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UNITED STATES DEPARTMENT OF JUSTICE

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TABLE OF CONTENTS

POINTS TO REMEMBER

All United States Attorneys are reminded that Departmental Memo No. 784, dated August 31, 1973, concerning False Personation of Federal Officers or Employees; 18 U.S.C. 912, has been distributed for your use. Also, it is again requested that all United States Attorneys cooperate fully with the requests made under Paragraph V, Administrative Matters, of Memo No. 784. Such cooperation will facilitate this Division's ability to be of assistance to all of you.

(Criminal Division)

ANTITRUST DIVISION
Assistant Attorney General Thomas E. Kauper

DISTRICT COURT

SHERMAN ACT

DISTRICT COURT DENIES MOTIONS TO DISMISS, QUASH PROCESS AND MORE DEFINITE STATEMENT IN SECTION 1 SHERMAN ACT CASE.

United States v. Metro MLS, Inc. (Civ. 210-73-N; September 19, 1973; D.J. 60-223-26)

On September 19, 1973, Judge John A. Mackenzie denied defendant's motion for a more definite statement, motion to quash process, and motion to dismiss.

Metro MLS, Inc., the defendant in this civil action brought under Section 1 of the Sherman Act, is a corporation operating a multiple listing service in the Tidewater area of Virginia. The fifty stockholders of Metro, which are named as co-conspirators, are real estate brokers and brokerage firms in the Tidewater area. Each stockholder submits information describing real properties available for sale through its agency to Metro, which then circulates the information to all the other stockholders. The suit charges that Metro unlawfully combined and conspired with its stockholders to fix and maintain fees for the sale of real estate, to restrict membership in Metro, and to restrain competition among brokers in the business of selling real estate in the Tidewater area.

The defendant filed a motion for a more definite statement, a motion to quash process, and a motion to dismiss. In its opinion and order dated September 19, 1973, the Court perfunctorily dismissed the defendant's motion for a more definite statement and its motion to quash process.

The motion to dismiss raised two arguments: (1) that the complaint failed to allege that Metro was sufficiently involved in interstate commerce to be subject to the Sherman Act, and (2) that Metro and its stockholders act as a single corporate entity in operating the multiple listing service and do not represent a plurality of parties necessary for a conspiracy. The Court rejected both contentions.

Citing United States v. International Boxing Club, 348 U.S. 236 (1955), the Court observed that a business of which the ultimate object is the operation of interstate activities

may make such a substantial utilization of the channels of interstate trade and commerce that the business itself assumes an interstate character, The court reasoned that intrastate activities could cause a restraint of interstate commerce, citing United States v. Women's Sportswear Manufacturers Assn.: "If it is interstate commerce which feels the pinch, it does not matter how local the operation which applies the squeeze." 336 U.S. 460, 464 (1949). The court concluded that the complaint when considered in view of those holdings alleged sufficient involvement of Metro with interstate commerce to bring Metro within the jurisdiction of the court under the Sherman Act, but remarked that if the activities of Metro and its members are found at trial to be local in nature with only incidental effects on interstate commerce, the action would not be sustained.

The defendant's contention that a single corporation cannot be charged with conspiring with its stockholders rested on the holding of Nelson Radio and Supply Company v. Motorola, Inc., 200 F.2d 911 (5th Cir. 1962), cert. denied, 345 U.S. 925 (1953). Nelson Radio held that the defendant manufacturing corporation did not conspire with its employees in rescinding the plaintiff's distributorship franchise, because in doing so the defendant's employees were merely acting on behalf of the corporation itself. The court read Nelson Radic to stand for the "limited principle that a corporation cannot conspire with its managing officers and agents when the agents maintain no separate business identity from the corporation." The court found that unlike the corporate employees involved in Nelson Radio, the stockholders of Metro MLS, Inc. are actually independent business entities, and that Metro itself in "an aggregation of separate businesses lurking behind the veil of corporate singularity."

Staff: Walter D. Murphy, Richard C. Siefert
(Antitrust Division)

CIVIL DIVISION
Acting Assistant Attorney General Irving Jaffee

COURT OF APPEALS

MILITARY LAW

THIRD CIRCUIT HOLDS THAT CIVILIAN FEDERAL COURTS CANNOT ENJOIN PENDING COURT-MARTIAL ON THE GROUND THAT THE MILITARY LACKS JURISDICTION OVER THE OFFENSES.

Jaroslav Sedivy v. Elliot L. Richardson, (C.A. 3, No. 72-2065, September 26, 1973, D.J. 145-15-411)

Sedivy, an MP sergeant charged by the Army with off-post possession of amphetamines and marijuana, brought this action to enjoin his pending general court-martial on the ground that his offenses were not service-connected. The district court issued the requested injunction.

On the Government's appeal, the Third Circuit reversed, holding that it is improper for civilian courts to interfere with ongoing military trials and noting that Sedivy's jurisdictional claim should be litigated initially within the military courts. Relying upon Noyd v. Bond, 395 U.S. 683 (1969), and Gusik v. Schilder, 340 U.S. 128 (1950), the Court of Appeals held that resort to civilian courts is barred until the military remedies have been exhausted. Alternatively, the Third Circuit held the equitable relief was not available to Sedivy because he had an adequate remedy at law within the military courts, citing Younger v. Harris, 401 U.S. 37 (1971). This decision should be read along with other recent cases in which civilian courts have enjoined court-martial proceedings on the ground that the offenses charged are not within the military's jurisdiction. Moylan v. Laird, 305 F.Supp. 551 (D. R.I., 1969); see Councilman v. Laird, 481 F.2d 613 (C.A. 10, 1973).

Staff: Anthony J. Steinmeyer (Civil Division)

FEDERAL TORT CLAIMS ACT

SECOND CIRCUIT HOLDS FAA AIR TRAFFIC CONTROLLERS NOT NEGLIGENT IN THE CRASH OF A LIGHT AIRCRAFT FLYING VISUAL FLIGHT RULES.

Joan S. Ross, etc., et al. v. United States of America (C.A. 2, No. 73-1213, decided September 17, 1973, D.J. 157-78-49 and 157-78-50).

This action is a Federal Tort Claims suit by plaintiffs arising out of an air crash by their decedents into Mt. Mansfield, near Burlington, Vermont. Plaintiffs' decedents, both pilots, were flying from Montreal to Burlington under visual flight rules to practice landing approaches at the Burlington airport. Upon their approach the pilots advised the approach control of their altitude which was lower than the peak of nearby Mt. Mansfield. The pilots did not request radar identification and had not been picked up on the radar scope. After they were turned over to the tower control, they also advised the tower of their altitude. Because of other jet traffic the tower control asked the pilots to delay their landing practice and, while the pilots were delaying, they crashed into the mountain.

The district court held that the air traffic controllers were not negligent. The Court ruled that since the pilots were flying visual flight rules they were primarily responsible for their separation from permanent obstacles and that in the absence of a request the air traffic controllers had no duty to radar identify the plane and to provide it with directions. The Court also held that the air traffic controllers, under the circumstances of this case, had no duty to warn the pilots of any danger which might have been posed by Mt. Mansfield. The Second Circuit affirmed the judgment for the United States on the basis of the district court's opinion.

Staff: Thomas G. Wilson (Civil Division)

LAND AND NATURAL RESOURCES DIVISION
Assistant Attorney General Wallace H. Johnson

COURT OF APPEALS

FEDERAL WATER POLLUTION CONTROL ACT

FEDERAL WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, SECTION 102(b), 33 U.S.C. SEC. 1251(b); EVALUATION OF WATER-QUALITY BENEFITS FROM FEDERAL DAMS AND RESERVOIRS; MENTAL PROTECTION AGENCY INSTEAD OF BY THE FEDERAL CONSTRUCTION AGENCY RESPONSIBLE FOR A PARTICULAR PROJECT; COVERAGE OF SECTION 102(b); REQUIREMENT FOR E.P.A. EVALUATION DOES NOT APPLY TO FEDERAL PROJECTS PREVIOUSLY AUTHORIZED AND UNDER CONSTRUCTION AT TIME OF 102(b)'s ENACTMENT ON OCTOBER 18, 1972.

Cape Henry Bird Club, Conservation Council of Virginia, Inc., National Wildlife Federation, Inc., et al. v. Melvin R. Laird, Secretary of Defense, et al. (Gathright Dam) (C.A. 4, Nos. 73-1606, 73-1607, Sept. 18, 1973; D.J. 90-1-4-607)

The details of this case are in the district court's opinion of April 2, 1973, reported at 359 F. Supp. 404 (W.D. Va.).

In 1946, Congress authorized the Corps of Engineers to construct Gathright Dam on the Jackson River in southwestern Virginia. Congress appropriated construction funds in 1967 and actual construction began shortly thereafter.

The environmental impact statement (EIS), prepared by the Corps in response to the National Environmental Policy Act, met with objection by the Environmental Protection Agency which stated that the EIS should have excluded downstream water quality as a project benefit. (Project justification by the Corps included programmed release of water from the dam for downstream low-flow augmentation, informally labelled "pollution dilution.") Nevertheless, the Corps' final EIS kept downstream water quality as a project benefit, and the Corps determined that the project should continue.

Several environmental organizations sued to enjoin further project work because, among other things, the Corps' decision to continue the project violated Section 102(b) of the Federal Water Pollution Control Act (FWPCA) as amended by the FWPCA Amendments of 1972, 86 Stat. 817-818, 33 U.S.C. sec.

1252(b). The statute states that no federal reservoir project shall be provided "as a substitute for adequate treatment or other methods for controlling waste at the source." The 1972 Amendments transferred the task of evaluating reservoir storage for water quality control from federal construction agencies, such as the Corps, to the Environmental Protection Agency. And because of EPA's adverse comments regarding the project, the plaintiffs contended that all project work must stop until Congress examined it and reauthorized it.

After a 10-day trial, the district court ordered the Corps to supplement the NEPA statement but, concluding that the Corps' decision to complete the project was not arbitrary or capricious, refused to enjoin on-going project work.

The Court of Appeals affirmed in a two-page per curiam opinion. It relied on the district court's opinion. It also held that Section 102(b) of the Federal Water Pollution Control Act Amendments of 1972--granting EPA the task of evaluating federal water-quality storage projects--did not apply to the Gathright project. By the terms of Section 102(b), EPA's evaluation of water-quality storage is to "be set forth in any report or presentation to Congress proposing authorization or construction of any reservoir including such storage." Here the Gathright project had been authorized and construction had begun years prior to the enactment on October 18, 1972, of the FWPCA Amendments of 1972. Consequently the Amendments were unapplicable to this case.

Staff: Assistant United States Attorney Paul N. Thompson (W.D. Va.); Irwin Schroeder, Dirk D. Snel (Land and Natural Resources Division)

INDIANS

SUIT TO CLOSE AN OFF-RESERVATION BUREAU OF INDIANA AFFAIRS SCHOOL BARRED BY SOVEREIGN IMMUNITY.

National Indian Youth Council v. Bruce, et al. (C.A. 10, No. 73-1168, Sept. 26, 1973; D.J. 90-2-4-199).

An association of Indian students brought an action seeking to close down an off-reservation Bureau of Indian Affairs school and transfer its functions to the Navaho Reservation. Affirming the district court, the court of appeals held that the suit was barred by sovereign immunity

because the United States had not given its consent to be sued and the judgment sought would expend itself on the federal treasury.

Staff: Robert L. Klarquist (Land and Natural Resources Division); Assistant United States Attorney Ralph Klemm (D. Utah)

ENVIRONMENT

NATIONAL ENVIRONMENTAL POLICY ACT: FOREST SERVICE REQUIRED TO FILE ENVIRONMENTAL IMPACT STATEMENT FOR TIMBER SALE CONTRACTS IN A ROADLESS AREA.

Wyoming Outdoor Coordinating Council v. Butz, et al. (C.A. 10, No. 73-1477, Sept. 21, 1973; D.J. 90-1-4-655).

On June 30, 1971, and June 30, 1972, the Forest Service entered into two timber sales contracts authorizing the harvesting of 670 acres of timber in the Teton National Forest, Wyoming. The area in which the timber was to be harvested contained jeep trails but had no developed roads and the plaintiffs asserted that the area had the potential of being included in the National Wilderness Preservation System.

Reversing the district court, the Court of Appeals held that the Forest Service was required, pursuant to the National Environmental Policy Act, 42 U.S.C. sec. 4321 et seq., to file an Environmental Impact Statement concerning the timber contracts. The court stated that it would be unreasonable to hold that the contracts did not involve "a major federal action significantly affecting the human environment." The court pointed out that present Forest Service policy would have required the Forest Service to file an impact statement had the contracts been entered on or after July 1, 1972.

Staff: Robert L. Klarquist (Land and Natural Resources Division); United States Attorney Richard V. Thomas (D. Wyo.)

ENVIRONMENT

ADEQUACY OF ENVIRONMENTAL IMPACT STATEMENT: STANDING.

Sierra Club, et al. v. Froehlke, et al. (C.A. 7, No. 72-1833, Oct. 2, 1973; D.J. 90-1-4-491).

In affirming a district court opinion that the EIS for La Farge Dam on the Kickapoo River in Wisconsin provided adequate notice of environmental problems to all concerned persons, the Court of Appeals substantially adopted the Gillham Dam (Environmental Defense Fund v. Corps of Eng., U.S. Army, 470 F.2d 289 (C.A. 8, 1972), cert. den., 412 U.S. 931) test of EIS adequacy. The court held that an EIS is adequate if it serves to alert the decisionmakers and the public of possible environmental consequences of proposed agency action. The Court of Appeals indicated that the district court should have reviewed the agency decision (to build the dam) on the merits to determine whether it was in accord with the substantive requirements of NEPA. However, it declined a remand and upon its own review determined that the decision was neither arbitrary nor capricious.

The court also held that Sierra Club, its members, or the individual plaintiffs did not have standing to challenge the authority of the Corps to continue the project in the absence of local assurances of financial participation from downstream communities. The local assurances related to downstream levees--an associated feature of the dam.

Staff: United States Attorney John O. Olson (W.D. Wisc.); Terrence L. O'Brien (Land and Natural Resources Division)

CONDEMNATION

THE GOVERNMENT'S RIGHT TO TAKE MAY BE PREMISED ON APPROPRIATIONS ACT; LESSEE, WHOSE RIGHTS UNDER LEASE LEASED UPON CONDEMNATION, NOT ENTITLED TO SHARE IN AWARD EXCEPT FOR "ECONOMIC BONUS"; ERROR IN DISTRIBUTION OF THE AWARD DOES NOT INVOLVE THE UNITED STATES.

U.S. v. The Right to Use and Occupy 3.38 Acres of Land, Alexandria, Virginia (C.A. 4, No. 72-2493, decided Sept. 25, 1973; D.J. 33-48-822).

For the purpose of an Army research facility, the United States condemned a short-term leasehold interest in 3.38 Acres of Land owned by two corporations (Linedsall and Fellsmere), although leased to Aiken. The lease contained a termination-by-condemnation clause, but reserved the lessee's right to sue the Government for damages. The district court found that the United States had the right to take the land based both on the appropriations act, which included funds for lease arrangements in order to facilitate army research activities, including those involved in this case, and the general condemnation statute, 40 U.S.C. sec. 257. The court also found that the lessee's rights terminated with the condemnation by virtue of the lease provisions and not the Government's actions. The lessee was not, therefore, permitted to share in the award although it was allowed to introduce evidence as to its damages. Finally the court refused to permit the lessee to share in the "economic bonus," the amount of the award in excess of the rent the lessor would have received had there been no condemnation. The lessee appealed.

The Court of Appeals affirmed the lower court on the right to take, stating:

> The federal condemnation statute, 40 U.S.C. sec. 257 (1970), allows the United States to condemn any real estate that an officer of the government has been authorized to acquire, but the statute itself confers no power to acquire any specific real estate. Furthermore, 10 U.S.C. sec. 267b (1970) denies a military department the power to acquire real property unless the acquisition is expressly authorized by law. Notwithstanding these statutory strictures, a general appropriations act provides a sufficient basis for condemnation if Congress intended the act to authorize the acquisition. United States v. Mock, 476 F.2d 272, 274 (4th Cir. 1973). Moreover, an appropriations act need not refer to the specific transaction if the project comes within the class of expenditures that Congress intended to authorize. United States v. Kennedy, 278 F.2d 121 (9th Cir. 1960).

The court also affirmed the district court's ruling that the lease terminated the lessee's rights and not the Government's condemnation and that the lessee could not under United States v. Petty Motor Co., 327 U.S. 372 (1946), because of the condemnation clause, recover for the loss of its lease. The court reversed and remanded the lower court's holding relative to the economic bonus. It concluded that, unlike the lessee in Petty Motors, the lessee here reserved the right to prove his damages and is entitled to everything above the amount of the rent he was obligated to pay under the lease. This part of the decision did not involve the United States.

Staff: Neil T. Proto and David Clarke (Land and Natural Resources Division)