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

POINTS TO REMEMBER

Asset Seizures And Forfeitures

Recently, the Deputy Attorney General approved six proposals to improve the Department of Justice's utilization of asset seizures and forfeiture initiatives. This action was taken in response to recommendations made by the Department of Justice Joint Task Force on Asset Seizures and Forfeitures.

Briefly, The Deputy Attorney General approved the following actions:

1) Establish a national forfeiture management organization in the United States Marshals Service with responsibility for overall management of seized assets which are subject to administrative or judicial forfeiture.

2) Establish a "no-year" appropriation as an independent source of funding for national forfeiture management operations under the United States Marshals Service.

3) Establish a department-wide forfeiture case tracking and inventory data collection capability under the United States Marshals Service.

4) Create a special unit in the Criminal Division to respond to United States Attorneys' offices and investigative agencies' requests for legal advice and policy guidance on forfeitures.

5) Propose amendments to Titles 18, 19, and 21 of the United States Code, to:

   - Eliminate "automatic" judical review of forfeiture cases by lifting the current $10,000 ceiling on administrative forfeitures;

   - Allow for the forfeiture of "substitute" assets in cases where property that has been identified as forfeiture cannot be located for seizure;

- Strengthen temporary restraining order provisions to allow for a preindictment "freeze" of forfeitable assets and, when necessary, the physical seizure of property;

- Provide authority to share federally forfeited assets, and proceeds from the sale of assets, with state and local agencies;

- Provide express authority to seize and forfeit real estate.

6) Amend existing administrative regulations to provide authority and procedures for disposition of abandoned and unclaimed property.

The special advice unit, described in number four above, is currently in full operation. This office, the Asset Forfeiture Office, is under the supervision of Mr. John Yoder, Director, (FTS 272-6420). For further information regarding this matter, you may contact Ms. Susan A. Nellor, Assistant Director, Legal Services, at FTS 633-4024.

(Executive Office)

Government Participation In Sentencing

Recommendation 14 of the Report of the Attorney General's Task Force on Violent Crime states that:

> The Attorney General should require, as a matter of sentencing advocacy, that Federal prosecutors assure that all relevent information about the crime, the defendant and, where appropriate, the victim is brought to the court's attention before sentencing. This will help ensure that judges have a complete picture of the defendant's past conduct before imposing sentence.

The Department's Principles of Federal Prosecution (Part G at pages 45-56), set forth in the United States Attorneys' Manual 9-27.000, fully explains these responsibilities. In particular, all Department prosecutors should:

1) File, before the allocution, a sentencing memorandum with the court and with the probation office for use in the presentence investigation report;

2) Review any material in the presentence report that is shown to the defendant or the defendant's counsel and advise the court by memorandum of any inaccuracies or other deficiencies;

3) Exercise their prerogative to speak to the court at the sentencing except where there is a sound reason for Government silence;

4) Advocate fully the right of all victims on the issue of restitution unless such advocacy would unduly prolong or complicate the sentencing proceeding;

5) Insure that the USA Form 792 (Report on Convicted Prisoners) is forwarded to the appropriate institution promptly after sentencing; and

6) Notify the Associate Attorney General and the Office of Public Affairs, through the Director, Executive Office for United States Attorneys, of a sentence imposed in a significant case which is clearly less severe than is warranted by the facts of the case or the background of the defendant.

(Executive Office)

Insanity Defense Legislation

At the start of the present (98th) Congress, the Department decided to modify its previously taken position on the insanity defense. In testimony before both the House and Senate Judiciary Committees this year, representatives of the Department have advocated the enactment of legislation which makes three significant changes in the insanity defense as it is presently applied in Federal courts.

The first change is the elimination of the volitional portion of the ALI-Model Penal Code cognitive-volitional test for insanity that has been adopted with some variations in all the circuits. Under the proposal we favor, the insanity defense would only obtain where the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature, quality or wrongfulness of his acts. Mental disease or defect would not otherwise constitute a defense. Specifically, proof that the defendant lacked the substantial capacity to conform to the law's requirements -- the so-called volitional arm of the cognitive-volitional test -- would not establish the defense. We favor the elimination of the volitional prong of the present test because mental health professionals recognize that it is very difficult if not impossible to determine whether a person lacked the ability to control his conduct because of a mental disease or defect.

There is a much higher degree of consensus among these professionals over whether a person could recognize or appreciate the nature of his acts than over whether he could control them. As stated by the American Psychiatric Association in describing its problem with determining whether a person could exercise volition over his acts: "The line between an irresistible impulse and an impulse not resisted is probably no sharper than that between twilight and dusk."

The second change in present law is to shift the burden of proof of insanity to the defendant who must show by clear and convincing evidence that a severe mental disease or defect rendered him unable to appreciate the nature and quality or wrongfulness of his acts.

The final change is an amendment to Rule 704 of the Federal Rules of Evidence to prohibit an expert witness from stating an opinion or inference as to whether the defendant's state of mind or mental condition constituted a defense.

These modifications of the insanity defense are contained in Title IV of S. 1762, The Comprehensive Crime and Control Act of 1983, which the Department strongly supports and which has been reported to the full Senate by the Judiciary Committee. They are also contained in H.R. 3336, expected to be considered this Fall by the full Judiciary Committee in the House. However, the Department has suggested a number of amendments to the House bill's treatment of several issues relating to procedures to determine competency and to handle the commitment and treatment of persons found not guilty by reason of insanity.

The Department's support for this modification of the insanity defense has replaced its previous support in the 97th Congress of the abolition of the defense, commonly called the mens rea approach. Under mens rea, insanity would only be a defense if the defendant's mental condition was such that the Government could not prove a statutorily prescribed mental element, such as that the defendant acted knowingly or willfully. At least one United States Attorney's Office unsuccessfully urged the adoption of the mens rea approach in district court after consultation with the Criminal Division. It should be kept in mind that this is no longer the position of the Department and, in any event, it is very doubtful that a court would today adopt such a change without legislation.

(Criminal Division)

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 with the Supreme Court on or before November 19, 1983, in Lorenzetti v. United States. The issue is whether the court of appeals erred in holding that the Government's statutory right (under the Federal Employees Compensation Act, 5 U.S.C. 8131 and 8132) to recover benefits paid to an injured employee from damages the employee recovers from a third-party tortfeasor is effectively nullified as a result of the Pennsylvania No-Fault Insurance Act, which prohibits recovery of damages for lost wages and medical expenses from a tortfeasor.

A petition for a writ of certiorari with the Supreme Court in United States v. Robinson. The issue is the prosecutor's right of reply to improper argument by defense counsel.

The Solicitor General has filed a petition for:

A writ of certiorari with the Supreme Court in INS v. Lopez-Mendoza, No. 83-491. The issue is whether the exclusionary rule applies in civil deportation proceedings.

A writ of certiorari with the Supreme Court in NLRB v. United Parcel Service, Inc., No. 83-453. The issue is the same as that presented in NLRB v. Transportation Management Corp., No. 82-168 (June 15, 1983), recently decided in the Board's favor.

A writ of certiorari with the Supreme Court in United States v. Sharpe. The issues are whether law enforcement officers may temporarily detain an individual reasonably suspected of criminal activity for a brief period while investigating the suspected criminal activity; and whether the detention of respondent, if unduly extended, requires suppression of marijuana discovered in his vehicle.

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Assistant Attorney General J. Paul McGrath

Heckler v. Mario Lopez, et al., _____ U.S. _____
No. A-145 (Sept. 9, 1983). D.J. # 137-12C-1015

JUSTICE REHNQUIST GRANTS STAY OF INJUNCTION REQUIRING REINSTATEMENT OF SOCIAL SECURITY DISABILITY BENEFITS IN NINTH CIRCUIT CLASS ACTION SUIT.

This class action suit was instituted in the District Court for the Central District of California to challenge the Secretary of Health and Human Services' failure to follow two Ninth Circuit decisions in terminating the payment of medical disability benefits under Title II and Title XVI of the Social Security Act to recipients in the states within the Ninth Circuit. In those decisions -- Finnegan v. Matthews, 641 F.2d 1340 (1981) and Patti v. Schweiker, 669 F.2d 582 (1982) -- the Ninth Circuit held that the Secretary cannot terminate the payment of such benefits without producing evidence that a recipient's medical condition has improved since he previously was declared disabled. The Secretary contended that those decisions are contrary to agency regulations, and that without producing evidence of medical improvement she can terminate benefits whenever current evidence indicates that a prior recipient is not now disabled. The plaintiffs claimed that the Secretary's "non-acquiescence" with these Ninth Circuit precedents violates constitutional principles of separation of powers and deprives them of due process and equal protection.

The district court issued a preliminary injunction which restrains the Secretary from disregarding the medical improvement standard in future cases and directs the Secretary to reinstate benefits to all recipients whose benefits were terminated within the last two years without proof of medical improvement. Following the reinstatement of benefits, the Secretary can conduct new hearings at which she must make a showing of medical improvement before terminating benefits. We sought a stay in the court of appeals of only that portion of the district court's order which requires reinstatement of benefits. When such a partial stay was denied, we sought identical relief from the Supreme Court. During the interim, the Secretary notified 34,357 members of the class that they could apply for reinstatement of benefits.

Justice Rehnquist granted a temporary stay on September 1, 1983 and a stay pending appeal on September 9, 1983. Justice Rehnquist assumed that "the scope of the district court's

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injunction would prompt review of the injunction by at least four members of [the] Court should the court of appeals affirm it without modification," inasmuch as the injunction "significantly interferes with the distribution between administrative and judicial responsibility for enforcement of the Social Security Act which Congress has established" (Sl. op. 3-4). He also noted that the case raises jurisdictional issues similar to those which will be decided in Heckler v. Ringer, 697 F. 2d 1291 (9th Cir. 1981), cert. granted, 51 U.S.L.W. 3914 (June 28, 1983, No. 82-1772) and Heckler v. Day, 685 F.2d 19 (2d Cir. 1982), cert. granted, 51 U.S.L.W. 3770 (April 26, 1983, No. 82-1371). The plaintiffs have now sought a vacation of the stay from the full Court.

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Gaspard v. United States and Sheehan v. United States, ____ F.2d ____ Nos. 82-3428 (5th Cir. Sept. 6, 1983).
D.J. # 157-32-802

FIFTH CIRCUIT HOLDS THAT THE FERES DOCTRINE AND THE RATIONALE BEHIND THE DOCTRINE BARS FORMER SERVICEMEN'S AND THEIR WIVES' SUITS AGAINST THE UNITED STATES AND MILITARY OFFICIALS FOR INJURIES ARISING OUT OF THE SERVICEMEN'S EXPOSURE TO RADIATION DURING THEIR MILITARY SERVICE.

Two former servicemen brought these actions in district court seeking recovery under the Federal Tort Claims Act for injuries allegedly caused by their exposure to radiation during their participation in atmospheric weapons tests during the early 1950's at Camp Desert Rock Flat, Nevada. The wives of both made separate claims alleging loss of consortium and emotional distress. One serviceman also filed a Bivens claim against

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military and civilian officials of the Atomic Energy Commission. Both district courts dismissed the claims under the Feres doctrine. The Bivens claim was also dismissed in reliance upon the Third Circuit's en banc decision in Jaffee v. United States.

In a unanimous decision, the court of appeals accepted all of our arguments in favor of affirmance. The court of appeals rejected the servicemen's attempt to bring their claim outside the Feres doctrine by alleging a separate post-service tort arising out of the Government's independent duty to warn them of the danger of radiation exposure as scientific knowledge increased. The court of appeals agreed with our argument that the pleadings evidenced a duty to warn and treat originating in-service and merely continuing after the servicemen were discharged, placing the claims squarely within the Feres bar. The court noted that there was no allegation that the Government's knowledge of the harmful effects of radiation exposure increased to the point where a new independent duty to warn was created. Since a crucial element of their claim was the injury inflicted upon their husbands, the court also agreed with our argument that the wives' claims were barred by Feres.

The court also held that the rationale of Feres barred the serviceman's Bivens claims, relying upon the Supreme Court's recent decision in Chappell v. Wallace. Dismissal of the claims against the civilian AEC officials was also held to be proper since an inquiry into their involvement in the testing would also necessitate an investigation into military affairs.

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CIVIL RIGHTS DIVISION
Assistant Attorney General Wm. Bradford Reynolds

United States v. Warren, No. 83-33-CR-T-8 (M.D. Fla. Aug. 30, 1983). D.J. # 50-17M-76.

DEFENDANTS WHO OPERATED MIGRANT LABOR CAMPS SENTENCED AFTER 18 U.S.C. 1584 (INVOLUNTARY SERVITUDE) AND 18 U.S.C. 371 (CONSPIRACY) CONVICTIONS.

Sentencing was held for defendants Willie Warren, Sr., Willie Warren, Jr., Michael Moore and Richard Warren, who were convicted of violating 18 U.S.C. 1584 (involuntary servitude) and 18 U.S.C. 371 (conspiracy). Willie Warren, Sr., received 10 years imprisonment, Willie Warren, Jr., received 15 years imprisonment, Richard Warren received 5 years imprisonment and Michael Moore received 5 years imprisonment. In addition, all defendants received 5 years probation. The defendants, who operated migrant labor camps in North Carolina and Florida, were alleged to have held migrants Len Gaston, who was beaten with a rubber hose, Michael Davis and Richard Simmons in a condition of involuntary servitude and prevented them from leaving the labor camp operated by the defendants. Three of the four defendants were incarcerated immediately after the jury verdict.

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In re Donald, No. 83-00028 (S.D. Ala. Aug. 31, 1983) D.J. # 144-3-994.

FEDERAL GRAND JURY HEARS ADDITIONAL TESTIMONY IN CASE INVOLVING HANGING OF 19-YEAR-OLD BLACK.

A Federal grand jury heard additional testimony in the case which involves a 19-year-old black male, Michael Donald, who was discovered dead and hanging by the neck in a classic hangman's noose from a tree in a poor residential area in Mobile, Alabama on March 21, 1981. The autopsy revealed that he had been beaten, slashed with a sharp object and strangled to death before being hung from the tree. Defendant James L. Knowles, a former KKK member, pleaded guilty to violating 18 U.S.C. 241 resulting in the death of Donald and has agreed to testify for the Government. Henry Hays, another KKK member, was arrested on civil rights charges, but Federal prosecution has been deferred in light of

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the fact that state authorities have instituted capital murder charges against Hays. The Federal grand jury is continuing an investigation into a cross burning at the Mobile County Courthouse on the night of Donald's murder.

Attorney: Albert Glenn (Civil Rights Division)
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United States v. Wiemers, et al., No. EP83-CR-161 (W.D. Tex. Sept. 6, 1983). D.J. # 144-76-2680.

FEDERAL GRAND JURY RETURNS 3-COUNT INDICTMENT AGAINST IMMIGRATION AND NATURALIZATION SERVICE BORDER PATROL AGENTS.

A Federal grand jury returned a three-count indictment, charging defendants Lonnie D. Wiemers and Charles Kern, both then Border Patrol Agents with the Immigration and Naturalization Service, with violating 18 U.S.C. 242 and 2 by allegedly handcuffing, beating and threatening a 12-year-old boy, Jorge Dominguez, as he was jogging home from school. In addition, the defendants are charged with violating 18 U.S.C. 371 and 1512 by allegedly intimidating a grand jury witness, David Offutt, a fellow border patrolman.

Attorney: Enrique Romero (Civil Rights Division)
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In re Chin, (E.D. Mich. Sept. 7 and 8, 1983).
D.J. # 144-37-1096.

FEDERAL GRAND JURY HEARS TESTIMONY IN CASE INVOLVING DEATH OF CHINESE-AMERICAN WHO WAS CLUBBED TO DEATH WITH BASEBALL BAT.

A Federal grand jury heard testimony in the case which involves a Chinese-American, Vincent Chin, who was clubbed to death with a baseball bat on a street in Highland Park, Michigan, on June 19, 1982. Two white men pled guilty in March to state charges of manslaughter in Chin's death and were placed on three years probation. Additional testimony is scheduled for November 2, 1983.

Attorney: Howard Feinstein (Civil Rights Division)
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United States v. City of Gallup, New Mexico, et al., No. 83-1395 -M-Civil (D. New Mex. Aug. 30, 1983). D.J. # 180-49-47.

DEPARTMENT FILES EMPLOYMENT DISCRIMINATION SUIT CHARGING DISCRIMINATION AGAINST AMERICAN INDIANS AND WOMEN IN HIRING.

The Department of Justice filed an employment discrimination suit, charging that the city discriminated against American Indians and women in hiring. The civil suit charges that the city pursues policies and practices which discriminate against Indians and women by failing to recruit or hire Indian applicants on the same basis as Anglo or Hispanic applicants. It also charges the city with using subjective and other selection procedures which have an adverse effect on Indians and women and which have not been shown to be necessary or related to success on the job. The suit states that as of December 1982, the city had about 370 employees of whom 55 (about 15 percent) were Indians and of the 82 sworn positions in the police and fire departments four (about 5 percent) were Indians and one (about 1 percent) was female. The suit further states that according to the 1980 census report the civilian labor force of McKinley County, in which Gallup is located, was about 52 percent Indian and about 41 percent women. Gallup is approximately 130 miles west of Albuquerque and several miles southeast of the largest Indian reservation in the country inhabited mainly by the Navajo Tribe. It has a population of approximately 18,000. The suit asks that the court enjoin the city from discriminating on the basis of race or sex in recruitment, hiring, assignment or transfer of applicants and employees. It also seeks to enjoin the city from failing to hire employees on a racially and sexually nondiscriminatory basis. In addition, it seeks affirmative relief, including back pay and seniority for Indians and women who applied for employment with the city and who were qualified but rejected because of discriminatory policies. The suit names the city; its mayor, Frank Colaianni; and its personnel director, Frank Garcia, as defendants.

Attorney: Eugenia Esch (Civil Rights Division)
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Assistant Attorney General Wm. Bradford Reynolds

Robinson v. Wyrick, No. 82-4197-CV-C-5 (W.D. Mo. Aug. 31, 1983). D.J. # 168-43-12.

DIVISION ATTORNEYS MEET WITH UNITED STATES ATTORNEY REGARDING DEPARTMENT'S POSSIBLE INTERVENTION IN CASE INVOLVING CONDITIONS AT MISSOURI STATE PENITENTIARY.

Civil Rights Division attorneys met with United States Attorney Robert Ulrich regarding the Department's possible involvement or intervention in the case which involves conditions in the Special Management Unit at the Missouri State Penitentiary. It was agreed that the Department would wait a few weeks before initiating discussions with state officials to help bring about a settlement of the case. The delay resulted from a desire to obtain additional information that will not become available for two or three weeks. At that time, division attorneys will coordinate with the United States Attorney before making any concrete decisions on how or under what circumstances to proceed.

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Battle and United States v. Anderson, No. 72-95 (E.D. Okla. Sept. 19, 1983). D.J. # 144-59-200.

HEARING BEGINS REGARDING RIOT AT CONNERS CORRECTIONAL CENTER IN OKLAHOMA.

The hearing involves a series of motions concerning the Court-appointed Fact Finder's Final Compliance Report and the August 29, 1983 riot at the Conners Correctional Center in Hominy, Oklahoma. In preparation for the hearing, the court directed the Department to secure the FBI to conduct an investigation of the circumstances surrounding the Conners riot. Special Agent George Ziegler testified that a serious overcrowding situation involving an inmate population approximately 50% over design capacity, coupled with temperatures in excess of 100° contributed heavily to the riot. Plaintiffs' experts and inmate witnesses confirmed overcrowding, overloaded sanitation, laundry, clothing and food service operations. The Fact Finder, who testified as the court's witness,

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indicated that while professionally operated, the facility had reached its saturation point, subsequently overloading the facility's capability to maintain inmates constitutionally. The hearing is expected to continue with the state's presentation.

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LAND AND NATURAL RESOURCES DIVISION
Acting Assistant Attorney General F. Henry Habicht, II

Southland Royalty Co. v. Navaho Tribe of Indians, Nos. 80-2035, 80-2036, 80-2037, 80-2038, 80-2067 and 80-2159 (10th Cir. Aug. 22, 1983). D.J. # 90-6-1-26.

INDIANS; TRIBE CAN TAX OIL AND GAS LESSEES WITHOUT APPROVAL BY SECRETARY OF THE INTERIOR.

In this action brought by companies holding oil and gas leases on the Navaho Indian Reservation, plaintiffs challenged the right of the Tribe to tax the lessees without the approval of the Secretary of the Interior. The district court, while holding that Federal regulation of mineral leasing on Indian reservations had not preempted the Tribe's taxing authority, held that the tax must be approved by the Secretary. The United States took an appeal from this judgment, while the plaintiffs cross-appealed. The court of appeals, relying on the recent Supreme Court decision in Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982), approved the district court's rejection of the preemption claim. The court of appeals reversed, however, the requirement of Secretarial approval, holding that such a requirement could not be inferred from the Indian Mineral Leasing Act of 1938, 25 U.S.C. 396a-396g, or from the Indian Reorganization Act of 1934, 25 U.S.C. 461-479.

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

United States v. Eastman, No. 82-3450 (9th Cir. Aug. 22, 1983). D.J. # 33-38-386-424.

CONDEMNATION; SCOPE-OF-THE PROJECT RULE DEPENDS ON LANDOWNERS' REASONABLE EXPECTATIONS.

In this condemnation case, the Corps of Engineers planned to acquire two-thirds of a tract owned by the Eastmans. Later, in response to pressure generated by the Eastmans that the Corps was acquiring more land than was needed for the project, the Corps modified the project boundary and acquired only about one-third of that tract. Still later, when turbidity and erosion problems were brought to the Corps' attention (which threatened to abort the project), it became necessary to acquire the remaining two-thirds of that tract. The district court held that under the scope-of-the-project rule of U.S. v. Miller, 317 U.S. 369 (1943), the United States should be charged with enhanced value when it acquired the remaining two-thirds of the

tract. 528 F. Supp. 1177 (D. Ore. 1981). The court of appeals, by a per curiam decision, affirmed, writing that it could not improve the lower court's opinion, which it adopted. The court ruled that the question whether a second taking is within the scope-of-the-project under Miller is to be answered essentially by determining the reasonable expectations of the ordinary landowner. The court did not mention U.S. v. Reynolds, 397 U.S. 1 (1970), upon which the Government relied, which clarifies the Miller rule by explaining that it need only be shown that "during the course of the planning or original construction" it becomes evident that the additional land would "probably be needed for the public use." Id. at 21.

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

Fiedler v. Clark, No. 82-4313 (9th Cir. Aug. 22, 1983). D.J. # 1-689.

JURISDICTION; PRIVATE INDIVIDUAL'S SUIT TO ENJOIN CONTAMINATION OF DAIRY PRODUCTS PROPERLY DISMISSED FOR LACK OF JURISDICTION.

Fiedler, a private individual filed suit against Hawaii's pineapple growers, dairy farmers, dairy processors, the State of Hawaii, and the United States for declaratory and injunctive relief against the contamination of dairy products with the pesticide heptachlor. The district court dismissed for lack of jurisdiction. The Ninth Circuit affirmed. It held: (1) the Declaratory Judgment Act, does not provide an independent basis for suits in Federal court; (2) the Federal Food, Drug and Cosmetic Act, confers jurisdiction on Federal courts, but requires that all such proceedings be brought by the United States, not by a private party such as Fiedler; (3) the Federal Insecticide, Fungicide and Rodenticide Act, as amended (FIFRA), confers jurisdiction on the district court to restrain violations of the Act and grants the EPA and the Attorney General power to enforce the Act but does not state that a private party is precluded from bringing an enforcement action. Under the first two Cort v. Ash, factors (a) plaintiff is not one of the class for whose "especial" benefit the statute was enacted and (b) there is no indication of a legislative intent to create or deny such a remedy; (4) the Hawaii Constitution did not grant private citizens all the authority possessed by the Attorney General of Hawaii to sue

on behalf of all the citizens of Hawaii in environmental cases, and, in any event, states have no power to enlarge or contract Federal jurisdiction.

Attorney: Jacques B. Gelin (Land and Natural Resources Division) FTS (633-2762)

James v. Watt, No. 83-1026 (1st Cir. Aug. 24, 1983). D.J. # 90-2-4-799.

INDIANS; SUPREMACY CLAUSE OF CONSTITUTION DOES NOT PREEMPT STATE APPROVAL OF CONVEYANCE OF INDIANS' LANDS.

Individual Indians who claim an interest in land on Gay Head Peninsula, Martha's Vineyard, Mass., and who, dissatisfied with their Tribe's settlement of a land claim involving the area, filed suit claiming the right to possession of all the land at Gay Head. The district court granted summary judgment against plaintiffs on the ground that the Indian Non-intercourse Act (INA) confers rights on a Tribe or nation, not on individuals, and that plaintiffs' other claims, under the Commerce Clause, the Supremacy Clause, the Fifth and Fourteenth Amendments, were either dependent on their nonintercourse claim or were independently devoid of merit. On appeal, the First Circuit affirmed. First, it ruled that its prior decisions, that the INA applies only to a tribe, were stare decisis on that issue. Second, after an extensive review of cases and legal activities, it concluded that plaintiffs' argument, that the Indian Commerce Clause (in and of itself, without the INA) invalidates the Massachusetts statutes permitting the conveyances in question--the Madison/Marshall "preemptive" theory of the Commerce Clause--is not the law of the land. Finally, the court sustained the district court's denial of plaintiffs' motion to amend their complaint to include the Tribe as a party plaintiff.

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Doria Mining and Engineering Corp. v. Watt, No. 82-6005 (9th Cir. Aug. 25, 1983). D.J. # 90-1-18-1113.

MINING CONTEST; ALLEGATION OF EXTRINSIC FRAUD IN ADMINISTRATIVE PROCEEDING NOT ESTABLISHED.

In the first appeal of this mining contest case, the Ninth Circuit held that the district court had jurisdiction to hear evidence outside the record to consider Doria's claim that the IBLA decision was obtained by fraud. 608 F.2d 1255 (1979). On remand, the district court allowed Doria to try and prove extrinsic fraud. On appeal, the Ninth Circuit held that Doria's proof that contestants' witness, Schroter, was false would be only intrinsic, not extrinsic, fraud. The district court's finding of no extrinsic fraud was affirmed as not clearly erroneous, and his earlier decision that the IBLA's decision was supported by substantial evidence in the record was proper.

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Cultee v. United States, No. 82-3632 (9th Cir. Aug. 26, 1983). D.J. # 90-2-4-775.

INDIAN'S WILL DOES NOT HAVE TO SPECIFICALLY MENTION HIS CHILDREN IN ORDER TO DISINHERIT THEM.

The children of a deceased Quinault Indian sought reversal of the district court's judgment that their father's will, which omitted any mention of them, was valid under Federal statutes governing the disposition of restricted Indian lands. At the district court level, the children had argued that 25 U.S.C. 464 requires that Indian wills comply with the substantive provisions of state law, such as the Washington pretermitted heir statute, if no Federal law governs. The district court held that the validity of Indian wills is determined by 25 U.S.C. 373 which only requires that the will be approved by the Secretary before or after the testator's death. Since the will in question had been approved, the district court granted summary judgment for the Government. The Ninth Circuit affirmed, but held that while Section 464 does not require the incorporation of state

law in the making of Indian wills, it does limit the disposition of restricted Indian property to one of three classes of devises and that if a will approved pursuant to Section 373 devises restricted property to a party not permitted by Section 464, the devise is invalid despite the Secretary's approval. The Ninth Circuit's interpretation of these statutes is consistent with Interior's interpretation and its past practice.

Attorneys: J. Carol Williams (Land and Natural Resources Division) FTS (633-2757)

Jacques B. Gelin (Land and Natural Resources Division) FTS (633-2762)

United States v. Whichard, No. 82-1983 (4th Cir., Aug. 29, 1983). D.J. 90-5-1-1-611.

WETLANDS VIOLATION SUSTAINED AS NOT BEING WITH "WETLANDS" EXCEPTION.

In June 1973 and July 1976, the Government filed actions against the defendant for violations of the Rivers and Harbors Act and the Federal Water Pollution Control Act Amendments. A consent judgment was entered in each case enjoining the defendant from all excavating, dredging and filling activities within waters of the United States, without first obtaining the necessary permits under both statutes. A show cause hearing was held before a magistrate on the Government's motions for adjudication of civil contempt. There, the Magistrate found that three of the areas in dispute were wetlands within the meaning of the FWPCA. He found, however, that two of the areas were adjacent to a small stream which fit the regulatory definition of a headwaters. The magistrate then found that Wichard was not in contempt of the consent decrees since the filling in of those two areas was permitted by the Corps headwaters exception. 33 C.F.R. 323.4-2. The Government appealed, asserting that the permit requirement should be predicated upon the adjacency of the wetlands to the Pamlico River instead of the stream. The Fourth Circuit agreed. The court of appeals reasoned that, since the Magistrate had found that the disputed areas were wetlands within the regulations, and that the stream they border connected with the River, the wetlands areas clearly "neighbor" the Pamlico and accordingly are adjacent to the River. The case was reversed and remanded for the imposition of sanctions upon the defendant.

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Peggy J. Matthews v. United States, No. 82-8111 (11th Cir. Aug. 29, 1983). D.J. # 90-1-1-2624.

ATTORNEYS' FEES UNDER EQUAL ACCESS TO JUSTICE ACT APPLIES TO CASES PENDING ON ACT'S EFFECTIVE DATE, EVEN THOUGH PERFORMED BEFORE THEM.

Matthews sued for removal of a floating boat dock anchored to the U.S.-owned shoreline of Lake Hartwell, Georgia, a Corps of Engineers project. The Corps had permitted this "condominium-style" dock (owned by eleven private individuals, each with a slip) to be attached to lands designated solely for public recreation use under the Corps' lakeshore management plan. In such areas, "private floating recreation facilities are not permitted," while "[c]ommercial concessionaire facilities" serving the public are allowed. 33 C.F.R. 327.30(e)(4)(ii). Although the dock was nominally operated by the Corps' concessionaire, which operated a public marina 3/4 mile away, Matthews contended that the dock was private and its placement therefore illegal. The district court agreed, but declined to order removal of the dock. The court concluded that the equities warranted, instead, relief designed to make the dock "public:" transfer of ownership to the concessionaire, with the slip owners' investment to be treated as prepaid rent at the going rate at the public marina. The district court also concluded that the Corps' litigating position in opposing the dock's removal was "substantially justified," and denied attorneys' fees under EAJA, 28 U.S.C. 2412(d)(1)(A).

On Matthews' appeal, the Eleventh Circuit reversed on both the injunction and attorneys' fees issues. It held that the relief ordered below did not "realistically render" the dock public, and that "Matthews' right to the view from her property weighs more heavily than the hardships caused by requiring" its removal. On the EAJA issues, the court of appeals held that the Corps' litigating position--i.e., defending against removal of a dock whose placement was "a per se violation of the applicable regulations"--was "not reasonable," and remanded with direction that Matthews recover attorneys' fees attributable to the dock issue. (The Corps prevailed in the district court on another issue, not reached by the court of appeals; and Matthews is not

to recover fees on that issue.) The court of appeals allowed fees under EAJA for services rendered before October 1981, but did not discuss or explicitly rule upon our argument that EAJA does not authorize such awards even though it applies to cases pending on its effective date.

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American Motorcyclist Association v. Watt, Nos. 82-5099 and 82-5100 (9th Cir. Sept. 1, 1983). D.J. # 90-1-4-2271.

INJUNCTION DOES NOT AUTOMATICALLY ISSUE, EVEN WHEN NEPA IS VIOLATED.

Section 601 of the Federal Land Policy and Management Act directs the Secretary of the Interior to prepare a comprehensive land management plan for the California Desert Conservation Area ("CDCA"). Accordingly, after preparing an EIS, the Secretary, acting through the Bureau of Land Management, formulated such a plan. The American Motorcyclist Association and the County of Inyo, California, then filed suit seeking to enjoin implementation of the CDCA Plan, contending that BLM had failed to follow all of the requisite procedures, including NEPA, when it formulated the Plan.

The district court denied a motion for a preliminary injunction barring implementation of the Plan. The district court found that the plaintiffs would likely prevail on the merits of certain of their claims. The court, however, taking note that Congress had determined that prompt implementation of the CDCA Plan was essential to protect threatened desert resources, denied a preliminary injunction as the requested relief would be detrimental to the public interest as expressed by Congress in Section 601.

The court of appeals affirmed. The court stated that while the courts have been liberal in granting injunctions in NEPA cases, "[t]here are nevertheless cases where public concerns other than failure to comply with NEPA must be weighed in determining whether to grant an injunction." The court of appeals, relying on Weinberger v. Romero-Barcelo, 456 U.S. 305 (1982),

rejected the plaintiffs' contention that courts are obligated to enjoin all agency action upon finding a violation of an "environmental" statute. "[T]he public interest is a factor which courts must consider in any injunctive action in which the public interest is affected." In view of Congress' express statement that the CDCA Plan was essential to protect and preserve fragile desert resources of regional and national importance, the court of appeals ruled that the district court had not abused its discretion in declining to enter a preliminary injunction barring implementation of the Plan.

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Sierra Club v. Peterson, No. 82-1695 (D.C. Cir. Sept. 13, 1983). D.J. # 90-1-4-2354.

NEPA; WHERE IRREVERSIBLE COMMITMENT OF RESOURCES IS MADE AGENCY MUST EITHER PREPARE AN EIS, OR RETAIN AUTHORITY TO PRECLUDE ALL SURFACE DISTURBING ACTIVITIES.

The Sierra Club challenged the decision of the Forest Service to issue leases in the Palisades Further Planning Area after preparation of an environmental assessment which found there would be no significant impact from leasing for oil and gas exploration. All leases issued in the Palisades contained stipulations designed to mitigate any potential for damage to the environment by exploration, with 80 percent of the leases carrying a No Surface Occupancy Stipulation. In those areas, designated highly environmentally sensitive, the Forest Service retains the authority to preclude all surface disturbing activities until further site-specific environmental studies are made. In the district court, Sierra Club challenged the enforceability of the lease stipulations. The district court upheld the use of all the stipulations, finding that any potential environmental impacts were sufficiently mitigated by the Forest Service's commitment to do further site-specific study once a plan for drilling was presented by the lessees. Sierra Club did not challenge the criteria used to evaluate which areas of the Palisades would be categorized as highly environmentally sensitive and thereby be leased only with the No Surface Occupancy Stipulation.

On appeal, Sierra Club argued only that in those areas without the No Surface Occupancy Stipulation, the decision to issue leases was the point of an irreversible commitment of resources and, accordingly, an EIS rather than an EA had to be prepared. This was so because, without the Surface Occupancy Stipulation, the Forest Service had only retained the authority to "condition" surface disturbing activities in order to mitigate environmental harm, and accordingly, the act of leasing itself meant that at least some surface disturbing activities would result. The court of appeals agreed, finding that "[t]he conclusion that no significant impact will occur is improperly based on a prophesy that exploration activity on these lands will be insignificant and generally fruitless."

However, the court of appeals found that the Forest Service had the option to delay preparation of an EIS until site-specific exploration plans were submitted as long as they retain "the authority to preclude all surface disturbing activities until an appropriate environmental analysis is completed." The decision as to how to best proceed is left to the Forest Service.

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FEDERAL RULES OF CRIMINAL PROCEDURE
Rule 32(a)(1). Imposition of Sentence.

At defendant's sentencing hearing, his counsel presented a videotape of defendant discussing his vocation. Defendant was not called as a witness. The court made no further inquiries of defendant nor did it invite him to make any further statement. Defendant appealed his sentence on the ground, inter alia, that his right to allocution under Rule 32(a)(1) had been denied.

The court of appeals rejected the Government's contention that the videotape constituted defendant's "statement" within the meaning of Rule 32(a)(1). Although a tape might sometimes be more advantageous to a defendant than a personal statement, the court recognized that it might also turn a defendant into "mouthpiece of his counsel-director" and defeat the purpose of allocution. Since the district court accepted the defendant's tape as his only statement and failed to make the mandatory inquiries required by Rule 32(a)(1), his sentence must be vacated.

(Vacated and remanded.)

United States v. Billy Roy Dickson, No. 82-2416 (5th Cir. Aug. 10, 1983).

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