United States Attorneys

Bulletin

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

Vol. 20 February 18, 1972 No. 4

UNITED STATES DEPARTMENT OF JUSTICE

TABLE OF CONTENTS

POINTS TO REMEMBER

Clearance of Information Collection

Recently three United States Attorneys offices sent "Water Surveys to several hundred establishments in their jurisdictions without obtaining approval of the Director, Office of Management and Budget, for such collection of information. Those surveys, when completed by the addressees, among other things, identified the establishment, the manufacturing process or service, primary products, principal raw materials, average daily water intake, daily volume of liquid waste, contents and nature of waste, treatment of wastes, where the waste was discharged, and whether or not the establishment has filed for a Refuse Act Permit from the Army Corps of Engineers.

The Federal Reports Act of 1942 provides for the review and clearance of plans and report forms used by Federal agencies in the collection of information. The Act specifically provides that:

> "No Federal agency shall conduct or sponsor the collection of information, upon identical items, from ten or more persons (other than Federal Employees considered as such) unless, in advance of adoption or revision of any plans or forms to be used in such collection,
>
> > "(a) the agency shall have submitted to the Director (of Office of Management and Budget) such plans or forms, together with copies of such pertinent regulations and other related materials as the Director shall specify; and
> >
> > "(b) the Director shall have stated that he does not disapprove the proposed collection of information."

Any future proposed "collection of information, upon identical items, from ten or more persons" must be submitted by the United States Attorney to the Department which, in turn will apply for OMB approval. The document that must be used for such submissions is Standard Form 83, Clearance Request and Notice of Action. An original and three carbons of each request must be prepared and submitted to:

Assistant Attorney General
for Administration
U.S. Department of Justice
Washington, D.C. 20530

ATTN: Management Analysis Section
Office of Management Support

In completing the form insert in block 1. the title and address appearing above. That is, Assistant Attorney General for Administration, etc., insertthe District and Division of the Office desiring to conduct the survey in block 2.

Two sets, eight blank copies, of the Standard Form 83 together with two copies of Standard Form 83A, Instructions for Requesting OMB Approval Under the Federal Reports Act, will be sent to each United States Attorney under separate cover.

(Administrative Division)

Controlled Substances

Controlled substance indictments should specify the controlled substance involved.

In the interests of good draftsmanship, indictments under the Controlled Substances Act and the Controlled Substances Import and Export Act should indicate specifically the controlled substance involved. (In this connection, please see the model indictment forms distributed to United States Attorneys some time ago by the Criminal Division.) Particularly should the controlled substance be specified when extradition is anticipated or is a possibility. Extradition treaties do not use the term "controlled substance." Rather, they indicate particular types of drug offenses which are extraditable. Thus, to obtain a controlled substance extradition, it must be demonstrated that the offense involved falls within such treaty provisions. In other words, it must be shown that the drug involved is of the type covered by the provisions. Some foreign courts have reacted adversely to the term "controlled substance" when it appears (without specification of the drug involved) in indictments accompanying extradition applications. These courts have refused to go beyond the indictment to ascertain the meaning of "controlled substance."

Offenses by Indians

The United States Court of Appeals for the Eight Circuit recently ruled in the case of Kills Crow v. United States that the Major Crimes Act, 18 USC 1153, creates Federal jurisdiction over the enumerated offenses but gives the trial court no jurisdiction over lesser included offenses (10 CrL 2176).

In Kills Crow the appellant, an Indian, was charged, convicted and sentenced for assaulting his wife on a South Dakota Indian reservation with the intent to do great bodily injury by stabbing her with a knife. Among the errors alleged by appellant on appeal was the district court's refusal to instruct the jury on the lesser offense of simple assault. In its opinion the Circuit Court held in effect (with one judge dissenting) that Section 1153 creates jurisdiction as to the major crimes enumerated therein and the court was without jurisdiction of the lesser included offense of simple assault; that Indian tribal courts have inherent jurisdiction over all internal criminal matters not taken over by the Federal Government. United States v. Quiver, 241 U.S. 602; Iron Crow v. The Oglala Sioux Tribe, 231 F. 2d 89.

In United States v. Joe (November Term, 1971), the United States Court of Appeals for the Tenth Circuit held in an Indian rape case that the crimes listed in 18 USC 1153 are exclusive of all others and appellant was not entitled to a jury instruction on the lesser included offense of the crime of rape.

It is our recommendation that when a tribal Indian commits an offense against another tribal Indian in the Indian country which is specifically listed in the serious crimed name in Section 1153, that no effort be made to prosecute the Indian culprit for a lesser included offense.

Memo No. 767--Corrections

Memo No. 767, recently issued by the Department, contains two errors. First, the issue date of the Memo should be January 3, 1972, rather than 1971. Second, the case of United States v. Thirty Seven (37) Photographs found in the footnote on page 3 of the memorandum is found at page 363 of 402 U.S. rather than page 351.

Memo 767 supersedes Memo No. 599, dated October 21, 1968.

(Criminal Division)

Regional Management - Community Services Division

Effective March 1, 1972, management authority for Community Services Division activities in the Federal Bureau of Prisons has been delegated to six Regional Managers. This will include the operating responsibilities associated with state and local correctional facilities contracts, residential centers, employment placement and NARA aftercare services. The Regional Managers and their territories are listed below:

OMB Regions I-II-III -- Regional Manager, Stan F. Lay
Office, New York City (planned)

States: I - Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, Vermont
II - New Jersey, New York, Puerto Rico, Virgin Islands
III - Delaware, Maryland, Pennsylvania, Virginia, West Virginia

---

OMB Region IV -- Regional Manager, Harold L. Thomas
Office, Atlanta (planned)

States: - Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, Tennessee

---

OMB Region V -- Regional Manager, William D. Messersmith
Office, Chicago (planned)

States - Illinois, Indiana, Michigan, Minnesota, Ohio, Wisconsin

---

OMB Region VI -- Regional Manager, Francis J. Kirkland*
Office, Community Treatment Center
3401 Gaston Avenue
Dallas, Texas 75246
FTS 214/749-3614, 15

States: - Arkansas, Louisiana, New Mexico, Oklahoma, Texas

OMB Regions VII-VIII -- Regional Manager, Vacant
Office, Denver (planned)

States: VII -Iowa, Kansas, Missouri, Nebraska
VIII -Colorado, Montana, North Dakota, South Dakota
Utah, Wyoming

OMB Regions IX-X -- Regional Manager, Fred R. Dickson
Office, Federal Building
450 Golden Gate Avenue
P.O. Box 36137
San Francisco, California 94102
FTS 415/556-3794, 95, 96

States: IX-Amer. Samoa, Arizona, California, Guam, Hawaii
Nevada
X-Alaska, Idaho, Oregon, Washington

*Redelegated authority from Warden, Federal Correctional Institution, Seagoville, Texas

(Bureau of Prisons)

* * *

ANTITRUST DIVISION

Acting Assistant Attorney General Walker B. Comegys

DISTRICT COURT

CLAYTON ACT

GOVERNMENT'S MOTION FOR SUMMARY JUDGMENT GRANTED IN BANK CASE.

United States v. County National Bank of Bennington, et al. (Civ. No. 6088; January 27, 1972; 60-11-199-0)

By Order and Opinion filed January 27, 1972, Sterry A. Waterman, Circuit Judge, 2nd Cir., sitting by designation, granted the Government's motion for entry of summary judgment.

The captioned civil complaint was filed December 5, 1970, alleging that the proposed merger of defendants would violate Section 7 of the Clayton Act. The Comptroller of the Currency had approved the merger and had intervened in the case pursuant to provisions of §1878(c)(7)(D) of the Bank Merger Act of 1966 and pursuant to Rule 24(a)(1), Fed. R. Civ. P.

The complaint charged that the proposed merger would tend substantially to lessen competition and create a monopoly in commercial banking in the Bennington area. Defendants and the intervenor moved to dismiss the complaint on the ground that the "Bennington Area" as defined in the Complaint was "economically, demographically and geographically" of insufficient size to constitute a "section of the country" within the intendment of the Clayton Act as a matter of law. The argument was predicated on the fact that the Bennington Area is an area of 408 square miles, had a population of 23,733 in 1970, and was not a significant banking area in relation to the United States as a whole. Judge Leddy, who then had the case before him, denied the motion without an opinion.

Defendants and intervenor then filed their answers to the complaint and simultaneously moved for summary judgment on the same grounds they had set forth in their earlier motion to dismiss. The answers, in the Government's view, admitted all the material allegations of the complaint. The Government therefore cross-moved for judgment on the pleadings and for summary judgment. Judge Leddy denied all motions on the ground that the question of what constituted a "section of the country" in this case was a factual one and had not been resolved by the pleadings.

All the parties thereupon filed a joint motion for summary judgment upon stipulation of pertinent, additional material facts. The decision on that motion was made by Judge Waterman, Judge Leddy having passed away in the meantime.

Judge Waterman held that defendant's and intervenor's postulation that the Bennington Area is "economically, demographically and geographically" of insufficient size to be a "section of the country" for any purpose or for any product was contrary to the decisions of the Supreme Court and to manifestations of Congressional intent. Judge Waterman relied upon recognition by the Supreme Court in United States v. Phillipsburg National Bank, 399 U.S. 350 (1970), of the local nature of banking, compared the economic context of the instant proposed merger with that in Phillipsburg and concluded that the "Bennington Area" was a "section of the country" in the light of Phillipsburg and of the facts stipulated here. Said the Court:

> We think that this conclusion is required by the Supreme Court's language in Phillipsburg, for if we held otherwise:
>
> > . . . the effect would likely be to deny customers of small banks - and thus residents of many small towns - the anti-trust protection to which they are no less entitled than customers of large city banks. Indeed, the need for that protection may be greater in the small town since, as we have already stated, commercial banks offering full service banking in one institution may be peculiarly significant to the economy of communities whose population is too small to support a large array of differentiated services and credit businesses. Phillipsburg, at 361-362.

Staff: Bernard Wehrmann, Peter W. Oldershaw and Philip Small. (Antitrust Division)

* * *

CIVIL DIVISION
Assistant Attorney General L. Patrick Gray, III

COURTS OF APPEALS

ENVIRONMENTAL PROTECTION AGENCY

TENTH CIRCUIT OVERTURNS INJUNCTION DELAYING CANCELLATION PROCEEDINGS AGAINST MANUFACTURER OF CERTAIN NOXIOUS WEED AND PEST KILLERS.

The Pax Company of Utah v. United States (C. A. 10, No. 643-70, January 26, 1972, D. J. 145-8-872)

The district court (Judge Willis Ritter) enjoined the Administrator of the Environmental Protection Agency from carrying out administrative proceedings, pursuant to the Federal Insecticide, Fungicide, and Rodenticide Act (7 U.S.C. 135 et seq.) which could cancel and bar the registration of certain weed and pest killers manufactured by appellee Pax. The Tenth Circuit reversed with instructions to vacate the injunction and to dismiss the action. The Court of Appeals held that judicial intervention was not justified since Pax was not injured, "had not yet had an administrative hearing and thus might never have been hurt" (Slip Opin. 6). The Court also sustained, as "not invalid on their fact," the Administrator's regulations governing the conduct of the hearings and the proceedings of the scientific advisory committee, with the exception of the regulation requiring advance payment of costs.

Staff: Carl Eardly and Ronald Glancz
(Civil Division)

FEDERAL TORT CLAIMS ACT

INDEPENDENT CAUSE OF ACTION OF SERVICEMEN'S WIFE BARRED BY FERES v. UNITED STATES, 340 U.S. 135.

DeFont v. United States (C. A. 1, No. 71-1124, January 6, 1972, D. J. 157-65-287)

Plaintiff brought this action under the Federal Tort Claims Act for damages she sustained as a result of the negligent medical treatment provided to her serviceman-husband by the Army. Under the applicable laws of Puerto Rico plaintiff did have a separate and independent cause of action for her own mental suffering and anguish.

In affirming the lower court's dismissal, the First Circuit held that the fact that the cause of action was not derivative did not remove the incident-to-service limitation of Feres. Moreover, the court stated that it would be unwilling to depart from Feres even if it were able to do so.

Staff: Morton Hollander and Robert M. Feinson (Civil Division)

SOCIAL SECURITY ACT

AFTER-ADOPTED CHILD OF DISABILITY BENEFICIARY MUST HAVE HAD ADOPTION SUPERVISED BY A CHILD PLACEMENT AGENCY IN ORDER TO QUALIFY FOR CHILD'S INSURANCE BENEFITS.

Morris v. Richardson (C. A. 4, No. 71-1757, January 28, 1972, D.J. 137-84-812)

Marion P. Morris, who became entitled to disability benefits under the Social Security Act in 1957, adopted his natural granddaughter, Linda, in 1966. While no adoption agency had been involved, the adoption had been investigated by the town policeman on behalf of the local county court in Raleigh County, West Virginia prior to the court's entering a decree. An application for Social Security Act child's insurance benefits 42 U.S.C. 402(d)(8)(E), was denied on the ground that, the child's adoption had not been supervised by a child-placement agency and that a regulation of the Secretary, 20 C.F.R. 404.323(a)(5)(iii), specifically states that the term child-placement agency does not include a court.

The Court of Appeals sustained the agency regulation, stating that by requiring both a court decree and participation by a child placement agency.

> Congress intended a two-step process to guard against an abuse of liberalized eligibility by adoption for the sole purpose of creating eligibility for child benefits. 113 Cong. Rec. 33196-7. By establishing separate requirements, Congress evidenced no intention to permit one of the requirements to suffice for the other.

Staff: Michael Kimmel (Civil Division)

* * *

CRIMINAL DIVISION

Assistant Attorney General Henry E. Petersen

COURTS OF APPEALS

FAIR TRIAL

HOLDING OUT INFORMER AS CO-DEFENDANT WAS FAIR TRIAL DENIAL.

Lusterino v. United States, (C. A. 2, No. 71-1541, decided November 30, 1971; D. J. 55-52-110)

Lusterino was charged along with co-defendant Grillo of dealing counterfeit money. Upon Lusterino's request, Grillo's case was severed from his on the basis that Grillo was an informer for the Government. On cross-examination at Lusterino's trial, Grillo admitted this fact. Subsequently, the indictment against Grillo was dismissed on motion of the Government.

Lusterino, whose principal defense was entrapment, appealed his conviction stating that he was prejudiced before the jury by Grillo's testimony as to the guilty of both defendants, and by the trial court's charge that Grillo was an accomplice instead of "a government informant for whom Lusterino had acted as a 'procuring agent'."

The United States Court of Appeals for the Second Circuit held that Grillo's revelation that he was acting as a Government informer in the transaction, brought about on cross-examination, could not offset the damage that his testimony had done. The jury might have given some weight to Grillo's testimony which was given with the consent of the Government and which gave a false picture of the situation. In such a case the prosecution had a heavy burden to show that Grillo's testimony could not have affected the verdict--a burden which the Government did not satisfy.

Even though the Court recognized the need for Government agents or informers at certain times, it held that "the prosecution in the conduct of this case overstepped the bounds of permissible advocacy." This was so since the prosecutor was well aware that Grillo's involvement in the transaction that gave rise to Lusterino's conviction was a pretense. "The continuance of a pretense of criminal participation may be essential to ferreting out the extent of criminal activity and evidence of its existence but such a pretense has no place in a trial in court to provide a false basis for determination of guilt."

Since Lusterino's right of a fair trial was denied, the Court of Appeals for the Second Circuit reversed the verdict and remanded the case for a new trial.

Staff: United States Attorney Robert A. Morse
Assistant United States Attorneys Edward R. Korman, David G. Trager, and George G. Bashian, Jr.
(E. D. New York)

FIREARMS

PROHIBITIONS AGAINST POSSESSION OF A FIREARM IN INTERSTATE COMMERCE BY THOSE "COMMITTED TO A MENTAL INSTITUTION" OR "ADJUDGED MENTALLY DEFECTIVE" NOT DENIAL OF DUE PROCESS

United States v. Buffaloe (C. A. 4, No. 71-1309, October 12, 1971, 449 F. 2d 779; D. J. 80-017-80)

The defendant was convicted under 18 U. S. C. 922(a)(6) for making a false statement with regard to a material fact in the acquisition of a firearm, i. e., by swearing that he was not a member of any of the statutory classifications of persons who are prohibited from transporting firearms interstate (18 U. S. C. 922(g) and (h)) when, in fact, he had been committed to a mental institution and subsequently released by a court order. The Court of Appeals for the Fourth Circuit rejected the defendant's argument that he was denied due process by the statutory classification. In essence, the Court found that Congress had a rational basis for the classification, and the prohibition did not amount to a denial of due process even though the defendant in this case had eventually been released from the hospital by a court order. The decision is also relevant to prosecutions under 18 U. S. C. App. 1202 in which Congress legislated against the possession or receipt in interstate commerce of firearms by mental incompetents and the other enumerated classes of persons. The recent Supreme Court decision in Bass v. United States, No. 70-71, decided December 20, 1971 (10 CRL 3037, 40 LW 4101), held that this statute does not prohibit the mere possession of firearms by the enumerated classes, but this decision did not affect prosecutions under 18 U. S. C. 922. See United States Attorneys Bulletin, Vol. 19, No. 24.

The holding of the Buffaloe case is consistent with earlier case law which has held that neither the classification against convicted felons, Cases v. United States, 131 F. 2d 916 (C. A. 1, 1942); United States v. Synnes, 438 F. 2d 764 (C. A. 8, 1971); United States v. Thorensen, 428 F. 2d 654 (C. A. 9, 1970), nor the classification against those discharged under dishonorable conditions violates due process, United States v. Karnes, 437 F. 2d 284 (C. A. 9, 1971).

On a collateral issue, the Court found that there was ample evidence in the particular case to support the finding that the defendant Buffaloe willfully and knowingly made false statements in the acquisition of the firearms, despite defense counsel's argument that the defendant did not possess the necessary mental capacity.

Staff: United States Attorney Leigh B. Hanes, Jr.
Assistant United States Attorney James G. Welsh
(M. D. Virginia)

MIGRATORY BIRD TREATY ACT - (16 U.S.C. 703)

SEARCH OF OPEN FIELD WITHOUT A WARRANT NOT CONSTITUTIONALLY "UNREASONABLE" AND HENCE NOT INVALID: DEFENDANTS NOT ENTITLED TO JURY TRIAL FOR PETTY OFFENSE.

United States v. Gerald E. Cain, Collin L. Cain, Charles E. Bishop, and Robert E. Boyd (C. A. 7, 71-1249, January 10, 1972; D. J. File No. 8-0)

Defendants were charged with hunting over a baited area, a violation of the Migratory Bird Treaty Act, 16 U.S.C. 703, and 50 C. F.R. 10.3(b)(9). Section 703 provides: "/I/t shall be unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, kill, attempt to take, capture, or kill . . . any migratory bird . . . " 50 C.F.R. 10.3(b)(9) provides that migratory birds may not be taken, inter alia, by the aid of baiting or on or over any baited area, and prohibits placing grain so as to constitute a lure, etc., where hunters are attempting to take such birds.

Defendants were tried before the district court and each was found guilty and fined $500.00. A request for a jury trial and a motion to suppress the evidence were denied. The first entry by game agents was on the commercially operated Grassey Lake Country Club, pursuant to routine supervisory procedure, to insure that hunting ceased at the proper time. After entry, wheat and corn were found in and near a pond in the area. The following day the agents returned and found corn in "heavy amounts," the area was declared "baited," and the club was closed for ten days. Defendants Collin L. Cain, Boyd, and Bishop were found in duck blinds in the vicinity of the baited pond. The defendant Gerald Cain is the owner of the farm where the club is located and did not object to the inspection by the agents.

Defendants urged in the Court of Appeals that the Government did not prove any violation of 50 C.F.R. 10.3(b)(9), that the searches conducted by Government agents were unreasonable, and that defendants were entitled to a jury trial. The Court held that, while the agents did not have a search

warrant, the protection of the Fourth Amendment does not extend to search of open fields, and the search was not invalid; that there was sufficient proof of attempting to take wild fowl by use of baiting; and that, since the maximum penalty provided for the violation was six months and $500 and the offense was a petty offense, defendants were not entitled to a jury trial. The decision of the district court was affirmed.

Staff: United States Attorney Henry A. Schwarz
Assistant United States Attorney Jeffrey F. Arbetman
(E. D. Illinois)

* * *

INTERNAL SECURITY DIVISION
Assistant Attorney General Robert C. Mardian

FOREIGN AGENTS REGISTRATION ACT

OF 1938, AS AMENDED

The Registration Section of the Internal Security Division administers the Foreign Agents Registration Act of 1938, as amended, (22 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 last half of January of this year the following new registrations were filed with the Attorney General pursuant to the provisions of the Act:

Sachs, Greenebaum, Frohlick and Taylor of Washington, D.C., registered as agent of the York Bag Company, Ltd., Toronto, Canada. Registrant will represent the foreign principal in its efforts to obtain Congressional legislation amending the tariff schedules of the United States.

The Japan Trade Center of New Orleans, Louisiana, registered as agent of the Japan External Trade Organization, Tokyo, Japan. Registrant will act as information service in connection with Japan's trade and industry.

The Bahama Islands TouristOffice of Miami, Florida, registered as agent of the Bahamas Government Ministry of Tourism, Nassau. Registrant maintains branch offices throughout the United States which engage in the promotion of tourism to the Bahama Islands.

Guggenheim Productions, Inc. of Washington, D.C., registered as agent of the Director of Information, Foreign Ministry of the State of Israel, Jerusalem. Registrant will produce and distribute motion pictures about the State of Israel.

* * *

LAND AND NATURAL RESOURCES DIVISION
Assistant Attorney General Kent Frizzell

COURT OF APPEALS

ENVIRONMENT

DISCUSSION OF ALTERNATIVES IN ENVIRONMENTAL IMPACT STATEMENT IN REGARD TO PROPOSED SALE OF LEASES TO SUBMERGED LANDS ON OUTER CONTINENTAL SHELF HELD TO BE INADEQUATE IN THAT IT FAILED TO FULLY CONSIDER ALTERNATIVES TO PROPOSAL AND ENVIRONMENTAL IMPACT OF THOSE ALTERNATIVES.

Natural Resources Defense Council, Inc., et al. v. Rogers C. B. Morton (C.A. D.C., No. 71-2031, Jan. 13,1972; D. D.C., No. 2397-71, Feb. 1, 1972; D.J. 90-1-18-954)

This appeal was taken from a decision of the district court granting plaintiffs' motion for a preliminary injunction enjoining the proposed sale by Interior of leases to approximately 80 tracts of submerged lands on the outer continental shelf for oil and gas production. The district court found that the environmental impact statement filed pursuant to NEPA was defective in that it did not discuss some alternatives at all, only superficially discussed the alternatives listed in it, and failed to discuss in detail the environmental impacts of the alternatives listed.

The Court of Appeals denied the Government's motion for summary reversal of the injunction. In so holding, the Court found that:

> The impact statement provides a basis for (a) evaluation of the benefits of the proposed project in light of its environmental risks, and (b) comparison of the net balance for the proposed project with the environmental risks presented by alternative courses of action.

Therefore, it found that the discussion of the environmental impacts of alternative, as well as of the proposed action, is necessary to satisfy NEPA.

Further, the Court held that the discussion of alternatives in regard to this particular proposal must encompass practically all aspects of the national energy posture. Since the Energy Subcommittee of the Domestic Council (designated by the President as the body with the power to make overall policy in this field) had not issued an impact statement on the decision to proceed with offshore leasing rather than to change import quotas, it fell to Interior when implementing that policy to evaluate the environmental

impact of reasonable alternatives, even though their implementation lies beyond the scope of Interior. The Court reasoned that, in addition to disclosin g the thinking of the agency in making its proposal, the impact statement serves as a guide for the ultimate decisionmakers who must decide between various alternatives within the purview of different agencies.

The Court established a rule of reasonableness as to the extent to which various types of alternatives must be evaluated, pointing out that, in regard to alternative beyond the authority of the responsible official, reference can be made to other studies, including other impact statements.

In addition, the Court held that past determinations by Congress and the President involved here (the 1953 Outer Continental Shelf Lands Act and the mandatory oil import program instituted by the President pursuant to congressional authority), regardless of the urgency embodied therein, do not override the need for review of the environmental impact of alternatives under NEPA. Rather, NEPA merely infused another element in the continuous review of these programs contemplated by Congress.

The Government then prepared an addendum to the impact statement, in an effort to comply with the Court of Appeals' opinion. On February 1, 1972, the district court held that the addendum did not comply with Section 102(2)(C) of NEPA and the decision of the Court of Appeals, in that it was really a draft impact statement and as such must be circulated for comments, which had not occurred. While denying the Government's Motion to Dissolve the Preliminary Injunction on that ground, the district court dismissed the case as moot because the proposed lease sale has been canceled and to hold that it was not moot would be tantamount to a holding that any future lease sale would be illegal as not in compliance with NEPA.

Staff: Edmund B. Clark, Thomas L. McKevitt, and
Larry G. Gutterridge (Land and Natural Resources Division)

DISTRICT COURT

ILLEGAL DISCHARGE OF MILK WASTES INTO MISSISSIPPI RIVER; CONSTRUCTION OF REFUSE ACT'S "SEWAGE IN A LIQUID STATE" EXCEPTION.

United States v. Genoa Cooperative Creamery Co. (W.D. Wisc., Criminal No. 71-CR-54, Jan. 6, 1972; D.J. 90-5-1-1-86)

A one-count information was filed against Genoa Cooperative Creamery Company charging it with violating the Refuse Act of 1899, 33 U.S.C. sec. 407, on November 19, 1970, by discharging milk wastes into the Mississippi River. The defendant stipulated that it discharged milk wastes containing

suspended solids into three underground tanks adjacent to the creamery and then through underground pipes down a hill and into a ditch leading to the Mississippi River.

The defendant claimed that the discharge was within the exception to the prohibition of the Refuse Act, i.e., it constituted refuse matter "flowing from streets and sewers and passing therefrom in a liquid state." However, relying upon United States v. Republic Steel Corp., 362 U.S. 482 (1960), the court held that, even assuming the milk wastes were "in a liquid state" and the company's discharge system were a sewer," nevertheless the wastes did not come within the exception because they were not "sewage," but "industrial wastes." Only human, animal, and domestic wastes were construed to be within the "sewage exception."

Staff: United States Attorney John O. Olson (W.D. Wisc.); Bradford F. Whitman (Land and Natural Resources Division)

INDIANS

1891 BOUNDARIES OF FORT BERTHOLD RESERVATION NOT DIMINISHED BY SUBSEQUENT STATUTES AND ADMINISTRATIVE PRACTICE; CRIMINAL JURISDICTION OF RESERVATION INDIANS.

City of New Town, North Dakota v. United States and The Three Affiliated Tribes of the Fort Berthold Reservation (C.A. 8, No. 71-1147), Jan. 17, 1972; D.J. 90-2-11-6942)

Two municipalities, New Town and Parshall, North Dakota, brought this suit seeking to overturn a written opinion of the Solicitor of the Department of the Interior which held that the boundaries of the Fort Berthold Reservation, as established by the Act of March 3, 1891, 26 Stat. 1032, were not changed by the Act of June 1, 1910, 36 Stat. 455, and that the municipalities were, therefore, located within the exterior boundaries of the Reservation. The consequence of the opinion is that indians living on the Reservation are subject to the criminal jurisdiction of the tribal courts or, in the case of major crimes, of the federal district court. Previously, New Town and other municipalities had exercised criminal jurisdiction over Indians.

The district court upheld the Solicitor's determination and the City of New Town appealed, arguing that the combination of the 1910 Act and Acts supplementary thereto, as well as the administrative practices which followed, imputed a diminishment of the Reservation boundaries. In addition, it was argued that the diminishment had the effect of removing some of the

timber reserves and natural resources from within the limits of the Reservation. The Court of Appeals reviewed the legislative history of the statutes and the subsequent administrative practices and found that no diminishment of the Reservation boundaries had occurred. In affirming the decision of the district court, the court chiefly relied on United States v. Celestine, 215 U.S. 278, 285 (1909); Menominee Tribe of Indians v. United States, 391 U.S. 404 (1968); and Seymour v. Superintendant, 368 U.S. 351 (1962).

Staff: Thomas L. Adams, Jr. (Land and Natural Resources Division); United States Attorney Harold O. Bullis (D. N. Dak.)

* * *