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UNITED STATES DEPARTMENT OF JUSTICE

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POINT TO REMEMBER

Juris: A Status Report

In early 1970, an initial plan was formulated for the development of a federal-law, practice-oriented, computer-based legal information storage and retrieval system as a research tool for Justice Department lawyers, including U.S. Attorneys and their Assistants. The plan called for providing immediate (online, interactive) access through remote terminals to federal statutory and case law, and selected "prior effort" materials (e.g., briefs, memos, policy directives, etc.). This plan and the underlying technical concepts were presented to the Attorney General, who approved proceeding with development and pilot implementation.

The Justice Retrieval and Inquiry System (JURIS) was developed and implemented on a pilot basis, and has been operational with a limited data base.

The JURIS data base presently consists of:

a) U.S. Code through Supplement I;

b) U.S. Reports Volumes 342 through 403;

c) Solicitor General Briefs to the Supreme Court (277 of 500 selected briefs);

d) Office of Legal Counsel Memoranda (110 Memoranda selected for a demonstration file);

e) Search and Seizure Briefs and Memoranda (500 selected for a demonstration).

By April 1, 1974, the following materials will be added:

a) Supplement II of the U.S. Code;

b) Public Laws of 93rd Congress (1973 Statutes at Large);

c) U.S. Reports Volumes 404 to 413;

d) Solicitor General Briefs (remainder of 500 selected briefs);

e) U.S. Attorneys' Policy Files
(drawn from U.S. Attorneys' Bulletins and orders and memoranda issued by the Attorney General);

f) Court of Appeals Criminal Law Decisions for the 2nd, 3rd, 4th, 5th, and D.C. Districts (going back 6 months).

By July 1, 1974, the Court of Appeals Criminal Law Decisions file for the 2nd, 3rd, 4th, 5th, and D.C. Districts will go back 5 years, and Slip Opinions from these Districts for all federal law (not just criminal) will be included going back 3 or 4 months. (The 2nd, 3rd, 4th, and 5th Districts were selected because these Districts encompass the U.S. Attorney Offices which have remote terminals namely, New York, Southern; New Jersey; Maryland; Virginia, Eastern; and Mississippi, Northern.) The U.S. Reports file will be augmented by however many volumes have been converted to computer-readable form by that time by the Air Force LITE project.

Further expansion of the JURIS data base will depend largely on feedback received from the five U.S. Attorney Offices with "pilot" terminals and an evaluation of system acceptance by attorneys in these Offices. Meanwhile, various sources are being actively explored for obtaining court opinions in computer-readable form as a by-product of automatic photo-composition publication processes.

Because of the rather limited present data base, JURIS utilization has been restricted to demonstrations, training, and sporadic search requests from the Criminal, Civil, Anti-trust, Civil Rights, and Lands Divisions, the Office of Legal Counsel, the Library of Congress Congressional Research Service, the U.S. District Court for the Southern District of Florida (which cited JURIS for assisting in the Diaz v. Weinberger decision), various legislative committees and the Government Accounting Office (which has made considerable use of the system in searching out U.S. Code sections dealing with appropriations).

Although JURIS activity has been concentrated primarily on computer program enhancements and data gathering and capture, the JURIS software is being heavily used by the LEAA National Criminal Justice Reference Retrieval Service (NCJRS). The online search and retrieval module is core resident for concurrent access to JURIS and NCJRS files, which means the U.S. Attorney Offices with JURIS terminals can also search for bibliographic references to documents in the general field of Criminal Justice. (A thesaurus of NCJRS subjects can be obtained from LEAA).

A new version of the JURIS software will be completed during July, 1974. The main reason for developing a new version was to enable expansion to over 100 terminals without degrading response time realized by the user. However, the whole programming effort constitutes a complete re-write (rather than a re-working of old programs), and consequently the new version will include significant functional enhancements which will make the software applicable to virtually any information retrieval application requiring an online, interactive dialog with the data base. Because of the high level of technical talent developing this software, it will represent a state-of-the-art capability in information retrieval technology.

Although JURIS has been in operation for some time, funding for a large scale data capture effort has only recently been made available. Now that this effort is underway in earnest, JURIS should experience increasing productive utility as an effective legal research tool.

Since terminals are presently installed only in pilot locations, attorneys are encouraged to request searches on the existing files by phone or mail. Contact Kirk Balcom, JURIS Advisor, or B.W. Basheer, Chief of Legal Information Retrieval Systems.

Address: Information Systems Section
310-6th St., N.W.
Courts Bldg.
Washington, D.C. 20530
Phone: 386-3273 or
386-3304

Staff: George S. Kondos, Chief of the Information Systems Section in the Office of Legal Administration.

ANTITRUST DIVISION
Assistant Attorney General Thomas E. Kauper

DISTRICT COURT

CLAYTON ACT

FIBERGLAS INSULATION MANUFACTURER ALLEGED TO HAVE VIOLATED SECTION 7 OF CLAYTON ACT.

United States v. Certain-teed Products, Corp., et al. (Civ. 74-471; February 27, 1974; DJ 60-12-730-7)

On February 27, 1974, a Section 7 suit was filed in the Eastern District of Pennsylvania challenging the acquisition by Certain-teed Products Corporation, Vally Forge, Pennsylvania of the fiberglass insulation manufacturing plant in Shelbyville, Indiana, which was formerly owned and operated by PPG Industries, Inc., of Pittsburgh, Pennsylvania. The acquisition took place on March 30, 1973.

The complaint alleges that in 1972 total sales of industrial mineral wool insulation products were approximately $169.3 million and total sales of industrial fiberglas insulatio products were approximately $151.7 million. Prior to the acquisition by Certain-teed, four manufacturers accounted for 90 percent of the total sales of industrial mineral wool insulation products and 100 percent of the total sales of industrial fiberglas insulation products.

Certain-teed's sales of industrial fiberglas insulation products in 1972 amounted to $27,070,000 which represents 16.0 percent of total sales of industrial mineral wool insulation products and 17.8 percent of total sales of industrial fiberglas insulation products, ranking it third among all manufacturers. PPG's sales of industrial fiberglas insulation products in 1972 amounted to $17,431,000 which represented 10.3 percent of total sales of industrial mineral wool insulation products and 11.5 percent of total sales of industrial fiberglas insulation products, ranking it fourth among all manufacturers.

As a result of the acquisition Certain-teed became the second largest manufacturer of industrial mineral wool insulation products, with approximately 26.3 percent of total sales and the second largest manufacturer of industrial fiberglas insulation products with approximately 29.3 percent of total sales. After the acquisition, only three companies in the United States manufactured industrial fiberglas insulation products.

The complaint alleges that the acquisition has eliminated direct competition between Certain-teed and PPG in industrial fiberglas insulation products and has increased concentration in the industrial minerial wood insulation market. The complaint asks that the acquisition be adjudged in violation of Section 7 of the Clayton Act and that Certain-teed be required to divest itself of the Shelbyville, Indiana plant acquired from PPG, either by sale to a third party or by returning ownership and control of the plant to PPG.

Staff: Raymond D. Cauley, Morton M. Fine and William A. DeStefano (Antitrust Division)

CIVIL DIVISION
Acting Assistant Attorney General Irving Jaffee

SUPREME COURT

VETERANS BENEFITS

SUPREME COURT HOLDS "NO REVIEW" STATUTE INAPPLICABLE TO A CHALLENGE TO THE CONSTITUTIONALITY OF VETERANS BENEFITS LEGISLATION; ON THE MERITS THE COURT SUSTAINS THE CONSTITUTIONALITY OF THE VETERANS READJUSTMENT BENEFITS ACT OF 1966.

Johnson v. Robison (Sup. Ct. No. 72-1297, decided March 4, 1974); Hernandez v. Veterans Administration (Sup. Ct. No. 72-700, decided March 4, 1974; D.J. Nos. 151-36-2087, 151-11-1441, 151-11-1440).

Plaintiff Robison was a conscientious objector who performed civilian alternative service in lieu of induction into the armed forces. Robison brought the present suit seeking a declaration that the Veterans Readjustment Benefits Act of 1966 violated the First and Fifth Amendments in failing to provide to him (and his class of conscientious objectors) educational benefits on an equal basis with veterans. The district court held first that the Veterans Administration's "no-review" statute, 38 U.S.C. 211(a), did not bar the suit, and it then held that the Veterans Readjustment Benefits Act violated Robison's right to equal protection under the Due Process Clause.

Since the district court invalidated an act of Congress, the government appealed this case directly to the Supreme Court, as is required by 28 U.S.C. 1252. The Supreme Court sustained the district court's ruling on jurisdiction, but reversed the holding that the Veterans Readjustment Benefits Act is unconstitutional.

On the issue of jurisdiction, the Court concluded, on the basis of the language and legislative history of section 211(a), that this "no-review" provision does not preclude the courts from considering "constitutional challenges to veterans' benefits legislation." (Emphasis added.) While the Court's holding on this aspect of the case rejected the government's broad construction of the no-review statute, it does not appear to otherwise affect our long-standing position that section 211(a) precludes judicial review of decisions of the Administrator dealing with non-contractual VA benefits. Thus, unless a suit plainly seeks the invalidation of an act of Congress, section 211(a) should still be asserted as a jurisdictional

bar in all cases involving non-contractual VA benefits.

On the merits, the Court held in Robison that the Veterans Readjustment Benefits Act of 1966 satisfies equal protection and does not violate the First Amendment's guarantee of the free exercise of religion.

The Court vacated the judgment of the Ninth Circuit to dismiss in the companion case, Hernandez v. Veterans Administration (which had relied solely on Section 211(a)) for reconsideration by the Court of Appeals in light of Robison.

Staff: William Kanter (Civil Division)

COURTS OF APPEAL

FEDERAL COAL MINE AND SAFETY ACT OF 1969

C.A.D.C. UPHOLDS SECRETARY'S PROCEDURES FOR ASSESSMENT OF PENALTIES AGAINST MINE OPERATORS WHO DO NOT CHALLENGE PROPOSED PENALTY.

National Independent Coal Operator's Association v. Morton (C.A.D.C., No. 73-1678, February 11, 1973, D.J. 236452-37).

Shortly after enactment of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. 801 et seq., the Secretary of the Interior developed preliminary procedures for assessing civil penalties against mine operators for violations of mandatory health and safety standards. 30 C.F.R. pt. 100. These procedures contemplated that assessment officers would issue proposed civil penalties for particular violations. If a mine operator requested an administrative hearing within 20 days of receipt of a proposed order, he could then obtain an administrative hearing in which the fact of violation and the amount of penalty were subject to formal administrative determination, prior to any enforcement proceeding. However, if an operator did nothing within the 20-day period, the proposed penalty became a final administrative penalty assessment, enforceable in the district courts.

Plaintiffs, an association of coal mine operators and several individual operators, brought this action to enjoin the Secretary's preliminary assessment procedures on the ground that 30 U.S.C. 819(a)(3) required the Secretary to issue a decision with findings of fact before any administrative penalty assessment could become final. The district court agreed and enjoined the Secretary's procedures. The court of appeals reversed, holding that the Act does not require a decision with findings of fact if an operator passes up his opportunity

to request an administrative hearing. In such circumstances, the court concluded that the operator was apparently satisfied with the proposed penalty and that Congress did not intend the Secretary to perform further "meaningless tasks." As a result of this decision the Secretary is expected to reissue the preliminary procedures and proceed with a substantial number of penalty assessment cases backlogged at both the administrative level and in the district courts.

Staff: Michael Kimmel (Civil Division)

FREEDOM OF INFORMATION ACT

CORRESPONDENCE CONCERNING POSSIBLE SAFETY DEFECTS IS PROTECTED BY EXEMPTION 7.

Ditlow and Nader v. Volpe (C.A.D.C., No. 73-1984, February 27, 1974, D.J. 145-18-184).

Plaintiffs, in this suit under the Freedom of Information Act (FOI Act), sought to compel public disclosure of correspondence between the National Highway Traffic Safety Administration (NHTSA) and automobile manufacturers concerning the possible existence of safety defects in the products of the manufacturers. The district court rejected NHTSA's claim that the documents were exempt from compelled disclosure pursuant to exemption 7 of the FOI Act (investigatory files compiled for law enforcement purposes) on the grounds that NHTSA had not demonstrated that disclosure would harm its law enforcement effectiveness.

The Court of Appeals reversed on the grounds that the correspondence was contained in investigatory files which were "patently" compiled for law enforcement purposes. The Court then went on to hold that NHTSA need not demonstrate that the release of such a file would harm its law enforcement effectiveness. The Court stated:

> [I]f the documents in issue are clearly to be classified as 'investigatory files compiled for law enforcement purposes,' the exemption attaches, and it is not in the province of the courts to second-guess the Congress by relying upon considerations which argue that the Government will not actually be injured by revelation in the particular case.

Staff: David Cohen (Civil Division)

CRIMINAL DIVISION
Assistant Attorney General Henry E. Petersen

COURT OF APPEALS

CONTROLLED SUBSTANCE ACT

BEFORE ACCEPTING A GUILTY PLEA, THE COURT MUST INFORM THE DEFENDANT THAT A MANDATORY SPECIAL PAROLE TERM WILL ATTACH TO ANY SENTENCE IMPOSING A PRISON TERM.

Sherwood E. Roberts v. United States, (C.A. 3, January 28, 1974, No. 73-1810)

After pleading guilty to a charge of distributing heroin (21 U.S.C. 841 (a)(1), Sherwood Roberts was sentenced to seven years in prison and given a three year special parole term. Thereafter, the district court denied a 28 U.S.C. 225 request from Roberts that his sentence be set aside on the ground that he had not been informed, prior to the court's acceptance of his guilty plea, that a special parole term would be part of his sentence. In denying the Section 2255 request, the district court equated special parole with ordinary parole (18 U.S.C. 4202) and held that there was no need to explain either parole concept to a guilty pleading defendant. The Third Circuit Court of Appeals, noting that special parole significantly differs from ordinary parole, reversed. The Court, referring to 21 U.S.C. 841(c), observed that a special parole term "imposes restrictions upon freedom in excess of the full term of sentence and the possibility of additional imprisonment" for violation of the conditions of special parole. Accordingly, the Court held that the district court, by neglecting to inform Roberts of the special parole term, had failed to explain to him the consequences of his plea.

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

SUPREME COURT

INDIANS

ELIGIBILITY FOR INDIAN WELFARE BENEFITS.

Morton v. Ruiz (S.Ct. No. 72-1052, February 20, 1974; D.J. 90-2-4-131).

The Supreme Court rejected the rationale of a Ninth Circuit decision ruling all Indians eligible for all Indian welfare programs, but affirmed the result that an unassimilated Indian maintaining close tribal ties and living near the reservations was eligible for Indian welfare. The Court's decision was on the narrow ground that legislative history and past agency action showed that the appropriation was meant to cover such Indians. The BIA was left free to change eligibility by the usual administrative procedures if the facts warrant such a change.

Staff: Harry R. Sachse (Office of the Solicitor General); Carl Strass (Land and Natural Resources Division)

COURT OF APPEALS

ENVIRONMENT: PRELIMINARY INJUNCTION; PARTY SEEKING PRELIMINARY INJUNCTION HAS AT ALL TIMES BURDEN OF SHOWING ITS RIGHT TO SUCH EXTRAORDINARY RELIEF, ESPECIALLY ON IRREPARABLE INJURY.

Canal Authority of State of Florida v. Callaway (C.A. 5, No. 2487, February 15, 1974; D.J. 90-1-4-286).

The controversy surrounding the Cross-Florida Barge Canal project has produced six separate lawsuits, some for and some against the project. On January 19, 1971, the President, following a recommendation of CEQ, halted all construction of the canal. Thereafter all cases were consolidated and assigned for trial to Senior Circuit Judge Harvey M. Johnsen. On September 29, 1971, Judge Johnsen issued a preliminary injunction enjoining the federal defendants from lowering the level of Lake Ocklawaha (a lake created by the construction of a dam which was part of the project) from its then operating level of 18 feet mean sea level.

In connection with a proposal to designate a portion of the Oklawaha River as a study river for potential inclusion in the National Wild and Scenic River System, the Government requested permission to draw down the waters of the lake to about 13 feet m.s.l. to preserve the area's trees from destruction by flooding. In July 1972, upon the basis of tentative scientific data complied by the Federal Government in cooperation with the Environmental Defense Fund the court authorized a temporary drawdown for the balance of the 1972 growing season. During the drawdown period of interagency, multidisciplinary task force studied the area and established that tree roots in northern Florida have no dormant period; they grow during the entire year. Consequently, the Government and EDF jointly moved to extend the drawdown period until Congress had acted on the Wild and Scenic River proposal, or until the court had decided the case on the merits. Upon a balancing of environmental factors, with particular weight being given to the new status quo created by the impounded waters, the court denied the motion to modify its preliminary injunction.

On appeal, the court of appeals reversed, holding that the district court, both in its original order granting the preliminary injunction and its subsequent orders dealing with it, had applied the wrong legal standards in placing the burden on the modification-movants. The district court had also erred in assuming that a preliminary injunction is normally available in such cases. "There is always a status quo. A court should not issue a preliminary injunction, unless its ability to render a meaningful decision on the merits would otherwise be in jeopardy. Most important, the district court had failed to find that plaintiffs (the pro-canal forces) had proven that they would be irreparably damaged if the lake were drawn down. The burden to show the four prerequisites for a preliminary injunction should have been at all times on the plaintiffs. Further, the district court had erroneously weighed some irrelevant factors in reaching its decision: the psychological effect of a drawdown in the public mind and upon the parties, because of the lake's symbolic value; the use of a preliminary injunction to advance the progress of the litigation on the merits; and the seemingly small tree acreage involved. Finally, the court of appeals explained, NEPA itself justifies temporary administrative action (including temporary cessation of a congressionally approved project) to meet previously unforeseen environmental dangers.

Since, meanwhile, the district court had decided the case adversely to movants on the merits, and had issued a permanent injunction, it will not be necessary under the terms of the appellate court's decision for the district court on remand to reconsider the question of the preliminary injunction.

The drawdown issue may yet be presented, however, upon an appeal from the district court's decision, or upon a renewed application to the district court.

Staff: Jacques B. Gelin and Frederick L. Miller, Jr. (Land and Natural Resources Division)

MINES AND MINERALS

TO CONSTITUTE A VALID DISCOVERY, A MINERAL DEPOSIT MUST HAVE PRESENT VALUE.

Reid Smith v. Rogers C. B. Morton (C.A. 9, No. 72-1799, February 1, 1974; D.J. 90-1-18-742).

The court affirmed on the Department of the Interior's opinion, United States v. Denison, 71 I.D. 144 (1964), holding that, to constitute a patentable mineral discovery, a deposit must be presently valuable, and that evidence of value in the past, or hope of value in the future is irrelevant.

Staff: Carl Strass (Land and Natural Resources Division)

ENVIRONMENT

CORPORATION IS PERSON IN CHARGE OF DISCHARGING OIL FACILITY.

United States v. Republic Steel Corp. (C.A. 6, No. 73-1768, January 23, 1974; D.J. 62-57-30).

The Sixth Circuit joined the Fifth Circuit (United States v. Mobil Oil Corp., 464 F.2d 1124 (1972)), in holding that the corporate owner of an oil facility is the person in charge of that facility who obtains use immunity for reports by employees of oil or hazardous substance spills, thus preventing most corporate prosecutions under the 1899 River and Harbor Act. It is worth note, however, that since the spill report is treated as a required corporate report, the person reporting, or any other supervisory or non-supervisory personnel involved is not immunized and may be prosecuted for the spill under the 1899 Act. United States v. White, 322 U.S. 694, 698-704 (1944); United States v. Orsinger, 428 F.2d 1105, 1114 (C.A. D.C. 1970), cert. den., 400 U.S. 831; United States v. Wernes, 157 F.2d 797, 800 (C.A. 7, 1946).

Staff: Carl Strass (Land and Natural Resources Division)

CONDEMNATION

FAIR MARKET VALUE; EXISTENCE OF MARKET DEMAND A MATTER FOR DETERMINATION BY THE FACTFINDER.

United States v. 363.40 Acres in Clermont County, Ohio, and Freda M. Renschke, et al. (C.A. 6, No. 73-1865, Feb. 8, 1974; D.J. 33-36-661-115).

Rejecting, sub silentio, the landowners' arguments that they were entitled to compensation for the "intrinsic" value of trees on the taken properties, the court of appeals by order affirmed the rule 71A commission's finding that the market value of the properties was not affected by any substantial demand for the land for "luxury forest" purposes. The court regarded the finding of no market demand as essentially a factual matter on which it was not free to substitute its judgment for that of the commission.

Staff: Robert L. Klarquist (Land and Natural Resources Division); Assistant United States Attorney James E. Rattan (S.D. Ohio).

ENVIRONMENT

CLEAN AIR ACT; EPA APPROVAL OF STATE IMPLEMENTATION PLANS; VARIANCES.

Natural Resources Defense Council, Inc., et al. v. Environmental Protection Agency (C.A. 5, No. 72-24-2, February 8, 1974; D.C. 90-5-2-3-52).

NRDC brought this suit in the Fifth Circuit for direct review of the EPA's approval of the Georgia Implementation Plan under Section 307(b)(1) of the Clean Air Act Amendments of 1970, 42 U.S.C. sec. 1857h-5(b)(1). The Fifth Circuit agreed with NRDC that the EPA approval was in violation of the Clean Air Act in four particulars. The Georgia Plan should have been disapproved inasmuch as (1) it does not assure public availability of emission data; (2) it would allow the State to grant variances without following the statutorily prescribed route of a petition for a postponement under Section 110(f) of the Act. According to the Fifth Circuit, the Section 110(f) procedure is required for all variances, contrary to the holding of the First and Eighth Circuits, even though in no way would the variance impair attainment of the statutory three-year deadline for the primary standards. (3) The

Georgia Plan must be reviewed by the EPA to determine if the tall stack dispersion technique which is part of the Plan was properly approved. This strategy may be included in a state plan only (a) if it is demonstrated that the emission limitation regulations in the plan are sufficient, standing alone, without the tall stack dispersion strategy, to attain the national standards, or (b) if it is demonstrated that emission limitation sufficient to meet the national standard is unachievable or unfeasible, and that the State has adopted regulations which will attain the maximum degree of emission limitation achievable. (4) EPA approval's of the Georgia Plan violated the Act since it allowed Georgia to consider economic cost or technical feasibility in exercising its authority under the state air quality code.

Staff: Henry J. Bourguignon (Land and Natural Resources Division)

DISTRICT COURTS

ENVIRONMENT

NATIONAL ENVIRONMENTAL POLICY ACT--ADEQUACY OF ENVIRONMENTAL IMPACT STATEMENT--JURISDICTION TO REVIEW ICC GENERAL REVENUE ORDER--HEARINGS--INJUNCTIVE RELIEF AND PRIMARY JURISDICTION.

Students Challenging Regulatory Agency Procedures (SCRAP), et al. v. United States and Interstate Commerce Commission, et al. (D. D.C. , Civil Action No. 971-72, Feb. 19, 1974; D.J. 90-1-4-501).

In a case which has been before the Supreme Court three times already, 409 U.S. 1207 (1972), 412 U.S. 669 (1973), 42 L.W. 3305 (Nov. 19, 1973), a three judge district court has granted plaintiffs' motion for summary judgment ruling, with one judge dissenting, that Interstate Commerce Commission orders allowing an increase in freight rates on recyclable commodities were invalid because of the inadequacy of the environmental impact statement prepared by the ICC pursuant to the National Environmental Policy Act (NEPA), 42 U.S.C. sec. 4321 et seq. (Freight rate increases on non-recyclable had been allowed to go into effect earlier.) Plaintiffs contended that the basic freight rate structure discouraged the shipment of recyclable materials in favor of virgin materials and an across-the-board increase would accentuate the disparity.

First, the court found that it had jurisdiction to review general revenue orders of the ICC to determine compliance with NEPA. The court reasoned that 28 U.S.C. secs.

2321 and 1336 did not place a statutory limitation on the courts' power to review the orders in question as to compliance with NEPA. The precedents putting restrictions on the courts' power on general revenue orders are judicial decisions, the court said, "predicated upon the judicially developed doctrines of ripeness and exhaustion of administrative remedies" and would force shippers to challenge the reasonableness of particular rates. Such circumstances do not exist here today, the court noted, in light of the enactment of NEPA and the general challenge to the rate structure by environmental groups as well as shippers. The court indicated that NEPA could be the basis for jurisdiction and said that the Supreme Court indicated this in the Cannikan case, because "absent NEPA [in that case] no court would have authority to review such a decision."

The court then determined that the procedures followed by the ICC in preparing its environmental impact statement did not meet the requirements of NEPA. For example, the court found that the statement did not adequately deal with the comments made on the draft statement, that the statement was too limited in scope since it only dealt with the incremental effect of the increases in the freight rates rather than the basic underlying rate structure, and that the statement was not considered by the ICC in its decisionmaking process but was utilized only to rationalize an already made decision. The court further stated that it would not have to reach the issue of review of the decision on the merits because it was going to remand the case to the agency because of the procedural defects in the agency procedures. The court indicated that even if it did reach that issue, substantive review would be limited to determining whether the decision was "arbitrary or clearly gave insufficient weight to environmental values."

The court noted that NEPA did not require a hearing on the statement. However, where the agency procedures required a hearing, as was the case here, the statement should be prepared prior to the hearing. As to the need for studies as to the effect of various changes in the freight rates, the court said, "it is not, of course, sufficient under NEPA for an agency to dismiss the environmental impact studies of opponents of the proposed action." The court continued, "it is the agency's responsibility to engage itself in the study necessary to gauge environmental effects."

The court stated that "out of an abundance of caution" and to avoid violating the primary jurisdiction doctrine as expressed in Atchison, Topeka & Sante Fe R. Co. v. Wichita Board of Trade, 412 U.S. 800 (1973), it would not issue an injunction to prevent the collection of the higher rates on recyclable commodities under the ICC's orders.

One judge dissented noting that the court did not have jurisdiction to determine the adequacy of the statement and, even if it did, the statement prepared by the ICC was adequate.

The ICC and the Department of Justice are now contemplating whether to appeal from this judgment directly to the Supreme Court.

Staff: William M. Cohen (Land and Natural Resources Division)

NAVIGABLE WATERS

WHEN CORPS OF ENGINEERS ASSISTS LOCAL GOVERNMENT IN SELF-HELP FLOOD CONTROL PROGRAM, IT IS NOT AT FAULT AND CANNOT BE MANDAMUSED IF PROJECT FAILS

Rager, et al. v. United States Corps of Engineers, et al. (Civil No. 4-70184, E.D. Mich., decided September 28, 1973; D.J. 90-1-4-715.

Plaintiffs brought an action to compel the codefendant, Corps of Engineers, to close a privately owned drainage canal which is flooding plaintiffs' homes. The complaint was filed in the state court, alleging that the Corps should close the canal to prevent flooding. The case was subsequently removed to the Federal District Court where the Government filed a motion to dismiss premised on the grounds that the court lacked jurisdiction and the plaintiffs failed to state a claim upon which relief can be granted. The claim against the Corps was dismissed with prejudice. The court held that 33 U.S.C. sec. 701(n) is not a mandatory act susceptible to mandamus relief. The act leaves to the discretion of the Chief of the Corps of Engineers what projects the Corps will be engaged in when assisting the community. The court also found that when a local government agency accepts federal funds under 33 U.S.C. sec. 701(n) to launch a self-help program to prevent flooding, it cannot hold the Federal Government at fault if the project fails to achieve its desired results.

Staff: Fred M. Master
Assistant United States Attorney (E.D. Mich.)

CONDEMNATION

DENIAL OF RIGHT TO REOPEN QUESTION OF THE RIGHT TO TAKE

United States v. 1,550.44 acres in McLean County, North

Dakota (Albert Wall) (Civil No. 1135, D. N.D., Jan. 22, 1974; D.J. 33-35-247-113).

Because the defendants' previous attorney did not file an answer contesting the Government's right to take within 20 days after the filing of the declaration of taking, the defendants' new attorney filed a motion to reopen the question and put forth the following arguments:

1. The taking is unconstitutional in that the court failed to hold a hearing on the question of the necessity of the taking.

2. There was fraud and oppressive dealing by the agency in negotiating with the defendants.

3. The taking was arbitrary and capricious.

4. The taking was excessive.

5. The project is at a point where it could be stopped.

The court ruled that the defendants' previous counsel was experienced and his waiver of a hearing on the question of the taking was his analysis of the best way to protect his clients' interest. The fact that a hearing was available satisfies the constitutional requirements of due process.

With respect to the allegation of fraud, the court found that the evidence consisted of the wide variation between the appraisal of the Government and the present price of land in the area. Such a situation is not unusual and does not constitute fraud.

As to the allegation that the taking was arbitrary and capricious, the defendants claimed that the canal should be located north of their farm rather than through the center of it which disturbs the water supply for their cattle. Citing Nichols on Eminent Domain, Section 4.11, the court ruled that it would not substitute its judgment for that of the agency constructing the project.

Concerning the question of excessiveness of the taking, the court pointed out that the land above that needed for the canal was to be used for a wildlife reserve and that Congress specifically authorized the project.

Finally, the court stated that criticism of the project from foreign and domestic sources was not sufficient to stop the project. The fact that the Cross-Florida Barge Canal was halted when about one-third complete does not mean that a possibility of an occurrence to open an inquiry into the necessity of taking. If the project should, at some future date, be halted, it might then be time to consider the question of the simplicity of closing the canal.

The court concluded its opinion with the observation that Congress has authorized the Bureau of Reclamation to construct this project, which includes the authority to acquire the needed land. It cited the following from Nichols on Eminent Domain:

> The overwhelming weight of authority makes clear beyond any possibility of doubt that the question of the necessity or expediency of taking in eminent domain lies within the discretion of the legislature and is not a proper subject for judicial review. [Section 4.11]

For these reasons the court denied the defendants' motion to reopen the question of the necessity for the taking.

Staff: Assistant United States Attorney
Eugene K. Anthony (D. N.D.)

TAX DIVISION
Assistant Attorney General Scott P. Crampton

Special Notice

In an effort to be able to keep the Attorney General informed of newsworthy actions in both civil and criminal tax cases, it is requested that United States Attorneys advise the Tax Division by telephone as soon as any newsworthy action occurs in such matters. For example, such notification would be indicated in the case of a conviction in a criminal prosecution, or the entry of a judgment in the Govenrment's favor in a civil case, where either the identify of the taxpayer, the flagrancy of the tax evasion or avoidance circumstances, or the general importance of the legal issues involved may be of sufficient public interest as to result in the Attorney General's being asked questions by the press.

DISPOSITION IN CRIMINAL CASE

It has come to the attention of the Department that, in connection with a recent prosecution as to a matter not involving federal income taxes, an agreement was entered into with the accused with respect to civil liability for income taxes and penalties.

Such an agreement was, of course, in disregard of clear and long-settled Department policy and procedure. All United States Attorneys are reminded that no agreement as to civil income tax liabilities or penalties (such as for fraud, negligence, etc.) is to be made in connection with any prosecution without prior approval by the Tax Division of the Department. (See United States Attorneys' Manual, Title IV ["TAX DIVISION"], pp. 7, 58, 61, and Title II ["CRIMINAL DIVISION"], pp. 80-81.)

(Tax Division)

APPENDIX
FEDERAL RULES OF CRIMINAL PROCEDURE

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RULE 11. Pleas.

The Court rejected defendant's contention that a defendant is always denied due process if he is tried before a judge who had questioned him as to the factual basis for the guilty plea, conditionally accepted the plea bargain, and then rejected it after having read the presentence investigation report. The Court held that under Rule 11 it was proper for a judge to satisfy himself that there was a factual basis for a plea of guilty before accepting a plea, even though the judge conditions the acceptance of the plea. The Court further held that after rejecting a plea under such circumstances, a judge may excuse himself from further involvement in the case, and should give this serious consideration, but absent a showing of actual prejudice, the choice lies within the discretion of the judge.

Since plea bargaining itself is subject to abuse, the Court cautioned that the requirements of Rule 11, as explicated in McCarthy v. United States, 394 U.S. 459 (1968), must be followed; further, the Court stated that the following safeguards must also be implemented: (1) prosecutors must avoid mischarging, overcharging, and threats of heavier sentences for those who do not plead guilty; (2) judges are to require the agreement to be disclosed in open court at the time the plea is offered and require that the reasons for reaching agreement be set forth in detail; (3) judges are not to participate in the bargaining; and (4) defendants must be given an opportunity to withdraw the plea if the bargain is rejected by the judge, with evidence of such plea being inadmissible in any civil or criminal proceeding against the person who made the plea or offer.

United States v. Roy Harding Gallington, (C.A. 8, December 12, 1973, 488 F.2d 637; D.J. 109-42-29).