the Assistant Attorney General for the Office of Legislative Affairs (OLA). 28 CFR 0.27

1. Requests from Congressional Committees or individual Members of Congress for interviews; testimony; briefings; visits to U.S. Attorney's offices; or information concerning official matters within the Department from Department employees, including U.S. Attorneys and their employees should be reduced to writing, signed by the chairman of the committee or individual Member of Congress, and addressed to the Assistant Attorney General for the Office of Legislative Affairs. Invitations for Departmental personnel to give testimony must be received fourteen days prior to the date of the hearing in order to be considered. Telephone requests or written requests from congressional staff may not serve in lieu of written requests signed by Members of Congress.

Requests of the aforementioned nature should be acknowledged as follows and forwarded to the Office of Legislative Affairs:

> This office is anxious to assist Congress whenever possible. However, pursuant to 28 C.F.R. 0.27, the Assistant Attorney General for the Office of Legislative Affairs is responsible for liaison between the Department of Justice and Congress. Directives established by the Department of Justice and reflected in the United States Attorney's Manual, Section 1-8.000, et seq., entitled Relations with the Congress, provide that requests made by Congress for the appearance of employees of the Department of Justice must be submitted to the Assistant Attorney General for the Office of Legislative Affairs. Therefore, I am forwarding a copy of your (Date) letter to me by teletype to the Office of Legislative Affairs to facilitate a response to your request by that office.

2. The Assistant Attorney General for the Office of Legislative Affairs shall be kept informed at all times regarding matters affecting any organizational unit of the Department of Justice which are submitted for consideration by the Congress or by any committee or individual member thereof.

3. A proposed amendment to existing law or a proposal for new legislation shall under no circumstances be submitted for consideration by the Congress, or by any committee or individual member thereof, unless it has been approved by the Assistant Attorney General for the Office of Legislative Affairs.

4. Any request calling for action by the Congress, or by any committee or member thereof, shall be addressed to the Assistant Attorney General for the Office of Legislative Affairs and shall contain full information concerning the legislative objective sought.

5. Requests from Congressional Committees or Members of Congress for statements on pending federal legislation; needs for legislation; legal issues; litigation trends; non-public discretionary litigation information may be acknowledged. (Copies of correspondence, accompanied by a draft response should be forwarded to the Office of Legislative Affairs for coordination with the Executive Office of U.S. Attorneys and components of the Department.)

6. Routine Congressional correspondence on specific cases or matters to U.S. Attorneys may be responded to by the attorney directly with a copy of the correspondence forwarded to OLA. Routine correspondence includes:

a. Employment related information such as openings, inquiries, recommendations, etc.

b. Public information related to specific cases i.e. cases filed, grand jury indictments, court dates.

c. Legal procedure i.e. processes clearly defined in statutes and/or regulations.

d. Press releases, reports or other published information.

Any question as to whether a matter is routine or not should be resolved in favor of reporting to the Office of Legislative Affairs.

In addition, OLA is responsible for all congressional correspondence sent to Department officials in Washington. Sometimes correspondence received by Department officials in Washington relates to matters pertaining to U.S. Attorney operations and are forwarded to U.S. Attorneys for inquiry and drafting a response. U.S. Attorneys should not mail the responses directly to the Congressional Committee or Member of Congress unless specifically requested to do so by the Office of Legislative

Affairs. Copies of the correspondence, accompanied by a draft response on the merits, should be sent to the Office of Legislative Affairs for coordination with other U.S. Attorneys and the Divisions of the Department.

See also USAM 1-5.700, Coordination of United States Attorneys' Offices Surveys, for the full text of DOJ Order No. 2810.1, signed by the Attorney General. All surveys and questionnaires from Congress members or Committees and the General Accounting Office should be sent to the Executive Office for United States Attorneys for review and endorsement prior to completion by the U.S. Attorney's office. For assistance, please contact the office of the Assistant Director for Legal Services. (FTS 633-4024)

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