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# TABLE OF CONTENTS

# ANTITRUST DIVISION

Assistant Attorney General Donald F. Turner

## DISTRICT COURT

### PERJURY

INDICTMENT RETURNED CHARGING PERJURY COMMITTED BEFORE GRAND JURY INVESTIGATING PRICE FIXING.

United States v. Lloyd Kent Jones (S. D. N. Y., Cr. 68-52; March 5, 1968; D. J. 60-3-160)

On March 5, 1968, an indictment was returned by a federal grand jury in Pittsburgh against Lloyd Kent Jones, charging him with perjury committed during his testimony before the same grand jury which was investigating price fixing in the plumbing brass fittings industry. Jones, who is the senior vice president for marketing of Sterling Faucet Company, Morgantown, West Virginia, appeared before the grand jury on December 6, 1966 and was interrogated in connection with collusive pricing activities. The indictment charges that Jones committed perjury when he denied having discussed prices of plumbing brass fittings with competitors of Sterling; having met privately in hotel rooms with competitors of Sterling, including one such meeting at the Fontainebleau Hotel in Miami in October 1964; and, at one or more of such meetings, having discussed prices of plumbing brass fittings with competitors of Sterling.

The antitrust grand jury investigation resulted in the return of an indictment on October 16, 1967, charging Sterling and five other manufacturers of plumbing brass fittings with conspiring to fix prices on such products from August 1964 to December 1965. That case was terminated on February 27, 1968, when judgments of guilty were entered upon pleas of nolo contendere by all of the defendants and fines totalling $150,000 were imposed.

Staff: United States Attorney Gustave Diamond (W. D. Pa.); John C. Fricano, Rodney O. Thorson, Joel Davidow and S. Robert Mitchell (Antitrust Division)

### SHERMAN ACT

CONVERSATION OF DECEASED OFFICER OF CORPORATION ADMISSIBLE.

United States v. Sabrett Food Products Corp., et al. (62 CIV 2031; D. J. 60-50-82)

At the trial of the above-entitled action, an offer of proof was made by the Government and taken by the court subject to the defendant's motion to strike on the ground that the proffered testimony was hearsay.

The offer of proof included the testimony of Gregory Papalexis, an officer of a defendant corporation and an alleged co-conspirator, concerning a conversation he had had with his now-deceased father in August 1956. He testified that his father, an officer of the same corporation and an alleged co-conspirator, had told him that he had just attended a meeting with an official of the defendant Union and officers of the two corporate defendants, all of whom were alleged co-conspirators. He further testified as to what his father had told him had transpired at the meeting and what the persons present had said. He also testified that his father then directed him to implement that which the parties had agreed to at the meeting.

The Government argued for admissibility on two grounds. First, it contended that the father's declaration to his son, relating the statements of the participants at the meeting and the events which transpired thereat, and his instruction to his son to act thereon, constituted a statement of a co-conspirator made during and in furtherance of the alleged conspiracy. In support of its contention the Government relied upon United States v. Annunziato, 293 F. 2d 373 (2d Cir. 1961), cert. denied, 368 U.S. 919 (1961). United States v. Imperial Chemical Industries, Ltd., 100 F. Supp. 504 (S. D. N. Y. 1952). Second, it was argued that the father's narration of the recent conversation merged with and was explicative of his then existing state of mind as expressed in his instruction to his son to effectuate the matters agreed to at the meeting. Therefore, the narration of past facts should have been admitted as an integral part of the declaration of the father's then existing intention, design, or state of mind. Authority for this proposition is found in United States v. Annunziato, supra.

Judge Levet ruled in a memorandum opinion that the above testimony was admissible as constituting a statement of a co-conspirator made during and in furtherance of the conspiracy, citing Annunziato and Imperial Chemical. The court made no reference to the alternative ground for admissibility presented by the Government.

Staff: Norman H. Seidler, Irving Kagan, David H. Harris and Donald L. Flexner (Antitrust Division)

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# CIVIL DIVISION

Assistant Attorney General Edwin L. Weisl, Jr.

## COURT OF APPEALS

### EMPLOYEE'S DISCHARGE

EMPLOYEE HAS NO CONSTITUTIONAL RIGHT TO DISCLOSURE OF INVESTIGATORY FILES IN ADMINISTRATIVE DISCHARGE HEARING; HOWEVER, HEARING IN VIOLATION OF REGULATIONS COMPELS REINSTATEMENT.

Herak v. Kelly (C. A. 9, No. 21,412; March 13, 1968; D. J. 106-44-82)

In an action by a county office manager of an Agricultural Stabilization and Conservation Service county committee for reinstatement, the district court found that the employee had a constitutional right to the disclosure of certain investigatory files at his administrative hearing. The district court further found that other facets of the administrative hearing violated Department of Agriculture regulations and ordered the employee reinstated.

On appeal, the Ninth Circuit held there was "no constitutional right to disclosure in this case. * * * Moreover, it seems settled that a government employee can be summarily discharged unless the expulsion is patently arbitrary or discriminatory. See Cafeteria Workers v. McElroy, 367 U. S. 886, 896-7 (1961)." Nevertheless the Court of Appeals affirmed the reinstatement on the ground that the Department of Agriculture's regulations had been violated. In particular, the Court found sufficient notice of charges had not been given in either the suspension notice or the removal notice as required by the regulations.

Staff: Stephen R. Felson (Civil Division)

### FEDERAL TRADE COMMISSION ACT

FEDERAL TRADE COMMISSION AUTHORIZED TO ISSUE FACTUAL NEWS RELEASES CONCERNING ADJUDICATORY PROCEEDINGS PENDING BEFORE IT.

Federal Trade Commission, et al. v. Cinderella Career and Finishing Schools, Inc., et al. (C. A. D. C., No. 21,118; March 12, 1968; D. J. 102-1338)

The Federal Trade Commission follows a uniform practice of issuing news releases in connection with adjudicatory proceedings pending before it.

In particular, the Commission issues news releases (1) at the time of filing of its complaint; (2) upon the filing of respondent's answer (unless respondent requests otherwise); (3) upon the issuance of the hearing examiner's decision; and (4) upon the issuance of the Commission's final order. On occasion, the Commission issues press releases relating to interlocutory orders. In Cinderella, the Commission, following an investigation, issued a complaint charging that the appellees, operators of schools furnishing various "self-improvement" courses, had engaged in unfair or deceptive advertising and false and misleading advertising. After the Commission declined to grant appellees' request that the Commission defer issuance of a news release respecting the complaint pending final adjudication, the appellees sued in the district court to enjoin the issuance of such a release. The district court declined to issue a temporary restraining order, and the Commission thereafter issued a factual news release containing an accurate summary of the allegations of the complaint, together with a statement expressly disclaiming that the complaint was anything more than a charge that had not been adjudicated. However, another judge of the same court subsequently issued a preliminary injunction enjoining further news releases pending final adjudication by the Commission of its five charges against appellees. On appeal, the Court of Appeals unanimously reversed the order granting the injunction, with one member of the Court writing a concurring opinion.

The majority opinion held that the Federal Trade Commission has statutory authority to issue factual news releases concerning adjudicatory proceedings pending before it. The Court rejected appellees' contention that the Commission's news releases violated their due process rights by prejudging, or giving the appearance of prejudging, the merits of the charges against them. The Court concluded that, while the news releases might have the effect of damaging appellees' economic, business, or community status, this damage cannot constitute a violation of their legal rights. In holding that the district court should have dismissed the complaint for failure to state a claim, the Court originally noted that there was no contention that the allegations in the Commission's complaint were knowingly false, that the Commission had acted discriminatorily, or that the news release did not fairly and accurately summarize the Commission's complaint. While the majority opinion stressed the fact that the news releases serve the function of alerting the public to suspected law violations, the concurring opinion emphasized the fact that Commission proceedings are matters of public record and that the people have a right to know "what goes on in goverment."

Staff: Assistant Attorney General Edwin L. Weisl, Jr.; Leonard Schaitman (Civil Division)

## SMALL BUSINESS ADMINISTRATION

### SMALL BUSINESS ADMINISTRATION'S STOCK DIVESTITURE ORDER UPHELD DESPITE ALLEGED RELIANCE ON STATEMENTS OF LOCAL SBA OFFICIALS AND RETROACTIVITY OF REGULATIONS INVOLVED.

ANA Small Business Investments, Inc. v. Small Business Administration (C. A. 9, No. 21,214; March 12, 1968; D. J. 105-29)

The Small Business Investment Act of 1958 provides for the licensing and regulating by SBA of "small business investment companies" (SBICs). After an administrative hearing, the SBA ordered the respondent SBIC to divest itself of the stock of, and the controlling interest in, certain small business companies, and its license was suspended pending compliance with that order. The basis for SBA's order was that respondent has purchased the stock of small business companies from third parties, rather than directly from the small business company itself, and thus had not furnished any equity capital to the small business company, as contemplated by the statute. In addition, SBA's position was that SBICs may not acquire control of small business companies except in certain limited situations not applicable in the instant case.

On petition for review by the SBIC, the Court of Appeals unanimously upheld the validity of the SBA order. The Court of Appeals found that respondent's purchase of the stock of the small business company from a third party clearly violated the statute, and that, under Federal Crop Ins. v. Merrill, 332 U. S. 380, this violation was not excused by respondent's alleged reliance upon unauthorized assurance by local SBA officials that the purchases were valid. The Court of Appeals also held that respondent's purchase or acquisition of control of small business companies violated the purpose of the statute. Moreover, under the doctrine of FHA v. The Darlington, Inc., 358 U. S. 84, SBA could properly require divestiture of such control even though the regulations barring control were promulgated subsequent to the transactions in question.

Staff: Leonard Schaitman (Civil Division)

## SOCIAL SECURITY ACT

### CONSTITUTIONALITY OF DIFFERENCES IN COMPUTING BENEFITS FOR MEN AND WOMEN UNDER ACT UPHELD.

Gruenwald v. Gardner (C. A. 2, No. 31, 798; March 6, 1968; D. J. 137-52-236)

Plaintiff, a male recipient under the Social Security Act of old age

assistant benefits at the age of 62, noted that differences in the way benefits are computed for men and women under the Social Security Act resulted in his receiving a less amount of benefits at the age of 62 than a woman with the exact same wage record. He claimed that this difference in the criteria for computation of benefits for men and women at the age of 62 was unconstitutionally discriminatory. Plaintiff sought to have his benefits measured by the computation applicable to women under the same circumstances. The Social Security Administration denied this request, and the district court affirmed that decision.

On appeal, the Court of Appeals rejected the contention that the unequal treatment of the two sexes was unconstitutional. The Court noted that only discriminations lacking rational justification were unconstitutional. This was held not to be such a discrimination. The Court observed that one of the purposes of the Social Security Act was to reduce the disparity between the economic and physical capabilities of men and women, and the Court concluded that the unequal treatment of the sexes, so as to afford to women more favorable benefit computations, was a reasonable means to achieve this purpose.

Staff: United States Attorney Joseph P. Hoey; Assistant United States Attorney Howard L. Stevens (E. D. N. Y.)

## DISTRICT COURT

### FEDERAL HOUSING ADMINISTRATION

COUNTERCLAIM DISMISSED IN FORECLOSURE ACTION BASED ON ALLEGED LOSS OF PROFITS DUE TO MISCONDUCT OF FHA IN ISSUING COMMITMENTS FOR LOAN INSURANCE ON OTHER PROJECTS IN SAME AREA.

United States v. Sherman Gardens Co. (Civil No. 958-S; D. Nev; D. J. 130-46-175)

This is an action to foreclose a defaulted Federal Housing Administration insured mortgage covering an urban renewal project in the Las Vegas area. Following the filing of a motion for summary judgment by the Government, the defendant filed an amended answer and counterclaim praying for $150,000 general damages and loss of profits for alleged misconduct of the Federal Housing Commissioner and his associates in issuing commitments for loan insurance on the project after certifying the economic feasibility of the project pursuant to 12 U. S. C. 1715L, and in thereafter financing additional nearby housing projects in direct competition with the defendant. This same conduct was relied upon by the defendant as affirmative defenses to the action based on alleged impossibility of performance, prevention of performance

and commercial frustration. The Court held that the counterclaim did not state a claim for relief against the United States and that, even if it did, the Court had no jurisdiction of the counterclaim. The Court held (a) that if the counterclaim sounded in tort, the United States has not waived its sovereign immunity in cases based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or in cases arising out of misrepresentation, deceit or interference with contract rights, under 28 U. S. C. 2680(h); (b) that if the counterclaim sounded in contract, the Court's jurisdiction against the United States is limited to claims not exceeding $10,000 under 28 U. S. C. 1346(a)(2); (c) that no express contractual undertaking by the Government was alleged and the Court could not imply from the facts alleged a promise not to insure loans on other housing projects, citing as authority, Bateson-Stolte, Inc. v. United States, 305 F. 2d 386; and (d) that this was a simple loan transaction and the Government did not guarantee a profitable operation or limit the source of the funds to be used to pay the loan, citing Desert Apartments, Inc. v. United States, 250 F. 2d 457 and Henry Barracks Housing Corp. v. United States, 281 F. 2d 196.

Staff: United States Attorney Joseph L. Ward (D. Nevada); Preston Campbell (Civil Division)

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# CRIMINAL DIVISION

Assistant Attorney General Fred M. Vinson, Jr.

## SPECIAL NOTICE

## ENFORCEMENT OF FEDERAL OUTDOOR RECREATION FEES

The Land and Water Conservation Act of 1965 (16 U.S.C. 460 L-5) provides for the collection of entrance, admission and recreation user fees at designated federal recreation areas by the National Park Service, the Bureau of Land Management, the Bureau of Sport Fisheries and Wildlife, the Bureau of Reclamation, the Forest Service, the Corps of Engineers, the Tennessee Valley Authority, and the United States section of the International Boundary and Water Commission. The entrance or admission fees are paid through the purchase of a $7 annual Golden Eagle Passport or a $1 daily permit. The permits must be displayed on the sunvisor or dashboard of every automobile within a designated recreation area. The permits are sold by special fee collectors or rangers employed by the participating agencies either at an entrance gate or designated place within the park.

The Act provides that violation of any rules or regulations at a posted recreation area shall be punishable by a fine of not more than $100. A person charged with the violation of such rules and regulations may be tried and sentenced by a United States Commissioner specially designated for that purpose by the court by which he was appointed, as provided for in 18 U.S.C. 3401.

Under the enforcement procedures presently employed by a number of the participating agencies, if an unattended vehicle is found within a designated federal recreation area without the proper permit, a ticket is placed on the automobile by a ranger or fee collector. If the violator chooses to ignore the ticket and criminal prosecution is begun, the Government usually finds itself unable to prove its case because the officer who issues the ticket is unable to identify the owner of the ticketed vehicle as the user of the fee area.

During the 1967 fee season a number of districts reported that United States Commissioners were reluctant to return convictions unless adequate proof of the violation was offered. We hope to be able to avoid this problem during the coming season.

In an effort to find a permanent solution, appropriate legislative amendments are presently being prepared for submission to the Congress. However, it is anticipated that these amendments will not be enacted in time for the 1968 fee season. Therefore, until corrective legislation is enacted, United States Attorneys are requested to prosecute only those fee cases in which adequate proof of the offense is available. In most cases, this would mean that the

ranger who issues the ticket must be able to identify the violator. We feel that adherence to this policy should eliminate the basic problem now encountered in prosecutions of user fee violators while still enabling us to conduct a sufficient number of sucessful prosecutions to serve the ends of deterrence.

## COURT OF APPEALS

### FORFEITURE OF BOND

FAILURE TO APPEAR IN COURT ON DATE SET FOR TRIAL IS SUFFICIENT REASON FOR COURT TO REFUSE TO SET ASIDE FORFEITURE OF BOND.

United States v. Sean P. Kelley and Mildred Nichols (C. A. 7, March 1, 1968; D. J. 144-85-127)

Defendants were indicted for thefts from Federally insured banks in Illinois, Wisconsin, and Nevada. They were released in Illinois on a bond filed by the Summit Fidelity & Surety Company and the trial was set for November 10, 1966. Defendants failed to appear in court on that date and the Judge ordered forfeiture of the bond and issued bench warrants for their arrest.

Defendants were brought before the court on November 14 and a mistrial was later declared so that all of the charges could be disposed of under Rule 20 in the Wisconsin District Court.

The district court record disclosed that on November 10 the defendants were in Wisconsin applying for transfers of the Illinois and Nevada charges to that court.

The surety brought this appeal of the decision ordering that the bond be forfeited. The Court alluded to Rule 46 (f) (2), F. R. Cr., P., and the fact that under this Rule forfeiture should be set aside if justice does not require that it be enforced. However, in the circumstances presented it was felt that forfeiture was an appropriate action to take against someone who had treated the court in such a manner, exhibiting disrespect for the district court by their flagrant disregard of their obligation to appear on the appointed date.

Affirmed.

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## EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS

Assistant to the Deputy Attorney General John W. Kern, III

## SPECIAL NOTICE

### Recording of Arguments in Jury Trials

The attention of all United States Attorneys and their Assistants is directed to the Bulletin dated September 15, 1967 (Vol. 15, No. 19, pp. 571-2) which reports a recent decision of the Fifth Circuit that 28 U.S.C. 753(b) is mandatory, not permissive, in requiring a court reporter to record verbatim all proceedings in civil cases unless the parties with the approval of the judge specifically agree to the contrary. In this case (Clay Calhoun v. United States) the failure to record the closing arguments to the jury necessitated a new trial, a result which perhaps could have been avoided had such recording been made.

It is the Department's position that all closing arguments to juries should be recorded as provided by the statute even though it may not be necessary in most cases to have the arguments transcribed. Department attorneys and Assistant United States Attorneys should not agree to waive this recording. If there is a question as to prejudicial remarks, the arguments can be subsequently transcribed and thereby minimize the risk of costly retrials.

United States Attorneys should review the practice in their districts and make certain that all jury arguments are recorded.

The statutory requirement that all proceedings in criminal cases had in open court must be recorded is, of course, mandatory and cannot be waived for any reason.

## APPOINTMENTS

### ASSISTANT UNITED STATES ATTORNEYS

Minnesota - JOSEPH T. WALBRAN; Creighton Law School, J.D., and formerly with the Department of the Interior.

Mississippi, Northern - JESSE M. AKERS; University of Mississippi Law School, J.D., and formerly a special assistant to the Attorney General of the State of Mississippi and law clerk to a Justice of the Mississippi Supreme Court.

Mississippi, Northern - WILLIAM M. DYE, JR.; University of Mississippi Law School, J.D., and formerly a law clerk to a Justice of the Mississippi Supreme Court and in private practice.

Pennsylvania, Eastern - ANTHONY F. LIST; University of Richmond Law School, LL.B., and formerly in private practice.

Texas, Northern - MERRILL HARTMAN; University of Texas Law School, LL.B., and formerly with the Tax Division of the Department of Justice.

Texas, Northern - WILLIAM E. SMITH; Southern Methodist University, LL.B., and formerly a Commissioner in the U.S. District Court, an Assistant United States Attorney, law clerk to a federal judge, and with the Department of Labor.

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## INTERNAL SECURITY DIVISION

Assistant Attorney General J. Walter Yeagley

### DISTRICT COURT

### UNLICENSED EXPORTATION OF ARMS AND MUNITIONS

CONSPIRACY TO EXPORT ARMS AND MUNITIONS WITHOUT LICENSE AND TO BEGIN MILITARY EXPEDITION AGAINST FRIENDLY NATION; ATTEMPT TO EXPORT ARMS AND MUNITIONS WITHOUT LICENSE.

United States v. Rolando Masferrer Rojas, et al (S. D. Fla., February 28, 1968; D. J. 146-1-95-27)

On November 16, 1967 Rolando Masferrer Rojas and his five co-defendants were convicted in Miami, Florida on both counts of an indictment charging them in the first count with conspiring to launch a military expedition against the Republic of Haiti in violation of 18 U. S. C. 960 and to export arms and munitions in violation of 22 U. S. C. 1934, and in the second count with attempting to export arms and munitions in violation of 22 U. S. C. 1934. On February 28, 1968 Judge Ted Cabot sentenced Masferrer to three years on Count I and one year on Count II, to run consecutively. Martin F. X. Casey was sentenced to nine months on each count, to run concurrently. The other four defendants were sentenced to one or two years on each count, concurrent, with all but sixty days suspended. All of the defendants have filed notice of appeal.

During the early stages of the trial, defense counsel through cross examination of Government witnesses, attempted to create the impression that the Government was involved in this plot to invade Haiti. On the motion of the Government the Court stated that defense counsel could not introduce the issue of Government involvement by mere innuendo. Accordingly, the Court ruled that, in the absence of a proper foundation, questions by defense counsel which suggested Government involvement in the plot could be propounded only in the absence of the jury, at which time the Court would rule on the relevancy of the testimony in response to such questions. Any such testimony which was held to be admissible could then be heard by the jury.

Staff: United States Attorney William A. Meadows, Jr.; Assistant United States Attorney Lloyd G. Bates (S. D. Fla.); and James P. Morris (Internal Security Division)

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# LAND AND NATURAL RESOURCES DIVISION

Assistant Attorney General Clyde O. Martz

## COURT OF APPEALS

### CONDEMNATION; INDIANS

LACK OF JURISDICTION TO ADJUDICATE ALLEGED CONTRACT RIGHT OF LANDOWNERS AGAINST UNITED STATES; TEMPORARY TAKING; DETERMINATION OF RESTORATION RIGHTS MAY BE DEFERRED UNTIL GOVERNMENT USE CEASES; UNITED STATES NOT LIABLE FOR FEES OF ATTORNEY FOR INDIAN CONDEMNEES.

United States v. Gila River Pima-Maricopa Indian Community, et al. (and reverse title, C. A. 9, Nos. 21143 and 21144, Mar. 6, 1968; D. J. 33-3-170-7)

The United States condemned successive five-year terms beginning in 1956 in certain Indian lands in Arizona, with the right to remove improvements, for use as an auxiliary airfield. The condemnations continued such use under earlier (1954) agreements with the Indians, which provided that improvements were to remain Government property and that the United States would restore the lands to their original condition before the end of the term in 1956 or make cash payment in lieu of restoration. The United States Attorney declined to represent the Indians in the condemnation actions, which proceeded to jury trial on the issue of just compensation, the Indians being represented by private counsel under contract approved by the Secretary of the Interior and the district court. Judgment was entered on the verdict. The Indians appealed only from that part of the judgment which provided for restoration or money in lieu thereof, to be ascertained at the end of Government use. The United States appealed only from that portion of the judgment which directed it to reimburse the Indians for their attorney fees.

On the Indians' limited appeal, the Court of Appeals affirmed. It held that the district court lacked jurisdiction in the condemnation proceedings to determine the Indians' contract claim because that claim was not taken (i.e., the contract claim was not described in the estate taken in the complaints or declarations of taking); and because the amount involved (over $200,000) exceeded the Tucker Act jurisdiction of the district court. The Court also ruled that the district court correctly deferred, until Government use ceases, the fixing of damages, if any, arising from the taking of the right to remove improvements:

> It is not certain when that time will come; there may be condemnation of further terms of years, including

> the same rights. Deferring the fixing of these damages under these circumstances seems to us to be sensible and permissible. United States v. Westinghouse Co., 1950, 339 U.S. 261, 267. When the government's right of occupancy ends, the court can interpret its judgment as to whether it gives the United States the right to remove improvements placed by it upon the land before July 1, 1956 or only those placed upon the land thereafter, and can fix damages accordingly.

The Court of Appeals reversed the award of attorney fees to the Indians, declaring that Section 1 of the Act of March 3, 1893, 27 Stat. 631, as amended, 25 U.S.C. 175 ("[T]he United States Attorney shall represent them [Indians] in all suits at law and in equity.") is not mandatory; the legislative history does not indicate congressional intent to impose liability for attorney fees; the United States Attorney could not properly represent both sides in these cases; and Congress has made express provision for Indians retaining private counsel on claims against the United States. It concluded: "Unless expressly provided for by statute, attorney fees cannot be awarded against the government."

Staff: Raymond N. Zagone (Land and Natural Resources Division)

## ENJOINING FEDERAL PROJECT

SUIT TO ENJOIN OFFICERS FROM PROCEEDING WITH RESERVOIR AND RECREATION AREA PROJECT WAS UNCONSENTED SUIT AGAINST UNITED STATES; SUFFICIENCY OF ALLEGATIONS CHALLENGING CONSTITUTIONALITY.

Delaware Valley Conservation Association, et al. v. Resor, Secretary of the Army, et al. (C.A. 3, No. 16772, Mar. 8, 1968; D.J. 90-1-3-1627)

This action was commenced to enjoin the Secretaries of the Army and Interior and the Chief of Engineers from proceeding with the development of the Tocks Island Reservoir Project and the Delaware Water Gap National Recreation Area. Plaintiffs were identified as the Association named above and 604 individual property owners and members thereof. The district court granted the federal officers' motion to dismiss on jurisdictional grounds. 269 F. Supp. 181.

Citing Larson v. Domestic & Foreign Corp., 337 U.S. 682 (1949), Malone v. Bowdoin, 369 U.S. 643 (1962), Dugan v. Rank, 372 U.S. 609 (1963), and other cases, the Court of Appeals affirmed. It concluded: "Although nominally directed at the defendant officers, the relief requested here would

operate directly against the United States since 'the sovereign can act only through agents'." The Court rejected appellants' claim that various statutes (including the Delaware River Basin Compact and the Federal Power Act) waived the sovereign's immunity and consented to suit, because the pleading was either too general or manifestly without foundation.

Answering appellants' contention that dismissal was error because "allegations in the complaint must be taken as admitted and true," the Court said: "The mere allegation of unconstitutional actions on the part of defendants does not deprive the court of its authority to dismiss a complaint since the court must examine those allegations and order dismissal where they are wholly without merit. Any other rule would result in an unnecessary increment of congestion in our trial calendars by requiring a full hearing every time a complaint contains an unwarranted general allegation of unconstitutional action on the part of some government official." The Court also ruled that "dismissal without leave to amend was altogether proper since the complaint is founded on assumed and hypothetical situations which may never come to pass * * *." Such general allegations were held not to "meet the requisite case or controversy requirements necessary for judicial determination."

Without discussion, appellants' further contentions (that public announcements are being made as to acquisition and project plans, even though all the funds ultimately needed have not been actually appropriated for all lands to be acquired; that acquisitions for the Recreation Area are preceding those for the Reservoir, although the latter is dependent on the former; that the projects are not feasible and desirable; and that the statutes authorizing the projects are unconstitutional because of vagueness) were found to be without merit.

Staff: Raymond N. Zagone (Land and Natural Resources Division)

## INDIANS

JURISDICTION TO REVIEW SECRETARY OF INTERIOR'S DECISION APPROVING INDIAN WILL UNDER 25 U.S.C. 273.

Willis Attocknie v. Stewart L. Udall (C.A. 10, No. 9391, March 14, 1968, D.J. 90-2-4-113)

The appellant, a Comanche Indian, contested the will of a deceased Comanche Indian allottee, Albert Attocknie, in an administrative proceeding before an Examiner of Inheritance of the Department of the Interior. Albert Attocknie's will disposed of his trust property in equal shares to four named children, but left nothing to the appellant. However, the will contained a

provision referring to the appellant which read, "I leave nothing to Willis Attocknie because he is not my son." Appellant contended that he was the illegitimate son of Albert Attocknie and that the denial of paternity showed that the testator was suffering from an insane delusion.

The Examiner of Inheritance determined that there had been no showing that the decedent was incompetent, although he did find that the appellant was the illegitimate son of the decedent. His decision was affirmed by the Secretary of the Interior. Appellant then sought judicial review of the Secretary's decision, alleging jurisdiction to review that decision under the Administrative Procedure Act (5 U.S.C. 701) and 25 U.S.C. 373. The district court found jurisdiction under the above-mentioned statutes, but dismissed appellant's claim on the merits.

The Court of Appeals did not reach the merits of appellant's claim but held that the district court had no jurisdiction to review decisions by the Secretary of the Interior approving Indian wills. The Court examined the statutory provisions relating to heirship and wills of members of certain Indian tribes, 25 U.S.C. 372 and 373, to determine if these statutes preclude judicial review. 25 U.S.C. 372 provides for the determination of heirship of Indians who die intestate and states specifically that the decision of the Secretary of the Interior in ascertaining the heirship of a decedent "shall be final and conclusive." 25 U.S.C. 373 provides that no will disposing of trust property shall be valid until it shall have been approved by the Secretary. 25 U.S.C. 373 does not contain a statement that the decision of the Secretary shall be final and conclusive. The Government argued that 25 U.S.C. 372 precludes judicial review by its express wording and that Congress intended that there should also be no judicial review under 25 U.S.C. 373 because these sections are so closely related and both concern the management and policies of the Secretary relating to trust property. The Court agreed, referring to its decision in Heffelman v. Udall, 378 F.2d 109 (C.A. 10, 1967), and extended the reasoning of that case to the present case. In Heffelman, the Court considered a determination by the Secretary that a certain individual was not the "husband" of a decedent under a will. The Court held that if there could be no judicial review of a determination of heirship in the absence of a will, then there was no logical reason why the existence of a will thereby made the proceeding subject to judicial review. The Court in the present case followed the logic in Heffelman, going one step further and precluding judicial review of the Secretary's approval of wills when there is no question of heirship.

Staff: Frank B. Friedman (Land and Natural Resources Division)

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