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EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS

Philip H. Modlin, Director

Private Practice of Law

As you know, the Standards of Conduct of the Department of Justice, embodied in 28 C.F.R. §45. 735-9 prohibit Departmental attorneys from engaging in the private practice of law. Every Department attorney must avoid the appearance of a conflict of interest with Department activities and must avoid acting in such a manner as to reflect adversely upon the Department of Justice.

To that end, it is important to underscore to every Assistant United States Attorney who has engaged in private practice before becoming associated with the Department, that it is incumbent upon them to make sure that their names are removed from all indicia of any former law practice including, but not necessarily limited to, the doors of law offices, stationary, billing statements and telephone listings.

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ANTITRUST DIVISION

Assistant Attorney General Richard W. McLaren

DISTRICT COURT

CLAYTON ACT

CONSENT JUDGMENTS ENTERED IN CONGLOMERATE CASES - SECTION 7 OF THE CLAYTON ACT.

United States v. International Telephone and Telegraph Corporation, et al. (Civ. 13319; D. Conn.; September 24, 1971; DJ 60-149-037-1)

United States v. International Telephone and Telegraph Corporation, et al. (Civ. 13320; D. Conn.; September 24, 1971; DJ 60-169-037-3)

United States v. International Telephone and Telegraph Corporation, et al. (Civ. 69 C 924; N.D. Ill.; September 24, 1971; DJ 60-270-037-1)

On September 24, 1971, final judgments were entered terminating these three cases, all of which were filed in 1969, charging ITT with violations of Section 7 of the Clayton Act. The judgments in the ITT-Hartford, and ITT-Grinnell cases were approved by M. Joseph Blumenfeld, Chief Judge, Hartford, upon the motion of both parties after ". . . a full exposition of the issues involved and of the considerations underlying the various provisions of the proposed settlement agreement, and the receipt of papers from amici counsel. . ." who had urged the Court not to accept the judgment in the ITT-Hartford case. The judgment in ITT-Canteen was approved by Richard B. Austin, District Judge, Chicago, the same day. The three judgments, taken together, constitute an overall settlement of the pending Government anti-merger actions against ITT, most voracious among America's acquisitors during the conglomerate acquisition movement of the past decade. The ITT-Hartford case had been set for trial in the District Court in Hartford in September 1971. The ITT-Grinnell case had been tried before Judge Timbers in Hartford, and the Government had appealed an adverse decision to the Supreme Court. The ITT-Canteen case had also been tried and lost in the District Court, and appeal was under consideration at the time that settlements were reached. The appeal in ITT-Grinnel was dismissed on August 24, 1971, simultaneously with the filing of the proposed judgment in that case.

The complaints in these cases had charged that ITT (the 11th largest U.S. corporation in 1968 and the 8th largest in 1970 if the acquisitions involved in the subject cases are included) would be enabled by the acquisitions to utilize its purchasing leverage to the detriment of competition in various lines of commerce including, principally, food vending (ITT-Canteen) automatic sprinkler devices and systems (ITT-Grinnell), and property and liability

insurance, rental automobiles and single family dwelling units (ITT-Hartford). Vertical foreclosure was charged in particular with respect to food vending and insurance, and all three complaints relied upon the existence of a merger trend in the economy to support the charge that these mergers would measurably foster and increase economic concentration in particular lines of commerce and economic sectors of the economy. The relief in all three cases provided for divestiture, prohibitions against future acquisitions by ITT, and injunctive prohibitions against reciprocity conduct and other internal practices which would result in foreclosure or discrimination against competitors. All of the decrees are in force for a period of 10 years only.

The ITT-Canteen decree requires total divestiture of Canteen as a viable concern within 2 years. The ITT-Grinnell decree requires total divestiture of Hajoca Corporation and the Fire Protection Division of Grinnell, also within 2 years. It was the Fire Protection Division of Grinnell that had been the focal point of the Government's proof of anticompetitive effects, at the Grinnell trial and in its Supreme Court appeal. The divestiture provisions of the ITT-Hartford judgment require that ITT divest within 3 years either Hartford Fire Insurance Company, or, in the alternative, ITT-Avis, ITT-Levitt, ITT-Hamilton Life and ITT-Life Ins. Co. of N.Y. Under each decree, if the required divestiture has not been accomplished within the time limit allowed, the responsibility for accomplishing the divestiture goes to a court appointed trustee.

By the terms of the ITT-Hartford judgment, ITT is prohibited from acquiring any domestic firm with assets of over $100 million, and from acquiring leading firms in concentrated markets, absent approval of the Department or the Court. A leading firm, as defined in the judgment, is one with total annual sales of over $25 million and holding 15% of any market in which total annual sales exceed $100 million. A concentrated market is defined as one in which the top four companies account for over 50% of the total sales. ITT is also prohibited from acquiring any domestic insurance company with insurance assets exceeding $10 million or any substantial interest in any domestic sprinkler company.

The ITT-Hartford and ITT-Canteen decrees contain prohibitions against the practice of reciprocity substantially the same as those contained in prior reciprocity case decrees, which are binding upon the various domestic commercial activities of ITT and its 200 or more subsidiaries. The ITT-Canteen judgment provides that Canteen is to bound by the reciprocity prohibitions after divestiture, and the ITT-Grinnell judgment requires a similar undertaking on the part of the divested Fire Protection Division of Grinnell. ITT and Hartford Fire are prohibited by the ITT-Hartford decree from discriminating in favor of each other with respect to ITT's insurance needs.

Staff: ITT-Hartford: Raymond M. Carlson, Joseph H. Widmar, William H. Rowan, Marshall C. Gardner, Robert M. Heier, Ivor C. Armistead, III, (Trial Section), Lewis Gold, I. Curtis Jernigan, and Stephen A. Aronow (Economic Section) - Antitrust Division

ITT-Grinnell: Joseph H. Widmar, Howard B. Meyers, (Special Litigation Section), and I. Curtis Jernigan (Economic Section) - Antitrust Division

ITT-Canteen: John W. Poole, Jr., Gary M. Cohen, Peter H. Goldberg (General Litigation Section), Roy L. Ferree (Atlanta Office), and Gordon Noe (Economic Section) - Antitrust Division

* * *

CRIMINAL DIVISION
Assistant Attorney General Will Wilson

COURT OF APPEALS

IMMIGRATION

ATTORNEY GENERAL'S REFUSAL TO RELEASE ON BAIL OR PAROLE AN ALIEN DETAINED BY INS FOR HEARING ON ADMISSIBILITY NOT VIOLATIVE OF FIRST OR FIFTH AMENDMENTS TO CONSTITUTION.

Petition of Joe Cahill for a Writ of Habeas Corpus (C.A. 2, No. 1106, September 3, 1971; D.J. 39-51-017)

Immigration officers detained Joe Cahill, a British citizen travelling to the United States on a valid Irish passport and visa, upon his arrival by air in New York on September 1, 1971. The officers informed him that the Secretary of State had revoked his visa. His attorneys requested that Cahill (one of the leaders of the Irish Republic Army) be released on bond or parole pending determination of his case, but the District Director denied their request. Cahill petitioned the District Court for a writ of habeas corpus, alleging the denial of bail or parole was arbitrary and capricious and in violation of the First and Fifth Amendments. The District Court set the case for immediate hearing, after which it denied the petition without prejudice.

Cahill appealed to the Court of Appeals which, on the following day, dismissed the appeal from the bench. The Court stated that Immigration officers have the right, pursuant to 8 U.S.C. 1225(b), to detain aliens for further inquiry and that the Attorney General may, in his discretion, parole certain aliens into the United States under 8 U.S.C. 1182. It noted that the alien denied entry "does not enjoy the panoply of rights granted by the Constitution" and repeated the Supreme Court's oft-quoted statement, "Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned," citing Knauff v. Shaughnessy, 338 U.S. 537, 543 (1950), and Shaughnessy v. Mezei, 345 U.S. 206, 210-215 (1953).

The Court further stated that well-settled law precludes it from reviewing the Attorney General's discretion as long as he has exercised discretion under Section 1182(d)(5) and (6) to deny parole. It held that, in the posture of the proceedings before the INS, as then presented, it had no authority to grant parole or bail.

Staff: United States Attorney Whitney N. Seymour, Jr.
Special Assistant United States Attorney Stanley H. Wallenstein (S.D. New York)

NARCOTICS AND DANGEROUS DRUGS

JUDGMENT OF DISTRICT COURT SUSTAINING MOTION TO SUPPRESS REVERSED AND CASE REMANDED. WARRANTLESS ARREST AND SEARCH BY BNDD AGENTS HELD JUSTIFIED.

United States v. Oscar Squella-Avendano, Marco Osorio, etc., Andres R. Rodriquez, Carlos Rojas, Rodolfo Quintanilla, Raul DeMaria and Jorge Vasquez. (C. A. 5, No. 71-1143, August 25, 1971, DJ 12-18-397)

An informant advised agents of the Bureau of Narcotics and Dangerous Drugs that a quantity of cocaine from Chile would arrive in Miami. The informant advised the agents on July 24, 1970 that the cocaine had arrived, and that the defendants were attempting to rent a certain type of automobile to pick up the cocaine; the informant supplied the type of vehicle which had been rented and also the last three numbers of the license plate. The car was located and placed under surveillance; the next day, it was seen next to an aircraft where cartons were unloaded into it. The defendants after an interval drove off in two cars, taking an evasive route. The agents lost sight of the vehicle but located it thereafter at an apartment occupied by Quintanilla. Cartons were being unloaded from the car to the apartment. The agents checked with their headquarters, were told that there was no time to obtain a warrant, and were instructed to make an immediate arrest. Agent Hudson went to the door, announced "Police, Open the door," and repeated this announcement in Spanish. Agent Robinson was stationed at the front window of the apartment; he observed cocaine strewn about the apartment. He declared through the window "Open the door. You're under arrest." Hudson opened the unlocked front door, and the defendants were arrested.

The district court found that there was probable cause for the arrest, but found the arrest defective because it felt that under the circumstances the agents fell short of their constitutional duty in failing to procure arrest and search warrants. The court alternatively found that the agents did not announce their purpose in accordance with 18 U.S.C. 3109. Therefore, he suppressed the 200 pounds of cocaine which had been seized; the Government appealed.

The Fifth Circuit reversed. It first held that the holding of the district court that warrants should have been obtained prior to the arrest was erroneous in light of 26 U.S.C. 7607(2), which allowed the agents to arrest without warrants for violations of the narcotics laws upon reasonable grounds that the person to be arrested has committed a narcotics violation.

The court then held that if the informant's report was worthy of belief, the arrests were based upon probable cause. Examining the information

which had been supplied by the informant, the court found that the precise detail of the information which he supplied was made upon his own direct and personal observation and knowledge. Additionally, much of this information was corroborated by the agent's own observations. Nevertheless, purchase negotiations between the agents and the defendants, the evasive driving of the defendants after picking the cocaine up from the aircraft, the attempt of the defendants to flee from surveillance, the frequent meetings among the defendants; and the suspicious activity of the defendants in picking up the cocaine all provided the agents with probable cause for the arrest. The defendant's argument that because the informant had not been used in connection with other investigations his reliability had not been established in accordance with Aguilar v. Texas, 378 U.S. 104 (1964), was rejected; the court stated that if sufficient corroborative evidence can be obtained to support a clear inference that the informant was generally trustworthy, the requirements of Aguilar were established. The court found such corroborative evidence and held that the requirements of Aguilar, Spinelli v. United States, 393 U.S. 410 (1969) and Whiteley v. Warden, 401 U.S. 560 (March 29, 1971), were all satisfied.

The court then rejected the defendant's contention that the search was unlawful because Agent Robinson's view through the window, just prior to the arrest, was an unjustified warrantless search. Finding his view to be a search, the court nevertheless found it permissible. Stating that the agents knew that the defendants might be armed, and knowing that their surveillance had been detected, the court held that the agents were justified in surveying the apartment to determine whether their arrest would be forcibly resisted. The court held that it would have been imprudent for the agents to enter the apartment without exercising at least this degree of care for their own safety.

Finally, the court held that the requirements of Miller v. United States, 357 U.S. 301 (1958), were satisfied here. The officers were virtually certain that the occupants of the apartment were aware of the impending arrest; the announcement of the agents that they were "police" and the instruction to "open the door" established that the defendants both suspected discovery and feared arrest. Accordingly, the technical "breaking" of the door--which was unlocked--was justified.

Staff: United States Attorney Robert W. Rust
Assistant United States Attorney Neal R. Sonnett (S.D. Fla.)

RECEIVING STOLEN GOVERNMENT PROPERTY
18 U.S.C. 641

INFORMATION PER SE CAN BE "GOVERNMENT PROPERTY" FOR PURPOSES OF 18 U.S.C. 641

United States v. Friedman (C. A. 9, No. 25,997, June 8, 1971; D.J. 51-12c-111)

In United States v. Friedman, the Ninth Circuit Court of Appeals has clearly established that "information" intrinsically is of such a nature as to constitute "property" under the requirements of 18 U.S.C. 641.

Appellants had previously been convicted, along with others, for participating in an organized scheme to cheat for profit in card games. During the previous trial a secret grand jury transcript was found on the counsel table of the defense. It contained the testimony of a witness before the grand jury which had returned the indictments in that case. The Court had not authorized access to the transcript by defense counsel.

The appellants in this case were convicted of several counts including contempt (18 U.S.C. 401) for violating F. R. Cr. P. 6(e) by possessing and disclosing unreleased grand jury transcripts and receiving and concealing stolen government property (18 U.S.C. 641). In instructing the jury the court stated in part:

> "I have heretofore instructed you as to the effect and the meaning of Rule 6(e), Criminal Rule 6(e) and the secrecy surrounding grand jury transcripts unless and until they are authorized to be released by order of a court. The effect of the said Rule is that the information contained in grand jury transcripts, i.e., the information as to the questions asked and answers given at a particular session or sessions of the grand jury, are the property of the United States and remain its property alone unless and until the release of said information is ordered by a court order. Said information is Government property regardless of who may be said to own the particular sheets of paper or tapes on which said information is recorded."

This case should be considered authority establishing the necessary foundation in cases dealing with theft or the receiving of any Federal Government documents or copies thereof.

The Government was represented both at trial and on appeal by Assistant United States Attorney David R. Nissen working under the direction of Robert L. Meyers, United States Attorney, Los Angeles, California.

Staff: United States Attorney Robert L. Meyers
Assistant United States Attorney David R. Nissen (C.D. Calif.)

* * *

INTERNAL SECURITY DIVISION
Assistant Attorney General Robert C. Mardian

COURT OF APPEALS

SELECTIVE SERVICE

HABEAS CORPUS - IN-SERVICE CONSCIENTIOUS OBJECTION

PFC Carl F. Rothfuss v. Stanley R. Resor, et al. PFC Lawrence P. O'Brien v. Stanley R. Resor, et al. (C.A. 5, Nos. 30731 and 30850; June 15, 1971; DJ File 25-76-1384)

The petitioners, both enlisted men on active duty in the Army, applied for discharge as conscientious objectors under AR 635-20. Both applications were processed correctly and in due course the requests were denied by the Army Conscientious Objector Review Board. Petition for writ of habeas corpus was filed by each individual in the Western District of Texas, claiming that the denial of the applications was without a basis in fact. At hearing, the court had before it for consideration the complete application file submitted to the CORB but not the decision rendered. Nevertheless, the district court found the Army decision proper and denied both writs.

On appeal the Fifth Circuit found the record insufficient to determine whether an adequate basis in fact had been presented to the CORB to justify the administrative decision (even though the briefs of counsel in Rothfuss included the Army decision). Accordingly, the cases were remanded to the district court for evidentiary hearings to determine what additional facts might have been presented to the board or to hearing officers to support the Army decision. In the alternative, the court was empowered to remand to the Army to determine the existence of such additional facts.

This decision, in which no petition for writ of certiorari will be filed, nevertheless requires clarification for future litigation. First, the court only sought to elicit further information concerning the interviews to amplify the board decision. The court would not have the prerogative to conduct a de novo hearing as to whether the applicants were in fact conscientious objectors. Second, the Army processing procedures must in future cases be clarified at the initial hearing. In this case, the opinion reflects the misconception that each applicant was personally interviewed by the CORB members, whereas, in fact, all hearings are conducted at the applicant's unit level and the file forwarded to the CORB for a decision. Thus, while the remand in this case may reveal further grounds to support the CORB decision in the testimony of the interviewing

officers, none of this previously unrecorded evidence would have been before the CORB. Finally, it is crucial that the Army file be introduced in toto before hearing in order that the administrative decision can be properly reviewed. The Division remains available for advice and assistance in obtaining this material for hearing.

Staff: Former United States Attorney Seagal V. Wheatley; Assistant United States Attorney Victor K. Sizemore, William M. Piatt (Internal Security Division)

FOREIGN AGENTS REGISTRATION ACT OF 1938, AS AMENDED

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

During the month of September of this year the following new registrations were filed with the Attorney General pursuant to the provisions of this Act:

Japan Trade Center, 1127 Walker Street, Houston, Texas, registered on September 20, 1971 as agent of Japan External Trade Organization (JETRO), Tokyo. Registrant will provide information on Japan's trade and industry and engage in public relations activities.

World Zionist Organization-American Section, Inc., 515 Park Avenue, New York, New York, registered on September 21, 1971, as agent of the World Zionist Organization, Jerusalem. Registrant will prepare and disseminate publications, engage in educational programs and public relations activities.

Australian Tourist Commission, 1270 Avenue of the Americas, New York, New York, registered on September 22, 1971, as agent of its parent Commission in Melbourne. Registrant will plan, organize and direct the foreign principal's marketing, travel and promotional campaigns in the United States.

Hamilton Wright Organization, Inc., 5736 Cactus Wren Road, Paradise Valley, Arizona, registered on September 28, 1971 as agent of the World Lebanese Union, Beirut. The registrant will produce and disseminate a series of films for the foreign principal.

Jack J. Morris Associates, Inc., 1725 K Street, N. W., Washington, D. C., registered on September 29, 1971 as agent of Soviet Life Magazine, Embassy of the USSR. Registrant will undertake a direct mail campaign to promote the distribution of Soviet Life Magazine in the United States.

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LAND AND NATURAL RESOURCES DIVISION

Assistant Attorney General Shiro Kashiwa

COURTS OF APPEALS

CONDEMNATION

VALUATION OF FARM LANDS WITH MINERAL DEPOSITS; FINDING BY RULE 71A(h) COMMISSION, WHICH EXCLUDED CONSIDERATION OF UNQUARRIED LIMESTONE DEPOSIT IN MAKING AWARD, IS "CLEARLY ERRONEOUS"; AWARD BASED THEREON VACATED AND REMANDED FOR RECONSIDERATION BY DISTRICT COURT OR COMMISSION.

United States v. 1,955.00 Acres in Geary and Riley Counties, Kansas (Shandy) (C.A. 10, No. 182-70; August 31, 1971; D.J. File 33-17-98-67)

The United States condemned 400 acres to expand the Fort Riley Military Reservation. The only dispute was whether the highest and best use for 101 acres was farming, as the Government contended, or limestone-rock production, as the landowner contended. It was undisputed that no rock-quarrying activities ever took place on the 101 acres which were devoted to agricultural uses on and before the date of taking. Nevertheless, a quarryman testified for the landowner that he took 33 core samples on the 101 acres which established the presence of hard commercial limestone and which the quarryman estimated to total over two million tons. The quarryman, in 1961, obtained from the landowner a lease obligating him to pay five cents per ton of rock extracted. However, the quarryman had not begun operations on the land at the time the condemnation intervened. None of this evidence was contradicted by the Government.

As to market demand for limestone rock in the vicinity, evidence was adduced by the landowner that such existed and that the rock on the subject lands met federal and state construction specifications. The Government witnesses testified that three other quarries were in the locality, though two had closed down, which met the needs in the area.

The Rule 71A(h)-commission's $88,110 award was based on a valuation for farm uses, and, as its report stated, the commission refused to consider any higher valuation attributable to the rock deposit because "there had been no rock produced on said land and * * * the land had never been quarried at any place to determine whether

there was a definite amount of rock * * * " The commission made no express finding as to the presence or absence of a market for the rock. The district court, nonetheless, adopted the commission's report and entered judgment for its award, saying, "though the Commission may have given a wrong or insufficient reason for not allowing any additional value for the rock in place, the fact remains that the Commission was not persuaded by a preponderance of the evidence that a market existed for the commercial quarrying of the rock * * *".

On appeal by the landowner, the Court of Appeals vacated the district court's judgment and remanded the case for reconsideration of the award by either the court or commission, as appropriate, with specific instructions to consider "as a proper factor" the present and future marketability of limestone and its impact on just compensation.

This result flowed from the appellate court's conclusion that the commission finding, which disregarded any enhanced value attributable to limestone, was "clearly erroneous," apparently within the meaning of Rule 53(e)(2), F. R. Civ. P. First, the commission finding was predicated on an error of law which assumed that the absence of actual quarrying destroyed the landowner's claim that mineral value be considered. Next, the Court of Appeals, in its review of the evidence, concluded that the "basic elements" calling for such consideration--that is, the existence of the rock deposit, together with a general market and future market demand for it--had been established. "In short, while the proof in no way compelled any particular valuation on the limestone, we feel it clear that the proof was such that it could not be entirely rejected in reaching a fair award of just compensation."

Staff: Dirk D. Snel (Land and Natural Resources Division); Former Assistant United States Attorney Patrick K. Monahan (D. Kan.)

WATER RIGHTS; CIVIL PROCEDURE

RIPARIAN LANDOWNER'S COMPENSABLE RIGHT TO FLOOD WATERS; REJECTION OF AMENDMENT TO TUCKER ACT CLAIM AND TRANSFER TO COURT OF CLAIMS.

United States v. Northern Colorado Water Conservancy District, et al., F. E. Yust (C. A. 10 Nos. 323-70 and 324-70; September 9, 1971; D. J. 90-1-2-454)

Prior to the construction of the Green Mountain Dam on the Blue River and the Grandy Dam on the Colorado River, Yust's cattle ranch in Colorado had been naturally irrigated by annual flood water of the two rivers. The project interfered with the natural spring flooding. The efforts of the Bureau of Reclamation to construct a ditch irrigation system on the Yust ranch (in accordance with Senate Doc. No. 80, 75th Cong., 2d sess., incorporated by reference into the Act of August 9, 1937, 50 Stat. 595) proved unsuccessful.

Yust intervened in a suit by the United States to quiet title to the water used in the Colorado-Big Thompson project and to obtain judicial interpretation of Senate Doc. No. 80, 75th Cong., 2d sess. Yust recovered judgment for $10,000 under the Tucker Act against the United States for the taking of vested property rights to overflow from the Colorado and Blue Rivers for the natural irrigation of Yust's meadow lands and the right to water his livestock in the rivers.

The Government on appeal to the Tenth Circuit argued that the use of Spring flood water for natural irrigation was not a vested property right in Colorado and that Senate Doc. No. 80, 75th Cong., 2d sess., did not create a vested right in flood waters, so that there was no compensable taking of property under the Fifth Amendment.

The Court of Appeals, however, affirmed the district court, holding that under Colorado law and under Senate Doc. No. 80, 75th Cong., 2d sess., the Government was required to pay just compensation for the taking for public use of Yust's property interest in the flood waters, citing United States v. Martin, 267 F. 2d 764 (C. A. 10, 1959). The Court also sustained the district court's refusal to allow belated amendment of Yust's Tucker Act claim in an amount in excess of $10,000 and transfer to the Court of Claims.

Staff: Edmund B. Clark (Land and Natural Resources Division); Robert H. Whaley (formerly of the Land and Natural Resources Division, now Assistant United States Attorney, E. D. Wash.)

PUBLIC LANDS; ADMINISTRATIVE LAW

CLASSIFICATION OF WITHDRAWN PUBLIC LANDS UNDER TAYLOR GRAZING ACT; JUDICIAL REVIEW OF ADMINISTRATIVE ACTION; SCOPE OF REVIEW.

Bleamaster v. Morton (C. A. 9, No. 24885, September 20, 1971; D. J. No. 90-1-15-147)

The Bleamasters selected certain public lands in the Coachella Valley near Palm Springs, California, for entry under the Enlarged Homstead Act of February 19, 1909, 35 Stat. 639, as amended, 43 U.S.C. sec. 218. By executive order these lands had been withdrawn from settlement, location, sale or entry and renewal for classification pending the Secretary of the Interior's determination of the most useful purposes to which they might be put under Section 7 of the Taylor Grazing Act, 48 Stat. 1269, 43 U.S.C. sec. 315f. Previously, the Palm Springs Desert Museum had filed an application to lease a portion of the lands for a desert habitat under the Public Recreational and Other Public Purposes Act of June 14, 1926, 44 Stat. 741, as amended, 213 U.S.C. sec. 869. The Department's field examination established that these lands were unsuitable for agricultural development and were valuable primarily for future real estate investment. After the Secretary declined to classify these lands as suitable for enlarged homestead entry, the Bleamasters brought suit to compel such classification. The district court granted summary judgment in favor of the Secretary and the Bleamasters appealed.

The Court of Appeals affirmed, stating that holders of enlarged homestead rights have no vested right in any particular land, and that their right of entry is merely a "float" until the Secretary has classified the particular land selected by them as suitable for entry. The Court specified that the Secretary's duty to classify land under Section 7 was satisfied by his decision to retain these lands in public ownership and his rejection of the Bleamasters' application based upon the field reports relating to the lands' highest potential use, and he was not required to make a formal classification. The Secretary's subsequent classification of part of the lands for lease to the Desert Museum was held to be a proper exercise of his authority. Finally, since the Secretary's decisions were supported by substantial evidence on the record as a whole, the Court concluded that the agency action taken was not arbitrary, capricious, unlawful or an abuse of discretion.

Staff: Jacques B. Gelin (Land and Natural Resources Division); Assistant United States Attorney Ernestine Tolin (C.D. Calif.)

NAVIGATION; CONDEMNATION

STATE NOT ENTITLED TO COMPENSATION FOR GOVERNMENT'S USE OF SUBMERGED LAND FOR NAVIGATION PURPOSE; AUTHORITY FOR USE; STATUTE OF LIMITATIONS UNDER TUCKER ACT STARTS TO RUN WHEN GOVERNMENT BEGAN POSSESSION; CONDEMNATION ACTION NO BAR TO DEFENSE OF LIMITATIONS.

United States v. State of California (C. A. 9, No. 23888, July 21, 1971; D. J. 33-5-470-5)

In 1940 the United States took physical possession of submerged lands in San Francisco Bay for use in connection with the San Francisco Naval Industrial Shipyard. The United States remained in possession until 1967. California in this case sought compensation for the fair rental value of the property for the 27-year period. Although California in 1944 requested the United States to enter a lease, the United States refused to agree to anything more than nominal rent and remained in possession without entering into a lease or paying rent until 1967 when it sold its facilities to California. In 1955 the United States filed a condemnation action against the property of which it was in possession. The state appeared in the action. In 1960, and again in 1964, the United States sought to have its complaint dismissed with prejudice to any claim of California for compensation, or, in the alternative, for a judgment that the United States had taken possession in exercise of its navigation servitude for which no compensation was payable.

In 1965 the district court, finding that the United States had not shown clear congressional authorization for exercise of the navigation servitude, denied the Government's motion. In July 1968 the United States again moved to dismiss the complaint or for summary judgment determining California to be entitled to no compensation since any claim it might have had was barred by its failure to sue under the Tucker Act within the six-year period of limitation. In November 1968 the United States district court for the Northern District of California dismissed the complaint in condemnation without comment and this appeal by California followed.

The Court of Appeals for the Ninth Circuit affirmed, accepting both of the Government's arguments: (1) The owner of land under navigable waters does not have a compensable right against the United States when the United States asserts its right to use the submerged land for navigation purposes. Even if express congressional authorization for the use of this submerged land for a

navigational purpose were lacking, the court held there was no compensable taking, since the court can look to the project itself to determine whether it was intended as an aid to navigation and commerce; and (2) the State's right to recover, if any had been found, was extinguished by its failure to bring an action within six years of the date the United States took possession as required by the Tucker Act. The taking occurred and the limitation period began to run when the United States began its physical possession of the subject property. The filing of the condemnation complaint was held not to constitute the taking; nor did instituting a condemnation action preclude the Government from asserting the defense of the statute of limitations against a possible Tucker Act claim.

Staff: Edmund B. Clark (Land and Natural Resources Division); Assistant United States Attorney J. Harold Weise (N. D. Calif.)

DISTRICT COURT

ENVIRONMENT

DISMISSAL OF SUIT TO ENJOIN CORPS OF ENGINEERS FROM DUMPING RIVER DREDGINGS INTO LAKE ONTARIO; NEPA NOT APPLICABLE; DREDGING AUTHORIZED BY CONGRESS; RIVERS AND HARBORS ACT; IRREPARABLE INJURY NOT SHOWN.

Monroe County Conservation Association, Inc. v. Hansen (W. D. N. Y., Civil No. 1971-213; June 1, 1971; D. J. 90-1-4-309)

Plaintiff brought an action for a preliminary injunction to enjoin the Corps of Engineers from disposing in Lake Ontario materials accumulated by dredging operations in the Genesee River to maintain Rochester Harbor in New York. This dredging procedure had been utilized for many years and would be the last time the Corps would have to dump the dredgings into Lake Ontario. In the future, it would use a land fill site.

The district court denied plaintiff's motion for preliminary injunction noting that the Rivers and Harbors Act of 1970, 84 Stat. 1818, supported the Corps' activities and that the National Environmental Policy Act, 42 U. S. C. sec. 4321, was not applicable.

The court observed that NEPA gave the federal agencies until July 1, 1971, to review their procedures and propose changes to achieve consistency with the Act. Furthermore, Executive Order 11507, 35 Fed. Reg. 2573 (Feb. 4, 1970), provided for procedures for abatement

of air and water pollution at federal facilities to be completed or under way no later than December 31, 1972. The court concluded that it was unwilling, by granting the injunctive relief sought, to superimpose or substitute its timetable with that provided for by Congress or the President.

The court also noted that in the Rivers and Harbors Act of 1970, Congress carefully considered the problem of dredging spoils. The Act authorizes the Secretary of the Army to construct contained spoil disposal facilities for the Great Lakes at the earliest practicable date. The court concluded that Congress was aware of and was responding to the environmental problems of dredging and did not intend to prohibit harbor dredging until such spoil disposal facilities were constructed.

In balancing the harm to the respective parties, the court said that without the dredging the Port of Rochester would be closed to deep draft commercial ships. Moreover, since the dredging has gone on periodically for many years, it was the plaintiff who sought to alter the status quo. Since it was admitted that Lake Ontario was already polluted, the court did not see irreparable harm to the Lake resulting from the project which would outweigh that to the City of Rochester: "The best it can hope to show is additional pollution to an already polluted lake."

Following denial of its motion plaintiff filed a notice of appeal and motion for injunction pending appeal with the Second Circuit Court of Appeals. The Second Circuit denied plaintiff's motion, but scheduled an expedited hearing on the appeal. Plaintiff then applied to the Supreme Court for an injunction pending appeal which was denied. Prior to the time scheduled for the hearing on the appeal, the Corps completed the project. Plaintiff then stipulated to dismissal without prejudice of its pending action in the district court for a permanent injunction and dismissal of the appeal.

Staff: United States Attorney H. Kenneth Schroeder, Jr. (W. D. N. Y.)

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TAX DIVISION

Acting Assistant Attorney General Fred B. Ugast

DISTRICT COURT

JURISDICTION

SUIT CHALLENGING CONSTITUTIONALITY OF AMENDMENTS, MADE BY EMPLOYMENT SECURITY AMENDMENTS OF 1970, P.L. 91-373, TO FEDERAL UNEMPLOYMENT TAX ACT DISMISSED AS NOT PRESENTING A JUSTIFIABLE CASE OR CONTROVERSY.

State of Texas v. United States and James Hodgson, Sec'y of Labor (W.D. Tex., Civil No. A-70-CA-117, September 20, 1971; DJ 5-76-1449)

A unanimous three judge district court, by order dated September 20, 1971, granted the Government's motion to dismiss the complaint filed by the State of Texas. Suit had been brought seeking a declaratory judgment holding recent amendments to the Federal Unemployment Tax Act (26 U.S.C., Sections 3301 et seq.) unconstitutional as indirectly imposing a federal tax upon a sovereign state. Texas also sought to enjoin the Secretary of Labor from implementing the challenged sections. The court held that the suit was premature, sought an advisory opinion and thus presented no justifiable case or controversy within the meaning of Article III, Section 2 of the Constitution. (Citing Aetna Life Ins. Co. v. Haworth, 300 U.S. 227 (1937)). The court found that, since none of the challenged sections become effective until 1972, the "vague threat to state - federal relations" and "uncertain risk of disruption of the state economy" present no serious and certain injury upon which a "real substantial controversy" could be based. The Court further held that, even assuming a substantial controversy, the action would nonetheless be non-justifiable in the district court in view of the alternative "complete and prompt" legal remedy afforded by the Federal Unemployment Tax Act. (26 U.S.C., Section 3310).

Staff: Hugh P. Shovlin, Assistant United States Attorney (W.D. Tex.); George F. Lynch and John M. Wood (Tax Division)

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