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UNITED STATES DEPARTMENT OF JUSTICE

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TABLE OF CONTENTS

EXECUTIVE OFFICE FOR U. S. ATTORNEYS
Philip H. Modlin, Director

U. S. District Judge Richard A. Dier (Nebraska) died of a heart attack on December 7, 1972. Judge Dier was United States Attorney from February 9, 1969 to January 7, 1972.

ANTITRUST DIVISION
Assistant Attorney General Thomas E. Kauper

DISTRICT COURT

CLAYTON ACT

CABLE TELEVISION COMPANIES CHARGED WITH VIOLATING SECTION 7 OF THE CLAYTON ACT.

United States v. American Television and Communications Corporation, et al. (Civ. 17573; December 20, 1972; D.J. 60-211-037-19)

On December 20, 1972 a civil action was filed in the United States District Court for the Northern District of Georgia, Atlanta Division, to prevent American Television and Communications Corporation (A.T.C.) from acquiring Cox Cable Communications, Inc. (Cox). The relief prayed for is a permanent injunction preventing the consummation of the aforementioned acquisition. Motions for a temporary restraining order and a preliminary injunction preventing the merger pending final adjudication on the merits of the complaint were also filed.

A.T.C. owns 74 cable systems in 21 states serving approximately 280,000 subscribers. In terms of number of subscribers it ranks fourth among all cable television companies. For the year ending June 30, 1972, it had revenues of $14.7 million and assets of $43.2 million. A.T.C. maintains its executive headquarters in Denver, Colorado.

Cox operates or has interests in 32 cable television systems in 14 states approximately 230,000 subscribers. By subscribers it ranks fifth among all cable television companies. For the year 1971, it had revenues of $13.5 million and assets of $30.7 million. Cox maintains its executive headquarters in Atlanta, Georgia.

The complaint alleges that the merger would substantially lessen competition for cable television franchises in the nation's largest television markets and that it would permanently eliminate competition between A.T.C. and Cox for franchises in these markets. Both firms have been actively competing for such franchises and are among the relatively few companies which can serve these markets.

The complaint also alleges a trend towards concentration in the cable television industry. Over the last five years at least five companies capable of competing for franchises in the major television markets have been acquired by or merged with a competitor. Finally, the complaint alleges that this merger will foster or encourage other such mergers.

On December 27, 1972, a stipulation between the parties was filed with the court setting forth the agreement of the defendants not to consummate the merger until a determination by the court on the motion for preliminary injunction and the government's withdrawal of its motion for temporary restraining order. Both parties will ask the court for a hearing date on the preliminary injunction for late February.

Staff: Joan S. Huggler, Gary Cohen, Michael Green, Richard Siefert and I. Curtis Jernigan (Antitrust Division)

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CIVIL DIVISION
Assistant Attorney General Harlington Wood, Jr.

COURTS OF APPEAL

EMPLOYEE DISCHARGE

NINTH CIRCUIT HOLDS BANKRUPTCY STATUTE NO BAR TO REMOVAL OF FEDERAL EMPLOYEE FOR FAILURE TO MEET HIS FINANCIAL OBLIGATIONS.

Robinson v. Blount, (C.A. 9. No. 26528, January 3, 1973, D.J. 35-11-25)

Plaintiff, a classified Government employee, was removed for failure to pay his financial obligations in a "proper and timely manner" under governing regulations of the Post Office and the Civil Service Commission. He challenged his removal on the ground that just prior to his discharge he had entered into a Wage Earner's Plan under Chapter XIII of the Bankruptcy Act and that the agency was for that reason prohibited from discharging him for his past debt delinquency. (A Wage Earner's Plan is designed to enable a debtor to repay his debts over an extended period of time.) The District Court sustained the removal and the Ninth Circuit has just affirmed.

The Court of Appeals accepted the Government's contention that the specific statutes and regulations prescribing employee conduct and authorizing removals, govern over the more general policies of Chapter XIII of the Bankruptcy Act. The Court further held that the applicable removal provisions provided a fair and adequate basis for the administrative action in this case.

The Court of Appeals ruling appears to be the first appellate decision upholding the Government's right to rely upon the debt delinquency regulations to remove a person participating in a Chapter XIII Wage Earners Plan. We note that, however, the Seventh Circuit reached a similar result in the case of a private employer. In Re Jackson, 424 F. 2d 1200 (C.A. 7), certiorari denied sub nom. Jackson v. International Harvester, 400 U.S. 911

Staff: William Kanter (Civil Division)

FEDERAL TORT CLAIMS ACT

THIRD CIRCUIT HOLDS THAT PLANNING, BUT NOT OPERATION, OF SUPERSONIC FLIGHTS FALLS WITHIN THE DISCRETIONARY FUNCTION EXCEPTION OF THE FEDERAL TORT CLAIMS ACT.

Ward v. United States, (C.A. 3, No. 71-2148, cited January 9, 1973, D.J. 157-64-260)

The plaintiffs brought suit for injuries allegedly suffered as a result of sonic booms created by United States Air Force jets. The Government moved in the District Court for summary judgment on the basis of affidavits of Air Force officers, which established that the aircraft had been flying in special supersonic flight corridors designated by the Strategic Air Command. No affidavits of the pilots in charge of the two aircrafts were submitted, however. The District Court entered summary judgment for the Government, finding that the individuals involved in the "planning and execution of such flights were performing a discretionary function" and the suit was therefore barred under the discretionary function exception of the Federal Tort Claims Act. See 28 U.S.C. 2680(a).

On the plaintiffs' appeal, the Third Circuit, following Laird v. Nelms, 406 U.S. 797, concluded that the plaintiffs were required to prove negligence on the part of the Government, and could not proceed on a theory of strict liability. Further, the Court of Appeals agreed with the District Court that the planning of supersonic flights was a discretionary function and therefore fell within 28 U.S.C. 2680(a). However, the Court of Appeals reversed and remanded the case to the District Court, because it found that the plaintiffs should have the opportunity to prove negligence in the operation of the particular flights. In this respect the Court noted that the Government had not submitted any affidavit of the pilots to establish that they were in compliance with the directives of the Strategic Air Command.

Staff: Robert E. Kopp (Civil Division)

SMALL BUSINESS ADMINISTRATION 8(a) PROGRAM

FIFTH CIRCUIT UPHOLDS SMALL BUSINESS ADMINISTRATION'S PROGRAM FOR OBTAINING CONTRACTS FOR SMALL BUSINESSES OWNED BY DISADVANTAGED PERSONS.

Ray Baillie Trash Hauling, Inc., et al. v. Thomas S. Kleppe, et al. (C.A. 5, No. 72-1163, decided January 5, 1973, D.J. 150-18-181)

This suit challenged the validity, on both constitutional and statutory grounds, of the SBA's program under Section 8(a) of the Small Business Act, 15 U.S.C. 637(a). Under Section 8(a), SBA is authorized to enter into all types of contracts (including contracts for supplies, services and construction) with other departments and agencies and to "arrange for the performance of such contracts by negotiating or otherwise letting subcontracts to small business concerns." 15 U.S.C. 637a(2). This provision has been used "to assist eligible small firms not yet able to compete effectively in the market place towards the goal of self-sufficiency." An eligible business concern is defined under the

program as one which is "owned or destined to be owned by socially or economically disadvantaged persons." SBA's implementing regulations recognize that [t]he category often includes, but is not restricted to, Black Americans, American Indians, Spanish Americans, Oriental Americans, Eskimos and Aleuts." The plaintiffs here are small business concerns engaged in the business of collecting and hauling refuse to disposal sites, and the dispute relates to a contract for the collection and removal of refuse from Homestead Air Force Base, which, commencing in 1970, has been awarded, without competition, to SBA for subcontracting pursuant to the Section 8(a) Program. The District Court enjoined placement of the contract pursuant to the 8(a) Program, on the grounds that the program violated plaintiffs' rights under the competitive bidding statutes, the Small Business Act, and the Fifth Amendment.

On appeal, the Fifth Circuit reversed. The Court carefully considered the history of Section 8(a), and concluded that while this particular use of the provision was not discussed by Congress, it was well within the general intent of Congress. The statutory goal is to promote the self-sufficiency of small businesses, and the court held that the 8(a) program is a reasonable means of fulfilling that purpose. In connection with this, the Court noted that plaintiffs "cannot complain because a specific type of small business concern [(i.e., those owned by disadvantaged persons) is the primary beneficiary of the present program."

With respect to the argument that the program violates the competitive bidding statutes, the Court found (1) that Section 8(a), which provides that the SBA may let subcontracts by negotiation or otherwise, constitutes specific statutory authority to dispense with competition and (2) that competition is impracticable in this case, and the competitive bidding statutes recognize impracticality as an exception to the general rule of competition.

Finally, the Court determined that the Program did not deny plaintiffs their rights to due process under the Fifth Amendment. First, the Court found that plaintiffs had not met their burden of establishing a prima facie case of racial discrimation, as was alleged. The fact that most program beneficiaries are black does not establish the prima facie case. Rather, what must be shown is that the number of contracts awarded to whites is significantly disproportionate to the number of white applicants for the program. No such showing was made here. The Court acknowledged that SBA's Section 8(a) program may produce some inequalities among small businesses as a class, but that in the area of socio-economic welfare legislation, the Government's action must be sustained if it is rationally related to a proper Government purpose. The Court concluded by observing that "[a]ssisting small business concerns owned by socially or economically disadvantaged persons certainly qualifies as a proper government purpose."

This decision is the first appellate case dealing with the 8(a) program on its merits. Previously, the Court of Appeals for the District of Columbia Circuit affirmed the dismissal of a similar challenge on standing grounds (Fortec Contractors v. Kleppe, C.A. 1755-72), and the Court of Appeals for the Ninth Circuit, without addressing the merits, let stand a preliminary injunction against the letting of a subcontract pursuant to the program (Pacific Cost Utilities Service, Inc. v. Laird, No. 71-2487). There are several similar cases now pending in various district courts, and it is hoped that the Fifth Circuit's decision will lead to a favorable resolution of these cases.

Staff: Walter Fleischer, Joseph Scott
(Civil Division)

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CRIMINAL DIVISION
Assistant Attorney General Henry E. Petersen

COURT OF APPEALS

NARCOTICS AND DANGEROUS DRUGS

FROM POSSESSION OF 50 POUNDS OF MARIHUANA, AN INFERENCE MAY BE DRAWN THAT THE DEFENDANT POSSESSED IT WITH AN INTENT TO DISTRIBUTE.

United States v. Philip Karsten Anderson, (C.A. 10, No. 72-1245, November 13, 1972; D.J. 12-49-144)

The defendant was charged with possession of marihuana with intent to distribute it in violation of 21 U.S.C. 841(a)(1). No testimony or evidence was offered on behalf of the defendant. Approximately 50 pounds of marihuana was discovered. The court stated: "There was testimony from the prosecution that such an amount of marihuana would enable a user thereof the roll approximately 1,000 cigarettes to the pound, a total here of 50,000 cigarettes. The implied inference that the amount of marihuana involved was not intended solely for the appellant's personal use - (if any way), was an inference which could be properly drawn by the trier of fact. Here it was."

Staff: United States Attorney Victor R. Ortega
Assistant United States Attorney Don J. Svet
(District of New Mexico)

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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 USC 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.

JANUARY 1973

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

Tromson Monroe Advertising, Inc. of New York City registered as agent of the Antigua-Barbuda Information Office, the St. Lucia Tourist Board, the Panama Government Tourist Office and the Moroccan National Tourist Office. Registrant's agreements with Antigua-Barbuda is for a 5 month period beginning August 1, 1972 and calls for the establishment and maintenance of a consumer and travel trade publicity program. Registrant is to receive a fee of $1,000 per month plus expenses. Registrant's agreement with St. Lucia is for a 1 year period beginning February 1, 1972 and calls for the establishment of office space allotted to the St. Lucia Tourist Board as well as a public relations and publicity campaign. Registrant's fee will be $15,000 with $3,000 of that amount allotted for expenses. Registrant's agreement with Panama begins October 1, 1972 and extends to December 31, 1973 and calls for a public relations campaign to increase travel to Panama, increase public awareness of commercial possibilities and generally help create a new, favorable image of that country. Registrant's fee is to be 28,125, Balboas to be paid in monthly installments plus expenses of 5,500 Balboas. John Morton McGuire filed a short-form registration statement as working directly on the foreign accounts and reports a fee of $22,500. Eleanor G. Curtain filed a statement as Assistant Public Relations Director with a salary of $13,000 per year.

Harris/Ragan Management Corporation of Los Angeles registered on behalf of the Embassy of the Republic of Panama. Registrant is to act as consultant to the foreign principal in the preparation of two reports; the first concerning an interpretation of the background to Panama's public relations positions concerning the Panama Canal Zone and the second; an assessment of U.S. attitudes toward the Panama Canal and the Zone. The first report an interpretation of Panama's p.r. concerning the canal and the zone may

be published and distributed to opinion leaders in the United States. Registrant's proposed fee to the foreign principal for the completion of the two reports is $10,750.00. Godfrey Harris filed a short-form registration as consultant working directly on the account.

Activities of persons or organizations already registered under the Act:

J. Sutherland Gould of New York City filed Exhibits in connection with its representation of the Swiss Industries Group. Registrant's agreement was to cover the last half of 1972 for a fee of $6,000 plus expenses for which registrant was to conduct a public program and publicity campaign. However, the agreement was terminated in October, 1972 and registrant received a total fee of $4,000. J. Sutherland Gould was the person working directly on the Swiss Industries account and is a regular salaried employee of registrant.

The following person filed short-form registration statements in support of registrations already on file pursuant to the terms of the Act:

On behalf of the Swiss National Tourist Office, San Francisco: Willy Isler as Director reporting a salary of $1,135.07 per month. Mr. Isler is supervisor and administrator of the San Francisco Office and promotes travel to Switzerland through contact with the media, carriers and the public.

On behalf of Friedlich, Fearon & Strohmeier, Inc. of New York City whose foreign principal is the Irish Tourist Board: David J. Frank as Art Director with a salary of $16,500. Mr. Frank is engaged in the design and photography of advertisements placed for the foreign principal.

On behalf of the British Columbia Government, Department of Travel Industry, San Francisco: Harry Harrod as Director with a salary of $14,000 per annum. Mr. Harrod provides tourist information to carriers, the travel media and the general public.

On behalf of Cox, Langford & Brown of Washington, D. C. working on the accounts of the Government of Belgium and Embassy, the Embassy of Italy, the Embassy of Italy and CONAHOTU: Richard J. Bacigalupo as doing legal research being compensated at the rate of $3.00 per hour.

On behalf of Infoplan International, Inc. of New York City whose foreign principal is Communications Affiliates (Bahamas) Ltd., Government of the Bahama Islands: Ernest S. Libby as public relations counsel engaged in the creation and distribution of

general publicity for Bahamas tourism and Government. Mr. Libby is a regular salaried employee of registrant receiving $25,000 per year.

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LAND AND NATURAL RESOURCES DIVISION
Assistant Attorney General Kent Frizzell

SUPREME COURT

EMINENT DOMAIN

LESSEE ENTITLED TO VALUE IMPROVEMENTS FOR REST OF THEIR USEFUL LIFE, WITHOUT REGARD TO REMAINDER OF LEASE TERM.

Almota Farmers Elevator & Warehouse Co. v. United States (S.Ct. 71-951; Jan. 16, 1973; D.J. 33-49-777-124)

The United States condemned land on which a lessee had built a substantial grain storage elevator. The lessee, which had occupied the land since 1919 under successive lease renewals had on the date of taking 7 1/2 years remaining on its current 20-year lease term, argued that its just compensation should be measured by what a willing buyer would pay in the open market for its leasehold and that it was entitled to value its improvements in place over their useful life without regard to the remainder of its lease term. The Government argued that no consideration should be given to any additional value based on the expectation that the lease might be renewed.

The district court accepted the lessee's theory and ruled that it was entitled to the full market value of the land and building in place as they stood at the time of the taking, without limitation of such use to the remainder of the term of the existing lease. On appeal, the Ninth Circuit explicitly refused to follow a Second Circuit decision, holding that in condemnation a lessee's improvements are to be assessed at their value, in place, over their useful life without regard to the term of the lease, and reversed.

After granting certiorari based on this conflict in the circuits, the Supreme Court reversed, holding (five-to-four) that where a lessee has erected valuable improvements, it is entitled, upon condemnation, to value such improvements for what it could have sold them in the market, including the expectancy that the improvements would be used beyond the lease term.

The majority distinguished United States v. Petty Motor Co., 327 U.S. 372, holding that a lessee's expectancy of renewal is not a compensable legal interest, by writing that Petty did not deal with the fair market value of improvements. Furthermore, the lessee's expectancy of continued occupancy of its improvements beyond the lease term was deemed an interest "probably within the scope of the project from the time the Government was committed to

it" which the Government could not depreciate by placing itself in the landlord's shoes and requiring the lessee to remove at the end of its term.

Staff: Assistant Attorney General Kent Frizzell (Land and Natural Resources Division); Wm. Terry Bray (formerly Assistant to the Solicitor General); and Jacques B. Gelin (Land and Natural Resources Division)

EMINENT DOMAIN

FEE OWNER NOT ENTITLED TO ADDITIONAL VALUE BASED ON AVAILABILITY AND ACCESSIBILITY OF ADJOINING PUBLIC LAND USED UNDER REVOCABLE PERMIT UNDER TAYLOR GRAZING ACT.

United States v. Fuller (S.Ct., No. 71-559, Jan. 16, 1973; D.J. 33-3-202-24)

The United States condemned 920 out of 1,280 acres held in fee by a rancher. The rancher argued he was entitled to enhanced value of his fee land based on the availability and accessibility of 31,461 acres of adjoining public domain land used under revocable permit issued under the Taylor Grazing Act, 43 U.S.C. sec. 315b. The Act specifies that its provisions "shall not create any right, title, interest, or estate in or to the lands."

The district court accepted the landowner's theory and instructed the jury to consider the availability and accessibility of the ajoining public lands, and the Ninth Circuit affirmed.

On certiorari, a divided (five-to-four) Supreme Court reversed. After reviewing a number of basic principles of federal eminent domain law, the majority adverted to the principle that the Government as condemnor may not be required to compensate a condemnee for elements of value which the Government has created, or which it might have destroyed under the exercise of governmental authority other than the power of eminent domain. Accordingly, the majority held that in condemnation a rancher is not entitled to compensation for any value added to the fee by revocable permits authorizing the use of adjoining public lands issued under the Taylor Grazing Act, because such permits create no property right.

Staff: Harry R. Sachse (Assistant to the Solicitor General); Raymond N. Zagone and Jacques B. Gelin (Land and Natural Resources Division)

COURTS OF APPEAL

ENVIRONMENT; INJUNCTIONS

DENIAL OF PRELIMINARY INJUNCTION; DISCRETION; BALANCING ALTERNATIVES; ADEQUACY OF ENVIRONMENTAL IMPACT STATEMENT.

Allison v. Froehlke (C.A. 5, No. 72-2219, decided Nov. 13, 1972, D.J. 90-1-4-369)

Some landowners and conservation organizations filed suit to enjoin construction of three reservoirs and dams on the ground that: (1) modifications made by the Corps of Engineers represented unlawful departures from the original congressionally authorized plan, and (2) the project violated numerous environmental and related statutes, including the National Environmental Policy Act of 1969, 83 Stat. 852, 42 U.S.C. sec. 4321 et seq.

The district court denied plaintiffs' motion for a preliminary injunction. On appeal, the Court of Appeals affirmed, holding that the court noted that it had previously rejected a challenge to another project based on an alleged unauthorized redesign by the Corps; that the Eighth Circuit had recently reviewed challenges to projects on environmental grounds, which require a balancing of interests. The court observed that even if the environmental impact statement should fail to consider that habitat of specific rare creatures should be adversely affected, this would scarcely render the EIS constitutionally defective. In conclusion, the court voiced its confidence that the district court would at trial enable the parties to fully develop their positions.

Staff: Jacques B. Gelin (Land and Natural Resources Division); Assistant United States Attorney Harold O. Atkinson (W.D. Tex.)

PUBLIC LANDS

SCRIP SELECTION RIGHTS; JUDICIAL REVIEW OF ADMINISTRATIVE ACTION; DISCRETION OF SECRETARY TO IMPOSE VALUE LIMITS AND LAND USE CRITERIA AS PRECONDITION TO SELECTION.

Bronken v. Morton (C.A. 9, No. 25,282); Hall v. Morton (C.A. 9, No. 25,283); Boothe v. Morton (C.A. 9, No. 25,284); Jan. 3, 1973, D.J. 90-1-4-163)

In 1872 Congress issued scrip rights to compensate one Valentine, as successor to a Mexican land grantee for the loss of some 13,000 acres, and Soldiers' Additional Rights, as a bounty for military service. Originally holders of these and other land selection rights were entitled to select any unreserved public lands.

After enactment of the Taylor Grazing Act of 1934, 48 Stat. 1269, as amended, 43 U.S.C. secs. 315 et seq., before they could redeem their rights for specific lands, scrip holders were required to obtain prior favorable classification by the Secretary.

By Act of August 5, 1955, 69 Stat. 534, Congress required holders to record their claims within two years, most of which were of unlimited duration, with the Department of the Interior. The Act of August 31, 1964, 78 Stat. 751, required holders to present their claims by stated dates. With respect to applications filed before July 1, 1966, Section 2 of the 1964 Act directed the Secretary to make classifications "under existing law." Section 3 of the 1964 Act limited the selection for applications filed after that date to a reservoir of public lands which the Secretary was to classify and set aside for conveyance, subject to certain minimum value limits. By regulation, the Secretary, in August 1966, fixed not only a floor, but also a ceiling (of up to 10% of the average value of lands conveyed since August 1955) on the value of lands eligible for selection.

Bronken and Hall, as holders of Valentine scrip, filed applications for public lands located near Las Vegas, Nevada, in April and June 1964, and in February 1965. In 1967 the Secretary rejected their applications solely on the ground that the values of the lands exceeded the $1,400 per acre maximum values established in his 1966 regulations. Challenging the Secretary's power to apply value limitations to lands applied for prior to July 1, 1966, Bronken and Hall filed suit in federal district court. There, finding that Section 10 of the Administrative Procedure Act precluded judicial review of the Secretary's action, the district court granted summary judgment in favor of the Secretary. 305 F.Supp. 723.

Boothe, a holder of Soldiers' Additional Homestead Rights, filed two applications for public lands. One application made before July 1, 1966, for lands near Carson City, Nevada, was rejected by the Secretary because, as with Homestead applications, he had limited such applications to lands suitable for agriculture. The other application, made after July 1, 1966, for lands located near Las Vegas, was rejected because these lands not previously classified as available for selection of Soldiers' Additional Rights, exceeded the Secretary's maximum value limits. Boothe filed suit in federal district court challenging the Secretary's authority to impose land use criteria to pre-1966 applications and to fix maximum values for lands classified for selection under the 1964 Act.

Again, based on the premise that Boothe's complaint was seeking federal review of action committed to agency discretion, the district court granted summary judgment in favor of the Secretary. 347 F.Supp. 1273.

On appeal, the Ninth Circuit reversed and remanded the Bronken-Hall decision, and affirmed the Boothe decision.

In Bronken-Hall the court held that Section 2 of the Act of August 31, 1964, 78 Stat. 751, directing the Secretary to treat the applications under "existing law," limited his authority to impose value limits on applications filed before July 1, 1966, and required him to apply only those criteria which had applied prior to the passage of the 1964 Act. The Secretary's denial of the Bronken-Hall applications, solely by reason of their high value, exceeded his discretion.

In Boothe, with respect to the Carson City application, the court deferred to the Department's long-standing interpretation limiting the application of Soldiers' Additional Rights to agricultural lands. It held that because the Secretary's legal standard was correct and was part of the "existing law" within the meaning of Section 2 of the 1964 Act, the Secretary's decision fell within his area of unreviewable discretion.

With respect to Boothe's Las Vegas application, made after July 1, 1966, under Section 3 of the 1964 Act, the court agreed that the Secretary's selection pool and value limitations had satisfied the statutory requirements that he offer a "reasonable selection of lands at not less than the average fair market value of public lands actually conveyed in exchange for each type to claim since 1955." It found that since the Secretary's classification, based on an administratively-set value ceiling, was neither inconsistent with the purposes of Section 3, unreasonable nor in excess of the limits of his statutory discretion since Boothe had no statutory right to seek any lands other than those previously classified as available, has denial of Boothe's application was correct.

Staff: Jacques B. Gelin (Land and Natural Resources Division); Assistant United States Attorney, Julien G. Sourwine (D. Nev.)

CIVIL PROCEDURE; STATUTE FRAUDS

SUMMARY JUDGMENT; FORECLOSURE SALE; STATUTE OF FRAUDS; FIDUCIARY DUTIES OF TRUSTEE UNDER DEED OF TRUST.

Hilltop House, Inc. v. Romney; United States v. Hilltop House, Inc. (C.A. D.C. Nos. 72-1329 and 72-1330, decided Jan. 12, 1973, D.J. 90-1-5-1162 and 90-1-5-1174)

The Court of Appeals affirmed, without opinion, a deficiency judgment in favor of the United States and refused to set aside a foreclosure sale following the debtor's default under a federally insured deed of trust loan. The district court had granted summary

judgment holding that proof of the agreement not to foreclose was barred by the statute of frauds and that there was no genuine issue as to any material fact. Specifically, the district court found that there had been no violation of fiduciary duty on the part of the HUD employee who was appointed by Secretary Romney to act as trustee under the deed of trust.

Staff: Eva R. Datz (Land and Natural Resources Division)

JURISDICTION; CHOICE OF LAW

CITY CANNOT ANNEX AIR FORCE BASE AND FEDERAL HOUSING DEVELOPMENT SOLELY TO INCREASE REVENUE.

United States v. City of Bellevue, Nebraska (C.A. 8, No. 72-1003, decided Jan. 10, 1973, D.J. 90-1-0-811)

The Court of Appeals approved a decision holding that the City of Bellevue could not properly annex Offutt Air Force Base and an adjacent Capehart housing development simply for the purpose of raising revenue.

Staff: Eva R. Datz (Land and Natural Resources Division)

DISTRICT COURT

ENVIRONMENT

NEPA: PREPARATION OF A NEPA STATEMENT.

J. Clark Akers, III, et al. v. Stanley R. Resor (Civil No. C-70-349, W.D. Tenn., Dec. 29, 1972, D.J. 90-1-3-2735)

This case concerns an Army Corps of Engineers flood control project in the Obion and Forked Deer Rivers basin, draining approximately 4,500 miles of west Tennessee. The case was brought for injunction and declaratory judgment by the owner of a duck hunting club alleging violation of NEPA and the Fish and Wildlife Coordination Act of 1958. Some drainage districts and local communities were allowed to join as defendants. An earlier report on this case is set out in 339 F.Supp. 1375.

In this instance the court discusses the items it thinks must be considered in preparation of an environmental impact statement. The court states that compliance with NEPA automatically means compliance with the Fish and Wildlife Coordination Act of 1958. The court holds that in preparing an adequate NEPA statement the decisionmaker must consider the possibility of abandoning the project and discuss its merits. The benefit-cost consideration

requires consultation with the Department of Agriculture to see the effect the flood control project would have on producing new crop lands contrary to Agriculture's program of retiring crop land, all of which relates to price supports, etc. Consideration of the cost of highways must be secured from the Highway Department by consultation and not merely by submitting a copy of the report to the Highway Department for comment. The decisionmaker must consult with local planning commissions which are interested in zoning areas and protecting and preserving flood plains.

The area here in question is located in the migratory bird flyway from Canada and the project would drain wetlands, necessary for bird migration. The Corps offered to recommend that Congress authorize securing 14,400 acres of mitigating land for the wetlands drained. The court held that the mere recommendation was insufficient. The mitigation plan must show that the Corps made a in-depth study of the cost, included such cost in its benefit-cost ratio and considered postponing the project until the mitigation lands were secured.

Generally the court seemed to demand a detailed discussion of many alternatives to the plans proposed.

Staff: United States Attorney Thomas F. Turley, Jr. (W.D. Tenn.)