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UNITED STATES DEPARTMENT OF JUSTICE

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COMMENDATIONS

Assistant U. S. Attorney Philip S. Malinsky, Central Dist. of Calif., was commended by the Administrator of the Veterans Administration for his successful defense in the case of Isobel Moore, et al. v. Donald E. Johnson, et al.

Assistant U. S. Attorney James H. Alesia, Northern Dist. of Illinois, was commended by L. Patrick Gray, III, Acting Director of the Federal Bureau of Investigation for his successful prosecution of a perjury case against Peter Alexander Makres.

Assistant U. S. Attorney Stephen K. Lester, District of Kansas, was commended by Assistant Attorney General Henry E. Petersen of the Criminal Division for his outstanding performance in successfully prosecuting a Wichita bombing and arson conspiracy. Mr. Lester tried the case which was full of complex issues; the statute of limitations had run on all state charges.

Assistant U. S. Attorney Malcolm L. Lazin, Eastern Dist. of Pa., was commended by Acting Director of the FBI, L. Patrick Gray, III, for his successful handling of a large number of FHA fraud cases.

Assistant U. S. Attorney Larry E. Parrish, Western Dist. of Tenn., was commended by John W. Warner, Secretary of the Navy for the thoroughness with which he successfully prosecuted the case of U. S. v. Charles Travis Austin.

Assistant U. S. Attorneys Reese L. Harrison, Jr. and Ralph E. Harris, Western Dist. of Texas, were commended by L. Patrick Gray, III, Acting Director of the FBI for the outstanding manner in which they prosecuted Kenneth Lewis Musgrave and Marshall Womack. Mr. Gray expressed his gratitude for their thorough and conscientious efforts in the successful prosecution of the case.

POINTS TO REMEMBER

Federal Election Laws and Crimes Incidental Thereto

This is an election year, and the following list of statutes which may relate to the elective process has been compiled to assist United States Attorneys. Questions regarding specific statutes should be referred to the appropriate Division or Section of the Criminal Division. The General Crimes Section may be reached at FTS 202-739-2346. The Fraud Section may be reached at FTS 202-739-2616.

I. Statute: 18 U.S.C. 111 - Assaulting, resisting, or impeding certain officers or employees. (Note: 18 U.S.C. 1752(b) prohibits non-forcible interference with Secret Service agents engaged in the performance of their protective functions.)

Investigative agency: FBI

Supervisory responsibility: Criminal Division, General Crimes Section.

Material available: U.S. Attorneys Bulletin, Vol. 19, No. 12, June 11, 1971.

II. Statute: 18 U.S.C. 241 - Conspiracy against rights of citizens.

18 U.S.C. 242 - Deprivation of rights under color of law.

Investigative agency: FBI

Supervisory responsibility: Criminal Division, Fraud Section (except in cases involving racial discrimination which are administered by the Civil Rights Division.)

Material available: An analysis of the offenses covered by these sections may be obtained from the Criminal Division, Fraud Section.

III. Statute: 18 U.S.C. 245 - Federally protected activities. (See primarily subsection 245(b) (1) (A)).

Investigative agency: FBI

Supervisory responsibility: Criminal Division, General Crimes Section (except in cases involving racial discrimination which are administered by the Civil Rights Division).

Material available: A legislative analysis of this section is available in the Criminal Division, General Crimes Section.

IV. Statute: 18 U.S.C. 351 - Congressional assassination, kidnaping, and assault; penalties.

Investigative agency: FBI. However, assistance may be requested from any Federal, state or local agency (including the military.

Supervisory responsibility: Criminal Division, General Crimes Section.

Material available: A legislative analysis of this section is printed in Volume 19, No. 10, United States Attorneys Bulletin, May 14, 1971, page 370.

V. Statute: 18 U.S.C. 591-613 (Chapter 29) - Elections and political activities.

Investigative agency: FBI

Supervisory responsibility: Criminal Division, Fraud Section.

Materials available: An analysis of the offenses covered by this chapter may be obtained from the Criminal Division, Fraud Section.

VI. Statute: 18 U.S.C. 871 - Threats against the President and successors to the Presidency.

Investigative agency: Secret Service. However, threats involving two or more persons and threats by a single individual will be investigated by the FBI as conspiracies or attempts, respectively, if accompanied by any overt act.

Supervisory responsibility: Criminal Division, General Crimes Section.

Material available: U. S. Attorneys Bulletin, Vol. 18, No. 9, May 1, 1970.

VII. Statute: 18 U.S.C. 1751 - Presidential assassination, kidnaping, and assault; penalties.

Investigative agency: FBI. However, assistance may be requested from any Federal, state or local agency (including the military). Note: This provision does not diminish the existing authority and responsibility of the Secret Service for the protection of the President or for making arrests for violations of this section.

Supervisory responsibility: Criminal Division, General Crimes Section.

Materials available: Departmental Memo No. 448, March 3, 1966. U.S. Attorneys Manual, Title 2, p. 23, June 1, 1970.

VIII. Statute: 18 U.S.C. 1752 - Temporary residence of the President.

Investigative agency: Secret Service

Supervisory responsibility: Criminal Division, General Crimes Section.

Material available: U. S. Attorneys Bulletin, Vol. 19, No. 19, September 17, 1971.

IX. Statute: Federal Election Campaign Act of 1971 (P.L. 92-225), 86 Stat. 3. (Short title: Campaign Communications Reform Act). See U.S. Code Cong. & Admin. News, 92nd Cong., 2nd Sess., No. 1, February 25, 1972, p. 3. (For a listing of U. S. Code sections affected, see U. S. Code Cong. & Admin. News, No. 4, May 20, 1972, p. 1504).

Investigative agency: FBI

Supervisory responsibility: Criminal Division Fraud Section.

Material available: An analysis of this law may be obtained from the Criminal Division, Fraud Section.

X. Statute: 18 U.S.C. 3056 - Secret Service powers. (Note: Subsection(b)

proscribes the obstruction, interference with Secret Service agents engaging in the performance of their protective functions.)

Investigative agency: Secret Service.

Supervisory responsibility: Criminal Division, General Crimes Section.

Material available: See discussion of amendments -- Memo No. 448, March 3, 1966.

XI. Statute: 42 U.S.C. 1937i(c) - Federal Election Statute.

Investigative agency: FBI

Supervisory responsibility: Criminal Division, Fraud Section.

Material available: Consult Criminal Division, Fraud Section.

(Criminal Division)

ANTITRUST DIVISION

Assistant Attorney General Thomas A. Kauper

DISTRICT COURT

SHERMAN ACT

UNITED STATES DISTRIBUTOR OF AUTOMOBILES CHARGED WITH VIOLATING SECTION I OF THE SHERMAN ACT.

United States v. Nissan Motor Corporation in U.S.A. (Civ. C 72 1212 RHS; June 30, 1972; DJ 60-107-109)

On June 30, 1972, a civil action was filed in the United States District Court for the Northern District of California charging Nissan Motor Corp. in U.S.A., the U.S. distributor of Datsun automobiles, with a violation of Section I of the Sherman Act.

The suit alleges a conspiracy between Nissan and its dealers to sell and advertise Datsun motor vehicles at prices fixed by Nissan; to refrain from selling Datsuns to third party automobile brokers or discounters; and to confine sales and advertising to areas designated by sometime prior to 1966.

Nissan is a wholly owned subsidiary of Nissan Motor Co. of Tokyo, the manufacturer of Datsun cars and trucks. In its latest fiscal year Nissan's sales were over $460 million.

The allegation regarding discount houses is similar to the basis for the Supreme Court's decision against General Motors in U.S. v. General Motors Corp., 384 U.S. 127 (1966), the Los Angeles automobile discount house case.

The prayer asks that the conspiracy be declared unlawful, that the activities described be enjoined, and that the Datsun dealers be advised that they may sell to any purchaser at such prices and in such areas as the dealers choose.

The case has been assigned to Judge Robert H. Schnacke.

Staff: Mark F. Anderson (Antitrust Division)

* * *

CIVIL DIVISION
Assistant Attorney General Harlington Wood, Jr.

COURTS OF APPEALS

EMPLOYEE DISCHARGE

FOURTH CIRCUIT HOLDS THAT EMPLOYEE DISCHARGE MUST BE AFFIRMED WHEN FREE FROM PROCEDURAL ERROR AND HAVING A REASONABLE BASIS IN THE RECORD.

Embrey v. Hampton, et al. (C.A. 4, No. 71-2073, decided July 3, 1972; D.J. 35-79-16)

In this case, the Post Office Department discharged the plaintiff employee from his post as a Civil Service Examiner after he had been convicted of fraud for falsifying his application for an FHA loan.

The Court of Appeals, although noting that the discharge was a "harsh" penalty, reaffirmed its limited scope of review of decisions to discharge federal employees, holding that the Department's finding that the discharge would "promote the efficiency of the service" had a reasonable basis. The Court also held the discharge was properly based upon the employee's conviction rather than the underlying conduct, and therefore did not violate a provision of his union's collective bargaining agreement which proscribes reference to conduct which occurred more than two years prior to the proposed discharge action.

(Staff: Stanton R. Koppel, Civil Division)

RENEGOTIATION ACT

RENEGOTIATION ACT HELD NOT TO PRECLUDE A PROFIT LIMITATION CLAUSE IN FEDERAL MARITIME ADMINISTRATION CONTRACTS.

Buck Kreihs Company, Inc. v. United States of America (C.A. 5, No. 72-1184, decided June 21, 1972; D.J. 154-240-69)

In 1966 Buck Kreihs Company was paid $1,871,000 for reconditioning vessels pursuant to a contract with the Federal Maritime Administration. Following an audit of its books, Kreihs paid back to the Administration $45,000 as excess profit and as penalties pursuant to a ten percent profit limitation clause in its contract. Thereafter Kreihs commenced an action to recover the money it had repaid, alleging that a profit limitation on any

one contract is implicitly forbidden by the statutory scheme of the Renegotiation Act under which a loss on one contract offsets high profits on another.

The Fifth Circuit, upholding the Administration's inclusion of a profit limitation clause in its contract, accepted our argument that the Renegotiation Act does not prohibit attempts by the Government to prevent excess profits by supplemental means. The Court pointed out that "such provisions designed to supplement the Act's provisions and make it even more difficult for contractors to gain excessive profits are clearly in tune with the Act's purpose to reduce contractor profiteering at the expense of the public coffer".

(Staff: Robert M. Feinson, Civil Division)

* * *

CRIMINAL DIVISION

Assistant Attorney General Henry E. Petersen

COURTS OF APPEALS

MISUSE OF NAMES BY COLLECTION AGENCIES, ETC.

THE PROHIBITION AGAINST THE USE OF NAMES WHICH INDICATE A FEDERAL AGENCY UNDER 18 U.S.C. 712 DOES NOT APPLY TO A RETAIL MERCHANT COLLECTING HIS OWN ACCOUNTS RECEIVABLE.

United States v. Shepard Boneparth and J.3. Boneparth & Sons, Inc. (C.A. 2, No. 71-315; February 23, 1972, 456 F.2d 497; DJ 108-51-36)

The defendants were convicted in the District Court, Southern District of New York, of violating 18 U.S.C. 712 which prohibits anyone "engaged in the business of collecting . . . private debts" from using the initials "U.S." or any name or emblem conveying the "false impression that such business is a department or instrumentality of the United States." The evidence at trial amply demonstrated that the defendants, operators of a furniture and appliance store in Harlem and collector of their own accounts receivable, mailed forms to delinquent debtors which bore the legend: "U.S. Funds Bureau." The form's recipient was led to believe that by returning the form and its requested data he would receive a money disbursement. Such data provided the defendants with the ability to locate the debtor.

The Court of Appeals reversed the convictions and dismissed the indictments. After reviewing the legislative history, the court concluded that the section was not meant to apply to businesses collecting their own debts, but rather to entities engaged solely in the business of collecting debts. See H.R. Rep. No. 874, 86th Cong., 1st Sess. (1959).

On appeal, the Government urged the theory upon which the case went to the jury; the defendants willfully caused their own agency, "U.S. Funds Bureau," to act and were therefore chargeable as aiders and abettors. 18 U.S.C. 2(b). The court rejected that argument, stating that there never was a separate fund collecting entity and noted the Government told the jury in its opening statement that there was no separate entity, and no evidence was presented to show the existence of a separate entity. No allegations regarding aider and abettor were contained in the indictment.

The Criminal Division believes that 18 U.S.C. 712 can and does play a role in the consumer protection area. The court's decision leaves the statute fully applicable to collection agencies and skip-tracing firms. Also, if the evidence permits, the Government's theory urged in this case should be advanced. The General Crimes Section of the Criminal Division has

responsibility for overseeing the enforcement of 18 U.S.C. 712, and any inquiries in regard to this statute are to be directed to that Section.

Staff: United States Attorney Whitney N. Seymour, Jr. Assistant United States Attorneys Patricia M. Hynes, John W. Nields, Jr. and Peter F. Rient (S.D.N.Y.)

IMMIGRATION

8 U.S.C. 1182(a) (14), ADMISSION OF ALIENS FOR THE PURPOSE OF PERFORMING LABOR.

Intercontinental Placement Service, Inc. v. Schultz (C.A. 3, No. 71-1657, May 23, 1972; DJ 39-62-435)

In a per curiam decision the Court of Appeals for the Third Circuit held that an employment agency does not have standing to challenge the promulgation without advance notice of a regulation by the Secretary of Labor which temporarily suspended a pre-certification list reflecting certain aspects of the American Labor market. The Court based its decision on the language in Data Processing Service v. Camp, 397 U.S. 150, 152 (1970), which states that a complainant must be "within the zone of interests to be protected or regulated by the statute." Because the statute's purpose here was to protect American labor, and not employment agencies, the complainant's interest was not one protected by the statute.

Staff: John L. Murphy and Robert L. Teagan (Criminal Division) United States Attorney Louis C. Bechtle; Assistant United States Attorney Merna B. Marshall (E.D., Penn.)

THEFT FROM THE MAILS

UNDER 18 U.S.C. 1708 MAILED MATTER RETAINS ITS CHARACTER AS "MAIL" UNTIL EITHER DELIVERED TO THE ADDRESSEE OR RETURNED TO THE SENDER.

United States v. Clay Davis and C.E. Fralix (C.A. 5, No. 71-2153, June 2, 1972; DJ 48-017-76)

The defendants were convicted, in part, for having possessed money orders which had been stolen from the mails, with knowledge that they had been stolen, in violation of 18 U.S.C. 1708. The evidence introduced at trial showed that a properly addressed envelope containing the money orders had been misdelivered by the U.S. Postal Service to a business establishment. The mail, which included numerous other pieces of correspondence which had been properly delivered, was removed by an employee from its depository and

taken to a rear office for eventual opening by the proprietor. Upon opening the misdelivered envelope, the proprietor discovered the money orders, gave them to a conspirator, who in turn furnished several of the money orders to the appellants for negotiation. On appeal, they contend that, as the envelope had been lawfully removed from the depository and later opened, the money orders ceased to be "mail" after their removal from the depository and that their subsequent theft was not an offense within the contemplation of section 1708 of Title 18, United States Code.

In refuting the appellants' contention the court drew a distinction between mail which had been misdelivered by the Postal Service and that which had been misaddressed by the sender. The court noted that the sheer volume of mail and the number of persons, required to collect, transport, and deliver postal matter have not only increased the statistical chance of misdelivery through human error, but has also fostered anonymity between today's postmen and addressees. Considering these factors and the overall Congressional purpose to give wide protection to the mails, the court concluded that, under section 1708, postal matter remains in the custody or locus of the postal system and continues to be "mail" until such time as the material is returned to the sender or delivered to the address specified by the sender.

In contrast to the foregoing, however, are cases involving mail matter which has been delivered to the addressees thereon, but the addressees themselves were incorrect. (See, Goodman v. United States, 341 F.2d 272 (5th Cir. 1968) and Allen v. United States, 387 F.2d 641 (5th Cir. 1968). In the context of section 1708, the court was of the opinion that the duty and authority of the Postal Service over mail placed in its custody ceases to exist once a letter is delivered to the address specified by the sender and is thereafter lawfully removed from a letter box or other receptacle. Under these facts, it ceases to be "mail" within the meaning of section 1708 and subsequent theft of such matter would be best subject to a charge under section 1702 of Title 18, United States Code. The Goodman and Allen cases, supra, reversed prior convictions under section 1708 under just such facts.

Staff: United States Attorney William S. Sessions; Assistant United States Attorney Reese L. Harrison, Jr. (W.D. Texas)

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INTERNAL SECURITY DIVISION
Assistant Attorney General A. William Olson

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.

JULY 1972

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

Bennett Public Relations Inc. of New York City registered as public relations counsel for the Tourist Information Service of Hungary, Budapest. Registrant's agreement is for a one month trial basis with a fee of $1,275. Registrant is to promote tourism to Hungary via public, promotion, and public relations. If the one month trial period is successful it is expected that the agreement will be renewed for a longer period of time. Bernard E. Bennett filed a short-form registration statement.

Rouss & O'Rourke of Washington, D.C. and Colorado Springs, Colorado registered as agent of Union Nacional de Productores de Azucar, S.A. de C. V. (UNPASA), Mexico, D.F. There is no formal agreement between registrant and foreign principal at the present time. Registrant will represent UNPASA in all matters pertaining to the maintenance and possible increase of Mexico's United States sugar quota; including furnishing information to and conferring with officials and employees in the legislative and executive branches of the U.S. Government. Until a formal agreement is negotiated registrant will render its services to the foreign principal for a $2,500 per month fee plus $300 per month for expenses. Dennis O'Rourke filed a short-form registration statement as U.S. representative of UNPASA.

Communetics Inc. of New York City registered as agent of the Turkish Government Tourism & Information Office. Registrant is to write and produce two 16mm color-sound motion pictures for the purpose of promoting tourism to Turkey. For these services, registrant will receive $40,000 payable in three installments. John Savage filed a short-form registration as Film Writer-Producer.

Japan National Tourist Organizations in Honolulu, Hawaii; Chicago, Illinois; Dallas, Texas; Los Angeles, California; and San Francisco, California filed

registration statements as official branches of the parent Organization in Tokyo. Registrants will promote tourism to Japan and their operating expenses are funded by the parent Organization. The operating expenses for these offices totalled $108,188.37 for the period March - May, 1972 and the offices employ 9 persons in the capacities of directors or officials; Shinya Takata; Kaoru Sakurada; Yoshio Kimura; Albert Ninomiya; Hiroshi Terashima; Atsushi Ikeda; Yasuyuki Yabuki; Osamu Seejima; and Takahide Yamada.

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LAND AND NATURAL RESOURCES DIVISION
Assistant Attorney General Kent Frizzell

COURTS OF APPEALS

CONDEMNATION; APPEALS

RULE 71A(h) COMMISSION; FAILURE TO APPOINT COMMISSION NOT ABUSE OF DISCRETION; JURY TRIAL PREFERRED IN CONDEMNATION; VALUATION TESTIMONY BELOW DEPOSIT OF ESTIMATED COMPENSATION; ADMISSIBILITY OF SALES; FAILURE TO PRESERVE ERROR FOR APPEAL.

United States v. 2,187.43 Acres in St. Francis County, Ark. (Butler) (C.A. 8, Nos. 71-1486 and 71-1487, June 16, 1972; D.J. 33-4-277-55)

The United States took in condemnation flowage easements over five tracts of land in Arkansas for a river basin floodway project. The Government's complaint and the landowners' answer both contained demands for a jury trial. However, about 10 days before trial, the landowners, after they had examined the jury list, moved for the appointment of a Rule 71A(h) commission to try the case. The landowners' stated reason for their sudden preference for a commission instead of a jury was that between the commencement of the condemnation action and the trial date, Congress enacted the Jury Selection and Service Act of 1968, 28 U.S.C. sec. 1861 et seq., which the landowners characterized as requiring "random jury selection from a master jury wheel of any and everybody, irrespective of competency and intelligence."

The case went to trial to a jury which returned a verdict of $144,000 as just compensation, which was $1,900 less than the Government's $145,900 deposit into the registry of the court when it filed its declaration of taking. Judgment was entered on the verdict.

On appeal, the court of appeals affirmed per curiam, holding that the denial of a commission trial did not constitute an abuse of discretion by the district court. "A condemnation case, such as this, typically calls for a jury, and the appointment of commissioners is proper only in exceptional cases, . . . especially where, as here, both parties originally demanded a jury trial."

The court also rejected the landowners' contention that the government appraisers were precluded from giving valuation opinions less than the deposit accompanying the declaration of taking.

The landowners finally contended that sales of other land within the floodway project were not admissible as comparable sales because the project

was allegedly incomplete, because the "sales could not represent total devaluation resulting from the construction of the project." The court noted that the landowners had not raised this particular ground for objection in the trial court. In any case, such data was admissible, the court said, for the jury to weigh.

Staff: Dirk D. Snel (Land and Natural Resources Division); Assistant United States Attorneys James G. Mixon and Walter G. Riddick (E.D. Ark.)

CONTRACTS

DETAINER, ACTION FOR RECOVERY OF RENTALS FROM UNITED STATES FOR POSTAL FACILITY; DEPOSIT IN COURT REGISTRY OF ACCUMULATED RENTALS; USE OF RENTALS FOR CONTRACT CONSTRUCTION SATISFACTION.

Walter J. Zimmerman v. United States (C.A. 6, No. 72-1020, May 25, 1972; D.J. 90-1-4-264)

This case concerns the interpretation of a lease executed on April 5, 1968, between Zimmerman and the United States in which the former agreed to construct a building in Bell Buckle, Tennessee, which the Government would then lease from him for use as a postal facility. Zimmerman failed to complete the building according to specifications. Final approval of the building was thus withheld pending completion or correction of the deficiencies. On February 15, 1970, prior to completion, the Post Office moved in the facility and advised Zimmerman that it would hold the monthly rental payments in escrow to await completion of the building or until enough rentals had accrued to permit the Government to pay for correction of the omitted and unsatisfactory work.

On November 24, 1970, Zimmerman brought a detainer proceeding and action for back rent in a state court. The United States removed the case to the federal district court pursuant to 28 U.S.C. 1446(e), and a trial was held on October 4, 1971. The district court found that Zimmerman had failed to satisfactorily complete 32 items in constructing the building. Further, the court stated that the Government had not waived these deficiencies and, under the terms of the lease, could withhold rental payments until the amount aggregated was equivalent to the cost of completion by the Government. Accordingly, the district court rejected Zimmerman's Tucker Act claim that he was being deprived of his property without just compensation and dismissed his complaint.

On appeal, the Sixth Circuit determined that the basic findings of the district court were not clearly erroneous. The Court of Appeals, however,

remanded the case with instructions that the district court enter an order directing that all rental payments accumulating in the escrow account be deposited into the registry of the Court, rather than have the United States act as its own escrow agent. Payment may then be made from this fund to the Government upon presentation of receipted bills for the repair work. The Court further directed that in no case should the amount of rent withheld exceed the $6,888 estimate by the Government for completion of the building.

Staff: Peter R. Steenland and John D. Helm (Land and Natural Resources Division); Assistant United States Attorney Jerry Foster (E.D. Tenn.)

INDIANS; JURISDICTION

CONFIRMATION OF INDIAN TITLE TO LANDS UNDERLYING ARKANSAS RIVER; LACK OF JURISDICTION TO RESOLVE TRIBES' CONFLICTING CLAIMS TO MINERAL DEVELOPMENT PROCEEDS.

The Cherokee Nation, etc. v. The State of Oklahoma, et al. (C.A. 10, Nos. 71-1210 and 71-1295, June 1, 1972; D.J. 90-2-11-6900)

This appeal arises from a remand for further proceedings by the Supreme Court in Choctaw Nation v. Oklahoma, 397 U.S. 620 (1970). In that case, as in the present appeal, the United States participated as amicus curiae addressing itself solely to the issue of ownership of the riverbed. On remand, the district court interpreted the Supreme Court's earlier decision as confirming present title to the riverbed in the Indians. Defendants appealed, contending that the Supreme Court's earlier decision had only confirmed historic title, not present title, in the Indians; that the Indians had received, and must hold title in their sovereign capacity; and that the Indians had lost their sovereignty prior to Oklahoma's statehood. The defendants then argued, that since title to lands underlying navigable rivers must be in a sovereign, title to the riverbed lands here had passed back to the United States and was conveyed to Oklahoma upon its admission to the union under the equal footing doctrine.

The Court of Appeals found little merit in those contentions, determining that (1) the Supreme Court had confirmed present title in the Indians, and (2) that even if the Indians had lost their sovereignty, this did not operate to divest them of their land. As a result, the court affirmed that portion of the district court's decision holding title in the disputed portion the riverbed to be in the Indians.

Judgment was reversed, for lack of jurisdiction, insofar as the district court attempted to resolve the Cherokees' and the Choctaws' conflicting claims to the proceeds derived from mineral development. The Court of Appeals

suggested that the Indians seek special legislation vesting jurisdiction to so determine.

Staff: John D. Helm (Land and Natural Resources Division); United States Attorney Richard A. Pyle (E.D. Okla.)

DISTRICT COURTS

ENVIRONMENT

CLEAN AIR ACT; APPROVAL OF HYDROCARBON EMISSION STANDARD FOR 1975 MODEL VEHICLES; DISCRETION IN APPLYING STATUTE IN LIGHT OF EVOLVING TECHNOLOGY.

Natural Resources Defense Council, et al. v. Ruckelshaus (D. D.C., Civil Action No. 2598-71, May 5, 1972; D.J. 90-5-2-4-3)

Plaintiffs, two non-profit corporations, filed an action on their own behalf and as representatives of all persons in the United States exposed to hydrocarbons or photochemical oxidants. The action challenged the hydrocarbon emission standard for 1975 model year, light-duty motor vehicles which was promulgated by the Administrator of the Environmental Protection Agency pursuant to Section 202 of the Clean Air Act, 42 U.S.C. 1857f-1. The plaintiffs alleged that the 1975 standard was too high to insure the protection of public health, and that the Administrator used the wrong test procedure to determine the 1975 hydrocarbon emission standard. Plaintiffs sought to have the court declare the 1975 standard null and void, and to direct the Administrator to promulgate new hydrocarbon standards for 1975 model year vehicles.

The Clean Air Act, Section 202 provides, in part, that the Administrator must promulgate hydrocarbon emission standards for 1975 model vehicles which

> shall contain standards which require a reduction of at least 90 per centum from the emissions of . . . hydrocarbons allowable under the standards under this section . . . in model year 1970.

The 1970 hydrocarbon standard, which was promulgated in 1968, was based on the 1970 test procedure. At the time the 1975 standard was promulgated, April 1972, two newer test procedures had been developed: the 1972 test procedure and the 1975 test procedure. The Administrator employed the 1975 test procedure when he promulgated the 1975 standard. The court held that the Administrator's use of the 1975 test procedure is setting the 1975 standard did not violate the provisions of the Clean Air Act stating:

> All the Administrator did, in effect, was translate the 1970 emission figures from the original test procedure into a more accurate procedure and calculate the 90 percent reduction according to the latter. This appears to be a reasonable exercise of the discretion necessary to correlate a fixed directive of the statute with evolving test procedures in a new technological area of governmental regulation. The Administrator has thus complied with the requirements of section 202(b)(1)(A) of the Act.

The court went on to say that since the Administrator had fulfilled the 90 percent mandate of the Act, it was unnecessary to resolve the technical complexities involved in determing whether the 90 percent reduction specifically complied with ambient air quality standards.

Staff: D. Lee Stewart, James R. Walpole (Land and Natural Resources Division)

ENVIRONMENT

DISCRETION IN MANAGEMENT OF AIRPORT; NO NEPA STATEMENT REQUIRED FOR CONTINUING AIRPORT OPERATION; INTRODUCTION OF LARGER AIRCRAFT NOT "MAJOR FEDERAL ACTION" UNDER NEPA; PRE-EMPTION; NUISANCE AND TRESPASS; BURDEN OF AIRPORT NOISE BALANCED AGAINST PUBLIC INTEREST.

Virginians for Dulles, et al., v. Volpe, et al. (E.D. Va., Civil No. 507-70-A, May 26, 1972; D.J. 90-1-4-272)

Several environmental groups and individual citizens residing in Washington, D.C. and the adjacent Virginia suburbs near Washington National Airport sued the Secretary of Transportation, the Administrator of the F.A.A., and nine commercial airlines, in an action relating to the operation of the airport by the federal government. The plaintiffs alleged violations of their constitutional rights, common law theories of relief including nuisance and trespass, and lack of compliance with the procedural and so-called substantive requirements of the NEPA. They sought injunctive and declaratory relief which would result in shifing all or a substantial portion of the jet aircraft traffic from National Airport to Dulles and Friendship Airports. The plaintiffs claimed that NEPA required the federal defendants to prepare environmental impact statements on both the continuing and future operation of National Airport, as well as on the admission of "stretch" jets into the airport in 1970.

After a trial on the merits, the Court dismissed all elements of the plaintiffs' action. It held that the government officers had properly exercised their statutory discretion in the management of the airport. The Court relied upon the recent Fourth Circuit holding in Arlington Coalition on Transportation v. Volpe, (decided April 4, 1972, No. 71-2109), to determine that the NEPA is not applicable to ongoing and future operations at the airport because National Airport has reached that stage of completion that the costs already incurred for jet operation clearly outweigh the benefits of altering or abandoning the facility. Furthermore, the Court found that the admission of longer ("stretch") jet aircraft to the airport had a minimal effect upon the environment. It was not a "major federal action" under sec. 102(2)(c) of NEPA and therefore, no environmental impact statement was required.

In addition, the Court rejected claims for relief under the Fifth and Ninth Amendments. It stated that the plaintiffs failed to present either examples of specific personal injury caused by jet noise, or injury to health and property. The Court declined to declare that the Ninth Amendment protects persons from noise.

Relying on the recent Supreme Court decisions in Washington v. General Motors Corp., 40 U.S.L.W. 4437 (April 24, 1972) and Illinois v. City of Milwaukee, 40 U.S.L.W. 4439 (April 24, 1972), the Court held that federal regulations and laws have pre-empted the federal common law of nuisance so far as emissions from airplanes are concerned, and the court refused (after motions to that effect were made by defendants) to receive evidence on the emissions issue at trial. Insofar as aircraft engine noise was at issue, the Court balanced the equities and decided that ". . . [b]urdensome as it may be, plaintiffs must submit to the great annoyance in the public interest . . ."

* * *