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UNITED STATES ATTORNEYS
BULLETIN

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APPOINTMENTS-UNITED STATES ATTORNEYS

The nomination of the following incumbent United States Attorneys to new four-year terms have been confirmed by the Senate:

Guam-James P. Alger
Indiana, Northern-Alfred W. Moellering

DISTRICTS IN CURRENT STATUS

The following districts were current in all four categories of work in all of the twelve months of fiscal 1966:

Colorado*
Guam*
Indiana, Southern
New Hampshire
Oklahoma, Northern
Oklahoma, Western*
Pennsylvania, Western*
Tennessee, Western
Texas, Western

* Second consecutive year.

The following districts achieved a level of 90 per cent or more in remaining current in all four categories of work during fiscal 1966:

Alabama, Northern
Alaska
Arizona
Arkansas, Eastern
Arkansas, Western
Canal Zone
Florida, Northern
Georgia, Middle
Georgia, Southern
Indiana, Northern
Kentucky, Western
Louisiana, Western
Maine
Missouri, Western
Montana
New Jersey
North Carolina, Middle
Oklahoma, Eastern
Pennsylvania, Middle
Texas, Northern
Texas, Eastern
Utah
Washington, Eastern
Wyoming

The following districts have maintained an unbroken record of improvement in the number of times current in all four categories of work over the past five fiscal years:

Louisiana, Eastern
North Dakota
Ohio, Northern

MONTHLY TOTALS

As can be seen from the totals below, the hope that the pending caseload would be reduced this year was not realized. Instead, the caseload rose by some 4.2 percent over last year. New records in cases filed and terminated were established this year, however - more cases were filed and terminated in fiscal 1966 than in any of the 12 fiscal years for which we have records. Despite this record, the year will go down as the sixth consecutive year in which the caseload has risen.

	Fiscal Year 1965	Fiscal Year 1966	Increase or Decrease Number	%
Filed				
Criminal	33,667	33,152	- 515	- 1.53
Civil	28,839	30,411	↑ 1,572	↑ 5.45
Total	62,506	63,563	↑ 1,057	↑ 1.69
Terminated				
Criminal	32,529	32,050	- 479	- 1.47
Civil	28,093	29,347	↑ 1,254	↑ 4.46
Total	60,622	61,397	↑ 775	↑ 1.28
Pending				
Criminal	11,234	12,064	↑ 830	↑ 7.38
Civil	24,082	24,750	↑ 668	↑ 7.39
Total	35,316	36,814	↑ 1,498	↑ 4.21

As is usual in the last month of the fiscal year, the number of cases filed dropped somewhat and the number of cases terminated rose considerably. The number of terminations did not rise as much as is usual in June, however - in fact, the total was not much higher than that for the month of December. The gap between total cases filed and total cases terminated was 3.5% this year, as compared with 3.1% last year.

	Filed			Terminated		
	Crim.	Civil	Total	Crim.	Civil	Total
July	2,296	2,465	4,761	2,212	2,194	4,406
Aug.	2,585	2,555	5,140	1,870	2,245	4,115
Sept.	3,162	2,103	5,265	2,448	2,258	4,706
Oct.	2,702	2,415	5,117	3,078	2,507	5,585
Nov.	2,516	2,240	4,756	2,595	2,032	4,627
Dec.	2,534	2,310	4,844	2,688	2,028	4,716
Jan.	2,823	2,542	5,365	2,501	2,349	4,850
Feb.	2,863	2,469	5,332	2,576	2,377	4,953
Mar.	3,092	3,049	6,141	2,999	3,027	6,026
April	2,922	2,855	5,777	2,863	2,816	5,679
May	3,055	2,557	5,612	3,211	2,479	5,690
June	2,602	2,851	5,453	3,010	3,035	6,045

For the month of June, United States Attorneys reported collections of $5,586,671. This brings the total for fiscal year 1966 to $74,706,570 compared with the previous fiscal year this is an increase of $9,641,565 or 14.82 per cent over the $65,065,005 collected in that year.

During June, 1966, $6,415,328 was saved in 103 suits in which the government as defendant was sued for $7,583,403. 55 of them ivolving $5,589,177 were closed by compromise amounting to $982,167 and 14 of them involving $487,937 were closed by judgments amounting to $185,908. The remaining 34 suits involving $1,506,289 were won by the government. The total saved for the fiscal year amounted to $123,837,756 and is an increase of $17,461,292 or 16.41 per cent over the $106,376,464 saved in the first twelve months of fiscal year 1965.

The cost of operating United States Attorneys Offices for fiscal year 1966 amounted to $19,424,392 as compared to $18,710,643 for fiscal year 1965.

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ANTITRUST DIVISION

Assistant Attorney General Donald F. Turner

Court Denies Preliminary Injunction. United States v. Phillips Petroleum Company, et al. (S.D. Calif.) D.J. File 60-0-37-905. On August 23, 1966, Judge Francis C. Whelan filed an eleven-page opinion in which he denied the Government's motion for a preliminary injunction which had been the subject of two days of oral argument on August 4 and 5, 1966.

The Court held that the evidence presently before it (on the motion for preliminary injunction) was insufficient to permit a finding that there would be any lessening of potential competition by the acquisition. The Court felt that the evidence indicated that unilateral entry by Phillips into the California gasoline market would be unprofitable and that Phillips has never manifested any intention to enter California except through acquisition. The Court also accepted the testimony of George F. Getty, President of Tidewater, that Tidewater would withdraw completely from manufacturing and refining on the West Coast if the sale to Phillips was blocked.

The Court also denied the Government's alternative request that Phillips operate the acquired Tidewater properties under the Tidewater brand names. Judge Whelan did continue his outstanding order that all the acquired assets be kept segregated in the books and records of Phillips.

Staff: Harry W. Cladouhos, Richard P. Delaney, Gregory B. Hovendon and Leonard M. Berke (Antitrust Division)

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CIVIL DIVISION

Assistant Attorney General John W. Douglas

COURTS OF APPEALS

ADMINISTRATIVE PROCEDURE ACT -- PERISHABLE AGRICULTURAL COMMODITIES ACT

90-Day License Suspension of Fruit and Vegetable Dealer Supported by Record; Letter Sent Dealer Advising of Violations and Giving It Opportunity to Redress Its Misconduct Meets Requirements of § 9 of Administrative Procedure Act. Mandell, Spector, Rudolph Co. v. United States (C.A. 3, No. 15,451, August 24, 1966). D.J. File 107-62-24. Petitioner brought this action in the Court of Appeals to obtain direct review of an order issued by the Judicial Officer of the Department of Agriculture, pursuant to the Perishable Agricultural Commodities Act, suspending it for 90 days from operating in interstate commerce as a commission merchant, dealer and broker in fresh fruits and vegetables. The Judicial Officer had ordered the license suspension after finding that petitioner had failed (1) truly and correctly to account to the fruit and vegetable growers for whom it acted for the net proceeds realized from sales of their produce, and (2) to maintain the records required of it by the Act and regulations promulgated under it.

The Third Circuit affirmed the suspension, holding that the Secretary of Agriculture had sustained his burden of proving violations of the Act. The Court further held that the Secretary had complied with Section 9(b) of the Administrative Procedure Act, 5 U.S.C. 1008(b) -- which provides that "except in cases of willfulness * * * no withdrawal, suspension or revocation, or annulment of any license shall be lawful unless, prior to the institution of agency proceedings therefor, facts or conduct which may warrant such action shall have been called to the attention of the licensee by the agency in writing and the licensee shall have been accorded opportunity to demonstrate or achieve compliance with all the lawful requirements" -- since "petitioner was notified by letter of the violations [uncovered after audit] and given an opportunity to redress its misconduct but failed to do so." The Court also rejected petitioner's claim that the administrative proceedings which resulted in the suspension order were defective because prior to their institution there had not been filed against it a complaint of a violation of the Act by a person aggrieved. In this connection, the Court held that even assuming there was no complaint filed against it (a point which was in dispute) petitioner had waived any technical objection it may have had by consenting to the audit of its books and records after adequate notice to it of the investigation.

Staff: Martin Jacobs (Civil Division)

CIVIL SERVICE EMPLOYEES

Court of Appeals Rules That Discharged Government Employee's Financial Inability to Obtain Counsel Is Justifiable Excuse for Delay in Commencing

Action for Reinstatement; Evidence Obtained From Broad Foreign Search Warrant Held Improperly Admitted Into Administrative Hearing. Robert I. Powell v. Zuckert, et al. (C.A.D.C. No. 19,793, July 28, 1966). D.J. File 151-16-529. Powell was employed by the Air Force in Japan. The Air Force sought his removal on five separate charges, and Powell elected to contest his removal before the Air Force's Grievance Committee. A hearing was held and the Committee sustained the removal notice. Powell then invoked his Veterans Preference Act remedies. Sixteen months after he had exhausted them, Powell sought judicial review of his discharge. The District Court ruled that Powell's uncontroverted poverty, which allegedly made it difficult for him to retain counsel, did not excuse his delay in seeking judicial review, and granted summary judgment for defendants on the ground of laches.

The Court of Appeals reversed. It ruled that if poverty creates a barrier to litigation in particular cases, the District Court must consider this fact in applying laches, and that defendants had failed to show any unnecessary delay on Powell's part. The Court then held that certain of the charges against Powell could not be sustained because Air Force agents had unlawfully obtained the evidence on which they were based under color of a general Japanese search warrant which would, if issued in this country, have violated the Fourth Amendment. Finally, the Court ruled that two of the other charges against Powell were proved by evidence which was inadmissible under applicable Air Force regulations. The Court ordered the case remanded to the Air Force for further proceedings not inconsistent with its opinion.

Staff: United States Attorney David G. Bress and
Assistant United States Attorneys Frank Q. Nebeker,
Gil Zimmerman and Henry J. Monahan (D. D.C.)

CONTRACTS

Meaning of Technical Term in Contract Is Question of Fact. United States v. Continental Oil Company (C.A. 10, No. 8228, July 18, 1966). D.J. File 146-51-2-7066. In a sale in 1948 to Continental Oil Company of a war surplus chemical facility designed to make toluene for TNT and aviation gas, the Government reserved the right to charge a rental for any month in which the facility was used for "extracting toluene" within a period of 8 years following the sale. During the Korean War, the facility was used to make a substance which Continental called "aviation blending compound," or "ABC." It consisted of 80 to 85% toluene, and was used as a component of aviation gas. Previously, and at the time of the sale, toluene for aviation gas had to be of at least 98% purity, and toluene for other uses had to be at least 96% pure. With a lowering of the purity, it was necessary to improve the quality of the other components of the blend to make aviation gas meeting Government specifications.

This suit was brought by the Government to collect rentals for Continental's production of "ABC" during the Korean War. The trial court found, on the basis of expert testimony as to general usage at the time the contract was signed, that the term "toluene" referred to toluene meeting industrial specifications at that time -- i.e., toluene that was at least 96% pure. Accordingly, it dismissed the action. The Court of Appeals affirmed, on the ground that the district court's finding was not clearly erroneous.

Staff: Robert V. Zener (Civil Division)

LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT

Employer Fails to Rebut Statutory Presumption That Claim Comes Within Provisions of Act. Joseph Francis Butler v. District Parking Management Co., et al. (C.A.D.C., No. 19,876, June 8, 1966). D.J. File 83-16-274. In this action for compensation benefits claimant, who had been employed as a parking lot attendant for more than 20 years, alleged that his work caused him to suffer a nervous breakdown. At the hearing, a psychiatrist testified for the employer that he could not determine whether claimant's mental illness were caused by his work. The Deputy Commissioner denied the claim for the reasons that the illness was not work-related and that claimant had failed to give the timely written notice to his employer required by Section 12 of the Act.

The District Court affirmed that denial; but the Court of Appeals reversed on two grounds. First, it held that the employer failed to establish by substantial evidence that the claim was not work-related and therefore failed to meet the burden imposed by Section 20 of the Act. Second, the Court held that Section 12(d) of the Act excused claimant's failure to give written notice since his employer knew of his illness.

Staff: United States Attorney David G. Bress and Assistant United States Attorney Frank Q. Nebeker (D. D.C.); Charles Donahue, Alfred H. Myers and George M. Lilly (Department of Labor)

OFFICIAL IMMUNITY

Seventh Circuit Adheres to Rule That Federal Officials Are Absolutely Immune From Civil Liability For Actions Done in Line of Duty. Bernice LeBurkien v. Robert W. Notti (C.A. 7, No. 15416, August 17, 1966). D.J. File 145-115-483. Plaintiff, who was discharged from her job with the Housing and Home Finance Agency, sued the Agency's director of administration in state court for alleged defamatory and malicious statements written about her in her termination notice. The action was removed to the federal district court, where defendant moved to dismiss on the ground that the complaint itself showed that he was a federal official whose challenged statements had been made in the line of duty and related to a matter under his authority, thus making them absolutely privileged under the official immunity doctrine. See Barr v. Matteo, 360 U.S. 564; Howard v. Lyons, 360 U.S. 593. The district court agreed that the complaint did establish these facts and therefore granted the motion; it also refused to permit plaintiff to amend the complaint in a particular which would not have cured its patent legal insufficiency. Citing Barr v. Matteo, Howard v. Lyons, and its own decision of Sauber v. Gliedman, 283 F. 2d 941, certiorari denied, 366 U.S. 906, the Seventh Circuit affirmed.

Staff: Frederick B. Abramson (Civil Division)

SOCIAL SECURITY ACT

Sixth Circuit Finds Substantial Evidence to Support Secretary's Denial of Benefits; Claimant Fails to Carry Initial Burden of Proving Inability to Resume Her Former Work. Anna M. Stumbo v. Gardner (C.A. 6, No. 16595, August 23, 1966).

D.J. File 137-30-353. Claimant alleged that two heart attacks and sundry other ailments prevented her from engaging in any substantial gainful activity. The district court and the Court of Appeals upheld the Secretary's denial of benefits, the latter specifically upholding the Secretary's resolution of the "wide divergence" in the medical testimony. The Court noted that since claimant had failed to carry her "initial burden" of proving her inability to resume her former work, "there was no burden on the Secretary to designate some other specific area of employment available to her."

Staff: Florence Wagman Roisman (Civil Division)

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CRIMINAL DIVISION

Assistant Attorney General Fred M. Vinson, Jr.

FRAUD

There Is No Government Overreaching if Attorney General When Examining Documents of Broker-Dealer Registered With SEC Which Have Been Turned Over to SEC Investigators Determines Therefrom to Institute Immediate Criminal Proceedings Simultaneously With Pending Civil Litigation. United States v. Mahler, et al. (254 F. Supp. 581, May 10, 1966). D.J. File 113-16-40. A motion by the defendants for the suppression of evidence obtained by the Government was denied disallowing a claim that records rendered to the Securities and Exchange Commission for inspection and examination may not be turned over to the Government for furtherance of a criminal action. Defendant's company was registered with the SEC as a broker-dealer and as such was required to make available for inspection and examination by the SEC its books and records. The thrust of their claims was that they were told by the SEC investigators that the records turned over would neither be kept any longer than deemed necessary nor removed from Miami. The court found that the Commission had authority to investigate as to whether any person had violated or was about to violate any provision of the Securities Act of 1933 and that further authority to transmit to the Attorney General evidence concerning such acts or practices was clearly present at 15 U.S.C. 78u. Neither coercion nor invasion of the defendant's privacy was found to exist.

Mahler raised the question of overreaching by the Government due to parallel civil and criminal investigations then proceeding against him. Defendants placed great reliance on their position by the holding in United States v. Parrott, 248 F. Supp. 196 (D.D.C., 1965). The court adopting the holding in United States v. Sclafani, 265 F. 2d 408 (1959) concluded that it is unrealistic to suggest that the Government should be compelled to constantly apprise an individual of the direction in which fluctuating investigations are leading. The placing of such a burden on the Government was characterized as both impossible to discharge and as serving no useful purpose. Inferring that the mere existence of the concurrent presence of both a civil and criminal action against the same individual or individuals does not, ipso facto, conclude overreaching by the Government, the motion to suppress was denied.

Staff: United States Attorney Robert M. Morgenthau; Assistant United States Attorney Stephen L. Hammerman (S.D. N.Y.).

BANKING - FALSE ENTRIES

Evidence of Similar Transactions Admissible in Prosecution for False Entries. United States v. Jean Kirkpatrick, 361 F. 2d 866 (C.A. 6, 1966). Defendant was convicted of making false entries with intent to defraud a federally insured bank under 18 U.S.C. 1005. On appeal, defendant contended, inter alia, trial error in allowing into evidence other similar transactions

which were not covered by the indictment. The Court of Appeals in affirming the conviction held that evidence of numerous similar transactions attributed to defendant's manipulations of the bank's books was admissible to show an intent to injure or defraud and to show the absence of mistake or accident.

Staff: United States Attorney Joseph P. Kinneary;
Assistant United States Attorney Arnold Morelli
(S.D. Ohio)

* * *

IMMIGRATION AND NATURALIZATION SERVICE

Commissioner Raymond F. Farrell

IMMIGRATION

Second Circuit Upholds Automatic Revocation of Approval of Visa Petition. U.S. ex rel. Grigorios Stellas v. P.A. Esperdy (C.A. 2, No. 30356, August 30, 1966.) D.J. File 39-51-2698. This case involves an appeal from the denial by the district court of a writ of habeas corpus. Appellant Stellas, a Greek national, arrived at New York in 1961 as a crewman on the M/T Andreas and was paroled into the United States for medical treatment. At the termination of his parole Stellas failed to return to his vessel or to the Immigration and Naturalization Service and remained at large until 1963 when he was found by the Service. In the meantime, he had married a United States citizen, had one daughter and his wife was expecting another child. He was permitted to remain on parole with the expectation that his wife would petition to accord him nonquota status, that he would depart from the United States to Venezuela and that he would there obtain a nonquota immigrant visa and return to the United States for permanent residence. The Service approved his wife's visa petition but Stellas did not depart from the United States. A marital rift developed and his wife in November 1965 signed a request for the withdrawal of her visa petition which by regulation 8 CFR 206.1(b)(1) caused the automatic revocation of the approval of the petition. The Service revoked the parole of Stellas but by the initiation of these proceedings he stopped his removal from the United States. In December 1965, Mrs. Stellas filed a new visa petition but subsequently withdrew it. The District Court denied the issuance of a writ of habeas corpus from which Stellas appealed.

In an opinion written by Circuit Judge Smith for himself and Judge Kaufman the order of the district court was affirmed. Circuit Judge Moore dissented. The sole issue on appeal of any merit according to the majority opinion was whether the regulation 8 CFR 206.1(b)(1) providing for the automatic revocation of the approval of a visa petition conflicted with 8 U.S.C. 1155 which states that the Attorney General may, at any time, for what he deems to be good and sufficient cause, revoke a visa petition. The majority found no conflict and that sufficient cause existed to revoke the visa petition in view of the failure of Stellas to obtain a visa and his wife's desire that the petition be withdrawn. The validity of the regulation had previously been upheld in Scalzo v. Hurney, 225 F.Supp. 560 (E.D. Pa. 1963) aff'd 338 F.2d 339 (3rd Cir. 1964). Judge Moore wrote a strong dissent finding that the Attorney General had by the regulation improperly delegated his authority to revoke to the citizen spouses of aliens. He also expressed the view that in the circumstances here Stellas was entitled to a hearing on the question of whether his parole should have been revoked.

Staff: United States Attorney Robert M. Morgenthau (S.D.N.Y.)
Special Assistant United States Attorneys Francis J. Lyons and James G. Greilsheimer of Counsel

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LAND AND NATURAL RESOURCES DIVISION

Assistant Attorney General Edwin L. Weisl, Jr.

Indians; Secretary Has Authority to Dismiss Tribal Attorney for Cause After Having Approved His Contract; Breach of Fiduciary Duty Resulting From Attorney-Client Relationship Is Sufficient Cause. Udall v. Littell (C.A. D.C., No. 19,725, Sept. 2, 1966, D.J. File 90-1-4-100). This decision vacated a permanent injunction issued by the district court controlling action by the Department of the Interior relating to Norman M. Littell's contract as an attorney with the Navajo Indian Tribe.

Norman Littell was General Counsel and claims attorney for the Navajo Tribe since 1947. As General Counsel for the Tribe he received a fixed contract fee for handling routine legal work. Junior attorneys were also provided to assist with such work and were paid salaries from tribal funds. As claims attorney, he received 10% of amounts "recovered, saved, or obtained," by preparing, investigating and prosecuting the Tribe's claims against the United States. His employment contract provided that the duties and functions of the junior attorneys were not to include services relating to claims work. The contract also provided for termination for good cause by action of the Tribal Council, subject to the approval of the Commissioner of Indian Affairs.

The Tribe, with the approval of the Secretary of the Interior, renewed Littell's employment contract in 1957. In 1963 tribal elections, Raymond Nakai was elected Chairman of the Tribal Council primarily on a platform "to get rid of Mr. Littell." Nakai unsuccessfully attempted to get the Council to terminate Littell's employment contract. The Advisory Committee of the Council called upon the Secretary of the Interior to investigate. After an investigation, the Secretary suspended and withdrew his approval of Littell's contract. He wrote to Littell that he intended to terminate his contract unless he submitted evidence that the conclusions justifying termination were unwarranted. The essence of the charge was that he violated the high duty and the high degree of trust imposed upon him by virtue of his attorney-client relationship by: (1) receiving a $10,000 increase in annual salary contrary to a provision in his contract; (2) classifying a case as a claims case so he could reap the benefit of a contingent fee without full disclosure; and (3) having junior attorneys work on claims cases when they were hired only to do General Counsel type work.

Instead of replying to the Secretary, Littell sought and obtained in the District Court a preliminary injunction barring any interference with his contract by the Secretary. While appeal from this judgment was pending, Littell filed a motion for an order adjudicating the Secretary in contempt for violation of the preliminary injunction. The motion was denied for lack of evidence (242 F.Supp. 635). The issuance of the preliminary injunction was affirmed in the Court of Appeals, reserving judgment on the merits (119 U.S.App.D.C. 197, 338 F.2d 537). On the merits, the District Court granted a permanent injunction holding that the Secretary of the Interior lacked authority to terminate Littell's contract, and even if he had the authority, his action was arbitrary and capriciou

cious. The District Court further found that Littell had used General Counsel attorneys on claims work for his own benefit, in the face of contrary contract provisions. However, the District Court said that the Secretary was not a party to the contract and thus had no standing to raise that defense. It was suggested that the Secretary could resort to setoff once Littell collected on the claims cases. Furthermore, the Secretary was affirmatively ordered to deal with Littell.

The Court of Appeals reversed the District Court in a unanimous decision. The Court held that the Secretary of the Interior has the power to administratively terminate a tribal attorney's employment contract for cause. This was inherent in the general powers delegated to the Secretary by Congress to supervise Indian affairs. The Secretary was charged with broad responsibility for the welfare of Indian tribes--he acts as a federal guardian over the tribes. Power to terminate an attorney's contract for cause is reasonable and necessary if he is to discharge his responsibility effectively and was not specifically denied. Narrowly construing the congressional delegation of authority to the Secretary, as Littell suggests, would mean that Congress acted for the protection of lawyers, rather than of the Indian tribes. Congress had no such intent.

The Court emphasized the fact that an attorney dealing with his client is "in a different posture from an ordinary litigant involved in an arms length commercial transaction" and that as a plaintiff seeking equitable relief he bore a heavy burden to demonstrate "clean hands." It adverted to the refusal of equity to enforce specific performance of professional services. The "basic elements of the attorney-client relationship are not changed" by the written contract, said the Court.

The Court then adverted to the "deteriorating relationship" between Littell and the Tribe and said that the Secretary had responsibility to see that such controversies do not develop "or if they do, to terminate them by administrative action." The Court went on to find good cause for the Secretary's action. As to the use of junior General Counsel attorneys on claims cases, the Court stated: "This was more than 'intermixture' or 'commingling' of Tribal assets with his own assets; it was an affirmative use--or misuse--of assets of the Tribe for his own interest." The suggestion of simply offsetting this value from any contingent fees due Littell was completely fallacious. "It is no defense for a fiduciary to say that he will shore the profits of assets he borrows from a trust account and invests, whether in a speculative enterprise or in a 'blue chip.'" And it said: "The happy flowering of an unauthorized investment of trust assets by a fiduciary does not alter the nature of the original diversion." Moreover, it was Littell's duty to keep precise records of time devoted to various duties but that the record showed such allocation was difficult. This itself was, the Court said, "one of the reasons why such interchange should not have occurred."

The Court concluded that once the District Court found that Littell "had diverted Tribal assets in the form of services of General Counsel staff attorneys to work on claims cases, a conclusion of law was compelled that the Secretary had adequate grounds to terminate Littell's contract."

Staff: Roger P. Marquis (Land and Natural Resources Division)

Federal Property; Condemnation by City of Land Held in Trust for United States; Absence of State Court Jurisdiction Where United States Is Indispensable Party; Filing of Amicus Brief Is Not Submission to Jurisdiction. City of Mesa v. Salt River Project Agricultural Improvement and Power District (Ariz. S.CT., July 1, 1966, D.J. File 90-1-2-714). The City of Mesa (plaintiff) brought an action in eminent domain against the defendant to condemn certain land. The defendant and the United States, by amicus curiae brief, claimed that the court lacked jurisdiction, since the United States is an indispensable party. The district court dismissed on a motion by the defendant. The plaintiff appealed.

The land involved is part of the first irrigation and power project established by the United States under the Reclamation Act of 1902 for the purpose of irrigating this arid region of the country. The United States, after instigating the project, agreed to turn part of its operation and control over to the predecessor of the present defendant. By agreement, the predecessor transferred the property in issue to the defendant, subject to all rights and interests of the United States. As a result of the irrigation project, the defendant was able to produce a substantial amount of electrical power. The defendant now supplies a large portion of the electricity in the area, including a significant percentage of the plaintiff's requirements.

On appeal from a summary judgment, the plaintiff asserts that the United States can make an appearance in a condemnation proceeding at any stage it wishes. Appellant's second point is that the United States does not have an interest in the land.

As to appellant's first claim, the Arizona Supreme Court held that "mere submission of appearance by the United States as an amicus curiae does not give the court jurisdiction." Thus, the only question was whether the United States has an interest in the property and was, therefore, an indispensable party to the proceedings. The Court answered this by construing the various contracts which existed between the defendant, his predecessor, and the United States. The Court found that (1) the United States retained title to the property; (2) the United States reserved the right to terminate the agreement between itself and the defendant; and (3) the right of termination did not expire because the ant dant fulfilled his contractual obligation of repaying all construction costs which the United States has expended. The Court concluded that "under the interpretation which has been placed upon the contracts with the United States government by this court, property acquired by the District [the defendant] in the extension of the Project's electrical plant and distributor system is held in trust for the United States." Therefore, "* * * the United States Of America has an interest in the property sought to be condemned, and is an indispensable party to the action." Consequently, the Court did not have jurisdiction.

Staff: Roger P. Marquis (Land and Natural Resources Division)

Indian Affairs; Indian May Bring Suit in State Court for Tort Committed by Non-Indian on Public Highway Easement Crossing Indian Reservation. Eugenia Paiz v. William O. Hughes (D.N.M., July 25, 1966, D.J. File 90-2-0-596). Two Indians,

members of the Jicarilla-Apache Tribe, were injured by an automobile as they were walking along a state highway easement which crosses their Reservation. The driver of the automobile, Hughes, is not an Indian, and does not reside on the Reservation. When suit was brought by the Indians against Hughes in the courts of New Mexico, it was dismissed on the ground that the state courts lacked jurisdiction over a tort involving an Indian which was committed on an Indian reservation. Since the tribal courts were without jurisdiction over the non-Indian, and there was no jurisdiction in the federal courts because of lack of diversity of citizenship, dismissal left the Indians without a remedy.

On an appeal to the Supreme Court of New Mexico, the United States appeared as amicus curiae on behalf of the Indians. The Supreme Court reversed the lower court, holding that it had jurisdiction over the suit brought by the Indians.

The Indians were held to have the same rights as are accorded any other persons to invoke the jurisdiction of state courts to protect their legal rights in matters not affecting either the Federal Government or tribal relations. The disclaimer in the state constitution to any Indian lands was held to be a disclaimer of proprietory rather than government interest. While the Court had stated in prior cases that New Mexico had no jurisdiction over acts of Indians on Indian land, it expressly rejected the "exclusive jurisdiction" theory heretofore advanced. Instead, the Court held the correct test was that stated in **Williams** v. **Lee**, 358 U.S. 217, i.e., the validity of state action depends on whether such action interferes with the right of reservation Indians to make their own laws and be ruled by them, or with tribal relations, or with the rights of the Federal Government. Finding that the assumption of jurisdiction at the request of the Indian did not interfere with any of these vital areas, the Court held there was jurisdiction in the state courts.

Staff: A. Donald Mileur (Lands and Natural Resources Division).

Condemnation; Indian Oil and Gas Leases Not Approved by Secretary of Interior Are Void. United States v. 9,345.53 Acres of Land, More or Less, Situate in Cattaraugus County, New York (W.D. N.Y., July 22, 1966, D.J. File 33-33-881-3). The defendants claimed $1,476,270 as the value of oil and gas reserves within 10,010 acres of land in the Allegany Indian Reservation of the Seneca Nation of Indians under five oil and gas leases and assisgnments which had not been approved by state or federal authorities. The leases were entered into on December 1, 1955, and the Seneca Nation was represented by an attorney who met with the Nation's Council and advised concerning lease rights. The Government does not contend that the leases are other than just and fair or that there was any default. However, the Government contends that in the absence of compliance with the provisions of the Federal Act of May 11, 1938, 52 Stat. 347, 25 U.S.C. 396a, b, c and d, which requires approval by the Secretary of the Interior, the leases are void. The defendants contended that under Sections 5 and 7 of a 1950 Act which authorized the Seneca Nation of Indians to regulate the collection and disbursement of lease moneys, federal supervision over mineral leasing by the Seneca Nation had been withdrawn. The Court viewed Section 5 not as a withdrawal of the Nation's existing right to lease lands in accordance with the provisions of Sections 396a, b, c and d of the Federal Act of May 11, 1938, but as a grant of a new and additional right to the Nation to lease reservation

lands "for such purposes and such periods as may be permitted by the laws of the State of New York." It was not intended that the Nation be cast adrift under the general leasing laws of the State of New York but that in presence of New York law forbidding or, in the absence of specific New York law authorizing, leasings by the Seneca Nation the Nation was required to exercise its rights in accordance with federal law. The leases in question entered into in violation of the provisions of Sections 396a, b, c and d were found to be void.

Staff: United States Attorney John T. Curtin (W.D. N.Y.); William F. Smith (Land and Natural Resources Division).

Water Rights; Sovereign Immunity; Petition to Enlarge Decree to Which United States Is Party to Adjudicate Upstream Rights on Indian Reservations Dismissed Because All Water Users Not Joined. Hurley v. Abbott, United States Intervenor. (Civil 2665, 2666; D. Ariz., D.J. File 52446). By decree entered in 1910 in the Territorial Court of Arizona were adjudicated the water rights in the Phoenix area, including those of the United States, intervenor, to the Salt and Verde Rivers. No rights were sought or decreed with respect to the Fort Apache Indian Reservation and the San Carlos Indian Reservation situated on the north and south side, respectively, of the Salt River in the Upper Valley. In recent years, the Indian tribes, particularly the White Mountain Apache Tribe, embarked upon a substantial commercial recreational program which involved impoundment of waters of upstream tributaries of the Salt River.

A petition to enlarge the territorial decree brought by the Salt River Valley Water Users' Association in the Superior Court of Arizona sought to enjoin the impoundment of waters on the Indian reservations. The case was removed to the Federal District Court and motion to dismiss the petition to enlarge made on the ground, inter alia, that in order to maintain an adjudication proceeding against the United States, notwithstanding the United States' previous intervention, all claimants to water rights of the entire river system must be before the court. The United States District Court for Arizona granted the motion on this ground and ordered the petition of the Association dismissed without prejudice citing California v. United States, 235 F.2d 647,663 (C.A. 9, 1956), and Dugan v. Rank, 372 U.S. 609 (1963).

Staff: Walter Kiechel, Jr. (Land and Natural Resources Division).

Public Domain; Fire Trespass; Suppression Costs. United States v. Walter L. Preston (Civil No. 65-458-TC, S.D. Cal., D.J. File No. 90-1-9-589). The defendant in this case attended a dinner party which included a barbecue. Defendant returned to the premises the following day and volunteered to clean up the patio and garage areas. He cleaned out both barbecues, removing the ashes and contents and placing them in barbecue briquet bags, which were placed in a cardboard container. He then transported the container to the road in front of the house. The Court found that an ensuing fire, which was extinguished by the Forest Service, originated from the carton containing the ashes and char-

coal which had been removed from the barbecue. Judgement of $1,700 included costs of suppression.

Staff: Assistant United States Attorney Thomas H. Coleman (S.D. Cal.)

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TAX DIVISION

Assistant Attorney General Mitchell Rogovin

CIVIL TAX MATTERS

Appellate Decision

Liability of Responsible Officer for Unpaid Corporate Withholding and FICA Taxes; Officer of Corporation Could Not Bring Suit to Enjoin Collection of 100 Percent Penalty on Ground That Government Should First Determine How Much Will Be Recovered From Bankrupt Corporation. Kelly v. Lethert (C.A. 8, 66-2 U.S.T.C., par. 9509). Taxpayer was a director, vice-president and treasurer of the bankrupt corporation prior to its bankruptcy and during the time the corporation failed to pay over to the United States withholding and FICA taxes. He was also one of five officers authorized to sign payroll checks, and one of three officers authorized to sign general checks. A 100 percent penalty of $20,346.09 was assessed against taxpayer and other officers under Section 6672 of Internal Revenue Code of 1954 for the unpaid withholding and FICA taxes of the corporation. Most of this amount represented taxes which had accrued prior to the chapter XI petition of the corporation and, although the Government had filed a proof of claim in the bankruptcy, there was no possibility of any of the pre-chapter XI taxes being paid. Taxpayer sued to enjoin the District Director from collecting the penalty from him. The District Director moved to dismiss on the ground that the Court lacked jurisdiction of the subject matter. The District Court granted the Government's motion without an opinion.

On appeal, taxpayer asserted that there would be sufficient funds in the bankruptcy to pay all tax claims, and that if he were forced to pay before those assets were exhausted, he would be paying taxes due from another without due process of law since he would be unable to collect from the bankrupt corporation.

The appellate court held in favor of the Government, adopting all of its contentions. While the Government showed that there were not enough corporate bankruptcy assets to pay the tax debt, we also contended that this fact was irrelevant to the responsible officer's liability for the tax debt. The Court agreed, holding that the liability of a responsible officer under Section 6672 of the 1954 Code is his own "separate and distinct" liability and, although denominated a penalty, is in the nature of a tax. Therefore, taxpayer was attempting to enjoin the collection of a tax, which is prohibited by Section 7421(a) of the 1954 Code unless it can be shown that under the most liberal view of the law and the facts the Government cannot prevail and that taxpayer has no adequate legal remedy. In this regard the Court found that the facts were clearly sufficient to establish the presumptive correctness of the Government's assessment.

The Court then went on to define more fully the nature of the responsible officer's liability. Section 6672 of the 1954 Code makes the responsible officers and the corporation equally liable to the Government as co-debtors for the unpaid taxes. Hence, the Government may proceed against either in the order best suited, in its judgment, to collect the tax, and one of them (taxpayer here) cannot avoid

collection on the ground that the Government should first attempted to collect from the other. Whatever claim one co-debtor may have against the other is irrelevant in the Government's action to collect. For this reason, it made no difference in this action how much the Government might collect from the corporation or whether the taxpayer could or could not collect from the corporation once he had paid the tax. The Court did, however, point out that the tax could only be collected once, so that when any amounts were collected from one of the debtors it would be applied to reduce the amount due from the others.

Staff: Joseph Kovner and Mark S. Rothman (Tax Division).

District Court Decisions

Tax Liens: Priority: Allocation of Payments: Where Government Claimed Six Tax Liens, A through F, and Where Liens A, B, and C Were Prior to Liens D, E, and F, Court Held It Was Improper for Government to Allocate All of Proceeds of Judgment in Partial Satisfaction of Lien F, the Most Junior Security Interest, and to Apply None of Proceeds to Liens A, B, or C. Joe Sutcliff v. J. Drilling and Exploration, Inc., et al. (D. Kan., February 10, 1966). (CCH 66-1 U.S.T.C. ¶9486). The subject of this proceeding was an oil and gas lease, known as the Moore Lease, of which the taxpayer, Joey Drilling and Exploration, Inc., was the original lessee. Plaintiff brought this action to enforce and foreclose his mechanic's lien.

The Moore Lease was sold in accordance with the order of a Special Master and after payment of costs the Clerk of the Court held the sum of $7,511.61 for distribution.

Prior to the execution of the Moore Lease, the United States filed the following lines: Lien A--$5,768.04 (Feb. 28, 1961); Lien B--$2,803.06 (Aug. 21, 1961); Lien C--$2,803.06 (Oct. 2, 1961). The United States subsequently filed liens D, E, and F. Liens A, B, and C were concededly prior liens upon the entire working interest in the Moore Lease.

Prior to the commencement of this action, the Government had brought five separate proceedings to foreclose its liens on other property of the taxpayer and had recovered $15,332.53. The proceeds recovered from the prior actions were applied in partial satisfaction to the most junior lien, F, rather than the senior liens A, B, and C.

The Court held that the United States was bound by the doctrine of "first in time first in right" and should have applied the first money received to satisfaction of senior liens A, B, and C, and not to lien F, with the result that the first three of the six federal tax liens and the judgment creditor would be paid but the remaining tax liens would not be paid. The decisions in Commercial Credit Corporation v. Schwartz, 130 F. Supp. 524 (E.D. Ark.) and O'Dell v. United States, 326 F.2d 451 (C.A. 10) were cited in support of this ruling.

This case is currently pending on appeal by the Government to the United States Court of Appeals for the Tenth Circuit.

Staff: United States Attorney Newell A. George; Assistant United States Attorney Thomas E. Joyce, (D.C. Kan.).

Federal Tax Liens; Failure to Honor Levy; Bank Held Liable for Failure to Surrender Property Subject to Levy When It Responded to Notice of Levy by Issuing Its Cashier's Check for Amount in Taxpayer's Bank Account Made Payable Jointly to Taxpayer and Internal Revenue Service, and Then Refused to Honor Check When Presented by Internal Revenue Service for Payment Because Taxpayer Had Not Endorsed It. United States v. Exchange-Security Bank (N.D. Ala., July 12, 1966). (CCH 66-2 U.S.T.C. ¶9571). On June 25, 1965 an assessment in the amount of $1,479.27 was properly made by the District Director of Internal Revenue against the taxpayer, Patton Contracting, Inc. On July 14, 1965 the taxpayer maintained a checking account with the Exchange-Security Bank which account contained the sum of $1,034.13. On that date, a notice of levy was served on the Bank. The Bank responded by issuing its cashier's check for the amount in the taxpayer's account, but made the check payable jointly to the Internal Revenue Service and the taxpayer. When the check was endorsed by the District Director and presented to the Bank for payment, the check was not honored because it had not been endorsed by the taxpayer.

The Court held that Section 6332 of the Internal Revenue Code of 1954 required the Bank upon demand to surrender any of the taxpayer's funds in its possession and subjected the Bank to liablity for failing to do so. Since the Bank admitted that at the time of the levy it had $1,034.13 in its possession which belonged to the taxpayer, the Court held the Bank liable to the United States for this amount, plus interest and costs.

Staff: United States Attorney Macon L. Weaver; Assistant United States Attorney Ray Acton, (N.D. Ala.); and Sherin V. Reynolds, (Tax Division).

Federal Tax Liens: Although Materialman's Stop Notice Was Filed Prior to Date Notice of Tax Lien Filed, Tax Lien Is Entitled to Priority Against Fund Owing to Subcontractor Because Stop Notice Created No Valid Mechanic's Lien Under Local Law. Shore Block Corporation v. Lakeview Apartments, (D. N.J., June 10, 1966) (CCH 66-2 U.S.T.C. ¶ 9584). On June 10, 1964, the owner of certain real property entered into a building contract with a contractor who, in turn, entered into a subcontract covering masonry work on July 8, 1964 with the taxpayer. Both the main contract and subcontract had provisions which waived the right of the contractor or subcontractor to file liens of any kind against the property, including a stop notice.

From July 23, 1964 through December 15, 1964, the taxpayer, subcontractor, purchased building materials from the plaintiff, materialman. Because payments for these materials ceased, the plaintiff filed a stop notice on January 29, 1965.

Thereafter, the contractor acknowledged that it owed the subcontractor certain money and filed the present interpleader action. The United States

was joined because of a tax lien, notice of which was filed of record on March 2, 1965, and the Government had the case removed to the federal court. The Court was asked to determine the priority of the various claims to the fund owing to the subcontractor-taxpayer and specifically, the basic issue presented to the Court was whether the materialman had a lien prior to the federal tax lien because the plaintiff's stop notice had been filed about one month before the notice of tax lien.

The District Court held that the Government's tax lien was entitled to priority under the facts of this case. The Court observed that while the plaintiff materialman was not initially aware of the no lien provisions in the main contract and subcontract, the plaintiff did learn of these provisions on September 3, 1964. Accordingly, under New Jersey law, the plaintiff was bound by those no-lien provisions from that date forward and no valid lien could be asserted for materials sold to the subcontractor after September 3, 1964.

The Court indicated that its holding might have been otherwise if plaintiff had entered into a contract with the subcontractor-taxpayer to supply whatever materials the latter might order on future dates. However, in this case, the facts showed no such contract or long term obligation existed. Each sale was a separate contract. Further, the subcontractor had paid for all material delivered by the plaintiff prior to September 3, 1964, the date it received notice of the no-lien provisions. Thus, since the plaintiff's claim in the present case was based solely on material sold under contracts while it was aware of the stop notice provisions in the main contract and subcontract, its stop notice could not create a mechanic's lien which was prior to the tax lien.

Staff: United States Attorney David M. Satz, Jr., Assistant United States Attorney Mark E. Litowitz (D. N.J.)

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