U.S. Department of Justice

Executive Office for United States Attorneys

United States Attorneys' Bulletin

Published by:

Executive Office for United States Attorneys, Washington, D.C.
For the use of all U.S. Department of Justice Attorneys

EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS

VOL. 32 DECEMBER 14, 1984 NO. 24

VOL. 32 DECEMBER 14, 1984 NO. 24

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

COMMENDATIONS

Assistant United States Attorney ROBERT J. HACKMAN, District of Colorado, was commended by Mr. John H. Stinchfield, Postal Inspector in Charge, United States Postal Service, for his efforts in the investigation and prosecution of Omar LePanto, which resulted in a guilty plea.

Assistant United States Attorney GARY S. KATZMANN, District of Massachusetts, was commended by Mr. Dan R. Williams, Regional Inspector General for Investigations, Department of Health and Human Services, for outstanding work and victory in the Fava trial, which involved a scheme and artifice to defraud the Massachusetts Division of Employment Security of unemployment insurance benefits.

Assistant United States Attorneys CATHERINE S. KILLAM and FREDERICK H. MCDONALD, Northern District of Ohio, were commended by Mr. Joseph E. Griffin, Special Agent in Charge, Federal Bureau of Investigation, for their exceptional work in the successful prosecution of the white collar crime case entitled "Paperchase."

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

POINTS TO REMEMBER

Attorney's Fees in Cases Remanded Pursuant to the Social Security Disability Benefits Reform Act of 1984

The question has arisen whether social security disability claimants, whose cases are remanded pursuant to the Social Security Disability Benefits Reform Act of 1984, are entitled to attorney's fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. §2412 (1982). In our view, motions seeking such fees should be opposed for the following reasons:

First, a plaintiff should not be deemed a prevailing party under the EAJA unless and until he actually prevails on the merits of his underlying claim, i.e., receives some award of benefits. Most recent social security cases hold that obtaining a remand does not justify an award of attorney's fees. E.g., McGill v. Secretary of Health and Human Services, 712 F.2d 28, 31-32 (2d Cir. 1983), cert. denied, 104 S. Ct. 1420 (1984); Wade v. Heckler 587 F. Supp. 492, 494 (D. Del. 1984); Tripodi v. Heckler, 100 F.R.D. 736 (E.D.N.Y. 1984). Most cases to the contrary are factually distinguishable.

Second, claimants are not entitled to attorney's fees because their remands did not result from a judicial finding that the agency had erred in individual cases. Instead, claimants have obtained remands as a result of the new disability amendments, an intervening legislative act.

Finally, we can also argue that a remand order does not constitute a final judgment for purposes of the EAJA. See Guthrie v. Schweiker, 718 F.2d 104, 106 (4th cir. 1983).

If you have any questions about requests for attorney's fees in cases remanded pursuant to the new Social Security Disability Reform Act, please call Lewis Wise (633-3786), Sharon Reich (633-3256), or Brian Kennedy (633-1359).

(Civil Division)

Cumulative List of Changing Federal Civil Postjudgment Interest Rates

Below is an updated "Cumulative List of Changing Federal Civil Postjudgment Interest Rates," as provided for in the amendment to the federal postjudgment interest statute, 28 U.S.C. §1961, effective October 1, 1982.

Effective Date	Annual Rate	Effective Date	Annual Rate
10-01-82	10.41%	11-02-83	9.86%
10-29-82	9.29%	11-24-83	9.93%
11-25-82	9.07%	12-23-83	10.10%
12-24-82	8.75%	01-20-84	9.87%
01-21-83	8.65%	02-17-84	10.11%
02-18-83	8.99%	03-16-84	10.60%
03-18-83	9.16%	04-13-84	10.81%
04-15-83	8.98%	05-16-84	11.74%
05-13-83	8.72%	06-08-84	12.08%
06-10-83	9.59%	07-11-84	12.17%
07-08-83	10.25%	08-03-84	11.93%
08-10-83	10.74%	08-31-84	11.98%
09-02-83	10.58%	09-28-84	11.36%
09-30-83	9.98%	10-26-84	10.33%
		11-28-84	9.50%

NOTE: When computing interest at the daily rate, round (5/4) the product (i.e., the amount of interest computed) to the nearest whole cent.

(Executive Office)

Equal Access to Justice Act: The Authority to Award Attorney's Fees and Expenses

The authority to award attorney's fees and expenses pursuant to 5 U.S.C. §504 and 28 U.S.C. §2412(D) expired on September 30, 1984. H.R. 5479, which would have reauthorized these Equal Access to Justice Act (EAJA) provisions with modifications, was not approved by the President. In his memorandum of disapproval, the President reaffirmed his strong commitment to the policies underlying the EAJA and stated that he would approve an acceptable reauthorization of the Act retroactively to October 1, 1984. Therefore, until the Act is reauthorized, attorney's fees may not be awarded pursuant to §2412 (D) in civil actions filed after September 30, 1984. The President, however, has directed agencies to continue to accept and retain on file applications for attorney's fees in cases filed after September 30, 1984.

It should be noted that the EAJA (Title II of Pub. L. No. 96-481) also amended 28 U.S.C. 2412(B). These provisions are permanent authorizations and continue to be in effect. The provisions of §2412(d) continue to apply through the final disposition of any action commenced before October 1, 1984.

(Executive Office)

Personnel

Effective November 1, 1984, Theodore B. Olson resigned from his position as Assistant Attorney General for the Office of Legal Counsel. Former Deputy Assistant Attorney General Ralph W. Tarr is now acting Assistant Attorney General.

Effective November 30, 1984, Robert A. McConnell resigned as Assistant Attorney General, Office of Legislative and Intergovernmental Affairs. Mr. McConnell will join CBS as Vice-President for Legislative Affairs.

Effective December 3, 1984, Phillip D. Brady assumed the position of acting Assistant Attorney General, Office of Legislative and Intergovernmental Affairs.

(Executive Office)

Teletypes To All United States Attorneys

A listing of the teletypes sent by the Executive Office during the period from November 30, 1984, through December 14, 1984, is attached as an appendix to this issue of the Bulletin. If a United States Attorney's office has not received one or more of these teletypes, copies may be obtained by contacting Ms. Theresa Bertucci, Chief of the Communications Center, Executive Office for United States Attorneys, at FTS 633-1020.

(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 in NLRB v. International Longshoremen's Ass'n, AFL-CIO, 734 F.2d 966 (4th Cir. 1984). The question presented is whether the National Labor Relations Board correctly concluded that the collectively bargained rules governing the use of containers in the shipping industry, in their application to certain widespread practices of motor carriers and warehouses, lack a valid work preservation objective and therefore constitute unlawful secondary activity under Section 8(b)(4)(B), and 8(e) of the National Labor Relations Act, 29 U.S.C. §§158(b)(4)(B) and 158(e).

CIVIL DIVISION
Acting Assistant Attorney General Richard K. Willard

Johnson v. Showers, ___ F.2d __, No. 83-2416 (8th Cir. Nov. 8, 1984). D.J. # 145-193-358.

EIGHTH CIRCUIT REVERSES DISTRICT COURT RULING CRITICIZING GOVERNMENT FOR REMOVING CASE FROM STATE COURT SIMPLY IN ORDER TO MOVE IN FEDERAL COURT TO DISMISS FOR LACK OF JURISDICTION.

In this case a plaintiff brought suit in state court against an insurance agent for failing to obtain proper flood insurance. The agent filed a third party action in the state court against the National Flood Insurance Program, a component of the Federal Emergency Management Agency (FEMA). The government removed the case to federal court on the ground that an action had been brought against a federal agency. In federal court, FEMA argued that the court lacked jurisdiction because actions under this program could be brought only in federal court and the state court had therefore lacked subject matter jurisdiction. While it seems like an odd result, the federal court must then also dismiss the action because, upon removal, the federal court obtains only the same underlying jurisdiction that the state court had (which in this case was none). The district court agreed that the state court lacked jurisdiction and therefore dismissed the case, but it held that the government had acted improperly by removing the case to federal court simply in order to file the motion to dismiss. (The district court believed that the government should have made its motion to dismiss, based on exclusive federal jurisdiction, in the state court.) Accordingly, the district court awarded costs against the government. We appealed, arguing that there is nothing improper in removing to federal court in order to file a motion to dismiss. Indeed, we argued that the removal provision exists specifically for cases such as this one in which a federal court is more likely to be sympathetic to a motion to dismiss a state court action for lack of jurisdiction. The Eighth Circuit has just agreed with us (after first treating this as an action against a federal official and therefore removable). The court of appeals held that the government is free to make its motion to dismiss in a federal forum, and the court therefore reversed the award of costs against the government.

Attorneys: William Kanter
FTS 633-1597

Douglas Letter
FTS 633-3427

CIVIL DIVISION
Acting Assistant Attorney General Richard K. Willard

Jordan v. Heckler, ___ F.2d ___, No. 84-1438 (10th Cir. Sept. 24, 1984). D.J. # 137-60-220.

TENTH CIRCUIT HOLDS THAT EAJA AWARD UNDER "COMMON BENEFIT" THEORY CANNOT BE AWARDED AGAINST SECRETARY OF HHS BUT DECLINES TO REDUCE AWARD UNDER SECTION 2412(d) EVEN THOUGH PLAINTIFFS PREVAILED ON ONLY ONE OF THREE CLAIMS.

In this nationwide class action, plaintiffs challenged the operation of the representative payee program of the Social Security Act. The district court denied plaintiffs' attempt to require HHS to issue regulations providing for (1) an opportunity for a hearing prior to the selection and appointment of a representative payee and (2) administrative and judicial review of allegations of misuse by beneficiaries against payees. The court did, however, order the Secretary to implement a mandatory periodic accounting program. The court made an EAJA fee award against the Secretary under 28 U.S.C. §2412(b).

The Tenth Circuit agreed with our arguments that an award could not be made against the Secretary under a common benefit theory. We argued that, even if the award were taken from the Social Security Trust Fund, it would not be restricted to those who benefited from the litigation but would be borne by all workers. This holding should help to establish that "common benefit" awards under the EAJA cannot be made against the government unless the award will be borne by the beneficiaries of the litigation.

The court of appeals, however, held that an award covering the entire litigation could be made under section 2412(d) and declined to reduce it to reflect that plaintiffs had succeeded on only one out of three separate claims. Since the court misconstrued the Supreme Court's guidelines in Hensley v. Eckerhart, 103 S.Ct. 1933 (1983), we are seeking rehearing.

Attorneys: William Kanter
FTS 633-1597

Christine Whittaker
FTS 633-4096

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

National Wildlife Federation v. Gorsuch, __ F.2d __, No. 83-5753 (3d Cir. Sept. 20, 1984). D.J. # 90-5-1-4-176.

COLLATERAL ATTACK ON JUDGMENT BARS SUIT TO COMPEL PHASING OUT OF DUMPING SLUDGE IN OCEAN.

National Wildlife Federation (NWF) sued to require New Jersey sewerage authorities to phase out ocean dumping of sewage sludge. The district court dismissed the suit as an improper collateral attack on two existing judgments, both of which were consent decrees entered in earlier litigation between EPA and New York and New Jersey public entities--litigation to which NWF "was no stranger": "Clearly, plaintiffs were not outsiders unaware of litigation in progress that would ultimately affect their interests. In a deliberate choice of litigation strategy, they chose to stand on the sidelines, wary but not active, deeply interested, but of their own volition not participants. Although plaintiffs may not have had their day in court as litigants, they had the opportunity and for reasons of their own adopted a different approach. Plaintiffs cannot, at this stage, assert persuasively that the interest of finality should not prevail."

Attorneys: Roger J. Marzulla
FTS 633-2736

Martin W. Matzen
FTS 633-4426

Jack J. Bender v. William P. Clark, __ F.2d __, No. 83-1306 (10th Cir. Sept. 28, 1984). D.J. # 90-1-18-2862

OFFEROR FOR NON-COMPETITIVE OIL AND GAS LEASE NEED ONLY TO SHOW IBLA'S DECISION ON KGS WAS WRONG BY PREPONDERANCE OF EVIDENCE.

Plaintiff Bender sought judicial review of an Interior Board of Land Appeals (IBLA) decision which found that his noncompetitive oil and gas lease offer for certain public lands in New Mexico was within an undefined known geologic structure (KGS). The IBLA had concluded that the government satisfied its burden of

establishing a prima facie case of the existence of a KGS and that Bender failed to show by "clear and definite" evidence that the government erred in making this determination. On review, the district court found that the IBLA erred legally in holding that Bender could overcome the KGS finding only by "clear and definite evidence." Bender need only show by a "preponderance of the evidence" that the government's determination was erroneous. The district court remanded the case to the ALJ to determine whether Bender established by a preponderance of the evidence that the KGS decision was incorrect.

The first issue on the government's appeal, not previously addressed by any circuit court, was whether the remand order of the district court is a "final decision," vesting the Tenth Circuit with appellate jurisdiction over the matter. The remand by a district court to an administrative agency for further proceedings is ordinarily not appealable because it is not a final decision. The Tenth Circuit ruled in our favor and held that the competing considerations in this dispute underscored the need for immediate review and outweighed the concerns over piecemeal review. The court concluded that they had jurisdiction to consider the appeal.

On the second issue on appeal, the standard of proof, the Tenth Circuit found that no statutory or judicial authority exists for applying the "clear and definite" evidence standard of proof in such a situation and that Bender may overcome the USGS finding by a preponderance of the evidence. The district court's order was affirmed and the case was remanded to Interior for further proceedings.

Attorneys: John A. Bryson
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Anne A. Almy
FTS 633-4427

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

Government of Guam v. United States, __ F.2d __, No. 83-2237 (9th Cir. Oct. 4, 1984). D.J. # 90-1-5-2231.

STATUTE OF LIMITATIONS IN QUIET TITLE ACT, 28 U.S.C. §2409a(b), BARS GUAM'S SUIT AGAINST THE UNITED STATES.

The court of appeals affirmed the dismissal of Guam's quiet title action as barred by the 12-year statute of limitations of 28 U.S.C. §2409a(f). Guam had claimed title to approximately 4,000 acres of land comprising various reservoirs, wells, utilities, and other property currently used by the Navy. The court found that Guam had sufficient notice of the government's claim to this property by reason of a 1950 Executive Order reserving the property to the United States and a quitclaim deed filed in the same year which evidenced the United States' claim of title. The court took note of the fact that the Governor of Guam was appointed by the United States for the period between 1950 and 1971, making a suit against the United States during this period unlikely. However, even if the statute of limitations was tolled for that period (a question not explicitly reached by the court), the action was still filed 12 years and 6 days too late.

Attorneys: David C. Shilton
FTS 633-5580

Dirk D. Snel
FTS 633-4400

United States v. Russell Carter, __ F.2d __, No. 83-5174 (11th Cir. Oct. 11, 1984). D.J. # 90-5-1-1-1191.

LAND WITHIN EVERGLADES HELD A WETLAND SUBJECT TO SECTION 404 OF CLEAN WATER ACT.

The court of appeals, per curiam, affirmed the decisions of the district court which found filling in violation of Section 404 of the Clean Water Act and ordered restoration. The main issues were whether the subject property in the Everglades was a wetland subject to the Act and whether the district court properly directed restoration.

Attorneys: Michael Mitchell
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Thomas H. Pacheco
FTS 633-2767

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

Loy Ree B. Marlowe Ballam v. United States, __ F.2d __, No. 83-1120 (4th Cir. Oct. 23, 1984). D.J. # 90-1-0-2101.

GOVERNMENT NOT LIABLE FOR EROSION DAMAGE TO PROPERTY UNLESS ITS ACTION DIRECTLY AND PROXIMATELY CAUSED THE DAMAGE.

Ballam brought suit claiming erosion damage to her property caused by the Atlantic Intracoastal Waterway (AIWW). The erosion went beyond the easement obtained from her predecessor-in-title. The court rejected Ballam's argument that a man-made waterway was not subject to the navigational servitude and found that the government had never expanded the waterway beyond the scope of the deed. Finding that "[t]he erosion damage . . . was caused by wave wash from passing ships, not the actions of the United States," the court held that the government could not be held liable for damages unless it could be shown that government action had "directly and proximately caused the damage."

Attorneys: Maria A. Iizuka
FTS 633-2753

Robert L. Klarquist
FTS 633-2731

Maryland Wildlife Federation v. Dole, __ F.2d __, No. 83-1429 (4th Cir. Oct. 25, 1984). D.J. # 90-1-4-2993.

SECRETARY'S CONSIDERATION OF SECTION 4(b) IMPACTS FOR U.S. 48, SUSTAINED.

In a 2 to 1 decision, the Fourth Circuit held that DOT complied with Section 4(f) of the Department of Transportation Act and with NEPA in selecting a route to complete a highway (U.S. 48) in western Maryland. Because all alternatives impacted 4(f) resources, the focal issue involved the minimization of harm requirement found in 4(f)(2). The majority opinion was satisfied that the Secretary considered the impact to parkland as well as to historical sites. Further, the majority rejected MNF's suggestion that the statute and decisional law establish a preference for parkland over historical sites. Although the Secretary did not make a finding that the impacts of the alternative routes were substantially equal, the majority concluded that there was a basis in the record for a reasonable belief that the chosen route was

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

the least harmful to 4(f) resources. While the majority did not regard the Secretary's undisputed consideration of relocation disruption to be fatal to her 4(f) compliance, Chief Judge Winters dissented on that basis. In Winters' view the relocations associated with the route preferred by the environmentalists were not extraordinary and, therefore, it was improper for the Secretary to allow that factor to contribute to her choice; only 4(f) impacts should have been considered.

Winters joined the majority's holding that the Secretary complied with NEPA by adequately considering alternatives.

Attorneys: Ellen J. Durkee
FTS 633-3888

Robert L. Klarquist
FTS 633-2731

United States v. City of Ft. Pierre, S. Dak., __ F.2d __, No. 84-1162 (8th Cir. Oct. 31, 1984). D.J. # 62-69-5.

CORPS' DETERMINATION OF WETLAND OVERTURNED.

The Corps of Engineers asserted jurisdiction under Section 404 of the Clean Water Act, 33 U.S.C. §1344, over the "Ft. Pierre Slough," a wetland near the Missouri River. Reversing the district court, the court of appeals held that the slough was not a wetland subject to Corps jurisdiction, because the Corps had in effect created the wetland by filling the southern end of the slough in 1968; resulting in impoundment of water in the slough area, "as an unintended by-product of ordinary river maintenance."

Attorneys: Thomas H. Pacheco
FTS 633-2767

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FTS 633-2731

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

People of the State of California v. Walters, __ F.2d __, No. 83-6368 (9th Cir. Oct. 9, 1984). D.J. # 90-7-6-5.

RESOURCE CONSERVATION AND RECOVERY ACT: SECTION 6001 OF ACT DOES NOT WAIVE FEDERAL GOVERNMENT'S SOVEREIGN IMMUNITY IN CRIMINAL PROSECUTION.

This case originated in a state court as a criminal prosecution for allegedly illegal disposal of hazardous medical waste by a VA Hospital in Los Angeles. Pursuant to 28 U.S.C. §1442(a), the case was removed to a federal district court, which dismissed the action on the ground of the United States' sovereign immunity. On appeal, the parties agreed that the action was in essence one against the United States, and the sole question was whether Section 6001 of RCRA, 42 U.S.C. §6961, waived sovereign immunity in requiring federal agencies to conform to state and local requirements "both substantive and procedural" in disposal or management of hazardous wastes. The Ninth Circuit affirmed dismissal of the criminal action: "State waste disposal standards, permits, and reporting duties clearly are 'requirements' for the purpose of §6961. Criminal sanctions, however, are not a 'requirement' of state law within the meaning of §6961, but rather the means by which the standards, permits, and reporting duties are enforced. Section 6961 plainly waives immunity to sanctions imposed to enforce injunctive relief but this only makes more conspicuous its failure to waive immunity to criminal sanctions." The court of appeals found nothing in the language or legislative history of 42 U.S.C. §6961 to show a clear congressional intent to waive immunity as to criminal sanctions.

Attorneys: Dean Dunsmore
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FTS 633-4426

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

People of the Village of Gambell v. Clark; Inupiat Community of the Arctic Slope v. United States, Nos. 83-3735, 83-3781, 82-3678 (9th Cir. Nov. 2, 1984). D.J. ## 90-4-180; 90-4-144.

ALASKA NATIVE CLAIMS SETTLEMENT ACT EXTINGUISHED NATIVES ABORIGINAL HUNTING AND FISHING RIGHTS; SECRETARY MUST CONSIDER SUBSISTENCE USES IN OUTER CONTINENTAL SHELF.

In both of these cases, Alaskan natives argued that oil and gas development on the outer continental shelf (OCS) should be barred because it would adversely affect their aboriginal rights to subsistence hunting and fishing or their aboriginal title to the OCS itself. Plaintiffs in Village of Gambell additionally contended that lease sale 57 (Norton Sound) failed to satisfy the procedural requirements of Section 810 of the Alaska National Interest Lands Conservation Act (ANILCA), providing protection for subsistence users in Alaska. The court of appeals assumed, without deciding, that the natives once had exclusive aboriginal rights to hunt and fish in offshore areas; it concluded, however, that any such rights were extinguished by the Alaska Native Claims Settlement Act (ANCSA). The court found that the phrase "in Alaska," as used in the extinguishment clause of ANCSA, could be taken to include the continental shelf contiguous to Alaska.

The court next considered Section 810 of ANILCA, which requires consideration of subsistence uses, and (in some circumstances) hearings, where the Secretary leases "public lands," which are defined as "land situated in Alaska." Based upon the legislative history of ANILCA, the rule that doubtful language should be construed in favor of Indians, and the need to read language in related statutes consistently, the court concluded that "in Alaska" should include the continental shelf for purposes of Section 810 of ANILCA. The case was remanded to the district court for a consideration of the government's arguments that it had substantially complied with Section 810 and that the lease sale should not be voided in any event. The court of appeals denied the appellants' request for attorneys' fees (even though the question had not been briefed), since it could not say that the government's position was not substantially justified.

Attorneys: David C. Shilton
FTS 633-5580

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FTS 633-2748

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

United States v. Devil's Hole, Inc., __ F.2d __, No. 84-1046 (3d Cir. Nov. 9, 1984). D.J. # 90-1-18-1679.

SURFACE MINING CONTROL AND RECLAMATION ACT; RECLAIMED MATERIAL USED AS A FUEL IS COAL WITHIN MEANING OF SECTION 402 OF ACT.

Title IV of the Surface Mining Control and Reclamation Act ("SMCRA"), 91 Stat. 447, 30 U.S.C. §1200 et seq., establishes the Abandoned Mine Reclamation Fund which is administered by the Secretary of the Interior for the reclamation and restoration of land and water resources adversely affected by past coal mining. Section 401, 30 U.S.C. §1231. Monies for the Fund are derived from a reclamation fee levied upon all operators of coal mining operations subject to the provisions of SMCRA, Section 402, 30 U.S.C. §1232.

The defendants are operators engaged in the business of producing "anthracite silt" -- a powdery material which collected behind silt or slush dam sites in former anthracite processing locations. When the operators refused to make payments to the Fund on the ground that their operations were not covered by the Act, the government brought a collection action to recover the delinquent payments assessed by Interior. The district court ruled that the operators must make payments to the Fund.

The court of appeals affirmed. First, the court found that the reclaimed material, which was being used as a fuel, was in fact "coal" within the meaning of SMCRA. Second, the court ruled that the operators' activities constituted "surface coal mining operations" for the purposes of the Act. Accordingly, the operators are subject to the reclamation fee.

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Robert L. Klarquist
FTS 633-2731

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

Dow Chemical Co. v. United States, __ F.2d __, No. 82-1811 (6th Cir. Nov. 9, 1984). D.J. # 90-5-1-1-1351.

AERIAL PHOTOGRAPHING OF PLANT DOES NOT VIOLATE THE FOURTH AMENDMENT.

The court of appeals reversed a district court ruling that EPA violated the Fourth Amendment and acted without statutory authority in obtaining aerial photographs of Dow Chemical's Midland, Michigan, plant. The appellate court reasoned that the aerial photography did not constitute a "search" within the meaning of the Fourth Amendment because Dow had no "reasonable expectation of privacy" in the outside of its buildings and spaces between them in the interior reaches of its plant. Further, the appeals court ruled that EPA did not need to be specifically authorized by Congress to investigate or gather evidence by means of aerial photography.

Attorneys: Anne S. Almy
FTS 633-2744

Dirk D. Snel
FTS 633-4400

Nuco Uranium and Minerals Corp. v. Clark, __ F.2d __, No. 83-2177 (10th Cir. Nov. 9, 1984). D.J. # 90-1-18-3644.

MINING CLAIMS ON RESERVATION INVALID BECAUSE CONGRESS HAD NOT EXPRESSLY OR IMPLIEDLY REVOKED EXECUTIVE WITHDRAWAL.

The court of appeals affirmed a district court decision which declared Nuco's mining claims on the former Fort Bayard Military Reservation invalid on the ground that Congress had not expressly or impliedly revoked President Grant's order of April 19, 1869, withdrawing the land from the public domain.

Attorneys: John A. Bryson
FTS 633-2740

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FTS 633-4400

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

Montana v. Clark, __ F.2d __, No. 83-1982 (D.C. Cir. Nov. 20, 1984). D.J. # 90-1-18-3569.

SURFACE MINING CONTROL AND RECLAMATION ACT; SECRETARY'S REGULATIONS REQUIRING OPERATORS TO PAY RECLAMATION FEE ON INDIAN LANDS SUSTAINED.

This case concerns the interpretation of Section IV of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. §1201 et seq. Under the Act, operators mining coal must pay a reclamation fee which is to be used to reclaim abandoned mines. Under 402 of the statute, "[f]ifty per centum of the funds collected annually in any State or Indian reservation shall be allocated to that State or Indian reservation . . . ." Interior's regulations, however, replaced the term "Indian reservation" with "Indian lands." This is significant to the Crow Indian Tribe, which owns mineral rights outside of the boundary of the reservation which are presently being mined.

Montana brought suit challenging the regulations, claiming that they did not comply with the statute. The district court dismissed the suit, holding that Montana had violated the applicable statute of limitations. Although it did not need to address the merits, it also found that the Secretary was correct in his interpretation of the Act. On appeal, the District of Columbia Circuit found that the action was not barred by the 60-day limitations period, but that the Secretary was correct on the merits. The opinion, per Circuit Judge Wright, contains an extensive discussion of deference to agency interpretation of statutes.

Attorneys: Edward J. Shawaker
FTS 724-5993

Robert L. Klarquist
FTS 633-2731

OFFICE OF LEGISLATIVE AND INTERGOVERNMENTAL AFFAIRS
Acting Assistant Attorney General Phillip D. Brady

SELECTED CONGRESSIONAL AND LEGISLATIVE ACTIVITIES

NOVEMBER 20, 1984 - DECEMBER 14, 1984

HIGHLIGHTS

The following is a summary of crime-related legislation as passed by the 98th Congress, other than the Comprehensive Crime Control Act of 1984, which was summarized in the October 19, 1984, United States Attorneys' Bulletin.

(1) Aviation Drug Smuggling, Pub. L. No. 98-499, was a Congressional initiative supported by the Department. It provides enhanced penalties for smuggling drugs by air and authorizes the revocation of airman's certificates and aircraft registrations. Primary sponsors were Senator Bentsen and Representative Mineta. Through meetings with House and Senate staff, the Department was successful in securing amendments to cover situations where airmen involved in smuggling drugs do so without an airman's certificate; the original bills only covered the use of fraudulent certificates.

(2) Product Tampering (the "Tylenol" bill), Pub. L. No. 98-127. The bill was originally part of the President's Comprehensive Crime Control Act. However, it was broken out of the omnibus bill and enacted as a separate measure. The measure clarifies federal jurisdiction over product tampering and establishes appropriately severe criminal sanctions for product tampering.

(3) Child Pornography Amendments, Pub. L. No. 98-292. This was originally part of the President's Comprehensive Crime Control Act, but was broken out and processed as a separate measure. It deletes the "commerciality" and "obscenity" requirements of prior law and provides enhanced penalties for child pornography offenses. Prime sponsors were Senators Grassley and Spector and Representatives Hughes and Sawyer.

(4) Tax Venue Amendment, Pub. L. No. 98-369. This was originally part of the President's Comprehensive Crime Control Act, but was processed as a part of the omnibus Deficit Reduction Act. It provides for consolidation of criminal tax prosecutions in a single court thereby avoiding fragmentation of such cases. Prime sponsor was Senator Dole.

(5) Pharmacy Robbery, Pub. L. No. 98-305. This Congressional initiative was originally introduced by Henry Hyde on behalf of the pharmacists. It authorizes federal criminal prosecution of certain offenses directed at persons registered to manufacture, sell or dispense controlled substances. Substantial effort was required to avoid a broadly written bill that would have involved the Department in every pharmacy robbery case. As finally approved, the bill carefully limits federal jurisdiction to cases involving interstate commerce, large-scale offenses, or crimes resulting in serious injury to a person. Prime sponsors were Senators Thurmond, Grassley and Jepsen and Representative Hyde.

(6) Forged Endorsement of U.S. Government Securities, Pub. L. No. 98-107. The bill was originally part of the President's Comprehensive Crime Control Act, but was processed as part of the 1983 Continuing Resolution. It supplements federal forged endorsement law to include a misdemeanor penalty thereby facilitating disposition of such cases by plea agreement.

(7) Rewards for Terrorist Information, Pub. L. No. 98-533. This was the third part enacted of the President's April 1984 anti-terrorism legislative package. It authorizes payment of rewards for information on terrorist activity; the Attorney General is authorized to pay rewards for information concerning domestic terrorism and the Secretary of State is authorized to pay rewards pertaining to foreign terrorism. Prime sponsors were Senator Denton and Representative Fascell.

(8) Criminal Fine Collection Improvements, Pub. L. No. 98-611. This is a refined and improved version of the criminal fine collection provisions of Chapter II of the Comprehensive Crime Control Act. Among other things it makes the new criminal fine levels (up to $250,000 for an individual and up to $500,000 for an organization) applicable to offenses committed after December 31, 1984, rather than in November of 1986 as would have been the case under Chapter II of the crime package. Prime sponsors were Senator Percy and Representative Conyers.

(9) Drug Aftercare Extension, Pub. L. No. 98-236. This Congressional initiative, supported by the Department, extends the highly successful program whereby federal probationers and parolees are regularly monitored to detect drug use. Prime sponsor was Representative Hughes.

(10) Organized Crime Commission Subpoena Power, Pub. L. No. 98-368. The Department initiative extended subpoena and other needed authorities to the President's Commission on Organized

Crime to facilitate its investigation of organized crime. As finally enacted, the measure closely tracks our original proposal.

(11) Secret Service Powers, Pub. L. No. 98-587. This Treasury Department initiative, supported by the Department of Justice, after needed amendments were made, clarifies the enforcement jurisdiction and powers of the U.S. Secret Service. Prime sponsors were Representative Sam Hall and Senator Thurmond.

(12) Vocational-Education Assistance to Prisons, Pub. L. No. 98-524. This Congressional initiative, supported by the Department, earmarks 5% of federal vocational-education funds for job training programs in prisons. Prime sponsor was Senator Hatch.

(13) "Chop Shop" Act, Pub. L. No. 98-547. This Congressional initiative requires numbering of motor vehicle parts and creates increased federal criminal sanctions for those who steal and disassemble motor vehicles. As finally enacted, the bill reflects a major effort to minimize any regulatory burden. Prime sponsors were Senator Percy and Representative Wirth.

(14) Reporting of Cash Purchases of $10,000 or More, Pub. L. No. 98-369. This Senate initiative requires businesses (including gambling casinos) to report cash receipts of $10,000 or more to the IRS. We supported this as an adjunct to the currency reporting requirements of the Bank Secrecy Act. The reporting requirement applies to purchases occurring on or after January 1, 1984.

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

Teletypes To All United States Attorneys

12/04/84--From William P. Tyson, Director, Executive Office for United States Attorneys, by C. Madison Brewer, Director, Office of Management Information Systems and Support (OMISS), re: "Department of Education Student Loan Default Referrals."

12/07/84--From William P. Tyson, Director, Executive Office for United States Attorneys, re: "Appointment of New Members to Attorney General's Advisory Committee of United States Attorneys."

12/07/84--From William P. Tyson, Director, Executive Office for United States Attorneys, re: "Annual Report of the Attorney General for Fiscal Year 1984."

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1984