United States Attorneys

Bulletin

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

VOL. 19 OCTOBER 1, 1971 NO. 20

UNITED STATES DEPARTMENT OF JUSTICE

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POINTS TO REMEMBER

Joint Tax Committees of the Department of Justice and the Internal Revenue Service

On January 25, 1956, the Assistant Attorney General in charge of the Tax Division and the Chief Counsel of the Internal Revenue Service established a permanent liaison committee to consider interagency problems concerning the civil administration and enforcement of the Internal Revenue laws. On April 19, 1971, the liaison committee was reorganized along lines of specialization and currently consists of three committees and two subcommittees: The Civil Procedure Committee consisting of a Refund Litigation Subcommittee and a General Litigation Subcommittee is responsible for considering procedural matters relating to civil litigation; the Enforcement Committee which is responsible for considering all matters relating to the development and handling of criminal tax prosecution; and, the Litigation Policy Committee which is responsible for formulating and coordinating the Government's overall policies and positions in civil tax litigation.

United States Attorneys are invited and urged to present to the Assistant Attorney General, Tax Division, any matter which is considered appropriate for discussion by the aforementioned groups. Solutions to problems and other decisions arrived at by the various committees and subcommittees will be distributed to United States Attorneys at regular intervals.

This Special Notice supersedes Bulletin Item, Vol. 4, No. 6, dated March 16, 1956.

(TAX DIVISION)

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ANTITRUST DIVISION
Assistant Attorney General Richard W. McLaren

DISTRICT COURT

SHERMAN ACT

FINES AND JAIL SENTENCES IMPOSED IN SHERMAN ACT CASE.

United States v. Dunham Concrete Products, Inc., et al. E.D. La. (Cr. 1842; August 31, 1971; 60-10-74)

On August 31, 1971, Judge William D. Murray, a visiting Judge from the District of Montana, imposed fines totaling $160,000.00 on three corporate defendants and their principle owner and management head Ted F. Dunham, Jr., convicted of a concerted attempt to monopolize and to extort by a New Orleans jury, on February 19, 1971. In addition, the Court sentenced the individual defendant to serve one year in jail. The sentences were as follows:

As to Count 3 of the indictment - an attempt to monopolize in violation of Section 2 of the Sherman Act:

Dunham Concrete Products, Inc.	$30,000
Louisiana Ready-Mix Company	30,000
Anderson-Dunham, Inc.	40,000
Ted F. Dunham, Jr.	30,000 and 6 months in prison.

As to Count 5 - an attempt to extort in violation of the Hobbs Act:

Dunham Concrete Products, Inc.	$ 5,000
Louisiana Ready-Mix Company	5,000
Anderson-Dunham, Inc.	10,000
Ted F. Dunham, Jr.	10,000 and 3 years in prison.

Judge Murray ordered the jail sentences to run consecutively, giving Dunham a total Federal prison term of one year and a period of probation of three years. The Court fixed October 1, 1971, as the date Dunham must begin serving the prison sentence.

Earlier, on August 27, 1971, Judge Murray denied post trial motions by the Dunham defendants for a new trial and for a reconsideration of all motions previously decided against them. The Court also denied a motion

by the defendant Ted F. Dunham, Jr., to reconsider an adverse ruling on his motion to dismiss the indictment by reason of asserted statutory immunity. Finally, Judge Murray rejected a last minute effort by the Dunham defendant to defer sentencing, pending completion of the trial of the co-defendant Edward Grady Partin, tentatively scheduled to commence in Billings, Montana, on or about January 31, 1972.

Staff: Wilford L. Whitley, Jr., Thomas Ruane, Ernest T. Hays (Economic Section), (Antitrust Division) and James Carriere, Assistant United States Attorney

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CIVIL DIVISION

Assistant Attorney General L. Patrick Gray, III

COURTS OF APPEALS

CIVIL RIGHTS

HUD HELD DISCRIMINATING IN APPROVING PUBLIC HOUSING SITES SELECTED BY CHICAGO HOUSING AUTHORITY ALMOST EXCLUSIVELY IN BLACK AREAS.

Gautreaux v. Romney (C.A. 7, No. 71-1073, decided September 10, 1971; DJ # 145-179-3)

Negro tenants brought class actions against the Chicago Housing Authority ("CHA") and HUD alleging racial discrimination in the Chicago public housing system. While the HUD action was stayed, the district court for the Northern District of Illinois held that CHA had discriminated in assigning tenants and in constructing public housing almost exclusively within the areas of high Negro concentration, thereby perpetuating racially segregated neighborhoods. The same district court then dismissed the action against HUD on the grounds of lack of jurisdiction and sovereign immunity.

The Seventh Circuit reversed. It held that despite HUD's good intentions and numerous and consistent affirmative efforts to persuade CHA to construct public housing in predominantly white areas, HUD nevertheless violated the Negro tenants' rights under both the Fifth Amendment Due Process Clause and the 1964 Civil Rights Act. The Court acknowledged that HUD faced the dilemma of either approving the housing sites selected by the local authorities with knowledge of their discrimination or of cutting off federal funds thereby halting all new public housing construction in Chicago, despite a desperate need for improved shelter by those in plaintiffs' class. The Court held, however, that the established racial discrimination precedents prevented such a dilemma from excusing a segregated result. The case was remanded so the district court could determine the appropriate equitable relief.

Staff: Alan S. Rosenthal and Anthony J. Steinmeyer (Civil Division)

FREEDOM OF INFORMATION ACT

FREEDOM OF INFORMATION ACT ENTITLES MEMBER OF PUBLIC TO DEPARTMENT OF AGRICULTURE LETTERS OF WARNING AND INFORMATION CONCERNING DETENTION

OF MEAT AND POULTRY PRODUCTS; "INVESTIGATORY FILES" EXEMPTION HELD INAPPLICABLE TO "RECORDS OF OFFICIAL ENFORCEMENT ACTION."

Harrison Wellford v. Clifford M. Hardin, C. A. 4, No. 14904, decided May 25, 1971; DJ #145-8-867)

Plaintiff, a consumer advocate, brought this action to compel the Department of Agriculture to disclose certain departmental records pursuant to the Freedom of Information Act, 5 U. S. C. 552. The district court granted plaintiff's request to inspect (1) the department's letters of warning sent to meat and poultry processors, and (2) information with respect to the administrative detention of meat and poultry products. The Fourth Circuit affirmed, holding that the "investigatory files" exemption of the Information Act (5 U. S. C. 552(b)(7)) was inapplicable since the records were only "the records of official enforcement action." The Court of Appeals thus rejected the Department's argument that the records were investigatory, tentative, ex parte, and the disclosure would subject the processors to unfair adverse publicity. Judge Bryan's dissent accepted the Government's argument.

The Fourth Circuit's opinion contains language which is much broader than the actual decision -- that the purpose of the "investigatory files" exemtion is only to "prevent premature discovery by a defendant in an enforcement proceeding." This dictum is plainly erroneous, since the exemption is also designed, among other things, to protect informers, prevent unfair prejudice to reputations and protect investigative techniques. These purposes cannot be served if a file becomes available to the public as soon as investigation is completed. The Fifth Circuit has recently held that the exemption protects informers, after the investigation has been closed. Evans v. Department of Transportation, No. 31092, decided July 13, 1971

The Solicitor General determined that certiorari would not be sought in Wellford. If the case is cited against the Government, it should be emphasized to the court that the broad language is only dictum and that the holding is quite narrow, viz., that the particular Agriculture Department records constituted, in the Court's view, final agency action.

Staff: Robert V. Zener (formerly of the Civil Division); Leonard Schaitman (Civil Division)

MILITARY SERVICE

THE TRANSFER OF A SOLDIER WHOSE ANTI-WAR ACTIVITIES IMPAIRED THE DISCIPLINE AND EFFICIENCY OF HIS UNIT UPHELD

Cortright v. Resor, (C. A. 2, No. 71-1365, decided August 20, 1971, DJ # 145-4-1878).

Specialist Cortright became the leader of an anti-war faction within the 26th Army Band at Ft. Wadsworth, New York. After Cortright had circulated two petitions protesting the Vietnam war and after his fiancee and others had demonstrated at a parade in which the band was performing, the chief of staff of the First Army decided that Cortright's presence in the band was impairing the ability of that unit to perform its mission. The band's mission included public relations in the community. Accordingly, Cortright was transferred to the 62nd Army Band at Ft. Bliss, Texas, where he has continued his anti-war activities.

Cortright then filed a complaint under Article 138 of the U. C. M. J., but the investigating officer upheld the transfer as having been in the best interests of the Army. Thereafter, in a suit for declaratory and injunctive relief, the district court for the Eastern District of New York held Cortright's transfer violated the First Amendment and ordered it rescinded. 325 F. Supp. 797 (1971).

On appeal, the Second Circuit (per Friendly, C. J.) reversed, concluding that "Judicial interference with transfer orders valid on their face must await a stronger showing than Cortright's." The Court expressly left open the possibility that a civilian court could properly invalidate a military transfer on First Amendment grounds, but held that when, as here, the Army officer who directed the transfer acted "concededly in a good faith belief that he was acting for the good of the Army, the matter should have been ended so far as the civilian courts are concerned." As to the Article 138 proceedings, which the district court held lacked due process and produced an arbitrary and capricious determination, the Second Circuit merely stated, "We do not sit as a super-Judge Advocate General to review determinations under that Article * * *."

Judge Oakes dissented on the grounds that the facts found by the district court were not clearly erroneous and that those facts warranted judicial intervention to protect a soldier's right of expression. Judge Oakes also agreed with the district court that the Army 138 proceedings did not limit the de novo scope of judicial review.

Staff: Alan S Rosenthal and Anthony J. Steinmeyer (Civil Division)

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CRIMINAL DIVISION
Assistant Attorney General Will Wilson

COURTS OF APPEALS

ASSAULTS ON OFFICERS OF U. S. CORRECTIONAL INSTITUTIONS - 18 U.S.C. 111

GRANT OF WRIT OF HABEAS CORPUS AD TESTIFICANDUM WITHIN TRIAL COURT'S DISCRETION

United States v. Price (C.A. 10, No. 489-70, June 17, 1971, 444 F. 2d 248; D.J 48-29-523)

In the case of United States v. Price the Tenth Circuit Court of Appeals upheld the trial court's refusal to grant two writs of habeas corpus ad testificandum intended to produce two inmates who witnessed the scuffle between the defendant and Federal correctional officers at the Federal penitentiary where defendant was incarcerated. The two inmates had subsequently been transferred to other Federal penitentiaries.

The Court pointed out that the right to have a defense witness produced is not absolute but that denial of that right, while within the trial court's discretion, must be premised on careful consideration to assure the accused of his Sixth Amendment rights.

Involved in the consideration must be the materiality of the testimony sought and the necessity of it for an adequate defense. In this case, the testimony sought would have been cumulative and not directed to the question of his physical resistance.

The Court further held that the fact that the indictment charged that the defendant did forcibly assault, resist, oppose, impede, intimidate and interfere with the victim, though the statute itself is worded in the disjunctive, neither rendered the indictment bad for publicity nor precluded conviction if only one of several allegations linked in the conjunctive in the indictment was proven.

Finally, it should be noted that when Federal prisoners come to the aid of correctional officers and are themselves assaulted by other inmates, 18 U.S.C. 113 and 114 should be utilized in appropriate cases. Such charges may be joined, the facts permitting, with counts charging offenses under 18 U.S.C. 111.

Staff: United States Attorney Robert J. Roth
Assistant United States Attorney Glen S Kelly
(District of Kansas)

NARCOTICS AND DANGEROUS DRUGS

EVEN THOUGH SUITCASE CONTAINING LARGE QUANTITY OF LSD TABLETS COULD NOT ACTUALLY BE SEEN FROM PLACE OF ARREST, SEIZURE WITHOUT A WARRANT HELD PROPER WHERE AGENT HAD BEEN FURNISHED SAMPLE TABLETS FROM SUITCASE APPROXIMATELY TWENTY MINUTES PREVIOUSLY

United States v. Douglas Cormack Welsch (C. A. 10 No. 653-70, August 9, 1971; D. J. 12-49-110)

A special agent of the Bureau of Narcotics and Dangerous Drugs had made arrangements to meet the defendant in Albuquerque, New Mexico, to effect the purchase of a large quantity of LSD. The defendant arrived, carrying a leather-like suitcase, was met by the agent, and the two of them went to a motel room. At the motel room, the defendant opened the suitcase and displayed a large quantity of LSD. The agent advised the defendant that he wished t have his own chemist examine the LSD; the chemist was in fact another BNDD agent. Prior to the "chemist's" arrival, the defendant placed the suitcase beneath one of the beds in the room. The "chemist" arrived, observed the defendant take the suitcase from beneath the bed, open it, and remove a sample of the LSD. The defendant then placed the suitcase beneath the bed again.

The "chemist" left the room, conducted a field test for LSD, which was positive, and returned to the room with other agents. They gained admittance and arrested the defendant. The "chemist" then reached beneath the bed and removed the suitcase, which was seized.

The trial court found probable cause to arrest the defendant; however, it suppressed the contents of the suitcase, with the exception of those tablets which had been removed as a sample prior to the defendant's arrest.

On appeal from the judgment of the United States district court for the District of New Mexico, the United States Court of Appeals reversed the suppression order. Conceding that at the time of the arrest the suitcase could not actually be seen from the place of arrest, the Court nevertheless held that it was in plain sight and was therefore subject to seizure without a warrant. The court noted that the agent had been absent from the motel room for about 20 minutes, and that in this time interval there was not time within which to perform the required chemical tests and also for the agents to apply for, have issued, and serve warrants for the arrest or for the seizure.

The Court placed reliance upon the recent Supreme Court decision in Coolidge v. New Hampshire, 403 U.S. 443, 39 U.S.L.W. 4795. Coolidge

held, in part, that officers must obtain warrants when they intend to seize objects outside the scope of a valid search incident to an arrest. In this case, the Court held that this language meant preexisting knowledge of the identity and location of an item sufficiently in advance of the seizure to permit the warrant to be applied for and issued. Therefore, the court held that when an object is in plain sight within this definition, its actual location relative to the place of arrest loses significance. In any event, however, the Tenth Circuit held that the suitcase here was located close to where the actual arrest was made, and was therefore within the "Coolidge-Chimel" "plain sight" space limitations, "although only in constructive sight."

The Court, therefore, concluded that "under the prevailing but ever changing case law on this somewhat confused subject, we hold that the seizure of the suitcase and its contents was proper and the evidence should not have been suppressed."

Staff: United States Attorney Victor R. Ortega
Assistant United States Attorney Ruth C. Streeter
(District of New Mexico)

HEARSAY REPUTATION EVIDENCE MAY BE USED WHEN THE DEFENSE OF ENTRAPMENT IS RAISED

United States v. Charles J. Robinson (C. A. 5, July 14, 1971, No. 71-1062; D. J. 12-32-331)

The defendant, a pharmacist, was convicted of the unlawful sale of drugs to a Government undercover agent. On appeal, he contended reversible error was committed when the trial court allowed the Government agents to testify they had reports and complaints from the local police, state pharmaceutical board and wholesale drug houses that the pharmacy where the defendant was employed, was engaged in the unlawful sale of drugs.

The Court of Appeals, in affirming the conviction, held that once the defense of entrapment is raised, hearsay evidence of the defendant's reputation may be introduced by the government to show the defendant's predisposition to commit the crime and the reasonableness of the conduct of the government agents.

Staff: United States Attorney Gerald J. Gallinghouse
(E. D. Louisiana)

NEGATING STATUTORY EXEMPTIONS IN INDICTMENTS UNDER 21 U. S. C. 331(q)(2) NOT REQUIRED

United States v. Carl Oslin Ramzy, Jr. (C. A. 5, July 16, 1971, No. 31136; D. J. 12-73-303)

The physician defendant was charged with unlawful sales of dangerous drugs under 21 U. S. C. 331(q)(2). Appealing his conviction, the doctor argued, inter alia, that his professional status required the negation of the statutory exemption to "practioners licensed by law to prescribe and administer depressant or stimulant drugs while acting in the course of their professional practice."

Upholding the defendant's conviction, the Court of Appeals said it was an affirmative defense with the burden on the defendant to prove his conduct fell within the legislative exception and "there was no necessity for the indictment to allege that it was not."

Staff: United States Attorney Eldon B. Mahon (N. D. Texas)

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LAND AND NATURAL RESOURCES DIVISION
Assistant Attorney General Shiro Kashiwa

COURTS OF APPEALS

CONDEMNATION

HOUSEBOATS NOT FIXTURES; FEDERAL LAW CONTROLS; BUSINESS LOSS; NAVIGATIONAL SERVITUDE; RIVERS AND HARBORS ACT OF 1970.

United States v. 967.905 Acres in Cook, Lake and St. Louis Counties, Minn. (Pete) (C.A. 8, Nos. 20709 and 20710; August 25, 1971, reh. pending; D.J. 33-24-863)

The United States condemned a one-fourth undivided interest in land on navigable Basswood Lake on the Minnesota-Canadian border for the Boundary Waters Canoe Area, a wilderness area. The landowners had used all of the surface of the land for improvements for their business of renting out 40-ton, self-propelled houseboats with crews to fishing parties which went out on the lake for days and fished from small boats towed by the houseboats.

The United States and Canada acquired all the land on the lake which was essentially landlocked. The owners asserted, and the district court agreed, that, since they could no longer be used, the boats were taken with the land.

The Courts of Appeals reversed, noting first that federal law controls the issue of fixtures in condemnation, and while local law may be examined, it need not follow local law if it is peculiar. The Court found that the boats were not fixtures under any body of law anyway. Their loss was only a business loss since their business value was destroyed.

The Court of Appeals also passed on Section III of the Rivers and Harbors Act of 1970, 84 Stat. 1818. Rejecting the Government's argument that the Act only meant to reverse United States v. Rands, 389 U.S. 121 (1967), as to fast lands in projects for physical improvement of navigable waters, the Court held that the Act also applied to ecological and environmental controls involving no physical improvements, or even reversion to nature. The Court did, however, accept the government argument that the 1970 Act did not require valuation which ignored the economic effect of any navigational regulations imposed on the

waterway before the date of taking. The land is to be valued as riparian, but taking into account the economic effects of any pre-existing regulations and restrictions, including in this case, regulations issued a few weeks before the taking.

Staff: Carl Strass (Land and Natural Resources Division)

PUBLIC LANDS

SECRETARY OF THE INTERIOR ACTED PROPERLY IN REFUSING TO CERTIFY AS VALID CERTIFICATES FOR SOLDIERS' ADDITIONAL HOMESTEAD RIGHTS ISSUED AFTER AUGUST 18, 1894.

Cord v. Morton (C.A. 9, No. 26873; August 30, 1971; D.J. 90-1-15-151)

This action involves the validity of certificates for Soldiers' Additional Homestead Rights which were issued to two Civil War veterans in 1896. Under the Act of 1872 providing for additional homestead rights, any qualified Civil War veteran who had already made homestead entries of less than 160 acres was entitled to increase his homestead holdings to not more than a total of 160 acres. In this case, the certificates for the additional homestead rights were erroneously issued to two veterans in 1896 who had already obtained their additional land, thus exhausting their rights. When the assignee of the 1896 certificates submitted them for validation, the Secretary of the Interior rejected them on the ground that they were invalid at the time they were first issued. Cord then sued the Secretary in the district court, seeking to compel him to certify as valid the certificates. His claim was rejected by the court, and he appealed.

The Court of Appeals affirmed, holding that the certificates in question were worthless. It pointed out that the Act of August 18, 1894, which declared valid all outstanding Soldiers' Additional Homestead Rights certificates, did not apply to the certificates in question because they were issued after the passage of the 1894 Act, and therefore were not affected by it. Furthermore, the Court found that the Secretary's decision was in accord with well-settled principles of contract law that an assignee, even though he is a purchaser for value and without notice, takes subject to the defenses that were available to the obligor against the assignor.

Staff: Peter R. Steenland (Land and Natural Resources Division)

DAMAGES

RECOVERY OF FIRE SUPPRESSION COSTS ON TRACT THEORY; IMPLIED COVENANT OR CONDITION.

United States v. Morehart (C. A. 9, No. 24992; August 27, 1971; D. J. 90-1-9-730)

The United States brought suit to recover its costs incurred in the supression of a fire which threatened to spread from land of a private owner to land owned by the United States. The statutes of the State of California provide for recovery only when a fire burns on to the adjoining owner's property. In a jury trial, the United States prevailed on its theory of the existence of a common law right of a property owner to protect his property from threats or destruction caused by the negligent act of another.

The Court of Appeals affirmed the result but for a different reason. The Court observed that the state courts had ruled the common law had been superseded by the state statutes. In this case the landowner was doing clearing work which in part was being paid for by the United States. This, the Court stated, created a contract, an implied-in-law covenant or condition that the work be done in a workmanlike manner. The cause of the fire being the failure of the landowner to use a proper spark arrester on his bulldozer, the Court affirmed the result of the district court.

This is, as the Court recognized, an unusual case. This case was thought to be a vehicle with which to obtain a ruling similiar to that found in United States v. Chesapeake & O. Ry. Co., 130 F. 2d 308 (C. A. 4, 1942), where the common law right of recovery was recognized independently of a state statute.

Staff: George R. Hyde (Land and Natural Resources Division)

MINES AND MINERALS

INFERIOR QUALITY OF COMMON VARIETY MINERAL DID NOT SATISFY MARKETABILITY TEST WHEN DEMAND WAS ONLY FOR A SUPERIOR QUALITY MATERIAL.

Barrows v. Hickel and United States v. Barrows (C. A. 9, Nos. 25944 and 26045; August 17, 1971; D. J. 90-1-4-205 and 90-1-18-763)

Barrows located a sand and gravel claim in 1953 and worked it sporadically until 1960 when he leased it out to a company which has since been operating a large commercial sand and gravel plant on the claim. The Government initiated a mining claim contest in 1964 and, while these administrative proceedings were pending, obtained in a separate proceeding a preliminary injunction designed to prevent irreparable injury to the land from continued mining operations. United States v. Barrows, 404 F 2d 749 (C. A. 9, 1968), cert. den., 394 U. S. 974. The Secretary of the Interior declared the claim null and void under 30 U. S. C. secs. 22 and 611 for lack of timely discovery of a valuable mineral deposit prior to July 23, 1955, the cut-off date for discovery of "common variety" minerals. The district court affirmed and thereafter the Government sought and obtained a permanent injunction against continuance of the mining operation and requiring removal of the plant and equipment. Both decisions were appealed.

A divided Court of Appeals held that Barrows did not show "present marketability" when the record showed that, prior to July 23, 1955, only sand and gravel of a superior quality to that on Barrows' claim was in demand. The majority rejected our contention that satisfaction of present demand by established operators negates present marketability but also rejected as speculative Barrows' contention that marketability could be shown where one might anticipate an increased market and depletion of better quality reserves. The Secretary's decision and the injunction were upheld. The dissent was of the view that a prudent man, under the facts, would have foreseen an increased market demand after 1955 for this quality material.

Staff: Robert S. Lynch (Land and Natural Resources Division)

CONDEMNATION

APPROVAL OF PRETRIAL INSTRUCTION RESTRICTING NUMBER OF SALES; DISCRETION OF DISTRICT COURT AND COMMISSION TO ADMIT SALES; ERROR OF COMMISSION IN EXCLUDING SALES NOT PREJUDICIAL WHERE DISTRICT COURT PROPERLY CONCLUDED ON REVIEW THAT ADDITIONAL SALES WERE NOT COMPARABLE.

United States v. 1,053.27 Acres in Osage County, Kan. (Tobler) (C. A. 10, No. 598-69; August 27, 1971; D. J. 33-17-246-1)

The Court of Appeals approved a standing, pretrial instruction restricting a party to three sales as a "guideline" which the district court

or commission can enlarge in its discretion. While the commission should have ruled on the comparability of three additional sales proffered by the Government, prior to their exclusion, no prejudicial error resulted, the Court of Appeals said, because the district court on review property concluded that those sales were not comparable to the property taken.

The Court was not persuaded that (1) the restriction and its application does not constitute an exercise of discretion which could be insulated from review on appeal; (2) the value of particular land is best shown by the sale prices of similar properties in the vicinity at the time of the taking demonstrating a market pattern for such property but, since land is unique, the limitation prevents such a demonstration, especially where the property taken is improved and contains large areas of different land classifications; (3) the restriction precludes the fact-finder from assessing the bases and reasons on which the valuation opinions rest; (4) the restriction compels all of a party's witnesses to agree to the market bases for their valuations and, as applied, severely curbs cross-examination: and (5) no reason appears why Kansas commissions are preculiarly unable to cope with the market transactions supporting the experts' valuations.

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

DISTRICT COURT

ENVIRONMENT; EVIDENCE

REFUSE ACT EMPLOYED AGAINST LANDFILL; JUDICIAL NOTICE OF NAVIGABILITY; EVIDENCE REGARDING TIDAL BENCH MARK DATA AND LINE OF MEAN HIGH WATER.

United States v. Mentor (W. D. Wash., No. 25554; August 6, 1971; D. J. 62-82-54)

A one-count information was filed against Joseph Mentor charging that between December 1, 1969, and May 9, 1971, the defendant deposited refuse matter from his property into Dyes Inlet. The refuse matter alleged was "a quantity of dirt, gravel, stone and other solid material." The evidence gathered to prove this violation was quite varied. The Corps of Engineers commissioned a private surveyor to perform two surveys for the purpose of locating the line of mean high water on the property; the first was performed in August 1970, and the second, in March 1971. Comparison of the surveys revealed that the deposit of

fill material had continued between these two dates and had extended 20 feet beyond the line of mean high water which the surveyor located in his first survey.

A pre-trial government motion requesting the taking of judicial notice of the navigability of the waters of Dyes Inlet, and further requesting a ruling that these waters extend, as a matter of law, to the line of mean high tide, was granted by Judge Walter T. McGovern. This narrowed considerably the issues to be tried.

Prior to the trial substantial doubts developed concerning the reliability of the tidal bench mark data upon which the government surveys were premised. The data had been published in 1935 and republished in 1951. Because one of the three bench marks had been destroyed, the National Ocean Survey was asked to run tests to determine the validity of the remaining tidal bench marks at Dyes Inlet. The tests revealed that the datum for mean high water, if revised upward by .33 foot, was still reliable, and N. O. S. made a recertification of the bench mark data on the basis of its tests. An N. O. S. official testified to provide the foundation for admission of the data into evidence.

To argument the Government's survey testimony, an expert in photogrammetry was employed to make a comparison of three aerial reconaissance photographs of the property, taken in July 1951, April 1970, and April 1971. The product was a scale drawing proving that the area had been filled up to 65 feet beyond the April 1970 line of mean high water, and substantiated the photogrammetrists' testimony of how he located the line of mean high water. This proved to be the best evidence that the violation had occurred.

The Government also relied, though to a lesser extent, on the testimony of "old-timers" who had observed the area before the defendant began filling and who knew the approximate former location of average high tides on the property.

The defense maintained that, although the defendant directed the filling of the area, he filled only out to, and not beyond, the line of mean high water. Cross-examination was directed at undermining the government surveys by suggesting technical weaknesses and errors and, in the case of the photogrammetric work, questioning the bases and soundness of the method used to locate the line of mean high water. However, defendant's own surveyor admitted on cross-examination that he could not testify as to the prior location of the line of mean high water and, further that he could not testify that the fill had not been responsible for relocating that line toward the water.

A three-day trial resulted in a verdict of guilty against the defendant.

Staff: Executive Assistant United States Attorney William C. Erxleben (W. D. Wash.); and Thomas C. Lee (Land and Natural Resources Division)

ENVIRONMENT

DEVELOPER REQUIRED TO RESTORE AREA OF ILLEGAL FILL IN NAVIGABLE WATERS TO ORIGINAL CONDITION.

United States v. Joseph G. Moretti, Inc., et al. (S. D. Fla., Civil No. 71-1176-Civ-WM; D. J. 62-17M-34 and 90-1-0-870)

A drege-and-fill land development project in the navigable water of Florida Bay, Key Largo, Florida, was commenced without a permit under 33 U. S. C. sec. 403 from the Corps of Engineers. The purpose of the Development was to create a trailer park within a system of canals connected to the Gulf of Mexico. Large areas of mangrove and other wetlands were destroyed. Work was continued despite stop orders from the Corps of Engineers and the arrest of the developer's vice president under 33 U. S. C. sec. 406.

In a permanent injunction issued September 2, 1971, Judge William O. Mehrtens concluded that the development constituted an unlawful and capricious violation of 33 U. S. C. sec. 403 Judge Mehrtens' opinion discusses at length the serious adverse consequences of the project to the environment. The developer was permanently enjoined from continuing the project and required to restore the area to its original condition. Preliminary estimates of the restoration cost range from $400,000 to $1,000,000.

Staff: Assistant United States Attorney Kenneth G. Oertel (S. D. Fla.)

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