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COMMENDATIONS

Assistant United States Attorney LOURDES G. BAIRD, Assistant Chief, Criminal Division, Central District of California, has been commended by Mr. John A. Mintz, Assistant Director, Legal Counsel Division, Federal Bureau of Investigation, for the successful prosecution of Leonard Peltier, an escaped fugitive wanted for the murder of two FBI Agents, in United States v. Leonard Peltier.

Assistant United States Attorneys LOUIS BIZARRI and JEROME SIMANDLE, District of New Jersey, have been commended by Mr. Jeffrey Axelrad, Director, Torts Branch, Civil Division, for their outstanding and successful efforts in the swine flu vaccine case of Stitch v. United States.

Assistant United States Attorney WESLEY FREDENBURG, Western District of Oklahoma, has been commended by Mr. David O. Finney, Special Agent in Charge, Bureau of Alcohol, Tobacco and Firearms, Department of Treasury, Dallas, Texas, for his expert prosecution of the Nick Alderson conspiracy case.

Assistant United States Attorney MARCIA W. JOHNSON, Northern District of Ohio, has been commended by Mr. Richard Riseberg, Assistant General Counsel for Public Health, Department of Health and Human Services, Rockville, Maryland, for her fine handling of In the Matter of Establishment Inspection of Empire Detroit Steel, Division of Cyclops Corporation, which involved an inspection warrant issued under the Occupational Safety and Health Act of 1970 (29 U.S.C. §651 et seq.) for a research study by the National Institute for Occupational Safety and Health (NIOSH).

Assistant United States Attorney KARLA MCALISTER, Western District of Oklahoma, has been commended by Mr. David O. Finney, Special Agent in Charge, Bureau of Alcohol, Tobacco and Firearms, Department of the Treasury, Dallas, Texas, for her expert handling of the Palmer case, dealing with violation of the Federal Firearms Law.

Assistant United States Attorney STEVEN SNYDER, Western District of Arkansas, has been commended by United States Attorney W. Asa Hutchinson, Western District of Arkansas, for the skillful prosecution of United States v. Casey, Almond, Penton, Haggerty, Olmstead, Hollis, Minor and Owens, which involved interstate car theft and schemes to defraud insurance companies by filing false theft reports.

EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS
William P. Tyson, Director

CLEARINGHOUSE

In an effort to more fully inform United States Attorneys and their subordinates of the standards of conduct that must be met as employees of the Department of Justice, the Executive Office will be publishing from time to time sanitized synopses of various types of conduct which have warranted imposition of informal or formal disciplinary sanctions. We will also publish ethical questions that have been raised by various United States Attorneys' offices and the Department's resolution of those problems.

ALLEGATIONS OF MISCONDUCT

1) An Assistant United States Attorney was arrested for driving while intoxicated and leaving the scene of an accident during his off duty hours. The Assistant, pursuant to a plea agreement, was convicted on the charge of driving while intoxicated; the charge of leaving the scene of the accident was dismissed. It was determined that such criminal conduct violated the Department's standards of conduct, in particular, 28 C.F.R. 45.735-18, which relates to criminal activity by Department of Justice employees. Furthermore, the Assistant's conduct, which received local press coverage, was considered damaging to the public's confidence in the integrity of the Department of Justice. The Assistant United States Attorney was subsequently suspended for 13 days.

2) A supervisory Assistant United States Attorney knowingly obtained an indictment in a criminal tax case without obtaining prior approval of the Tax Division in violation of the provisions of 6-2.210 and 6-2.330 of the United States Attorneys' Manual. When confronted with these violations, the Assistant United States Attorney took the position that his conduct was justified by the Tax Division's delay in granting its approval. A formal written reprimand was issued to the Assistant.

3) An Assistant United States Attorney initiated an ex parte communication with a state judge in a state proceeding in which one of the parties was also a witness for the Federal Government in a civil case being handled by the Assistant. The prupose of the contact was to assist his witness in a domestic dispute. It was determined that the Assistant's conduct was in violation of DR 7-110(B) of the American Bar Association's Code of Professional Responsibility, and 28 C.F.R. 45.735-10. The Assistant resigned prior to disciplinary action being taken.

4) An Assistant United States Attorney entered into an arrangement whereby he would receive fees for referring cases to private attorneys. The Assistant referred a number of individuals to local attorneys for representation, discussed the progress of these cases with those attorneys and/or their clients, and casually followed the progress of the cases. None of the referrals were the result of the Assistant's work at the United States Attorney's office. It was determined that the Assistant's conduct constituted the unlawful practice of law and receipt of fees in violation of the American Bar Association's Code of Professional Responsibility, DR 2-107, and the Department of Justice Standards of Conduct, 28 C.F.R. 45.735-9. The Assistant United States Attorney resigned prior to any disciplinary action being initiated.

ETHICAL QUESTIONS

1) A United States Attorney considered assigning a certain Assistant United States Attorney responsibility for a criminal investigation in which one of the victims was a client of the law firm for which the Assistant had previously worked. The Executive Office was requested to provide an opinion whether a conflict of interest would arise. After reviewing the matter, it was decided that to avoid any suggestion of impropriety, the Assistant United States Attorney should have no connection with the investigation.

2) A newly appointed Assistant United States Attorney requested permission to continue work on two civil cases and as a municipal judge in local court. In accordance with Title 10-2.664 of the United States Attorneys' Manual, it was determined that continuing work on the civil cases would be a violation of 28 C.F.R. 45.735-9, and would create the potential for a conflict of interest and the appearance of impropriety. With regard to the Assistant's request to continue to serve as a municipal judge, the Executive Office indicated that such employment would foster the appearance of impropriety, and therefore, denied the request.

3) Several inquiries have been made as to whether a conflict of interest automatically arises when a United States Attorney or Assistant United States Attorney's spouse is employed by a private law firm that handles cases involving the United States Attorney's office. Formal Opinion 340 of the American Bar Association Committee on Ethics and Professional Responsibility indicates that the disciplinary rules do not expressly require a lawyer or his firm to decline employment in all cases in which the lawyer's spouse represents an opposing party or is a member of the firm which represents an opposing party. Rather, the opinion sets forth those factors which should be considered in determining whether a conflict of

interest exists. Those factors include fee arrangements, the nature and status of the case (e.g., criminal or civil, negotiation or litigation), the ability of the respective firms to protect their client's interests, and the degree of involvement by the spouses in each case. In light of this opinion, it is not mandatory that the firm disqualify itself when it and the United States Attorney's office represent opposing interests. However, caution must be exercised in the areas noted in the opinion. A copy of this opinion may be obtained by contacting Ms. Sue Nellor, Assistant Director, Legal Services Section (FTS 633-4024).

Employees of United States Attorneys' offices are reminded of 28 C.F.R. 45.735-2(b) which requires that they discuss problems concerning ethics or professional conduct with their supervisors, and refer those problems which cannot be readily resolved to the Executive Office for United States Attorneys.

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EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS
William P. Tyson, Director

POINTS TO REMEMBER

Press Release Dated January 18, 1983

John S. Martin, Jr., United States Attorney for the Southern District of New York, announced today that yesterday the Attorney General presented John Marshall awards to Assistant United States Attorney David M. Jones and former Assistant United States Attorney Stuart J. Baskin. The John Marshall award, which is one of the highest awards given by the Department of Justice, is presented to attorneys for outstanding achievement in some particular phase of litigation.

David M. Jones received the award in the category of "Preparation of Litigation" in recognition of his outstanding achievement in the handling of the case of United States v. Volkswagen of America which after lengthy pretrial proceedings was settled pursuant to an agreement under which the Government will receive a total of $25 million which according to the Commissioner of Customs made this the greatest penalty case in the history of the United States Customs Service.

Stuart J. Baskin received the John Marshall award for "Trial Litigation" in recognition of his outstanding representation of the Government in the trial of two criminal cases in which the leaders of a nationwide Croation terrorist organization were convicted of violations of the RICO Statute relating to their participation in a series of murders, bombings, extortions and other terrorist acts.

The Justice Department also announced yesterday that special commendation awards were given to the following individuals who had served in the Southern District during last year:

Daniel H. Bookin
Gaines Gwathmey, III
Richard A. Martin
Lawrence F. Ruggiero

In addition, the Executive Office for United States Attorneys awarded the "Director's Award for Superior Performance as an Assistant United States Attorney" to Lee S. Richards and former Assistant United States Attorney Martin Flumenbaum.

(Executive Office)

The Director's Award Ceremony Of The Executive Office For United States Attorneys

The first occasion of the Director's Award Ceremony of the Executive Office for United States Attorneys was held in the Great Hall of the Department Of Justice on March 4, 1983. This ceremony was in honor of a select group of employees of the United States Attorneys who have distinguished themselves in the pursuit of excellence.

The Director's Award for Superior Performance as an Assistant United States Attorney was presented to:

District of Arizona
Virginia A. Mathis

Central District of California
Eric L. Dobberteen
Carolyn M. Reynolds

Northern District of California
Leida Schoggen
Gregory H. Ward

Southern District of California
Raymond J. Coughlan, Jr.

District of Columbia
Roger M. Adelman
Michael J. Ryan

Northern District of Illinois
Frederick H. Branding
James C. Schweitzer

Eastern District of Louisiana
Richard T. Simmons, Jr.

Massachusetts
Douglas P. Woodlock

Eastern District of Michigan
Michael C. Leibson

District of Montana
Robert L. Zimmerman

The Director's Award Ceremony Of The Executive Office For United States Attorneys (continued)

Southern District of New York
Martin Flumenbaum
Lee S. Richards

District of Oregon
Robert C. Weaver

Eastern District of Virginia
Robert W. Jaspen

Western District of Pennsylvania
David M. Curry

Eastern District of Wisconsin
Charles H. Bohl

Special Commmendation Awards were presented to:

Central District of California
Daniel J. Gonzales
Frederik A. Jacobsen
Robert A. Pallemon

Southern District of California
Douglas G. Hendricks
John R. Kraemer

District of Columbia
Richard L. Beizer
William J. Bowman
William H. Briggs, Jr.

Northern District of Georgia
Janet F. King

Southern District of Georgia
Frederick W. Kramer, III

District of Hawaii
Elliot R. Enoki

Northern District of Illinois
Barry Rand Elden
Cynthia Giacchetti
Nancy K. Needles

The Director's Award Ceremony Of The Executive Office For United States Attorneys (continued)

Eastern District of Louisiana
Albert J. Winters, Jr.

Eastern District of Michigan
Josephine M. Brown
Marcia G. Cooke
Richard L. Delonis

District of New Jersey
Richard L. Friedman
Mark Malone
James A. Plaisted
Samuel Rosenthal

Southern District of New York
Daniel H. Bookin
Gaines Gwathmey, III
Richard A. Martin
Lawrence F. Ruggiero

District of North Dakota
H. Gary Annear

Eastern District of Pennsylvania
Joan K. Garner
Daniel B. Huyett
James G. Sheehan

Western District of Pennsylvania
Charles D. Sheehy
Frederick W. Thieman

Western District of Texas
Archie Carl Pierce

Eastern District of Wisconsin
Lawrence O. Anderson
Barbara B. Berman

Dissemination Of Safety-Related Information To The Nuclear Regulatory Commission

Ordinarily, in criminal cases involving the handling of nuclear materials, or the construction or operation of a nuclear power plant, the NRC functions as the initial investigative agency and is the reporting source of the alleged criminal violation. In such cases, the NRC is cognizant of any potential health or safety threats concerning the nuclear power plant involved. There are circumstances, however, when information regarding health and safety matters with respect to a nuclear power plant is developed in the first instance by the Department of Justice and the FBI. In these circumstances, it is important that such health and safety-related information be communicated promptly to the NRC, the agency with the expertise to assess the impact of, and deal with, such information.

Should health or safety-related information concerning a nuclear power plant be discovered during initial investigative efforts, prior to the commencement of grand jury proceedings, such information should be communicated directly to the NRC, as soon as practicable. If Department of Justice attorneys are working with the FBI on such matters, the attorneys should request the FBI to communicate with the NRC. If the FBI is not involved, the attorney assigned to the matter is responsible for disseminating the information.

Should health or safety-related information concerning a nuclear power plant be developed in the first instance during grand jury proceedings, dissemination of such information to the NRC is more problematical. Although none of the exceptions to grand jury secrecy enumerated in Rule 6(e), Federal Rules of Criminal Procedure, may apply specifically to this situation, there is notable judicial precedent granting the court, which supervises grand jury proceedings, discretion to make disclosure of matters occurring before the grand jury to proper authorities under circumstances demonstrating a compelling public interest. See In re Special February, 1975, Grand Jury, 662 F.2d 1232 (7th Cir. 1981), cert. granted, 102 S.Ct. 2955 (1982); In re Biaggi, 478 F.2d 489 (2d Cir. 1973); In re Report & Recommendation of

June 5, 1975, Grand Jury, 370 F. Supp. 1219 (D.D.C. 1974); In re Bullock, 103 F. Supp. 639 (D.D.C. 1952).

In accordance with such authority, each Department of Justice attorney assigned to a grand jury matter during which health or safety-related information concerning a nuclear power plant is developed, should seek a court order, pursuant to Rule 6(e), Federal Rules of Criminal Procedure, and the inherent authority of the court to supervise the grand jury, for disclosure of such information to the NRC for use in connection with its safety enforcement responsibilities.

Department of Justice personnel should construe the term "health or safety-related information" in a broad manner, to ensure that all information which reveals an actual or potential threat to health or safety arising out of the handling of nuclear material, or in the construction or operation of a nuclear facility, is disseminated promptly to the NRC. Questions concerning the above procedures should be directed to the General Litigation and Legal Advice Section (FTS 724-7144).

(Criminal Division)

United States Attorneys And Assistant United States Attorneys Carrying Of Law Enforcement Type Identification Badges And Accompanying Agents On Raids

On March 29, 1983, a memorandum was issued to all United States Attorneys and Assistant United States Attorneys from William P. Tyson, Director, Executive Office of United States Attorneys, concerning the use of law enforcement type badges by Department of Justice employees. This memorandum is reproduced verbatim and is attached as an appendix to this issue of the United States Attorneys' Bulletin.

(Executive Office)

New Form For Application For Release Of Right Of Redemption In Respect Of Federal Tax Liens

On February 10, 1983, a memorandum was issued by Glenn L. Archer, Jr., Assistant Attorney General, Tax Division, to inform all United States Attorneys of the New Form OBD-225, Application for Release of Right of Redemption in Respect of Federal Tax Liens, which replaces Form DOJ-108. The major change on the form is in Part B of the instructions and sets forth the current redelegation to United States Attorneys of the authority to release rights of redemption in respect of Federal tax liens. A copy of this form is an attachment to the Tax Division memo which is included as an appendix to this issue of the United States Attorneys' Bulletin.

(Tax Division)

Commendations

A special feature of the United States Attorneys' Bulletin is the Commendation Section. The commendations of Assistant United States Attorneys are published not only to give recognition to individuals for jobs well done, but also to alert other Government attorneys to recent achievements in different areas of the law. In order to fully appreciate the accomplishments of these attorneys and the particular types of litigation involved, submitted commendations should include:

1. Name, title, district, and phone number of attorney(s) being commended;
2. Name, title, and location of person(s) making the commendation; and
3. Nature and name of the case.

Your cooperation is appreciated.

(Executive Office)

OFFICE OF THE SOLICITOR GENERAL
Solicitor General Rex E. Lee

The Solicitor General has authorized the filing of:

A petition for a writ of certiorari on or before March 21, 1983, with the Supreme Court in United States v. Garcia. The issues are whether an arrest that is illegal under state law (because made by a game warden without authority to arrest for drug offenses) but not independently violative of national norms established by the Fourth Amendment is properly considered to violate the Constitution, and if so, whether the exclusionary rule requires suppression of evidence in such a case.

A petition for a writ of certiorari on or before March 26, 1983, with the Supreme Court in Natural Resources Defense Council v. Gorsuch. The issue is the validity of regulations adopted by the Environmental Protection Agency defining the term "stationary sources" of air pollution for purposes of the nonattainment provisions of the Clean Air Act (42 U.S.C. (Supp. IV) 7501-7508).

A petition for a writ of certiorari on or before April 1, 1983, with the Supreme Court in Weber Aircraft Corp. v. United States. The issue is the applicability of Exemption 5 of the Freedom of Information Act, 5 U.S.C. 552(b)(5), to witness statements given under a pledge of confidentiality to an Air Force Mishap Investigation Board investigating an aircraft accident. The Government contends that the FOIA does not require release of such statements.

A petition for a writ of certiorari on or before April 7, 1983, with the Supreme Court in American Trucking Ass'n v. United States & ICC. The issue is whether the ICC may reject a tariff after it has become effective, requiring the carrier to refund, as an overcharge, the difference between the rates paid and the former tariff.

A direct appeal on or before April 14, 1983, with the Supreme Court in Lone Steer, Inc. v. Donovan. The case concerns the constitutionality of certain inspection powers of the Secretary of Labor under the Fair Labor Standards Act, 29 U.S.C. 209.

CIVIL DIVISION
Assistant Attorney General J. Paul McGrath

Block v. Neal, _____ U.S. _____ No. 82-1494 (March 7, 1983).
D.J. # 157-70-482.

FEDERAL TORT CLAIMS ACT: SUPREME COURT HOLDS THAT FTCA "MISREPRESENTATION" EXCEPTION DOES NOT BAR SUITS AGAINST UNITED STATES ARISING OUT OF ALLEGEDLY NEGLIGENT HOUSING INSPECTIONS PERFORMED BY DEPARTMENT OF AGRICULTURE EMPLOYEES.

In administering Title V of the Housing Act of 1949, the Secretary of Agriculture is authorized to extend financial assistance, in the form of loans and loan guarantees, to indigent rural residents to help them acquire decent housing. In connection with this loan program, and pursuant to 42 U.S.C. 1476, the Farmers' Home Administration conducts inspections of homes constructed with FmHA funds prior to closing and completes inspection reports indicating, inter alia, whether significant defects or deviations from the approved plans and specifications exist.

This suit was brought by a Title V loan recipient, under the Federal Tort Claims Act, for damages for construction defects in her FmHA-financed house which were not discovered by the FmHA inspector prior to closing and which the builder subsequently refused to correct. The Sixth Circuit rejected our argument that plaintiff's claim arose out of misrepresentation and was therefore barred by 28 U.S.C. 2680(h) as interpreted by the Supreme Court in United States v. Neustadt, 366 U.S. 696 (1961).

On March 7, 1983, the Supreme Court issued a unanimous opinion affirming the court of appeals' decision. Based on its reading of plaintiff's complaint, the Court concluded that her action was not barred by the "misrepresentation" exception because it was based on the FmHA's alleged "duty to use due care to ensure that the builder adheres to previously approved plans and cures all defects before completing construction," rather than on any duty the agency might have to use due care in communicating information obtained from the inspection process to plaintiff. The opinion leaves open the possibility that on remand the Government may be able to prevail on a discretionary function theory or on the ground that certain administrative relief available under the Housing Act to individuals such as plaintiff constitutes an exclusive remedy; nevertheless, the Court's decision appears likely to encourage increased litigation

CIVIL DIVISION
Assistant Attorney General J. Paul McGrath

against FmHA as well as against numerous Government agencies that conduct inspection activities in many different contexts.

Attorneys: Anthony J. Steinmeyer (Civil Division)
FTS (633-3388)

Margaret E. Clark (Civil Division)
FTS (633-5431)

Pegues v. Mississippi State Employment Service, _____ F.2d _____ No. 80-3212 (5th Cir. March 11, 1983). D.J. # 145-10-171.

TITLE VII: FIFTH CIRCUIT HOLDS THAT PLAINTIFFS FAILED TO ESTABLISH THAT CERTAIN VOCATIONAL APTITUDE TESTS DEVELOPED AND SUPPLIED BY THE DEPARTMENT OF LABOR HAD A RACIALLY DISPARATE IMPACT, AND, THEREFORE, PLAINTIFFS FAILED TO ESTABLISH A PRIMA FACIE CASE OF DISCRIMINATION AGAINST FEDERAL DEFENDANTS.

A class of black and female job applicants brought a Title VII suit in 1972 claiming discrimination by the Bolivar County Office of the Mississippi State Employment Service in classifying and referring them for job openings. Plaintiffs also named various Federal entities as defendants, contending that the vocational aptitude tests developed by the Labor Department and supplied to the state employment service had a racially discriminatory impact and that the use of the tests violated Title VII. The district court ruled against plaintiffs on all issues. The Fifth Circuit has just affirmed the district court's ruling in favor of the Federal defendants, while reversing the district court regarding certain claims against the state defendants. With regard to plaintiffs' claims against the Federal defendants, the court held that the plaintiffs had failed to establish that the use of the tests had a disparate impact on blacks. Consequently, plaintiffs failed to establish a prima facie case, and the court did not reach the issue of whether the tests had been shown to be job-related.

Attorneys: William Kanter (Civil Division)
FTS (633-1597)

John Hoyle (Civil Division)
FTS (633-3547)

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

United States v. Kaiyo Maru No. 53, Nos. 81-3273 and 81-3293 (9th Cir. Feb. 22, 1983). D.J. # 90-3-10-245.

FISHERY CONSERVATION AND MANAGEMENT ACT: WARRANTLESS SEARCH AND SEIZURE OF VESSEL SUSTAINED; FOURTH AMENDMENT NOT VIOLATED.

A party from a Coast Guard cutter, acting without a warrant, boarded and searched a Japanese vessel fishing in American territorial waters and discovered an illegal catch of fish. The vessel was seized and escorted to an American port and the Government initiated a civil action against the vessel under the Fishery Conservation and Management Act ("FCMA"), 16 U.S.C. 1821, 1857. The district court imposed a civil penalty of $450,000, rejecting the Government's contention that the penalty must equal the full value of the vessel. The district court also rejected the defendants' assertion that the FCMA does not authorize warrantless searches and that the warrantless search and seizure violated the Fourth Amendment. The Government appealed and the defendants cross-appealed.

The court of appeals affirmed. First, the court held that the FCMA contemplates routine warrantless inspections or searches and seizures as part of the enforcement scheme of the Act. Second, the court ruled that, under the FCMA, foreign fishing had become a pervasively regulated industry and, accordingly, no warrant is required under the Fourth Amendment for periodic boardings of foreign fishing vessels to determine compliance with the Act and applicable fishing regulations. Third, the court determined that the seizure had been accomplished with Fourth Amendment requirements. Fourth, the court found that the procedures set forth in Fed.R.Civ.P. C for perfecting the "arrest" of a vessel met due process requirements. Finally, the FCMA authorizes a district judge to impose a civil penalty for less than the amount of the value of the vessel, although, in such an event, the Secretary of Commerce may "stiffen the consequences of illegal fishing by resort to administratively imposed permit sanctions and fines."

Attorney: Donald A. Carr (Land and Natural Resources Division) FTS (724-7371)

Attorney: Robert L. Klarquist (Land and Natural Resources Division) FTS (633-2731)

Sierra Club v. Corps of Engineers (Westway), Nos. 82-6125, et seq. (2d Cir. Feb. 25, 1982). D.J. # 90-5-1-4-139.

IMPOSITION OF SPECIAL MASTER VACATED.

In an 86-page opinion, the court of appeals affirms most of the district court's holdings on the merits, including its holdings that the Westway EIS was inadequate in its treatment of fisheries and that the Corps' grant of a Section 404 permit was improper. On the question of relief, the court relieves the agencies of some of the intrusive measures, such as the special master, imposed by the district court in connection with producing a supplemental EIS, but affirms an extensive record-keeping requirement.

Attorney: David C. Shilton (Land and Natural Resources Division) FTS (633-5580)

Attorney: Dirk D. Snel (Land and Natural Resources Division) FTS (633-4400)

Westlands Water District v. United States, No. 81-4500 (9th Cir. March 1, 1983). D.J. # 90-1-2-1147.

INTERVENTION BY ENVIRONMENTAL ORGANIZATION DENIED.

The Environmental Defense Fund (EDF) appealed from an order of the district court denying its application for intervention as of right and for permissive intervention in a lawsuit brought by a water district against the United States. EDF had argued that a victory for the water district would result in less water being available for the Sacramento-San Joaquin Delta, resulting in lowered water quality. The court of appeals stated that while EDF and its members had an "interest" in the extent of the right of the water district to export water from the Delta, it was an interest shared by "a substantial portion of the population of northern California." Further, EDF's interest was not a "legally protectible interest" because it was not founded on the contracts at issue in the water district's lawsuit, but upon EDF's view of enlightened public policy. Thus, EDF's concerns were more appropriate for resolution by the executive or legislative branches, not by a court in the context of a contract dispute.

Attorney: David C. Shilton (Land and Natural Resources Division) FTS (633-5380)

Attorney: Anne S. Almy (Land and Natural Resources Division) FTS (633-4427)

Pacific Legal Foundation v. Watt, Nos. 82-5459 and 82-6013 (9th Cir. March 9, 1983). D.J. # 90-5-1-1-1127.

EPA NOT REQUIRED TO CONSULT UNDER ENDANGERED SPECIES ACT ON SEPARATE PROJECT STILL IN PLANNING STAGE.

The district court granted summary judgment for Pacific Legal Foundation (PLF) on its claims that EPA failed to follow the procedural requirements of the Endangered Species Act and NEPA before funding various sludge management projects, in the Los Angeles area. The court of appeals, in a memorandum opinion, reversed and ordered that judgment be entered on behalf of defendants. The court first found that PLF had standing, noting that it "impose[d] a relatively low threshold with respect to environmental litigation in general and the Endangered Species Act in particular." The court next found that EPA's partial compliance with the district court's injunction did not moot the appeal since "mere obedience to a judgment does not render a case moot." On the merits issues, the court ruled that EPA, having once engaged in Endangered Species Act consultation with respect to a project, did not have to reinitiate consultation when it made non-substantial modifications to the project. The court noted that EPA had obtained the Fish and Wildlife Service's concurrence that further consultation was unnecessary, and that that agency's views were entitled to deference. The court also ruled that the district court erred by imposing Endangered Species Act consultation requirements on a separate project which was merely in the planning stage. The court also reversed the imposition of consultation requirements on several projects which had been considered by EPA but which had not been approved or funded. The propriety of the district court's order requiring EPA to take action on an NPDES permit application within six months was found to be moot, as the permit was granted while the appeal was pending. Finally, the court affirmed the district court's ruling that PLF's NEPA claims against a sludge management EIS were barred by res judicata.

Attorney: David C. Shilton (Land and Natural Resources Division) FTS (633-5580)

Attorney: Dirk D. Snel (Land and Natural Resources Division) FTS (633-4400)

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TAX DIVISION
Assistant Attorney General Glenn L. Archer, Jr.

Richard Davidson v. James S. Brady, et al., No. G-81-239 (W.D. Mich. March 16, 1983). D.J. # 5-38-801.

DISTRICT COURT DISMISSED SECTION 7217 DAMAGE SUIT AGAINST FORMER UNITED STATES ATTORNEYS FOR USE OF TAX RETURN INFORMATION IN SENTENCING PROCEEDING

On March 16, 1983, Judge Richard A. Enslen dismissed this $1 million damage action under 26 U.S.C. §7217 for improper disclosures of tax return information against two former United States Attorneys, and two unknown Internal Revenue Service employees, finding that the complaint did not state a claim upon which relief could be granted.

While the primary basis for the dismissal was the court's conclusion that the disclosures at issue were authorized by 26 U.S.C. §6103, the court also stated, in a significant footnote, that it appeared the prosecutors were immune from this lawsuit under the doctrine of prosecutorial immunity. The Government had argued this point in its motion papers, and this is apparently the first time that any court has addressed the question of whether Department of Justice employees may be immune from suits under §7217.

The damage suit arose from a sentencing memorandum filed by the United States Attorney, which sought to establish that a criminal defendant (Solomon) had lied in the presentence financial statement he had filed with the court. Prosecutors attached to their sentencing memorandum a financial statement filed by Davidson (the plaintiff here) with the Internal Revenue Service in an attempt to settle an unrelated civil tax liability. This document contained a statement which refuted Solomon's presentence financial statement.

The complaint in this damage suit alleged that the filing of the sentencing memorandum, and the original transmittal of Davidson's financial statement from the Internal Revenue Service to the United States Attorney, were both illegal disclosures.

After a lengthy analysis, the court found that the filing of the sentencing memorandum was authorized by

26 U.S.C. §6103(h)(4)(C), and that the transmittal of Davidson's financial statement by the Internal Revenue Service was authorized by 26 U.S.C. §6103(h)(2)(C). Further, the court noted that the prosecutors were obliged to file Davidson's financial statement with the sentencing court, pursuant to Fed.R.Crim.P. 32(c), in order to bring Solomon's fraud to the court's attention.

Attorney: Robert L. Gordon (Tax Division)
FTS (724-6438)

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Federal Rules of Criminal Procedure

Rule 35(b). Reduction of Sentence.

Defendant and four co-defendants filed timely motions under Rule 35(b) for a reduction in their sentences. On the ground that justice would be better served by a contemporaneous consideration of all of the Rule 35 motions, the district court delayed action on these motions for ten months pending disposition of a concurrent §2255 petition filed by one of the co-defendants. When the defendant's sentence was subsequently reduced pursuant to the Rule the Government appealed, claiming that the court's reliance on United States v. Mendoza, 581 U.S. 88 (1978) as a basis for its discretion to extend, in certain circumstances, the 120 day time period of Rule 35, was no longer appropriate in light of the Supreme Court's decision in United States v. Addonizio, 442 U.S. 178 (1979). The Government contended that language in Addonizio made compliance with the time period strictly jurisdictional, and was a clear rejection of the more expansive interpretation of the Rule found in Mendozo.

The court of appeals discussed the holding in Addonizio and concluded that the language imposing strict compliance with the time period was dictum, and inapplicable to the facts in the present case. There, the Court was concerned with the district court's power to reduce a sentence as a substitute for consideration of parole by the Parole Board. This was a further interpretation of the Mendoza principle that only under appropriate circumstances may the sentencing court use its discretion to extend the 120 day period. Here, the delay was reasonable, did not intervene in matters committed to the authority of the parole board, and thus was a proper exercise of the court's discretion.

(Affirmed.)

United States v. Joseph E. Krohn, No. 82-3262(5th Cir. March 21, 1983).

U.S. ATTORNEYS' LIST EFFECTIVE APRIL 15, 1983

UNITED STATES ATTORNEYS

DISTRICT	U.S. ATTORNEY
Alabama, N	Frank W. Donaldson
Alabama, M	John C. Bell
Alabama, S	J. B. Sessions, III
Alaska	Michael R. Spaan
Arizona	A. Melvin McDonald
Arkansas, E	George W. Proctor
Arkansas, W	W. Asa Hutchinson
California, N	Joseph P. Russoniello
California, E	Donald B. Ayer
California, C	Stephen S. Trott
California, S	Peter K. Nunez
Colorado	Robert N. Miller
Connecticut	Alan H. Nevas
Delaware	Joseph J. Farnan, Jr.
District of Columbia	Stanley S. Harris
Florida, N	W. Thomas Dillard
Florida, M	Robert W. Merkle, Jr.
Florida, S	Stanley Marcus
Georgia, N	Larry D. Thompson
Georgia, M	Joe D. Whitley
Georgia, S	Hinton R. Pierce
Guam	David T. Wood
Hawaii	Daniel A. Bent
Idaho	Guy G. Hurlbutt
Illinois, N	Dan K. Webb
Illinois, S	Frederick J. Hess
Illinois, C	Gerald D. Fines
Indiana, N	R. Lawrence Steele, Jr.
Indiana, S	Sarah Evans Barker
Iowa, N	Evan L. Hultman
Iowa, S	Richard C. Turner
Kansas	Jim J. Marquez
Kentucky, E	Louis G. DeFalaise
Kentucky, W	Ronald E. Meredith
Louisiana, E	John Volz
Louisiana, M	Stanford O. Bardwell, Jr.
Louisiana, W	Joseph S. Cage, Jr.
Maine	Richard S. Cohen
Maryland	J. Frederick Motz
Massachusetts	William F. Weld
Michigan, E	Leonard R. Gilman
Michigan, W	John A. Smietanka
Minnesota	James M. Rosenbaum
Mississippi, N	Glen H. Davidson
Mississippi, S	George L. Phillips
Missouri, E	Thomas E. Dittmeier
Missouri, W	Robert G. Ulrich

UNITED STATES ATTORNEYS

DISTRICT	U.S. ATTORNEY
Montana	Byron H. Dunbar
Nebraska	Ronald D. Lahners
Nevada	Lamond R. Mills
New Hampshire	W. Stephen Thayer, III
New Jersey	W. Hunt Dumont
New Mexico	William L. Lutz
New York, N	Frederick J. Scullin, Jr.
New York, S	John S. Martin, Jr.
New York, E	Raymond J. Dearie
New York, W	Salvatore R. Martoche
North Carolina, E	Samuel T. Currin
North Carolina, M	Kenneth W. McAllister
North Carolina, W	Charles R. Brewer
North Dakota	Rodney S. Webb
Ohio, N	J. William Petro
Ohio, S	Christopher K. Barnes
Oklahoma, N	Francis A. Keating, II
Oklahoma, E	Gary L. Richardson
Oklahoma, W	William S. Price
Oregon	Charles H. Turner
Pennsylvania, E	Peter F. Vaira, Jr.
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Pennsylvania, W	J. Alan Johnson
Puerto Rico	Daniel F. Lopez-Romo
Rhode Island	Lincoln C. Almond
South Carolina	Henry Dargan McMaster
South Dakota	Philip N. Hogen
Tennessee, E	John W. Gill, Jr.
Tennessee, M	Joe B. Brown
Tennessee, W	W. Hickman Ewing, Jr.
Texas, N	James A. Rolfe
Texas, S	Daniel K. Hedges
Texas, E	Robert J. Wortham
Texas, W	Edward C. Prado
Utah	Brent D. Ward
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Virginia, E	Elsie L. Munsell
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Washington, W	Gene S. Anderson
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Wisconsin, W	John R. Byrnes
Wyoming	Richard A. Stacy
North Mariana Islands	David T. Wood

MARCH 29, 1983

MEMORANDUM FOR: All United States Attorneys and
Assistant United States Attorneys

FROM: William P. Tyson
Director

SUBJECT: United States Attorneys and Assistant United States Attorneys Carrying of Law Enforcement Type Identification Badges and Accompanying Agents on Raids

The purpose of this memorandum is to remind you of the provision of DOJ Order 2610.1A, December 27, 1979, which limits the use of law enforcement type badges by Department of Justice employees. The provision states:

> IDENTIFICATION BADGES. Only Department law enforcement employees who are authorized by law to carry firearms and make arrests as part of their official duties may be issued or carry on their persons law enforcement identification badges. Authorized badges will remain the property of the U.S. Government, and will be controlled and protected against unauthorized use, using the same guidelines that are established for identification documents.

Memorandum

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VOL. 31 APRIL 15, 1983 NO. 7

Subject: New Form for Application for Release of Right of Redemption in Respect of Federal Tax Liens

Date: FEB 10 1983

To: United States Attorneys

From: Glenn L. Archer, Jr.
Assistant Attorney General
Tax Division

Attached is a copy of Form OBD-225, Application for Release of Right of Redemption in Respect of Federal Tax Liens, which replaces Form DOJ-108.

The major change on the form is in Part B of the instructions and sets forth the current redelegation to United States Attorneys of the authority to release rights of redemption in respect of federal tax liens. As set forth in Tax Division Directive No. 30, and in Part B of the Instructions to Form OBD-225, the United States Attorney, with the concurrence of the Internal Revenue Service, may accept an application to release a right of redemption involving (1) real property on which is located a single-family residence and (2) all other real property having a fair market value not exceeding $60,000 [increased from $10,000]. The consideration paid for the release must be equal to the value of the right of redemption or $50, whichever is greater. The limitations as to value or use of property and consideration to be paid do not apply in those cases in which the release is requested by the Veterans Administration or any other federal agency. Tax Division Directive No. 30 is set out in Title 6 of the United States Attorneys' Manual, Chapter 6-4.140.

I would appreciate your bringing this new form to the attention of your legal and nonlegal personnel who will have responsibility over this matter.

Copies of Form OBD-225 can be requisitioned in the usual manner.

U.S. Department of Justice

Application for Release of Right of Redemption in Respect of Federal Tax Liens

(See instructions on reverse)

Title of Case (Give exact and complete data)

_____ hereby makes application for the release of the described property from the right of redemption of the United States arising under Title 28, United States Code, Section 2410 (c), or under applicable state law where the United States is joined as a party, and represents as follows:

PART A—TO BE EXECUTED BY APPLICANT

1. PROPERTY DATA

Address	Description
Type	**Use**

2. APPRAISAL ACTION

Date	Name of Appraiser	Fair Market Value	Forced Sale Value

3. FORECLOSURE ACTION

Date of Sale	Name and Address of Purchaser	Purchase Price

4. ENCUMBRANCES AND CHARGES TO BE CONSIDERED

Date	Description	Amount	Date and Place of Filing

5. FEDERAL TAX LIENS

Amount	Name and Address of Taxpayer	Date and Place Filing

6. OTHER PERTINENT INFORMATION

7. STATEMENT OF APPLICANT

This application is accompanied by a cashier's check or certified check payable to "Internal Revenue Service", which is hereby offered for release of the right of redemption of the United States. Should this application be rejected, the return of such cashier's or certified check will be accepted without interest.
I declare, under the penalties of perjury, that this application (including any accompanying schedules, exhibits, affidavits, and statements) has been examined by me and to the best of my knowledge and belief is true, correct and complete.

Name of applicant (Type or Print)	Amount of Check	Date
Address	**Signature**	

PART B—FOR GOVERNMENT USE

Release Recommended ☐ Yes ☐ No	Reasons for recommending rejection, if any.		
Date	Signature (District Director, Internal Revenue Service)		
Release Recommended ☐ Yes ☐ No	Reasons for recommending rejection, if any.		
Date	Signature (Regional Counsel, Internal Revenue Service)		
Release Recommended ☐ Yes ☐ No	D. J. File Number	CMN	Signature of United States Attorney
FOR USE OF OFFICIAL AUTHORIZED TO TAKE FINAL ACTION: Application is ☐ Accepted ☐ Rejected	Date		Signature of Appropriate Official

Instructions Regarding Applications for Releases of Rights of Redemption

PART A—To be executed by applicant

The application on obverse side of this sheet is to be completed in applying for any release of right of redemption of United States in respect of federal tax liens arising under 28 U.S.C. Section 2410(c), or under state law when the United States is joined as a party. In making application for such release applicant must complete obverse side hereof and submit original and three (3) copies to the United States Attorney for the district in which property subject to right is located in accordance with the following instructions:

1. Property Data—State address and legal description of property as it appears in the foreclosure or quiet title complaint. Attach additional sheets if necessary. Indicate type and use of property. As to type, indicate whether it is commercial or residential; as to use, indicate whether it is personal residence, rental property, etc.

2. Appraisal Action—State fair market value and forced sale value as of current date as established by written appraisals of two (2) disinterested persons qualified to render appraisals. Written appraisals in triplicate must accompany application, together with brief statement setting forth each appraiser's qualifications. Veterans' Administration or other Federal Agency may submit its own appraised value in lieu of two written appraisals.

3. Foreclosure Information—Give date of foreclosure sale, name and address of purchaser, and purchase price. Attach copy of decree of foreclosure or other judicial proceeding.

4. Encumbrances and Charges to be Considered—List all encumbrances and charges which applicant requests be taken into consideration in valuing the right of redemption, in order of priority, together with sufficient information to establish or identify such priority. Attach additional sheets if necessary in supplying the information requested.

5. Federal Tax Liens—List applicable notices of federal tax liens in chronological order, using additional sheets if necessary to supply the information requested.

6. Other Pertinent Information—List any other information which, in the opinion of the applicant, might have a bearing upon the determination to be made.

7. This applicant must be accompanied by a cashier's or certified check payable to the "Internal Revenue Service" in an amount equal to the value of the right of redemption of the United States as best estimated by the applicant based on the information contained in this application, but in no event can the consideration offered for the release be less than $50.00 (except in the case of applications by agencies of the United States Government). The remittance shall be retained by the United States Attorney, and should this application be rejected such cashier's or certified check will be returned without interest.

PART B—For Government Use

The United States Attorney will forward original and two copies of application together with one set of the appraisals to District Director of Internal Revenue for his verification and recommendation. The Internal Revenue Service will return the original application to the United States Attorney who must satisfy himself that amount offered is at least equal to the value of right of redemption of the United States. He may take into consideration his own experience and familiarity with this or similar property in the area. Also, he may take into consideration forced sale value when it bears a realistic relationship to fair market value. United States Attorney upon satisfying himself that acceptance of application is in best interest of the United States and with concurrence of Internal Revenue Service is authorized to accept any application to release right involving (1) real property on which is located a single-family residence, (2) all other property having fair market value not in excess of $60,000, and (3) any application of Veterans' Administration or any other Federal Agency. If the United States Attorney concludes that acceptance of any application is not in best interest of the United States, he is authorized to reject such application. When the United States Attorney takes final action, a *completed copy* of the application should should be sent to the Tax Division, U.S. Department of Justice. When the United States Attorney is not authorized to take final action, the *original* application and all appraisals and schedules which he has should be sent to the Tax Division.