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EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS

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COMMENDATIONS

Assistant United States Attorney RAYMOND BANOUN, District of Columbia, was commended by Assistant Attorney General Stephen S. Trott, Criminal Division, for his outstanding work in the successful prosecution of United States v. Datasaab Contracting, A.B., a Swedish company, for a serious violation of the Export Administration Act. This case involved the unlawful exportation of strategic equipment and technology to the Union of Soviet Socialist Republics.

Assistant United States Attorney ARTHUR W. LEACH, Southern District of Georgia, was commended by Mr. David J. Hayes, Special Agent in Charge, Department of Treasury, for his outstanding participation in United States v. Tourbah. This case represented one of the largest Customs criminal fraud cases, and resulted in the seizure of fraudulently entered textile merchandise totalling over $5 million in value.

Assistant United States Attorney JOSEPH J. MCGOVERN, District of Massachusetts, was commended by Mr. Herbert S. Cables, Jr., Regional Director, National Park Service, Department of Interior, for his outstanding performance in the successful defense of the agency's position in Greenwald v. Olsen. The implication and consequences of an adverse decision in Greenwald was of major concern as it would have threatened the integrity of the Cape Cod National Seashore.

Assistant United States Attorney AMANDA S. MEERS, District of Kansas, was commended by Mr. William H. Webster, Director, Federal Bureau of Investigation, for her outstanding prosecutive efforts in connection with a large scale narcotics investigation, initiated in January, 1983, targeting large scale cocaine trafficking in several cities. Seventeen individuals, including four members of the Kansas City Royals (baseball team) were indicted. With the exception of one defendant, a fugitive, all of the other defendants have been convicted of various charges filed under the Drug Abuse Prevention and Control Act.

Assistant United States Attorney WILLIAM B. PETERSON, Eastern District of New York, was commended by Mr. Robert C. Heinemann, Clerk of the Court, U.S. District Court, Brooklyn, for the thorough, competent and professional manner in which the clerk's office was represented in In Re Hearing Petition Ronald J. Restaino.

Assistant United States Attorney DAYLE E. POWELL, Northern District of Alabama, was commended by Mr. William H. Webster, Director, Federal Bureau of Investigation, for her outstanding prosecution of United States v. Ruggieri, a case involving illegal narcotics trafficking, conspiracy, violation of the White Slave Traffic Act, and interstate transportation in aid of racketeering-prostitution violations. The impact of the convictions has had a profound affect on the Birmingham community, sending a strong message that sexual exploitation of minors will result in prosecution.

Assistant United States Attorney PETER B. ROBINSON, Northern District of California, was commended by Mr. Alexander F. Beltrao, Executive Director, International Coffee Organization, London, and Mr. Rollin B. Klink, Special Agent in Charge, Department of the Treasury, U.S. Customs Service, for his successful prosecution of Patel in Guam. This case involved several corporations, charged with smuggling and conspiring to smuggle coffee into the United States.

Assistant United States Attorney WAYNE SPECK, Western District of Texas, was commended by Mr. Robert C. Sawyer, Chief, Criminal Investigation Division, Department of Treasury, for the outstanding job in United States v. Lewis, an income tax evasion case. This is a significant victory, with a wide ranging impact on tax protestors who try to hide behind a sham church.

Assistant United States Attorney SANDRA L. WILLIS, Northern District of California, was commended by Mr. Zane G. Smith, Jr., Regional Forester, Department of Agriculture, for her successful defense of the Forest Service against a claim by Great American Houseboat Company that the Forest Service engaged in unconstitutional conduct in restricting its access to and use of Shasta Lake.

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

CLEARINGHOUSE

Handbook on Appeals in the Ninth Circuit

The Chief of the Appellate Section for the United States Attorney's office, District of Arizona, has prepared a Handbook on Appeals in the Ninth Circuit. The Handbook was prepared from the Federal Rules of Appellate Procedure, the rules promulgated by the Court of Appeals, and its memoranda on practice and procedure. It contains sections addressing the history and organization, jurisdiction, and scope of review of the Ninth Circuit, as well as procedures to be followed for cross appeals, joint appeals, motions, writing and filing briefs, excerpts of record, oral argument, petitions for rehearing, en banc procedures, costs, issuance of mandate and publication of disposition of cases.

Copies of this publication may be obtained by contacting the Legal Services Section, Executive Office for United States Attorneys (FTS 633-4024). Please ask for publication No. CH-3.

(Executive Office)

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

POINTS TO REMEMBER

Comparative Summary of United States Attorneys' Cash Collections

Appended to this issue is a "24-Month Comparative Summary of U.S. Attorneys' Cash Collections" for the period April 1, 1982, through March 31, 1984. The Debt Collection Section suggests that this summary table be used by U.S. Attorneys as a guidepost in the assessment of the effectiveness of their debt collections units.

(Executive Office)

Notices of Appeal in Civil Cases Awarding Money Judgments Against the United States: Possible Appeals to the Court of Appeals for the Federal Circuit

The Federal Courts Improvement Act of 1982 specifies that appeals awarding money judgments of less than $10,000 against the government must be taken to the Court of Appeals for the Federal Circuit. Under the new Act it is unclear in some kinds of cases which court has appellate jurisdiction. In "Notices of Appeal in Civil Cases Awarding Money Judgments Against the United States: Possible Appeals to the Court of Appeals for the Federal Circuit," Acting Assistant Attorney General Richard K. Willard, Civil Division, discusses the Act and presents examples of situations where it may be unclear which court has appellate jurisdiction.

(Civil Division)

Use of Law Enforcement Type Badges by U.S. Attorneys and Assistant U.S. Attorneys is not Authorized

By memorandum of May 17, 1984, all United States Attorneys were advised of Department of Justice policy relative to the possession of law enforcement type badges by United States Attorneys and their Assistants. The memorandum is attached as an appendix to this issue of the United States Attorneys' Bulletin.

(Executive Office)

Personnel

On May 21, 1984, the Senate confirmed Carol E. Dinkins as the Deputy Attorney General for the Department of Justice. On Wednesday, May 23, Ms. Dinkins received the Oath of Office from Supreme Court Justice Sandra Day O'Connor. Ms. Dinkins was formerly the Assistant Attorney General for the Land and Natural Resources Division before leaving the Deparment in 1983.

On May 25, 1984, John D. Tinder was sworn in as the court-appointed United States Attorney for the Southern District of Indiana.

(Executive Office)

Teletypes To All United States Attorneys

A listing of the teletypes sent during the period from May 18, 1984, through June 1, 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.

(Executive Office)

CIVIL DIVISION
Acting Assistant Attorney General Richard K. Willard

Provenzano v. DOJ, ____ U.S. ____, No. 83-1045 (Apr. 2, 1984). D.J. # 145-12-5043.

SUPREME COURT GRANTS CERTIORARI IN CASE CONCERNING THE PROPER RELATIONSHIP BETWEEN THE PRIVACY ACT AND THE FOIA.

In this case a major Mafia figure has sought his FBI and Criminal Division files. We argued that because he is not entitled to the files under the broad criminal justice records exemption in the Privacy Act, he is automatically barred from access under the Freedom of Information Act (FOIA) also, pursuant to FOIA Exemption 3. The Third Circuit rejected that argument and denied rehearing en banc by a 6-4 vote. (We had earlier lost this argument in the D.C. Circuit, but sought no further review.) We subsequently prevailed on this argument in the Seventh Circuit, which acknowledged its conflict with the Third Circuit. We sought certiorari with regard to the Third Circuit decision, and the Supreme Court has granted our petition, as well as a petition filed by the requester in the Seventh Circuit case. Thus, the Supreme Court will now resolve this issue which has caused a 2-2 split among appellate courts.

Attorneys: Leonard Schaitman
FTS 633-3441

Douglas N. Letter
FTS 633-3427

Helicopteros Nacionales De Colombia, S.A. v. Hall, ____ U.S. ____, No. 82-1127 (Apr. 24, 1984). D.J. # 145-0-1244.

SUPREME COURT RULES THAT PURCHASES IN FORUM STATE PLUS TRAINING RELATED TO THOSE PURCHASES ARE NOT SUFFICIENT CONTACTS WITH THE FORUM STATE TO SUPPORT LONG ARM JURISDICTION OVER A FOREIGN CORPORATION.

Helicol is a Colombian corporation which entered into a contract to provide helicopter transportation in South America for a Peruvian consortium of businesses, with an alter ego in Houston, Texas. Helicol was sued in a wrongful death action in Texas by representatives of decedent U.S. citizens. Decedents were killed in Peru in an accident in a helicopter owned and operated by

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Helicopteros. Helicol's contacts with Texas consisted of purchases of helicopters from Bell Helicopter in Texas and training sessions in Texas from Bell for its pilots. In addition, Helicopteros sent its chief executive to Houston to negotiate the contract with the Peruvian consortium.

We filed an amicus brief in support of Helicol's argument that the Texas court lacked jurisdiction. Our amicus brief argued that Helicol's contacts with Texas--purchases of equipment in Texas, training in Texas, and the one-time visit of Helicopteros' chief executive to negotiate the transportation contract in Texas --were insufficient for long arm jurisdiction in the circumstances presented here. The Supreme Court completely agreed with our views.

Attorneys: Michael Hertz
FTS 724-7179

Howard Scher
FTS 633-4820

National Treasury Employees Union v. Devine, No. 84-5009 (D.C. Cir. Apr. 27, 1984). D.J. # 145-156-401.

D.C. CIRCUIT HOLDS OPM RULES HALTED BY CONGRESS.

The District of Columbia Circuit has upheld the National Treasury Employees Union (NTEU) in its quest to stop implementation of new OPM personnel regulations. The rules, published in final form on October 25, 1983, with an effective date of November 25, 1983, cover promotions, RIFS, and overtime pay in the federal civil service.

The NTEU argued that House Joint Resolution 413, a continuing funding measure for fiscal year 1984, expressed Congress's intention that the final rules not go into effect. The government asserted that the Resolution, which merely referred to "proposed" OPM regulations by incorporating language from an earlier House bill, was not intended to reach, and in any event did not reach, the final rules. The court of appeals, affirming the district court's grant of an injunction, adopted the plaintiff's reading of the Resolution. The court found that it had jurisdiction in this case, rejecting the government's claim that under the Civil Service Reform Act, 5 U.S.C. §§7105, 7123, 7703, the issue must initially be heard before the Merit Systems Protection Board or the Federal Labor Relations Authority.

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The new OPM rules, therefore, are for the moment inoperative. The court of appeals emphasized, however, that the congressional prohibition was finite, expiring at the point OPM stops receiving funds under Joint Resolution 413.

Attorneys: Anthony J. Steinmeyer
FTS 633-3388

Richard A. Olderman
FTS 633-4052

Hyatt v. Heckler, No. 84-1381 (4th Cir. Apr. 25, 1984). D.J. # 137-55-308.

FOURTH CIRCUIT ISSUES STAY OF DISTRICT COURT DECISION THAT HHS HAD NONACQUIESCED IN THREE FOURTH CIRCUIT DECISIONS, AND ENJOINING HHS TO REOPEN AND READJUDICATE A CLASS OF CLAIMS GOING BACK SEVERAL YEARS IN ACCORDANCE WITH THE CORRECT STANDARD.

Plaintiffs, three social security recipients and applicants, complained that the Secretary of HHS was nonacquiescing in three specific Fourth Circuit cases. The district court agreed with plaintiffs that the Secretary was nonacquiescing in the Fourth Circuit's decisions in cases involving pain, hypertension and diabetes, and medical improvement. The court then (1) certified a class of social security applicants and terminatees to include individuals whose benefits were denied or terminated on or after September 10, 1981; (2) enjoined the Secretary to begin to follow the Fourth Circuit law in these three subject matter areas; and (3) ordered the Secretary to reopen and readjudicate the claims of the class members. The court set extremely short deadlines for compliance with its order and required the Secretary to give individual notice to putative class members and to publish notice via radio, television, and the newspapers. The Secretary also was required on the first of each month to give plaintiffs' counsel pertinent information concerning those individuals who had responded to the notices.

We filed a request for an emergency stay because the first significant deadline would have occurred on April 26, 1984. In our motion, we emphasized that we were not nonacquiescing in Fourth Circuit law and that decisions which were inconsistent with such law were isolated examples of errors. In this connection, we cited to the court several very recent unpublished decisions in which the court affirmed the Secretary's decisions in cases involving pain and hypertension. We also emphasized that the district court awarded relief to individuals over whom the court

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Acting Assistant Attorney General Richard K. Willard

did not have jurisdiction. On April 25, 1984, the court granted a complete stay of the district court's decision and established an expedited briefing schedule.

Attorneys: William Kanter
FTS 633-1597

Deborah Kant
FTS 633-3469

Howard Scher
FTS 633-4820

State of Texas v. United States, No. 82-1693 (5th Cir. Apr. 23, 1984). D.J. # 59-12-3503.

FIFTH CIRCUIT UPHOLDS CONSTITUTIONALITY OF STAGGERS ACT.

Texas, and twelve intervening plaintiffs, sought a declaration that sections 201, 202, 203, and 214 of the Staggers Rail Act of 1980 are unconstitutional because of alleged violations of congressional authority under the Commerce Clause, and violations of the Tenth Amendment, the Guaranty Clause, and the Fifth Amendment prohibition against taking property without just compensation. Section 201 establishes that, except as otherwise provided, railroad ratemaking is deregulated; section 202 establishes certain conditions under which rates may be regulated; section 203 creates a permissible zone of rate flexibility; and, section 214 establishes a two-step process to compel state regulators to employ federal law when regulating intrastate rates of interstate rail carriers, completely preempting state authority to regulate those rates unless the state agency has been certified by the ICC.

In an opinion which forcefully upholds congressional authority, the Fifth Circuit rejected all of plaintiffs' attacks. First, using the traditional tests, the court held section 214 a valid exercise of the commerce power, declining to treat the Staggers Act differently simply because it addresses intrastate activity, preempts state law, or concerns economic regulation. Next, in an extended presentation strongly supporting congressional power when measured by the limits of the Tenth Amendment, the court upheld section 214, holding that there was no violation of the Amendment because there was no regulation of the states as states. The court then rejected the argument that the Guaranty Clause had been violated, holding that acceptance of such an argument would enable the states to destroy the ability of Congress to preempt state law. Finally, the Fifth Amendment

claims were dismissed on the ground that the mere enactment of the Act did not effect a taking of property because the legislation advances legitimate governmental interests and there has been no assertion by plaintiffs that anyone has been denied any economically viable use of property.

Attorneys: Leonard Schaitman
FTS 633-3441

Edward R. Cohen
FTS 633-4331

Zantop International Airlines, Inc. v. National Mediation Board, No. 82-1657 (6th Cir. Apr. 19, 1984). D.J. # 145-135-57.

SIXTH CIRCUIT HOLDS THAT NEITHER THE METHOD USED BY THE NATIONAL MEDIATION BOARD (NMB) TO DETERMINE WHETHER A MAJORITY FAVORS REPRESENTATION, NOR THE FORM OF BALLOT USED, NOR THE NMB'S MEANS OF INFORMING VOTERS OF THE MAJORITY RULE, ARE SUBJECT TO JUDICIAL REVIEW

After an election, the NMB certified the UAW as the representative of two separate crafts or classes of Zantop's employees; pilots/co-pilots and flight engineers. In the pilots' election, 88 employees voted for the UAW and four for other representatives (out of 181 eligible voters), while in the flight engineers' election, 33 voted for the UAW and 3 for others (out of 71 eligible voters). Under NMB rules a representative is certified when a majority of those eligible vote for representation, the representative being the one receiving the largest number of votes. The employer filed this action challenging the certifications on the ground that the NMB could not certify a representative unless that representative was named by a majority of the eligible voters, and on the ground that the NMB's method of informing the voters of the above rule breached the NMB's duty to investigate a representation dispute.

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The Sixth Circuit affirmed the district court's dismissal for lack of jurisdiction. In a strong opinion the court held that the method of determining a majority is within the broad discretion granted the NMB, and that the form of the ballot used is a detail left for the final determination of the NMB. Also, the court held that the NMB had not failed to investigate the dispute, concluding that the NMB's explanation did not bring the case within the few recognized exceptions to the general rule that certifications are not subject to judicial review.

Attorneys: Robert S. Greenspan
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Edward R. Cohen
FTS 633-4331

Dyke v. Gulf Oil Corp., TECA Nos. 9-80, 9-81 (Apr. 17, 1984).
D.J. # 146-185-7662.

TEMPORARY EMERGENCY COURT OF APPEALS ACCEPTS OUR ARGUMENT THAT THE STATUTORY SCHEME GOVERNING PRICE CONTROL OF PETROLEUM PRODUCTS IS VALID IN SPITE OF THE PRESENCE OF LEGISLATIVE VETO PROVISIONS.

In this case a private party brought an action against Gulf Oil Corporation claiming that Gulf had overcharged it for petroleum products under the price control regulations governing such products. Gulf filed a motion to dismiss in the appellate court (TECA), arguing that the presence of legislative veto provisions in the price control statutory scheme (which is no longer in effect) made the entire scheme unconstitutional, and deprived the court of jurisdiction to hear the appeal. We intervened to argue that the legislative veto provisions were invalid but severable from the remainder of the statute. (We also argued that the decision invalidating legislative veto provisions should not be applied retroactively to void this statutory scheme.) The court agreed in full with our severability argument, upholding the major portion of the price control legislation.

Attorneys: Anthony Steinmeyer
FTS 633-3388

Douglas N. Letter
FTS 633-3427

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

United States v. Washington (Makah Ocean Fishing Claim), No. 83-3802 (9th Cir. Apr. 12, 1984). D.J. # 90-2-0-670.

INDIAN TRIBES "USUAL AND ACCUSTOMED" TREATY FISHING RIGHTS EXTEND 40 MILES TO SEA.

The Makah tribe claimed that its usual and accustomed fishing places under the 1855 Treaty of Neah Bay, extended almost 100 miles out to sea. The court of appeals affirmed the district court's finding that a boundary extending 40 miles out, delineated the Makah's "U & A" fishing areas.

Attorney: George Dysart, Special AUSA
FTS 423-3660

Allegheny County Sanitary Authority v. EPA, No. 83-5338, (3d Cir. Apr. 20, 1984). D.J. # 90-5-1-1906.

CLEAN WATER ACT; REJECTING CLAIM THAT EPA VIOLATED NON-DISCRETIONARY DUTY.

ALCOSAN, a municipal sewage authority, sought injunctive and declaratory relief against the state environmental agency, its officials, and EPA, contesting its failure to receive funding under the Federal Water Pollution Control Act. The district court dismissed all counts against the state defendants and the count against the EPA which was based on the Administrative Procedure Act. The district court then denied ALCOSAN's motion for a preliminary injunction and certified the dismissal of claims against the state and federal defendants under Federal Rules of Civil Procedure 54(b).

In view of the recent Supreme Court decision in Pennhurst State School & Hospital v. Halderman, 52 U.S.L.W. 4155 (Jan. 23, 1984), the court found pendant jurisdiction over the state law claims barred by the Eleventh Amendment and observed that a state--and therefore, a state agency--could not be sued in federal court on allegations of violations of federal law. The court noted that the Eleventh Amendment did not bar all prospective relief against state officials if violations of federal law are established. However, the court found that the state actions of which ALCOSAN complained, were not actionable under the Clean Water Act, and following Middlesex County Sewerage Authority v. National Sea Clammers' Association, 453 U.S. 1 (1981), held that no private

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Assistant Attorney General F. Henry Habicht, II

right of action or action under 42 U.S.C. §1983 against the State could be implied.

The court of appeals held the Rule 54(b) certification improper with respect to the federal defendants, since an alternative theory of recovery remained in district court against the EPA under the citizen suit provision of the Clean Water Act. The court determined, however, that it had jurisdiction to consider the APA dismissal since consideration of that issue was essential to review of the denial of the preliminary injunction. With respect to the dismissal, the court held "that a fair reading of the district court's opinion is that it treated the APA claim as being limited to the failure of the federal defendants to perform mandatory duties" and reviewed the district court's dismissal on that basis. Finding that the Clean Water Act provides specifically for citizen suits against EPA for failures to perform nondiscretionary duties, the court held that the citizen suit provision provides an adequate remedy for ALCOSAN and that permitting suits under the APA for actions where remedies are available in the Clean Water Act, would frustrate the congressional purpose behind the notice-provision in the Clean Water Act.

The court then affirmed the district court's denial of a preliminary injunction based on ALCOSAN's contention that EPA violated a non-discretionary duty.

Attorneys: J. Carol Williams
FTS 633-2757

Martin W. Matzen
FTS 633-4426

United States v. 760.807 Acres of Land (West Loch), No. 83-1991 (9th Cir. May 1, 1984). D.J. # 33-12-256.

CONDEMNATION; IN PARTIAL TAKING FOR A HAZARD ZONE DIMINUTION OF VALUE OF PENINSULA COVERED BY FEAR RECOVERABLE IF MARKET REFLECTS THIS.

This condemnation case involves the acquisition of an explosive safety hazard zone for the West Loch Naval Magazine at Pearl Harbor, Hawaii. The land acquired was part of a larger 1560 acre parcel owned by the trustees of the Campbell Estate. Both the United States and the Trustees valued the property, using the before and after approach. The judge awarded $14,500,000, finding that there was no diminution in value to the remaining property

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as a result of the taking. On appeal, the trustees argued that the district court erred in refusing to instruct the jury that fear of a hazard created by the taking should be considered regardless of the objective likelihood of the dangerous event occurring, if the fear affects market value.

The Ninth Circuit agreed with the Trustees. The court held that "if fear of a hazard would affect the price a knowledgeable and prudent buyer would pay to a similarly well-informed seller, diminution in value caused by that fear may be recoverable as part of just compensation." The court affirmed the judgment, however, finding that the Trustees had failed to show any evidence in the market that the taking caused any diminution in value to the remainder based on fear. The court emphasized that the "fear" should be caused by the use of the property taken, not other property owned by the condemning authority.

Attorneys: Albert M. Ferlo, Jr.
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Robert L. Klarquist
FTS 633-2731

United States v. Casitas Municipal Water District, No. 83-6053 (9th Cir. May 4, 1984). D.J. # 90-1-2-1143.

UNITED STATES NOT OBLIGATED TO BEAR COST FOR RELOCATION OF RIGHT OF WAY FOR WATER MAIN.

While constructing the Ventura River Reclamation Project, the Bureau of Reclamation located a water main in the right-of-way of a state highway, pursuant to a state permit which provided that the permittee must bear its own relocation costs in the event that relocation, subsequently, becomes necessary. The project was then turned over to the Casitas Municipal Water District, a municipal corporation, under a standard reclamation project contract which provides that the District will pay all current operating expenses and reimburse the United States for its project construction costs in installments over the term of the contract.

The State later relocated a portion of the highway which, in turn, necessitated a relocation of the water main. After an initial delay, the United States relocated the water main and attempted to add its relocation expenses as construction costs repayable over the contract term. Casitas then resisted

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repayment, contending that the Bureau of Reclamation had been obligated, under the terms of the contract, to obtain a permanent right-of-way for the water main. The United States filed suit and the district court entered summary judgment in favor of the Bureau of Reclamation.

The court of appeals affirmed, by a "Do Not Publish" memorandum order. The court found that the repayment contract required Casitas to repay the government for all of its bona fide project costs and that nothing in the contract required the Bureau to obtain a permanent right-of-way for the water main. The court also found that Casitas itself was responsible for the initial delay in making the relocation, which delay had the effect of increasing the final relocation costs.

Attorneys: Robert L. Klarquist
FTS 633-2731

Jacques B. Gelin
FTS 633-2762

Arkla Exploration Co. v. Clark, No. 82-2228, (8th Cir. May 4, 1984). D.J. # 90-1-18-3560.

OIL AND GAS LEASING; SECRETARY; DETERMINATION THAT LEASE AREA WAS NOT WITHIN KNOWN GEOLOGICAL STRUCTURE REVERSED FOR FAILURE TO CONSIDER ALL RELEVANT FACTORS.

Under Section 17 of the Mineral Leasing Act, 30 U.S.C. §226, federal oil and gas lands may be leased by competitive bid if the "lands to be leased are within any known geological structure of a producing oil and gas field . . . ." ["KGS."] Conversely, the lands must be leased by noncompetitive bid if they are not within such a "KGS."

The Federal Coal Leasing Amendments Act of 1976, 90 Stat. 1083, 1090, made acquired lands within federal military reservations available for oil and gas leasing under the Mineral Leasing Act. The Texas Oil and Gas Corporation ("TXO") then promptly filed numerous noncompetitive oil and gas lease applications for lands within Fort Chaffee, Arkansas. Interior ultimately determined that certain lands within Fort Chaffee were not within a KGS and issued 20 noncompetitive leases to TXO.

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Assistant Attorney General F. Henry Habicht, II

The Fort Chaffee leases immediately proved to be controversial. After directing Interior to undertake an inhouse investigation which sustained the non-KGS determinations, Secretary Andrus cancelled the leases on the ground that they had been issued prior to the time at which Interior's regulations implementing the 1976 Act had become effective. TXO then sued to have its leases reinstated and ultimately the District of Columbia Circuit ruled in favor of TXO and directed the Secretary to issue the leases to TXO. Texas Oil and Gas Corporation v. Watt, 683 F.2d 427 (D.C. Cir. 1982).

The Arkla Exploration Company and the State of Arkansas then commenced this action in the Western District of Arkansas seeking to have the leases set aside on the ground that Interior had acted arbitrarily and capriciously in finding that the lands at issue were not within a KGS. The district court ruled in favor of the plaintiffs and the government and TXO appealed.

The court of appeals affirmed in a 2-1 opinion. First, the court stated that the District of Columbia Circuit had never considered the KGS issue and, therefore, its order directing the Secretary to issue the leases did not preclude a second judicial order barring the Secretary from issuing the leases on different grounds. The court also found that the plaintiffs had standing, that there was a private right of action under the Mineral Leasing Act, and that the case was not barred by the statute of limitations or by res judicata. The court also rejected other similar "procedural" defenses.

Reaching the merits, the court of appeals found that the Secretary's non-KGS determination was invalid because Interior had not considered all of the relevant factors. The court stated that Interior could not simply classify all sections adjoining a section with a producing well as KGS, but must also consider additional geological data, which was, in this case, readily available. The court also found that Interior should have considered the "actual competitive interest" expressed by various other producers interested in obtaining leases from the Fort Chaffee lands.

Judge Gibson, dissenting, stated that he would uphold Interior's non-KGS determination. He stated that the district court had conducted a trial de novo and improperly substituted its judgment for that of the Secretary. In fact, the record shows that, due to the characteristically small size of the gas

traps in the Fort Chaffee area, Interior had a rational basis for its non-KGS determination and, therefore, its decision would be upheld.

Attorneys: Robert L. Klarquist
FTS 633-2731

Anne S. Almy
FTS 633-4427

24-MONTH COMPARATIVE SUMMARY OF U.S. ATTORNEYS' CASH COLLECTIONS
(April 1, 1982 through March 31, 1984)

CRIMINAL
Cash Receipts

Month	82 - 83	83 - 84	% Change
April	3,623,527	6,130,917	69.20%
May	2,671,948	2,435,264	(08.86)%†
June	2,798,487	3,104,237	10 93%
July	2,077,293	5,598,537	169.51%
August	4,502,892	2,899,271	(35.61)%
September	3,421,458	6,407,632	87.28%
October	5,501,985	5,422,644	(01.44)%
November	1,540,581	7,695,363	399.51%
December	2,926,059	6,106,913	108.71%
January	6,441,614	10,201,709	58.37%
February	3,538,503	3,194,953*	(09.71)%
March	$ 2,099,760	$ 5,296,561	152.25%
Total	$41,144,107	$64,494,001	56.75%

CIVIL
Cash Receipts

Month	82 - 83	83 - 84	% Change
April	14,359,070	17,341,700	20.77%
May	20,228,909	14,660,724	(27.53)%
June	6,347,956	13,746,440	116 55%
July	9,752,093	12,776,758	31.02%
August	8,236,754	11,726,309	42 37%
September	15,719,678	22,082,178	40.47%
October	7,243,968	12,770,761	76.30%
November	10,215,151	8,051,231	(21.18)%
December	8,845,767	8,768,241	(00.88)%
January	12,344,126	16,935,642	37.20%
February	8,588,325	8,928,510	3.96%
March	$ 13,395,189	$ 11,973,924	(10.61)%
Total	$135,276,986	$159,762,418	18 10%

TOTALS
Cash Receipts

Month	82 - 83	83 - 84	% Change
April	17,982,597	23,472,617	30 53%
May	22,900,857	17,095,988	(25.35)%
June	9,146,443	16,850,677	84.23%
July	11,829,386	18,375,295	55.34%
August	12,739,646	14,625,580	14 80%
September	19,141,136	28,489,810	48.84%
October	12,745,953	18,193,405	42.74%
November	11,755,732	15,746,594	33.95%
December	11,771,826	14,875,154	26.36%
January	18,785,740	27,137,351	44.46%
February	12,126,828	12,123,463	(00.03)%
March	15,494,949	17,270,485	11.46%
Totals	$176,421,093	$224,256,419	27.11%

* Maryland not reporting.
† ( ) = Negative Values

AJSteinmeyer:pat

CIVIL DIVISION

Acting Assistant Attorney General Richard K. Willard

Notices of Appeal in Civil Cases Awarding Money Judgments Against the United States: Possible Appeals to the Court of Appeals for the Federal Circuit

In the past, appeals from district court decisions awarding money judgments of less than $10,000 against the government were taken to the court of appeals for the circuit in which the district court is located, unless a statute was held unconstitutional, in which event the appeal was taken to the Supreme Court. The Federal Courts Improvement Act of 1982, however, specifies that appeals in such cases must be taken to the Court of Appeals for the Federal Circuit. Under the new Act it is unclear in some kinds of cases which court has appellate jurisdiction. In these doubtful cases, appeals should be filed protectively in both the regional court of appeals and the Federal Circuit.

Section 127 of the Federal Courts Improvement Act of 1982, 28 U.S.C. §1295(a), provides, "The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction . . . of an appeal from a final decision of a district court of the United States . . . if the jurisdiction of that court was based, in whole or in part, on" 28 U.S.C. §1346(a)(2). Section 1346(a)(2), the "little Tucker Act," confers jurisdiction over "any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort" except for cases under the Contract Disputes Act. 41 U.S.C. §601 et seq.

The clearest case where the appeal can only be taken to the Federal Circuit is where the district court's decision expressly and correctly states that its jurisdiction rests in whole or in part upon 28 U.S.C. §1346(a)(2). Beyond that, you no doubt can anticipate the difficulties. The following three examples are situations where it is at present unclear which court has appellate jurisdiction:

1. Where the district court incorrectly states that its jurisdiction rests on 28 U.S.C. §1346(a)(2). Unless the district court corrects its mistake on reconsideration, an appeal would appear still to lie in the Federal Circuit.

2. Where the district court's opinion is silent as to section 1346(a)(2), but the complaint alleges that section and possibly others as the basis for jurisdiction. If section 1346(a)(2), in fact, conferred jurisdiction, the appeal would appear to lie only in the Federal Circuit.

3. Where neither the district court decision nor the complaint asserts jurisdiction under section 1346(a)(2), but jurisdiction for the relief sought or granted lies only under that section, i.e., a money judgment against the government of less than $10,000. Here, too, in our view the appeal must be taken to the Federal Circuit.

If the relief sought or granted determines the appropriate appellate court, the problem will often be complex. For example, in one recent case, the district court purported to exercise mandamus jurisdiction under 28 U.S.C. §1361 in ordering the plaintiff reinstated in the Air Force with back promotions, credits for service missed, and back pay. In our view, back pay can be awarded only under section 1346(a)(2). E.g., Carter v. Seamans, 411 F 2d 767 (5th Cir. 1969), cert. denied, 397 U.S. 941 (1970). Thus, we think the appeal lies exclusively in the Federal Circuit.

In the past we have often argued that many kinds of claims can only be brought under the Tucker Act because they are claims for money founded upon the Constitution, a statute, a regulation, or an express or implied contract with the government. If a district court grants such relief, say in a case involving an Agriculture subsidy or military pay, then it follows under our view that the appeal lies to the Federal Circuit only.

It should be noted that Title VII has its own jurisdictional provision, 42 U.S.C. §2000e-5(f), and specifies, 42 U.S.C. §2000e-5(j), that appeals are governed by 28 U.S.C. §1291, which, of course, confers jurisdiction on the regional circuits. Thus,

fortunately, in our many Title VII suits involving claims of racial or sexual discrimination against government employees, it is clear that the appeals will continue to lie in the regional circuits.

In the second and third cases above, and any others where the answer is unclear, however, two notices of appeal should be filed, one to the regional circuit, the other to the Federal Circuit. One appeal can then be stayed while the appeal proceeds in what we think is the proper court.

Note this problem will arise both where we are the appellant and where we are the appellee. The Federal Courts Improvement Act also provides for the transfer of an appeal filed in the wrong court to the proper court, 28 U.S.C. §1631 so that provision should mitigate the consequences of a mistake by us or our opponents. Nevertheless, particularly until the courts resolve questions such as those discussed above, careful consideration will have to be given to a matter that used to be fairly routine, namely, which appellate court should be specified in our notice of appeal.

U.S. Department of Justice

Executive Office for United States Attorneys

Office of the Director

Washington, D.C. 20530

MAY 17 1984

MEMORANDUM FOR: ALL UNITED STATES ATTORNEYS

FROM: William P. Tyson
Director

SUBJECT: Use of Law Enforcement Type Badges by United States Attorneys and Assistant United States Attorneys

* * DOES NOT AFFECT TITLE 10 * *

The Department Security Office has recently turned over to this office a law enforcement type badge which was apparently carried in a credentials folder by a former Assistant United States Attorney. The purpose of this memorandum is to remind you of Department of Justice policy which prohibits the possession and or use of such badges by United States Attorneys and their Assistants.

Paragraph 10 of Change 1 to DOJ Order 2610.1A, dated December 27, 1979, limits the use of law enforcement type badges to Department of Justice employees who are authorized by law to carry firearms and make arrests. The Order further states that authorized badges are and will remain the property of the United States government and will be controlled and protected against unauthorized use.

It has been the established policy of the Department of Justice for some time that United States Attorneys and Assistant United States Attorneys are not authorized to carry law enforcement type badges or to accompany law enforcement agents on raids or arrests.

Please ensure that all Assistant United States Attorneys in your office are reminded of this policy.

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

Teletypes To All United States Attorneys

05/18/84--From William P. Tyson, Director, Executive Office for United States Attorneys, re: "Prosecutions Under 18 U.S.C. §1001 Relating to Civil Rights Matters."

05/22/84--From Stephen S. Trott, Assistant Attorney General, Criminal Division, re: "Samuel Rosenthal Appointed Chief, Appellate Section, Criminal Division, Effective May 14, 1984."

05/24/84--From Richard K. Willard, Acting Assistant Attorney General, Civil Division, re: "Social Security Ruling Implementing the Continuing Disability Review Moratorium Announced by Secretary Heckler on April 13, 1984."

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