United States Attorneys

Bulletin

Published by Executive Office for United States Attorneys
Department of Justice, Washington, D.C.

Vol. 20 January 7, 1972 No. 1

UNITED STATES DEPARTMENT OF JUSTICE

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Internal Security Division
Assistant Attorney General Robert C. Mardian

FOREIGN AGENTS REGISTRATION ACT

OF 1938, AS AMENDED

The Registration Section of the Internal Security Division administers the Foreign Agents Registration Act of 1938, as amended, (22 USC 611) which requires registration with the Attorney General by certain persons who engage within the United States in defined categories of activity on behalf of foreign principals.

During the last half of December of this year the following new registrations were filed with the Attoney General pursuant to the provisions of the Act:

The Australian Tourist Commission, 111 East Wacker Drive, Chicago, Illinois, registered as agent of its parent Commission in Melbourne. Registrant is to be the official Australian Tourist Commission in the central United States and will promote tourism to Australia through film showings, speeches and advertising.

Lawrence B. Sunderland, 1812 N Street, N. W., Washington, D. C., registered as agent of Vorort of the Union of Swiss Commerce and Industries, Zurich, Switzerland. Registrant will gather information pertaining to developments in foreign trade policy and the regulation of foreign trade affecting the interests of the foreign principal.

Louise S. Ansberry, 146 Central Park West, New York City, registered as agent of the Japan Trade Center. Registrant will gather information with respect to economic and financial problems of world trade relating to Japanese-United States relations.

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LAND AND NATURAL RESOURCES DIVISION
Assistant Attorney General Shiro Kashiwa

COURTS OF APPEALS

MINES AND MINERALS; ADMINISTRATIVE LAW; APPEALS

EXHAUSTION OF ADMINISTRATIVE REMEDIES; WAIVER OF CONTENTIONS NOT URGED; NO NEED FOR AGENCY HEARING WHERE NO FACTUAL ISSUE; WITHDRAWAL OF LANDS FROM ENTRY; ESTOPPEL AND ADVERSE POSSESSION AGAINST UNITED STATES; RELOCATIONS OF MINING CLAIMS; DISCOVERY OF VALUABLE MINERAL DEPOSIT; DISMISSAL OF APPEAL FOR LACK OF PROSECUTION.

United States v. Consolidated Mines and Smelting Co. and Hugh Brown (C.A. 9, Nos. 25164 and 25241, Dec. 6, 1971; D.J. 90-2-10-361)

The United States sought to quiet its trust title to lands within the Colville Indian Reservation in Washington. The Department of the Interior, in six separate opinions, had invalidated 56 mining claims on the grounds that the claims had been located after the Indian lands were withdrawn from entry in 1934, of that no valuable mineral deposit had been found, or both. The claimant did not fully pursue appellate review in Interior in all six proceedings.

The district court affirmed five of the six Interior decisions, ruling that (a) the failure of a mining claimant to exhaust his Interior appellate remedies does not bar judicial review (exhaustion is not expressly required by statute or regulation); (b) the claimant waives contentions not urged (here, lack of a contest hearing) where he pursues an administrative appeal (Nos. 1-3), but not where he does not (No. 6); (c) the 1934 withdrawals of the Indian lands from entry were valid; (d) the contention, that some of the claims were relocations of claims located prior to the 1934 withdrawal, was not proved; (e) the claimant may not assert estoppel and adverse possession against the United States; and (f) no valid mineral deposit had been found (Nos. 4 and 5). All parties appealed.

The Court of Appeals adopted the district court's opinions as follows: On the claimant's appeal as to Nos. 1-5, the Court of Appeals affirmed. On the Government's limited appeal as to No. 6, the court reversed. It agreed with the district court's rulings (a) and (b)--except to hold that the claimant "waived the right to complain about the lack of a hearing by never raising the question before the agency, although afforded an opportunity to do so" and, moreover, that the claimant was not entitled to a contest hearing because "the claims were located on withdrawn land and there was no factual issue to be decided."

Dismissal of Brown's separate appeal for lack of prosecution was not prejudicial, the Court added, in that Brown (the company's alter ego) did not personally have title to any of the mining claims.

Staff: Raymond N. Zagone (Land and Natural Resources Division); Assistant United States Attorney Robert M. Sweeney (E. D. Wash.)

INDIANS; JURISDICTION; CIVIL PROCEDURE

JURISDICTION OF SINGLE JUDGE TO ENFORCE DECREE OF THREE-JUDGE DISTRICT COURT; SOVEREIGN IMMUNITY; INDISPENSABLE PARTY; TAILORING RELIEF TO FACTS.

Hamilton, et al. v. Nakai, et al. (C.A. 9, No. 26588, Dec. 3, 1971; D.J. 90-2-0-584)

The Hopi Indian Tribe petitioned the district court for an order of compliance or writ of assistance, against the Navajo Indian Tribe and the Attorney General on behalf of the United States, to enforce its rights as a co-tenant with the Navajos on jointly lands determined by a three-judge district court in Healing v. Jones, 210 F. Supp. 125 (D. Ariz. 1962), affirmed on appeal, Jones v. Healing, 373 U.S. 758 (1963), pursuant to the Act of July 22, 1958, 72 Stat. 403. By virtue of the Act the United States was made a party defendant to that action and was determined by the Court to hold the title in trust in the subject lands for the benefit of both tribes. The single-judge district court denied the relief sought, holding that the matter was left to Congress, rather than the courts, to resolve the question of disposition of the jointly held land. From this order the Hopi Tribe appealed.

The United States and the Navajo Tribe as appellees took the position that the district court ruling was correct and urged on appeal that the Hopi petition was in effect seeking a partition of the jointly held land and that the petition had to be heard and determined by the special three-judge district court that originally decided the matter pursuant to the Act.

The Court of Appeals did not agree. It ruled that the three-judge court had completed its purpose pursuant to the Act; that the single-judge district court had jurisdiction to enforce the three-judge district court judgment; that the relief requested was not in the nature of partition of the jointly held land; that the sovereign immunity of the United States and the Navajos did not prevent enforcement of the judgment; that failure to join the Secretary of the Interior was not fatal since he and the United States are sufficiently represented by the Attorney General; and that the diffuculty of enforcing the decree should not preclude the petition at the threshold.

As to the final matter, the Court of Appeals said the "District Judge is not a creature without judgment or imagination * * * and can tailor the relief to be afforded to the facts that confront him," always bearing in mind the objective in the original decree of the joint, undivided and equal interest of the Hopi and Navajo Tribes in the subject lands.

Staff: Glen R. Goodsell (Land and Natural Resources Division); Assistant United States Attorney Richard S. Allemann (D. Ariz.)

ENVIRONMENT

NEPA; LEAD AGENCY; SUBSTANTIAL EVIDENCE; APA AS JURISDICTIONAL BASIS.

Upper Pecos Association v. Stans (C.A. 10, Dec. 7, 1971; No. 71-1411, D.J. 90-1-4-280)

In this action, the Upper Pecos Association sought a declaratory judgment and injunctive relief against the Department of Commerce and its Economic Development Administration (EDA) on the ground that EDA's funding of 80% of the cost of a road through part of a national forest was a violation of NEPA. The Association contended that the granting of this money for the road was a "major federal action," requiring the preparation of an environmental impact statement by EDA.

The Tenth Circuit affirmed the finding of the trial court that the Forest Service, as the agency charged with the construction of the road, was the "lead agency" and, therefore, was the agency with the responsibility to prepare the environmental impact statement. The Court stated that the Forest Service has a continuing commitment to the course of action to build the road, and also has the expertise to prepare the statement which sets forth the various alternatives to the project.

Furthermore, the Court rejected the Association's contention that preparation of the statement after the grant had been made was a meaningless gesture. It stated that the project must be of sufficient definiteness before an evaluation of its environmental impact can be made and alternatives proposed. Since the Forest Service still approve the location of the road and grant the necessary right-of-way easements for its construction, the impact statement prepared by the Forest Service will provide the basis on which that agency will make the final determinations. Therefore, the Court found no violations of NEPA and denied the Association's motions for declaratory and injunctive relief against the project.

Lastly, the Tenth Circuit noted that the district court had found jurisdiction over the action based upon the Administrative Procedure Act. This is a departure from past holdings of this circuit, and now places it in line with the other circuits which have been active in this area.

Staff: George R. Hyde and Peter R. Steenland (Land and Natural Resources Division); Assistant United States Attorney Mark B. Thompson, III (D. N. Mex.)

DISTRICT COURT

INDIANS

TRIBE AND ITS POLICEMAN LIABLE FOR DAMAGES FOR VIOLATIONS OF INDIAN BILL OF RIGHTS; DENIAL OF MOTION TO DISMISS.

Mrs. Lorraine Loncassion, Individually and as Mother and Next Friend of Terry Loncassion v. Willis Leekity and The Pueblo of Zuni (D. N. Mex., Civ. No. 8793, Nov. 16, 1971; D. J. 90-2-0-689)

This is a civil rights action filed by two members of The Pueblo of Zuni, seeking damages for injuries allegedly suffered when Terry Loncassion was arrested by defendant Leekity, a tribal policeman, for intoxication. Loncassion was shot through the torso by Leekity while attempting to escape, and the complaint alleged that Leekity's actions either were negligent or intentional and the Tribe was negligent in hiring and training Leekity, in violation of rights guaranteed by the Indian Bill of Rights, 25 U.S.C. secs. 1301-1303.

In denying the defendants' motion to dismiss, the court ruled that among the rights guaranteed by the Indian Bill of Rights is the right to be free from excessive injurious force which is arbitrarily inflicted, and that money damages would be appropriate when a person suffers physical injury as a result of the denial of a guaranteed right. It was specifically held that Leekity would be liable for any injuries suffered as a result of any violations by him of rights guaranteed by the Indian Bill of Rights, and that the Tribe would be liable for damages suffered as a result of its negligence in hiring policemen who violate guaranteed rights.

Staff: Case is being handled by tribal attorneys. Assistant United States Attorney Mark C. Meiering (D. N. Mex.) is monitoring case for Departments of Justice and the Interior.

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TAX DIVISION

Assistant Attorney General Scott P. Crampton

DISTRICT COURT

BANKRUPTCY

PAYMENTS FOR SERVICES AND FUNDS OBTAINED THROUGH FRAUD IN RETURN FOR WORTHLESS NOTES AND SECURITY HELD PROPERLY INCLUDED IN BANKRUPT-CORPORATION'S GROSS INCOME.

In re Home and Mortgage Corp., et al. (D. N. J., Bankruptcy No. B-198-67; decided October 4, 1971; D. J. 5-48-7967)

The Government filed a proof of claim for income taxes assessed against the bankrupt-corporation for two fiscal years in the amount of $262,700.18. The bankrupt's gross income was determined on the basis of its bank deposits during the period in the absence of any meaningful books and records. The trustee objected to the proof of claim on the grounds that the bank deposits included funds from sources which should not have been included in gross income.

The corporation had promoted a retirement village in which various persons had purchased memberships which entitled them to living quarters. In addition, the corporation took in funds from investors in return for a bond or note and a mortgage on a parcel of real estate it owned. After the death of the sole stockholder of the bankrupt, it was discovered that the same real estate had been mortgaged over and over. The bankruptcy court held that the mortgages were invalid although the investors remained general creditors of the corporation. The Government took the position that the so-called "loans" to the bankrupt were obtained through a scheme to defraud the investors. Since there was no intention to repay these "loans," the funds obtained thereby were includible in the bankrupt's gross income.

The Referee held that the payments by persons seeking living quarters in the retirement village were contributions to capital and were not income to the bankrupt. It was also held that despite the fact that the payments by investors were obtained in return for worthless security that there was a genuine intention to repay these bona fide loans. The basis for this conclusion was a finding that the corporation had made payments of interest and had paid utility and insurance bills and fees for permits and licenses, which it would not have done if it was perpetrating a fraud. The Referee entered an order expunging the Government's claim for taxes in its entirety.

On a petition for review, the district court reversed the Referee and held that the amount of gross income used by the Government in computing the tax assessment was correct. Since all facts had been stipulated, the court held it could review the Referee's findings free of the "clearly erroneous rule" applicable to ordinary findings of fact by the trial court. Philber Equipment Corp. v. Commissioner, 237 F. 2d 129 (C. A. 3, 1956).

The court found that payments by persons seeking living quarters in the retirement village were not contributions to capital of the bankrupt but were payments for a service and as such are regarded as taxable income to the bankrupt. The court went on to hold that "loans" received by the corporation were obtained through fraud and that the facts evidenced no intention to repay on the part of the bankrupt. Where the "borrower" does not intend to repay a "loan" it will be taxed on the economic benefit it realizes from the transaction. Commissioner v. Makransky, 321 F. 2d 598 (C. A. 3, 1963). The court dismissed the bankrupt's interest payments as "nothing more than tokenism" when compared to the extent of the bankrupt's indebtedness and emphasized the fact that over two-thirds of the bankrupt's expenditures that had been indentified had been paid out to its sole stockholder. The court held that the corporation could be held liable for the acts of its sole stockholder on its behalf even when fraudulent in nature and that it was liable as well for the tax consequences of his acts.

The matter was remanded to the Referee for a determination of what, if any, additional tax deductions the bankrupt might have.

Staff: Richard A. Scully (Tax Division)

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