U.S. Department of Justice

Executive Office for United States Attorneys

United States Attorneys' Bulletin

Published by:

Executive Office for United States Attorneys, Washington, D.C.
For the use of all U.S. Department of Justice Attorneys

William P. Tyson, Director

EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS

Editor-in-Chief: Susan A. Nellor FTS 633-4024
Editor: Judith C. Campbell FTS 673-6348

TABLE OF CONTENTS

VOL. 33, NO. 8 THIRTY-SECOND YEAR April 26, 1985

Please send change of address to Editor, United States Attorney's Bulletin, Room 1629, Main Justice Building, 10th & Pensylvania Avenue, N.W., Washington, D.C. 20530.

COMMENDATIONS

Assistant United States Attorney DAVID L. ALLRED, Middle District of Alabama, was commended by Assistant Attorney General William Bradford Reynolds, Civil Rights Division, for his assistance in developing and organizing the case against Joe Garner and others for violations of the nation's criminal civil rights laws.

Assistant United States Attorney VERNELIS K. ARMSTRONG, Northern District of Ohio, was commended by Mr. John O. Hibbs, Regional Administrator, Federal Highway Administration, Department of Transportation, for her successful representation of federal defendants in Dunn v. City of Tiffin.

Assistant United States Attorney WALTER LEON BARFIELD, Southern District of Georgia, was commended by Mr. William H. Webster, Director, Federal Bureau of Investigation, for his outstanding contributions to the prosecution of members of a major cocaine trafficking ring.

Assistant United States Attorney JOHN D. BATES, District of Columbia, was commended by Mr. John J. Lafferty, Regional Director, Office of Personnel Management, New York, for his briefing on "The Personal Liability of Federal Executives and Managers," presented at a meeting of regional Housing and Urban Development officials in Morristown, New Jersey.

Assistant United States Attorney DANIEL J. BRODERICK, Central District of California, was commended by Mr. W.J. Maisch, Inspector-in-Charge, United States Postal Service, Pasadena, California, for his outstanding work in United States v. Michael Bass.

Assistant United States Attorney CHARLES F. FLYNN, District of Columbia, was commended by Mr. William B. Wharton, Director, Office of Citizenship Appeals and Legal Assistance, Department of State, for his efforts in cases involving the Department of State.

Assistant United States Attorney JOHN R. HALLIBURTON, Western District of Louisiana, was commended by Mr. Thomas D. Reese, Brigadier General, United States Army, Acting Commander, Fifth Infantry Division (Mechanized) and Fort Polk, for the successful defense in the cases of Landen et ux. v. United States and Landen v. United States.

Assistant United States Attorney NEWMAN T. HALVERSON, JR., District of Columbia, was commended by Assistant General Counsel D. D. Anna, Procurement Division, Office of Contracts and Property Law, United States Postal Service, for his skillful defense of the Postal Service in International Mailing Systems v. United States Postal Service.

Assistant United States Attorney MARTIN FRANCIS HEALEY, Northern District of California, was commended by Mr. Robert S. Gast, II, Special Agent in Charge, Federal Bureau of Investigation, San Francisco, California, for his initiative and persistence in pursuing a grand jury investigation to the point that three persons responsible, rather than the one against whom the evidence was strongest, were successfully indicted and prosecuted.

Assistant United States Attorney JOEL RICHARD LEVIN, Northern District of California, was commended by Mr. Robert S. Gast, II, Special Agent in Charge, Federal Bureau of Investigation, San Francisco, California, for his successful prosecution of David Carey.

Assistant United States Attorney PATRICIA J. KENNEY, District of Columbia, was commended by Mr. Gerald F. Meyer, Associate Commissioner for Management and Operations, Food and Drug Administration, for her successful efforts in Butler v. Young.

United States Attorney SALVATORE R. MARTOCHE, Western District of New York, was commended by Mr. Donald O. Chesworth, Superintendent, New York State Police, Albany, for his leadership, dedication, and cooperation in the efforts of the Law Enforcement Coordinating Committee.

Assistant United States Attorney MANUEL A. MEDRANO, Central District of California, was commended by Mr. Michael Stark and Mr. Grant Carter, Bell Police Department, Bell, California, for his successful prosecution of United States v. Manuel Gonzalez

Assistant United States Attorney TOMMY E. MILLER, Eastern District of Virginia, was commended by Mr. William H. Webster, Director, Federal Bureau of Investigation, for his outstanding work in connection with the ongoing Organized Crime Drug Enforcement Task Force case, "Zuider Zee."

United States Attorney ELSIE L. MUNSELL, and her professional staff, particularly, Assistant United States Attorney CLARENCE H. ALBRIGHT, JR., Eastern District of Virginia, were commended by Mr. Herbert L. Beckington, Inspector General, Agency for International Development (AID), for their diligence, dedication and drive in prosecuting a most difficult AID case.

Assistant United States Attorney JEFFREY S. NIESEN, Central District of California, was commended by Mr. Jerry D. Garner, Acting Inspector in Charge, United States Postal Service, for his outstanding work in United States v. Celso Macadamia.

Assistant United States Attorney JOSEPH D. NEUMAN, Southern District of Georgia, was commended by Mr. William H. Webster, Director, Federal Bureau of Investigation, for his invaluable role in the prosecution of Charles Edward Fleming and members of his organization in connection with a narcotics case.

Assistant United States Attorney HENRY H. ROSSBACHER, Central District of California, was commended by Mr. Ronald E. Saranow, Chief, Criminal Investigation Division, Internal Revenue Service, Los Angeles, California, for his outstanding work in United States v. Hartman.

Assistant United States Attorney KATHRYNE ANN STOLTZ, Central District of California, was commended by the Honorable Joan M. Clark, Assistant Secretary of State for Consular Affairs, Department of State, for her outstanding work in Ross v. McNamara.

Assistant United States Attorneys LEIDA BETH SCHOGGEN and LELAND B. ALTSCHULER, Northern District of California, were commended by Mr. William H. Harrison, Major General, Department of the Army, Commander of the 7th Infantry Division at Fort Ord, for their successful prosecution of Robert Howell.

Assistant United States Attorney JEFFREY G. VARGA, Central District of California, was commended by Mr. Robert J. Wilson, Assistant Regional Counsel (General Legal Services), Western Region, Internal Revenue Service, for his outstanding work in United States v. One 1954 Rolls Royce Silver Dawn.

POINTS TO REMEMBER

Federal Juvenile Delinquency Act, 1984 Amendments.

The 1984 Amendments to the Federal Juvenile Delinquency Act, effective October 12, 1984, redelegates to United States Attorneys the authority of the Assistant Attorney General in charge of the Criminal Division pursuant to 18 U.S.C. §§5032 and 5036, and 28 C.F.R. §0.57 to:

1. Prosecute juveniles for acts of juvenile delinquency (including proceeding by information);

2. Certify to the appropriate district court of the United States that:

   (a) the juvenile court or other appropriate court of a state does not have jurisdiction or refuses to assume jurisdiction over a juvenile alleged to have committed an act of juvenile delinquency;

   (b) the state does not have available programs and services adequate for the needs of juveniles; or

   (c) the offense charged is a crime of violence that is a felony or an offense described in Sections 841, 952(a), 955, or 959 of Title 21, and that there is a substantial

federal interest in the case or the offense to warrant the exercise of federal jurisdiction; and,

3. Make the proper showing to the court in the event a juvenile delinquent is not brought to trial within 30 days from the date detention began.

The 1984 Amendments cancels Memoranda Nos. 801, 808 and 808 (Revised), to all United States Attorneys, dated October 30, 1974, March 20, 1975, and April 1, 1975, respectively, subject: Federal Juvenile Delinquency Act, 1974 Amendments.

(Criminal Division)

Items Submitted for Publication in the United States Attorneys' Bulletin.

The Executive Office for United States Attorneys, through its Office of Legal Services, Bulletin Staff, has developed a form for United States Attorneys' offices to regularly submit case decisions, with application to other districts, for publication in the Bulletin. The form was developed as a result of the Survey of the United States Attorneys' Bulletin, which was conducted during the summer of 1984 of United States Attorneys' offices legal personnel. The form is appended to this issue of the Bulletin and, for your convenience, the form will be published in the Bulletin on a regular basis. Instructions for completing the form are also set out in the appendix to this Bulletin.

(Executive Office)

Personnel.

Effective April 8, 1985, Donn R. Baker resigned as United States Attorney, and Roger Hilfiger was court appointed United States Attorney in the Eastern District of Oklahoma.

Effective April 11, 1985, James L. Powers resigned as United States Attorney, and Henry K. Oncken was court appointed United States Attorney in the Southern District of Texas.

(Executive Office)

Teletypes to All United States Attorneys

A listing of recent teletypes sent by the Executive Office is appended to this 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)

United States Parole Commission Requests Notification of Sentence Reductions Resulting From Disappointed Expectations Concerning Parole Dates.

United States Attorneys are reminded that it is important to remain alert to any instances in which a court orders the reduction of a prisoner's sentence under Federal Rules of Criminal Procedure 35, when such an order is a result of disappointed expectations concerning that prisoner's parole date. United States Attorneys' offices should promptly inform the United States Parole Commission's legal staff on FTS 492-5959, of such sentence reductions. The Parole Commission will then challenge, within the 30-day limit set for appeal, any sentence reduction, not timely made within the 120-days allowed under Rule 35, which affects the lawful exercise of the Parole Commission's authority.

A copy of the Order reducing the sentence should be immediately mailed to the United States Parole Commission, Legal Counsel Division, Room 432, Park Place Building, 5550 Friendship Blvd., Chevy Chase, Maryland 20815.

(Executive Office)

Victim and Witness Protection Act: Recent Circuit Court Opinions on the Scope of Sections 1503 and 1512 of Title 18 of the United States Code.

The United States Court of Appeals for the Second Circuit, holding, in United States v. Hernandez, 730 F.2d 895 (2d Cir. 1984), that "[C]ongress affirmatively intended to remove witnesses entirely from the scope of [18 U.S.C.] §1503" reversed Hernandez' conviction under that section. Hernandez was indicted on charges of receipt of stolen Treasury checks, forgery of endorsements, possession of stolen mail, obstruction of justice and threatening a witness. The count of obstruction of justice was brought under 18 U.S.C. §1503 and was based on Hernandez' threat to kill a witness in possession of the dishonored Treasury checks unless the witness gave the checks to Hernandez. Agreeing with Hernandez' contentions that by enacting 18 U.S.C. §1512 specifically to cover witness intimidation and, at the same time, by deleting from 18 U.S.C. §1503 all references to witnesses, Congress clearly intended that threats against witnesses to induce them to withhold evidence would fall solely under section 1512, the Court of Appeals reversed Hernandez' conviction on that count. The Second Circuit did narrow its holding, however, by observing later in the opinion that "by enacting [the Victim and Witness Protection Act] in 1982, Congress intended that intimidation and harassment of witnesses should thenceforth be prosecuted under §1512 and no longer under §1503." Id. at 899.

The United States Court of Appeals for the Ninth Circuit, however, has held in United States v. Lester, 749 F.2d 1288 (9th Cir. 1984), that a charge of hiding a witness in order to prevent the witness' appearance at a murder trial was properly brought under 18 U.S.C. §1503. The jury returned a verdict against Lester and a codefendant on charges of obstructing justice under 18 U.S.C. §1503 and §1510, and conspiracy to obstruct justice, but the district judge granted Lester's Rule 29, Federal Rules of Criminal Procedure, motion for acquittal on the two substantive counts. On appeal, Lester argued that he had been improperly indicted under section 1503. The Ninth Circuit disagreed and reinstated the jury verdict, stating its belief that "Congress enacted section 1512 to prohibit specific conduct comprising various forms of coercion of witnesses, leaving the omnibus provision of section 1503 to handle more imaginative forms of criminal behavior, including forms of witness tampering, that defy enumeration." Id. at 1294.

The Ninth Circuit discussed the Second Circuit's construction of the interplay between sections 1503 and 1512 in Hernandez, supra, emphasized the factual differences in the two cases, and stated that the Second Circuit's holding did not invalidate its conclusion that while Lester's conduct fell outside "intimidation and harassment of witnesses," it fell precisely within the residual omnibus clause of section 1503. Id. at 1295. The Ninth Circuit accordingly set aside the judgments of acquittal on the substantive counts against Lester and restored the jury verdict.

(Executive Office)

CASENOTES

OFFICE OF THE SOLICITOR GENERAL

The Solicitor General has authorized the filing of:

A petition for a writ of certiorari in United States v. Mechanik, No. 80-5166 (4th Cir. March 1, 1985). The issue is whether a grand jury proceeding in which a technical violation of Federal Rules of Criminal Procedure 6(d) occurred is prejudicial per se and requires dismissal of the indictment without regard to whether the error was prejudicial to the defendant.

A petition for a writ of certiorari in Heckler v. American Hospital Association, S. Ct. No. 84-1529. The issue is whether Section 504 of the Rehabilitation Act of 1973 prohibits a hospital from withholding nourishment or medically indicated treatment from a handicapped child, or otherwise discriminating against the child, solely because of his handicap.

A petition for a writ of certiorari in American College of Physicians v. United States, 743 F.2d 1570 (Fed. Cir. 1984). The issue is whether commercial advertising income received by a tax-exempt organization that publishes a medical journal is "unrelated trade or business income" taxable to the organization under Sections 511 to 513 of the Internal Revenue Code.

A petition for a writ of certiorari in City of Fulton v. United States, No. 84-913 (Fed. Cir. Jan. 9, 1985). The issue is whether the Secretary of Energy may impose an interim increase in the rates charged for electricity generated by federal hydro-electric projects pending confirmation of the rate increase by the Federal Energy Regulatory Commission.

CIVIL DIVISION

SUPREME COURT REVERSES D.C. CIRCUIT HOLDING THAT FDA MUST REGULATE USE OF LETHAL DRUGS FOR CAPITAL PUNISHMENT PURPOSES.

This case was brought by prison inmates sentenced to death in Texas and Oklahoma. They had petitioned the FDA to prohibit the enforcement of state statutes providing for the carrying out of death penalties by administering lethal overdoses of drugs, on the ground that the states proposed to administer drugs which had been approved by the FDA as safe and effective for other purposes, but had not been so approved for human execution. The FDA denied the petition, invoking, among other things, "its inherent enforcement discretion . . . not to investigate." Plaintiffs then brought this suit for injunctive and declaratory relief. The D.C. Circuit, reversing the district court's dismissal of the complaint, held that the FDA's decision to take no enforcement action was subject to judicial review, and that the FDA, in reaching its decision, had acted "arbitrarily, capriciously, and without authority of law."

The Supreme Court has now reversed, holding that the FDA's decision not to take the enforcement actions requested by plaintiffs was not subject to judicial review under the Administrative Procedures Act (APA). The Court held that an agency's decision not to take enforcement action is presumed immune from judicial review under 5 U.S.C. §701(2)(2), which precludes judicial review where agency action is "committed to agency discretion by law." Under that provision of the APA, an agency's decision not to take enforcement action is unreviewable unless Congress has indicated an intent to circumscribe agency enforcement discretion, and has provided meaningful standards for defining the limits of that discretion. The Court found no such standards in the enforcement provisions of the Food, Drug, and

Cosmetic Act, and accordingly reversed the decision of the court of appeals.

Chaney v. Heckler, ___U.S.___, No. 83-1878 (Mar. 20, 1985). D. J. # 145-16-2065.

Attorneys: Leonard Schaitman (Civil Division) FTS 633-3441; John Rogers (Civil Division) FTS 633-1673.

D.C. CIRCUIT HOLDS THAT VA PROCEDURES FOR DECIDING VETERANS DISABILITY CLAIMS ARE EXEMPT FROM JUDICIAL REVIEW.

Plaintiffs in this action brought suit challenging various Veterans Administration (VA) and Defense Nuclear Agency documents that concern the VA's award of benefits for disabilities that allegedly result from radiation exposure while in service. Plaintiffs claimed that the documents constituted rules that were invalid because they were not published with an opportunity for comment in compliance with the Administrative Procedure Act (APA). The district court agreed with plaintiffs and invalidated the use of the documents.

Thereafter, plaintiffs moved for contempt sanctions, alleging that the VA continued to adjudicate radiation exposure claims in accordance with the documents. The district court denied the motion for contempt but expanded the government's obligations by requiring the VA and the Defense Nuclear Agency to promulgate, through APA rulemaking, the methodologies they use to estimate in-service radiation exposures.

On appeal, we argued that the methodologies and documents are not rules subject to notice and comment rulemaking. The court of appeals, however, did not address that issue. Instead it held --sua sponte and by a divided vote--that 38 U.S.C. §211(a) deprives the courts of jurisdiction even to consider plaintiffs' claims. Under Section 211(a), the VA's decisions "on any question of law or fact under any law administered by the [VA] providing benefits for veterans" are specifically exempt from judicial review. According to the court of appeals, this preclusion of judicial review applies both to VA actions on individual disability claims and to VA rulemaking, whether formal or informal.

Gott v. Walters, ___F.2d___, Nos. 82-1159, 82-1448, 82-1454 (D.C. Cir. Mar. 22, 1985). D. J. # 145-151-677.

Attorneys: William Kanter (Civil Division) FTS 633-1597; Marc Johnston (Civil Division) FTS 633-3305; Fred Geilfuss (Formerly of the Appellate Staff).

D.C. CIRCUIT UPHOLDS SEVEN OF EIGHT CHALLENGED REGULATIONS IMPLEMENTING THE SERVICE CONTRACT ACT.

In 1983 the Department of Labor issued extensive revisons of the regulations implementing the Service Contract Act, which sets labor standards for contracts in excess of $2,500 to furnish services to the government. Eight of the new regulations were challenged in this litigation. The district court upheld all of the regulations. The court of appeals has now affirmed the district court's ruling regarding seven of the regulations on the ground that they were not arbitrary, capricious, an abuse of discretion or contrary to law. The court reversed on one regulation, holding that the Labor Department had failed to comply with the notice and comment requirements of the APA with regard to that regulation. The court did not reach the substantive validity of that regulation that adopted a "significant or substantial" standard for determining whether a contract for services was performed "in the United States."

AFL-CIO v. Donovan, ____F.2d____, No. 84-5072 (D.C. Cir. Mar. 22, 1985). D. J. # 145-10-2396.

Attorneys: Anthony Steinmeyer (Civil Division) FTS 633-3388; John Hoyle (Civil Division) FTS 633-3547.

SECOND CIRCUIT HOLDS U.S. CREDITOR BANKS MAY OBTAIN JUDGMENT IN U.S. COURTS ON DEFAULTED LOANS TO COSTA RICAN GOVERNMENT BANKS DESPITE DECREES OF THE COSTA RICAN GOVERNMENT RESTRICTING THE PAYMENT OF EXTERNAL DEBT.

The defendants in this case are banks, owned by the Costa Rican Government, that defaulted in 1981 on loans from a syndicate of 39 United States banks. The default occurred after Costa Rican authorities determined that public sector companies would pay external debt only with the express approval of the Costa Rican Central Bank, and that payments would be deferred in view of external debt renegotiations. The syndicate brought suit for full payment and the district court ultimately dismissed the suit on act of state grounds. The Second Circuit affirmed on the ground that the actions of the Costa Rican Government in rescheduling its public debt were "consistent with the law and policy of the United States" and were therefore entitled to comity regardless of whether the act of state doctrine applied. The determination of United States policy was based in part on "our foreign policy [as] indicated by the support voiced for the renegotiation by both the legislative and executive branches of our government."

The court of appeals panel reheard the case and has now vacated its previous decision. We filed an amicus brief and presented oral argument on rehearing, on behalf of the Departments of State and Treasury, and the Federal Reserve Board. The court of appeals accepted our view that United States policy supports cooperative adjustment of international debt problems through the auspices of the International Monetary Fund, and that the entire strategy assumes "that, while parties may agree to renegotiate conditions of payment, the underlying obligations to pay nevertheless remain valid and enforceable." The court also accepted our argument that the act of state doctrine does not preclude enforcement of debts otherwise enforceable in the courts of the United States. The court of appeals accordingly reversed and directed the district court to enter judgment for the plaintiff bank.

Allied Bank International v. Banco Credito Agricola de Cartago, ___F.2d___, No. 83-7714 (2d Cir. Mar. 18, 1985). D. J. # 145-0-1409.

Attorneys: Robert Kopp (Civil Division) FTS 633-3311; Leonard Schaitman (Civil Division) FTS 633-3441; John Rogers (Civil Division) FTS 633-1673.

FIFTH CIRCUIT HOLDS HAGUE EVIDENCE CONVENTION DOES NOT PRECLUDE DISCOVERY ORDER REQUIRING PARTY TO PRODUCE DOCUMENTS LOCATED ABROAD.

In this private admiralty action in federal district court, a German corporation party sought relief by mandamus against district court orders that it produce documents located in Germany and produce employees for depositions in Germany. The corporation argued that the Hague Evidence Convention, to which both the United States and the Federal Republic of Germany are parties, provided the exclusive means for a court to obtain information located abroad. At the request of the Fifth Circuit, we submitted an amicus brief stating the view of the United States that the Hague Evidence Convention is not "exclusive," and that document production orders against parties over whom United States courts had jurisdiction did not conflict with the convention, although a balancing of interests (comity analysis) was required where, as here, the German government had asserted that the production order violated its sovereignty. We also argued, however, that a United States court order that depositions be conducted in the territory of a foreign state, without following procedures permitted under the Evidence Convention, would violate the judicial sovereignty of a state party to the convention.

In denying the mandamus petition, the court of appeals wrote an extensive analysis, largely adopting the position urged by the United States. The Evidence Convention does not supersede

the Federal Rules of Civil Procedure, and foreign judicial sovereignty is not infringed by an order to produce documents or examine witnesses in the United States. The court suggested that the district court reconsider all orders in light of its opinion.

In re Anschuetz, ___F.2d___, No. 84-3286 (5th Cir. Mar. 7, 1985). D. J. # 78-754.

Attorneys: Leonard Schaitman (Civil Division) FTS 633-3441; John Rogers (Civil Division) FTS 633-1673.

NINTH CIRCUIT, APPLYING SAMPSON v. MURRAY, VACATES DISTRICT COURT ORDER PRELIMINARILY ENJOINING AIR FORCE FROM DISCHARGING A SERVICEMAN PENDING REVIEW OF HIS GENERAL DISCHARGE BY THE BOARD FOR CORRECTION OF MILITARY RECORDS AND BY THE DISTRICT COURT.

Hartikka, an Air Force pilot, showed up drunk for two overseas flying missions, and later drunkenly discharged a rifle in the direction of his neighbor's house. The Air Force ordered him discharged under honorable conditions (general). He sought review in the Board for Correction of Military Records (BCMR), and the district court granted a preliminary injunction pending that review and review by the district court if administrative review was unsuccessful. He contended that he was a recovered alcoholic and that he was being discharged for having the disease of alcoholism, contrary to AF regulations prescribing rehabilitation. The court of appeals (Sneed, Anderson, JJ.) held that under Sampson v. Murray, 415 U.S. 61 (1974), such a preliminary injunction had to be supported by "genuinely extraordinary" irreparable injury, something much greater than what usually occurs in employee discharge cases. Since Hartikka had alleged only the normal kinds of injury (loss of income and the ensuing collateral effects thereof, and the possibility of stigma), the injunction could not stand. Judge Ferguson dissented; he would have found the genuinely extraordinary irreparable injury in the stigma of a general discharge.

Hartikka v. United States, ___F.2d___, No. 84-5604 (9th Cir. Mar. 6, 1985). D. J. # 145-14-2001.

Attorneys: Anthony Steinmeyer (Civil Division) FTS 633-3388; Marc Richman (Civil Division) FTS 633-5735.

NINTH CIRCUIT UPHOLDS NATIONAL MEDIATION BOARD'S CERTIFICATION OF UNION WHEN THE NMB'S MEMBERSHIP HAD FALLEN FROM THREE MEMBERS TO ONLY ONE MEMBER DURING PART OF THE CERTIFICATION PROCESS.

This case is one of a series of challenges to actions taken by the National Mediation Board (NMB) during a period when its membership fell from three members to one. The actions were taken pursuant to an order delegating authority to the one remaining member to take all actions on behalf of the Board until a second member was appointed. The Railway Labor Act provides that a quorum of the Board shall be two members. In this case, only preliminary actions of the NMB during the process of certifying a union as representative of airline employees were taken when the NMB's membership had fallen to one member. By the time the certification order was issued by the NMB, a second member had been appointed, thereby satisfying the quorum provision. The Ninth Circuit has just affirmed the district court's order upholding the validity of that certification order. The court ruled that only the NMB's certification order was reviewable since that was the agency's final action. Because that order was issued by a statutory quorum, the court upheld the order without reaching the question whether final agency action taken by the NMB when it had only one member would be valid. The court also upheld against plaintiffs' Fifth Amendment challenge to the NMB's rule that it would not accept an application for a representational election within two years of a certification order. The court accepted the need to preserve the status quo for a reasonable time and to stabilize labor relations as reasonable justification for the NMB's two year time bar.

We expect this case to end the challenges to the actions taken by the NMB when it had only one member. The D.C. Circuit has upheld a certification order issued by the one member. Railroad Yardmasters v. NMB, 721 F.2d 1332 (D.C. Cir. 1983). The Eighth Circuit dismissed a similar challenge as moot. Scheduled Skyways v. NMB, No. 83-2162 (October 26, 1984). We know of no other challenges to the NMB's actions that are not controlled by these appellate decisions. (Anthony Steinmeyer/John Hoyle).

Hunter v. National Mediation Board, ___F.2d___, Nos. 84-5748, 84-5754 (9th Cir. Mar. 5, 1985). D. J. # 145-135-74.

Attorneys: Anthony Steinmeyer (Civil Division) FTS 633-3388; John Hoyle (Civil Division) FTS 633-3547.

LAND AND NATURAL RESOURCES DIVISION

JURISDICTION TO REVIEW NRC'S DENIAL OF REQUEST TO REVOKE NUCLEAR POWER LICENSE EXCLUSIVELY IN COURTS OF APPEALS

The Supreme Court, by a vote of 8-1, sustained our position that the courts of appeals have exclusive jurisdiction to review the denial by the Nuclear Regulatory Commission (NRC) of a request to initiate proceedings to revoke a nuclear power plant license. The NRC, pursuant to its regulation, 10 C.F.R. §2.206(a), had denied the petition of Joette Lorion for an investigation of the safety of the Turkey Point nuclear reactor near Miami, Florida, and she filed a petition to review this decision in the D.C. Circuit. At oral argument, the court raised sua sponte the question of its jurisdiction, and in a subsequent opinion held that 42 U.S.C. §2239 did not give the court of appeals jurisdiction in this case because the proceeding was not of the type where NRC had granted, or would have granted, a hearing. In reaching this conclusion, the court effectively overruled its own precedent, which had been followed by the court of appeals. The Supreme Court, however, disagreed and reversed the court of appeals. Justice Brennan concluded that the language of 42 U.S.C. §2339 did not unambiguously bar court of appeals review of proceedings when no hearing was given. A review of legislative history indicated that Congress intended the court of appeals to review initially all final orders in licensing proceedings. The Court also found support for its interpretation in the general policy favoring initial review of agency decisions in the courts of appeals.

Florida Power and Light Co. v. Lorion, ___U.S.___, Nos. 83-703, 83-1031 (Mar. 20, 1985). D. J. # 90-1-4-2437.

Attorneys: John A. Bryson (Land and Natural Resources Division) FTS 633-2740; Dirk D. Snel (Land and Natural Resources Division) FTS 633-4400.

CATEGORICAL EXCLUSION DETERMINATION UNDER NEPA, REVIEWED UNDER ARBITRARY AND CAPRICIOUS STANDARD, SUSTAINED.

In a case of major concern to those who use the Shirley Highway during the daily "rush hour," the Fourth Circuit has cleared the way for implementation of the Traffic Management System (TMS). The TMS is an integrated system of freeway improvements, including an entrance ramp metering system. The ramp metering system uses traffic control lights and traffic sensors in order to adjust the rate of traffic flow on the ramps to accommodate the capacity of the highway, the ramps and the demand of traffic to enter the highway. The Federal Highway Administration (FHWA) provided 90%

funding for the project after determining that the project qualified as a categorical exclusion under NEPA. The City of Alexandria challenged the categorical exclusion determination, arguing that the FHWA had failed to take a hard look at the environmental impacts of the metering system.

The Fourth Circuit upheld the agency's decision. The court first held that the agency's decision would be reviewed under the arbitrary and capricious standard. The court next held that FHWA's categorical exclusion regulation was valid, if not more stringent than required. The court finally approved the use of the categorical exclusion here, finding that the agency had considered all relevant factors.

City of Alexandria v. Dole, ___ F.2d ___, No. 84-1349 (4th Cir. Mar. 11, 1985). D. J. # 90-1-4-2613.

Attorneys: Albert M. Ferlo, Jr. (Land and Natural Resources Division) FTS 633-2774; Dirk D. Snel (Land and Natural Resources Division) FTS 633-4400.

MODIFICATION OF CONSENT DECREE SETTING INTERIM EFFLUENT LIMITS DENIED.

The Ninth Circuit affirmed the district court's order, which had dismissed the claims for lack of subject matter jurisdiction.

The case involved a consent decree between the City of Las Vegas, Clark County, the State of Nevada, and the Environmental Protection Agency (EPA), which set out procedures for determining water quality standards in Lake Mead as a basis for setting effluent limits for the lake. The consent decree established interim effluent limits which, under the decree's terms, were to remain in effect unless the water quality study demonstrated that "different" limitations were "necessary." The city complained that the state adopted water quality standards without the study setting out the method for the standards' selection having been completed, and sought a relaxation of the interim effluent limits to move lenient limits as well as the ability to exceed a flow limitation the city claimed Nevada intended to impose, inter alia. The city raised several other issues in its brief which were not present on its complaint, including claims that EPA's approval of the state-promulgated water quality standards was improper because (1) the standards were couched in terms of effluent limits, (2) the state's selection of these standards was without empirical basis, and (3) EPA should have prepared total maximum daily loads (TMDLs) in the absence of the state having so done.

On appeal, the Ninth Circuit found that the City had raised issues concerning the procedures set out in the consent decree which were not wholly insubstantial and refused to decide whether

the consent decree remains in effect. Nevertheless, the court determined that the city's complaint failed to state a claim on which relief could be granted because (1) the consent decree guaranteed only against the imposition of no more strict effluent limits than those imposed in the interim, and (2) the city's flow limit claim was meritless under the decree. The court, furthermore, dismissed for lack of subject matter jurisdiction the city's Clean Water Act claims against both the non-federal and the federal defendants because they were not proper claims under Section 505 of the Act. The court, however, suggested that the district court may have had jurisdiction under 28 U.S.C. §1331 to review EPA's approval of Nevada's water quality standards, had the city filed a proper pleading in the first instance. (In fact, the city's complaint was filed prior to EPA's approval of Nevada's standards.)

Due process claims were dismissed because the effluent limitation is reasonably related to the important state interest in cleaner water.

City of Las Vegas, Nevada v. Clark County, Nevada, ___F.2d___ No. 84-1567 (9th Cir., decided by order Dec. 11, 1984, opinion filed Mar. 11, 1985). D. J. # 90-5-1-6-116.

Attorneys: William B. Lazarus (Land and Natural Resources Division) FTS 633-4168; Dirk D. Snel (Land and Natural Resources Division) FTS 633-4400.

EXPROPRIATION OF PLANTATION BY EL SALVADOR NOT A FIFTH AMENDMENT TAKING BY THE UNITED STATES.

Plaintiffs (United States citizens) owned a large coffee plantation (known as Las Lahas) in El Salvador that was expropriated in March 1980 as part of El Salvador's land reform. Plaintiffs alleged that the United States pressured El Salvador to adopt the land reform, that the United States was responsible for planning, implementing, and financing the land reform, and consequently, that expropriation of Las Lahas was a taking of their property by the United States without just compensation in violation of the Fifth Amendment. Plaintiffs also alleged that the United States' role in the land reform effectively extinguished any claim that plaintiffs might have under international law for compensation from El Salvador. The Claims Court granted summary judgment for the United States. Langenegger v. United States, 5 Cl. Ct. 229 (1984).

The Federal Circuit affirmed the judgment and held that: (1) plaintiffs' claim is not banned by the political question doctrine, (2) the expropriation of Las Lahas was not a taking by the United States, and (3) that plaintiffs' claim against El

Salvador was not extinguished by the United States. Addressing the political question issue, the court ruled that plaintiffs' claim must be assessed on the basis of the publicly disclosed actions of the United States and El Salvador and ruled out any judicial inquiry into the "real reasons" for the actions of either government. On the merits, the issue, as posed by the court, was whether the United States' involvement in the taking was "sufficiently direct and substantial to require compensation under the Fifth Amendment." The court held, as a matter of law, that diplomatic pressure "cannot be deemed sufficiently irresistible to warrant a finding of direct and substantial involvement, however difficult refusal may be as a practical matter."

Langenegger v. United States, ___ F.2d ___, No. 84-1420 (Fed. Cir. Mar. 12, 1985). D. J. # 90-1-23-2450.

Attorneys: James T. Draude (Land and Natural Resources Division) FTS 633-3796; David C. Shilton (Land and Natural Resources Division) FTS 633-4427.

ATTORNEYS' FEES UNDER EAJA DENIED WHERE APPLICATION FILED PREMATURELY.

In a published opinion affirming the district court's judgment, the Ninth Circuit held that a motion for attorneys' fees under EAJA must be filed "after entry and within thirty days of final judgment." The district court enjoined construction of a marina project on September 7, 1982, pending completion of an environmental impact study (EIS). Auke Bay filed a motion for attorneys' fees on December 20, 1982. The district court entered "formal" final judgment on August 11, 1983. On November 22, 1983, the district court denied Auke Bay's motion, finding it "premature."

The Ninth Circuit affirmed, holding that "a fair reading of the thirty day limitation provision [in EAJA] indicates that motions are to be filed after entry and within thirty days of final judgment." The court noted that since EAJA was a waiver of sovereign immunity, courts should not enlarge the waiver "beyond what a fair reading of the statute requires." The court stated that even though the United States would not be prejudiced by the early filing, the waiver of sovereign immunity must be strictly interpreted.

Auke Bay Concerned Citizens Advisory Council v. Marsh, ___ F.2d ___, No. 84-3812 (9th Cir. Mar. 12, 1985). D. J. # 90-1-4-2444.

Attorneys: Albert M. Ferlo, Jr. (Land and Natural Resources Division) FTS 633-2774; Martin W. Matzen (Land and Natural Resources Division) FTS 633-4426.

SIX-YEAR STATUTE OF LIMITATIONS IN QUIET TITLE ACT APPLIES TO INDIAN ALLOTTEES.

The Ninth Circuit affirmed the district court and endorsed the government's position that the 6-year statute of limitations in 28 U.S.C. §2401(a) applies to actions brought by Indian allottees under 25 U.S.C. §345. The decision is significant in that it appears to conflict with the Eighth Circuit's decision in Mottaz v. United States, a decision from which we have petitioned for rehearing en banc.

Christensen v. United States, ___F.2d___, No. 84-1971 (9th Cir. Mar. 12, 1985). D. J. # 90-2-4-929.

Attorneys: Donald T. Hornstein (Land and Natural Resources Division) FTS 633-2813; Martin W. Matzen (Land and Natural Resources Division) FTS 633-4426.

ITEM FOR PUBLICATION IN THE UNITED STATES ATTORNEYS' BULLETIN

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A. HEADNOTE (brief description of the case):

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B. Case summary. Briefly highlight the facts of the case, it's status, and it's relevance to other districts, if known. Please submit only those cases with relevancy to other districts and state that relevancy early in the case summary. Also, please limit the length of individual items to one-half page.

C. Complete case title, with citation. The Bulletin Staff follows the "Bluebook" (A Uniform System of Citation, Thirteenth Edition, The Harvard Law Review Association (1983)) recommendations for case cites, and includes the Department of Justice control number assigned to the case.

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TELETYPES

04-05-85 From C. Madison Brewer, Director, Office of Management Information Systems and Support, re: "Student Loan Cases Involving Bell and Howell Technical Schools."

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