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COMMENDATIONS

Assistant United States Attorney AMANDA M. DORR, Southern District of Iowa, has been commended by Mr. Jeffrey Axelrad, Director, Torts Branch, Civil Division, for her successful efforts in the case of Cox v. United States, in which a number of important issues were resolved in favor of the United States in the Swine Flu Immunization Products Liability Litigation.

Assistant United States Attorney RICHARD DROOYAN, Central District of California, has been commended by Mr. L. O. Poindexter, Inspector in Charge, U.S. Postal Services in Los Angeles, California, for his excellent prosecutive efforts in United States v. Tom Skala which resulted in the conviction of Thomas Skala and Jeffrey Altman.

Assistant United States Attorney GREGORY K. HARRIS, Central District of Illinois, has been commended by Mr. James C. Gritman, Acting Regional Director, and Mr. Robert A. Hodgins, Special Agent-in-Charge of the U.S. Department of Interior, Fish and Wildlife Service in Twin Cities, Minnesota, for his assistance and thorough prosecution of cases resulting from a major wildlife enforcement operation in the Beardstown/Browning area of central Illinois.

Assistant United States Attorney E. FITZGERALD PARNELL, III, Western District of North Carolina, has been commended by Mr. Robert E. Coy, Acting General Counsel, Veterans Administration, for his exemplary work in the psychiatric medical malpractice case of Joan Biggers Putnam v. United States.

Assistant United States Attorney HENRY H. ROSSBACHER, Central District of California, has been commended by Mr. Edgar N. Best, Special Agent in Charge, Federal Bureau of Investigation in Los Angeles, California, for his great assistance in the handling of a complex fraud case which led to the successful prosecution and conviction of Thomas Charles Ellis.

Assistant United States Attorney NANCY WIEBEN STOCK, Central District of California, has been commended by R. G. S. Young, Regional Administrator, U.S. Department of Transportation in San Francisco, California, for her efforts in obtaining a successful resolution in United States v. BHY Trucking, Inc. which involved the violation of provisions of The Federal Motor Carrier Safety Regulations (49 CFR 390-397).

EXECUTIVE OFFICE FOR U.S. ATTORNEYS
William P. Tyson, Acting Director

POINTS TO REMEMBER

SPECIAL NOTICE TO UNITED STATES ATTORNEYS

All attorneys should take particular note of the recent Fourth Circuit decision in Hensley v. Chesapeake and Ohio Ry. Co., No. 80-1457 (June 8, 1981), which holds that the time to appeal runs from the time a judgment is entered on the docket regardless of whether an attorney receives notice of the entry.

In this case, following an adverse judgment, plaintiff timely filed under Rule 59(b) a lengthy motion for a new trial on March 23, 1979, raising several points of error. Anticipating that it would take the court some time to consider the matter, plaintiff's counsel did not inquire as to the status of the motion until September 1979. At that time counsel learned for the first time that an order had been entered on June 17, 1979, denying a new trial. The denial of the motion for a new trial had started the running of the time for filing a notice of appeal, and plaintiff was thus out of time for both a notice of appeal and for a Fed.R.App.P. 4 extension based on excusable neglect. Plaintiff therefore filed a Rule 60(b) motion, which the district court granted, vacating the June 17, 1979 order, and reentering it as of June 5, 1980. Plaintiff then appealed. The defendant also appealed, challenging the grant of the Rule 60(b) motion.

On appeal, the Fourth Circuit held that the district court improperly granted plaintiff's Rule 60(b) motion, and dismissed plaintiff's appeal as untimely. FRAP 4 and Rule 77(d) provide that lack of notice of the entry of judgment does not affect the time to appeal or relieve a party for failure to take a timely appeal, and the Fourth Circuit held that these rules could not be circumvented through the use of a Rule 60(b) motion.

As the decision notes, this is the position uniformly taken by several courts, including the D.C., Second and Tenth Circuits. Counsel must therefore be responsible for periodically checking the dockets of the district courts in order to protect the government's time limits for appeal.

(Civil Division)

CIVIL DIVISION
Acting Assistant Attorney General Stuart E. Schiffer

Ostrowski v. U.S. Department of Labor, 6th Cir. No. 79-1667 (July 2, 1981) D.J. No. 83-37-12.

FECA: SIXTH CIRCUIT RULES THAT THE GOVERNMENT'S RIGHT TO RECOUP FECA BENEFITS WHEN THIRD PARTY IS LIABLE FOR INJURY IS NOT AFFECTED BY STATE NO-FAULT LAW PRECLUDING TORT RECOVERY FOR ECONOMIC LOSS.

By statute, a federal employee who is injured on the job is entitled to medical care at government expense and to continued wage payments. Where the employee's injury occurs under circumstances creating legal liability upon a third person other than the United States, the statute provides that the government shall be reimbursed for the benefits it has paid to the employee (5 U.S.C. 8132).

Ostrowski, a federal employee injured in the course of his employment, received substantial benefits from the government. He also recovered damages from the tort-feasor, but only for his non-economic loss, since the Michigan no-fault statute has essentially abolished tort recovery for economic loss -- medical care and lost wages -- which is paid by the no-fault insurer. The government sought to recoup the amounts it paid to Ostrowski for economic loss from his tort recovery. He argued that since the particular items of damages the government paid were specificially precluded by state law from his tort recovery, the government could not seek reimbursement from the recovery.

The Sixth Circuit has affirmed the district court decision that the government is not precluded from reimbursement from Ostrowski's non-economic loss recovery. The court held that the plain language of 5 U.S.C. 8132 does not delineate types of damages subject to the government's recoupment rights and that the purpose of minimizing the cost of administering FECA is enhanced by not subjecting the government's recoupment right to various state laws modifying tort recovery.

Attorney: Freddi Lipstein (Civil Division)
FTS 633-4825

Johniece F. Williams v. United States Department of the Army and United States Merit Systems Protection Board (4th Cir. No. 80-1795) (June 18, 1981).

FOURTH CIRCUIT AFFIRMS MERIT SYSTEMS PROTECTION BOARD HOLDING THAT NON-PROMOTION IS NOT APPEALABLE TO THE BOARD.

In this action, appellant challenged the Merit Systems Protection Board's refusal to review her non-promotion and discrimination claims. The Court held that the Board can only review matters placed within its jurisdiction "under any law, rule, or regulation." Absent a matter "otherwise appealable" to the Board, the Board can not review a discrimination claim.

Denial of a promotion is not an action as defined by law, rule, or regulation, which is appealable to the Board. Accordingly, the Court held that where appellant did not allege a matter otherwise appealable to the Board, the Board properly dismissed both counts of the appeal for lack of jurisdiciton.

Attorney: Susan D. Warshaw (Office of Personnel Management, Office of the General Counsel)

FTS 632-5524

LAND AND NATURAL RESOURCES DIVISION
Assistant Attorney General Carol E. Dinkins

Metromedia, Inc. v. San Diego, ____ U.S. ____, No. 80-195 (S. Ct., July 2, 1981) DJ 90-1-24-36.

Ban on commercial billboards sustained.

Various owners of advertising billboards in the city of San Diego challenged that city's ban, with limited exceptions, on off-premises outdoor advertising. On appeal from the Supreme Court of California, the United States, as amicus curiae, supported the city's position (and that of the court below) that the ordinance was a constitutionally permitted exercise of police power and did not violate freedom of speech.

The Supreme Court, which issued five separate opinions, did not reach a majority. Four Justices, in a plurality opinion written by Justice White, found the ordinance constitutional on the police power issue, but overly broad under the First Amendment because of its impact on non-commercial speech. The plurality reasoned that a city might permissibly ban commercial billboards, or conceivably even all billboards, but it could not enact an ordinance with exceptions, such as the one in San Diego for on-premise advertising, which favored commercial over non-commercial speech. Justices Burger, Rehnquist and Stevens, in separate opinions, agreed with the city and the United States that the ordinance was a permissible exercise of police power and not an abridgement of free speech. Justices Brennan and Blackmun, concurring in the judgment with the plurality, would have invalidated the ordinance on both police power and free speech grounds.

Attorneys: F. Kaid Benfield, Edward J. Shawaker (Land and Natural Resources Division) FTS 633-4496/2813 and S.G. staff

Commonwealth Edison v. State of Montana, ____ U.S.____, No. 80581 (S. Ct., July 2, 1981) DJ 90-1-4-2270.

State 30 percent severance tax sustained.

This case concerned the constitutionality of Montana's coal severance tax, imposed at a rate of 30% of the value of the coal extracted, under the Supremacy and Commerce Clauses of the Federal Constitution. Appellants claimed that the tax violated the Supremacy Clause because it conflicted with federal policy

favoring utilization of low-sulfur domestic coal and the allotment of royalties to the states under federal mineral lands leasing legislation. They claimed it violated the Commerce Clause both because it was discriminatory and because the amount of the tax was not fairly related to the services provided by the State of Montana. On July 2, 1981, the United States Supreme Court by a 6-3 vote upheld the Montana tax on all counts. Turning first to the Commerce Clause question, the Court agreed with appellants that the tax was not immune from Commerce Clause scrutiny simply because it concerned a local activity (mining). The Court, however, rejected the notion that the tax was discriminatory, finding no real discrimination in a tax that applies at the same rate regardless of the final destination of the coal. The Court similarly found no merit in the claim that the tax amounted to an undue burden on interstate commerce because it was excessive, ruling that the Commerce Clause is not concerned with the amount of the tax, but merely with whether the measure of the tax, in this case the value of the coal extracted, is in proper proportion to the taxpayer's activities in the state, which the Court found it was. The Court next turned to the Supremacy Clause issue and similarly upheld the tax. According to the Court, the tax was authorized, and not preempted by federal mineral lands leasing legislation. Concerning the preemptive force of federal policy favoring coal utilization, the Court held that general policy statements in federal statutes do not possess preemptive force alone, and that the provisions of the powerplant and Industrial Fuel Use Act evince a congressional intent to accommodate, not to override, Montana's tax. The Court did not address the distinct question of the validity of the Montana tax on coal mining on Indian lands in Montana. Justice White filed a concurring opinion in which he stated that he was troubled by the Montana tax but would defer to the executive and legislative judgment as to its constitutionality. Justice Blackmun filed a dissenting opinion, joined by Justices Powell and Stevens, in which he argued that the majority had "emasculated" the "fairly related" test since it would neither prevent a State from imposing a 100% tax or from raising enough revenue to eliminate all other state taxes. According to the dissenters, the Montana tax had been "tailored to fall on interstate commerce and thus a closer fit between the amount of the tax and the services the State provided, although difficult for the judiciary to enforce, should be constitutionally required. At the invitation of the Supreme Court, we had filed an amicus brief with the Court in support of the Montana tax.

Attorneys: Richard J. Lazarus, Christopher Harris, and Edward J. Shawaker (Land and Natural Resources Division) FTS 633-4192/1442/2813

Middlesex County Sewerage Authority v. National Sea Clammers Association, ___ U.S. ____, No. 79-1711 (S. Ct., June 25, 1981) DJ 90-5-1-6-74.

No private right of action under Clean Water Act.

The Supreme Court held that the "citizens' suit" provisions of the Federal Water Pollution Control Act, 33 U.S.C. 1251, et seq., and the Marine Protection, Research, and Sanctuaries Act of 1972, 33 U.S.C. 1401, et seq., provided precisely the private remedies which Congress considered appropriate, and that consequently no private rights of action based upon either statute can be implied. The Court noted, with respect to rights of action for water pollution based upon the federal common law of nuisance, that it had recently held, in Milwaukee v. Illinois, 451 U.S. _____, that the federal common law of nuisance was entirely preempted by the FWPCA; the Court in the instant decision reaffirmed that holding, and held further that "to the extent this case involves ocean waters not covered by the FWPCA and regulated under the MPRSA, we see no cause for different treatment of the pre-emption question."

A third issue briefed at the Court's request was whether private parties (as opposed to States) could invoke the federal common law of nuisance. The Court observed that in view of its holding that the federal common law of nuisance had been entirely preempted in this field, it need not reach the third issue.

Attorneys: Peter R. Steenland, Jr., Raymond N. Zagone, Jacques B. Gelin, David Buente (Land and Natural Resources Division) FTS 633-2748/2762/2807

Watt v. Star Coal Co., ____ U.S. ____, No. 80-49 (S. Ct., June 29, 1981) DJ 90-1-18-1384.

Section 518(c) of Surface Mining Contol Act does not violate Fifth Amendment.

The United States appealed to the Supreme Court from the district court's decision that Section 518(c) of the Surface Mining Control and Reclamation Act of 1977 violates the Fifth Amendment's Due Process Clause by requiring that proposed civil penalties be paid into an interest-bearing escrow account before full administrative review of such proposed penalties may be obtained. On June 15, 1981, the Surpreme Court in Hodel v. Virginia Surface Mining and Reclamation Assn. (S. Ct. Nos.

79-1538 and 79-1596), declined to rule on these civil penalty provisions of the Act because the issue was not ripe for review. The Supreme Court vacated the judgment in Star Coal and remanded the case to the district court for further consideration in light of Virignia Surface Mining, supra, and Hodel v. Indiana (S. Ct. No. 80-231, Jun. 15, 1981).

Attorneys: Thomas H. Pacheco, Jacques B. Gelin (Land and Natural Resources Division) FTS 633-2767/2762 and Peter Buscemi, S.G. staff

Citizens for a Better St. Clair County v. James, 648 F.2d 246, No. 80-7223 (5th Cir., June 15, 1981) DJ 90-1-4-2133.

Insufficient federal involvement in State prison to require EIS.

Alabama state officials decided to build a new prison in St. Clair County to relieve overcrowding and to satisfy a federal court order in Newman v. Alabama, 466 F.Supp. 628 (M.D. Ala. 1979), directing the State either to expand its prison system or to reduce its prison population. The plaintiffs claimed that this effort required the preparation of an EIS under NEPA, and sued the state officials, EPA, and LEAA for failure to prepare an EIS. The district court dismissed for lack of any federal question, and the court of appeals affirmed. No "major federal action" by any federal agency, which might trigger a duty to prepare an EIS, could be connected to the facts of this case. Federal court orders were the work of the Judiciary, and not "major federal action" by an executive-branch "agency" under NEPA. The federal funds which the state prison system was receiving from LEAA were not earmarked for construction of the new prison, and the Fifth Circuit rejected the notion that "substantial federal grants to a state can convert state projects receiving no direct grants into federal actions." Nor was EPA required to prepare an EIS. The state prison officials had made a "preliminary inquiry" about the "feasibility" of discharging wastes from the proposed prison. This "inquiry" was made to the Alabama state agency approved by EPA to issue NPDES permits under the Clean Water Act. The Fifth Circuit ruled that the state agency's response to this informal "inquiry," even if favorable, did not then constitute the issuance of an NPDES permit in which EPA had any "legitimate interest." Finally, the Fifth Circuit ruled that the district court, in dismissing, properly cut off plaintiffs' discovery efforts since no discoverable fact would be material to the solution of issues of law.

Attorneys: Gail Osherenko, Dirk D. Snel (Land and Natural Resources Division) FTS 633-4400

Venters v. United States, ____ F.2d ____, No. 80-3342 (6th Cir., June 22, 1981) DJ 90-1-5-1678.

Collateral estoppel no ban to quiet title action.

The Venters sued the United States under 28 U.S.C. 2409a to quiet title to some land which the United States claimed it had acquired by deed from other landowners. The district court, adopting a magistrate's recommendations, decided that the Venters were collaterally estopped from litigating the issues in this case because of a 1976 decision adverse to the Venters, in which the Venters had sued other landowners in reliance on the same deed the Venters relied on in their suit against the government. The court of appeals, in an order, reversed and remanded for further proceedings, concluding that "plaintiffs had similar but distinct interests in the instant action that were not present in the prior suit."

Attorneys: Thomas H. Pacheco and Dirk D. Snel (Land and Natural Resources Division) FTS 633-2762/4400

Downstate Stone Co. v. United States, ____ F.2d ____, No. 80-2491 (7th Cir., June 19, 1981) DJ 90-1-5-2059.

Preliminary injunction barring United States from enforcing criminal statutes.

The court of appeals reversed a preliminary injunction that enjoined the United States from enforcing, during the pendency of a quiet title action, several criminal statutes intended to protect national forests and to insure compliance with Forest Service regulations. The court found that the case did not fall within any of the recognized exceptions to the rule that equity will not interfere with the enforcement of criminal statutes. Downstate had not challenged the constitutionality, validity, or applicability of the laws and regulations which the government had threatened to enforce. Downstate's allegation that the government was required to institute civil injunctive proceedings before it threatened criminal prosecution was characterized as "specious." The court went on to find that Downstate had failed to satisfy even the normal standards for a preliminary injunction, let alone the stricter standards for an injunction against criminal prosecution. The court stated that delay and consequent

loss of profits because necessary government approval is not immediately forthcoming does not constitute irreparable harm. On the other hand, the preliminary injunction threatened irreparable harm to the overriding public interest in continued government control and supervision of national forest lands. Finally, the court held that the preliminary injunction was contrary to the mandate of 28 U.S.C. 2409a(b), which provides that during the pendency of a quiet title action, control and possession of the contested property remain with the United States. Moreover, the injunction, which permitted exploitation of the land prior to final resolution of the quiet title action, undermined the government's right under 2409a(b) to retain the property upon payment of just compensation should Downstate succeed on the merits.

Attorneys: David C. Shilton and Robert Klarquist (Land and Natural Resources Division) FTS 633-2767/2731

New Yorkers to Preserve the Theater District v. Landrieu, ____ F.2d ____, No. 80-6363 (2d Cir., June 17, 1981) DJ 90-1-4-2286.

HUD not required to prepare EIS before giving preliminary approval to grant.

The court of appeals, in a brief unreported opinion, upheld the dismissal of a complaint seeking to enjoin federal financial support for a hotel-theater complex in New York City. The court held that NEPA does not require HUD to prepare an EIS before granting preliminary approval for an Urban Development Action Grant. Section 104(h) of the Housing and Community Development Act of 1977, which supersedes NEPA in this respect, only requires environmental review at the time federal funds are released.

Attorneys: Assistant United States Attorney Robert S. Groban (S. D. N.Y.), David C. Shilton and Jacques B. Gelin (Land and Natural Resources Division) FTS 633-2737/2762

Cummings v. United States, 648 F.2d 289, No. 80-2298 (5th Cir., June 16, 1981) DJ 90-1-5-2042.

Federal court lacks jurisdiction on removal over Quiet Title Act action against the United States.

Plaintiff brought a quiet title suit in Texas state court, naming as defendants the United States and an official of the Army Corps of Engineers. The federal government removed the case to federal court, where it was dismissed on the basis that the federal court had exclusive original jurisdiction. On appeal, the Fifth Circuit held that dismissal was clearly proper because the state court lacked jurisdiction under Section 2409a over both the United States and the individual defendant. The court also rejected Cummings' argument that Section 2410 conferred subject matter jurisdiction. Finally, in the most novel portion of the opinion, the court stated that the appeal was "frivolous" and therefore taxed attorney's fees to Cummings in the amount of $1,000, even though the government had made no request for such fees.

Attorneys: Thomas L. Riesenberg and Edward J. Shawaker (Land and Natural Resources Division) FTS 633-4519/2813

Sewerage Commissions of Milwaukee v. Wisconsin Dept. of Natural Resources, ___ N.E. 2.d ___, No. 79-884 (S. Ct. Wis., June 30, 1981) DJ 90-5-1-6-269.

State's authority to require City to achieve secondary treatment before July 1, 1977, sustained.

The Wisconsin court of appeals upheld DNR's authority to issue an NPDES permit requiring the City to achieve secondary treatment before July 1, 1977, the date "not later than" which municipal compliance was to be achieved under Section 301 of the FWPCA, 33 U.S.C. 1311, and implementing state law. As amicus curiae, the United States opposed the City's contention that compliance could be required only "on" that date. The Wisconsin Supreme Court, however, did not reach the merits. The City had not sought review of its permit terms, either administratively or judicially, within the time allowed by state law. Concluding that early review was important to "progress against environmental pollution," and permitting late challenges in anticipation of enforcement would encourage "lying in the weeds," the court held that the City's action must be dismissed for failure to use the "exclusive procedure for review." The court held further that DNR could proceed with its counterclaim for enforcement, to which the City could raise no defense that the permit terms were unlawful.

Attorneys: Martin W. Matzen and Dirk D. Snel (Land and Natural Resources Division) FTS 633-2850/4400

Sierra Club v. Watt, ____ F.2d ____, No. 80-1674 (D.C. Cir., July 7, 1981). DJ 90-1-4-1949.

FLPMA does not reserve water rights.

The court of appeals, reaching an issue avoided by the district court in its favorable decision, held that FLPMA effected no reservation of water rights for unreserved public lands managed by the BLM. The court of appeals declined to rule on the threshold standing and justiciability arguments we had raised as to the right of a citizen to compel the United States to assert, in litigation, a property right which federal officials regard as unfounded. The court of appeals acknowledged the existence of unsettled questions respecting those matters but chose to skip over them, reaching the merits.

Attorneys: Joshua I. Schwartz, Anne S. Almy, Raymond N. Zagone and Jerry L. Jackson (Land and Natural Resources Division) FTS 633-4427/2748/2772

National Food Processors Assn. v. Baldridge, ____ F.2d ____, No. 81-1239 (D.C. Cir., June 30, 1981) DJ 90-3-10-267.

Challenge to NOAA regulations not timely.

Plaintiff Association challenged regulations which NOAA promulgated requiring food processors in the Mid-Atlantic Surf Clam and Ocean Quahog Fishery to submit periodic reports to the Secretary of Commerce. The Secretary issued the regulations to implement a fishery management plan designed by the regional Fishery Management Council to help restore the number of surf clams in the midAtlantic. The Association argued that the regulations were not authorized under the Fishery Conservation and Management Act, that they were not promulgated in compliance with E.O. 12044 (requiring regulatory analyses), and that the basis and purpose statement supporting the regulations was insufficient. We defended the action in the district court, the merits, and also on the ground that plaintiff sought review of the regulation out-of-time, since the 1980 processor data reporting regulation was substantially unchanged from earlier versions of the regulation and therefore the 30-day review period provided for in the Act did not again commence. The district court ruled in favor of the government on the ground that plaintiff was untimely in seeking review.

On appeal, a week after oral argument, the court of appeals affirmed the district court. In a short memorandum

opinion, the court ruled that since the regulation was not changed, plaintiff sought review out-of-time. Judge Markey dissented on the ground that, since he believed the agency was without authority to require data from processors, the failure of the plaintiff to seek timely review could not confer "jurisdiction" to issue the regulations on the agency.

Attorneys: Lois J. Schiffer and Peter R. Steenland, Jr. (Land and Natural Resources Division) FTS 633-2793/2748

United States v. Federal Communications Commission, ____ F.2d ____, Nos. 802559 and 2560 (D.C. Cir., July 2, 1981) DJ 90-1-4-2275.

Petition to review dismissed for lack of final order.

The FCC issued an order approving an EIS, finding no significant environmental impacts, and excluding consideration of environmental issues from a comparative hearing called to consider competing applications for broadcast transmission facilities. Interior objected to the FCC order because one of the competing license applications under consideration would, if granted, permit the construction of several communications transmission towers on a mountaintop overlooking Soquaro National Monument, Arizona. Upon the request of Interior, the United States filed a petition for review in the court of appeals, seeking to have the order set aside. By summary order, the court of appeals dismissed the petition, apparently on the grounds that the FCC had not yet entered a final order reviewable under the special statutes governing judicial review of FCC orders and, therefore, the court lacked jurisdiction.

Attorneys: C. Robert Wright, Jacques B. Gelin and Robert L. Klarquist (Land and Natural Resources Division) FTS 633-2720/2762/2731

Hart v. Lewis, ____ F.2d ____, No. 81-6090 (2d Cir., June 29, 1981) DJ 90-1-4-2329.

EIS on highway sustained.

In an unpublished opinion, the court of appeals affirmed the district court's denial of a permanent injunction against widening a stretch of highway in Connecticut. The district court had ruled that the proposed widening, which took land from a farm listed on the National Register, did not violate

section 4(f) of the Department of Transportation Act. The district court opinion states that the Secretary of Transportation does not have to consider alternatives to a road-widening proposal which would not accomplish the proposal's objectives of improved safety and drainage. The court found no evidence of any alternative which would have a lesser impact on historic properties and would still meet the project's objectives.

Attorneys: Assistant United States Attorney George Kelly (S. C. N.Y.) David C. Shilton and Edward J. Shawaker (Land and Natural Resources Division) FTS 633-2737/2813

Arnold v. Watt, ____ F.2d ____, No. 79-4857 (9th Cir., June 29, 1981) DJ 90-1-18-995.

Complaint by lease applicants on lands within Pet 4 property dismissed for failure to state claim.

The Ninth Circuit affirmed the judgment of district court which dismissed plaintiffs' cause of action for failure to state a claim upon which relief could be granted. The issues on appeal were: (1) whether the Interior lacked jurisdiction to issue certain oil and gas leases because the lands in Alaska were withdrawn from leasing pursuant to the Naval Petroleum Reserves Production Act of 1976 (NPRPA), 42 U.S.C. 6501 et seq., and (2) whether appellants had any "valid existing rights" which were preserved pursuant to the Section 102 savings clause of the NPRPA. The court held that a lease application under the Mineral Lands Leasing Act of 1920 (MLLA), 30 U.S.C. 181 et seq., vests no rights in the applicant. In addition, the court concluded that appellants' lease applications were not preserved by the savings clause of Section 102 of the NPRPA, and, therefore, Interior had correctly determined that the NPRPA withdrew his power to issue any leases to appellants.

Attorneys: Arthur Gowran and Kathyrn A. Oberly (Land and Natural Resources Division) FTS 633-3907/2716

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OFFICE OF LEGISLATIVE AFFAIRS
Assistant Attorney General Robert A. McConnell

SELECTED CONGRESSIONAL AND LEGISLATIVE ACTIVITIES

JULY 9, 1981 - JULY 21, 1981

Antitrust Aspects of Professional Sports. On Tuesday, July 14, 1981, Abbott Lipsky, Deputy Assistant Attorney General, Antitrust Division, testified before the Subcommittee on Monopolies and Commercial Law of the House Judiciary Committee. Mr. Lipsky stated that the Department recommended that the antitrust exemption presently conferred on baseball be eliminated.

S. 821/H.R. 1957. Both of these bills contain a provision which would establish an International Telecommunications and Information Task Force. The Department has serious reservations over this provision. Such an entity would introduce a new cumbersome and unnecessary level of the bureaucracy to an already complex policy-making process. It would also interfere with the Federal Communications Commission ability to obtain expertise and insight of various Federal agencies.

Posse Comitatus. The House passed the White/Hughes version of posse comitatus (supported by DOJ), as amended by Representative Shaw to grant the authority to armed services personnel to make drug arrests and seizures outside the land area of the U.S., as part of H.R. 3519, the Armed Services Authorization Bill. Other provisions permit military assistance to civilian law enforcement authorities by providing information, equipment, and personnel to such civilian authorities in drug, immigration, and customs enforcement.

Regulatory Reform. On July 14, the Senate Judiciary Committee ordered favorably reported S. 1080, Senator Laxalt's regulatory reform bill. Apparently, no major amendments to the legislation were made. Senator DeConcini attempted to attach an environmental venue provision but was dissuaded from doing so.

The bill now proceeds to the Governmental Affairs Committee, which has thirty days to report out its own version or be discharged from further consideration.

On the House side, markup of H.R. 746 continues on July 22.

Venue. At the Department's request, the Senate Judiciary Committee's hearing on S. 1107, Senator Simpson's venue proposal, has been postponed. If required to appear, the Department would have had to oppose the bill, although we endorse the concept.

Freedom of Information Act. On July 15, Jonathan Rose, Assistant Attorney General, Office of Legal Policy, testified before two subcommittees (Senate Judiciary Subcommittee on the Constitution, and the House Government Operations Subcommittee on Government Information & Individual Rights) on the subject of the Administration's ongoing efforts to draft amendments to the Freedom of Information Act. Reaction to the testimony was subdued on the House side. Members on both sides indicated that concrete examples of abuses would be necessary to justify FOIA amendments.

Equal Access to Justice Act. The House version of H.R. 3982, the Omnibus Budget Reconciliation Act, includes amendments to narrow the scope of the Equal Access to Justice Act. Although we support the amendments, they contain numerous technical problems.

Court of Appeals for the Federal Circuit. A clean Senate bill incorporating the substance of S. 21, the Court of Appeals for the Federal Circuit legislation, is on the agenda for markup by the Senate Judiciary Committee at its next Executive Session. The Department supports the legislation in principle but strongly objects to a provision which would grant to the Court of Claims equitable and declaratory judgment jurisdiction.

DOJ Authorization. On July 13 the Senate failed to approve a second cloture petition designed to end the filibuster led by Senator Weicker against the anti-busing amendments to the DOJ Authorization bill, S. 951.

The cloture petition by Senator Johnston failed by a 54-32 vote. Senator Johnston promptly filed another petition in the hope that he could gain the necessary 6 additional votes to invoke cloture from some of the 14 senators who were absent from the July 13 vote. However, it is unlikely that S. 951 will come up on the floor again before September because Majority Leader Baker has given priority to the tax and reconciliation bills.

Presumably a vote Senator Johnston's cloture petition will be the first order of business when S. 951 does come to the floor again. However, the petition pertains only to debate on the Helms anti-busing amendment as modified by Senator Johnston's language; thus, even if cloture is invoked, Senator Weicker could still filibuster the original Helms

amendment.

Agents Identities. On July 16 the House Intelligence Subcommittee on Legislation marked up H.R. 4, the proposed Intelligence Identities Protection Act. The subcommittee made some modifications of the bill's intent standard for criminal liability which are not considered significant by cognizant prosecutors. However, the modifications did have the beneficial effect of gaining Congressman Edwards' agreement to refrain from demanding sequential referral of H.R. 4 to the Judiciary Committee.

The full Permanent Select Committee on Intelligence will markup H.R. 4 sometime next week.

The Senate version of the Intelligence Identities Protection Act, S. 391, will be not considered by the Senate Judiciary Committee until September 15, 1981.

Bail Reform and Narcotic Sentencing. On July 22, the House Select Committee on Narcotics will be holding a hearing on bail reform and narcotic sentencing. Francis Mullen, Acting Administrator, DEA, is scheduled to testify for DOJ.

Federal Effort in Narcotics Enforcement. On July 27, the House Select Committee on Narcotics will hold a hearing on the federal effort in narcotics enforcement. The Committee is concerned how DOJ will continue the effort in narcotic enforcement with the proposed budget cuts. Rudolph Guiliani, Associate Attorney General, is scheduled to testify for DOJ.

Hazardous Waste. On Wednesday, July 8, 1981, Carol E. Dinkins, Assistant Attorney General, Land and Natural Resources Division, testified before the Subcommittee on Environmental Pollution of the Senate Committee on Environment and Public Works. The subject of the hearing was the Department's future efforts in the environmental enforcement area.

Financial Institutions. On Wednesday, July 8, 1981, William Baxter, Assistant Attorney General, Antitrust Division, testified before the Subcommittee on Monopolies and Commercial Law of the House Judiciary Committee. The subject of the hearing was the competitive characteristics of the financial institutions industry.

Nominations: On July 15 1981, the United States Senate confirmed the following nominations:

Edward C. Prado to be the United States Attorney for the Western District of Texas;

Sarah E. Barker to be the United States Attorney for the Southern District of Indiana; and

Daniel K. Hedges to the United State Attorney for the Southern District of Texas.

On July 20, 1981, the United States Senate confirmed the nomination of William W. Wilkins, Jr. to be U.S. District Judge for the District of South Carolina.

On July 16, 1981 the United States Senate received the following nominations:

Robert F. Chapman of South Carolina to be a U.S. Circuit Judge for the Fourth Circuit;

John C. Bell to be United States Attorney for the Middle District of Alabama;

Joseph J. Farnan, Jr. to be United States Attorney for the District of Deleware; and

James A. Rolfe to be United States Attorney for the Northern District of Texas.

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Rule 17(d). Service.

Defense contended that a pre-trial evidentiary hearing should be reopened to allow the defense to resubpoena two FBI Agents and a government attorney whose testimony would have been important but who failed to appear at the hearing. The defense had attempted to subpoena the witnesses the day before the hearing, serving the subpoenas on the legal offices of the FBI in Philadelphia; however, they were not delivered to the person named nor was the witness tendered the fee for one day's attendance and the mileage allowed by law as required by Rule 17(d). The defense contended that, on the basis of defense counsel's past experience as an Assistant United States Attorney, no situation had been seen before where a witness fee was required or accepted for a government agent testifying in a case in his official capacity.

The Court conceded that this might be true, but nevertheless concluded that this fact did not change Rule 17(d), and took judicial notice of the strict budgetary control being exercised over all governmental expenses by the present administration. Accordingly, the motion to reopen the hearing for the purpose of properly resubpoenaing the witnesses was denied.

United States v. Eugene Boffa, Sr. et al., 513 F. Supp 512 (D.Del. March 31, 1981)