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# **Title 5**

# **Land and Natural Resources Division**

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5-1.000 POLICY

## 5-1.100 GENERAL POLICY AND RESPONSIBILITIES

The Land and Natural Resources Division, which was created in 1909, represents the United States, its agencies and officials in matters relating to environmental quality, public lands and natural resources, Indian lands and native claims, and wildlife and fishery resources. The Division's responsibilities are varied and include both enforcement and defensive work, in both criminal and civil cases. More specifically, responsibilities of the Land and Natural Resources Division are set forth in 28 C.F.R. § 0.65.

## 5-1.200 LITIGATION INVOLVING THE ENVIRONMENTAL PROTECTION AGENCY

With respect to any matter assigned to the Land and Natural Resources Division in which the Environmental Protection Agency is a party, the Assistant Attorney General in charge of the Land and Natural Resources Division, and such staff as he/she may specifically designate in writing, are authorized to exercise the functions and responsibilities undertaken by the Attorney General in the Memorandum of Understanding between the Department of Justice and the Environmental Protection Agency (42 Fed.Reg. 48942), except that Subpart Y of 28 CFR Part 0 shall continue to govern as authority to compromise and close civil claims in such matters.

## 5-1.300 SUPERVISION AND HANDLING OF LAND AND NATURAL RESOURCES DIVISION CASES

## 5-1.301 General

All cases within the area of responsibility of the Land and Natural Resources Division are subject to the supervision and control of the Assistant Attorney General in charge of the Land and Natural Resources Division. As is hereinafter more fully set forth, the responsibilities for direct handling of cases are divided into four general classifications: (1) cases for which authority has been delegated to the U.S. Attorneys which may be directly referred to him/her by an authorized field officer or a federal department or agency, see USAM 5-1.310, *infra*; (2) cases which are delegated to the U.S. Attorneys by the Assistant Attorney General of the Division for which the U.S. Attorneys are assigned primary responsibility, see USAM 5-1.323, *infra*; (3) cases which the Assistant Attorney General of the Division determines shall be the joint responsibility of the Division and the U.S. Attorney, see USAM 5-1.324, *infra*; and (4) cases for which the Division retains primary responsibility, see USAM 5-1.325, *infra*.

## 5-1.302 Pleadings to be Signed by the Assistant Attorney General

In all civil cases where the United States is a plaintiff, other than direct referral cases, see USAM 5-1.310, *infra*, and specific cases or

classes of cases the Assistant Attorney General exempts from this requirement, arising from matters in the litigating sections, all complaints, stipulations or agreements for entry of judgment or dismissal shall be signed, prior to filing, by the Assistant Attorney General, unless otherwise expressly delegated.

5-1.310 Authority of U.S. Attorneys to Initiate Actions Without Prior Authorization, i.e., Direct Referral Cases

Actions which may be initiated by the U.S. Attorneys without prior authorization from the Land and Natural Resources Division are listed in Land and Natural Resources Division Directive No. 8-80, amending Division Directive No. 7-76 (41 Fed.Reg. 53660) as amended. The pertinent portion of the amended Directive is as follows:

By virtue of the authority vested in me by Part 0 of Title 28 of the Code of Federal Regulations, and particularly Sections 0.165, 0.160, 0.162, 0.164, 0.166, and 0.168 thereof, I hereby redelegate to the Deputy Assistant Attorney General, certain Section Chiefs and to the U.S. Attorneys the following authority to act in connection with, and to compromise, Land and Natural Resources Division cases:

Section I—AUTHORITY TO INITIATE CASES

A. Delegation to U.S. Attorneys

1. Land Cases. U.S. Attorneys are hereby authorized to act in matters concerning real property of the United States, including tribal and restricted individual Indian land, not involving new or unusual questions or questions of title or water rights, on behalf of any other department or agency in response to a direct request in writing from an authorized field officer of the department or agency concerned, without prior authorization from the Land and Natural Resources Division, in the following described cases:

a. Actions to recover possession of, or quiet title to, property from tenants, squatters, trespassers or others, and actions to enjoin trespasses on federal property;

b. Actions to recover damages resulting from trespasses when the amount of the claim for actual damage bases upon an innocent trespass does not exceed \$200,000 (the U.S. Attorneys may seek recovery of amounts exceeding \$200,000 (i) if the actual damages are \$200,000 or less and state statutes permit the recovery of multiple damages, e.g., double or treble, for either a willful or an innocent trespass; or (ii) if the actual damages are \$200,000 or less, but the action is for conversion to obtain recovery of the enhanced value of property severed and removed in the trespass;

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c. Actions to collect delinquent rentals or damages for use and occupancy of not more than \$200,000;

d. Actions to collect costs of forest fire suppression and other damages resulting from such fires;

e. Actions to collect delinquent operation and maintenance charges accruing on Indian irrigation projects and federal reclamation projects of not more than \$200,000;

f. Actions to collect loans of money or livestock made by the United States to individual Indians without limitation on amount, including loans made by Indian tribal organizations to individual Indians if the loan agreements, notes and securities have been assigned by the tribal organizations to the United States, and

g. Actions to recover damages resulting from breach of a timber sale contract when the amount of the claim does not exceed \$200,000.

h. Actions in which the United States is named as a party pursuant to 28 U.S.C. § 2410.

2. Environmental Cases. Pursuant to Paragraph 10 of the Memorandum of Understanding between the Department of Justice and the Environmental Protection Agency (42 Fed.Reg. 41942) with respect to the handling of litigation to which the Environmental Protection Agency is a party, all requests of the Environmental Protection Agency for litigation must be submitted by the Agency through its General Counsel or its Assistant Administrator for Enforcement to the Assistant Attorney General, except that matters requiring an immediate temporary restraining order may be submitted by Regional Administrators of the Environmental Protection Agency simultaneously to a U.S. Attorney and the Assistant Attorney General. Consequently, except for matters requiring an immediate temporary restraining order, *U.S. Attorneys are not authorized to accept on a direct reference basis any matters or cases originating in any office of the Environmental Protection Agency.*

U.S. Attorneys are authorized to act without prior authorization from the Land and Natural Resources Division, on behalf of federal departments or agencies other than the Environmental Protection Agency, in response to a direct request in writing from an authorized field officer of the department or agency concerned (a copy of said request is to be forwarded forthwith to the Assistant Attorney General, Land and Natural Resources Division by the U.S. Attorney) in the following environmental cases:

a. Civil or criminal actions involving the filling or the deposit of dredged or fill material upon, or the alteration of the channels of, the waters of the United States, in violation of Section 10 of the

River and Harbor Act of March 3, 1899 (33 U.S.C. § 403), or of Section 404 of the Federal Water Pollution Act Amendments of 1972 (33 U.S.C. § 1344) or of both statutes;

b. Civil or criminal actions involving the discharge of refuse into the navigable waters of the United States, and, in certain cases, their tributaries, in violation of Section 13 of the Act of March 3, 1899 (33 U.S.C. § 407), except for

(i) *in rem* actions against vessels, which actions shall continue to be handled in the manner set forth in Departmental Memorandums 374 and 376, dated June 3, 1964, and shall continue to be under the jurisdiction of the Civil Division; and

(ii) criminal actions involving the discharge either of oil or of hazardous substances, for which discharge a government agency either has imposed a civil penalty pursuant to Section 311(b)(6) of the Federal Water Pollution Control Act Amendments of 1972 (33 U.S.C. § 1321(b)(6)), or has under consideration the imposition of such a penalty.

3. Wildlife and Marine Resources Cases. U.S. Attorneys are hereby authorized to act, without prior authorization from the Land and Natural Resources Division, on behalf of any other department or agency in response to a direct request in writing from an authorized field officer of the department or agency concerned, in the following wildlife cases:

- a. Endangered Species Act of 1973, 16 U.S.C. § 1531 *et seq.*;
- b. Lacey Act, 16 U.S.C. § 3371 *et seq.*;
- c. Airborne Hunting Act, 16 U.S.C. § 742j-1;
- d. Migratory Bird Treaty Act, 16 U.S.C. § 703 *et seq.*;
- e. Migratory Bird Conservation Act, 16 U.S.C. §§ 715 to 715d, 715e, 715f to 715k, 715l to 715r;
- f. Bald and Golden Eagle Protection Act, 16 U.S.C. §§ 668 to 668d;
- g. Dingell-Johnson Fish Restoration Act, 16 U.S.C. §§ 777 to 777i, 777k;
- h. National Wildlife Refuge System Administration Act, 16 U.S.C. §§ 668dd, 668ee;
- i. Marine Protection, Research and Sanctuaries Act, 33 U.S.C. § 1431 *et seq.*;
- j. Magnuson Fishery Conservation and Management Act, 16 U.S.C. § 1801 *et seq.*;

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- k. Whaling Convention Act, 16 U.S.C. § 981 *et seq.*;
- l. Atlantic Tunas Convention Act, 16 U.S.C. § 971;
- m. Tuna Convention Act, 16 U.S.C. § 951 *et seq.*;
- n. Marine Mammal Protection Act, 16 U.S.C. § 1361 *et seq.*;
- o. Sockeye Salmon or Pink Salmon Fishing Act, 16 U.S.C. § 776 *et seq.*;
- p. Fur Seal Act of 1966, 16 U.S.C. § 1151 *et seq.*;
- q. Protection of Sea Otters on the High Seas Act, 16 U.S.C. § 1171 *et seq.*;
- r. Wild Free Roaming Horses and Burros Act, 16 U.S.C. §§ 1331 to 1340;
- s. Fish and Wildlife Coordination Act, 16 U.S.C. §§ 661 to 667e;
- t. Animal Damage Control Act, 7 U.S.C. § 426 *et seq.*;
- u. Sponge Act, 16 U.S.C. § 781 *et seq.*;
- v. Northern Pacific Halibut Act, 16 U.S.C. § 772 *et seq.*; and
- w. North Pacific Fisheries Act, 16 U.S.C. § 1021 *et seq.*

*Provided* that upon receipt of referrals of any law enforcement action under the above statutes, notice shall be given to the Wildlife and Marine Resources Section before filing or declining to file an action, as set forth in USAM 5-10.312, *infra*.

*Provided* that U.S. Attorneys are not authorized to commence actions against foreign vessels or foreign fishermen under the Magnuson Fishery Conservation and Management Act, 16 U.S.C. § 1801 *et seq.*, without prior telephonic approval from the Section. The views of the U.S. Attorney for a district to which a foreign vessel may be brought will be ascertained in advance of seizure by the Coast Guard. The U.S. Attorney should then contact the Section to discuss the complaint to be filed, release bond and inventory arrangements.

#### 5-1.320 Actions Not Subject to Direct Referral to U.S. Attorneys

##### 5-1.321 Prior Authorization Needed to Initiate Action

Actions which may not be initiated by the U.S. Attorneys without prior authorization from the Division are listed in USAM 5-2.000, *infra*.

##### 5-1.322 Assignment of Actions Generally

All cases which are not subject to direct referral to the U.S. Attorneys as set forth in USAM 5-1.310, *supra*, are initially referred to the Assis-

tant Attorney General for review. Such review is assigned to the appropriate Section of the Division which then initially determines whether the case should more appropriately be: (1) assigned to the U.S. Attorney, see USAM 5-1.323, *infra*, (2) designated as a case to be handled as the joint responsibility of the U.S. Attorney and the Division, see USAM 5-1.324, *supra*, or, (3) retained by the Division for its direct handling. See USAM 5-1.325, *infra*. The costs of litigation and the proximity of the U.S. Attorney to the court result in a large percentage of cases being assigned to the U.S. Attorneys. However, the nature of the issue of law involved, the relative national or financial importance of the case, the precedential possibilities of the litigation, and the need for the Division to retain a cadre of staff attorneys trained in the trial of cases, are considerations in making case assignments.

#### 5-1.323 Cases Assigned to U.S. Attorneys

Assignment of case responsibility to the U.S. Attorney is always with the understanding that the Assistant Attorney General of the Division has supervisory responsibility on behalf of the Attorney General over all litigation under the jurisdiction of the Division. Where possible, the Division will promulgate categories of cases which will be assigned to the U.S. Attorneys; these assignments may distinguish between U.S. Attorneys on the basis of their experience and expertise with respect to such cases. If an assignment of any such case is made pursuant to USAM 5-1.324 or 5-1.325, *infra*, the notice of assignment to the U.S. Attorney will note the exception.

The U.S. Attorney shall be primarily responsible for all cases assigned to him/her. If he/she feels that he/she cannot accept responsibility by reason of a conflict of interest, the lack of personnel or expertise in his/her office, or other good reasons, he/she should immediately consult with the Chief of the appropriate Section to determine if some other assignment of responsibility can be made.

Regular communication should be maintained with the appropriate Section of the Division regarding the conduct of litigation assigned to the U.S. Attorneys, especially if any problems arise in connection with a case. The Division is organized so as to maintain considerable expertise in the particular subject matter areas under the jurisdiction of the Division and is, therefore, in a position to provide valuable assistance to the U.S. Attorney, including assistance in preparing pleadings and briefs as well as providing general advice on the substantive law and the handling of litigation. A copy of the final order entered in any case must be transmitted promptly to the appropriate Section of the Division.

#### 5-1.324 Cases Assigned as a Joint Responsibility

If the appropriate Section of the Division feels that a given case should be handled as a joint responsibility of the U.S. Attorney and the

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Division, the Chief of the Section shall make the assignment initially with a written description of the expected division of work and responsibility for the case. In the event the U.S. Attorney involved is not satisfied with the assignment, he/she shall consult with the appropriate Section Chief to resolve the assignment and/or division of responsibility. Any remaining differences will be resolved by the Assistant Attorney General of the Division. At least three months before trial, a firm understanding will be reached between the Division and the U.S. Attorney on trial responsibility. Either the Division or the U.S. Attorney may request a change in the assignment at any time. The Division will periodically review all joint responsibility assignments with the objective that where Division assistance is no longer required the case may be assigned to the U.S. Attorney under USAM 5-1.323, *supra*.

#### 5-1.325 Cases for Which the Division is Assigned Responsibility

If the appropriate Section of the Division feels that a given case should be handled by staff attorneys in the Division, the Chief of the Section will notify the U.S. Attorney, and the Chief of the Section and the U.S. Attorney will then agree upon exactly what, in any, support services the U.S. Attorney will provide to assist the staff attorneys in handling the litigation. Again, any differences over such case assignments and the provision of support services will be resolved by the Assistant Attorney General in charge of the Division.

#### 5-1.326 Review and Change of Case Assignments

The assignment of case responsibility to the U.S. Attorney may be reviewed at any subsequent time at the request of the U.S. Attorney, the client agency, or the appropriate Section, and may be changed; a change of assignment will only be made, however, after consultation with the U.S. Attorney. As with all differences between a Section of the Division and the U.S. Attorney, any differences concerning assignment or handling of cases will be resolved by the Assistant Attorney General of the Division.

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5-2.000 PRIOR APPROVALS

## PRIOR APPROVAL REQUIREMENTS

USAM SECTION	TYPE & SCOPE OF APPROVAL	WHO MUST APPROVE	COMMENTS
5-1.302	Filing complaints, stipulations or agreements for entry or judgment or dismissals in all civil cases where the United States is a plaintiff, other than direct referral cases and specific cases or classes of cases the Assistant Attorney General exempts from this requirement, arising from matters in the litigating sections.	Assistant Attorney General, Land and Natural Resources Division	Written approval required.
5-1.321	Indictment of certain cases involving laws within the jurisdiction of the Lands Division.	AAG, Lands and Natural Resources Division	Written approval required. In emergency telephone request is acceptable. See USAM 5-1.302
5-5.112	Entering into a stipulation concluding the substantive rights of the United States or consent to entry of judgment is required in all nondirect referral matters and in the following direct referral matters: Wildlife Import, export, Airborne Hunting Act, Bald and Golden Eagle Protection Act, and Wild Horses and Burros Act.	Land and Natural Resources Division	
5-5.125	Filing a separate action in suits against federal agencies, or federal employees acting in their official capacity, if a basis for counterclaim exists.	Assistant Attorney General, Land and Natural Resources Division	
5-5.210	Certain claims of cases within the area of responsibility of the Lands Division may not be compromised, closed or dismissed.	Assistant Attorney General or Section Chief, Land and Natural Resources Division	See USAM 5-5.230
5-5.230	Accept or reject offers in compromise in condemnation cases in which the amount of the proposed settlement exceeds \$200,000.	Assistant Attorney General, Land and Natural Resources Division	Land and Natural Resources Directive No. 776; 41 Fed.Reg., 53660.
5-6.112	Initiate an action under Section 10 or Section 13 of the River and Harbors Act. Exceptions: 1) All search warrants except under CERCLA; and, 2) TROs if a public health emergency.	Assistant Attorney General, Lands and Natural Resources Division	
5-6.311	Initiate certain cases under the supervision of the Environmental Defense Section; and, initiate civil or criminal enforcement actions involving the dredging or filling or alteration of the navigable waters of the United States or their tributaries.	Assistant Attorney General, Land and Natural Resources Division	33 U.S.C. §§ 1311, 1344. See USAM 5-6.310
5-7.321	Initiate certain cases under the supervision of the General Litigation Section.	See Above.	Exceptions, see USAM 5-1.310; Land and Nat.

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USAM SECTION	TYPE & SCOPE OF APPROVAL	WHO MUST APPROVE	COMMENTS
			Resources Dir. No. 7-76; 8-80 and 9-81
5-7.610	Initiate, settle or compromise any claim or case under the supervision of the General Litigation Section, except direct referral cases.	Attorney General	Written request required. Land and Nat. Resources Dir. No. 7-76; See USAM 5-1.310; 5-7.630
5-8.620	Settle or dismiss Land and Natural Resources Division cases on appeal.	Assistant Attorney General, Deputy Asst. Attorney General, Land and Natural Resources Div., or appropriate division trial sec., Lands Division	
5-9.321	Initiate, settle or compromise certain cases under the supervision of the Policy, Legislation and Special Litigation Section.	Assistant Attorney General, Lands and Natural Resources Division	Written approval required. See USAM 5-5.230
5-10.310	Initiate actions against foreign vessels and foreign fishermen under the Magnuson Fishery Conservation and Management Act.	Wildlife and Marine Resources Section, Land and Natural Resources Division	See 16 U.S.C. § 1801
5-10.321	Initiate, settle or compromise certain cases under the supervision of the Wildlife and Marine Resources Section.	Land and Natural Resources Division	Exceptions, See USAM 5-10.310 See also USAM 5-5.230
5-12.111	Initiate or terminate certain civil cases brought on behalf of the Environmental Protection Agency and other federal client agencies.	Assistant Attorney General, Land and Natural Resources Division	See USAM 5-12.102
5-12.121	Amend a complaint which has been approved and signed by the Assistant Attorney General.	Chief, Environmental Enforcement Section, Land and Natural Resources Division	
5-14.310	Initiate cases under the supervision of the Indian Resources Section, except cases referred by a direct request from a field officer of an agency regarding: 1) Action to recover possession of property from tenants, trespassers and others and actions to enjoin trespassers on Indian land if the damages do not exceed \$200,000; 2) Actions to collect delinquent opera-	Assistant Attorney General, Land and Natural Resources Division	Title 25 U.S.C. Written approval required under USAM 5-14.321; Land and Natural Resource Directive No. 7-76

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USAM SECTION	TYPE & SCOPE OF APPROVAL	WHO MUST APPROVE	COMMENTS
	tion and maintenance charges accruing on Indian irrigation projects of not more than \$200,000; and, 3) Actions to collect damages resulting from the default on a contract to remove timber from Indian lands providing such damages do not exceed \$200,000.		
5-15.321	Settlements of land acquisition cases in excess of \$200,000 or when: 1) The compromise of the claim will control or adversely influence the disposition of claims totaling in excess of \$200,000; and, 2) The revestment under 40 U.S.C. § 285f of any land or improvements or any interests in land is involved.	Land and Natural Resources Division	
5-15.526	Application for a citation in contempt under Rule 70, F.R.Civ.P. in certain environmental cases.	Land and Natural Resources Division	
5-15.543	Altering pleadings to modify or change the estate being condemned or description of the property.	Land and Natural Resources Division	
5-15.544	The exclusion of property acquired by declaration of taking, or for entering into stipulations for the exclusion of property of high value.	Land and Natural Resources Division	See USAM 5-15.544, Sub-section A.
5-15.551	Waiver of jury trials in cases in the major-tract program.	Land and Natural Resources Division	
5-15.610;.640	Unless the U.S. Attorney is given settlement authority, no cases under the jurisdiction of the Land Acquisition Section may be settled or dismissed.	Attorney General or as delegated	Land and Natural Resources Directive No. 3-83; See USAM 5-15.620; .630
5-15.631;.640	Settlement of land acquisition cases otherwise authorized when: 1) Settlement exceeds \$200,000 or the compromise of the claim will control or adversely influence the disposition of another claim totaling more than \$200,000; and 2) The agencies involved oppose the proposed closing or dismissal of the case or acceptance or rejection of the offer in compromise.	Assistant Attorney General, Land and Natural Resources Division	Land and Natural Resources Directive No. 3-83
5-15.650	Dismissal of condemnation cases as to any of the land included in the instructions to condemn, or to change the interest or estate to be acquired.	Land and Natural Resources Division	

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5-3.000 ORGANIZATION OF THE DIVISION

## 5-3.100 GENERAL

The Division is administered by an Assistant Attorney General, who is assisted by three Deputy Assistant Attorneys General.

## 5-3.200 LITIGATING SECTIONS

The litigating functions of the Division are discharged through nine sections:

The Environmental Defense Section (described in detail in USAM 5-6.000, *infra*);

The General Litigation Section (described in detail in USAM 5-7.000, *infra*);

The Appellate Section (described in detail in USAM 5-8.000, *infra*);

The Policy, Legislation and Special Litigation Section (described in detail in USAM 5-9.000, *infra*);

The Wildlife and Marine Resources Section (described in detail in USAM 5-10.000, *infra*);

The Environmental Crimes Section (described in detail in USAM 5-11.000, *infra*);

The Environmental Enforcement Section (described in detail in USAM 5-12.000, *infra*);

The Indian Resources Section (described in detail in USAM 5-14.000, *infra*);

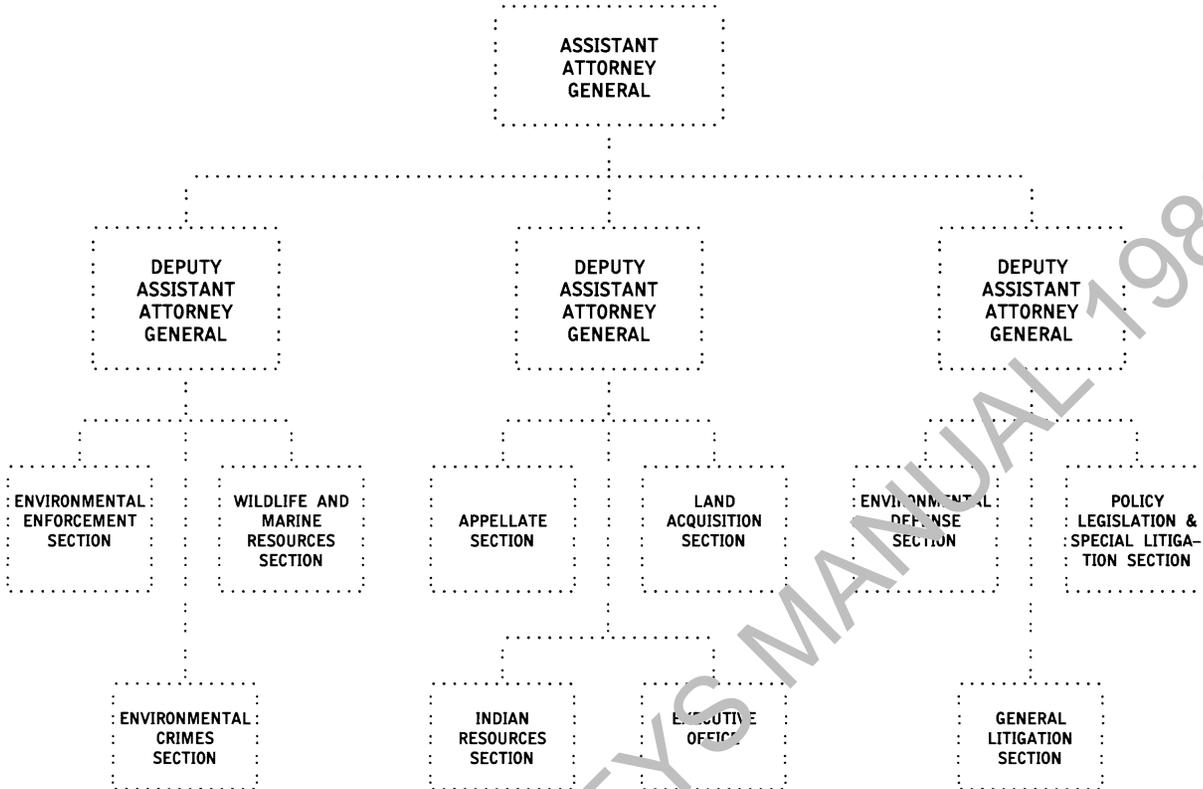
The Land Acquisition Section (described in detail in USAM 5-15.000, *infra*).

## 5-3.300 SUPPORT UNITS

Policy planning, legislative and special activities are assigned to the Policy, legislation and Special Litigation Section (described in detail in USAM 5-9.000, *infra*).

5-3.400

LAND AND NATURAL RESOURCES DIVISION



Approved:           /s/            
 EDWIN MEESE III  
 Attorney General

Date: 24 Apr 87

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5-4.000 STATUTES IN GENERAL

The principal statutes affecting the litigating activities of the Land and Natural Resources Division are listed in USAM 5-6.130, 5-7.120, 5-9.120, 5-10.120, 5-11.101, 5-12.102, 5-14.120, and 5-15.201.

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5-5.000 PROCEDURES

## 5-5.100 GENERAL PROCEDURES IN DISTRICT COURT LITIGATION

5-5.110 General

The instructions hereinafter set forth are applicable to all cases under supervision of the Division, whether they be cases directly referred to the U.S. Attorney, cases for which primary responsibility has been assigned to U.S. Attorneys by the Assistant Attorney General, cases which are the joint responsibility of the Division and the U.S. Attorneys or cases which are the primary responsibility of the Division.

## 5-5.111 Transmittal of Pleadings and Memoranda

Except for such papers as are originally prepared in the Department and then transmitted to the U.S. Attorneys for filing, the U.S. Attorneys should submit to the appropriate Section of the Land and Natural Resources Division in each case involving matters under the jurisdiction of the Section, one copy of the complaint, information or indictment, and one copy of all other papers filed by any party or by the court including pleadings, orders, proposed findings, judgments, opinions, briefs, memoranda, offers in compromise, plea offers, and any other instrument or record.

## 5-5.112 Stipulations

The U.S. Attorney may stipulate to any fact required to be proved by the government, or to the authenticity of government records. In no case except certain direct referral matters should a U.S. Attorney enter into a stipulation concluding the substantive rights of the United States, or consent to entry of judgment in favor of the adverse party, without specific authority from the Land and Natural Resources Division. Specific authority from the Land and Natural Resources Division to enter into such stipulations, or consent to judgment, is required in all nondirect referral matters and in the following direct referral matters: Direct referral wildlife import, export, Airborne Hunting Act, Bald and Golden Eagle Protection Act, and Wild Horses and Burros Act actions.

## 5-5.113 Assistance by Other Attorneys

U.S. Attorneys and their Assistants shall themselves conduct and direct all cases within the jurisdiction of this Division handled by them. There is no objection to U.S. Attorneys receiving assistance from attorneys connected with other offices of the government in the preparation and trial of cases, but it should be understood that such attorneys assist only, and do not conduct, direct, or control cases in which they may be interested. 28 U.S.C. §§ 509, 516 and 547. Such trial attorneys are only "of counsel" to the U.S. Attorney; they do not control or direct the conduct of cases in

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which they are interested, and they may not sign pleadings or briefs on behalf of the government or its officers, employees, or agents.

5-5.120 Suits Against the United States, Federal Agencies or Officials

5-5.121 Appearances by U.S. Attorneys

Upon being served with the complaint designating the United States or a federal official or agency as a defendant, a U.S. Attorney shall immediately take such steps as are necessary to protect the federal interest, and shall immediately transmit copies of the complaint and other papers to the supervisory section of the Land and Natural Resources Division. However, when time permits, no appearance should be made until instructions from the Department are obtained. If necessary, the request for instruction should be only by telephone or telegraph, directed to the Chief of the Section having jurisdiction over the type of action involved.

5-5.122 Removal of State Court Actions

An action against the United States, a federal agency, or a federal official, brought in a state court, may be removed to a federal court (28 U.S.C. § 1442). The U.S. Attorney should seek instructions immediately as to whether an action in a state court should be removed to a federal court, and before receiving instructions, he/she should take no steps in the state court which would prevent removal.

5-5.123 Sovereign Immunity Not Waivable

Neither the Department of Justice nor any U.S. Attorney may consent to suits against the United States, its officers or agents. A recent statute having some effects upon the doctrine of sovereign immunity is the Act of October 21, 1976, Pub.L. No. 94-574.

5-5.124 Service of Process on the Attorney General

The Attorney General has designated the Deputy Attorney General and the Administrative Assistant to the Attorney General to accept service of pleadings and process for him/her. In the absence of specific authority from the Attorney General or his/her designees, U.S. Attorneys have no authority to accept such service.

5-5.125 Counterclaims

In suits against federal agencies, or federal employees acting in their official capacity, counterclaims shall not be filed in the name of the defendants. If a basis for a counterclaim exists in such a suit, a separate action may be filed in the name of the United States, but such action may be filed only with the prior approval of the Assistant Attorney General.

5-5.126 to 5-5.128 [Reserved]

5-5.130 Proposed Findings of Fact and Conclusions of Law

In all actions in the federal courts tried upon the merits without a jury, care should be taken to have proper findings of fact and conclusions of law entered by the court as provided by Rule 52(a), Fed.R.Crim.P. When possible, two copies of the requests for findings should be transmitted to the Land and Natural Resources Division for comment and discussion before filing.

5-5.140 Costs

In no case may payment of costs be waived. Whenever money is accepted as full or partial payment, or in compromise, it must be applied first to court costs.

5-5.150 Judgments

5-5.151 Recording Judgments

Whenever a judgment is obtained by the United States affecting title to its property, the necessary recordation should be made promptly in accordance with the requirements of local law and the provisions of 28 U.S.C. § 1962 *et seq.*

5-5.152 Perfecting Lien of Judgments

Whenever a judgment for money is recovered by the United States, the necessary action shall be taken in accordance with the provisions of local law to perfect and preserve the lien of the judgment upon all property of the judgment debtor in the district in which the judgment has been entered or in any other district where the property of the defendant may be found, *See* 28 U.S.C. §§ 1962 and 1963, and also *Rhea v. Smith*, 274 U.S. 434 (1927).

5-5.153 Collection of Claims or Judgments

Except when required by the circumstances of a particular case, no property other than money should be accepted in full or part payment of a claim, compromise, or judgment and in no event shall property other than money be accepted until all incurred court costs are paid. The procedure followed in the collection and transmittal of funds is set forth in the title to this Manual relating to the Administrative Division.

5-5.154 Execution to Enforce Collection of Judgments

Whenever necessary to enforce collection of a money judgment, the U.S. Attorney or the field attorney should ascertain such facts as the facilities of his/her office will permit to determine whether the judgment debtor has property subject to execution and whenever necessary should invoke the

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aid of the field officer of the agency at whose instance the action originally was instituted. If property subject to execution is found, execution should be issued and a levy made. If no property subject to execution is found, execution should not be issued unless required by local law to perfect or protect the judgment lien or its priority, or unless the U.S. Attorney has reason to believe the issuance of execution will induce voluntary payment. If no distrainable property is found, the Department should be informed of the results of the investigation and the case should be held in abeyance until a determination can be made as to what further action should be taken.

#### 5-5.155 Execution to Enforce Judgments for Possession

A judgment for possession of property owned by the United States should be served upon all defendant trespassers, including those in privity with such defendants. If they fail to vacate the property in accordance with the judgment, a writ of assistance should be obtained from the clerk of the court and delivered to the U.S. Marshal for execution. When justified by unusual circumstances, an injunction may be obtained against the unlawful occupants. If they refuse to vacate the premises as required by the injunction, contempt proceedings may be instituted. Service of the injunction upon each respondent is a prerequisite to the institution of contempt proceedings.

#### 5-5.156 Post-Judgment Collection Efforts

The instructions issued by the Civil Division governing action to be taken for the collection of judgments, set forth in Title 11, Debt Collections, are applicable to all judgments entered in favor of the United States, and reference is made to them for appropriate guidelines to be followed in collection activities to be undertaken after the entry of judgment in favor of the United States in Land and Natural Resources Division cases. This does not enlarge the authority of cases beyond the limits stated in USAM 2-2.000, *infra*.

#### 5-5.160 Appeals

#### 5-5.161 Copies of Decisions to be Forwarded to Supervising

In cases subject to the supervision of the Land and Natural Resources Division in which a decision is rendered, the U.S. Attorney shall, by the most expeditious means, forward a copy of the decision to the Chief of the Section involved.

#### 5-5.162 Recommendation With Respect to Appeal

In any case handled by a U.S. Attorney in which a final decision is rendered, the U.S. Attorney shall proceed in accordance with the provisions of USAM 2-2.000.

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## 5-5.200 SETTLEMENT AND DISMISSAL OF CASES

5-5.210 Settlement Authority of the Assistant Attorney General

The authority delegated by the Attorney General to the Assistant Attorney General to compromise suits is set forth in 28 C.F.R. §§ 0.016 through 0.172. As is hereinafter set forth, the Assistant Attorney General has redelegated to Section Chiefs, and to the U.S. Attorneys, authority to compromise, close, or dismiss, certain types of cases. Except for those claims expressly and specifically authorized to be compromised, closed or dismissed by the U.S. Attorneys, no claim or case within the area of responsibility of the Land and Natural Resources Division may be compromised, closed or dismissed without the specific authority of the Attorney General, the Assistant Attorney General or the appropriate Section Chief. Instruction with respect to submitting proposed settlements or compromises for approval, and for authorization to dismiss cases, are set forth in USAM 5-15.600, *infra*, for cases under the supervision of the Land Acquisition Section; USAM 5-14.310C, *infra*, for cases under the supervision of the Indian Resources Section; USAM 5-10.600, *infra* for cases under the supervision of the Wildlife and Marine Resources Section; and USAM 5-7.600, *infra*, for cases under the supervision of the General Litigation Section.

5-5.220 Settlement Authority of Officers Within the Land and Natural Resources Division

Certain authority of the Assistant Attorney General to compromise claims has been delegated to the Deputy Assistant Attorney General and the Chiefs of the various litigating sections. The most recent such delegation of authority was effected on October 29, 1976, by Land and Natural Resources Directive No. 7-76. That directive as amended reads as follows:

## Section II—AUTHORITY TO COMPROMISE, DISMISS, OR CLOSE CASES

A. Delegation to Deputy Assistant Attorney General

Subject to the limitations imposed by USAM 5-5.240, *infra*, the Deputy Assistant Attorney General in the Land and Natural Resources Division is hereby authorized, with respect to matters assigned to the Land and Natural Resources Division, to accept or reject offers in compromise of claims against the United States in which the amount of the proposed settlement does not exceed \$500,000, and of claims in behalf of the United States in which the gross amount of the original claims does not exceed \$500,000.

B. Delegation to Section Chiefs

Subject to the limitations imposed by Paragraph D of USAM 5-5.240, *infra*, the Chiefs of the litigating sections of the

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Land and Natural Resources Division are hereby authorized, with respect to matters assigned to their respective sections, to accept or reject offers in compromise of claims against the United States in which the amount of the proposed settlement does not exceed \$300,000, and of the claims in behalf of the United States in which the gross amount of the original claim does not exceed \$300,000.

#### 5-5.230 Settlement and Dismissal Authority of U.S. Attorneys

Land and Natural Resources Division Directive No. 7-76 (41 Fed. Reg. 53660), as amended authorizes U.S. Attorneys to compromise, close or dismiss certain cases. Pertinent portions of the Directive, as amended are as follows:

##### Delegations to United States Attorneys

1. Compromise of Land Cases. Subject to the limitations imposed by paragraph D of USAM 5-1.640, *infra*, U.S. Attorneys are authorized, without the prior approval of the Land and Natural Resources Division, to accept or reject offers in compromise in the direct referral land cases listed in sub paragraph A-1 of section I, and in claims against the United States in which the amount of the proposed settlement does not exceed \$200,000, if the authorized field officer of the interested agency concurs in writing, except that where the United States is a plaintiff, a U.S. Attorney may accept an offer without the concurrence of the field officer if the acceptance is based solely upon the financial circumstances of the debtor.
2. Compromise of Environmental Cases. Prior delegations of authority to the U.S. Attorneys to settle any type of case in which the Department of Justice represents the Environmental Protection Agency, or the Administrator or any other official of that Agency, are hereby revoked; all offers in compromise of such cases shall be submitted to the Assistant Attorney General of the Land and Natural Resources Division for appropriate action.
3. Compromise of Wildlife Cases. Subject to the limitations imposed by this paragraph and section USAM 5-5.240, *infra*, U.S. Attorneys are authorized, without prior approval of the Land and Natural Resources Division, to settle all direct referral actions relating to wildlife law enforcement. This delegation of authority to the U.S. Attorneys to settle wildlife import, export, Airborne Hunting Act, Bald and Golden Eagle Protection Act, and Wild Horses and Burros Act actions.
4. Compromise of Condemnation Cases.

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a. Subject to the limitations imposed in Paragraph D of USAM 5-5.220 *supra*, U.S. Attorneys are hereby authorized, without prior approval of the Land and Natural Resources Division, to accept or reject offers in compromise of claims against the United States for just compensation in condemnation proceedings in any case in which the gross amount of the proposed settlement does not exceed \$200,000.

b. When a U.S. Attorney has settled a condemnation proceeding under the authority conferred upon him/her by the foregoing subparagraph the U.S. Attorney shall promptly secure the entry of judgment and distribution of the award, and shall take all other steps necessary to dispose of the matter completely. The U.S. Attorney concerned shall also immediately forward to the Department a report, in the form of a letter or memorandum, bearing his/her signature or showing his/her personal approval, stating the action taken and containing an adequate statement of the reasons therefor. In routine cases, a form, containing the minimum elements of the required report, may be used in lieu of a letter or a memorandum. In any case, special care shall be taken to see that the report contains a statement as to what the valuation testimony of the United States would have been if the case had been tried.

5. Closing or Dismissal of Matters and Cases. Subject to the limitations imposed in USAM 5-5.240, *infra*, a direct referral matter described in Section I may be closed without action by the U.S. Attorney or, if in court, may be dismissed by him if the field officer of the interested agency concurs in writing that it is without merit legally or factually. Except for claims on behalf of Indian or Indian tribes, the U.S. Attorney may close a claim without consulting the field office of the interested agency if he concludes (a) that the cost of collection under the circumstances would exceed the amount of the claim is uncollectible; claims on behalf of Indian individuals or Indian tribes may not be closed merely because the cost of collection might exceed the amount the claim.

5-5.240 Limitations on Delegations

The authority to compromise, close or dismiss cases delegated in USAM 5-5.220 and 5-2.330, *supra*, may not be exercised when:

A. For any reason, the compromise of a particular claim, as a practical matter, will control or adversely influence the disposition of other claims totaling more than the respective amounts designated above;

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B. Because a novel question of law or a question of policy is presented, or for any other reason, the offer should, in the opinion of the officer or employee concerned, receive the personal attention of the Assistant Attorney General in charge of the Land and Natural Resources Division; and

C. The agency or agencies involved are opposed to the proposed closing or dismissal of a case, or acceptance or rejection of the offer in compromise.

If any of the above conditions exist, then the matter shall be submitted for resolution to the Assistant Attorney General in charge of the Land and Natural Resources Division.

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5-6.000 THE ENVIRONMENTAL DEFENSE SECTION

## 5-6.001 Establishment

The Environmental Defense Section was created on July 1, 1981, as part of a Division reorganization. The predecessor section, the Pollution Control Section, was abolished on that date.

## 5-6.100 AREA OF RESPONSIBILITY

5-6.110 General Responsibilities

The Environmental Defense Section defends, and supports and coordinates the defense of, all civil and criminal cases, matters and proceedings arising under the statutes enumerated in USAM 5-6.130, *infra* (all of which statutes are concerned with the regulation and abatement of sources of pollution or with the protection of the natural environment). In cooperation with the Environmental Enforcement Section, it prosecutes, and supports the prosecution of, civil and criminal matters arising under Section 10 of the River and Harbor Act of 1899 and Sections 301 and 404 of the Clean Water Act. The Section also engages in certain other affirmative litigation.

## 5-6.111 Defense of Actions Directed Against the United States, Its Agencies and Officials

The Environmental Defense Section has Departmental responsibility for defending actions brought against the Administrator of the Environmental Protection Agency, and his or her subordinate officials, and against the Secretary of the Army, the Chief of Engineers of the United States Army, and their subordinate officials, challenging administrative actions which those officials have taken or failed to take under the statutes set forth in USAM 5-6.130, *infra*. Such actions may take the form of (a) challenges to regulations promulgated by these officials, (b) challenges to the propriety of the issuance or denial of permits, (c) assertions that actions required by law have not been taken, (d) challenges to measures taken or not taken with regard to enforcement of the statutes listed in USAM 5-2.130, *infra* and (e) any other defensive matters relating to the agencies' activities under the statutes listed in USAM 5-6.130, *infra*.

Additionally, the Environmental Defense Section has Departmental responsibility for litigation directed against any other federal agency or official alleged to have violated any duties under the statutes listed in USAM 5-6.130, *infra* and also for litigation directed at federal installations, properties, and activities charged with violating applicable discharge or emissions limitations, or other federal, state or local pollution laws.

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## 5-6.112 Cases Brought on Behalf of the United States

The Environmental Defense Section also has responsibility for civil and criminal actions initiated on behalf of the United States to enforce the provisions of Section 10 of the River and Harbor Act of 1899 and Sections 301 and 404 of the Clean Water Act, relating to unlawful filling or other unauthorized activities undertaken in waters of the United States. As a matter of policy and practice, these civil and criminal prosecutions are initiated only at the request of the Administrator of the Environmental Protection Agency or Chief of Engineers of the United States Army.

Whenever apparent violations of the above-mentioned statutes are brought to the attention of the Department of Justice by persons or agencies other than those with statutory enforcement responsibilities, the Department forwards reports of these apparent violations to cognizant enforcement officials for evaluation and referral for legal proceedings, if appropriate.

Forwarding reports of suspected violations to the appropriate agencies affords them an opportunity to resolve matters administratively. It also minimizes the government's vulnerability to a number of technical, procedural and equitable defenses. On occasion, however, an action under Section 10 or Section 13 of the River and Harbor Act may be initiated by the Environmental Defense or Enforcement Section or U.S. Attorneys at their own instance. All such actions require the approval of the Assistant Attorney General, Land and Natural Resources Division.

Other affirmative litigation undertaken on behalf of the agencies responsible for administering the statutes listed in USAM 5-6.130, *infra* and on behalf of agency clients having facilities subject to federal, state and local pollution control laws are initiated upon referral of the proposed action by the client agency to the Section Chief, Environmental Defense Section.

5-6.120 Overlapping Section Case Responsibility

While the Environmental Defense Section is responsible for defensive actions involving the statutes listed in USAM 5-6.130, *infra* cases arise from time to time involving several different claims and defenses, only some of which lie within the cognizance of the Environmental Defense Section. The Chiefs of the appropriate Sections within the Land and Natural Resources Division will decide between or among themselves concerning the primary assignment of such cases within the Division. The Section having primary responsibility for the case also has the responsibility to coordinate with the appropriate Section within the Division on all matters within said Section's jurisdiction. This should be accomplished by furnishing copies of pertinent pleadings and memoranda to said Section. Whenever possible, the Division attorney with the primary responsibility for

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the case will notify the U.S. Attorney of the identity of the attorney in any other Section who may be contacted with respect to matters within the expertise of that Section.

#### 5-6.121 Responsibility for Cases With New Issues or an Altered Character

Occasionally, issues involving statutes within the Environmental Defense Section's cognizance may be injected into existing litigation by way of amendment or supplemental pleadings, etc. In such events, U.S. Attorneys should notify the Chief of the Environmental Defense Section so that the Section can properly perform its responsibilities.

On rare occasions, the fundamental character of existing litigation may change such that issues within the cognizance of the Environmental Defense Section become the dominant issues. In such situations, the Environmental Defense Section staff attorney with advisory responsibility for the case shall notify the Section Chief who may request a transfer of Section responsibility if he/she deems it appropriate. If such issues become dominant in a case where the U.S. Attorney has primary responsibility, he may make a written request to the Assistant Attorney General, Land and Natural Resources Division, to have the case transferred to the Environmental Defense Section.

On occasion private plaintiffs may assert federal common law nuisance claims as a basis for relief against the United States, its agencies and officers. Any such case should immediately be brought to the attention of the Chief, Environmental Defense Section.

#### 5-6.130 Statutes Administered

The Environmental Defense Section is responsible for conducting defensive and certain other litigation as described in USAM 5-6.110, 5-6.111 and 5-6.112, *supra* arising under the following statutes:

- A. Sections 10 and 13 of the River and Harbor Act of 1899, 33 U.S.C. §§ 403, 407;
- B. The Clean Water Act (Federal Water Pollution Control Act, as amended), 33 U.S.C. § 1251 *et seq.* (except for *in rem* actions against vessels, which are supervised by the Admiralty and Shipping Section of the Civil Division);
- C. The Toxic Substances Control Act of 1976, 15 U.S.C. § 2601 *et seq.*;
- D. The Safe Drinking Water Act of 1974, 42 U.S.C. § 300f *et seq.*;
- E. The Clean Air Act, 42 U.S.C. § 7401 *et seq.*;
- F. The Noise Control Act of 1972, 42 U.S.C. § 4901 *et seq.*;

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G. The Uranium Mill Tailings Radiation Control Act, 42 U.S.C. § 7133 *et seq.*;

H. The Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. § 136 *et seq.*;

I. The Resource Conservation and Recovery Act, 42 U.S.C. § 6901 *et seq.* (also called the "Solid Waste Act").

J. The Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9601 *et seq.* (also called "Superfund Act");

K. Marine Protection, Research and Sanctuaries Act, 33 U.S.C. § 1401 *et seq.* ("Ocean Dumping Act").

#### 5-6.200 ORGANIZATION

##### 5-6.210 General

The Section is administered by a Chief and two Assistant Chiefs. One Assistant Chief is primarily responsible for district court litigation and the other Assistant Chief is primarily responsible for appellate court litigation. The work of the Section is assigned among staff attorneys according to experience and workload. Generally speaking, all staff attorneys are involved to some extent with every aspect of the Section's work and there are no specific units or other organizational subdivisions. General information relating to the Section or cases within its supervision may be obtained by calling the Chief or Assistant Chiefs at (202) 633-2219. Information on a specific case should be requested from the staff attorney assigned to that case. Where the staff attorney's name is unknown, the docket clerk of the Section (202) 633-3255 will furnish that information.

##### 5-6.220 General Duties of Staff Attorneys

In general, the following are the more significant duties of staff attorneys assigned to the Environmental Defense Section; (a) to handle cases authorized by statutes for direct review in appellate court; (b) to handle environmental litigation in district courts in cases of major significance when directed by the Assistant Attorney General, Land and Natural Resources Division, pursuant to the policies set forth in USAM 5-6.300, *et seq.*, *infra*; (c) to offer advice, policy guidance and trial assistance in environmental cases in the district court where the U.S. Attorney or designated assistant has primary responsibility for the litigation; and (e) to assume advisory responsibility with respect to environmental issues in cases falling within the cognizance of other Sections of the Land and Natural Resources Division.

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## 5-6.300 SUPERVISION AND HANDLING OF ENVIRONMENTAL DEFENSE SECTION CASES

## 5-6.301 Requests for Instructions

All requests for instructions and guidance relating to the defense or prosecution of actions under the jurisdiction of the Environmental Defense Section shall be referred to the Chief of the Environmental Defense Section of the Land and Natural Resources Division of the Department of Justice, Washington, D.C. 20530 (202) 633-2219.

## 5-6.302 Assignment of Case Responsibility

Responsibility for the handling of cases under the supervision of the Environmental Defense Section is assigned by the Chief of the Section under the provisions of USAM 5-1.323 through 5-1.325, *supra*.

5-6.310 Authority of U.S. Attorneys to Initiate Actions Without Prior Authorization, i.e., Direct Referral Cases

At present, the Assistant Attorney General, Land and Natural Resources Division, has delegated to the U.S. Attorneys the authority to act, without prior authorization from the Land and Natural Resources Division, on behalf of any other department or agency in response to a direct request in writing from an authorized field officer of the department or agency concerned, in the following environmental cases under the supervision of the Environmental Defense Section and Enforcement Section in certain cases:

Civil or criminal enforcement actions involving the dredging or filling or alteration of the navigable water of the United States and their tributaries in violation of Section 10 of the River Harbor Act of March 13, 1899 (33 U.S.C. § 403), and in violation of Sections 301 and 404 of the Clean Water Act, 33 U.S.C. §§ 1311, 1344. This authority is, however, revocable on a case by case basis where, in the opinion of the Assistant Attorney General, important or novel issues of law or policy are involved.

Generally speaking, direct referral cases are of a routine nature and involve statutes whose interpretation is relatively well-settled. Departmental policies on cases authorized for direct referral, however, are not necessarily related to policies on case responsibility allocation. The former have been formulated in cooperation with enforcement agencies to afford them an opportunity for headquarters review of enforcement action falling within unsettled areas of the law.

## 5-6.311 Notification to Environmental Defense Section of Intention to File Actions

Prior to filing a civil complaint or criminal information or return of indictments in a case authorized for direct referral, the Chief, Environ-

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mental Defense Section, shall be notified of the proposed action, and shall be furnished with a copy of the written request from the authorized field officer for initiation of the action.

#### 5-6.312 Transmittal of Papers to Environmental Defense Section and Client Agencies

One copy of each letter prepared or received by a U.S. Attorney in a direct referral case, as well as one copy of each pleading and paper filed by any party or by the court, shall be promptly forwarded to the Environmental Defense Section, and two copies shall be forwarded to the local officer of the referring agency (the local officer forwards one copy to his/her agency in Washington, D.C.).

#### 5-6.313 Authority to Handle Direct Referral Cases Does Not Extend to Appeals

The authorization to handle direct referral cases under the provisions of USAM 5-6.310, *supra* extends to district court proceedings only. Responsibility for appellate proceedings in all such cases remains in the Division's Appellate Section. See USAM 5-8.310 *et seq.*, *infra*. Accordingly, appeals in all such cases are governed by the procedures in USAM Title 2, Appeals.

#### 5-6.320 Actions Not Subject to Direct Referral to U.S. Attorneys

##### 5-6.321 Prior Authorization Needed to Institute Action

Except for cases *not* requiring prior authorization as stated in USAM 5-6.310, *supra* no case under the supervision of the Environmental Defense Section may be initiated by a U.S. Attorney without the prior authorization of the Assistant Attorney General, who shall sign the complaint prior to its being filed (see USAM 5-1.302, *supra*). Additionally, U.S. Attorneys may not initiate upon direct referral cases arising under the statutes listed in USAM 5-6.310, *supra*, where relief sought is monetary damages or civil penalties in excess of the U.S. Attorneys' settlement authority.

No defensive matters may be handled by the U.S. Attorneys on direct referral.

In cases under the supervision of this Section not authorized for direct referral, in which the U.S. Attorney wishes to file an action in the name of the United States, a request for such authority shall be sent to the Assistant Attorney General, Land and Natural Resources Division, attention Chief, Environmental Defense Section. Responsibility for handling such cases will be determined in accordance with the policies set forth in USAM 5-1.322 through 5-1.325, *supra*.

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5-6.400 [RESERVED]

5-6.500 GENERAL PROCEDURES IN DISTRICT COURT LITIGATION

5-6.510 General

The general instructions set forth in USAM 5-1.000 *et seq.*, *infra* with respect to the handling of litigation under the jurisdiction of the Land and Natural Resources Division apply to litigation within the cognizance of the Environmental Defense Section.

5-6.520 Preparing Responsive Pleadings in Actions Directed Against the United States, Its Agencies or Officials

Whenever an action is initiated against an agency or official of the United States, the underlying factual material required for the preparation of responsive pleadings is forwarded from the headquarters of the concerned agency to the Assistant Attorney General, Land and Natural Resources Division, by way of a litigation report. Except in unusual circumstances, agencies are required to forward a litigation report well in advance of the sixty (60) day deadline for responsive pleadings specified by Rule 12(a). If the U.S. Attorney has been given primary litigation responsibility, the Environmental Defense Section will request the agency to forward a copy of the litigation report to the U.S. Attorney concurrently with its transmittal to the Assistant Attorney General.

There are, however, inherent delays in the customary procedure for transmitting litigation reports. Service of the complaint may be upon the agency headquarters in Washington, D.C., and it may be some time before the local agency field office is aware of the pendency of the action. To minimize potential delays, the U.S. Attorney should immediately advise local agency field offices and the Chief, Environmental Defense Section, of the pendency of actions in which they may be a party or otherwise have an interest. The field offices should be provided with copies of the complaint and related documents as soon as possible so that they can initiate the preparation of a litigation report.

5-6.520(a) Temporary Restraining Orders and Preliminary Injunctions

Occasionally, an action directed against an agency or official of the United States will involve a motion for temporary restraining order or preliminary injunction or otherwise require that action be taken on behalf of the United States well before any responsive pleadings are due. In such cases the U.S. Attorney should immediately notify the Chief of the Environmental Defense Section (Telephone FTS 633-2219). If memoranda, affidavits or other responses must be filed prior to the agency's preparation of a litigation report, the U.S. Attorney should clear all legal and factual positions with the Environmental Defense Section prior to advancing them formally on behalf of the United States. It is the responsibility of the

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Environmental Defense Section to coordinate such positions with the agency headquarters in Washington, D.C.

#### 5-6.521 *Lis Pendens* and the Recording of Judgments

In civil prosecutions under Sections 10 and 13 of the River and Harbor Act and Section 301 and 404 of the Clean Water Act seeking prohibitory or mandatory injunctive relief, complications may arise if the ownership of the property in question changes hands during the pendency of the action. Where there is a threat of transfer or ownership, the U.S. Attorney should consider filing a notice of the pendency of the action, or *lis pendens*. The steps necessary for the filing of such a notice are determined by the law of the particular state (see 28 U.S.C. § 1964).

On occasions, the final judgment in a civil prosecution under these statutes may, in effect, place a permanent burden on the property which was subject to the unauthorized activities. In order to protect the future interests of the United States, the judgment should be recorded in accordance with the requirements of local law and the provisions of 28 U.S.C. § 1962 *et seq.*

#### 5-6.530 Suits Against the United States, Federal Agencies or Officials

##### 5-6.531 General

Upon notification that an action has been initiated against the United States, its agencies or officials, the U.S. Attorney should examine the complaint and supporting documents to ascertain whether the action will involve issues within the cognizance of the Environmental Defense Section. If it appears that the Environmental Defense Section will have responsibility for the case (see USAM 5-6.112, *supra*), the U.S. Attorney should promptly send a copy of the complaint and supporting documents to the Chief of the Environmental Defense Section.

If the case does not appear to be the primary responsibility of the Environmental Defense Section but appears that the Section may have advisory responsibilities, the Section Chief should be notified pursuant to USAM 5-6.120, *supra*.

##### 5-6.532 Direct Review in the Courts of Appeals

Most of the statutes listed in USAM 5-6.130, *supra* authorize direct review in the appellate courts of various actions taken by the Administrator of the Environmental Protection Agency, as well as certain other federal officials; all cases involving such petitions for review in such cases which may be served upon a U.S. Attorney should be promptly forwarded to the Chief of the Environmental Defense Section.

## 5-6.533 Citizens' Suits

The Clean Air Act, the Clean Water Act, the Marine Protection, Research and Sanctuaries Act, the Noise Control Act, and several of the other Acts also authorize citizen suits in the United States district courts against various persons, including federal officials. Normally, a period of notice is required before such an action may be instituted. Citizens' suits must be analyzed carefully to determine the relief sought in the case, and the U.S. Attorney should promptly seek instructions from the Chief, Environmental Defense Section, as to the handling of the case.

## 5-6.600 SETTLEMENT AND DISMISSAL OF CASES

5-6.610 General

U.S. Attorneys are not authorized to settle or dismiss any case arising under any of the statutes listed in USAM 5-6.100, *supra*. Any offer to settle or dismiss any such suit must be directed to the Chief of the Environmental Defense Section, who will take final action, or if the matter is not within the scope of his/her delegated authority, will forward the offer, with his/her own recommendation, to the Deputy Assistant Attorney General, who, in turn, will either act upon the offer, or, if necessary, refer the matter to the Assistant Attorney General. Offers to settle or compromise in direct referral cases, when transmitted to the Environmental Defense Section, should be accompanied by the recommendation of the referring agency.

## 5-6.611 Transmittal of Settlement Offers

Any offer to settle or dismiss an action shall be transmitted to the Chief of the Environmental Defense Section for referral to the Assistant Attorney General and for such other action as may be directed by regulation. Such offers should be accompanied by the written comments and recommendation of the referring agency. In emergency situations, such as with settlement offers received during trial, settlement offers dealing exclusively with monetary damages or penalties may be communicated to the Chief of the Environmental Defense Section by telephone.

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5-7.000 THE GENERAL LITIGATION SECTION

## 5-7.001 Establishment

The General Litigation Section was created by Order of June 28, 1960, consolidating the Trial Section and the Water Resources Section, as modified by the LNRD Directive 14-86 of April 28, 1986, consolidating the Indian Claims Section into it.

## 5-7.100 AREA OF RESPONSIBILITY

5-7.110 General

The General Litigation Section handles all pending and contemplated cases, matters and proceedings in the trial courts, assigned to the Land and Natural Resources Division, except condemnation proceedings brought by the United States and matters specifically assigned to the Indian Resources Section, the Wildlife and Marine Resources Section, the Environmental Crimes Section, Environmental Defense Section, and the Environmental Enforcement Section.

5-7.120 Statutes Administered

The General Litigation Section supervises and conducts litigation arising under several different classes of statutes, described below, and also under treaties and agreements with Indians, Executive Orders, common law, and the laws of various states. The listing is not exhaustive, but illustrative, and contains the primary statutes under which litigation arises.

A. Civil construction and operation of projects and facilities. Chief among these statutes are: 1) the Federal-Aid Highway Act of 1958, 72 Stat. 885, as amended, 23 U.S.C. § 101 *et seq.*, 2) Flood Control Act of 1938, 52 Stat. 1215, as amended, 33 U.S.C. § 701b *et seq.*, and other civil works authorities of the U.S. Army Corps of Engineers, some of which are codified at 33 U.S.C. § 540 *et seq.*; 3) Airport and Airway Development Act of 1970, 84 Stat. 227, as amended, 49 U.S.C. § 1711 *et seq.*; Housing and Community Development Act of 1974, 88 Stat. 633, 42 U.S.C. § 5301 *et seq.*

B. National Environmental Policy Act and similar procedural and review statutes. Regardless of the agency involved: 1) the National Environmental Policy Act of 1969, 42 U.S.C. § 4321 *et seq.*; 2) the National Historic Preservation Act of 1966, as amended, 16 U.S.C. § 470 *et seq.* (for *all* such cases, see USAM 5-7.322); and 3) Fish and Wildlife Coordination Act, 16 U.S.C. §§ 661 to 666c, except sec. 666a (see USAM 5-10.120).

C. Federal Land Management. The statutes under which the Bureau of Land Management, the Forest Service, the Fish and Wildlife Service and the National Park Service administer lands and resources under their jurisdiction, excepting those matters related to wildlife management delegated to

the Wildlife and Marine Resources Section (see USAM 5-10.100). Chief among these statutes are: 1) (Bureau of Land Management) Federal Land Policy and Management Act, 43 U.S.C. § 1701 *et seq.*, Taylor Grazing Act of 1934, 43 U.S.C. § 315 *et seq.*; 2) (Forest Service) "Organic Act of 1897", 16 U.S.C. § 471 *et seq.*, Weeks Act of 1911 (eastern acquired lands forests), found in part at 16 U.S.C. §§ 513 to 519, 36 Stat. 961, National Forest Management Act, 16 U.S.C. § 1601 *et seq.*; 3) (Fish and Wildlife Service) National Wildlife Refuge System Administration Act, as amended, 16 U.S.C. §§ 668dd and 668ee; 4) (National Park Service) National Park Service Act, 16 U.S.C. §§ 1 to 4, and the authorizing statutes for individual units of the National Park System, 16 U.S.C. §§ 21 through 460mm, and the Historic Sites, Buildings and Antiquities Act of 1935, 16 U.S.C. §§ 461 to 467.

D. Mineral exploration and development. Statutes governing mineral activity on federal lands: 1) General Mining Law of 1872, as amended, 30 U.S.C. § 22 *et seq.*, 2) Mineral Leasing Act of 1920, as amended, 30 U.S.C. § 181 *et seq.*, 3) Mineral Leasing Act for Acquired Lands, 30 U.S.C. § 351 *et seq.*, 4) Outer Continental Shelf Lands Act, 43 U.S.C. § 1331 *et seq.*, 5) Federal Oil and Gas Royalty Management Act of 1982, 30 U.S.C. § 1701 *et seq.*

E. Indian cases. 1) Suits by Indian tribes, individuals or allottees against the United States under treaties and agreements with Indians, and in the administration of statutes governing Indian lands, Indian resources, Indian assistance programs, and actions with respect to tribal self-government, and 2) Alaska Native Claims Settlement Act, 43 U.S.C. § 1601 *et seq.*

F. Water Rights and Projects. 1) Reclamation Act of 1902, as amended, 43 U.S.C. § 431 *et seq.*, and other project authorizations of the Bureau of Reclamation; and 2) McCarran Act of 1952, 43 U.S.C. § 666, involving adjudication of federal water rights in state courts, *except* for Indian water rights (see USAM 5-5.100).

G. Boundaries, Quiet Title and Navigation. 1) Quiet Title Act, as amended, 28 U.S.C. § 2409a, including suits by states regarding navigability under the Equal Footing doctrine, 2) Sections 9 and 11 of the Rivers and Harbors Act of 1899, 33 U.S.C. §§ 401, 404, and 3) Submerged Lands Act of 1953, 43 U.S.C. § 1301 *et seq.*

H. Other statutes of general applicability: 1) Tucker Act, 28 U.S.C. §§ 1346(a)(2) and 1491 (for all matters within the responsibility of the Land and Natural Resources Division (USAM 5-1.100)), 2) Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1201 *et seq.*, 3) Coastal Zone Management Act, 16 U.S.C. § 1415 *et seq.*, 4) Alaska National Interest Lands Conservation Act of 1980, Pub.L. No. 96-487, and 5) Wilderness Act of 1964, 16 U.S.C. § 1131 *et seq.*

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## 5-7.200 ORGANIZATION

5-7.210 General

The Section is administered by a Chief, a Deputy Chief, and two Assistant Chiefs. Information related to any matter in the section may be sought by calling any of these four at 202-633-2704. The workload is assigned according to experience, expertise and workload. The section has distributed to United States Attorneys' offices a listing of the expertise of section personnel. Information on a specific case should be sought from the attorney assigned. Information on case assignment is available from the docket clerk, 202-633-2788.

## 5-7.300 PROCESSING AND HANDLING OF CASES

Assignment of case responsibility is treated in USAM 5-1.323 through 5-1.326.

## 5-7.301 Special Provisions

A. National Historic Preservation Act. The Department of Justice has agreed, pursuant to 16 U.S.C. § 470k, to notify the Advisory Council on Historic Preservation of all cases involving the National Historic Preservation, 16 U.S.C. § 470 *et seq.*, or regulations promulgated thereunder (36 C.F.R. Part 800). The Advisory Council will rarely be a party to the litigation, but the Council is charged, *inter alia*, with advising the President and Congress on matters relating to historic preservation and with reviewing federal, federally assisted, and federally licensed undertakings affecting cultural properties.

Many of these cases involve proposed alterations to, or demolition of, historic structures and may originate as temporary restraining orders. It is especially important, therefore, that the Section receive early notice of these cases, so that it can then notify the Advisory Council. Accordingly, upon receipt of any complaint raising an issue under the National Historic Preservation Act, the U.S. Attorney's Office should call the attorney assigned to the case in the Department of Justice in Washington, D.C. who will then notify the Council. Most of the cases involving the Act or regulations are within the jurisdiction of the General Litigation Section, Land and Natural Resources Division, FTS 633-2704. In the event a request for a temporary restraining order is filed before the case is assigned to a General Litigation attorney, the Chief of that Section should be notified.

B. Biotechnology Litigation. Litigation involving biotechnology and its environmental implications is handled in the Land and Natural Resources Division. Within the Division, the cases—whether filed by complaints in the district courts or by petitions for review in the courts of appeals—are assigned to a team of attorneys from the Division, usually

from the General Litigation Section (see USAM 5-7.120), Environmental Defense Section (see USAM 5-6.130), or the Wildlife and Marine Resources Section (see USAM 5-10.120), as appropriate, depending on the statutes identified and claims raised. If such litigation is filed in your district, please contact the chief of any of the above-stated sections who will contact the other appropriate sections.

5-7.310 Authority of U.S. Attorneys to Initiate and Defend Actions Without Prior Authorization, i.e., Direct Referral Cases

The authority of U.S. Attorneys to initiate cases under the supervision of the General Litigation Section is set forth in USAM 5-1.310.

5-7.311 Actions to Recover Money to be Instituted Only Where a Judgment is Collectible

No action for the recovery of money only shall be instituted unless the referring agency supplies satisfactory proof that a judgment, if recovered, would be collectible.

5-7.312 Authority of U.S. Attorneys to Defend Actions Without Prior Authorization

U.S. Attorneys are hereby authorized to act in the following matters, in response to service on the United States, without assignment of the case from the Land and Natural Resources Division, in the following cases:

a. Actions under 28 U.S.C. § 2410 affecting property in which the United States has a lien, except where the lien is a tax lien (see Title 6—TAX DIVISION, USAM). See also Land and Natural Resources Division Directive No. 9-68 (August 5, 1968): "Procedure for the Handling of Condemnation Actions against the United States under or purportedly under Title 28 U.S.C. § 2410."

b. Suits for judicial review of decisions of the Department of the Interior regarding the probate or estate administration of deceased Indians' interests in trust or allotted land.

5-7.320 Actions Not Subject to Direct Referral to U.S. Attorney

Responsibility for the handling of cases under the supervision of the General Litigation Section is assigned by the chief of the Section under the provisions of USAM 5-1.326, *supra*.

5-7.321 Prior Authorization Needed to Initiate Action

Except for cases authorized to be filed by USAM 5-1.310, *supra*, no case under the supervision of the General Litigation Section may be initiated by

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a U.S. Attorney without the prior authorization of the Assistant Attorney General.

5-7.400 [RESERVED]

5-7.500 GENERAL PROCEDURES IN DISTRICT COURT LITIGATION

5-7.510 General

The general instructions set forth in USAM 5-5.100 *et seq.*, *supra* with respect to the handling of litigation apply in every respect to the litigation of the General Litigation Section. Particularly, it is of the utmost importance that complaints filed against the federal government and federal officials in matters relating to the area of responsibility of the General Litigation Section be transmitted promptly to the Chief of the Section.

5-7.520 Lis Pendens

Whenever required by the nature of the case, the attorney assigned to the case shall, or assure that the agency shall, file or record a notice of the pendency of the action or lis pendens among the proper local records, except in those jurisdictions where the law is settled that the commencement of the action is notice to all persons affected.

5-7.530 Judgments

U.S. Attorneys should note and comply with the instructions relating to the recording, collection and enforcement of judgments set forth in USAM 5-5.150 through 5-5.155.

5-7.600 SETTLEMENT AND DISMISSAL OF CASES

5-7.610 General

Except with respect to direct referral cases (discussed in USAM 5-7.630, *infra*) no claim or case under the jurisdiction of the General Litigation Section may be settled or dismissed without specific or delegated authority from the Assistant Attorney General. See USAM 5-5.200 *et seq.*, *supra*.

5-7.620 Transmittal of Compromise Offer to General Litigation Section: Recommendations With Respect to Acceptance

Any offer to settle or dismiss an action shall be transmitted to the Chief of the General Litigation Section for referral to the Assistant Attorney General or for such other action as may be directed by regulation. Such offers should be accompanied by the written comments and recommendation of the referring agency and the U.S. Attorney. In emergency situations, such as with settlement offers received during trial, settlement

offers dealing exclusively with monetary damages or penalties may be communicated to the Chief of the General Litigation Section by telephone.

The recommendation should be guided by the principles that compromise offers cannot be accepted unless (a) there is doubt as to whether judgment can be secured for an amount larger than that offered or (b) because the probable cost of collection exceeds the difference between the amount offered and the amount recoverable.

5-7.630 Authority of U.S. Attorneys to Settle or Dismiss Direct Referral Cases

The authority of U.S. Attorneys to settle or dismiss direct referral cases under the supervision of the General Litigation Section is set forth in USAM 5-5.230, *supra*.

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5-8.000 THE APPELLATE SECTION

## 5-8.001 Establishment

The Appellate Section was created on July 12, 1937, by memorandum of that date signed by Assistant Attorney General Carl McFarland.

## 5-8.100 AREA OF RESPONSIBILITY

5-8.110 General

The Appellate Section is responsible for all division cases on appeal which were handled by the General Litigation Section, the Indian Resources Section, the Indian Claims Section, the Environmental Defense Section, the Environmental Enforcement Section, the Wildlife and Marine Resource Section, and the Land Acquisition Section in the district courts, including criminal prosecutions under the various environmental control and wildlife protection statutes. The responsibility for handling appeals of division cases handled by U.S. Attorneys is determined pursuant to the provisions of USAM Title 2, Appeals.

## 5-8.200 ORGANIZATION

5-8.210 General

The Appellate Section is composed of a Chief, two Assistant Chiefs, and those members of the professional, clerical, and stenographic staff specifically assigned to it. Five senior attorneys are designated as counselors to, and reviewers of the work of, the junior attorneys.

## 5-8.300 SUPERVISION AND HANDLING OF APPELLATE CASES

5-8.310 General

Except as provided for in USAM 5-8.320, *infra*, staff attorneys in the Appellate Section handle all cases within the area of responsibility of that Section. The Chief of the Appellate Section is in charge of the assignment of all cases. Generally, the function of assigning cases has been delegated to an Assistant Chief. The reviewing attorney is specified at the time the case is assigned. Both the attorney assigned the case and the reviewing attorney are then responsible for all aspects of the case. The junior attorney apprises the reviewing attorney of all developments.

5-8.320 Handling of Appeals by Other than Staff Attorneys

The assignment of cases on appeal to attorneys in the Offices of U.S. Attorneys is determined pursuant to the provisions of USAM Title 2, APPEALS. At the conclusion of trial court proceedings, the report to the Division of the decision, either adverse or favorable to the government, in a case handled by the U.S. Attorney should indicate his/her preference, if

any, for handling of the appeal; if the report does not indicate a preference, the Division will handle the appeal. See USAM Title 2, Appeals, 2-2.111, 2-2.000, 2-3.220. Where a U.S. Attorney handles the appeal, a section attorney and a reviewing attorney are assigned for assistance and necessary department coordination purposes. Because briefs must be coordinated with client agencies and interested agencies prior to filing, a draft must be provided to the section and reviewing attorneys at least ten days prior to filing.

In unusual circumstances, especially where time is of the essence (e.g., some applications for stays or injunctions pending appeal and for interlocutory appeals), arrangements for handling should be made by telephone with the Chief of the Appellate Section. See USAM Title 2, APPEALS; Rules 5, 8, and 26, F.R.A.P.

5-8.400 [RESERVED]

5-8.500 GENERAL PROCEDURES IN APPELLATE LITIGATION

5-8.510 General

Detailed instructions with respect to the handling of appeals are set forth in Title 2 of this Manual.

5-8.600 SETTLEMENT AND DISMISSAL OF CASES ON APPEAL

5-8.610 General

Reference is made to the statement of the Division relative to settlement and dismissal of cases, (USAM 5-1.500 *et seq.*) and to the statements of the Division's trial litigation sections. See USAM 5-2.600, 5-4.600, 5-5.600 and 5-7.600, *supra*.

5-8.620 Authorization for U.S. Attorneys to Handle Settlement and Dismissal Appeals

U.S. Attorneys are not authorized to settle or dismiss Land and Natural Resources Division cases on appeal, without specific Division authority. A request for authorization to settle or dismiss division cases on appeal must be directed to the Chief of the Appellate Section, who transmits the request to the appropriate Division Trial Litigation section for action, if the matter is within that section's delegated authority. If the matter is beyond that section's delegated authority, that section forwards the request, with its own recommendation, to the Deputy Assistant Attorney General, who will act on the request or refer the matter to the Assistant Attorney General.

In a case where the Solicitor General has determined that no appeal will be prosecuted by the government and the appeal has not been docketed in the

court of appeals, the Appellate Section requests the U.S. Attorney to dismiss the appeal in the district court. If the appeal has already been docketed in the court of appeals, the Appellate Section itself files a motion to dismiss the appeal in the court of appeals. See Rule 42, F.R.A.P.

5-8.630 Settlements Requiring Approval of Solicitor General

Special Attention is directed to 28 C.F.R. § 0.163, Subpart Y, Chap. I:

§ 0.163 Approval by Solicitor General of action on compromise offers in certain cases.

In any Supreme Court case the acceptance, recommendation of acceptance, or rejection, under § 0.160 [Offers which may be accepted by Assistant Attorney General], § 0.161 [Recommendations to Attorney General of acceptance of certain offers], is § 0.162 [Offers which may be rejected by Assistant Attorney General], of a compromise offer by the Assistant Attorney General concerned, shall have the approval of the Solicitor General. In any case in which the Solicitor General has authorized an appeal to any other court, a compromise offer, or any other action, which would terminate the appeal, shall be accepted or acted upon by the Assistant Attorney General that the principles of law involved do not require appellate review in that case.

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5-9.000 THE POLICY, LEGISLATION AND SPECIAL LITIGATION SECTION

## 5-9.001 Establishment

The Policy, Legislation and Special Litigation Section was created on March 16, 1979, by Land and Natural Resources Division Directive No. 4-79.

## 5-9.100 AREA OF RESPONSIBILITY

5-9.110 General

The Policy, Legislation and Special Litigation Section performs policy planning for the Division including review of existing policy and programs, analysis and initiation of new policy, revision of management systems and integration of policy changes in budget submissions. This Section also drafts proposed legislation, reviews and reports on bills of interest to the division and develops litigation programs designed to meet new nonroutine problems. Most of the special litigation is developed when a client agency presents a legal problem of a unique nature that has not been previously dealt with in the routine program of the Division. In this regard, Policy, Legislation and Special Litigation is also responsible for the filing of *amicus curiae* briefs in cases involving issues which affect the Land and Natural Resources Division's areas of responsibility, unless those cases are specifically assigned to the Appellate Section.

5-9.120 Statutes Administered

The Policy, Legislation and Special Litigation Section is not limited to a specific area of statutory responsibility. Rather, the section supervises and conducts litigation arising under numerous federal statutes, as well as under treaties and agreements with Indians, Executive Orders, regulations of the various departments and agencies, the common law, and the laws of the various States. Policy, legislation and special litigation has sole responsibility for litigating cases arising under the Aviation Safety and Noise Abatement Act of 1979, 49 U.S.C. App. § 2101. In addition, the section is responsible for administering and/or conducting congressionally mandated studies and reports, such as those required by section 301(e) of the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. § 9601 *et seq.*, the Uranium Mill Tailings Radiation Control Act 1978, 42 U.S.C. §§ 2021 & 1901 *et seq.*, and the Asbestos School Hazard Detection and Control Act of 1980, 20 U.S.C. § 3601 *et seq.*

## 5-9.200 ORGANIZATION

5-9.210 General

The Section is administered by a Chief. The work of the Section is assigned among staff attorneys according to experience and workload.

5-9.300 SUPERVISION AND HANDLING OF THE POLICY, LEGISLATION AND SPECIAL LITIGATION SECTION CASES

5-9.301 Requests for Instructions

All requests for instructions and guidance relating to the prosecution or defense of actions under the jurisdiction of the Policy, Legislation and Special Litigation Section shall be referred to the Chief of the Policy, Legislation and Special Litigation Section of the Land and Natural Resources Division of the Department of Justice, Washington, D.C. 20530 (202-633-2586).

5-9.320 Actions Not Subject to Direct Referral to U.S. Attorneys

Responsibility for handling of cases under the supervision of the Policy, Legislation and Special Litigation Section is assigned by the Chief of the Section under the provisions of USAM 5-1.322 through 5-1.326, *supra*.

5-9.321 Prior Authorization Needed to Initiate Action

No case under the supervision of the Policy, Legislation and Special Litigation Section may be initiated by a U.S. Attorney without the prior authorization of the Assistant Attorney General, who shall sign the complaint prior to its being filed. See USAM 5-1.302, *supra*.

5-9.400 [RESERVED]

5-9.500 GENERAL PROCEDURES IN DISTRICT COURT LITIGATION

5-9.510 General

The general instructions set forth in USAM 5-5.100 *et seq.*, *supra*, with respect to handling of litigation apply in every respect to the litigation of the Policy, Legislation and Special Litigation Section.

5-9.600 SETTLEMENT AND DISMISSAL OF CASES

5-9.610 General

No claim or case under the jurisdiction of the Policy, Legislation and Special Litigation Section may be settled or dismissed without specific or delegated authority from the Attorney General. See USAM 5-5.700 *et seq.*, *supra*.

5-9.620 Transmittal of Compromise Offer to Policy Legislation and Special Litigation Section; Recommendations With Respect to Acceptance

Where compromise in a case other than a direct referral case is offered to a U.S. Attorney, he shall require the offer or to reduce the proposal to writing and to submit with it a cashier's or certified check, bank draft, or

money order for the amount offered, drawn or endorsed unconditionally to the order of the Treasurer of the United States. Where a large sum is involved, a token deposit is acceptable. The U.S. Attorney then shall forward to the Department the written offer, this recommendation and the reasons therefor, and a statement of the debtor's financial status.

The recommendation should be guided by the principles that compromise offers cannot be accepted unless (a) there is doubt as to whether judgment can be secured for an amount larger than that offered in compromise, (b) there is doubt as to whether an amount larger than that offer can be collected, although a judgment has been or can be secured, or (c) the probable cost of collection exceeds the difference between the amount recoverable and the amount offered.

The financial statement need not be forwarded where the offer is recommended for acceptance solely because there is doubt as to whether judgment can be secured for an amount larger than that offered or because the probable cost of collection exceeds the difference between the amount offered and the amount recoverable.

5-9.630 Authority of U.S. Attorneys to Settle or Dismiss Direct Referral Cases

The authority of U.S. Attorneys to settle or dismiss direct referral cases under the supervision of the Policy, Legislation and Special Litigation Section is set forth in USA 5-1.630, *supra*.

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5-10.000 THE WILDLIFE AND MARINE RESOURCES SECTION

## 5-10.001 Establishment

The Wildlife Section was established on November 8, 1979, by Land and Natural Resources Division Directive No. 22-79. The Marine Resources Section was established on November 5, 1969, by Land and Natural Resources Division Directive No. 6-691. The consolidated Wildlife and Marine Resources Section was established on June 15, 1981, by Land and Natural Resources Division Directive No. 1.

## 5-10.100 AREA OF RESPONSIBILITY

5-10.110 General

The Wildlife and Marine Resources Section has responsibility for prosecuting, defending, supporting, and coordinating the prosecution and defense of all civil and criminal cases, matters, and proceedings arising under the laws listed below (see USAM 5-10.120, *infra*).

5-10.120 Statutes Administered

The federal statutes giving rise to litigation handled by the Section include the following:

- A. Endangered Species Act of 1973, 16 U.S.C. § 1531 *et seq.*
- B. Lacey Act, 16 U.S.C. § 5571 *et seq.*
- C. Airborne Hunting Act, 16 U.S.C. § 742j-1
- D. Migratory Bird Treaty Act, 16 U.S.C. § 703 *et seq.*
- E. Migratory Bird Conservation Act, 16 U.S.C. §§ 715 to 715d, 715e, 715f to 715k, 715l to 715r
- F. Bald and Golden Eagle Protection Act, 16 U.S.C. §§ 668 to 668d
- G. Dingell-Johnson Fish Restoration Act, 16 U.S.C. §§ 777 to 777i, 777k
- H. National Wildlife Refuge System Administration Act, 16 U.S.C. §§ 668dd, 668ee
- I. Marine Protection, Research and Sanctuaries Act, 33 U.S.C. § 1431 *et seq.*
- J. Magnuson Fishery Conservation and Management Act, 16 U.S.C. § 1801 *et seq.*
- K. Whaling Convention Act, 16 U.S.C. § 981 *et seq.*
- L. Atlantic Tunas Convention Act, 16 U.S.C. § 971

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- M. Tuna Conventions Act, 16 U.S.C. § 951 *et seq.*
- N. Marine Mammal Protection Act, 16 U.S.C. § 1361 *et seq.*
- O. Sockeye Salmon or Pink Salmon Fishing Act, 16 U.S.C. § 776 *et seq.*
- P. Fur Seal Act of 1966, 16 U.S.C. § 1151 *et seq.*
- Q. Protection of Sea Otters on the High Seas Act, 16 U.S.C. § 1171 *et seq.*
- R. Wild Free Roaming Horses and Burros Act, 16 U.S.C. §§ 1331 to 1340
- S. Fish and Wildlife Coordination Act, 16 U.S.C. §§ 661 to 667e
- T. Animal Damage Control Act, 7 U.S.C. § 426 *et seq.*
- U. Sponge Act, 16 U.S.C. § 781 *et seq.*
- V. Northern Pacific Halibut Act, 16 U.S.C. § 772 *et seq.*
- W. Northern Pacific Fisheries Act, 16 U.S.C. § 1021 *et seq.*
- X. Antarctic Conservation Act, 16 U.S.C. § 2401 *et seq.*
- Y. Atlantic Salmon Convention Act, 16 U.S.C. § 1601 *et seq.*

#### 5-10.200 ORGANIZATION

##### 5-10.210 General

The section is administered by a Chief and an Assistant Chief. The work of the Section is assigned among staff attorneys according to experience and workload.

#### 5-10.300 SUPERVISION AND HANDLING OF WILDLIFE AND MARINE RESOURCES SECTION CASES

##### 5-10.301 Request for instructions

Requests for instructions and guidance relating to the prosecution or defense or actions under the jurisdiction of the Section shall be referred to: Chief, Wildlife and Marine Resources Section, Land and Natural Resources Division, Department of Justice, Washington, D.C. 20530 (202-724-7522).

##### 5-10.310 Authority of U.S. Attorneys to Initiate Actions Without Prior Authorization, i.e., Direct Referral Cases

The general authority of U.S. Attorneys to initiate cases under the supervision of the Wildlife and Marine Resources Section is set forth in USAM 5-1.310. Cases which do not raise new or unusual questions of law may be initiated by the U.S. Attorney without prior authorization from the

Section in response to a direct request in writing from an authorized field officer of the department or agency concerned.

*Provided that* upon receipt of referrals of any case within the jurisdiction of the Section, notice shall be given to the Section before filing or declining to file an action, as set forth in USAM 5-10.312, *infra*.

*Provided that* U.S. Attorneys are not authorized to commence actions against foreign vessels or foreign fishermen under the Magnuson Fishery Conservations and Management Act, 16 U.S.C. § 1801 *et seq.*, without prior telephonic approval from the Section. The views of the U.S. Attorney for a district to which a foreign vessel may be brought will be ascertained in advance of seizure by the Coast Guard. The U.S. Attorney should then contact the Section to discuss the complaint to be filed, release bond and inventory arrangements.

5-10.312 Notice to Wildlife and Marine Resources Section of Intention to File Direct Referral Action

No later than three (3) business days prior to instituting or declining to institute a direct referral action arising under the jurisdiction of the Section, the Chief of the Section shall be notified of the proposed action, and copies of relevant documents shall be forwarded in due course. This notice and document forwarding requirement is waived when, for example, a case involves routine enforcement of the Migratory Bird Treaty Act or ordinary forfeiture proceedings not concerning wildlife or associated articles of significant value.

The notice requirement is applicable where, for example, a case involves a conspiracy to violate the import or export provisions of the Endangered Species Act, the Marine Mammal Protection Act, or the Lacey Act; a multi-jurisdictional conspiracy involving the interstate trading in wildlife or wildlife parts and products in violation of any federal wildlife or marine resource law; a violation of the felony provisions of the Lacey Act or the Migratory Bird Treaty Act; any litigation involving the Wild Horses and Burros Act. If there is doubt as to whether notice and document forwarding is necessary, inquiry to the Section is appropriate.

5-10.320 Actions Not Subject to Direct Referral to U.S. Attorney

Responsibility for the handling of cases under the supervision of the Wildlife and Marine Resources Section is assigned by the Chief of the Section under the provisions of USAM 5-1.322 through 5-1.326.

5-10.321 Prior Authorization Needed to Initiate Action or Assume Defense of Action

Except for cases authorized to be filed upon direct referral, (see USAM 5-10.310, *supra*), no case under the supervision of the Wildlife and Marine

Resources Section may be initiated by a U.S. Attorney without prior authorization (see USAM 5-1.302). In all cases under the supervision of the Section in which the United States, a federal agency or agency official is a defendant, the U.S. Attorney shall inquire of the Section whether the assignment will be field, staff or joint. The U.S. Attorney shall provide notice immediately to the section when any motion for preliminary relief is filed.

5-10.400 [RESERVED]

5-10.500 GENERAL PROCEDURES IN DISTRICT COURT LITIGATION

5-10.510 General

The general instructions set forth in USAM 5-1.500 *et seq.*, with respect to the handling of litigation, apply in every respect to the litigation of the Wildlife and Marine Resources Section. Particularly, it is of the utmost importance that complaints filed against the United States, federal agencies or federal officials in matters relating to the area of responsibility of the Wildlife and Marine Resources Section be transmitted promptly to the chief of the Section.

5-10.600 SETTLEMENT AND DISMISSAL OF CASES

5-10.610 General

Except with respect to direct referral cases involving no new or unusual questions of fact or law (discussed in USAM 5-1.630), no claim or case under the jurisdiction of the Wildlife and Marine Resources Section may be settled or dismissed without specific or delegated authority from the Attorney General. See USAM 5-1.600 *et seq.*

5-10.620 Transmittal of Compromise to Wildlife and Marine Resources Section; Recommendations With Respect to Acceptance

Where compromise in a case other than a direct referral case is offered to a U.S. Attorney, he shall forward the offer to the Section along with his recommendation and supporting analysis.

The recommendation should be guided by the principle that a compromise offer should be declined unless it fairly reflects (a) doubt that the government position will prevail, (b) doubt that judgment can be secured for an amount larger than that offered in compromise, (c) doubt that an amount larger than that offer can be collected, although a judgment has been or can be secured, or (d) the probability that cost of collection will exceed the difference between the amount recoverable and the amount offered.

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5-10.630 Authority of United States Attorneys to Settle or Dismiss Direct Referral Cases

The general authority of U.S. Attorneys to settle or dismiss direct referral cases under the supervision of the Wildlife and Marine Resources Section is set forth in USAM 5-1.630.

Subject to the limitations imposed by this paragraph and section USAM 5-1.640, U.S. Attorneys are authorized, without prior approval of the Land and Natural Resources Division, to settle all direct referral actions relating to wildlife law enforcement.

*Provided* that telephonic notice shall be given to the Section prior to any such settlement or dismissal and copies of all relevant documents shall be forwarded to the Section. This notice requirement is waived in certain categories or cases discussed in USAM 5-10.312, *supra* and Section I USAM 5-1.310.



Office of the Attorney General  
Washington, D. C. 20530

August 23, 1994

**MEMORANDUM**

**TO:** Holders of the United States Attorneys' Manual,  
Title 5

**FROM:** Office of the Attorney General

Janet Reno  
Attorney General

**Subject:** Environmental Crimes

**Affects:** USAM 5-11.000

**Purpose:** This Bluesheet replaces the entire Chapter 11 of Title 5. These procedures are designed to define and strengthen the partnership between the Environment and Natural Resources Division and U.S. Attorney's Offices in the investigation and prosecution of environmental crimes.

This Bluesheet is a final amendment to Chapter 11 and all Department attorneys should immediately begin to follow the procedures set forth in the amendment.

This chapter describes the partnership between U.S. Attorney's Offices and the Environmental Crimes Section ("ECS") of the Environment and Natural Resources Division ("ENRD"). It is the Department's goal to promote cooperation among the U.S. Attorney's Offices and ECS to utilize the strengths of every office and in each case to apply the Department's resources in the most effective manner.

### 5-11.101 Statutes Administered

Prosecutions initiated pursuant to the following statutes listed in the attachment to this chapter are deemed to be environmental crimes, and the provisions of this chapter apply to all such cases.

### 5-11.102 Other Criminal Provisions

Experience has shown that cases involving violations of the federal environmental laws identified in USAM 5-11.101, *supra*, also may involve violations of certain other federal statutes. Therefore, the Environmental Crimes Section is empowered to investigate and prosecute violations of additional criminal statutes when such violations arise within the context of environmental crimes. Examples of some of the statutes which may be involved in those cases include, but are not limited to, the following:

<u>Statute</u>	<u>Subject Matter</u>
18 U.S.C. § 2	Aiding and abetting
18 U.S.C. § 287	False claims
18 U.S.C. § 371	Conspiracy
18 U.S.C. § 641	Theft or conversion of public property or money
18 U.S.C. § 1001	False statement
18 U.S.C. § 1341	Mail Fraud
18 U.S.C. § 1343	Wire Fraud
18 U.S.C. § 1505	Obstruction of administrative proceedings
18 U.S.C. §§ 1621 to 1623	Perjury

### 5-11.103 Notice of Case Initiation

The Case Initiation Report formerly described in the U.S. Attorneys' Manual for environmental crimes is abolished. When a U.S. Attorney's Office opens a case file for an environmental case or matter, the Office will inform the Environmental Crimes Section, which it may do by entering the case or matter in the Department's computerized case tracking system and identifying the case type as "environmental." If the case or matter is not identified as "environmental" in the case tracking system (for example, due to data entry limitations), the office will inform the Environmental Crimes Section by telephone or in writing. When ECS opens a case file to initiate a case or matter, the Section Chief will provide notice to the U.S. Attorney for the district in which the crime is alleged to have occurred and will confer with the U.S. Attorney's Office pursuant to USAM 5-11.104 or USAM 5-11.105.

5-11.104 Responsibility for Case Development and Prosecution

Responsibility for the approval, investigation, and prosecution of environmental crimes, except in cases of national interest, normally rests with the U.S. Attorney's Office. With the agreement of the U.S. Attorney's Office, ECS may participate as a partner, as the lead, or otherwise in such cases. Cooperation and consultation between U.S. Attorney's Offices and ECS is encouraged, in order to make the most effective use of the Department's resources. When ECS participates in a case, there should be a clear understanding between the offices concerning the allocation of case responsibility.

5-11.105 Cases of National Interest

A case is of national interest if it is a case that presents a novel issue of law (including the first case under a statute, provision, or regulation), a case with simultaneous investigations in multiple districts (unless the U.S. Attorney's Offices in each such district and the ECS conclude that national interests are not involved), a case with international or foreign policy implications, or an urgent or sensitive case as defined in USAM 1-10.230. In a case of national interest, the U.S. Attorney's Office and ECS will participate jointly as co-counsel from the initiation of the investigation through prosecution, unless otherwise agreed. A case may be identified as one of national interest by the U.S. Attorney's Office or the Assistant Attorney General for the ENRP.

5-11.106 Exchanging Case Information

Among ECS' other responsibilities, it is a clearinghouse for information about environmental prosecutions and a source of expertise about the handling of such cases. U.S. Attorney's Offices are encouraged to communicate with ECS early in environmental investigations and prosecutions to benefit from ECS' information and expertise, and to provide ECS with information about successes, obstacles, and strategies that ECS may share with other prosecutors. As part of this consultation, U.S. Attorney's Offices are encouraged to provide ECS with advance notice of indictments. U.S. Attorney's Offices are encouraged to consult with ECS on indictments and other matters with sufficient lead time to allow ECS to have time to provide meaningful input. In any event, U.S. Attorney's Offices will provide copies of indictments or informations within two days after filing. The Attorney General expects that ECS will participate in implementing the Assistant Attorney General's responsibilities pursuant to 28 C.F.R. § 0.65 and that each U.S. Attorney's Office will provide information to ECS to assist it in

this purpose, including responding fully and expeditiously to reasonable requests for information.

#### 5-11.107 Notification of Case Resolutions

When ECS is not participating in a case, the U.S. Attorney's Offices shall provide ECS with notice of case resolutions by providing ECS with copies of disposition documents (including any plea agreements) when judgment is entered, except as provided in USAM 5-11.108 and 5-11.115.

#### 5-11.108 Dismissals

In the case of dismissal of indictments, informations, or complaints in criminal cases involving violations of the statutes identified in USAM 5-11.101, supra, except when a superseding indictment has been returned or an information or a complaint has been filed against the same defendant or when the individual defendant has died, notification of the dismissal (or, in the case of a written dismissal, a copy) shall be provided to ECS so that it is received seven days before filing.

#### 5-11.109 Declinations

When a U.S. Attorney's Office or ECS declines a case and writes a substantive memo to the file or to the investigative agency, either office will promptly provide a copy of the declination memo to, respectively, ECS or the U.S. Attorney's Office for the district in which the crime is alleged to have occurred. Nothing in USAM 5-11.104 is intended to limit ECS' authority to prosecute a case declined by a U.S. Attorney's Office after consultation with that office, nor shall these provisions limit the authority of a U.S. Attorney's Office to prosecute a case that ECS has declined for reasons that ECS advises do not involve policy considerations.

#### 5-11.110 Staffing

The appointment of Special Assistant U.S. Attorneys shall be approved by the U.S. Attorney of the relevant district and the Assistant Attorney General for the ENRD. In their approval process, the U.S. Attorney and the Assistant Attorney General should seek to ensure sensible and efficient use of government resources.

#### 5-11.111 Policy-Making, Support, and Other Functions of the ENRD

In addition to its litigation activities, ECS helps the ENRD fulfill its other responsibilities:

- a) setting policy nationally for the prosecution of environmental crimes;
- b) providing training to U.S. Attorney's Offices, federal investigative agencies, and others;
- c) providing expertise, information, and support concerning environmental prosecutions nationally, including providing a clearinghouse of prosecution-related documents; and
- d) to use environmental criminal enforcement to address environmental and compliance problems, consistent with the standards of federal prosecution.

U.S. Attorney's Offices are encouraged to provide ECS with copies of important pleadings, briefs, search warrant applications, grand jury subpoenas, and similar case documents so that such documents can be made available to other prosecutors.

#### 5-11.112 Parallel Proceedings

Because many of the environmental statutes specifically provide for criminal, civil, and administrative sanctions (see, e.g., 33 U.S.C. § 1319(a), (b), (c), and (d)), this is an area of the law especially susceptible to parallel proceedings. Such proceedings may be appropriate, for example, when in the course of the civil case the government receives evidence of deliberate violations of the law meriting criminal prosecution or when a criminal investigation uncovers evidence of an on-going violation causing environmental contamination which should be stopped quickly through an injunctive action.

Although they may be appropriate in particular circumstances, parallel proceedings must be handled carefully in order to avoid allegations of improper release of grand jury material or abuse of civil process. Therefore, in any case under any of the statutes identified in USAM 5-11.101, supra, in which parallel proceedings arise, the U.S. Attorney's office shall contact the Environmental Crimes Section for the purpose of coordinating the parallel proceedings.

#### 5-11.113 Coordination with State Programs

Most states have environmental enforcement programs which overlap, in whole or in part, with federal programs. U.S. Attorneys should familiarize themselves with state environmental enforcement laws and state enforcement officials. Particular attention should be directed toward the following aspects of state-federal relations in the environmental enforcement field:

A. State environmental enforcement agencies may be a valuable source of information on suspected violations of federal environmental statutes. U.S. Attorneys may be in a position to assist in apprising state officials of the nature of the local federal enforcement program and in developing methods for exchanging information on suspected violations;

B. State authorities often possess evidentiary materials which are relevant to pending federal court proceedings. U.S. Attorneys should be aware of the nature and extent of the states' investigatory resources and should make provision in appropriate circumstances for the exchange of information on pending cases with state authorities;

C. Frequently a particular activity constitutes a violation of both federal and state law. When state officials are proceeding with an environmental enforcement case which may include violations of federal law, the U.S. Attorney in the affected district should monitor that state activity. If it appears that all federal interests in the case will be vindicated in the state court action, action in federal court may be an unnecessary duplication of effort. On the other hand, if federal interests will not be protected completely in state court, federal proceedings may be warranted. See also, USAM 9-2.142 and 9-27.240.

#### 5-11.114 Individual and Corporate Defendants

A. Congress has demonstrated its intent that individuals, as well as corporations, should be criminally prosecuted for violations of federal environmental laws, see, e.g., 33 U.S.C. §§ 1319(c)(5) and 1362(5), thereby recognizing the fact the unlawful acts or omissions of corporations actually can be traced to individual officers or employees. That Congressional intent should be given serious consideration in the development of prosecutions for violations of the statutes identified under USAM 5-11.101, supra.

B. In any case against both a corporation and any of its individual employees the willingness of the offending corporation to enter a guilty plea is not a basis for dismissal as against the individual.

5-11.115 Plea Negotiations and Agreements; Global Settlements"; Alternative Sentencing

A. Without the express approval of the Assistant Attorney General, Environment and Natural Resources Division, in any criminal case arising under the statutes identified in USAM 5-11.101 no plea agreement will be negotiated which compromises the right of the United States to any civil or administrative remedies under those statutes. Efforts by defendants to effect such results may arise in the context of so-called "global settlement" offers.

B. The Assistant Attorney General for the Environment and Natural Resources Division will consider a policy for plea agreements that include "alternative sentencing," meaning a sentence other than fine, imprisonment, or restitution to specific entities for out-of-pocket expenses.

5-11.116 Handling of Appeals

All appeals in criminal cases arising under the statutes identified in USAM 5-11.101, supra, shall be handled as provided for in USAM 5-8.310 and Title 2. When a U.S. Attorney's Office makes a request to handle an appeal, such a request will be resolved by agreement between the U.S. Attorney's Office and the Chief of the Appellate Section of the Environment and Natural Resources Division. In jointly resolving such a request, the following factors among any others should be considered on a case-by-case basis and, if necessary, discussed:

- the relative advantages in this case of staffing the appeal with an Assistant U.S. Attorney who tried the case or with an appellate lawyer who was not involved in the trial;
- the relative advantages in this appeal of the U.S. Attorney's local perspective or the Environment and Natural Resources Division's national perspective;
- whether there are issues in this appeal on which components of the government may have differing viewpoints; and
- the available resources of each office, especially relative to the briefing and argument schedule of the appeal.

Copies of any draft briefs prepared by a U.S. Attorney's Office on behalf of the government shall be forwarded to the Appellate Section in sufficient time to allow review, comment, and approval by the Section and the Assistant Attorney General. Copies of any draft brief prepared by the Appellate Section shall be forwarded

to the U.S. Attorney's Office in sufficient time to allow review, comment, and approval by that office. In any appeal, copies of all other briefs by other parties shall be promptly forwarded by the U.S. Attorney's Office to the Appellate Section.

5-11.117 Notice of Appeals

USAM 2.200 describes the manner in which U.S. Attorney's Offices forward notices of appeal or requests to take an appeal to the Environment and Natural Resources Division. For environmental crimes, the Division designates ECS as the unit to which such notices and requests should be sent. ECS will forward the notices and requests to the Division's Appellate Section.

5-11.118 Record on Appeal

Whenever an appeal is taken in a case arising under any statute identified in USAM 5-11.101, supra, for which the U.S. Attorney has taken primary trial level responsibility, and that appeal is to be handled by the Environment and Natural Resources Division, the U.S. Attorney is responsible for assembling and transmitting to the Environment and Natural Resources Division those items which constitute the record of the case of the trial court level.

ATTACHMENT TO CHAPTER 5, TITLE 11  
OF THE U.S. ATTORNEY'S MANUAL

Prosecutions intitiated pursuant to the following statutes  
are deemed to be environmental crimes:

FEDERAL INSECTICIDE, FUNGICIDE AND RODENTICIDE ACT (FIFRA)  
7 USC §§ 136-136y

ENERGY SUPPLY AND ENVIRONMENTAL COORDINATION ACT  
15 USC §§ 791-798

TOXIC SUBSTANCES CONTROL ACT (TSCA)  
15 USC §§ 2601-2692

SURFACE MINING CONTROL AND RECLAMATION ACT  
30 USC §§ 1201-1328

PROTECTION OF NAVIGABLE WATERS AND OF HARBOR AND RIVER  
IMPROVEMENTS GENERALLY, RIVERS AND HARBORS APPROPRIATION ACT,  
REFUSE ACT  
33 USC §§ 401-454

FEDERAL WATER POLLUTION CONTROL ACT (also known as the CLEAN  
WATER ACT)  
33 USC §§ 1251-1387

MARINE PROTECTION RESEARCH AND SANCTUARIES ACT  
(also known as the OCEAN DUMPING ACT)  
33 USC §§ 1401-1445

DEEPWATER PORT ACT  
33 USC §§ 1501-1524

ACT TO PREVENT POLLUTION FROM SHIPS  
33 USC §§ 1901-1912

SAFE DRINKING WATER ACT  
42 USC §§ 300f-300j-26

ATOMIC ENERGY ACT  
42 USC §§ 2011-2296

NOISE CONTROL ACT  
42 USC §§ 4901-4918

SOLID WASTE DISPOSAL ACT (including, in Subchapter III,  
The RESOURCE CONSERVATION AND RECOVERY ACT, RCRA)  
42 USC §§ 6901-6992k

CLEAN AIR ACT  
42 USC §§ 7401-7671q

COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION & LIABILITY  
ACT (CERCLA)  
42 USC §§ 9601-9675

EMERGENCY PLANNING AND COMMUNITY RIGHT TO KNOW ACT (EPCRA) (also  
known as SARA Title III)  
42 USC §§ 11001-11050

OUTER CONTINENTAL SHELF LANDS ACT  
43 USC §§ 1331-1356

FEDERAL HAZARDOUS MATERIALS TRANSPORTATION STATUTE  
49 USC §§ 5101-5127

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U.S. ATTORNEYS MANUAL 1988

5-12.000 ENVIRONMENTAL ENFORCEMENT SECTION

## 5-12.001 Establishment

The Environmental Enforcement Section was created on September 10, 1980, by Land and Natural Resources Division Directive No. 17-80.

## 5-12.002 Purpose and Functions

The Environmental Enforcement Section was organized in order to provide a specialized legal staff capable of carrying out the effective civil judicial enforcement of laws relating to protection of the environment.

## 5-12.100 AREA OF RESPONSIBILITY

## 5-12.102 Statutes Administered

The Environmental Enforcement Section is responsible for conducting civil enforcement litigation arising under the following statutes:

A. Federal Water Pollution Control Act and Clean Water Act, 33 U.S.C. § 1251 *et seq.* (except for *in rem* actions against vessels, which are supervised by the Torts Branch (Admiralty and Shipping) of the Civil Division and except for wetlands cases under 33 U.S.C. Sections 1311(a), 1344 that are supervised by the Environmental Defense Section);

B. Clean Air Act, 42 U.S.C. § 1701 *et seq.*;

C. Resource Conservation and Recovery Act, 42 U.S.C. § 6901 *et seq.* (also known as the Solid Waste Disposal Act);

D. Comprehensive Environmental Response, Compensation, and Liability Act (Superfund), 42 U.S.C. § 9601 *et seq.*;

E. Safe Drinking Water Act, 42 U.S.C. § 300f *et seq.*;

F. Toxic Substances Control Act, 15 U.S.C. § 2601 *et seq.*;

G. Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. § 135(d) *et seq.*;

H. River and Harbor Act, 33 U.S.C. § 4401 *et seq.*, except for *in rem* actions against vessels and wetlands cases. See Federal Water Pollution Control Act, *supra*;

I. Marine Protection Research and Sanctuaries Act, 33 U.S.C. § 1401 *et seq.*;

J. Noise Control Act, 42 U.S.C. § 4901 *et seq.*;

K. The Atomic Energy Act of 1954, 42 U.S.C. § 2011 *et seq.*, insofar as it relates to the civil prosecution of violations committed by a company in

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matters involving the licensing and operation of nuclear power plants and affecting the environment;

L. Powerplant and Industrial Fuel Use Act of 1978 (Pub.L. No. 95-620), National Energy Conservation Policy Act (Pub.L. 95-619), and Titles I and V of the Public Utility Regulatory Policies Act of 1978 (Pub.L. No. 95-617);

M. Uranium Mill Tailings Radiation Control Act, 42 U.S.C. § 7133 *et seq.*;

N. Section 2 of the Energy Supply and Environmental Coordination Act of 1974, 15 U.S.C. § 791 *et seq.*;

O. The Act of June 23, 1910 (33 U.S.C. § 421 *et seq.*);

P. The Act of June 29, 1888 (33 U.S.C. § 441 *et seq.*);

Q. Sections 3, 6, and 9 of the Act of August 30, 1961 (30 U.S.C. §§ 1002, 1005, 1008);

R. Sections 15 and 18 of the Deepwater Port Act of 1971 (33 U.S.C. § 1501 *et seq.*), insofar as a violation of the Act or the rules and regulations promulgated pursuant thereto results in environmental pollution;

S. Section 5(a)(2) of the Outer Continental Shelf Lands Act of August 7, 1953 (43 U.S.C. § 1334(a)(2)), where the violation of a rule or regulation results in environmental pollution.

#### 5-12.110 General Responsibilities

The Environmental Enforcement Section prosecutes, supports, and coordinates the prosecution of all civil cases, matters, and proceedings arising under the statutes identified in USAM 5-12.102, *infra*, or initiated under federal common law for environmental protection.

#### 5-12.111 Cases Brought on Behalf of the United States

A. The Environmental Enforcement Section has Departmental responsibility for civil matters initiated on behalf of the United States to secure the control and abatement for sources of pollution or to protect the natural environment, to the extent that such cases may arise under the statutes identified in USAM 5-12.102, *supra*, or under the federal common law. As a matter of policy and practice, civil prosecutions are initiated at the request of the Administrator of the Environmental Protection Agency, the Commandant of the Coast Guard, the Chief of Engineers of the United States Army, and other government officials having statutory responsibility for the enforcement of laws designed to protect the public health, welfare, and the environment. Section 12 of the statute that authorized the Department's 1980 budget authorized the Attorney General with the concurrence of any agency or department with primary enforcement responsi-

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bility for an environmental or natural resource law to investigate any violation, and bring such actions as are necessary to enforce such laws. Except for cases initially subject to treatment as direct referrals, see USAM 5-3.320, *infra*, the Assistant Attorney General of the Land and Natural Resources Division must review and approve in advance the following actions in cases referred by or brought on behalf of the Environmental Protection Agency and other Federal client agencies under the statutes identified in USAM 5-3.102, *infra*:

1. File or amend a complaint or counterclaim;
2. File a claim or otherwise initiate process or file a counterclaim in a bankruptcy or probate matter;
3. Raise issues involving statutes administered by the EPA or other Federal agencies;
4. Compromise, close or dismiss a case; or
5. Modify or enforce a consent decree or judgment.

B. When apparent violations of the statutes identified in USAM 5-3.102, *infra*, are brought to the attention of the Department of Justice by persons or agencies other than those with statutory enforcement responsibilities, the Department either forwards those reports to appropriate executive branch enforcement officials for evaluation and possible referral for legal proceedings or, in criminal cases, may itself undertake the necessary investigation and prosecution. The practice of forwarding reports of suspected violations to appropriate agencies has several potential benefits: (1) it allows the agencies to bring to bear their technical expertise to determine whether violations actually have occurred; (2) it allows the agencies to settle cases administratively in certain circumstances; and (3) it allows the agencies to apply technical and investigative resources in order to develop those cases which do have merit.

#### 5-12.120 Overlapping Section Case Responsibility

Although the Environmental Enforcement Section has the primary responsibility for actions involving the statutes identified in USAM 5-12.102, *infra*, occasionally cases occur which involve those statutes along with statutes for which another section of the Department generally is responsible. In each such case, the chiefs of the respective sections will designate the section which will assume the primary responsibility. The designated section will coordinate with any other concerned section, will furnish copies of all pertinent pleadings and memoranda to that section, and will notify the U.S. Attorney of the names and telephone numbers of attorneys in the other sections who may be contacted for information in their areas of expertise.

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## 5-12.121 Responsibility for Cases With New Issues and/or Altered Character

A. Occasionally issues involving laws for which the Environmental Enforcement Section is responsible may be injected into existing litigation by way of amendment or supplemental pleadings or *sua sponte* by the court. The U.S. Attorney should not add or raise such matters without first notifying and receiving approval from the Chief of the Environmental Enforcement Section. In cases where such issues have been raised by others, the U.S. Attorney should immediately notify the Chief of the Environmental Enforcement Section to assure that the section can properly perform its responsibilities.

B. On other occasions, the fundamental character of existing litigation may change and environmental enforcement issues may become dominant issues. In such situations, the Environmental Enforcement Section staff attorney responsible for the case shall notify the Section Chief, who may request a transfer of section responsibility if he/she deems it appropriate. If Environmental Enforcement issues become dominant in a case in which no Environmental Enforcement Section attorney is directly involved, the U.S. Attorney shall notify the Environmental Enforcement Section Chief of the situation and he/she may make a written request to the Assistant Attorney General of the Land and Natural Resources Division to have the case transferred to the Environmental Enforcement Section.

## 5-12.200 ORGANIZATION

5-12.210 General

The section is administered by a Chief, Deputy Chief, and five Assistant Chiefs. Within the section, work is assigned among staff attorneys by the Assistant Chiefs, under the supervision of the Chief and Deputy Chief, according to experience and workload. General information relating to the Section or cases within its supervision may be obtained by calling the Chief or Assistant Chiefs at FTS (202) 633-5271 or 633-5403. Information on a specific case should be requested from the staff attorney assigned to that case. When the staff attorney's name is unknown, the docket clerk of the section (FTS (202) 633-5251 or 633-5468) may furnish that information. (Note that a quicker response to inquiries may be forthcoming if the requestor can cite a departmental file number, e.g., 90-5-1-2-40 or 62-81-2, which generally appears in the upper left-hand corner of correspondence originating from the Department.)

## 5-12.300 SUPERVISION AND HANDLING OF ENVIRONMENTAL ENFORCEMENT SECTION CASES

## 5-12.301 Requests for Instructions

All requests for instructions and guidance relating to the prosecution of actions under the jurisdiction of the Environmental Enforcement Section

shall be referred to the Chief of the Environmental Enforcement Section of the Land and Natural Resources Division of the Department of Justice, Washington, D.C. 20530, or to the section attorneys known to be handling such actions.

5-12.302 Transmittal of Papers to Environmental Enforcement Section and Client Agencies

In any case arising under the statutes identified in USAM 5-12.102, *infra*, one copy of each letter sent or received by a U.S. Attorney as well as one copy of each pleading and paper filed by any party or by the court, shall be forwarded promptly to the Environmental Enforcement Section and one copy shall be forwarded to the referring client agency.

5-12.311 Exigent Circumstances

A. Whenever the U.S. Attorney becomes aware of a recently developed situation in his/her district not previously the subject of any report or referral, which merits a temporary restraining order or preliminary injunction, he/she should contact both the regional legal office of the client agency and the Chief of the Environmental Enforcement Section directly by telephone. An example might be the U.S. Attorney's learning of a company's intention to burn hazardous material in an uncontrolled incinerator thereby endangering the lives and health of those living near the incinerator. To prevent such action a temporary restraining order or a preliminary injunction may be in order.

B. Under circumstances which involve immediate threats to life or health, the Chief of the Environmental Enforcement Section may give authorization by telephone for the filing of a complaint and application for a temporary restraining order. If the Section Chief, Deputy Chief, the Assistant Chiefs, the Deputy Assistant Attorney, and the Assistant Attorney General, cannot be reached by telephone, the U.S. Attorney may seek a temporary restraining order to prevent threats to life or health without prior approval.

5-12.320 Direct Referral Civil Cases Not Requiring Prior Approval by the Assistant Attorney General

A. The following groups of cases arising under the statutes identified in USAM 5-12.102, *infra*, may be handled by the U.S. Attorneys as direct referrals, *i.e.*, as not requiring specific authorization by the Assistant Attorney General of the Land and Natural Resources Division:

- 1: Cases referred by the United States Coast Guard for the collection of federal clean up costs or civil penalties under 33 U.S.C. § 1321;
2. Miscellaneous proceedings, such as warrants, in assistance to agencies seeking investigative entry under the Clean Water Act, 33

U.S.C. § 1318; Clean Air Act, 42 U.S.C. §§ 7414, 7525; Resource Conservation and Recovery Act, 42 U.S.C. §§ 6927, 6934; Safe Drinking Water Act, 42 U.S.C. § 300(j)(4); Toxic Substances Control Act, 15 U.S.C. § 2610; and Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. § 136(g); but not the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. § 9601 *et seq.*

All other enforcement cases arising under these statutes identified in USAM 5-3.102, *infra*, require the approval of the Assistant Attorney General before they can be filed, with the exception of warrants under CERCLA which may be approved by the Environmental Enforcement Section Chief or his/her designee.

B. The Assistant Attorney General and his/her designee retain the authority to direct that any case within the responsibility of the Land and Natural Resources Division shall be handled in whole or in part by Division attorneys.

#### 5-12.321 Notification to Environmental Enforcement Section of Intention to File Actions

Prior to filing a civil complaint in a case authorized for direct referral, the U.S. Attorney shall notify the Chief of the Environmental Enforcement Section of the proposed action and shall furnish the section with a copy of the written request from the respective client agency for the initiation of the action. Thereafter, the Environmental Enforcement Section shall be furnished with copies of all pleadings filed in any direct referral case.

#### 5-12.340 Cooperation and Coordination with Environmental Protection Agency

A. Pursuant to a Memorandum of Understanding with the Environmental Protection Agency, within 60 days of receipt from the Environmental Protection Agency of a formal request to file a suit, the Chief Environmental Enforcement Section is required to decide whether an enforcement action is to be filed.

B. If a determination is made by the Section Chief not to file a complaint, he/she shall report this determination promptly to the Assistant Attorney General and, upon the approval of the determination by the Assistant Attorney General, to the official of the Environmental Protection Agency requesting the initiation of the action.

C. If a determination is made by the Chief to file an action, the complaint, signed by the Assistant Attorney General, shall be filed within 20 days of the determination to file. In the event that any U.S. Attorney or Environmental Enforcement Section attorney does not file such a complaint, he/she shall submit a report to the Assistant Attorney General

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explaining why such complaint has not been filed, and shall continue to submit such reports at two-week intervals until the complaint is filed or a decision is reached not to file the complaint.

D. If the Department of Justice fails to file a complaint within 120 days of its receipt of a request for litigation and a civil litigation report by the agency to the Attorney General, then the Administrator may request the Attorney General, to file a complaint within 30 days. Failure of the Department thereafter to file a complaint within the said 30 days may be considered by the Administrator or his/her delegate to be a failure of the Attorney General to notify the Administrator within a reasonable time that he/she will appear in litigation for purposes of Section 303 of the Clean Air Act, 42 U.S.C. § 7605; Section 506 of the Federal Water Pollution Control Act, 33 U.S.C. § 1366; or Section 1450 of the Safe Drinking Water Act, 42 U.S.C. § 300(j)(9). If such a failure occurs, attorneys of the Environmental Protection Agency may represent the Administrator without the U.S. Attorney or Department attorneys. However, the failure of the Attorney General to file a complaint within the time period requested by the Administrator in a case in which the Administrator requested immediate action to protect public health under §§ 311(e) and 504 of the Federal Water Pollution Control Act, 33 U.S.C. §§ 1321(e) and 1364; Section 303 of the Clean Air Act, 42 U.S.C. § 7603; or Section 1450 of the Safe Drinking Water Act, 42 U.S.C. § 300(i), may also be considered by the Administrator to be a failure of the Attorney General to notify the Administrator under 42 U.S.C. § 7605; 33 U.S.C. § 7603; or 42 U.S.C. § 300(j)(9).

5-12.400 [RESERVED]

5-12.500 GENERAL PROCEDURES IN DISTRICT COURT LITIGATION

5-12.510 General

The general instructions set forth in USAM 5-1.500 *et seq.*, *infra*, with respect to the handling of litigation under the jurisdiction of the Land and Natural Resources Division apply to litigation within the responsibility of the Environmental Enforcement Section.

5-12.520 Investigation and Administrative Processing of Violations

5-12.521 Responsibility for Detecting and Investigating Violations

The primary responsibility for detecting and investigating suspected violations of statutes rests with the federal agencies which are charged by statute with administering those acts. After investigating reports of suspected violations, the respective agencies generally evaluate them internally under their own procedures to determine which matters merit referral to the Department of Justice for prosecution. Generally, whether it goes directly to the U.S. Attorney or to the Land and Natural Resources

Division, a referral will be accompanied by a litigation report describing the alleged violation and the evidence available to the agency to support a prosecution.

While primary responsibility for investigating violations of an environmental enforcement statute may reside with the agency administering the act, this does not mean that other agencies, including U.S. Attorneys' offices, should not have a role in this phase of enforcement. Agencies such as the Fish and Wildlife Service of the Interior Department and the National Marine Fisheries Service of the Commerce Department may have personnel in the field who can be important sources of information on suspected illegal activities. Also, some U.S. Attorneys' offices have employed legal technicians, whose duties include assisting the Army Corps of Engineers, Environmental Protection Agency, and Coast Guard in investigating activities proscribed by environmental statutes and preparing cases for litigation.

Because of his/her function as representative of the various federal agencies in legal matters, the U.S. Attorney is in a position to coordinate the investigative efforts of those agencies the violations of environmental statutes. Such coordination can result in more thorough and efficient case development with fewer resources devoted to duplicative efforts. The U.S. Attorneys, therefore, are encouraged to establish contact with the investigative agencies which operate within their districts, to render to them useful advice regarding sound case development, and to take a lead in creating a cooperative federal effort. The Environmental Enforcement Section is prepared to assist the U.S. Attorneys in establishing contact with personnel of the federal agencies who operate within the various districts.

#### 5-12.522 Transmittal of Reports of Unauthorized Activities

Notwithstanding the source, all reports of violations of environmental enforcement statutes should be referred to the enforcement agencies charged with administering the acts. There are numerous reasons for this policy. In addition to the fact that prompt referral may avert wasteful duplication of federal effort, under certain of the statutes identified in USAM 5-12.102, *supra*, administrative consideration may be a prerequisite to civil enforcement. See, e.g., 42 U.S.C. § 7413(a)(1). In some instances, such matters may be resolved administratively without resort to litigation.

#### 5-12.523 Coordination With State Programs

Most states have environmental enforcement programs which overlap, in whole or in part, with federal programs. U.S. Attorneys should familiarize themselves with state environmental enforcement laws and state enforcement officials. Frequently a particular, unauthorized activity consti-

tutes a violation of both federal and state law. U.S. Attorneys should remain advised of pending state environmental enforcement prosecutions. If it appears that all federal interests in the case will be vindicated in the state court proceeding, action in federal court may be an unnecessary duplication of effort. On the other hand, if federal interests will not be protected completely in state court, federal proceedings may be warranted. A key policy question in determining the source of federal environmental enforcement proceedings is often whether the unauthorized activity would have been permitted if the violator had sought permission in advance. The regulation of federal enforcement agencies, such as that of the Army Corps of Engineers, frequently requires that a permit-applicant obtain all necessary state permits, licenses, easements, etc., before a federal permit will be issued. In some cases, the only substantive objections to an authorized activity may be those which are raised by state authorities. Federal legal proceedings therefore may be directed, in substance, toward vindicating a state interest. In certain of these cases, it might be more appropriate to defer to state prosecution. But even where legal action in federal court appears warranted, the U.S. Attorney will have to maintain close ties with state authorities during all stages of the litigation. Some of the statutes identified in USAM 5-1.102, *infra*, e.g., 33 U.S.C. § 1319(b) and 42 U.S.C. § 7413(b), specifically require that notice of any federal civil action be given immediately to appropriate state officials. At least one statute, 33 U.S.C. § 1319(e) requires that a state be made a party to any enforcement action against one of its municipalities.

#### 5-12.524 Administrative Disposition of Violations

By statute or by regulation, most environmental enforcement agencies have administrative procedures which can result in the disposition of environmental enforcement matters. Generally, U.S. Attorneys should defer legal action until those administrative proceedings have been completed. Court proceedings should be regarded as an adjunct to, and not substitute for the administrative process.

#### 5-12.530 Litigation Procedures; Draft Complaints

Referral packages from the environmental agencies frequently include draft complaints. In direct referral cases the U.S. Attorney is not bound by the form of such a draft complaint, *see* USAM 5-1.513, *infra*, but a well drafted complaint can be helpful in expediting the initiation of an action. In order to avoid the necessity of redrafting complaints in such cases, U.S. Attorneys should cooperate closely with local agency counsel and advise them as to local practice and the customary local forms of complaints. In cases requiring the approval of the Assistant Attorney General, a draft complaint furnished by the client agency also may be used, or a new draft may be prepared by the Environmental Enforcement Section. Because formats vary from district to district, Environmental Enforcement

Section attorneys often will seek guidance from the U.S. Attorney prior to drafting a complaint. Whether an agency is used or a new draft is generated by the Environmental Enforcement Section, once a complaint has been approved and signed by the Assistant Attorney General, it may not be altered prior to filing without the express approval of the Chief of the Environmental Enforcement Section.

#### 5-12.531 Lis Pendens and the Recording of Judgments

In civil environmental enforcement actions for prohibitory or mandatory injunctive relief, complications may arise if the ownership of the property in question changes hands during the pendency of the action. Where there is a threat of transfer of ownership, the U.S. Attorney should consider filing a notice of the pendency of the action, of lis pendens. The steps necessary for the filing of such a notice are determined by the law of the particular state. See 28 U.S.C. § 1964.

The final judgment in a civil environmental enforcement prosecution may, in effect, place a permanent burden on the property which was subject to the unauthorized activities. In order to protect the future interests of the United States, the judgment should be recorded in accordance with the requirements of local law and the provisions of 28 U.S.C. § 1962 *et seq.*

#### 5-12.532 Pleadings

The Environmental Enforcement Section maintains files of pleadings which have been employed successfully in past cases. Upon request to the staff attorney, U.S. Attorneys may obtain pertinent, sample papers or other assistance in preparing for a particular case.

#### 5-12.533 Trial Assistance

In cases in which U.S. Attorneys have primary litigating responsibilities, they are encouraged to request assistance in trial preparation from the Environmental Enforcement Section staff attorney assigned to a case. Section staff attorneys often are in a position to obtain legislative histories, archive materials, and technical information which is not readily available in U.S. Attorneys' offices. Memoranda, trial briefs, information on unreported cases, and other material relevant to environmental cases also can be obtained through the staff attorneys. Additionally, the section keeps a file on expert witnesses used in various cases and is able to procure the services of expert witnesses through the headquarters of a number of different agencies in Washington, D.C.

#### 5-12.600 SETTLEMENT AND DISMISSAL OF CASES

##### 5-12.610 General

The U.S. Attorneys are authorized to compromise any case referred to them by the Coast Guard for the collection of a civil penalty imposed

pursuant to 33 U.S.C. § 1321. (Checks submitted for the payment of civil penalties should be forwarded to the referring agency for disposition.) The U.S. Attorneys are *not authorized* to settle or dismiss any case arising under any of the statutes identified in USAM 5-12.102, *infra*.

#### 5-12.611 Transmittal of Settlement Offers

Any offer to settle or dismiss an action which the U.S. Attorney is not authorized to compromise shall be transmitted to the Environmental Enforcement Section attorney assigned to the case for consideration and disposition at the appropriate level. Such offers should be accompanied by the written comments and recommendation of the referring U.S. Attorney and of the referring agency. In emergency situations, such as with settlement offers received during trial or settlement offers dealing exclusively with monetary damages or penalties, those offers may be communicated to the Chief or the Deputy Chief of the Environmental Enforcement Section by telephone.

#### 5-12.612 Solicitations of Agency Views

U.S. Attorneys should remain in continuing communication with the referring agency prior to and during settlement negotiations. This will insure that the proposals being discussed are compatible with agency policies and regulations and facilitate agency approval.

Additionally, agencies other than the referring agency may have statutory review responsibilities in connection with work in navigable waters. For example, the Fish and Wildlife Service has the responsibility to review, comment on, and make recommendations as to such work under the Fish and Wildlife Coordination Act of 1958, 16 U.S.C. §§ 661 to 666. In the interests of inter-agency cooperation, the views of these agencies should at least be considered before an offer in compromise is accepted or transmitted to the Environmental Enforcement Section.

#### 5-12.613 Settlement Policy in Suits Brought on Behalf of the Administrator of the Environmental Protection Agency

Frequently, cases brought on behalf of the Administrator of the Environmental Protection Agency results in agreed judgments or consent decrees. Copies of consent decrees in previously settled cases are available from the Environmental Enforcement Section.

To assist U.S. Attorneys' offices in understanding the types of settlements and language in decrees which are acceptable, the following general guidance is provided:

A. Defendants should be informed that any settlement must be approved by the Assistant Attorney General of the Land and Natural Resources Division and by the Assistant Administrator for Enforcement and Compliance

Monitoring of the Environmental Protection Agency or his/her delegate, and are subject to review by them. This is a requirement of the Memorandum of Understanding with the Environmental Protection Agency.

B. Defendants should be advised that only the Department of Justice and the attorneys specifically designated may bind the United States to any agreement.

C. The pendency of settlement negotiations should not cause a cessation of litigating activities. Defendants in enforcement cases often are more amenable to settlements favorable to the United States when discovery and trial preparations proceed in parallel with settlement negotiations;

D. In no civil settlement agreement will the Land and Natural Resources Division compromise the ability of the United States to undertake criminal prosecutions in appropriate circumstances;

E. All correspondence and other communication pertaining to the case from a defendant must come through the U.S. Attorney, the Environmental Enforcement Section, or client agency counsel who are assigned to assist in the litigation of the case.

F. Defendants should be advised that the United States is bound only by the provision actually set forth in any consent decree, and that no alleged agreement, written or oral, with any client agency representative or with anyone else, which does not appear on the face of a decree, in any way alters the actual terms of that decree.

#### 5-12.620 Consent Decrees: Public Notice Policy

A. Consent judgments in actions in which the complaint seeks to enjoin the discharge or emission of pollutants, after being approved by the Assistant Attorney General, are to be lodged with the court and made available for public inspection for a period of 30 days prior to their entry. This is required by Departmental Order No. 529-73, 38 Fed.Reg. 19029, dated July 17, 1973, 28 C.F.R. § 50.7.

B. Criminal actions, suits brought solely for the imposition of civil penalties, and actions pursuant to 33 U.S.C. § 403 for injunctive relief are not covered by this policy.

C. The purpose of the provision is to allow the public to comment and to allow Executive Branch to receive the benefit of such input, and to allow it to withdraw or modify its consent to the decree based upon such information.

D. Whenever a proposed consent decree is lodged with the court pursuant to 28 C.F.R. § 50.7, the U.S. Attorney shall notify the Environmental Enforcement Section of that fact immediately, in order that the section may have notice of the proposed settlement published in the Federal Register.

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E. In some instances district judges have proceeded to enter consent decrees prior to the expiration of the public notice and comment period. If this should occur, the U.S. Attorney must notify the Environmental Enforcement Section of that fact immediately.

F. When the public comment period has expired, the Environmental Enforcement Section will notify the U.S. Attorney as to whether any comments have been received by the Division and will forward such comments for filing with the court. If the Environmental Enforcement Section or the respective client agency intends to respond to any material public comments, the Environmental Enforcement Section will notify the U.S. Attorney of that fact.

G. After the court has approved the consent decree, the U.S. Attorney should provide copies of the file-stamped and court-signed decree to the Environmental Enforcement Section of the Environment and Natural Resources Division and to the appropriate regional EPA office. The mailing list for these offices is as follows:

Copies of all court-approved consent decrees on behalf of the Environmental Protection Agency should be addressed as follows:

Debt Tracking Unit  
Environmental Enforcement Section  
Environment and Natural Resources Division  
Department of Justice  
10th and Pennsylvania Avenue, N.W.  
Washington, D.C. 20530

U.S. ATTORNEY OFFICES LOCATED  
IN THE FOLLOWING STATES

Maine, New Hampshire,  
Vermont, Mass., R.I., Conn.

N.Y., N.J., P.R., Virgin  
Islands

Pa., Del., Md., Va.,  
W.Va., D.C.

N.C., S.C., Ga., Tenn.  
Ky., Fla., Miss., Ala.

SHOULD SEND DECREES TO THE  
FOLLOWING EPA REGIONAL OFFICE

Regional Counsel  
EPA-Region I  
JFK Bldg.  
Rm. 2203  
Boston, MA 02203

Regional Counsel  
EPA - Region II  
26 Federal Plaza  
New York, NY 10278

Regional Counsel  
EPA - Region III  
841 Chestnut Street  
Philadelphia, PA 19107

Regional Counsel  
EPA - Region IV  
345 Courtland Street, N.E.  
Atlanta, GA 30365

U.S. ATTORNEY OFFICES LOCATED  
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Tex., La., Okla., N.M.,  
Ark.

Kan., Mo., Iowa, Neb.

Col., Utah, Wyo., Mont.,  
N.D., S.D.,

Cal., Ariz., Nev., Hawaii

Wash., Ore., Idaho, Alaska

SHOULD SEND DECREES TO THE  
FOLLOWING EPA REGIONAL OFFICE

Regional Counsel  
EPA - Region V  
230 South Dearborn Street  
Chicago, IL 60604

Regional Counsel  
EPA - Region VI  
1445 Ross Avenue  
12th Floor - Suite 1200  
Dallas, TX 75202

Regional Counsel  
EPA - Region VII  
726 Minnesota Avenue  
Kansas City, MO 64101

Regional Counsel  
EPA - Region VIII  
999 18th Street - Suite 50  
Denver, CO 80202-2405

Regional Counsel  
EPA - Region IX  
1235 Mission Street  
San Francisco, CA 94103

Regional Counsel  
EPA - Region X  
1200 Sixth Avenue  
Seattle, WA 98101



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June 4, 1990

MEMORANDUM

TO: Holders of United States Attorneys' Manual Title 5

FROM: United States Attorneys' Manual Staff  
Executive Office for United States Attorneys

Richard B. Stewart *RBS Stewart*  
Assistant Attorney General  
Environment and Natural Resources Division

SUBJECT: Consent Decrees In Environmental Cases

NOTE: 1. This is issued pursuant to USAM 1-1.510 and 1-522.  
2. Distribute to holders of Volume II, USAM.  
3. Insert at end of affected section.

AFFECTS: USAM 5-12.620

PURPOSE: To ensure that the Environmental Protection Agency receives file-stamped copies of entered consent decrees in cases in which that agency is a party.

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The following section has been revised by adding a paragraph C.

5-12.620 Consent Decrees; Public Notice Policy

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G. After the court has approved the consent decree, the U.S. Attorney should provide copies of the file-stamped and court-signed decree to the Environmental Enforcement Section of the Environment and Natural Resources Division and to the appropriate regional EPA office. The mailing list for these offices is as follows:

Copies of all court-approved consent decrees on behalf of the Environmental Protection Agency should be addressed as follows:

Debt Tracking Unit  
Environmental Enforcement Section  
Environment and Natural Resources Division  
Department of Justice  
10th and Pennsylvania Avenue, N.W.  
Washington, D.C. 20530

U.S. ATTORNEY OFFICES LOCATED  
IN THE FOLLOWING STATES

SHOULD SEND DECREES TO THE  
FOLLOWING EPA REGIONAL OFFICE

Maine, New Hampshire,  
Vermont, Mass., R.I., Conn.

Regional Counsel  
EPA - Region I  
JFK Bldg.  
Rm. 2203  
Boston, MA 02203

N.Y., N.J., P.R., Virgin  
Islands

Regional Counsel  
EPA - Region II  
26 Federal Plaza  
New York, NY 10278

Pa., Del., Md., Va.  
W.Va., D.C.

Regional Counsel  
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841 Chestnut Street  
Philadelphia, PA 19107

N.C., S.C., Ga., Tenn.,  
Ky., Fla., Miss., Ala.

Regional Counsel  
EPA - Region IV  
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Atlanta, GA 30365

Ill., Ind., Ohio, Minn.,  
Wis., Mich.

Regional Counsel  
EPA - Region V  
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Cal., Ariz., Nev., Hawaii

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EPA - Region IX  
1235 Mission Street  
San Francisco, CA 94103

Wash., Ore., Idaho, Alaska

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EPA - Region X  
1200 Sixth Avenue  
Seattle, WA 98101

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MAY 1988

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5-13.000 [RESERVED]

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5-14.000 THE INDIAN RESOURCES SECTION

## 5-14.001 Establishment

The Indian Resources Section was created on May 27, 1975, by the Land and Natural Resources Directive No. 6-75, to conduct litigation for the United States as trustee for the private rights of Indian people.

## 5-14.100 AREA OF RESPONSIBILITY

5-14.110 General

The Indian Resources Section conducts and supervises civil litigation on behalf of the United States both in defense of suits against individual Indians or tribes and prosecution of suits on behalf of Indian tribes or individuals. Lawsuits brought by Indians or Indian tribes against the United States or federal officials is the responsibility of the General Litigation Section (see USAM 5-7.000). Litigation usually supervised by the Indian Resources Section includes protection of tribal assets or jurisdiction, assertion of Indian rights to property including hunting, fishing and water rights and the protection of tribal sovereignty in such areas as taxation, alcoholic beverage control, law enforcement and reservation boundaries.

5-14.120 Statutes Administered

Most of the statutes pertaining to the trust responsibilities of the United States to Indian people are found in Title 25 of the United States Code except for matters under the Indian Civil Rights Act, 25 U.S.C. § 1302 et seq., which are the responsibility of the Civil Rights Division.

5-14.130 Information Concerning the Conduct of Indian Litigation by the United States

Guidance concerning the role of the Department of Justice in the conduct of Indian litigation is set forth in a 1979 letter from the Attorney General to the Secretary of the Interior. A copy of the letter is available from the Chief, Indian Resources Section. A useful source of information concerning the law relating to Indian litigation and the United States' role therein, is contained in *Felix S. Cohen's Handbook of Indian Law* (1982 ed.).

## 5-14.200 ORGANIZATION

The Indian Resources Section is administered by a Chief and an Assistant Chief.

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## 5-14.300 PROCESSING AND HANDLING OF CASES

## 5-14.301 Requests for Representation by Individual Indians to United States Attorneys

A. 25 U.S.C. § 175 provides that the United States Attorney shall represent Indians in any lawsuit in states where there are reservations or Indian allottees. This statute has been construed to be non-mandatory. *Gila River Indian Community v. Henningson, Etc.*, 626 F.2d 708, 710, n. 5 (9th Cir.1980).

B. When a request for representation is received by a United States Attorney, the requestor should be advised that no action can be taken until the matter is reviewed by the Department of the Interior, and its recommendation is received. The United States Attorney should refer the request to the nearest Regional Solicitor's office of the Department of the Interior with a copy to the Chief, Indian Resources Section.

C. The United States Attorney will be advised of any recommendations from the Department of the Interior on requests under Section 175 and consulted thereon before the Chief, Indian Resources Section makes any final determination.

5-14.310 Authority of United States Attorneys to Initiate or Terminate Actions Without Prior Authorization

A. Subject to the provisions of USAM 5-1.310, United States Attorneys are authorized to act in matters concerning tribal and restricted Indian land, not involving unique or unusual questions of law or fact or matters concerning title or water rights, without prior authorization from the Land and Natural Resources Division, only in the following cases:

1. Actions to recover possession of property from tenants, squatters, trespassers or others, and actions to enjoin trespasses on the land, if the actual damages based upon a trespass do not exceed 200,000;
2. Actions to collect delinquent operation and maintenance charges accruing on Indian irrigation projects of not more than 200,000;
3. Actions to collect damages resulting from the default on a contract to remove timber from Indian lands, providing such damages do not exceed 200,000.

B. The actions described in paragraph A, *supra*, may be referred directly from the originating agency to the appropriate United States Attorney provided that the Chief, Indian Resources Section is notified immediately by receipt of a copy of the referral letter. The Indian Resources Section must be further advised in writing from the United States Attorney of any dispositive action taken on the referral including the filing of a complaint.

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C. Subject to the provisions of USAM 5-5.210, all actions described in paragraph A, *supra*, referred directly to a United States Attorney may be settled or dismissed without prior approval of the Assistant Attorney General provided the Indian tribe or individual involved concurs in the disposition. All other actions may not be dismissed or settled without the approval of the Assistant Attorney General.

D. Prior to the initiation of litigation on behalf of individual Indians or Indian tribes or termination thereof, efforts should be made to consult with the individual Indians or tribes and their counsel to obtain their concurrence in the course of action proposed.

#### 5-14.400 GENERAL PROCEDURES IN DISTRICT COURT LITIGATION

##### 5-14.410 Conflicts of Interest

In cases involving Indian representation by the United States, conflicts may arise between Indian interests and those of particular entities of the federal government. Guidance concerning resolution of these conflicts is included in the Attorney General's letter referenced in USAM 5-14.130. When it is determined that such conflicts exist and can not be resolved, the Chief, Indian Resources Section should be notified.

##### 5-14.420 Intervention

Intervention by individual Indians or Indian tribes in litigation where the Department of Justice has undertaken the representation of the individual Indians or tribes is not encouraged, especially where Indian or tribal concurrence has been obtained in accord with USAM 5-14.310D, *supra*.

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5-15.000 LAND ACQUISITION SECTION

## 5-15.001 Area of Responsibility

The Land Acquisition Section is responsible for the institution and prosecution of condemnation proceedings on behalf of the United States, and for approving title to land acquired by the United States by purchase or condemnation.

## 5-15.002 Policy Regarding Consent to Trial of Condemnation Cases by United States Magistrate.

It is the policy of the Division to encourage, in appropriate cases, consent to the conduct of condemnation trials by United States Magistrates if the attorney in charge of the case determines that trial before a magistrate would be in the litigating interests of the United States. For a complete statement of this policy, see USAM 5-15.913, *infra*.

## 5-15.100 PRIOR APPROVAL REQUIREMENTS

Prior approval requirements for the Land Acquisition Section are set forth in USAM 5-2.000.

## 5-15.200 ORGANIZATION OF LAND ACQUISITION SECTION

The Section is administered by a Chief and an Assistant Chief. The Section is divided into a number of units.

A. Litigation Unit

Attorneys assigned to the Litigation Unit supervise the handling of all cases and handle all aspects of certain cases including pre-trial, trial and post-trial activities.

B. Title Unit

The Title Unit prepares opinions of title for land acquired by the United States by purchase pursuant to the provisions of 40 U.S.C. § 255.

C. Appraisal Unit

The Appraisal Unit reviews appraisals, settlement proposals and appraisal guidelines for cases in condemnation and provides assistance to Section attorneys and U.S. Attorneys in trial preparation and procedures. See USAM 5-9.100, *infra*, for further information concerning the function of this unit.

D. Administrative Unit

The Administrative Unit is responsible for processing all requests for the institution of condemnation proceedings; preparing all intermediate

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and final opinions of title of the Attorney General; and managing LDTS, a comprehensive computer-based information system designated to track all significant events from the time of its inception through final disposition of the case.

#### 5-15.201 Statutes Administered

The litigation of the Land Acquisition Section is conducted pursuant to the following authorities:

A. Act of August 1, 1888, c. 728, § 1, 25 Stat. 357, as amended, 40 U.S.C. § 257 (Condemnation Act);

B. Act of February 26, 1931, c. 307, § 1, 46 Stat. 1421, 40 U.S.C. § 158a-f (Declaration of Taking Act);

C. Act of August 27, 1958, 72 Stat. 892, 23 U.S.C. § 107 (interstate highway rights-of-way acquisition);

D. Rule 71A, Fed.R.Civ.P.;

E. 16 D.C. Code §§ 1351-1368 (1973 ed.) (federal land acquisition in the District of Columbia);

F. Joint Resolution of September 11, 1941, 5 Stat. 468, as amended, 40 U.S.C. § 255 (Examination of Title Act).

#### 5-15.300 SUPERVISION AND HANDLING OF LAND ACQUISITION SECTION CASES

##### 5-15.310 Direct Referral Cases

Land acquisition cases may not be referred directly to U.S. Attorneys by agencies. Actions to acquire land may not be initiated by a U.S. Attorney except upon their referral to him/her by the Attorney General, through the Land Acquisition Section.

##### 5-15.320 Assignment of Case Responsibility

The extent to which a U.S. Attorney is responsible for handling any condemnation case is determined by the classification given that case by the Land Acquisition Section. Condemnation matters are classified into two categories, as described at USAM 5-15.321 and 5-15.322, *infra*. A case may be reclassified at any time if this becomes necessary due to changed circumstances.

##### 5-15.321 Category 1 Matters

Category 1 consists of cases in which there are no actual or anticipated policy questions, peculiar appraisal problems, novel legal questions, or

claimed compensation in excess of \$100,000. U.S. Attorneys will have full responsibility for the Category 1 cases, subject only to:

A. Such assistance on tactical or legal matters as they may request from the Department of Justice; and

B. Approval of the Justice Department of any settlements in excess of \$200,000 or under that amount when:

1. For any reason, the compromise of a particular claim, as a practical matter, will control or adversely influence the disposition of related claims totalling an amount in excess of \$200,000; or

2. When the revestment under 40 U.S.C. § 285f of any land or improvements or any interests in land are involved, except in cases in which the land owner desires to remove buildings, trees and shrubs, crops, or fixtures attached to the realty which are not needed or desired by the government, provided that the exclusion has been approved by the local representative of the acquiring agency; or

3. Because a novel issue of law or question of policy is presented, or for any other reason, the settlement offer should receive the attention of the Land and Natural Resources Division of this Department.

The U.S. Attorney should send copies of court papers to the Department of Justice for information, comment, and suggestions, and should cooperate in the reasonable implementation of all suggestions made.

#### 5-15.322 Category 2 Matters

Category 2 consists of cases in which there are actual or anticipated policy questions, peculiar appraisal problems, novel legal questions, or claimed compensation in excess of \$100,000. Category 2 cases will be the joint responsibility of the U.S. Attorneys' Offices and the Department of Justice. The participation of the Land Acquisition Section may range from mere counsel and advice, on the one hand, to management of the case on the other, depending upon national interests. The provisions of USAM 5-1.324, *supra*, are applicable to Category 2 matters.

5-15.400 [RESERVED]

#### 5-15.800 GENERAL PROCEDURES IN LAND ACQUISITION LITIGATION

##### 5-15.510 General

The instructions herein set forth deal in broad terms with general procedures peculiar to condemnation litigation.

Examples of the various forms referred to in these instructions will be found in USAM 5-15.800, *infra*. Set forth in their entirety in USAM 5-15.900

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*infra*, are three Department of Justice publications designed primarily to assist federal agencies in preparing and assembling the materials which must accompany their requests to the Attorney General for the acquisition of land: 1) *A Procedural Guide for the Acquisition of Real Property by Governmental Agencies*; 2) *Uniform Appraisal Standards for Federal Land Acquisitions*; and 3) *Standards for the Preparation of Title Evidence in Land Acquisition by the United States*.

#### 5-15.511 Rule 71A, Federal Rules of Civil Procedure

Rule 71A of the Fed.R.Civ.P. governs the procedure to be followed in all cases for the condemnation of real and personal property under the power of eminent domain. All condemnation cases must be prosecuted in strict conformity with this Rule. Rule 71A provides that the general Fed.R.Civ.P. shall be applicable to all cases, except as otherwise provided in Rule 71A. There must be, therefore, strict conformity with the general rules, subject to the complaint, the form, content, and method of service of notice to defendants, and the form and content of the answer or appearance of defendants.

#### 5-15.512 Declaration of Taking Act

The Declaration of Taking Act (see 40 U.S.C. § 258(a), (e)) authorizes the United States to acquire an interest in land immediately upon the filing of a declaration of taking with a court and the deposit in the court of the estimated compensation stated in the declaration.

U.S. Attorneys and field attorneys must comply promptly with instructions from the Department for filing of a declaration of taking and the deposit of estimated just compensation pursuant to the Declaration of Taking Act (see 40 U.S.C. § 258(a), (e)). Duplicate originals of a dated receipt of the clerk of the court for the amount deposited as estimated just compensation should be obtained and transmitted to the Department. A judgment on declaration of taking is not required unless specifically requested by the Department. The judgment, if obtained, should contain a finding by the court of the filing of the declaration of taking and the deposit of estimated compensation, the dates thereof, and an adjudication that title to the exact extent of the estate or interest described in the declaration is vested in the United States. The judgment should also contain an order for the surrender of possession if requested by the acquiring agency. Unnecessary recitations should be omitted from the judgment in accordance with Rule 54(a), Fed.R.Civ.P. Service of copies of the judgment upon defendants is controlled by Rules 5 and 77(d), Federal R.Civ.P. The case must be prosecuted to a speedy conclusion in order to minimize the amount of interest which the government must pay on the amount of the ultimate award in excess of the deposit.

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Under the Declaration of Taking Act and Rules 71A(c)(2) and (j), Fed.R. of Civ.P., the court may order that the monies deposited as estimated compensation, or any part thereof, shall be paid forthwith to the rightful claimant. The purpose of the Declaration of Taking Act is, first, to give the government title to and possession of the land and to relieve the government of the burden of interest accruing on the amount of the deposit, and second, and of equal importance, to make funds available for immediate distribution to the former owner in the discretion of the court.

In furtherance of this purpose and in accordance with Rule 71A(j), Fed.R. of Civ.P., U.S. Attorneys and field attorneys are required actively to assist landowners and the court, as *amici curiae* in effecting prompt distribution of funds deposited pursuant to the Declaration of Taking Act. Detailed instructions with respect to distribution are set forth in USAM 5-15.943, *infra*.

Immediately upon the filing of a declaration of taking and the deposit of estimated compensation, the landowner and other parties interested should be notified by letter, by the U.S. Attorney or field attorney, of the deposit and the amount thereof and that government counsel will render assistance in effecting advance distribution without prejudice to the right of the landowner to claim a larger amount. A form letter with which there should be substantial conformance is included at USAM 5-15.805, *infra*.

#### 5-15.513 Local Practice

Practices in land acquisition cases vary from district to district, depending upon the rules and customs of the courts.

In several districts, local rules have been adopted which permit up to 15 tracts, economic units or ownerships, to be included in one declaration of taking, but require that for each such tract, economic unit or ownership, a separate civil action will be opened by the clerk of the court. These local rules generally follow the guidelines suggested by the United States Judicial Conference, as set out in USAM 5-15.911, *infra*. It should be noted that before this filing procedure can be utilized a local rule must be adopted by the court. Special forms of the complaint have been prepared to conform to the guidelines. See USAM 5-15.802 and 5-15.804, *infra*.

#### 5-15.514 Division Programs to Expedite Handling of Condemnation Cases

The Division has developed a program called the "'Nine-Point Program for Settlement or Trial Within a Year'" as a means of expediting the handling of condemnation cases. Details with respect to this program are set forth in USAM 5-15.912, *infra*. U.S. Attorneys are urged to become familiar with this program and to the fullest extent possible to process land acquisition cases in their districts in this methodical way.

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The Division issued a memorandum dated June 6, 1980, to all U.S. Attorneys, announcing the Department of Justice policy favoring consent to trial of land condemnation cases by United States Magistrates in appropriate circumstances, as defined in 28 U.S.C. § 50.11. The policy furthers the goals of the Federal Magistrates Act of 1979 (Pub.L. 96-82) and will also serve to expedite trial in appropriate circumstances. All attorneys in the U.S. Attorneys' offices are encouraged to seek the consent of parties to trials, either by a magistrate or by a jury presided over by a magistrate in appropriate cases, and to ensure that parties in cases filed before October 10, 1979, are notified of their right to consent to the magistrates' exercise of litigation jurisdiction. For a detailed statement of the Division's policy in this regard, see USAM 5-15.913, *infra*.

#### 5-15.515 Transmittal of Papers to the Land Acquisition Section

The Land Acquisition Section must be informed promptly by letter including the forwarding of all pleadings, where pertinent, of all major steps taken in each case, such as the completion of personal service of notice and of publication of notice, USAM 5-15.925 *et seq.*, *infra*, the dates of all trials and hearings and the results thereof, and the filing by the U.S. Attorney and any defendant of a notice of appeal or a motion for new trial. It is essential that there be strict observance of the foregoing rule.

#### 5-15.516 Transcripts of Record

The U.S. Attorney or field attorney shall transmit to the Land Acquisition Section, at the stages of the case hereinafter designated, successive partial transcripts which will be combined in the Department at the conclusion of the case into a complete transcript of record. No further or additional transcript is required and no documents included in one transcript need be duplicated in any subsequent transcript.

A. Initial Transcript. Upon the institution of the case there shall be transmitted to the Department an initial transcript, which shall contain the following documents:

1. One certified and one conformed copy of the complaint (USAM 5-15.801 or 5-15.802, *infra*);

2. Two conformed copies of the notice of condemnation (USAM 5-15.804);

3. If a declaration of taking, USAM 5-15.804, *infra*, is filed, duplicate originals of the dated receipt of the clerk of the court for the moneys deposited as estimated compensation;

4. If a judgment is entered upon a declaration of taking or is an order of possession, USAM 5-15.827, *infra*, is obtained, one certified and one conformed copy of the judgment or order; and

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5. One certified and one conformed copy of any order and two conformed copies of any other papers filed in connection with the institution of the case.

B. Intermediate Transcript. Upon the entry of any judgment determining just compensation (whether for one or more tracts in a case) there shall be transmitted to the Department an intermediate transcript consisting of:

1. One certified and three conformed copies of the judgment if the Department is to obtain the deficiency, or one certified and one uncertified copy of the deficiency judgment together with a copy of the letter of transmittal if the judgment has been transmitted with a request for payment to the local representative of the acquiring agency as authorized at USAM 5-15.582, *infra*;

2. One conformed copy of all papers of whatever nature filed in the case prior to and including the date of entry of the judgment (but excluding copies of papers included in transcripts previously transmitted to the Department and excluding orders of distribution);

3. Evidence of any *lis pendens* recorded among the local land records, *see* USAM 5-15.524;

4. The evidence of title, properly continued, *see* USAM 5-15.533, *infra*; and

5. The certificate as to parties in possession and mechanics' liens. *See* USAM 5-15.536, *infra*.

When an intermediate transcript is transmitted to the Department, the U.S. Attorney or field attorney should state in the letter of transmittal that the transcript constitutes, or when combined with partial transcripts previously transmitted will constitute, a complete transcript of the record of the case to date. If there is no deficiency the intermediate transcript may be combined with the final transcript.

C. Final Transcript. At the conclusion of the proceedings, the Attorney General prepares an opinion directed to the acquiring agency. Therefore, upon the entry of a final judgment (whether for one or more tracts in the case) there shall be transmitted to the Department a final transcript consisting of:

1. One certified and one conformed copy of the final judgment, unless copies of the judgment were previously transmitted to the Department with the intermediate transcript;

2. Duplicate originals of the dated receipt of the clerk of the court for any moneys deposited pursuant to a judgment determining compensation;

3. The evidence of title, properly continued as provided in USAM 5-15.533, *infra*, unless needed for use in effecting distribution of just compensation, in which event the evidence of title should be transmitted to the Department upon the completion of distribution. The transmittal letter should indicate how any title objections noted in the title evidence have been eliminated or should have attached to it any curative data obtained to eliminate such objections;

4. Evidence of the disposition other than in the case of any outstanding compensable interests disclosed by the evidence of title;

5. All other related papers and curative data pertinent to the proceeding, such as affidavits, deeds, disclaimers, USAM 5-15.833, *infra*, releases, etc., unless other papers transmitted will indicate that the liens and other interests are barred by service of process on the necessary parties;

6. Evidence that complete distribution has been ordered of all funds which have been deposited in court by the government (however, transmittal of the papers enumerated above should not be deferred pending completion of this step); and

7. If no declaration of taking was filed, one certified and one plain copy of the order vesting title should be forwarded to the Department.

#### 5-15.517 Closing File

No case may be considered closed until:

- A. All funds have been ordered disbursed;
- B. All pending matters, such as motions for new trial or appeals, have been terminated;
- C. In use cases:
  1. The final term has expired, or the government's occupancy has otherwise terminated, and
  2. The question of restoration damages has been adjudicated or otherwise disposed of.

#### 5-15.520 Institution of Actions

#### 5-15.521 Initial Documents Sent to U.S. Attorneys

U.S. Attorneys will be advised when they have been authorized by the Attorney General to acquire land on behalf of the federal agency. Accompanying the authorization to the U.S. Attorney to acquire the land will usually be the following documents:

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A. A copy of the government official's letter to the Attorney General requesting the institution of condemnation proceedings, and citing the authority for the taking;

B. Where immediate title is required, a declaration of taking and one copy thereof, to which will be attached a description of the land to be acquired and a map showing the land;

C. In cases where a declaration of taking is to be filed, a check for the estimated compensation, or instructions indicating how the check may be obtained; and

D. Advice as to classification of the case and division of responsibility for the prosecution of the case between the U.S. Attorney and attorneys in the Land and Natural Resources Division. See USAM 5-15.300 *et seq.*, *supra*.

On occasion the letter of transmittal may contain special instructions which will govern procedure if at variance with anything contained herein.

#### 5-15.522 Preparing and Filing Complaints

Upon receiving the letter authorizing the initiation of an action to condemn land, the U.S. Attorney shall:

A. Secure from the acquiring agency the materials described in USAM 5-15.921, *infra*;

B. Prepare the documents described in USAM 5-15.922, *infra*; and

C. File the complaint pursuant to the instructions in USAM 5-15.923, *infra*.

#### 5-15.523 Land Subject to Options or Contracts of Sale by Acquiring Agency

When the land involved in a condemnation case is the subject of a valid accepted option or contract of sale, executed both by the presumptive owners and by a duly authorized representative of the acquiring agency prior to the institution of the condemnation case, the accepted option or contract is binding upon the signatories thereto in the condemnation case. The accepted option or contract should be pleaded in the complaint in condemnation. The U.S. Attorney or field representative is authorized without the prior approval of the Attorney General to have a judgment entered in the amount of the accepted option or contract provided that the local representative of the acquiring agency has advised in writing that the land has not decreased in value due to any action of the owners since the date of the option or contract, and all special and unusual conditions and requirements of the option or contract, if any, have been performed. It is also necessary that a determination shall have been made that the optionors in the accepted option or the vendors in the contract of sale are the sole

and only parties entitled to the just compensation, other than taxing authorities, lienholders and encumbrancers whose claims may be satisfied from the award.

The procedure for summary judgments under Rule 56, Fed.R.Civ.P., should be utilized in obtaining the entry of consent judgments on options and contracts of sale, but only after the expiration of the time for filing of answers or appearance by defendants, see USAM 5-15.541 and 5-15.542, *infra*.

#### 5-15.524 Lis Pendens

In connection with the institution of condemnation proceedings, a notice of the pendency of the action or *lis pendens* shall be filed or recorded among the proper local records, except in those jurisdictions where the law is settled that the commencement of the action is notice to all persons affected. If more than one county is involved, a separate notice is necessary for each county.

The steps necessary for the commencement of *lis pendens* notice are determined by the law of the particular state. Some states follow the common law, which is that notice commences upon the mere filing of the complaint. Some common law states, however, have the additional requirement that the defendants must be served with process before notice will commence. In other states the common law has been superseded by statute and the filing of a prescribed form of notice of *lis pendens* is necessary to commence notice. And where, under local law, either a declaration of taking or a judgment on declaration of taking is entitled to be recorded and is deemed to give notice, the recording thereof would constitute notice. In no instance should both a *lis pendens* notice and a judgment on declaration of taking be recorded.

#### 5-15.525 Service

Service of the notice of condemnation must be made in accordance with Rules 4(c) and (d), Fed.R. of Civ.P. A copy of the complaint need not be served with the notice of condemnation.

The Soldiers' and Sailors' Civil Relief Act of 1940 (54 Stat. 1178), as amended, is in full force and effect and is applicable to condemnation cases. The U.S. Attorney or field attorney must investigate to determine whether any defendant who has not answered or filed an appearance is in military service with the Armed Forces or is in public Health Service on duty with the Armed Forces. The U.S. Attorney or field attorney must comply strictly with the provisions of the Act (50 U.S.C., App. 520) by filing necessary affidavits and moving for the appointment of an attorney *ad litem*, when required.

Complete instructions with respect to service are set forth in USAM 5-15.925, *infra*.

#### 5-15.526 Possession

Where a declaration of taking has been filed, U.S. Attorneys and field attorneys must comply with instructions from the Department requiring the entry of an order for the surrender of possession of property to the government. See USAM 5-15.827, *infra*. Unless the property is vacant, the acquiring agency should be requested to advise that the necessary 30 days' written notice has been given of the date by which possession is required if any person lawfully occupying the property shall be required to move from a dwelling or to move his/her business or farm operation, as required by Section 301(5) of Public Law 91-646, approved January 2, 1971, 84 Stat. 1905. Notice of the entry of the order, see USAM 5-15.827, *infra*, and of the date provided therein for the surrender of possession are controlled by Rules 5 and 77(d), Fed.R.Civ.P. Service of a copy of the order should be made upon the person in possession of the land in accordance with Rule 5(b), Fed.R.Civ.P., or service should be made in the manner and within the time directed by the court in the order.

If the party in possession refuses to surrender possession as provided in the order, application should be made, in accordance with Rule 70, Fed.R. of Civ.P., for a writ of assistance to put the government in possession. Application for a citation in contempt under Rule 70 should not be made without the prior approval of the Department.

#### 5-15.530 Title Evidence

##### 5-15.531 Purpose

Rule 71A(c), Fed.R.Civ.P., provides that there shall be named defendants in condemnation cases all persons having or claiming an interest in the property condemned whose names can be ascertained by a reasonably diligent search of the local land records, considering the character and value of the property involved and the interest or estate to be acquired. Persons having an interest in property include those owning an estate in the land (*e.g.*, fee owner, lessee, tenant) and those having a lien or encumbrance on the land (*e.g.*, mortgagee, taxing authority, material person, mechanic). Evidence of title must, therefore, be obtained and examined for a determination of the necessary and proper parties defendant. Persons having (or claiming) an interest in the property at the time of the commencement of *lis pendens* notice, see 5-15.524, *infra*, are necessary parties and must be joined in the action as defendants. By joining as defendants all persons disclosed by the title evidence as having a possible interest in the property as of the commencement of *lis pendens* notice, and, in the course of proceedings, by giving those parties notice and opportunity to be heard at the trial or hearing on just compensation, due process

will have been afforded and the final judgment will be res judicata as to those parties. If the United States secures a judgment of condemnation fixing compensation and ordering distribution to the wrong person or to fewer than all persons entitled thereto, the party having a compensable interest who was omitted from the proceedings has been denied due process and is entitled to bring an action against the United States for just compensation. The United States may thus be compelled to pay twice for the same acquisition. Where the interest of the omitted party was a matter of record but was not disclosed by the title evidence, the United States may recover its loss from the title company or abstractor up to the limit of liability. See USAM 5-15.534, *infra*.

#### 5-15.532 Title Evidence Usually Supplied by Acquiring Agency

In condemnation proceedings the necessary evidence of title is made available to the Department by the acquiring agency. In compliance with applicable standards, title evidence conforming to the requirements of the Department should be obtained from approved abstractors or title companies. Contracts for the title evidence should include as a separate item the costs of any necessary continuation of the evidence of title.

#### 5-15.533 Continuation of Title Evidence

The evidence of title must be continued to a date subsequent to the recordation of the *lis pendens*, declaration of taking or of the judgment on the declaration of taking. On the basis of information, if any, disclosed by the continuation of the evidence of title, and the certificate of inspection and possession, USAM 5-15.536, *infra*, any additional parties shown by the continuation to have, or who may claim to have, any interest in the property involved must be joined as defendants in the case, and any changes in the naming of necessary and proper parties defendant must be effected. The procedure for adding, dropping, or substituting parties is by motion and order under Rules 21 and 71A(g) and (i)(3), Fed.R.Civ.P. An amended complaint need not be filed. Detailed instructions with respect to continuing title evidence are set forth in USAM 5-15.924, *infra*.

#### 5-15.534 Title Company Liability

Title evidence, in addition to being properly continued, must also comply with the Department's requirements with respect to the limitation of the title company's liability.

Generally, certificates of title, USAM 5-15.832, *infra*, and title insurance policies shall not limit the liability of the title company to a sum less than 50% of the reasonable value of the property. As to acquisitions valued at more than \$50,000, the limitation of liability of the issuing title company under the certificate of title or title insurance policy may

be limited to 50% of the first \$50,000 and 25% of that portion of the value in excess of that amount.

The "reasonable value of the property," in the context of condemnation proceeding, is the amount awarded as just compensation in the judgment. Where the title company has limited its liability to a sum substantially less than that permitted, an endorsement to the certificate or policy must be obtained from the title company providing for an acceptable amount of coverage. (Reasonable compliance with the requirements as to the percentage limitation of liability is all that is required.)

Recitations in the title evidence that the limitation of liability is "as per agreement," "to be agreed upon," or the like, are unsatisfactory. In such instances it will be necessary to obtain an endorsement providing adequate coverage in a stated dollar amount. Title evidence that does not state dollar amounts of coverage, but states that coverage is in "the amount of the award" or a stated percentage (not less than permitted) of the award, is acceptable.

#### 5-15.535 Certification of Ownership

It is essential that the title evidence disclose the names of the persons in whom title was vested at the time of commencement of notice. See USAM 5-15.531, *supra*. This should present no problem in cases instituted by complaint only.

In cases in which a declaration of taking has been filed and either the declaration itself or a judgment thereon has been recorded, the continued evidence of title typically recites that title to the property as of the effective date thereof is vested in the United States of America, followed by an appropriate reference to the recordation of the declaration or judgment. However, such a recitation must also be accompanied by a statement that prior to the filing for record of the declaration or judgment, as the case may be, title was vested in a named person or persons. An example of a satisfactory endorsement is given below:

#### ENDORSEMENT

Attached to Policy No. 87654

Issued by

URBAN TITLE INSURANCE COMPANY

Schedule of A of the above policy is hereby amended in the following particulars:

Paragraph 2 of Schedule A is hereby deleted and the following is substituted:

2. Title to the estate or interest covered by this policy at the date hereof is vested in the UNITED STATES OF AMERICA by

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judgment upon declaration of taking recorded January 15, 1973, Book 312, Page 923, Deed Records of Benton County, Missouri. Prior to filing said judgment, title was vested in John Smith and Mary Smith, his wife.

Without such a certification by the title company as to prior ownership, it cannot be ascertained whether the person from whom the property has been taken by the condemnation proceeding has been made a defendant in the action. Insurance that title is vested in the United States by declaration of taking or judgment thereon recorded on a given date is no protection against the loss that might result in the event that the prior owner was not joined in the action and subsequently recovers compensation from the United States in a separate proceeding.

#### 5-15.536 Certificates as to Parties in Possession and Mechanics' Liens

In order to insure the joinder as defendants in the condemnation cases of all parties who have, or who may claim to have, any right or interest in the property involved, whether or not such right or interest is disclosed by the evidence of title, the U.S. Attorney or field attorney should obtain a certificate showing (a) whether any party is in actual or constructive possession of all or any part of the land whose rights, if any, are not a matter of record, and (b) whether within the period provided by local law there has been any work or labor performed upon the property or any material furnished in connection with any work upon the property which would entitle anyone to a lien. Generally, the necessary certificate of inspection may be obtained from the local representative of the acquiring agency or the custodian for the government of the property. The certificate should conform substantially with that set out at USAM 5-15.831, *infra*. All or any number of the tracts or parcels of land in a particular case may be included in one certificate of inspection, if more convenient than using a separate certificate for each tract.

All parties disclosed by the certificate as to possession and mechanics' liens to have an interest in the property involved must be joined as defendants in the case as provided at USAM 5-15.531, *supra*.

When submitting a final transcript; USAM 5-15.516, *supra*, to the Department, the title evidence is incomplete unless it includes a certificate of parties in possession and mechanics' liens.

#### 5-15.537 Final Title Evidence

The final evidence submitted to the Department in the final transcript must satisfy the following requirements:

A. The abstract must be continued to the date of commencement of *lis pendens* or other notice, USAM 5-15.524, *supra*;

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B. A supplemental certificate or continuation title report, binder, or endorsement based on a search of the records to the date of commencement of *lis pendens* or other notice must be obtained. *No final certificate or policy is required provided* the preliminary certificate, report, or binder does not improperly limit the title company's liability, USAM 5-15.534, *supra*, or the company assumes the required financial liability and the certificate, report, or binder contains no provision under which the issuing company denies liability for losses if the final certificate or policy is not issued.

#### 5-15.538 Curative Materials

When transmitting title evidence to the Department as part of a final transcript of record, there should be included evidence of the disposition of any outstanding compensable interests disclosed by the evidence of title which interests are not barred by the condemnation proceedings. For example, an official receipt for the payment of *ad valorem* taxes should accompany title evidence disclosing unpaid taxes which were a lien on property on the date of taking.

#### 5-15.540 Objections to Taking; Alterations in Estate Taken

##### 5-15.541 Answer of Defendant

If a defendant wishes to raise an objection to the taking, he/she must answer within 20 days from receipt of notice, USAM 5-15.804, *infra*, unless the time is extended. If a defendant files any pleading alleging failure to comply with the requirements of the National Environmental Policy Act of 1969, 83 Stat. 852, 42 U.S.C. § 4321, U.S. Attorneys should immediately submit to the Department duplicate copies of such pleadings, together with available information as to compliance with this Act by the acquiring agency. Detailed instructions with respect to responding to a challenge to the taking are set forth in USAM 5-15.931, *infra*.

##### 5-15.542 Notice of Appearance

If a defendant merely wishes to appear in the cause to assure notice of any future action to be taken therein, the U.S. Attorney or field attorney may suggest that he/she file a notice of appearance.

##### 5-15.543 Alteration of Estate Sought to Be Condemned

It may occasionally be to the advantage of all concerned to modify or change the estate being condemned. The Department should be informed promptly of any suggestions which either the U.S. Attorney or the property owners may have concerning modification, alteration, or change of the estate or description of the property to be condemned, but no alteration of

the pleadings should be made except upon receipt of appropriate authorization from the Department.

#### 5-15.544 Exclusion of Property Acquired by Declaration of Taking

The Attorney General is authorized in any condemnation case to stipulate on behalf of the United States to exclude any property or any part thereof or interest therein which may have been taken by the United States by declaration of taking (40 U.S.C. § 258(f)). See USAM 5-15.512, *supra*. The necessity for the exclusion of property acquired by taking generally occurs in two classes of cases:

A. Where the estate taken is not the estate wanted. In cases in which through inadvertence or otherwise title has been taken to property or some portion thereof or an estate or interest therein not desired by the acquiring agency or found subsequently not to be needed for public use, U.S. Attorneys and field attorneys must obtain the prior authorization of the Department for the exclusion of property.

B. Where a former landowner wishes to remove property not needed by government. In cases in which the landowner desires to remove buildings, trees and shrubs, crops, or fixtures attached to the realty which are not needed or desired by the government, U.S. Attorneys and field attorneys are authorized to enter into stipulations for the exclusion of property without securing the approval of the Department provided that the exclusion has been approved by the local representative of the acquiring agency. However, if the property is of high value, the specific approval of the Department should be obtained.

#### 5-15.545 Stipulation of Exclusion

The authority of U.S. Attorneys and field attorneys to enter into stipulations is governed by the nature of the property to be excluded (see USAM 5-15.544, *supra*), but in the event of any question, specific instructions should be obtained from the Department. Detailed instructions with respect to the exclusion or dismissal of land from proceedings are set forth in USAM 5-15.932, *infra*.

In all cases in which a stipulation is entered into for the exclusion of property, the stipulation must contain either a provision fixing the amount by which the just compensation, whether already determined or to be determined, shall be reduced by reason of the exclusion, or a provision to the effect that no claim of whatever nature for just compensation will be asserted in the case or otherwise for the property excluded. If, in the opinion of the acquiring agency, the property to be excluded is of no value or the exclusion will result in a savings to the government by the avoidance of demolition or removal costs, the provisions of this paragraph shall not apply.

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A stipulation relating to the removal of property not needed by the government, *see* USAM 5-15.544, *supra*, should also contain a provision limiting the time for removal by the owner of the property and providing that if the owner fails to remove the property within the prescribed time, the stipulation shall be of no force and effect.

#### 5-15.546 Termination of Temporary Use Cases

Upon receipt of instruction from the Department that the temporary use of property is no longer necessary, the U.S. Attorney or field attorney should promptly file a motion for the limitation of the term condemned to the date of termination of the temporary use and the surrender of possession of the property by the government. Service of the motion and notice should be made in accordance with Rule 5(b), Fed.R.Civ.P. Proper arrangements should be made promptly for a determination of the extent, if any, of the monetary liability of the government for payment of just compensation by reason of any physical changes of the property resulting solely from the government's use. Generally, there should be obtained an estimate of the cost of physical restoration, with proper allowance for salvage, and an appraisal reflecting the diminution or enhancement in the fair market value of the property as of the date of termination of the temporary use resulting directly and exclusively from physical changes made by the government.

An appropriate order of termination should be entered covering restoration damages, if any, or finding no further liability on behalf of the government (one certified and one plain copy of such order should be forwarded to the Department), or the case should be set for trial at the earliest practicable date for the adjudication of all claims of the defendants for restoration.

#### 5-15.550 Determination and Payment of Just Compensation

#### 5-15.551 Right to Trial by Jury or Commission

Rule 71(h), Fed.R.Civ.P., provides that any party to a condemnation case may have a trial by a jury on the issue of just compensation by filing a demand therefor unless the court in its discretion orders that, because of the character, location or quantity of the properties to be condemned, or for other reasons in the interest of justice, the issue of just compensation should be determined by a commission of three persons appointed by the court. The rule further provides that trial of all issues shall otherwise be by the court.

In order to preserve the right to a trial by a jury or commission, a demand for a jury trial should be filed in all major tract cases and in any other cases when by reason of special circumstances the Department requests such demand or the U.S. Attorney determines that it is in the

interest of the United States that a jury trial should be demanded. Major tracts include all tracts involving deposits of estimated compensation of \$150,000 or more and other tracts involving claims for compensation in such amounts and tracts in which significant and complex legal problems may be decided. (See Tab W, "I Condemnation Seminar 1962" and USAM 5-15.865.) Under Rule 38(b), Fed.R.Civ.P., a demand for a jury trial may be endorsed upon a pleading. In the cases referred to above, the demand for a trial by jury should be endorsed upon the complaint in condemnation, USAM 5-15.801 or 5-15.802, *infra*, and notice of the demand should be included in the notice of condemnation. See USAM 5-15.804, *infra*.

As to all pending cases except those in the major-tract program, U.S. Attorneys are authorized to waive jury trials if, in their discretion, it is in the interest of the United States to do so, except when contrary instructions are issued by the Department as to a particular case. Juries will be waived in cases in the major-tract program only upon instructions from, or with the prior consent of, the Department.

If it is subsequently determined that the use of a commission is advisable, a motion should be made for the appointment of the commission. The motion should set forth the facts justifying the use of the commission. The order of court appointing the commission should include a finding of fact by the court as to the necessity for use of the commission. Instructions with respect to trial settings, or a hearing before a commission, are set forth in USAM 5-15.941, *infra*.

#### 5-15.552 Retaining Independent Appraisers

Should a U.S. Attorney find it necessary to retain the services of an independent appraiser, he/she should, before engaging the appraiser's services, submit to the Department a Form OBD 47, together with executed Form USA-157 and, when the appraiser's fee is over \$2,500, Form LN-116. Instructions with respect to engaging an appraiser are set forth in USAM 5-15.942, *infra*.

#### 5-15.553 Disbursement of Funds Deposited in Court

U.S. Attorneys and field attorneys are required to actively assist landowners and the court, as *amicus curiae*, in effecting prompt distribution of funds deposited into the registry of the court as just compensation. Duplicate conformed copies of all orders of distribution, see USAM 5-15.815 or 5-15.824, *infra*, should be promptly transmitted to the Department. Rule 71(j), Fed.R.Civ.P., which relates to distribution, provides that the court and attorneys shall expedite the proceedings for distribution and for the ascertainment and payment of just compensation in cases in which a deposit is made. Government counsel should obtain promptly and furnish to the court all information available as to the state of the title to the property and any liens, taxes, and encumbrances thereon.

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Government counsel should also assist landowners in the preparation of motions for, and orders of, distribution, see USAM 5-15.815 and 5-15.824, *infra*, and affidavits for execution by the claimants in support of motions for distribution. Care should be taken to see that a proper order is entered for the payment of all taxes and assessments due and exigible at the time of vesting of title in the United States. Unless serious doubt exists as to the real ownership of the property, government counsel should not delay distribution of just compensation for any extended period for the procurement of curative material for the elimination of defects of title but should rely upon the condemnation procedure for that purpose. Instructions with respect to procedures in disbursing funds deposited in court are set forth in USAM 5-15.943, *infra*.

#### 5-15.554 Refund of Excess Funds Deposited

After a deposit has been made to the registry of the court and it becomes necessary to have a part or all of it returned to the government (because of an abandonment of the case or an overdeposit of estimated compensation), the check representing such refund must be made payable to the Treasurer of the United States and forwarded to the Department for distribution to the proper agencies.

#### 5-15.555 Refund of Balance When Owner Not Locatable

When funds cannot be disbursed because the owner cannot be located, or for other reasons, an order should be sought, as promptly as the court will entertain such orders, for the refund of the undistributed balance to the Treasury of the United States at the expiration of the five-year period pursuant to 28 U.S.C. § 2042. Action pursuant to this section becomes a ministerial duty of the clerk of the court, although copies of the order directing the transfer of funds should be furnished the Department, the clerk of the court will assume the responsibility for the actual transfer of funds pursuant to the court order. In the event a subsequent order is entered for a redeposit of the money for the purposes of withdrawal, it will be the duty of the clerk of the court to submit the court's order directly to the audit section of the Administrative Office of the United States Courts for processing with the Treasury Department. A copy of this order should also be sent to the Department so that the records of the case will be complete. Although the U.S. Attorneys should assist the landowners in filing the motion to redeposit the funds and advise the court with reference thereto, no further action thereon by either the U.S. Attorney or the Department will be required to obtain the redeposit.

#### 5-15.556 Reimbursement in Certain Cases for Moving, Relocation and Related Expenses

The Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, approved January 2, 1971, 84 Stat. 1894, requires the

payment by acquiring agencies of moving, replacement, relocation and related expenses of property owners and for certain expenses incidental to the transfer of title to the United States, including reimbursement to the owner for the pro-rata portion of real property taxes paid which are allocable to the period subsequent to the date of vesting title in the United States or the effective date of possession of such real property by the United States, whichever is earlier. Section 102(a) of this Act provides as follows:

The provisions of section 301 of title III of this Act create no rights or liabilities and shall not affect the validity of any property acquisitions by purchase or condemnation.

And, Section 102(b) provides as follows:

Nothing in this Act shall be construed as creating in any condemnation proceedings brought under the power of eminent domain, any element of value or of damage not in existence immediately prior to the date of enactment of this Act.

Representatives of acquiring agencies have been instructed to coordinate their activities under the authorizing statute with representatives of the Department of Justice to insure that no duplication of payment will result.

All inquiries by owners or tenants with respect to reimbursements under this statute should be referred to the local representative of the acquiring agency. No changes in existing practices and procedures in handling condemnation cases and particularly in negotiating for settlements in condemnation cases are required by this authorizing statute. However, U.S. Attorneys and field attorneys should advise the local representatives of the acquiring agency of any case in which an owner or tenant asserts a claim for expenses and other loss and damage alleged to have been incurred by such owner or tenant as a result of the moving of themselves, their families and possessions because of the acquisition of the land. This requirement for notice to representatives of the acquiring agency is particularly applicable in cases for the condemnation of the temporary use of property wherein claims may be asserted for moving costs under the rule established in *General Motors Corporation v. United States*, 323 U.S. 373 (1945).

#### 5-15.560 Post-Trial Motions

#### 5-15.561 Notification to Division of Awards

Immediately after hearing or trial, send executed Form LN-18, USAM 5-15.866, *infra*, in triplicate, together with a detailed report of the trial or hearing to the Division with specific recommendations for future action.

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## 5-15.562 Motions for New Trial; Objections to Commission's Awards

The usual course of action, when awards materially exceed the government's testimony, is to move for a new trial, where the award was made by a jury, or to object to the award made by a commission.

Procedures for the U.S. Attorneys to follow with respect to motions for new trials and objections to a commission's award are set forth in USAM 5-15.944, *infra*.

5-15.570 [Reserved]5-15.580 Judgments

The U.S. Attorney or field attorney should take care that judgments in condemnation cases include an adjudication of all issues within the jurisdiction of the court. Separate judgments on the several issues in the case should be avoided whenever possible, thus, for example, an order of distribution should be included in a judgment determining compensation. Judgments should not contain recitals of pleadings, reports of commissions or the record of prior proceedings. See USAM 5-15.824, *infra*, for form of judgment.

## 5-15.581 Contents of Judgment

Judgments determining compensation should contain:

A. A finding and adjudication of the right of the United States to condemn the property involved for public use;

B. An adjudication that title to the exact estate or interest condemned is vested in the United States if the declaration of taking procedure has been used, or, if not, an adjudication that title to the exact estate or interest will vest in the United States upon payment of the just compensation into the registry of the court and an order vesting title should be entered;

C. Confirmation of the stipulation between the government and the landowners fixing the amount of just compensation or confirmation of the verdict of the jury or the award of a commission appointed by the court to determine compensation;

D. An accurate legal description of the property, which may be referred to the complaint or declaration of taking;

E. Whenever possible, a finding and adjudication of the right of the defendants to distribution of the just compensation;

F. Provision for the payment of interest, if any, for which the government may be legally liable;

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G. Provision for any refund of money deposited into the registry of the court to which the government may be entitled; and

H. An adjudication of any other issue not previously ruled upon formally by the court.

#### 5-15.582 Satisfaction of Deficiency Judgments

Upon the entry of judgments fixing compensation and ordering the deposit of deficiencies, the U.S. Attorney shall request the Department to secure a check for the necessary amount, except in cases where the acquiring agency is the Department of the Interior, the Departments of the Navy, Army or Air Force, the General Services Administration, the Nuclear Regulatory Commission or the National Aeronautics and Space Administration, in which case the request for the amount of deficiency is sent to a local representative of the acquiring agency. Instructions for securing deficiency checks are set forth in USAM 5-15.945, *infra*.

#### 5-15.590 Appeals

##### 5-15.591 Recommendation With Respect to Appeals

In any case where he/she believes substantial error has been committed, the U.S. Attorney shall immediately advise the Land Acquisition Section and give his/her recommendations regarding appeal.

##### 5-15.592 Procedure in Recommending Appeal

If a U.S. Attorney wishes to recommend that a judgment be appealed, he/she should:

A. Send one certified and one plain copy of the order of the court to the Department.

B. Prepare a recommendation including a statement of the factual and legal issues involved, the rulings of the court which may be grounds for an appeal, the reasons for his/her recommendations and the approximate cost of a transcript of the testimony. The date from which the time for appeal runs should also be stated.

C. Unless otherwise instructed, file a protective notice of appeal just prior to the expiration of the time within which such notice may be filed, but not before then. This is to allow the Department the benefit of the full period of time for appeal to study the case and reach a decision. Two copies of the notice of appeal should be forwarded to the Land Acquisition Section immediately after filing.

The Department will advise the U.S. Attorney whether to order the transcript of testimony. Note the instructions at USAM 5-8.000, *infra*, and in USAM Title 2, regarding the handling of appeals.

## 5-15.600 SETTLEMENT AND DISMISSAL OF CASES

5-15.610 General

Except as set forth in USAM 5-15.620, *infra*, no case under the jurisdiction of the Land Acquisition Section may be settled or dismissed without specific or delegated authority from the Attorney General.

## 5-15.611 Partial Settlements

Overall settlements for all interest in a tract in a pending condemnation proceeding are much to be preferred over separate settlements for partial interests. Offers not including all interests in a tract will be approved only in exceptional cases and should be explained and justified fully.

5-15.620 Settlement Procedures

Negotiations for compromise settlement always should be attempted, and should be undertaken by the U.S. Attorney with the cooperation of the local office of the acquiring agency. Negotiations should be initiated or entered into only after the appraisals have been thoroughly examined and found to be sound. If evaluations vary greatly, then consultations with appraisers first should be had to clarify or correct any possible misapplication of the facts or legal principles involved. If the appraisals are not satisfactory, or vary greatly, the U.S. Attorney should request authority to engage additional appraisers, see USAM 5-15.942, *supra*.

Settlement should never be sought for statistical purposes. Where settlement negotiations lead to an offer in any case that is deemed by the condemnation attorney to be a reasonable reflection of fair market value, in light of the pertinent appraisal reports, the risks and costs of trial and the effect of the settlement upon other pending cases, he/she is encouraged to consummate the settlement with dispatch, if it is within his/her authority to do so (see USAM 5-15.630, *infra*), or to furnish the settlement offer to the Department for approval (see USAM 5-15.640, *infra*).

Detailed procedures with respect to settlements are set forth in USAM 5-15.952, *infra*.

5-15.630 Authority of U.S. Attorneys to Settle Condemnation Cases

On January 14, 1983, by Land and Natural Resources Division Directive No. 3-83, the U.S. Attorneys were authorized, subject to the limitations imposed in USAM 5-15.631, *infra*, to accept or reject offers in compromise, without the prior approval of the Land and Natural Resources Division, of claims against the United States for just compensation in condemnation proceedings in any case in which:

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A. The gross amount of the proposed settlement does not exceed \$200,000.

B. The settlement is approved in writing (the written approval to be retained in the file of the U.S. Attorney concerned) by the authorized field representative of the acquiring agency if the amount of the settlement exceeds the amount deposited with the declaration of taking as to the particular tract of land involved;

C. The amount of the settlement is compatible with the sound appraisal, or appraisals, upon which the United States would rely as evidence in the event of trial, due regard being had for probable minimum trial costs and risks; and

D. The case does not involve the revestment of any land or improvements or any interest, or interests, in land under the Act of October 21, 1942, 56 Stat. 797 (40 U.S.C. § 258f).

#### 5-15.631 Limitations on Delegations

The U.S. Attorney's authority to settle land acquisition cases may not be exercised when:

A. For any reason, the compromise of a particular claim, as a practical matter, will control or adversely influence the disposition of other claims totaling more than the respective amounts designated above;

B. Because a novel question of law or a question of policy is presented, or for any other reason, the offer should, in the opinion of the officer or employee concerned, receive the personal attention of the Assistant Attorney General in charge of the Land and Natural Resources Division; or

C. The agency or agencies involved are opposed to the proposed closing or dismissal of a case, or acceptance or rejection of the offer in compromise.

If any of the conditions listed above exist, the matter shall be submitted for resolution to the Assistant Attorney General in charge of the Land and Natural Resources Division.

#### 5-15.632 Authority of Agency Representatives to Recommend Acceptance or Rejection of Settlement Offers

In Department of the Army acquisitions, the District Engineers have authority to recommend on behalf of their Department the approval or rejection of settlements involving payments of \$40,000 or less, or for greater amounts which are not in excess of the fair market value of the land involved as determined by Department of the Army appraisers. In submitting

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offers in compromise which require the payment of sums in excess of the authority of the District Engineers in cases for the condemnation of land at the request of the Department of the Army, the U.S. Attorney or field attorney should urge the District Engineer promptly to submit his/her recommendation for acceptance or rejection of the offer to the Office of the Chief of Engineers whose views will be requested by the Department.

The Naval Facilities Engineering Command of the Department of the Navy has authorized its Field Divisions to approve or reject on its behalf proposed settlements or claims not in excess of 10 percent above the deposit in all cases in which the deposit does not exceed \$250,000. As to settlement offers involving payments in excess of 10 percent above the deposit and in cases wherein the deposit exceeds \$250,000, the U.S. Attorney should urge the local Field Division promptly to forward its recommendation to: Commander, Naval Facilities Engineering Command, Department of the Navy, Washington, D.C. (Attention: Office of Counsel), whose recommendation will be sought by the Department.

The Regional Commissioners of the General Services Administration have authority to recommend on behalf of their Administration the approval or rejection of any settlement offer.

Regional Solicitors of the Department of the Interior have authority to recommend approval or rejection of settlements involving payments of \$500,000 or less. In submitting offers in compromise in excess of \$500,000 the U.S. Attorney should, in Department of the Interior cases, request the Regional Solicitor to forward his/her recommendation to the appropriate officer in his/her agency whose recommendation will be sought by the Department.

The authority of the above-mentioned field representatives does not relate to settlements which involve the revestment of the title to portions of the lands acquired or interest therein. The field representatives should submit their recommendations as to such offers in the same manner as in settlements involving payment in excess of their delegated authority.

5-15.640 Transmittal of Compromise Offer to Land Acquisition Section;  
Recommendations with Respect to Acceptance

Every offer of compromise in a condemnation case, with the exception of those offers within the authority of the U.S. Attorney to accept or reject (see USAM 5-15.630, *supra*), which the U.S. Attorney considers may be recommended for acceptance must be submitted to the Department for consideration and acceptance or rejection. The U.S. Attorney or field attorney shall submit with the offer in compromise:

- A. His/her recommendation;

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B. The range of the government's proposed testimony of value in event of trial;

C. The probable range of testimony on behalf of the landowner insofar as known;

D. All available appraisal reports; and

E. A statement of all other factors pertinent to a determination of the advisability of accepting or rejecting the proposed settlement.

Whenever feasible, the Department should be advised of the recommendation of the local representative of the acquiring agency with respect to the proposed settlement. This recommendation and information should be submitted in triplicate using Form No. OBD 43 (see USAM 5-15.867), which forms may be obtained from the Department. See USAM 5-15.816, *infra*, for suggested forms of stipulation and judgment thereon. The forms for offers involving the revestment of property under 40 U.S.C. § 208f (see USAM 5-15.812, *infra*) must include the appraisals of the property to be revested and the appraised value of the interest to be retained by the United States.

#### 5-15.650 Dismissal or Abandonment of Condemnation Case

Condemnation cases must not be dismissed as to any of the land included in the instructions to condemn, nor may there be any change as to the interest or estate to be acquired unless expressly authorized by the Department. (See USAM 5-15.543 and 5-15.544, *supra*.) Orders of dismissal must be entered without prejudice. In the absence of a stipulation with the property owner in which he/she waives the right to costs, the federal court may award to the owner of any right, title or interest in such real property such sum as will in the opinion of the court reimburse such owner for his/her reasonable costs, disbursements and expenses, including reasonable attorney, appraisal, and engineering fees, actually incurred because of the condemnation proceeding, if the proceeding is abandoned by the United States. See Section 304(a), Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, Pub.L. No. 91-646, approved January 2, 1971, 84 Stat. 1906 (see USAM 5-3.558). The procedure for dismissal is set forth in Rule 71A(i), Federal Rules of Civil Procedure. Instructions for the termination of cases instituted to acquire the temporary use of property are set forth at USAM 5-15.546, *supra*. See USAM 5-15.813, *infra* for forms of stipulation and order.

5-15.700 [RESERVED]

#### 5-15.800 SAMPLE PLEADINGS, ORDERS AND FORMS

When using these forms as models, typewritten pleadings should be double spaced.

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5-15.801 Complaint in Condemnation

IN THE UNITED STATES DISTRICT COURT FOR

THE DISTRICT OF \_\_\_\_\_

UNITED STATES OF AMERICA, )  
 )  
 PLAINTIFF, )  
 )  
 v. )  
 )  
 \_\_\_\_\_, )  
 )  
 DEFENDANTS. )

CIVIL ACTION NO. \_\_\_\_\_

COMPLAINT IN CONDEMNATION

1. This is an action of a civil nature brought by the Attorney General of the United States at the request of and in the name of \_\_\_\_\_ for the taking of the property under the power of eminent domain and for the ascertainment and award of just compensation to the owners and parties in interest.

2. The authority for the taking is set forth in \_\_\_\_\_ attached hereto and made a part hereof.

3. The public use for which the property is to be taken is the \_\_\_\_\_, all as provided in the Act of \_\_\_\_\_.

4. The interest in the property to be acquired is set forth in \_\_\_\_\_ attached hereto and made a part hereof.

5. The property to be taken is described in \_\_\_\_\_ attached hereto and made a part hereof.

6. The persons, firms and corporations known to the plaintiff to have or claim an interest in the property are set forth in \_\_\_\_\_ attached hereto and made a part hereof.

7. All persons, firms and corporations named as defendants herein are joined as defendants generally to the end that all right, title, interest and estate of all said defendants in and to any and all of the lands herein involved shall be divested out of them and vested in plaintiff.

8. In addition to the persons named, there are or may be others who have or may claim some interest in the property to be taken, whose names are unknown to the plaintiff, and such persons are made parties to the action under the designation "Unknown Owners."

WHEREFORE, the plaintiff demands judgment that the property be condemned and that just compensation for the taking be ascertained and awarded and for such other relief as may be lawful and proper.

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Trial by jury of the issue of just compensation is demanded by plaintiff.<sup>1</sup>

UNITED STATES OF AMERICA

BY: \_\_\_\_\_  
United States Attorney

<sup>1</sup>Jury trial is not requested in tracts worth less than \$4,000; an additional paragraph is necessary if option contracts are to be enforced.

5-15.802 Complaint in Condemnation for Use in Districts Which Have Adopted the Judicial Conference Guidelines

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF \_\_\_\_\_

UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )  
 )  
 v. ) CIVIL NO. \_\_\_\_\_  
 ) TRACT NO. \_\_\_\_\_  
 \_\_\_\_\_ )  
 )  
 Defendants. )

COMPLAINT IN CONDEMNATION

1. This is an action of a civil nature brought by the United States of America for the taking of property, under its power of eminent domain, and for the ascertainment and award of just compensation to the parties in interest.

2. The uses for which the property is to be taken and the authority for the taking are set forth in Schedule "A" annexed hereto and made a part hereof.

3. The property to be taken, the estates to be taken and the names and addresses of the persons having or claiming an interest in said property are described in Schedule "B" annexed hereto and made a part hereof.

4. Local and state taxing authorities may have or claim an interest in the property by reason of taxes and assessments due and exigible.

5. There are or may be others who have or may claim some interest in the property to be taken, whose names are unknown to plaintiff, and such persons are made parties to this action under the designation "Unknown Owners."

Wherefore plaintiff demands judgment that the property be condemned, and that just compensation for the taking be ascertained and awarded, and such other relief as may be lawful and proper.

October 1, 1988

UNITED STATES OF AMERICA  
UNITED STATES ATTORNEY

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Assistant United States Attorney

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N.B. Modification is necessary if option contracts are to be enforced or if trial by jury is desired.

5-15.803 Amended Complaint

(Caption as in Complaint)

AMENDED COMPLAINT IN CONDEMNATION AS TO TRACT(S)  
NO(S). (ADDING PARTIES)

Plaintiff, United States of America, files this its Amended Complaint in Condemnation, which amendment applies only to that land in this proceeding designated in the original Complaint filed in this cause on the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, as Tract(s) No(s). \_\_\_\_\_, and should show the Court:

1. By authority of the \_\_\_\_\_ and the Attorney General of the United States the above-mentioned land was included in these proceedings in condemnation, and from the best information obtainable it has been determined that the following named persons are necessary parties defendant herein as to the respective tracts of land set out opposite their names below:

2. The original Complaint filed in this cause contains a description of said tract(s) of land.

3. Plaintiff adopts in full the allegations contained in its original Complaint herein, as fully and completely as though the same were again set forth in this Amended Complaint.

Wherefore, plaintiff prays as in its original Complaint, and in addition thereto prays as follows: That the persons hereinabove named be made parties defendants herein; that the just compensation for the taking of said tract(s) of land be ascertained; that the respective interests of said defendants and their right to receive a portion of the compensation awarded herein be ascertained and established; that the amount finally determined to be due said defendants as just compensation for the taking of said land be paid to them in the respective proportions found to be due them.

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United States Attorney

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5-15.804 Notice of Condemnation

(Caption as in Complaint)

NOTICE

TO: All those persons named in Exhibit "C" attached hereto and made a part hereof.

You are hereby notified that a complaint in condemnation has heretofore been filed in the office of the Clerk of the above-named Court in an action to condemn an interest in and to the property described in \_\_\_\_\_ attached hereto and made a part hereof for the public use \_\_\_\_\_.

The estate hereby taken for said public use as aforesaid is set forth in \_\_\_\_\_ attached hereto and made a part hereof.

The authority for the taking is set forth in \_\_\_\_\_ attached hereto and made a part hereof.

You are further notified that if you have any objection or defense to the taking of the property in which you may have or claim some interest you are required to serve upon plaintiff's attorney at the address herein designated within twenty (20) days after personal service of this notice upon you, exclusive of the date of service, an answer identifying the property in which you claim to have an interest, stating the nature and extent of the interest claimed and stating all your objections and defenses to the taking of the property. A failure so to serve an answer shall constitute a consent to the taking and to the authority of the court to proceed to hear the action and to fix the just compensation and shall constitute a waiver of all defenses and objections not so presented.

You are further notified that if you have no objection or defense to the taking you may serve upon plaintiff's attorney a notice of appearance designating the property in which you claim to be interested and thereafter you shall receive notice of all proceedings affecting the said property.

You are further notified that at the trial of the issue of just compensation, whether or not you have answered or served a notice of appearance, you may present evidence as to the amount of the compensation to be paid for the property in which you have an interest and you may share in the distribution of the award of compensation.

UNITED STATES OF AMERICA

BY \_\_\_\_\_  
United States Attorney

N.B. Additions may be made to give notice of jury request and requests to enforce options.

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5-15.805 Letter Advising Landowners of Filing of Action and Deposit of Funds

Re: Civil Action No.: \_\_\_\_\_
Tract No(s): \_\_\_\_\_
Amount deposited as estimated just compensation: \$\_\_\_\_\_
Project: \_\_\_\_\_

The United States heretofore has filed a condemnation suit to acquire an interest in certain land owned by you, designated by tract number(s) as above, and has deposited in the registry of the United States District Court, as estimated just compensation, the sum of money indicated above.

This estimated compensation is based upon appraisals made by competent appraisers, but the amount is not binding upon either you or the government. The exact amount to be paid for the taking of your land will be determined either by agreement or by trial. However, the amount deposited is available for distribution in the discretion of the court to those found to be entitled to payment, without regard to whether or not an agreement has been reached and without prejudice to your right to claim a larger amount. If you desire to withdraw a portion of the amount on deposit, please advise this office. If, on the other hand, you are willing to accept the sum specified above as full payment of just compensation for the condemnation of the designated interest in your land, please notify us of that fact as soon as possible.

We will appreciate hearing from you, either by telephone or by letter, at your earliest convenience, so that we may know whether a trial of the issue of just compensation will be necessary in this case.

Very truly yours,
United States Attorney

5-15.810 Sample Motions and Stipulations

5-15.811 Motion to Amend Complaint to Join Additional Parties

(Caption as in Complaint)

MOTION TO JOIN ADDITIONAL PARTIES DEFENDANT
AS TO TRACT(S) NO(S).

Plaintiff, United States of America, moves the Court to enter its order joining as additional parties defendant the following persons, as to the respective tracts of land set out opposite their names below:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

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In support of such motion, plaintiff shows the Court that subsequent to the commencement of this proceeding, the title evidence as to said tract(s) of land disclosed that said defendants may have some interest therein and they therefore are necessary parties to a full and complete adjudication of this matter.

Wherefore, plaintiff moves the Court to enter its order joining said persons as parties defendant in this proceeding.

\_\_\_\_\_  
United States Attorney

It is so ordered this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_.

\_\_\_\_\_  
United States District Judge

5-15.812 Stipulation for Revestment

(Caption as in Complaint)

STIPULATION FOR REVESTMENT

WHEREAS, the plaintiff, United States of America, commenced the above-entitled action for the purpose of acquiring by eminent domain certain lands described as follows, to wit:

\_\_\_\_\_  
\_\_\_\_\_;

WHEREAS, the above-described tract is a part of the same land as that described in the following deeds:

\_\_\_\_\_  
\_\_\_\_\_;

WHEREAS, by reason of the filing of a declaration of taking and the depositing of \$\_\_\_\_\_ as estimated just compensation for the taking thereof, title to such land, to the extent of the estate described below, vested in the United States of America on \_\_\_\_\_, 19\_\_;

WHEREAS, it has been determined to be necessary to revest to the former owners title to the \_\_\_\_\_ heretofore described in above-described tract of land;

WHEREAS, the defendants \_\_\_\_\_ have agreed that by reason of the afore-said they are not entitled to any just compensation for the interests acquired in the proceeding and have agreed further than the sum of \$\_\_\_\_\_ remaining on deposit in the registry of the court shall be returned to the United States of America;

\_\_\_\_\_  
October 1, 1988

NOW, THEREFORE, IT IS STIPULATED AND AGREED BY AND BETWEEN THE UNITED STATES OF AMERICA, PLAINTIFF, AND THE ABOVE-NAMED DEFENDANTS \_\_\_\_\_ as follows:

(a) That the defendants herein consent to the reversion by the United States of the estate in the land as heretofore set forth;

(b) That said defendants consent to the withdrawal of any answer and/or interrogatories heretofore filed in the proceeding contesting the Government's right to acquire the land;

(c) That the legal description of Tract \_\_\_\_\_ and the estate acquired therein, as set forth in the complaint in condemnation and the declaration of taking heretofore filed in the proceeding shall be deleted therefrom;

(d) That all right, title and interest of the stipulating defendants in and to any and all portions of the tract as set forth in the complaint in condemnation and the declaration of taking heretofore filed in the proceeding shall be excluded from the proceeding and title thereto shall be reversioned in said defendants to the extent held by them immediately prior to the taking;

(e) That the defendants in consideration of the foregoing waive any and all compensation for the taking of all interest acquired in the proceeding, and for the Government's use of that portion and/or interest in the land title to which is reversioned by this stipulation, including all damages arising therefrom;

(f) That judgment shall be entered pursuant hereto in accordance with the aforementioned terms and conditions.

In support of the foregoing stipulation, it is hereby represented to the court as follows:

I.

That this stipulation is intended as a voluntary appearance and express waiver of service of notice and of all other process and pleading, notice of hearing and trial by jury.

II.

That except as aforesaid on said date no other person, party or corporation was in possession of said lands and there were no unrecorded liens, leases, encumbrances or transfers outstanding affecting said property.

It is expressly understood and agreed that upon the entry of this stipulation, the defendants and counsel agree to waive any and all claims of whatsoever kind including attorneys' fees and any other costs.

WHEREFORE, the parties hereto pray for judgment as appropriate to effectuate this stipulation.

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October 1, 1988

DATED this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_.

UNITED STATES OF AMERICA

BY: \_\_\_\_\_  
United States Attorney

APPROVED:

\_\_\_\_\_  
Attorney for Defendants

N.B.: Attorneys' fees and court costs are not awardable in eminent domain proceedings.

5-15.813 Stipulation and Joint Motion to Dismiss

(Caption as in Complaint)

STIPULATION AND JOINT MOTION TO DISMISS  
AS TO TRACT(S) NO(S). \_\_\_\_\_

Whereas plaintiff, United States of America, and defendant(s), \_\_\_\_\_ stipulate and agree as follows:

1. The interests included in Tract(s) No(s). \_\_\_\_\_ in the above proceeding are no longer required by the plaintiff.

2. No Declaration of Taking has been filed in this suit and title to the estate described in the Complaint filed herein has not vested in the United States of America.

3. An order of this Court previously has been entered giving plaintiff possession of the land and estate described in the Complaint; however, the United States has not taken actual possession of the property of said defendant(s), and the plaintiff and defendant(s) stipulate and agree that the Court may vacate such order of possession as to Tract(s) No(s). \_\_\_\_\_ and any other order giving plaintiff possession or an interest in said tract(s).

4. There are no existing claims for compensation with respect to said tract(s) of land.

Therefore, plaintiff and defendant(s) agree that this proceeding should be dismissed and defendant(s) hereby consent(s) to the entry by the Court of all orders, judgments and decrees necessary and appropriate to effectuate this stipulation and agreement without further notice to said defendant(s).

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Wherefore, premises considered, plaintiff, United States of America, and \_\_\_\_\_, defendant(s) in Tract(s) No(s). \_\_\_\_\_ in the above-styled and numbered cause, move that the order of possession entered in such cause as to Tract(s) No(s). \_\_\_\_\_ be vacated; and that the Court enter an order of dismissal as to said tract(s) in this proceeding, on which motion plaintiff and defendant(s) pray for judgment of the Court.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_.

\_\_\_\_\_  
United States Attorney

\_\_\_\_\_  
Defendant

\_\_\_\_\_  
Defendant

5-15.814 Application for Withdrawal of Funds

(Caption as in Complaint)

APPLICATION FOR WITHDRAWAL OF ESTIMATED  
COMPENSATION AS TO TRACT NO.

\_\_\_\_\_, hereinafter referred to as applicant, whether one or more, shows the Court:

1. At the time of the filing of the Declaration of Taking in this cause (s)he was the owner of (or the owner of an estate or interest in) Tract No. \_\_\_\_\_, more particularly described in the Declaration of Taking hereinbefore mentioned;

2. Said Declaration of Taking included the above-mentioned tract of land, subject to the exceptions noted therein, and the sum of \$\_\_\_\_\_ was deposited in the registry of the Court as estimated compensation for the taking thereof;

3. (S)he is entitled to receive said deposit, no part or portion thereof has been paid to him/her, and the entire amount thereof remains in the registry of this Court, except: \_\_\_\_\_

4. (S)he was the owner of an interest or estate in said tract of land on the date of taking, as follows: \_\_\_\_\_

5. Applicant prays the Court to order the disbursement of \$\_\_\_\_\_ of said deposit to him/her, subject to the following conditions:

(a) That out of said deposit all valid taxes, liens and encumbrances first shall be paid.

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(b) That any amount paid to him/her from said deposit, and any sums paid therefrom to others for taxes, liens and encumbrances, shall be in part payment of any award finally made as to such tract if such award exceeds said sums.

(c) That in case it finally is determined that applicant is not entitled to receive said deposit, or any part thereof, (s)he agrees to refund into the registry of this Court said sum paid to him/her, or such part thereof as the Court may direct with interest at 6 percent per annum thereon; and further, that in the event a final judgment is entered herein for an amount less than that which has been expended for taxes, liens and encumbrances and that which has been paid directly to him/her, (s)he agrees to refund into the registry of the Court the amount by which such payments exceed said judgment, with interest at 6 percent per annum thereon.

(d) That this application is made without prejudice to applicant's right to claim additional compensation for the taking of said tract of land.

6. Applicant hereby expressly enters his/her appearance in the above proceeding for all purposes and waives the issuance, service and return of all process herein.

\_\_\_\_\_  
Applicant

\_\_\_\_\_  
Applicant

Subscribed and sworn to before me this day of \_\_\_\_\_, 19\_\_.

\_\_\_\_\_  
Notary Public in and for \_\_\_\_\_

APPROVED:

\_\_\_\_\_  
United States Attorney

5-15.815 Motion for Disbursement of Funds

(Caption as in Complaint)

MOTION TO DISBURSE FUNDS AS TO TRACT NO. \_\_\_\_\_

Plaintiff, United States of America, moves the Court for an order directing the Clerk of the Court to make the following disbursement(s) out of funds not in the registry of the Court to the credit of Tract No. \_\_\_\_\_.

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Movant would show the Court that after making the disbursement(s) hereby requested, there would then remain in the registry of the Court to the credit of the above-mentioned tract of land the sum of \$\_\_\_\_\_, which is ample to discharge any and all liens, encumbrances and charges upon said land.

Attached to this motion is an application for the withdrawal of funds which has been executed and sworn to by the aforementioned defendant(s) in this civil action.

WHEREFORE, movant prays the Court to enter an order directing the Clerk of the Court to make the disbursement(s) above set forth, and further directing the Clerk of the Court to credit such disbursement(s) to the funds now on deposit in the registry of the Court for Tract No. \_\_\_\_\_; and movant further prays that said disbursement(s) be made without prejudice to the right of said defendant(s) to demand and receive additional compensation for the taking of said tract of land.

---

United States Attorney

5-15.816 Stipulation as to Amount of Just Compensation

(Caption as in Complaint)

STIPULATION AS TO COMPENSATION FOR TRACT NO.

Comes now the United States of America and the defendant(s) \_\_\_\_\_, former owner(s) of Tract No. \_\_\_\_\_ herein, more particularly described in the Declaration of Taking filed herein; and

It is stipulated and agreed by and between the parties hereto that the full just compensation payable by plaintiff, the United States of America, for the taking of the said tract, together with all improvements thereon and appurtenances thereunto belonging, shall be the sum of \$\_\_\_\_\_, inclusive of interest; and

It is further stipulated and agreed that the said sum of \$\_\_\_\_\_ shall be subject to all liens, encumbrances and charges of whatsoever nature existing against the said lands at the time of vesting of title thereto in the United States of America and that all such liens, encumbrances and charges of whatsoever nature shall be payable and deductible from the said sum; and

It is further stipulated and agreed that the said sum shall be full and just compensation and in full satisfaction of any and all claims of whatsoever nature against the United States of America by reason of the institution and prosecution of this action and the taking of the said lands and all appurtenances thereunto belonging; and

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The said parties hereby consent to the entry of any and all orders and judgments necessary to effectuate this stipulation and agreement.

\_\_\_\_\_  
United States Attorney

\_\_\_\_\_  
Defendant

\_\_\_\_\_  
Defendant

5-15.817 Motion for Order for Delivery of Possession  
(Caption as in Complaint)

MOTION FOR ORDER FOR DELIVERY OF POSSESSION

Now comes the United States of America, the Plaintiff herein, and moves this Honorable Court for an order requiring all defendants to this action and any and all persons in possession or control of the property described in the Complaint filed herein to surrender possession of the said property, to the extent of the estate to be condemned, to the Plaintiff forthwith, and as grounds therefor the Plaintiff states that the Plaintiff has found and determined that it is necessary and advantageous to the interests of the Plaintiff to acquire such possession.

UNITED STATES OF AMERICA

By: \_\_\_\_\_  
United States Attorney

\_\_\_\_\_  
Assistant United States Attorney

5-15.818 Certificate for Service by Publication  
(Caption as in Complaint)

CERTIFICATE FOR SERVICE BY PUBLICATION

\_\_\_\_\_, attorney for plaintiff, hereby certifies that (s)he believes the hereinafter named defendant(s) cannot be personally served because after diligent inquiry within the state in which this action is pending the places of residence of the said defendants cannot be ascer-

\_\_\_\_\_  
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tained by plaintiff, or, if ascertained, the places of residence of said defendants are beyond the territorial limits of personal service as provided in Rule 71A, Federal Rules of Civil Procedure.

(Names of Defendants.)

\_\_\_\_\_  
United States Attorney

Address \_\_\_\_\_

Dated \_\_\_\_\_

5-15.819 Certificate of Publication and Mailing

(Caption as in Complaint)

CERTIFICATE OF PUBLICATION AND MAILING

\_\_\_\_\_, Attorney for plaintiff, hereby certifies that (s)he caused the publication once a week for three weeks in the \_\_\_\_\_ of the notice, a printed copy of which is with the name and dates of the newspaper marked thereon is attached hereto and that prior to the date of last publication of said notice, he caused a copy thereof to be mailed to the defendant(s) named therein at his/her/their last known place(s) of residence.

\_\_\_\_\_  
United States Attorney

Dated: \_\_\_\_\_

5-15.820 Sample Orders and Judgments

5-15.821 Final Judgment for Use When No Declaration of Taking Has Been Filed

(Caption as in Complaint)

FINAL JUDGMENT OF CONDEMNATION

It appearing to this Court that on the \_\_\_ day of \_\_\_\_\_, a Judgment Determining Compensation was entered in this cause by the Honorable \_\_\_\_\_, United States District Judge, adjudicating that the fee simple absolute title to the lands identified as Tract \_\_\_\_\_ as described in the Complaint and Notice of Lis Pendens, would vest in the United States of America simultaneously upon payment by the United States into the Registry of the Court of \$ \_\_\_\_\_, which amount was adjudicated to be full compensation for the taking of said lands,

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And it further appearing that on the \_\_\_ day of \_\_\_\_\_, 19\_\_\_, there was deposited by the United States of America, the Plaintiff, with the Clerk of the United States District Court for the District of \_\_\_\_\_, the sum of \$ \_\_\_\_\_, pursuant to said Judgment,

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that on the \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_, the fee simple absolute title to the lands identified as Tract \_\_\_\_\_ as described in the Complaint, vested in the United States of America free and discharged of all claims and liens of every kind whatsoever.

Dated this \_\_\_ day of \_\_\_\_\_, 19\_\_\_.

\_\_\_\_\_  
United States District Judge

5-15.822 Order Appointing Guardian Ad Litem

(Caption as in Complaint)

ORDER APPOINTING GUARDIAN AD LITEM

It appearing to the Court that the defendant, \_\_\_\_\_ is \_\_\_\_\_ and does not have a duly appointed representative within this State,

THE COURT FINDS that a Guardian Ad Litem should be appointed to represent said defendant, and

THE COURT FINDS that the Honorable \_\_\_\_\_ has no interest adverse to the said defendant,

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED (s)he be, and is hereby appointed Guardian Ad Litem to represent the said defendant.

DONE, this the \_\_\_ day of \_\_\_\_\_, 19\_\_\_.

\_\_\_\_\_  
UNITED STATES DISTRICT JUDGE

5-15.823 Order of Dismissal

(Caption as in Complaint)

ORDER OF DISMISSAL AS TO TRACT(S) NO(S).

On this day came on to be heard the stipulation and joint motion of the plaintiff, United States of America and defendant(s) \_\_\_\_\_ for an Order of Dismissal as to Tract(s) No(s). \_\_\_\_\_ in this proceeding; and it appearing to the Court that:

- 1. This suit was instituted by Complaint, that no Declaration of Taking has been filed, and that title to the estate described in said Complaint has not vested in the United States; and

\_\_\_\_\_  
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2. On \_\_\_\_\_, the Court entered its Order giving possession to the plaintiff of the estate described in the Complaint; however, the United States no longer requires such estates in Tract(s) No(s). \_\_\_\_\_; and<sup>1</sup>

3. Both the plaintiff and defendant(s) herein have stipulated that the Court may vacate such Order of Possession; and, it is the opinion of the Court that such Order should be vacated; and<sup>1</sup>

It further appearing to the Court that there are no existing claims for compensation with respect to said tract(s) of land, and that both plaintiff and defendant(s) have stipulated and jointly moved that said tract(s) be dismissed from this proceeding, and that such motion should be granted;

It is therefore ordered, adjudged and decreed that the Order of Possession entered herein be vacated as to Tract(s) No(s). \_\_\_\_\_;<sup>1</sup>

It is further ordered, adjudged and decreed by the Court that this proceeding be and it is hereby dismissed as to said tract(s).

Entered this \_\_\_ day of \_\_\_\_\_, 19\_\_.

---

United States District Judge

<sup>1</sup>To be used only when Order of Possession has issued.

#### 5-15.824 Order for Disbursement of Funds

(Caption as in Complaint)

#### ORDER TO DISBURSE FUNDS AS TO TRACT NO.

Plaintiff, United States of America, having moved the court for an order directing the Clerk of the Court to disburse funds out of the registry of the Court to the defendant(s) \_\_\_\_\_, and to credit said disbursement(s) to the funds now on deposit in the registry of the Court to the credit of Tract No. \_\_\_\_\_, and the Court having considered said motion and having read the application(s) is of the opinion that said motion should be granted.

IT IS, HEREFOR, ORDERED that the Clerk of this Court be and hereby is ordered to make the following disbursement(s) out of the funds in the registry of the Court:

---

IT IS FURTHER ORDERED that said disbursement(s) be credited to Tract No. \_\_\_\_, that said disbursement(s) be without prejudice to the right of said defendant(s) to demand and receive additional compensation for the taking of said tract of land, and that should the compensation finally determined

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to be due to said defendant(s) be less than the amount hereby disbursed, the United States shall have a right to recover the difference between the amount disbursed pursuant thereto and the amount of the final judgment determining compensation, with the interest at 6 percent per annum thereon.

ENTERED THE \_\_\_ day of \_\_\_\_\_, 19\_\_.

\_\_\_\_\_  
United States District Judge

Approved:

\_\_\_\_\_  
United States Attorney

5-15.825 Order of Final Distribution

(Caption as in Complaint)

ORDER OF FINAL DISTRIBUTION

Upon consideration of the deposit of \$\_\_\_, in the registry of this Court on \_\_\_\_\_, 19\_\_, in satisfaction of the judgment entered herein fixing the just compensation payable by the plaintiff for the taking of said lands, it is by the Court this \_\_\_ day of \_\_\_\_\_, 19\_\_,

ORDERED that the clerk of this Court draw his/her check forthwith upon the entry of this order, in the amount of the aforesaid deposit, to the order of \_\_\_\_\_ upon the filing by the payees thereof or their attorney of record of a praecipe with the clerk of the court entering the aforesaid judgment satisfied.

\_\_\_\_\_  
UNITED STATES DISTRICT JUDGE

Consented to:

\_\_\_\_\_  
Attorney, Department of Justice

5-15.826 Judgment on Stipulation of Just Compensation

(Caption as in Complaint)

JUDGMENT DETERMINING JUST COMPENSATION

Pursuant to a stipulation filed in this cause agreeing to the amount of just compensation for the taking of the property herein, it is by the Court this \_\_\_ day of \_\_\_\_\_, 19\_\_,

\_\_\_\_\_  
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ADJUDGED AND ORDERED that the just compensation payable by the plaintiff for the taking of the fee simple title absolute to said lands is the sum of \$\_\_\_\_, inclusive of interest,<sup>1</sup> and judgment is hereby entered against \_\_\_\_\_ in the aforesaid amount, and the said \_\_\_\_\_ shall deposit the additional sum of \$\_\_\_\_, in the registry of this Court in satisfaction of the judgment.

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United States District Judge

Consented to:

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Attorney, Department of Justice

<sup>1</sup> In a complaint only case, eliminate the words "inclusive of interest."

5-15.827 Order for Delivery of Possession

(Caption as in Complaint)

ORDER FOR DELIVERY OF POSSESSION

This action coming on for hearing ex parte upon motion of the Plaintiff for an order for the surrender of possession of the property described in the Complaint filed herein to Plaintiff, and it appearing that Plaintiff is entitled to possession of said property:

It is hereby adjudged that all defendants to this action and all persons in possession or control of the property described in the Complaint filed herein shall surrender possession of said property to the extent to the estate being condemned, to the Plaintiff on or before \_\_\_\_\_; <sup>1</sup> provided that a notice of this order shall be served upon all persons in possession or control of the said property forthwith.

Dated this \_\_\_\_ day of \_\_\_\_\_, 19\_\_.

---

United States District Judge

<sup>1</sup> "immediately."

5-15.828 Order Appointing Commission

(Caption as in Complaint)

ORDER APPOINTING COMMISSION UNDER  
FEDERAL RULES OF CIVIL PROCEDURE

The Court having concluded that, because of the character, location and quantity of the land being condemned by Plaintiff, United States of Amer-

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ica, in this cause and because such would be in the interest of justice, the issue of just compensation to be paid the landowners for the lands being condemned herein should be determined by a Commission of three persons as provided for by Rule 71A, Federal Rules of Civil Procedure;

It is accordingly ordered by the Court that the following be, and they are hereby, appointed Commissioners under said above-mentioned rule: \_\_\_\_\_ who shall act as Chairperson, \_\_\_\_\_ and \_\_\_\_\_.

It is further ordered that this cause be and the same is hereby referred to said Commission, which shall determine the just compensation to be paid the landowner or landowners as to each tract of land, or interest therein condemned, in this cause involved.

On the \_\_\_ day of \_\_\_\_\_ at \_\_\_\_\_ in the United States District Courthouse Court Room No. \_\_\_\_\_, the Court will instruct the Commission as to its powers and duties in accordance with Rules 71A(h) and 53(c) and (d) of the Federal Rules of Civil Procedure. As soon thereafter as practicable the Commission should commence hearings at such place or places as may be proper and necessary.

Ordered and entered this \_\_\_ day of \_\_\_\_\_, 19\_\_.

United States District Judge

5-15.829 Notice and Acknowledgment of Receipt of Notice of Condemnation  
IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF

PLAINTIFF, )  
v. ) CIVIL NO.  
DEFENDANTS. )

NOTICE AND ACKNOWLEDGMENT OF RECEIPT  
OF NOTICE OF CONDEMNATION

TO:

The enclosed notice of condemnation is served pursuant to Rule 71A(d) and Rule 4(c)(2)(C)(ii) of the Federal Rules of Civil Procedure.

You must complete the acknowledgment part of this form and return one copy of the completed form to the sender within 20 days.

You must sign and date the acknowledgment. If you are served on behalf of a corporation, unincorporated association (including a partnership),

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or other entity, you must indicate under your signature your relationship to that entity. If you are served on behalf of another person and you are authorized to receive process, you must indicate under your signature your authority.

If you do not complete and return the form to the sender within 20 days, you (or the party on whose behalf you are being served) may be required to pay any expenses incurred in serving a notice of condemnation in any other manner permitted by law.

I declare, under penalty of perjury, that this Notice and Acknowledgment of Receipt of Notice of Condemnation was mailed on 198\_\_.

\_\_\_\_\_  
(Government Attorney)

DATE: \_\_\_\_\_

ACKNOWLEDGMENT OF RECEIPT OF NOTICE  
OF CONDEMNATION

I declare, under penalty of perjury, that I received a copy of the notice of condemnation in the captioned matter at (insert address).

(Defendant's Name)

BY: \_\_\_\_\_

\_\_\_\_\_  
Relationship to Entity/Authority  
to Receive Service of Process

DATE: \_\_\_\_\_

5-15.830 Samples of Supporting Documentation

5-15.831 Certificate of Inspection and Possession  
(Caption as in Complaint)

CERTIFICATE OF INSPECTION AND POSSESSION

I, \_\_\_\_\_, a \_\_\_\_\_ of the Department of \_\_\_\_\_, hereby certify that on the \_\_\_\_ day of \_\_\_\_\_, 19\_\_, I made a personal examination and inspection of that certain tract or parcel of land situated in the County of \_\_\_\_\_, State of \_\_\_\_\_, designated as Tract No. \_\_\_\_\_, and \_\_\_\_\_ containing \_\_\_\_\_ acres (proposed to be) acquired by the United States of America in connection with the \_\_\_\_\_ Project (from \_\_\_\_\_) in the condemnation proceeding entitled \_\_\_\_\_, Civil No. \_\_\_\_\_.

1. That I am fully informed as to the boundaries, lines and corners of said tract; that I found no evidence of any work or labor having been performed or any materials having been furnished in connection with the making of any repairs or improvements on said land; and that I made careful inquiry of the above-named vendor (and of the occupants of said land) and

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ascertained that nothing had been done on or about said premises within the past \_\_\_\_\_ months that would entitle any person to a lien upon said premises for work or labor performed or materials furnished.

2. That I also made inquiry of the above-named vendor (and of all occupants of said land) as to his/her/their rights of possession and the rights of possession of any person or persons known to him/her/them, and neither found any evidence nor obtained any information showing or tending to show that any person had any rights of possession or other interest in said premises adverse to the rights of the above-named vendor or the United States of America.

3. That I was informed by the above-named vendor (and by all other occupants) that to the best of his/her/their knowledge and belief there is no outstanding unrecorded deed, mortgage, lease, contract, or other instrument adversely affecting the title to said premises.

4. That to the best of my knowledge and belief after actual and diligent inquiry and physical inspection of said premises there is no evidence whatever of any vested or accrued water rights for mining, agricultural, and manufacturing, or other purpose, nor any ditches or canals constructed by or being used thereon under authority of the United States, nor any exploration or operations whatever for the development of coal, oil, gas, or other minerals on said lands; and that there are no possessory rights now in existence owned or being actively exercised by any third party under any reservation contained in any patent or patents heretofore issued by the United States for said land.

5. That to the best of my knowledge and belief based upon actual and diligent inquiry made there is no outstanding right whatsoever in any person to the possession of said premises nor any outstanding right, title, interest, lien, or estate, existing or being asserted in or to said premises except such as are disclosed and evidenced by the public records.

6. That said premises are now wholly unoccupied and vacant except for the occupancy of the following, from whom disclaimer(s) of all right, title and interest in and to said premises, executed on the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, has (have) been obtained:

Name \_\_\_\_\_, Address \_\_\_\_\_, Statement of Interest Claimed \_\_\_\_\_.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_.

Approved:

\_\_\_\_\_

\_\_\_\_\_  
(Name)

\_\_\_\_\_

October 1, 1988

(Title)

N.B.: To be prepared at or near the date of taking.

5-15.832 Certificate of Title

CERTIFICATE OF TITLE

Name of title company \_\_\_\_\_ Address \_\_\_\_\_

To (\_\_\_\_\_ and) United States of America:

The \_\_\_\_\_, a Corporation organized and existing under the laws of the State of \_\_\_\_\_, with its principal office in the city of \_\_\_\_\_, certifies that it has (made) (obtained a report showing) a thorough search of the title to the property described in Schedule A hereof, beginning with the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, and hereby certifies that the title to said property was indefeasibly vested in fee simple of record in \_\_\_\_\_ as of the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, free and clear of all encumbrances, defects, interests, and all other matters whatsoever, either of record or otherwise known to the corporation, impairing or adversely affecting the title to said property, except as shown in Schedule B hereof.

The maximum liability of the undersigned under this certificate is limited to the sum of \$\_\_\_\_\_.

In consideration of the premium paid, this certificate is issued for the use and benefit of (said \_\_\_\_\_ and) the United States of America (and each of them).

In witness whereof, said Corporation has caused these presents to be signed in its name and behalf, sealed with its corporate seal, and delivered by its proper officers thereunto duly authorized, as to the date last above mentioned.

\_\_\_\_\_  
(Name of title company)

By \_\_\_\_\_  
(Title of executing officer)

Attest:  
\_\_\_\_\_  
(Title of attesting officer)

SCHEDULE A

The property covered by this certificate is accurately and fully described as follows: \_\_\_\_\_

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SCHEDULE B

The property described in Schedule A hereof is free and clear from all interests, encumbrances, and defects of title and all other matters whatsoever of record, or which, though not of record, are known to this corporation to exist impairing or adversely affecting the title to said property, except the following:

5-15.833 Disclaimer

(Caption as in Complaint)

APPEARANCE AND DISCLAIMER

NOW COME the undersigned defendants in the above-styled and numbered condemnation proceeding, enter their appearance herein for all purposes, waive service of all notices, and disclaim any right, title, claim or interest in the compensation paid or to be paid for the taking of said tracts.

\_\_\_\_\_  
\_\_\_\_\_

Dated:

5-15.834 Answer of Tax Collector

(Caption as in Complaint)

ANSWER OF TAX COLLECTOR AS TO TRACT(S) NO(S).

Defendant, Tax Collector in and for \_\_\_\_\_, hereby appears in this proceeding, waives issuance of any and all service of process and all notices, and for his/her answer alleges that the land designated in this proceeding as Tract(s) No(s). \_\_\_\_\_, which at the time of the taking, \_\_\_\_\_, was assessed to \_\_\_\_\_, is located within \_\_\_\_\_, and that all taxes, including those for the year 19\_\_\_\_, and all prior years which have been assessed against said property have been paid heretofore, or are due as shown below:

\_\_\_\_\_  
\_\_\_\_\_

The total amount of taxes assessed against said property which has not been paid, as set forth above, is the sum of \$\_\_\_\_\_, which should be paid to this defendant in his/her capacity as Tax Collector.

Wherefore, defendant prays that this court enter an order disbursing out of the funds on deposit to the credit of the aforesaid tract(s) the amount

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of \$\_\_\_\_\_ to said defendant in payment of all taxes against said property.

Dated this the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_.

\_\_\_\_\_  
Tax Collector in and for \_\_\_\_\_

\_\_\_\_\_  
(Address)

5-15.835 Answer of Lienholder

(Caption as in Complaint)

ANSWER OF TAX LIENHOLDER AS TO TRACT(S) NO(S).

1. \_\_\_\_\_, defendant (by his/her attorney, \_\_\_\_\_) states that (s)he claims to have a lien against the property described as Tract(s) No(s). \_\_\_\_\_ in the Complaint filed herein.

2. The nature and extent of the lien so claimed is: \_\_\_\_\_

3. At the time of the filing of the Declaration of Taking, \_\_\_\_\_, in this proceeding, there was due and owing upon the indebtedness secured by said lien the sum of \$\_\_\_\_\_.

4. There is now due and owing upon said indebtedness the sum of \$\_\_\_\_\_.

Wherefore, defendant prays that this court enter an order disbursing to him/her out of the funds on deposit to the credit of the aforesaid tract(s) the amount of \$\_\_\_\_\_.

Dated this the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_.

\_\_\_\_\_  
(Signed by defendant lienholder or his/her attorney)

\_\_\_\_\_  
(Address)

5-15.836 Waiver of Service

(Caption as in Complaint)

WAIVER OF SERVICE AS TO TRACT(S) NO(S).

\_\_\_\_\_, defendant in the above-entitled and numbered cause, hereby enters his/her appearance generally in this proceeding for all purposes, waives any and all service of notice of the filing of this proceeding, says

\_\_\_\_\_  
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that (s)he is fully advised in the premises and waives all further notice or service of process herein.

Dated this the \_\_\_ day of \_\_\_\_\_, 19\_\_.

\_\_\_\_\_

(Defendant)

\_\_\_\_\_

(Address)

5-15.837 Affidavit of Heirship

(Caption as in Complaint)

AFFIDAVIT OF HEIRSHIP

I, (Name of affiant), residing at (Street and number), in (City or town), (County), (State), being of full legal age, for the purpose of establishing the legal ownership of certain land in (City or town), (County), (State), proposed to be purchased by the United States of America from all the lawful heirs of (Name of decedent) late of (City or town), (County), (State), who died on the \_\_\_ day of \_\_\_\_\_, 19\_\_, at the age of \_\_\_ years, a resident of (City or town), (County), (State), on oath depose and say as follows:

(1) That I was personally acquainted with the above-named decedent for the period of \_\_\_ years from \_\_\_\_\_ 19\_\_, until his/her death, and that my relationship to said decedent was \_\_\_\_\_.

(2) That said decedent was married to (Spouse) at \_\_\_\_\_, in 19\_\_, who (survived) (predeceased). (The affiant should cross out any statement enclosed in parenthesis which is not applicable to said decedent.)

(3) That the following is a list of the full names, relationships to the decedent, ages, marital status, and addresses of all surviving issue or other heirs of said decedent:

Full Name	Relationship to Decedent	Age	Married to	Address

(4) That said decedent left no will, no issue, or no collateral heirs other than those named above and no unpaid debts or claims except as stated below. (That I have made careful inquiry and that to the best of my information and belief said decedent left no will, no issue, or no collateral heirs other than those named above, and no unpaid debts or claims except as stated below.) (The affiant should cross out any statement enclosed in parenthesis which is not applicable. All statements made by

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the affiant will be considered to be made on the affiant's personal knowledge unless the contrary is expressly indicated.)

(Unpaid debts)

(5) That the value of the decedent's entire estate at death, including all property, real and personal, then owned by the decedent, did not exceed \$\_\_\_\_\_.

(6) That I am (not) interested financially or by reason of relationship to said decedent in the proposed conveyance to the United States of America in connection with which this affidavit is furnished, and understand that it is secured for the purpose of inducing the United States to purchase land owned by said decedent.

\_\_\_\_\_, 19\_\_

\_\_\_\_\_  
 \_\_\_\_\_, ss:

There personally appeared before me the above-named \_\_\_\_\_, who subscribed to the foregoing affidavit and made oath that the statements contained therein are true.

5-15.838 Oath of Commissioners

(Caption as in Complaint)

OATH OF COMMISSIONER

The undersigned, \_\_\_\_\_ appointed by the United States District Court Judge in the District of \_\_\_\_\_, as Commissioner to assess and award just compensation for the taking of the real property and interest herein designated as: Civil No. \_\_\_\_\_, Tract Nos. \_\_\_\_\_ the above Tracts being more particularly described in the pleadings for condemnation heretofore filed and the undersigned being duly sworn, says that (s)he is a resident of \_\_\_\_\_, and is not interested in the same or any like question as that involved herein; that (s)he will, to the best of his/her ability, faithfully and impartially assess the just compensation for the taking of the real property by the United States as hereinbefore set out, and that (s)he will make a written report to the Court of all proceedings in connection with the appraisalment of said real property, and do all other acts as required by him/her as such Commissioner according to the Order and Instructions of this Court.

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## SCHEDULE A

1. The estate or interest in the land described or referred to in this schedule covered by this policy is:

(Will be shown as a fee or such lesser estate or interest owned by the person or party named in paragraph 2 of this Schedule.)

2. Title to the estate or interest covered by this policy at the date hereof is vested in: \_\_\_\_\_

The land referred to in this policy is situated in the County of \_\_\_\_\_, State of \_\_\_\_\_, and is described as follows:

(This phraseology may be modified to eliminate a specific description by including it by reference to the description as contained in a specific instrument.)

## SCHEDULE B

This policy does not insure against loss or damage by reason of the following:

1. Current and delinquent taxes and assessments as follows:

(List all taxing districts in which the land is situated and other taxing authorities that have jurisdiction over said land for the levy of taxes, showing lien date for each and amounts for all such assessments that have not been paid on the date of the policy.)

2. (Continue with the Special Exceptions such as recorded easements, liens, etc., showing in addition the persons or parties holding such interests of record, and who the Company would require to convey such interest or who would be the proper parties defendant in a condemnation proceeding to eliminate such matter.)

The write-up could be substantially as follows:

An easement for road purposes conveyed to \_\_\_\_\_, by deed recorded \_\_\_\_\_.)

## GOVERNMENTAL POWERS

1. Because of limitations imposed by law on ownership and use of property, or which arise from governmental powers, this policy does not insure against:

(a) consequences of the future exercise or enforcement or attempted exercise or enforcement of police power, bankruptcy power, or power of eminent domain, under any existing or future law or governmental regulations; (b) consequences of any law, ordinance or governmental regulation, now or hereafter in

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force (including building and zoning ordinances), limiting or regulating the use or enjoyment of the property, estate or interest described in Schedule A, or the character, size, use or location of any improvement now or hereafter erected on said property.

#### MATTERS NOT OF RECORD

2. The following matters which are not of record at the date of this policy are not insured against:

(a) rights or claims of parties in possession not shown of record; (b) questions of survey; (c) easements, claims of easement or mechanics' liens where no notice thereof appears of record; and (d) conveyances, agreements, defects, liens or encumbrances, if any, where no notice thereof appears of record; provided, however, the provisions of this subparagraph 2(d) shall not apply if title to said estate or interest is vested in the United States of America on the date hereof.

#### MATTERS SUBSEQUENT TO DATE OF POLICY

3. This policy does not insure against loss or damage by reason of defects, liens or encumbrances created subsequent to the date hereof.

#### REFUSAL TO PURCHASE

4. This policy does not insure against loss or damage by reason of the refusal of any person to purchase, lease or lend money on the property, estate or interest described in Schedule A.

#### CONDITIONS AND STIPULATIONS

##### Notice of Actions

1. If any action or proceeding shall be begun or defense asserted which may result in an adverse judgment or decree resulting in a loss for which this Company is liable under this policy, notice in writing of such action or proceeding or defense shall be given by the Attorney General to this Company within 90 days after notice of such action or proceeding or defense has been received by the Attorney General; and upon failure to give such notice then all liability of this Company with respect to the defect, claim, lien or encumbrance asserted or enforced in such action or proceeding shall terminate. Failure to give notice, however, shall not prejudice the rights of the party insured, (1) if the party insured shall not be a party to such action or proceeding, or (2) if such party, being a party to such action or proceeding be neither served with summons therein nor have actual notice of such action or proceeding, or (3) if this Company shall not be prejudiced by failure of the Attorney General to give such notice.

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### Notice of Writs

2. In case knowledge shall come to the Attorney General of the issuance or service of any writ of execution, attachment or other process to enforce any judgment, order or decree adversely affecting the title, estate or interest insured said party shall notify this Company thereof in writing within 90 days from the date of such knowledge; and upon a failure to do so, then all liability of this Company in consequence of such judgment, order or decree or matter thereby adjudicated shall terminate unless this Company shall not be prejudiced by reason of such failure to notify.

### Defense of Claims

3. This Company agrees, but only at the election and request of the Attorney General of the United States, to defend at its own cost and expense the title, estate or interest hereby insured in all actions or other proceedings which are founded upon or in which it is asserted by way of defense, a defect, claim, lien or encumbrance against which this policy insures, provided, however, that the request to defend is given with sufficient time to permit the Company to answer or otherwise participate in the proceeding. If any action or proceeding shall be begun or defense be asserted in any action or proceeding affecting or relating to the title, estate or interest hereby insured and the Attorney General elects to defend at the Government's expense, the Company shall upon request, cooperate and render all reasonable assistance in the prosecution or defense of such proceeding and in prosecuting appeals.

If the Attorney General shall fail to request and permit the Company to defend, then all liability of the Company with respect to the defect, claim, lien or encumbrance asserted in such action or proceeding shall terminate; provided, however, that if the Attorney General shall give the Company timely notice of all proceedings and an opportunity to suggest such defenses and actions as it shall conceive should be taken and the Attorney General shall present the defenses and take the actions of which the Company shall advise him/her in writing, then the liability of the Company shall continue; but in any event the Company shall permit the Attorney General without cost or expense to use the information and facilities of the Company for all purposes which (s)he thinks necessary or incidental to the defending of any such action or proceeding or any claim asserted by way of defense therein and to the prosecuting of any appeal.

### Compromise of Adverse Claims

4. Any compromise, settlement or discharge by the United States or its duly authorized representative of an adverse claim, without the consent of this Company shall bar any claim against the Company hereunder. Provided, however, that the Attorney General may at his/her election submit to the issuing company for approval or disapproval any proposed compromise, settlement or discharge of any adverse claim and in the event of the consent of

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the issuing company to the proposed compromise, settlement or discharge it shall be liable for the payment of the full amount paid.

Statement of Loss

5. A statement in writing of any loss or damage sustained by the party insured, and for which it is claimed this Company is liable under this policy, shall be furnished by the Attorney General to this Company within 90 days after said party has notice of such loss or damage and no right of action shall accrue under this policy until 30 days after such statement shall have been furnished. No recovery shall be had under this policy unless suit be brought thereon within one year after said period of 30 days. Failure to furnish such statement of loss or to bring such suit within the times specified shall not affect the Company's liability under this policy unless this Company has been prejudiced by reason of such failure to furnish a statement of loss or to bring such suit.

Policy Reduced by Payments of Loss

6. All payments of loss under this policy shall reduce the amount of this policy pro tanto.

Amendment of Policy

7. No provision or condition of this policy can be waived or changed except by writing endorsed hereon or attached hereto signed by the President, a Vice President, the Secretary, and Assistant Secretary or other validating officer of the Company.

Notice, Where Sent

8. All notices required to be given the Company and any statement in writing required to be furnished by Company shall be addressed to it at (insert proper address).

ENDORSEMENT

Attached to Policy No. \_\_\_\_\_

Issued by

BLANK TITLE INSURANCE COMPANY

1. Schedule A of the above policy is hereby amended in the following particulars:

(a) Paragraph 1 of Schedule A is hereby deleted and the following is substituted:

1. The estate or interest in the land described or referred to in this Schedule covered by this policy is:

(An easement for \_\_\_\_\_.)

(b) Paragraph 2 of Schedule A is hereby deleted and the following is substituted:

2. Title to the estate or interest covered by this policy at the date hereof is vested in:

THE UNITED STATES OF AMERICA

(Follow with appropriate reference to Declaration of Taking or Deed.)

(c) Paragraph 3 of Schedule A is hereby deleted and the following is substituted:

3. Schedule B of the above policy is hereby amended in the following particulars:

(a) Paragraphs numbered \_\_, \_\_, \_\_ and \_\_ of Schedule B are hereby deleted. (Enumerate those paragraphs eliminated by proper releases, conveyances, etc.)

(b) Schedule B of the above policy is amended by adding the following paragraphs numbered \_\_ to \_\_, inclusive.

3. Subparagraph 2(d) of the General Exceptions of the above policy is hereby deleted.

4. The effective date of the above policy is hereby extended to \_\_\_\_\_.

(Date of recording of Deed or Notice of Action, since no insurance is to be afforded as to regularity of proceedings.)

The total liability of the Company under said policy and this endorsement thereto shall not exceed, in the aggregate, the sum of \$\_\_\_\_\_ and costs which the Company is obligated under the Conditions and Stipulations thereof to pay.

This endorsement is made a part of said policy and is subject to the Schedules, General Exceptions and the Conditions and Stipulations therein, except as modified by the provisions hereof.

Dated \_\_\_\_\_

BLANK TITLE INSURANCE COMPANY,

By \_\_\_\_\_

(Authorized Officer)

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5-15.840 Forms for Use in Small Tract Program

5-15.841 Letter 'A'

Dear Sir:

Re: Civil Action No. \_\_\_\_\_, Tract(s)  
Nos). \_\_\_\_\_. Amount  
deposited as estimated just compensation:

Our records show that the United States heretofore has filed a condemnation suit to acquire an interest in certain land owned by you, designated by tract number(s) as above, and has deposited in the registry of the United States District Court, as estimated just compensation, the amount of money indicated above. This land was acquired for use in connection with the \_\_\_\_\_ Project. You previously have been served with notice of the filing of this condemnation suit.

We should like to close this matter as soon as possible. Therefore, if you are willing to accept the sum specified above, as just compensation for the condemnation of the designated interest in your land, will you please notify us by return mail? If this meets with your approval, we will prepare the necessary papers for your signature and arrange for the disbursement of money in the registry of the court, if this has not already been done.

We have made arrangements with the United States District Court for the trial during \_\_\_\_\_ of all cases which cannot be closed by agreement without trial.

A self-addressed envelope, which requires no postage, is enclosed for your convenience in replying to this letter. If you prefer, you may telephone the office of the United States Attorney at \_\_\_\_\_. The telephone number is \_\_\_\_\_. We will appreciate it if you will let us hear from you within one week from receipt of this letter so that we may know whether a trial of the issue of just compensation will be necessary in this case.

Yours very truly,

\_\_\_\_\_  
United States Attorney

5-15.842 Letter 'B'

Dear Sir:

Re: Civil Action No. \_\_\_\_\_, Tract(s) No(s). \_\_\_\_\_  
Amount deposited as estimated just compensation:

Our records indicate that you have appeared as attorney for the landowners in connection with condemnation proceedings which have been filed on the above-designated tract of land, which has been acquired in connection with the \_\_\_\_\_ Project.

A special effort is being made at this time to close this case as soon as possible. The court has indicated that it may be tried during \_\_\_\_\_, if a

\_\_\_\_\_  
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trial should be necessary. Will you please contact this office within one week and let us know if your clients will accept the amount deposited as just compensation, or if the case must be tried.

Your cooperation and prompt reply will be appreciated.

Yours very truly,

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United States Attorney

5-15.843 Letter 'C'

Dear Sir:

Re: Civil Action No. \_\_\_\_\_, Tract(s)  
No(s). \_\_\_\_\_ Amount  
deposited as estimated just compensation:  
\_\_\_\_\_

We have not received a reply from you to our recent letter, in which we inquired whether you were willing to accept the amount deposited by the United States as just compensation for the condemnation of an interest in certain property owned by you, and designated by tract number as above. As indicated in our letter, it is our intention to close this matter, either by agreement or by trial, as promptly as possible. Arrangements have been made with the United States District Court to try this case in \_\_\_\_\_, if it cannot be settled by agreement.

If you are unwilling to accept the amount set out above as just compensation, would you please let us know what amount of money you feel would be fair to you and to the Government as compensation for the taking of the interest in your property? We are anxious to do everything possible and reasonable in order to bring about a mutually acceptable settlement of this case without the necessity of a trial.

A self-addressed envelope, which requires no postage, is enclosed for your convenience in replying to this letter. If you prefer, however, you may call this office. Our telephone number is \_\_\_\_\_. If you wish to come to this office to discuss this matter, will you please telephone in advance so that an appointment can be made? In this way we may avoid your having to wait until an Assistant United States Attorney is free to talk with you.

Please let us hear from you within one week from receipt of this letter, so that we may know whether this case will be tried in \_\_\_\_\_.

Yours very truly,

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United States Attorney

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5-15.844 Letter 'D'

Dear Sir:

Re: Civil Action No. \_\_\_\_\_  
Tract(s) No(s). \_\_\_\_\_

We have not received a reply from you to our recent letter, in which we inquired whether the above-mentioned condemnation case can be settled. Would you please let us hear from you?

Arrangements have been made for the trial of the case in \_\_\_\_\_ and unless we hear from you, it will be tried at that time.

Yours very truly,

\_\_\_\_\_  
United States Attorney

5-15.845 Letter 'E'

Dear Sir:

Re: Civil Action No. \_\_\_\_\_  
Tract(s) No(s). \_\_\_\_\_

Enclosed is a stipulation and a judgment setting the amount of just compensation due for the condemnation of an interest in your land, designated by tract number as above. You have indicated that this is acceptable to you and that a trial in this case therefore will be unnecessary.

Please sign the stipulation on the lines indicated by an 'x' and return one copy to this office in the enclosed envelope, which requires no postage. The extra copy of the stipulation and the copy of the judgment may be retained by you. Nothing further need be done by you.<sup>1</sup>

We appreciate your cooperation.

Yours very truly,

\_\_\_\_\_  
United States Attorney

Enclosures

\_\_\_\_\_

<sup>1</sup> When funds remain to be disbursed, whether the original deposit or a deficiency, add an appropriate sentence to the effect that disbursement will be made promptly.

5-15.846 Letter 'F'

Dear Sir:

Re: Civil Action No. \_\_\_\_\_  
Tract(s) No(s). \_\_\_\_\_

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This will confirm your appointment to discuss possible settlement of the above-pending condemnation case. The conference is scheduled for \_\_\_\_\_, at \_\_\_\_\_ o'clock \_\_\_ A.M./P.M. at this office.

Yours very truly,

\_\_\_\_\_  
Assistant United States Attorney

5-15.847 Notice of Hearing

IN THE UNITED STATES DISTRICT COURT FOR THE  
DISTRICT OF \_\_\_\_\_

MEMORANDUM

TO: All parties in interest in the below-mentioned case and to all attorneys who have entered their respective appearances on behalf of one or more such parties.

RE: United States of America v. \_\_\_\_\_  
\_\_\_\_\_, Civil No. \_\_\_\_\_

A hearing will be held \_\_\_\_\_ at \_\_\_\_\_ in this court to determine the issue of the amount of just compensation to be paid and to be distributed to all and each of the parties in this case.

If you plan to appear at the hearing on \_\_\_\_\_ you are requested to notify this Court by return mail. In any event, all and each of the parties will be bound by the determinations and rulings made by this Court at the hearing, whether or not you appear, unless good cause to the contrary is shown.

Very truly yours,

\_\_\_\_\_  
Clerk

5-15.850 Sample Pleadings and Order for Enforcement of Option Contracts

5-15.851 Motion for Summary Judgment in Amount of Option

(Caption as in Complaint)

MOTION FOR SUMMARY JUDGMENT

Comes the plaintiff, United States of America, by its attorney, \_\_\_\_\_, for the \_\_\_\_\_ District of \_\_\_\_\_, and hereby moves this Court in accordance with the provisions of Rule 56(b) and (c) of the Federal Rules of Civil Procedure to enter summary judgment fixing the amount of just compensation for the estate taken as to Tract(s) No(s). \_\_\_\_\_, in this cause to be the sum of \$\_\_\_\_\_ for the reasons hereinafter set forth in the attachment.

WHEREFORE, plaintiff is entitled to have judgment entered in this cause fixing just compensation for the taking by plaintiff of the estate in

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Tract(s) No(s). \_\_\_\_\_ in the total sum of \$\_\_\_\_\_, and requests a hearing by the Court to determine the amounts to be distributed to all parties who may have an interest in said tract(s).

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United States Attorney

5-15.852 Memorandum in Support of Motion for Summary Judgment

(Caption as in Complaint)

MEMORANDUM OF POINTS AND AUTHORITIES  
IN SUPPORT OF  
MOTION FOR SUMMARY JUDGMENT

The option agreement which is attached to the Motion of the United States for Summary Judgment is self-explanatory. It will be noted that it provides that the vendors agreed to sell the property involved and to execute a deed thereto to the United States, and that the Government accepted the option in due time. It will be further noted that the vendors agreed that the United States may, notwithstanding the prior acceptance of this offer, acquire title to said land by condemnation or other judicial proceedings, in which event the vendor agrees to cooperate with the United States in the prosecution of subject proceedings, and agrees that the considerations as stated therein shall be the full amount of the award of just compensation, exclusive of interest, for the taking of said land.

The authority for the motion is Rule 56 of the Federal Rules of Civil Procedure.

In addition, the United States Supreme Court in *Danforth v. United States*, 308 U.S. 271, 181-182 (1939), held that, even if an offer were accepted, "friendly condemnation proceedings" could be instituted to clear title with a request for an award in the amount of the offer. In the case cited, *supra*, after acceptance, the United States attempted to withdraw the offer, then condemned. After stating the agreement was authorized, the Supreme Court held:

The effect of such an agreement is to fix the value of the easement when the authority of the Court is invoked against a party to the agreement to acquire good title.

In *Albrecht v. United States*, 329 U.S. 599, 602-603 (1947), the Court stated in part as follows:

But the method used by courts to determine "just compensation" in an adversary proceeding where the parties have failed previously to agree on its amount is not the exclusive method for determining that question. The Fifth Amendment does not

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prohibit landowners and the Government from agreeing between themselves as to what is just compensation for property taken. Nor does it bar them from embodying that agreement in a contract, as was done here.

*See also Wachovia Bank & Trust Company v. United States*, 98 F.2d 609, 612 (4th Cir.1938); *United States v. Two Acres in Will County*, 144 F.2d 207 (7th Cir.1944); *Mahowald v. United States*, 176 F.2d 509 (8th Cir.1949).

It is submitted that based upon the option agreement as duly executed by the vendors and accepted by the Government there is no genuine issue as to the amount of just compensation to be received by the owners of Tract(s) No(s). \_\_\_\_\_ and that an order of this Court should be entered fixing said compensation in accordance with the motion filed herein by plaintiff.

UNITED STATES OF AMERICA

BY: \_\_\_\_\_  
United States Attorney

5-15.853 Show Cause Order

(Caption as in Complaint)

ORDER OF COURT

AND NOW, To wit, \_\_\_\_\_ upon Motion of the United States of America, and it appearing that \_\_\_\_\_

it is hereby ORDERED that a hearing be held on \_\_\_\_\_ to determine title questions, and a rule granted upon defendants as recited in said motion to show cause why a summary judgment of just compensation should not be entered in the sum of \$ \_\_\_\_\_ in favor of \_\_\_\_\_.

It is further ORDERED that all parties who claim any interest whatsoever in the aforementioned tract(s) appear on the stated hearing date to show why a summary judgment of just compensation should not be entered in favor of \_\_\_\_\_.

\_\_\_\_\_  
United States District Judge

Filed: \_\_\_\_\_

5-15.854 Order Granting Summary Judgment

(Caption as in Complaint)

ORDER

On \_\_\_\_\_, a hearing was had before the Court upon plaintiff's Motion for Summary Judgment praying that just compensation for the taking by

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plaintiff of Tract(s) No(s). \_\_\_\_\_ be fixed at the sum of \$\_\_\_\_\_, the plaintiff appearing by \_\_\_\_\_. The Court, being fully advised in the premises, has determined the owner of Tract(s) No(s). \_\_\_\_\_, as of \_\_\_\_\_, to be \_\_\_\_\_

and has determined that the Government's Motion for Summary Judgment be granted and that the full, fair and just compensation for the interest taken by the United States in Tract(s) No(s). \_\_\_\_\_ is hereby fixed at the sum of \$\_\_\_\_\_.

IT IS ORDERED AND ADJUDGED THAT the plaintiff's Motion for Summary Judgment be and the same is hereby granted and the compensation to be paid by plaintiff to \_\_\_\_\_ for the taking of the estate in Tract(s) No(s). \_\_\_\_\_ is hereby fixed at the sum of \$\_\_\_\_\_.

\_\_\_\_\_  
Date

\_\_\_\_\_  
United States District Judge

5-15.860 DOJ and OBD Forms

5-15.861 Request and Authorization for Fees and Expenses of Witnesses

U.S. ATTORNEYS MANUAL 1988



5-15.861.1 Expert Witness Agreement

U.S. Department of Justice

Expert Witness Agreement

INSTRUCTIONS: Form should be prepared after submission and approval of Form OBD-47, Request and Authorization for Fees and Expenses of Witnesses. Each copy of this form must be signed by the negotiating attorney and the expert witness.

DISTRIBUTION:

ORIGINAL: Hold and submit to Accounting Operations Group, Finance Staff/OC/JMD with the original payment voucher.

COPY NO. 1: To Expert Witness

COPY NO. 2: To Negotiating Attorney

COPY NO. 3: To Special Authorizations Unit, Procurement & Contracts Staff/JMD

Name of Case	Division or Judicial District
Name and Address of Expert Witness	Expert's Field
Preparation \$ _____ Rate per day; or \$ _____ Rate per hour; Estimated time: _____ Days; or _____ Hours \$ _____ Incidental expenses. ( <i>Laboratory analysis, charts, etc.</i> ) Specify _____ _____ _____ Subsistence ( <i>Check one</i> ) <input type="checkbox"/> Included in the fees above. <input type="checkbox"/> At the rate of \$ _____ per day ( <i>prorated by quarter days for fractional days</i> ) <input type="checkbox"/> Actual expenses not exceeding \$ _____ per day ( <i>to be itemized on payment voucher</i> ) <input type="checkbox"/> Other ( <i>Specify</i> ) _____	Court Attendance \$ _____ per day for _____ days; or \$ _____ per hour for _____ hours. _____ Transportation ( <i>Check appropriate box(es)</i> ) <input type="checkbox"/> Common carrier, at less than first-class accommodations <input type="checkbox"/> Taxi fares to and from terminals <input type="checkbox"/> Privately owned vehicles at _____ cents per mile for travel of 200 miles or less, one way <input type="checkbox"/> Privately owned vehicle, not exceeding cost by common carrier at less than first-class rates <input type="checkbox"/> Special conditions ( <i>Specify</i> ) _____ _____ Number of round trips anticipated: _____

TERMINATION FOR THE CONVENIENCE OF THE GOVERNMENT

The Contracting Officer, by written notice, may terminate this agreement, in whole or in part, when it is in the best interest of the Government. To the extent that this agreement is for services and is so terminated, the Government shall be liable only for payment in accordance with the payment provisions of this agreement for services rendered prior to the effective date of termination.

Description of Duties (*Explain details of service to be performed and other conditions.*)

(Continue on reverse)

Signature ( <i>Government Attorney</i> )	Date	Signature ( <i>Expert Witness</i> ) I agree to perform the above service and appear as a witness on behalf of the Government.	Date
Name and Title ( <i>Government Attorney</i> )		Name and Title ( <i>Expert Witness</i> )	

FORM OBD-12  
APR 82  
[E7530]

October 1, 1988

5-15.862 Pay Voucher  
U.S. Department of Justice

Pay Voucher for Special Services  
ORIGINAL

Formerly Form 5 1/2 D.C.  
Form approved by  
Comp. Gen., U.S.

Bureau Vou. No. \_\_\_\_\_

\_\_\_\_\_  
(Bureau or Division)

Schedule No. \_\_\_\_\_

TO \_\_\_\_\_ \*SS/EIN \_\_\_\_\_  
(Name of payee)

ADDRESS \_\_\_\_\_

\_\_\_\_\_  
(To which checks should be mailed)

For SERVICES rendered as _____	Period of Service	Rate per _____	Amount	
			Dollars	Cents
from _____, 19____, to _____, 19____, inclusive.	Days			
In the matter of _____ (State case or nature of business)				
Remarks: _____				
_____				
_____				
_____				

(Sign original only)	I CERTIFY that the above bill is correct and just and that payment has not been received. _____ Signature (Payee) _____ Date	Amount claimed ..... \$ _____ Less differences, (See attached) ..... \$ _____ Employee withholdings, (See reverse) ..... \$ _____ Approved for payment ..... \$ _____
	I CERTIFY that the above services on this voucher have been received. _____ Signature (Receiving Officer) _____ Date	<p><b>*PRIVACY ACT NOTICE</b>          Mandatory Disclosures, Authority, Purpose and Uses:          Disclosure of your social security number or employer identification number is mandatory for Federal income tax reporting purposes under the authority of 26 U.S.C., Sections 6011 and 6109, and 26 CFR, Section 301.6109-1, in order to ensure the accuracy of income computation by the Internal Revenue Service. This information will be used to identify an individual who is compensated by funds of the Department of Justice. Failure to provide this information may result in delay of your compensation, and the Department of Justice will be required to notify the Internal Revenue Service that your number is unknown. Information on this voucher is being provided on Form 1099 to the Internal Revenue Service.</p>
	I CERTIFY that the foregoing account is correct and proper for payment. _____ Signature (Authorized Certifying Officer) _____ Date	

ACCOUNTING CLASSIFICATION (Appropriation Symbol must be shown; other classification optional)

IRM OBD-1  
[E7531]

October 1, 1988

NAME	GROSS AMOUNT EARNED	FICA	NET AMOUNT PAID	CHECK NO.
U.S. ATTORNEYS MANUAL 1988				

[E7532]

October 1, 1988

5-15.863 Contract for Appraisal Services

J. S. Department of Justice LN-116 (Ed. 5-24-71)	Land and Natural Resources Division <b>AGREEMENT FOR APPRAISAL SERVICES</b>
Date: _____	Name of Appraiser: _____
You are invited to submit a proposal to appraise the property hereinafter described in accordance with the following instructions and specifications. Execution of this instrument by you and submission to the Department of Justice within the time period provided herein will be considered your offer to appraise the property. In the event your proposal is accepted by the Department of Justice, this instrument will be executed by an authorized representative of the Department of Justice and will thereafter constitute the agreement of employment.	
<b>PART I — INSTRUCTIONS</b>	
Your proposal to appraise the property described herein must be submitted to the Department of Justice on or before _____.	
In the event of employment, four copies of the appraisal report must be submitted to the Department of Justice on or before _____.	
The interest (acquired) to be appraised is _____	The property condemned (considering the interest (acquired) to be appraised) is _____
The fee of the appraiser includes _____ days time which may be necessary as determined by the Department of Justice for preliminary discussions in explanation of the appraisal report.	
DESCRIPTION OF PROPERTY	
In the event circumstances arise which in the judgment of the Department of Justice make unnecessary the completion of the appraisal report, the appraiser will be paid a pro-rata portion of the agreed fee based upon the amount of work completed at that time.	
In addition to the preparation of the appraisal report in accordance with these instructions and specifications, the appraiser, upon request by the Department of Justice, agrees to attend conferences and to testify as an expert witness in support of his conclusions of value. For conferences prior to the trial (other than the time allocated for preliminary discussions in explanation of the report, the appraiser will be paid at the rate of _____ per day (pro-rated) and for testimony at trial the sum of \$ _____ per day (pro-rated). For attendance at conference or trial, if the site of the conference or trial is a distance of more than 25 miles from the appraiser's place of business, payment will be made for travel expenses from his place of business to the site of the conference or trial and return, in accordance with existing Government travel regulations. The appraiser will personally inspect the property condemned. Travel to and from the subject property for the purpose of said inspection will be at the cost of the appraiser. The appraiser will not employ any other experts or utilize any members of his staff or others to assist him in the preparation of the appraisal at additional cost to the United States, unless otherwise agreed to herein. In the event the Department of Justice determines it is necessary to update the appraisal from the date of valuation set forth herein to another date, the appraiser shall be paid on the basis of \$ _____ per day (pro-rated) for the number of days utilized by the appraiser to complete the assignment. The number of days requested by the appraiser to complete said updating is subject to the approval of the Department of Justice and shall be approved by the Department of Justice in advance of undertaking the assignment.	
Visual aids to understanding of the appraisal, such as illustrative tables, graphs, charts, and maps will be prepared for the purpose of trial and according to specifications determined by the Department of Justice and at the cost of the appraiser, unless otherwise agreed to herein.	
All information contained in the appraisal report to be made hereunder and all parts thereof will be treated as confidential and will not be divulged to anyone other than the Department of Justice or whomsoever the Department of Justice will designate. The appraiser, in preparation of the appraisal report, will follow current professional appraisal practices to determine (fair market value) (fair rental value). The appraisal shall be made in accordance with applicable law.	
<b>ADDITIONAL INSTRUCTIONS</b>	
THE APPRAISER, _____, whose address is _____	
agrees to the terms and conditions herein and to make an appraisal to determine the (fair market value) (fair rental value) of the described property, in accordance therewith, for the fee of \$ _____ which is at the daily rate of \$ _____. The breakdown of the total fee is as follows (itemize estimated expenses): _____	
<b>PROPOSAL ACCEPTED</b>	
_____ Department of Justice	_____ Appraiser

Bus. & Stat.

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<b>PART II — GENERAL SPECIFICATIONS OF REPORT</b>	
<p>The report shall include the following items:</p> <ol style="list-style-type: none"> <li>1. <b>Title Page:</b> <ol style="list-style-type: none"> <li>a. Name of owner(s)</li> <li>b. Street address or location of property</li> <li>c. Name of individual making report</li> <li>d. Effective date of appraisal</li> <li>e. Appraised value</li> </ol> </li> <li>2. <b>Table of Contents.</b></li> <li>3. <b>Letter of Transmittal.</b></li> <li>4. <b>Photographs.</b> Photographs of the property condemned and relevant comparable sales. On the back of the photographs will appear a statement identifying the property, the name and address of the photographer, the position and direction of the photographer in relation to the property, and the date the photograph was taken.</li> <li>5. <b>Statement of the Estate Taken.</b></li> <li>6. <b>Description:</b> <ol style="list-style-type: none"> <li>a. Legal description of property. In partial takings, a description of the total property before the taking and of the remainder.</li> <li>b. General description of the city and neighborhood where subject property located and general economic data concerning the same.</li> <li>c. Description of improvements on subject property.</li> <li>d. Site description. Soil, topography, mineral deposits of commercial value, etc.</li> <li>e. Description and physical condition of equipment considered realty. Also, general statement of items not considered part of realty for appraisal purposes.</li> <li>f. A schedule of existing leases, encumbrances, easements, etc., affecting the subject property on the date of taking.</li> </ol> </li> <li>7. <b>Highest and Best Use.</b> State the highest and best use of the property at the date of taking and in a partial taking the highest and best use of the property immediately before the taking and the highest and best use of the remainder immediately after the taking. Determination of highest and best use must be supported by market data.</li> <li>8. <b>Assessed value and dollar amount of real estate taxes.</b></li> <li>9. <b>Zoning of Subject and Comparable Properties.</b> If there existed a reasonable probability that the subject property would have been rezoned at the time of the acquisition by the Government or in the reasonable future from said date, document by reporting other rezonings in the area and changed conditions indicating reasonable probability of rezoning. Set forth the indicated reasonable probable zoning classification.</li> <li>10. <b>Impact of the Government Project.</b> The impact of the Government project as it effects (fair market value) (fair rental value) in the area in which the subject property is located must be discussed in the report. The property will be valued as of the date of acquisition, excluding any enhancement or diminution in value by reason of the Government project. A determination that the project enhanced or depreciated values must be documented.</li> <li>11. <b>Partial Takings.</b> In the event of a partial taking of property in single ownership used as an economic unit, the before and after method of appraisal will be utilized,</li> </ol>	<p>unless otherwise instructed herein. The before value will exclude any enhancement or diminution in value by reason of the Government project and the after value will include any enhancement (benefits) or reflect any diminution (severance) by reason of the Government project. A determination that the remainder is enhanced or diminished in value by reason of the taking must be factually supported.</p> <ol style="list-style-type: none"> <li>12. <b>Market Data — Comparable Sales.</b> Comparable sales utilized must be confirmed by the buyer, seller, broker, or other persons having knowledge of price, terms and conditions of sale. Degree of comparability of each comparable sale to subject must be reported and a full description of each sale properly set forth. The land records must also be examined and any mortgages and encumbrances pertaining to each comparable sale must be reported. Any improvements or changes made in the sale property after the date of sale must be fully investigated and reported.</li> <li>13. <b>Sales History of Subject Property.</b> Sales history of subject property for at least 10 years preceding taking must be reported. Modernization or improvement of subject property for the 10 years aforementioned and the cost of same, if determinable, will be reported.</li> <li>14. <b>Reproduction Cost.</b> In the event the reproduction cost less depreciation plus land value method of appraisal is applicable, a complete breakdown of each item will be set forth including dimensions of the property, the source of costs, the physical, functional or economic depreciation, and comparable sales utilized to determine land value.</li> <li>15. <b>Income Approach.</b> If the income approach to value is applicable, each figure and factor used will be supported by factual data and reported. Capitalization rates, whenever possible, will be supported by reference to sales analysis of comparable properties with sufficient similarity and use. Actual income and expenses and vacancy experience of the subject property for 5 years preceding the taking must be reported. In the event estimated income and expenses are utilized for the purposes of capitalization, set forth the reason for disregarding the actual experienced income and expenses. Comparable leases to support the reasonableness of the rental utilized must be reported. The terms and conditions of said leases must be set forth. Data to support the expenses utilized must also be reported.</li> <li>16. <b>Certification.</b> The appraisal will be signed by the appraiser and will contain a certification that neither the appraiser nor any member of his family, or business associates had any undisclosed interest in the property, or any other property within the project area and that he has personally inspected the premises. The appraiser will further certify that he has not been employed to make an appraisal nor has he made any appraisal on any property within the project area for any party other than the United States, and that if this agreement is accepted, the appraiser will agree not to accept any assignment to appraise any property within the project area for any party except the United States, unless otherwise agreed to by the Department of Justice.</li> <li>17. <b>Appraisal Qualifications.</b> The appraisal report will include the appraiser's education, appraisal qualifications and experience.</li> </ol>

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FORM. LDN-86 7-18-75 (N.I.) Formerly LN-86		U.S. Department of Justice		DJ File No.:		Civil No.:	
MAJOR TRACT STATUS CONTROL				District:		State:	
Project:		Authorization date:		Date Complaint filed:		Date DT filed:	
DJ Attorney:		Field Attorney:		Date service complete: _____			
Defendant's Attorney:		Owner:		Date of pretrial conference: _____			
Estate Acquired:		Agency:		Date of trial: _____			
				Method of trial: _____			
				Award: _____			
				Date Judgment entered: _____			
				Date Objections filed: _____			
				Date Motion for new trial filed: _____			
				Date Notice of Appeal filed: _____			
				Result of Appeal: _____			
				Judge: _____			
PROPERTY INVOLVED							
Tract No(s).	Deposit	AREA (ACRES, SQ.FT., ETC.)		Nature of improvements			
		Acquired	Remainder				
APPRAISAL DATA							
Government						APPRAISAL SECTION REVIEW	
Appraiser	Staff or contract	Date of appraisal	Amount (all tracts)	Updated appraisal to DT		Date	Comments
				Date requested	Date received		
Defendant(s)						ACQUIRING AGENCY RECOMMENDS: <input type="checkbox"/> Acceptance of offer  <input type="checkbox"/> Rejection of offer	
Appraiser	Appraisal	Claim	Settlement offer				

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CHAP. 15  
 5-15.864 Major Tract Status Sheet  
 UNITED STATES ATTORNEYS' MANUAL  
 5-15.864



5-15.865 Report on Condemnation Award or Verdict

FORM-LIN-18 MAY 80 U.S. Department of Justice Land & Natural Resources Div.		Date:	
REPORT ON CONDEMNATION AWARD OR VERDICT (To be submitted in triplicate)		DJ File No.:	
Tried by:		Civil No.:	
Trial attorney recommendation:		District:	
Agency recommendation:		Agency recommendation:	
TYPE OF PROPERTY TAKEN: <input type="checkbox"/> Residential <input type="checkbox"/> Industrial <input type="checkbox"/> Farm <input type="checkbox"/> Commercial <input type="checkbox"/> Other (specify)	NATURE OF ESTATE: <input type="checkbox"/> Fee simple <input type="checkbox"/> Easement <input type="checkbox"/> Term <input type="checkbox"/> Other (specify)	Tract No(s).:	
Project:		Acquiring agency:	
Date complaint filed:		Date DT filed:	
Date motion for new trial filed:		Date service completed:	
By government		By defendant(s)	
TRIAL DATA			
Date trial started:		Date trial ended:	
Actual trial days:		Award or verdict:	
Percentage above gov't high testimony:		RANGE OF TESTIMONY Government: From: \$ To: \$ Defendant(s): From: \$ To: \$	
APPRAISERS UTILIZED BY GOVERNMENT			
Name of Appraiser:		Witness (Excellent, Good, Fair, Poor)	
APPRAISERS UTILIZED BY DEFENDANT(S)			
Name of Appraiser:		Witness (Excellent, Good, Fair, Poor)	
METHOD OF TRIAL (check one)			
COMMISSION <input type="checkbox"/>		MAGISTRATE <input type="checkbox"/>	
JUDGE <input type="checkbox"/>		JURY <input type="checkbox"/>	
Names of Commission members:		Name of judge:	
Date Commission appointed:		Name of magistrate:	
Objection to appointment: ( ) By government ( ) By defendant(s)		Date findings of facts and conclusions of law filed:	
Date Commission's report submitted:		Date objections to report filed: ( ) By government ( ) By defendant(s)	
THE FOLLOWING ARE FOR COMPLETION BY DEPARTMENT PERSONNEL ONLY			
Reviewed by:		Remarks:	

[E7537]

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5-15.866 Proposed Settlement of the Government's Liability

FORM OBD-43- MAY 80		U.S. Department of Justice		Date:
PROPOSED SETTLEMENT OF THE GOVERNMENT'S LIABILITY				D.J. File No.:
				Civil No.:
The following information is submitted (in tripli- cate) in connection with the proposed settlement of the Government's liability in the condemnation pro- ceeding noted.				Tract No(s).:
				Project:
				Agency:
TO: ASSISTANT ATTORNEY GENERAL, LAND AND NATURAL RESOURCES DIVISION				
FROM: _____ District _____				
Assistant United States Attorney _____ City _____				
SUMMARY OF OFFER				
1. Offer (inclusive of interest - where revestment or removal of improvements is involved explain and give market and/or salvage value.):		2. Former Owner(s):		
		3. Landowners' Attorney:		
		4. Estate Condemned:		
5. Interests and Estate included in Offer (When offer does not include all interests, give details and justification.):				
6. Deposit:	7. Percent interest over Government's proposed high testimony:	8. In event of trial and a deficiency, interest runs from:		
DESCRIPTION OF LAND				
9. Date Complaint filed:		12. Use to which property was devoted:		
10. Date Declaration of Taking filed:				
11. Date Government granted possession:		13. Highest and best use:		
14. General location:	15. Number of acres:	16. Nature of improve- ments:		
	Taken:			
	Remaining: _____			
	Total:			

(E7538) (X)

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17. VALUATION SUMMARY			
Government appraisers.....	_____	_____	_____
Amount of appraisal.....	\$ _____	\$ _____	\$ _____
<b>Appraisal breakdown:</b>			
1. Value of land taken.....	\$ _____	\$ _____	\$ _____
2. Value of improvements taken...	\$ _____	\$ _____	\$ _____
3. Severance estimate.....	\$ _____	\$ _____	\$ _____
4. Offsetting benefits, if any....	\$ _____	\$ _____	\$ _____
<b>18. Owners' appraisal:</b>	<b>19. Owners' claim: :</b>		
20. Setting or anticipated trial date:	21. Indicate type of trial expected (court) (jury) (commission):		
22. Deadline on acceptance of offer, if any:	23. Local representative of acquiring agency recommendation (acceptance) (rejection) (attach all agency recommendations):		
24. Unusual legal or factual issues, if any: (Explain in detail.)			
<b>APPRAISALS</b>			
25. The following appraisals are attached:			
26. Appraisers who would be used as witnesses in event of trial: (If any appraiser will not be used as a witness, explain reasons.)			
<b>RECOMMENDATION OF UNITED STATES ATTORNEY</b>			
I recommend that the proposed settlement be (accepted) (rejected). A statement of my reasons for such recommendation is as follows:			
_____	_____		
Date	United States Attorney		

[E7539]

**Settlement Form When Amount Within  
Authority of United States Attorney**

Form No. USA-155 U.S. Department of Justice (Rev. 1/18/71)		Date:
MEMORANDUM OF CONDEMNATION COMPROMISE SETTLEMENT Land and Natural Resources Division		District:
		State:
		DJ file no.:
		Civil No.:
Style of Case: United States v.		Tract or Parcel No(s).:
		Area:
Former owner(s):	Acquiring Agency:	
Amount deposited with declaration of taking: \$		
Range of Government's testimony: \$ to \$		
Defendant's(s') claim, if known: \$ to \$		
Amount of settlement (inclusive of interest): \$		
AGENCY APPROVAL IN WRITING: (check) (Must be "yes" if settlement exceeds deposit)		Yes <input type="checkbox"/> No <input type="checkbox"/>
Appraisal reports forwarded herewith: (Identify by name and date.)		
Deficiency check, if any: \$		<input type="checkbox"/> Has been requested directly <input type="checkbox"/> You are requested to obtain
Remarks:		
	United States Attorney	
	Assistant United States Attorney	

[E7540]

5-15.868 Cover Sheet for Transmittal of Documents

UNITED STATES DEPARTMENT OF JUSTICE  
UNITED STATES ATTORNEY

The Assistant Attorney General  
Land and Natural Resources Division  
Department of Justice  
Washington, D. C. 20530

\_\_\_\_\_  
(Date)

Attention: Chief, Land Acquisition Section

Dear Sir:

Re: Civil No.: \_\_\_\_\_ Tract No(s):  
Project: \_\_\_\_\_ J.D. File No.:

Enclosed are the following instruments which constitute the transcript of the above tract(s) of land.

<u>Certi-</u>	<u>Plain</u>		<u>Certi-</u>	<u>Plain</u>	
<u>fied</u>			<u>fied</u>		
___	___	Complaint	___	___	Motion for Appointment of Commission
___	___	Amendment to Complaint	___	___	Order Appointing Commission
___	___	Certificate of Clerk	___	___	Objections to Order Appt. Commission
___	___	Notice of Condemnation	___	___	Order Fixing Fees of Commission
___	___	Marshals' Returns of Service	___	___	Oath of Commissioners
___	___	Publication and Proof of Publication	___	___	Objections to Report of Commissioners
___	___	Motion for Order for Delivery of Possession	___	___	Order Confirming Report of Commissioners
___	___	Order for Delivery of Possession	___	___	Final Judgment
___	___	Notice of Lis Pendens	___	___	Petition for Distribution
___	___	Answer	___	___	Order of Distribution
___	___	Appearance	___	___	Affidavits
___	___	Disclaimer	___	___	Cert. of Inspection and Possession
___	___	Order Setting Pretrial or Trial Date	___	___	Report of Commissioners
___	___	Settlement Memo	___	___	Preliminary Certificate of Title
___	___	Stipulation	___	___	Final Certificate of Title
___	___	Judg. on Stipulation	___	___	Motions (New Trial, Judgment, etc.)
___	___	Stipulation to Revest Property	___	___	_____
___	___	Judg. Revesting Property	___	___	_____
___	___	_____	___	___	_____

Respectfully,

United States Attorney

By: \_\_\_\_\_

Assistant United States Attorney

[E7541]

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5-15.900 GUIDELINES, PROCEDURES, HANDBOOKS AND OTHER MATERIALS RELATING TO LAND ACQUISITION CASES

5-15.901 Guidelines

5-15.911 Condemnation Guidelines Suggested by the United States Judicial Conference

PRINCIPLES

I

A higher quality of justice to the parties should be the primary objective.

Continued improvement in the administration of justice is needed to meet the increasing demands of our complex society on our court system. When the quality of justice can be appreciably improved by uniform guidelines designed to improve and expedite the processing to finality of federal land condemnation actions, it should be no answer that some reasonable mechanical effort by one or more of the parties may be required in order to simplify procedure and expedite judicial management of the case for the benefit of all concerned. This is in accordance with the most recent legislation of Congress on the subject, namely, Title 42, U.S.C., § 4651 and 4655, inclusive, concerning uniform real property acquisition policy and practices, forbidding certain prior unjust practices, and requiring individual consideration for each landowner. Thus, the guidelines should serve the purpose of assisting in conservation of judicial time, the expediting of the judicial process, the removal of confusion and the enhancement of the quality of justice.

I

Fair and accurate statistical credit for the judicial work performed should be assured.

The courts are considered for many of their critical needs on the basis of their statistics particularly those that apply to the number of cases filed and to the weighted caseload. Regardless of personal modesty or the indifference of any particular judge to receiving fair credit for his condemnation caseload, it is, nevertheless, important in the overall evaluation of the needs of the courts that fair credit be received in each instance.

PROPOSED STANDARD GUIDELINES

Guideline 1

For each tract, economic unit or ownership for which the just compensation is required to be separately determined in a total lump sum, there shall be a separate civil action file opened by the clerk which shall be given a serial number, as given all other civil actions. For each such

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civil action, a separate J.S. 5 card shall be prepared on filing and a separate J.S. 6 card prepared on closing of each such separate civil action. The condemnor's counsel shall make the initial determination of each tract, economic unit or ownership for which just compensation is required to be separately determined in a lump sum, subject to review by the court after filing.

#### Guideline 2

The file in the civil action containing the first complaint filed under a single declaration of taking shall be designated as the Master File for all the civil actions based upon the single declaration of taking. The numerical designation as the Master File shall be shown by adding as a suffix to the civil action serial number the symbol MF \_\_\_\_\_. (In the blank shall be inserted a code number or numbers, selected by the condemnor, designating the project or projects and the number assigned the declaration of taking with which the property concerned is connected.) The single declaration of taking shall be filed in the Master File only. In all other civil actions for condemnation of property which is the subject of the declaration of taking, an appropriate reference to the Master File number in a standard form of complaint shall be deemed to incorporate in the cause the declaration of taking by reference and shall be a sufficient filing of the declaration of taking referred to.

For example, assuming that the civil serial number assigned to the first complaint under a single declaration of taking is C.A. 72-20,000, that the project number selected by the condemnor is 500 and the declaration of taking is the first in the project, the Master File Number would be C.A. 72-20,000-MF 500-1.

#### Guideline 3

For the civil action designated as the Master File, there shall be a separate complaint. At the option of the condemnor, this complaint and exhibits shall (1) describe all owners and other parties affected and all properties that are the subject of the declaration of taking, or (2) describe only the owner or owners of the first property or properties in the declaration of taking for which the issue of just compensation is separately determinable.

#### Guideline 4

In order to reduce administrative, clerical and secretarial work, a standard form of complaint (see USAM 5-15.801, *supra*), printed, photocopied, mimeographed or otherwise produced in numbers, may be used for each civil action filed to condemn a tract, economic unit or ownership for which the issue of just compensation is required to be determined in a single lump sum. In the body of the complaint it shall not be necessary to designate the owner or owners of the property concerned, other parties affected by

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the civil action, or to describe the property concerned in the civil action. The names of the owners and other parties affected and the description of the property concerned in the civil action may be set forth in an exhibit or exhibits incorporated by reference in the standard form of complaint and attached thereto.

#### Guideline 5

In any notice or process required or permitted by law or by the Rules of Civil Procedure (including but not limited to process under Rule 71A(d), Federal Rules of Civil Procedure), the condemnor at its option, may combine in a single notice or process, notice or process in as many separate civil actions as it may choose in the interest of economy and efficiency. (See USAM 5-15.804, *supra*.)

#### Guideline 6

A district court should adopt a local rule or general order to the effect that the filing of a declaration of taking in the Master File constitutes a filing of the same in each of the actions to which it relates.

NOTE: An essential element of the Master File system is that the filing of the declaration of taking in the Master File shall constitute a filing of the same in each of the separate actions to which the Master File relates. This is of particular significance because the Declaration of Taking Act, 40 U.S.C. § 258a, specifies filing of the declaration of taking "in the cause." If the filing of the declaration of taking is defective, the vesting of the title to the subject property in the United States under the Act is jeopardized. To ensure that the filing of a pleading in the Master File will legally constitute a filing in the several related actions, it is considered necessary that each district court, as part of the implementation of this system, adopt a local rule of procedure giving the desired effect to the filing of pleadings in the Master File. The following language for such a rule is suggested:

Where the United States files separate condemnation actions and a single declaration of taking relating to those separate actions, the clerk is authorized to establish a Master File in which the declaration of taking may be filed, and the filing of the declaration of taking therein shall constitute a filing of the same in each of the actions to which it relates.

#### Guideline 7

A district court may adopt a local rule or general order that, unless otherwise ordered, all issues of just compensation involved in a single declaration of taking shall be consolidated for a joint hearing and trial.

#### CONCLUSION

Since the Department of Justice is voluntarily cooperating with the courts in seeking an appropriate and workable solution on the subject to

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the end that the administration of justice will be both improved and expedited, the district courts, in return, should be careful not to apply these guidelines in any particular situation so as to unnecessarily burden the Department of Justice. These guidelines should be applied so as to expedite justice to all parties.

#### 5-15.912 9-Point Program for Settlement or Dismissal Within One Year

The following specific suggestions for a procedural program are designed to aid in securing the settlement or trial of a condemnation action within one year of its institution:

A. Inspect the property as soon as possible. There is no substitute for thorough knowledge of the property for either settlement negotiations or trial purposes.

B. Promptly request continuation of title evidence (see USAM 5-15.533, *supra* and USAM 5-15.927, *infra*) to the date of recordation of declaration of taking, judgment on declaration of taking or *lis pendens*, and, if you have difficulty in obtaining such evidence, request assistance from the Department.

C. Review agency appraisals within 10 days. Satisfy yourself both as to the adequacy of the appraisal report and of the ability of the appraiser to be an effective witness. Appraisal reports must, of course, be updated to reflect valuations as of the date of taking. This will supply trial counsel with current information concerning the case, will enable him/her to determine whether an additional appraisal is necessary, and will put him/her in a position to conduct meaningful settlement negotiations or be ready for trial. When further appraisal services are deemed necessary, promptly submit a Form OBD 47, together with executed Forms USA-157 and LN-11 (USAM 5-15.864, *supra*), if fee is over \$2,500, for that purpose. If a proposed fee of \$2,500 or more for appraisal services is submitted by an appraiser, proposals from two other qualified appraisers must be obtained whenever possible. In the event some of the printed instructions on Form LN-116 (USAM 5-15.864, *supra*,) are not pertinent, they may be deleted. When and if approved, a copy of this agreement will be forwarded to the U.S. Attorney and to the appraiser, at which time the work may proceed. The last copy of this package agreement is to be retained by the appraiser for his/her records. See USAM 5-9.100 *et seq.*, for information as to the preparation and review of appraisals by personnel of the offices of the U.S. Attorneys, the Land and Natural Resources Division, and the acquiring agencies.

D. Commence serving parties or publishing against them within 30 days of the receipt of the continuation title evidence. Personal service should, of course, be effected whenever possible. Service or publication

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should be completed within 60 days. (See USAM 5-15.525, *supra*, and USAM 5-15.925, *infra*.)

E. Advise the Department of important legal issues within 30 days or as soon as they develop after that time. The Department has, indexed and readily available, many briefs and memoranda of law covering legal issues which have developed in condemnation cases, and the Department is willing to undertake research on other issues; but it must first be informed of the problems which you have encountered before it can be of maximum help to you.

F. Service or publication should be completed within 60 days.

G. There should be a thorough exploration of settlement possibilities within 90 days. Use your settlement authority to the fullest extent possible. Outside of direct purchase, which the acquiring agencies have been urged to accomplish whenever possible, amicable settlement represents the quickest and most satisfactory way for a government to acquire privately owned property. (See USAM 5-15.630, *supra*, and USAM 5-15.925, *infra*.)

H. Wherever local practice and the condition of court calendars will permit, a pre-trial should be held within six months. In addition to resolving preliminary matters, such as discovery, objections to the taking, motions, methods or trial, etc., a pre-trial setting necessitates an examination of positions and frequently acts as a spur to serious settlement negotiations. A later pre-trial, or even pre-trials, may prove to be necessary if the case is to be tried on its merits.

I. Trial should be set within a year. If circumstances beyond your control preclude this, then the earliest possible trial setting should be sought.

#### 5-15.913 Policy Regarding Consent to Trial of Condemnation Cases by United States Magistrates

The Federal Magistrate Act of 1979 (Pub.L. No. 96-82) authorized United States Magistrates to conduct any or all proceedings in a jury or non-jury civil matter and order the entry of judgment in the case, when specifically designated to exercise such jurisdiction by the district court or courts he/she serves, provided the parties consent thereto. The Act preserves to the parties the right to appeal as from a judgment of the district court.

This Division is favorably disposed to the use of United States Magistrates to conduct the trial of condemnation cases and to enter judgment therein whenever, in the opinion of the responsible attorney, consent to such trial would be in the litigating interests of the United States. Because of the very large number of condemnation cases pending throughout the country and the difficulty generally experienced in obtaining trial time for these cases, the option of consensual trial by magistrate provides

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an effective means of expediting the disposition of condemnation cases in appropriate circumstances.

Accordingly, it is the policy of this Division to encourage, in appropriate cases, consent to the conduct of condemnation trials by United States Magistrates if the attorney in charge of the case determines that trial before a magistrate would be in the litigating interests of the United States. In making this determination (on an individual case basis), all relevant factors should be considered, including the complexity of the case, the relief sought, the amount involved, the importance and nature of the issues raised, and the likelihood that the referral of the case to the magistrate will expedite resolution of the litigation. The attorney in charge of the case should similarly determine whether the consent should be to a trial by the magistrate or by a jury presided over by the magistrate.

The Federal Magistrate Act of 1979 provides that where a magistrate is designated to exercise civil litigation jurisdiction, the clerk of court shall, at the time the action is filed, notify the parties of their right to consent to the exercise of such jurisdiction. In many districts, however, there are backlogs of condemnation cases that were filed before the October 10, 1979 enactment of the Act for which such notification has not been given by the clerk. Accordingly, this Division urges the responsible attorneys to review their cases and determine which, if any, are appropriate for trial before a magistrate and that such action as necessary and appropriate be taken to notify the parties thereto of their right to consent to the magistrate's exercise of litigation jurisdiction.

5-15.920 Condemnation Procedures—Filing and Serving Complaints

5-15.921 Materials to be Secured From Acquiring Agency By United States Attorney Upon Being Authorized to Institute Action

Upon the receipt of a request to institute condemnation proceedings, the U.S. Attorney shall request the following from the local office of the acquiring agency:

A. A check for the amount of the estimated compensation, in those cases where a declaration of taking is to be filed, if a check was not transmitted with the request to institute the proceedings;

B. A sufficient number of copies of the property description of the condemned land;

C. If the description of the estate condemned is lengthy, a sufficient number of copies of the description (this often is desirable in easement cases); and

D. Such title evidence as is presently available. (See USAM 5-15.530, *supra*.)

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This description of the estate and of the land condemned, referred to in B and C above, may be attached as exhibits to and incorporated as a part of the complaint, the notice of condemnation, and other orders and pleadings, where deemed necessary, in order to avoid the necessity of retyping such descriptions, with consequent chance for error. These descriptions usually will be mimeographed upon request to the acquiring agency.

5-15.922 Documents to be Prepared by United States Attorneys Prior to Filing Condemnation Actions

After receiving the material described in USAM 5-15.921, *supra*, the U.S. Attorney shall prepare:

A. Complaint in condemnation (*see* Rule 71A(c), Fed.R.Civ.P. and USAM 5-15.801 or 5-15.802, *supra*). The complaint in condemnation must not vary in form or substance from any instructions given by the Department and, if there is any variance, the Department must be advised at once of such changes and the reasons therefor;

B. Clerk's receipt if a declaration of taking is to be filed showing the deposit of estimated compensation;

C. Motion and order for delivery of possession, if requested by the Department (*see* USAM 5-15.526, 5-15.817, 5-15.827, *supra*);

D. Notices of condemnation for service upon defendants (*see* Form 28, Fed.R.Civ.P., or USAM 5-15.804, *supra*);

E. *Lis pendens* notice, if necessary (*see* USAM 5-15.524, *supra*); and

F. Form letters to purported owners notifying them of the proceedings and of their right to withdraw the deposit, upon proof of ownership (*see* USAM 5-15.805, *supra*).

5-15.923 Procedures in Filing Complaints in Condemnation

After all the documents listed in USAM 5-15.922, *supra* are prepared, the U.S. Attorney should:

A. File the complaint (*see* USAM 5-15.801 or 5-15.802, *supra*) and the declaration of taking, if one has been furnished;

B. In cases where a declaration of taking is filed, deposit the check for the estimated just compensation in the registry of the court, and have the clerk execute the clerk's receipt in duplicate;

C. When requested, file a motion for order for delivery of possession (*see* USAM 5-15.817, *supra*), and present an order for delivery of possession (*see* USAM 5-15.827, *supra*) to the court as soon as possible (depending upon local practice and the circumstances of a given case, a hearing on such a

motion, after notice and service, may be required, especially where the condemned tract is not vacant land);

D. Deliver to the clerk, or hand to the United States Marshal (depending on local practice), a notice of condemnation, *see* USAM 5-15.804, *supra*, or for each defendant unless he/she has executed a waiver of service, *see* USAM 5-15.836, *supra*. (Two copies of each such notice will be required; one copy for service on the defendant and one copy which the United States Marshal will make his/her return.);

E. Record in the local land records the *lis pendens*, a copy of the declaration of taking or a copy of the judgment on declaration of taking, as provided in USAM 5-15.524, *supra*;

F. If an order for delivery of possession (*see* USAM 5-15.827, *supra*) has been entered, hand two certified copies of such order for each defendant to the U.S. Marshal, one for personal service and the other for the Marshal's return;

G. If a declaration of taking has been filed, mail a form letter (*see* USAM 5-15.805, *supra*) to each defendant.

#### 5-15.924 Procedures in Continuing Title Evidence

It is the general practice in condemnation cases for the acquiring agency to furnish the Department with the preliminary evidence of title to land.

This preliminary evidence of title will necessarily predate the institution of proceedings, often by a substantial period. For purposes of instituting suit, the preliminary evidence of title may properly be relied upon for identification of those persons to be joined as original defendants. But prior to the distribution of any funds of deposit, settlement of the claim, or judicial determination of just compensation, the evidence of title must be continued to a time immediately subsequent to the commencement of notice by recordation of *lis pendens*, declaration of taking or judgment thereon to disclose the state of title at the time. Based upon the information disclosed by the continuation of the evidence of title, any additional parties shown to have, or who may claim to have, any interest in the property involved must be joined as defendants in the case and any changes in the naming of necessary and proper parties defendant must be effected (*see* USAM 5-15.531, *supra*).

To continue the title evidence after the institution of an action, the U.S. Attorney shall request the local office of the acquiring agency to furnish:

A. Title evidence, properly extended to a date subsequent to the time of filing the complaint in condemnation, in those states where such filing

constitutes notice; or to the time of recordation of either a *lis pendens* notice, a declaration of taking, or a judgment on declaration of taking. See USAM 5-15.524, *supra*.

B. Copies of options, if any, on the land acquired. See USAM 5-15.523, *supra*; and

C. Certificates as to parties in possession and mechanics' liens claims (see USAM 5-15.831, *supra*), dated immediately following the recordation of the *lis pendens* notice or the declaration of taking.

Upon receipt of the title evidence, duly extended, and certificates as to parties in possession and mechanics' liens, the U.S. Attorney shall:

A. If the description of the property in the title evidence differs from that in the declaration of taking, request that the title evidence be amended or obtain a statement that the land examined by the title examiner is the same as that described in the declaration of taking;

B. Examine the title evidence and such certificates to determine the persons having a possible compensable interest who should be joined as parties defendant:

1. When joining unknown heirs and devisees of a deceased person, or any other persons having an apparent interest whose names cannot be ascertained, always add "unknown owners" as parties defendant; and

2. Always join the state as a party defendant when you have named as parties defendant heirs in an unprobated estate, who are expected to share in the award. This is to clear inheritance tax liability which must be satisfied;

C. If any parties are found by the title search to have an interest in the property who were not joined in the original complaint, prepare and file a pleading by which they may be joined as parties defendant. This may be accomplished by:

1. A motion and order to add additional parties (see USAM 5-15.811, *supra*);

2. A supplemental complaint to add parties; or

3. An amendment to the complaint to add parties (see USAM 5-15.809, *supra*);

D. Where a party dies or becomes incompetent, move for a hearing on a motion to substitute parties as provided by Rule 71A(g), Fed.R. of Civ.P., and effect service on the necessary parties as provided in USAM 5-15.340 *et seq.*, *supra*. As to transfers of interest, however, see the Anti-Assignment Act, 31 U.S.C. § 203, and *United States v. Dow*, 357 U.S. 17;

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E. Obtain appropriate service of notice upon additional parties in the same manner as parties named in the original complaint in condemnation (see USAM 5-15.525, *supra* and USAM 5-15.925); and

F. Request a current tax statement from the applicable taxing authorities (see USAM 5-15.834, *supra*) and a current statement from other lienholders (see USAM 5-15.835, *supra*) and take steps to see that all taxes and assessments which are a lien as of the date of taking are satisfied either by payment out of the deposit or by requiring the landowner to furnish a receipt or other evidence of payment.

#### 5-15.925 Procedures in Serving Notices of Condemnation

A. Personal Service. Personal service of the notice of condemnation (see USAM 5-15.804, *supra*) must be made under Rule 71A(d)(3), Fed.R. of Civ.P., upon any defendant whose residence is known who resides within the United States or its territories or insular possessions. The United States Marshal for the district in which the defendants reside should be requested to make personal service upon defendants living outside the territorial limits of the court in which the case is pending. A sufficient number of copies of the notice should be furnished the United States Marshal for service upon defendants, for the return of service pursuant to Rule 4(d), Fed.R. of Civ.P., for the United States Marshal's files and for use by government counsel in charge of the case. In jurisdictions in which notices are served on defendants immediately after the filing of the case, such notices should be accompanied by a statement showing the amount deposited as estimated just compensation, the procedure to be followed in obtaining disbursement of the funds, and other helpful information that will facilitate the disposition of the case. See form letter, USAM 5-15.805, *supra*.

B. Service by mail. Rule 71A(d)(3)(i) provides that personal service of the notice of condemnation (but without copies of the complaint) shall be made in accordance with Rules 4(c) and (d). Since Rules 4(c) and (d) have now been amended to permit service on individuals and corporations by mail, that method of service of the notice of condemnation is also permitted by virtue of Rule 71A(d)(3)(i).

The amendment to Rule 4 adds to the Appendix of Forms at the end of the Fed.R. of Civ.P. "Form 18-A" denominated "Notice of Acknowledgement for Service by Mail." Form 18-A, as it stands, is inappropriate for use in condemnation cases. A modification of the form is necessary to substitute "notice of condemnation" wherever the words "summons and complaint" appear and to eliminate a substantive provision that is inconsistent with Rule 71A. A sample modified form of "Notice of Acknowledgment for Service by Mail" for use in condemnation cases is provided at USAM 5-15.829, *supra*.

The substantive change made to Form 18-A is the deletion of the following paragraph:

If you do complete and return this form, you (or the party on whose behalf you are being served) must answer the complaint within 20 days. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

This paragraph is deleted because it is inconsistent with the provision of Rule 71A(e) that at the trial of the issue of just compensation, *whether or not he/she has previously appeared or answered*, a defendant may present evidence as to the amount of the compensation to be paid for his/her property, and he/she may share in the distribution of the award.

Thus, service of an answer is not mandatory, and a judgment by default cannot be taken against the defendant in the condemnation case for failure to answer. And since the Rule 71A(e) provisions regarding appearance and answer are included in the notice of condemnation served upon the defendant, there is no need to recite them in the "Notice of Acknowledgment for Service by Mail."

We see no problem with modifying Form 18-A to conform to the peculiarities of Rule 71A. The Introductory Statement to Appendix of Forms at the end of the Rules of Civil Procedure states that "The following forms are intended for illustration only." Such forms are "sufficient under the rules and are intended to indicate the simplicity and brevity of statement which the rules contemplate." Rule 84. But, "[i]t is not mandatory that the Official Forms be followed . . ." Wright and Miller, *Federal Practice and Procedure: Civil* § 3161. Accord: 7-Pt. 2 Moore's *Federal Practice* § 84.02.

The subject has been covered in detail in this memorandum to aid you in your response should a defendant or the court question the sufficiency of service by mail accomplished in the manner outlined herein.

C. Service by Publication. The same form of notice is used for service by publication as for personal service (see USAM 5-15.804, *supra*). If constructive service is required:

1. Prepare certificate of service by publication (see USAM 5-15.819, *supra*).
2. Arrange for its publication in the manner provided by Rule 71A(d)(3)(ii), Fed.R. of Civ.P.; and
3. Only those not personally served need be named and the notice to be published should contain only the shortest legal description sufficient to identify the property.

When publication has been completed:

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1. Obtain from the publisher the required proof of publication, and
2. Prepare the certificate of publication (see USAM 5-15.819, *supra*) and mailing as required by Rule 71(A)(d)(3)(ii), Fed.R. of Civ.P.

#### D. Service Upon Minors and Incompetents

Minors and incompetents are served in the manner prescribed by the law of the state. It will often be necessary to secure the appointment of and effect service upon guardians *ad litem*. The appointment of and service upon attorneys *ad litem* is necessary for those in the Public Health Service on duty with the Armed Forces (see USAM 5-15.525, *supra*).

When personal service has been completed and publication of constructive service has been commenced, a copy of the actual published notice, accompanied by the United States Marshal's returns of all persons served with summons and a list of those defendants whose appearances have been entered, should be forwarded to the Department.

#### 5-15.930 Condemnation Procedures—Prosecution of Actions

#### 5-15.931 Responses to Challenges of a Taking

##### A. Insufficient Defenses.

If the answer filed by a defendant contains allegations or contentions which are insufficient as a matter of law, or objections to the taking which are not timely filed (see USAM 5-15.541, *supra*):

1. File a motion to strike on behalf of the government; and
2. Have such motion set down for an immediate hearing, if necessary.

##### B. Challenge of Right to Take.

If the answer filed by a defendant raises the issue of the government's right to take the property, or a motion is filed by the defendant to dismiss the proceeding or to vacate the declaration of taking or the order for delivery of possession:

1. If time permits, the answer or motion should be sent to the Department for comment before filing a responsive pleading;
2. Otherwise, file a motion to strike on behalf of the government. (N.B. *Berman v. Parker*, 348 U.S. 26; *United States v. Carmack*, 329 U.S. 230);
3. In lieu of a motion to strike, you may file a motion for summary judgment and/or judgment on the pleadings as to the right of the government to condemn the property in question; and

4. Have the motion set for a hearing, if necessary, at the earliest possible date.

C. Notice to the Department.

The Department must be notified promptly of the outcome of all hearings and arguments upon such motions, and you should send two copies of the following instruments to the Department:

1. Answer of the defendant;
2. Motion to strike (or other appropriate motion) if filed on behalf of the United States, and any memorandum of law filed in support thereof; and
3. Order of the court ruling on such motion.

5-15.932 Procedures for Excluding or Dismissing Land From Condemnation Proceeding

If authorization is received from the Department for the exclusion or dismissal of land from a proceeding, the U.S. Attorney shall:

A. If a declaration of taking has been filed, endeavor to stipulate (see USAM 5-15.813, *supra*) with the former owners, pursuant to 40 U.S.C. § 258(f), for the exclusion of such property from the proceeding and the reversion of title thereto in the former owners. (Absent a stipulation, no reversion is possible.) The stipulation should waive, as to any lands so excluded or dismissed, any claims for costs or attorneys' fees by reason of the proceeding. See Section 304(a) of Pub.L. No. 91-646, approved January 2, 1971, 84 Stat. 1906. (See USAM 5-15.558, *supra*.) The stipulation should provide for the return of the estimated compensation for such reversioned property to the United States. If the government had possession of the property for a period of time, the stipulation should fix the amount of compensation for the period of such occupancy, or specifically include a waiver for such temporary use and occupancy or for damages resulting from the institution of the proceedings. If no agreement is reached, a hearing as to compensation due, if any, will be necessary. See USAM 5-15.941, *supra*.

B. If no declaration of taking has been filed, dismiss the property in question from the proceedings, pursuant to Rule 71A(i), Fed.R.Civ.P. See USAM 5-15.813, *supra*, unless otherwise instructed by the Department.

5-15.940 Condemnation Procedures—Just Compensation, Determination and Payment

5-15.941 Procedure for Ascertainment of Just Compensation

When service has been completed, the case should be prosecuted to a speedy conclusion in order to reduce the amount of interest on any award in

excess of the amount which has been deposited in court. Prompt action should be taken to conclude the case by settlement, either on the basis of an option (see USAM 5-15.523, *supra*) or a compromise offer (see USAM 5-15.620 *et seq.*, *supra*) or by having the case set for an early trial on the issue of just compensation.

A trial setting should be delayed only if settlement is imminent. If a settlement agreement appears unlikely, set the case for trial as soon as possible.

A. The Department must be advised, as far in advance thereof as possible, concerning all dates of hearings, trials, or arguments, including continuances thereof.

B. Rule 71A(h), Fed.R.Civ.P., authorizes the court when a jury has been demanded to appoint a commission instead of a jury to try the issue of just compensation when certain conditions prevail. (Note that the forms of complaint contained in USAM 5-15.805, *supra*, and USAM 5-15.806, *supra*, contain a request for a jury which may be deleted except in the cases set out at USAM 5-15.551, *supra*.) In respect to reference to a commission, except as to tracts included in a small tract program (see USAM 5-15.913, *supra*), and other tracts involving no unusual legal problem or substantial value, the procedure set out should be followed:

1. If a motion for reference to a commission is filed by a defendant or if the court indicates that he, she is considering the appointment of commissioners, you should immediately notify the Department of this fact, together with your recommendations as to whether objections should be made to the appointment of a commission, and await instructions;

2. If the court appoints a commission on its own motion, immediately notify the Department and give your recommendation as to whether or not objections should be filed to the order of the court. If possible, no objections should be filed to an order appointing a commission without first obtaining the approval of the Department;

3. If, in your opinion, a commission should be appointed in a case, notify the Department to that effect and await instructions before requesting the appointment of a commission.

#### 5-15.942 Procedure for Retaining Services of an Independent Appraiser

- ♦ A. A request to the Department to retain the services of an independent appraiser should be submitted on Form CBD 47, and should indicate:

1. The amount to be paid the expert for an appraisal in a lump sum (however), you should show the estimated number of days required for such appraisal); or

2. The rate per diem and the estimated number of days necessary to prepare the appraisal.

B. Submit a separate Form OBD 47 for each such appraiser which includes his/her fee for conferences with you in preparation for trial and for testifying at trial, generally on a per diem rate, giving the anticipated number of days required for such purposes. If it is anticipated that such conferences and trial will not occur during the current fiscal year, do not submit an OBD 47 for these services until after the end of the current fiscal year, as funds otherwise will be set aside for such purpose which could be used for other purposes during the fiscal year. The expense must be justified. See USAM 5-9.231, *supra*.

C. If the services of the appraiser, previously authorized, will not be utilized, in whole or in part, immediately notify the Department, so obligated funds may be released.

D. When an independent appraiser is to be retained, you should be sure that his/her appraisal is made before improvements have been removed or the condemned property is otherwise altered.

E. To insure efficiency in incurring appraisal and expert witness expenses:

1. Secure adequate appraisals from the acquiring agency;
2. Incur expenses only where necessary; and
3. Negotiate a fair price for appraisers' services.

F. Upon receipt of appraisal data:

1. Examine appraisals carefully; and
2. As necessary, arrange for consultations and viewing of the land with the appraiser.

G. If the acquiring agency has agreed to reimburse the Department for the cost of obtaining the services of the independent appraiser, then the usual pay voucher should be submitted to the United States Marshal's office for payment. In support of the voucher, the bill of the appraiser and a copy of the reimbursement agreement from the acquiring agency should be submitted with a cover memorandum advising the United States Marshal that a copy of these documents should be submitted to Financial Manager, Executive Office for U.S. Attorneys, Room 1618, Main Building, who will contact the acquiring agency to obtain reimbursement.

#### 5-15.942 Procedure for Distribution of Funds Deposited in Court

Funds deposited with the declaration of taking and any funds thereafter deposited in court should be promptly distributed. To this end, the U.S. Attorney should:

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A. Obtain promptly and review all information available as to the state of the title to the property and any liens, taxes, and encumbrances thereon.

B. Advise the defendants or their counsel by letter (*see* USAM 5-15.805, *supra*) of the fact that funds have been deposited in court, and offer all possible assistance in obtaining the disbursement of such funds. Suggested forms for use in processing such disbursements are set out at USAM 5-15.814, 5-15.815, 5-15.824, and 5-15.825, *supra*. By this procedure the landowner makes written application through the U.S. Attorney, who makes an appropriate motion to disburse, attaching the defendant's sworn application. The court may enter its order either with or without a formal hearing.

1. If the former owner's title is clear and unencumbered all of the funds deposited may be disbursed to him/her.

2. If the title is encumbered, sufficient funds should be retained in the registry of the court to pay all liens on the property and to satisfy claims of any third persons whose interest is disclosed by the title evidence.

3. If additional funds are deposited pursuant to a deficiency judgment, the defendants should be advised when the funds are available for withdrawal.

4. When funds cannot be disbursed because the owner cannot be located, or for other reasons, an order should be sought immediately requiring the clerk to disburse the undistributed balance to the Treasury of the United States at the expiration of the five-year period pursuant to 28 U.S.C. § 2042. One certified and one uncertified copy of the order should be transmitted to the Department, together with two copies of the certificate of deposit showing the deposit in a federal depository. *See* USAM 5-15.555, *supra*.

#### 5-15.944 Procedures in Moving for a New Trial or Objection to a Commission's Award

If trial has been to a judge or jury and the award or verdict materially exceeds the government's testimony, and there is a valid basis for a motion for a new trial:

A. Within ten days after entry of judgment, file a motion for a new trial setting forth with particularity all grounds for the motion.

B. Prepare and file a brief on the motion and arrange for a hearing thereon.

If the trial was held before a commission, resulting in an award which materially exceeds the government's testimony, and the report of the com-

mission is inadequate for judicial review and/or the commission's findings are "clearly erroneous":

A. Prepare objections to the report and findings of the commission and serve upon the other parties within 10 days after being served with notice of the filing of the report (or within such additional time as the court may grant). (See Rules 71A(h) and 53(e)(2), Fed.R.Civ.P.) Rule 6(b), Fed.R.Civ.P., requires that objections be full and complete and state specifically the grounds therefor. The objections cannot be amended later to include additional grounds.

B. A commission report is inadequate for judicial review, and thus objectionable, if it does not distinctly mark the path followed by the commissioners in reaching the amount of the award. *U.S. v. Merz*, 376 U.S. 192 (1964). An inadequate report does not permit the parties or a reviewing court to determine whether the findings are "clearly erroneous."

C. A commission finding is "clearly erroneous" when based upon a substantial error in the proceedings, based upon a misapplication of the controlling law, unsupported by substantial evidence, or when contrary to the clear weight of all the evidence. *E.g.*, *U.S. v. Waymire*, 202 F.2d 550, 553-554 (10th Cir.1953). See also *U.S. v. Gypsum Co.*, 333 U.S. 364, 395 (1948).

D. If objections are filed, prepare and file a brief in support thereof, and arrange for a hearing. Application to the court for action upon the report and upon objections thereto shall be by motion and upon notice as prescribed in Rule 6(d), Fed.R.Civ.P.

If the motion for new trial is granted or the objections to the award are sustained:

A. Send one certified and one plain copy of the order of the court to the Department;

B. Proceed with a new trial or other action directed by the court as expeditiously as possible;

C. Advise the Department of the results.

#### 5-15.945 Procedures in Securing a Check to Satisfy Deficiency Judgment

Upon the entry of judgments fixing compensation and ordering the deposits of deficiencies:

A. In acquisitions for the Department of the Interior, General Services Administration and for the Department of the Navy, if the judgments are satisfactory and acceptance of the award has been approved by the local authorized representative of the agency, send one certified copy and one plain copy of the judgment to the designated local representative with a

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request for a check in satisfaction of the deficiency, and send one certified and one plain copy of the judgment to the Department of Justice.

B. In acquisitions for the Departments of the Army and Air Force, if the judgment is not in excess of the highest testimony of the valuation witness for the government or in cases where there are stipulated judgments, send one certified copy and two plain copies of the judgment to the local District Engineer with a request for a check in satisfaction of the deficiency, and send one certified and one plain copy of the judgment to the Department of Justice.

C. In acquisitions for all other agencies:

1. Send one certified copy and three plain copies of the judgment to the Department; and

2. Request that the check be obtained.

#### 5-15.950 Procedures for Processing Settlement Offers

#### 5-15.951 Procedure With Respect to Processing Settlement Offers

If a settlement offer is received, the U.S. Attorney should:

A. Ascertain in writing the views of the local office of the acquiring agency;

B. Formulate his/her own views of the offer, based upon the compatibility of the amount of the settlement with the sound appraisals upon which the government would rely as evidence in the event of trial, having due regard for probable minimum trial costs and risks.

#### 5-15.952 Settlement Offer Within Authority

If the settlement offer is within the authority of the U.S. Attorney (see USAM 5-15.830, *supra*) and he/she and the representative of the acquiring agency both believe that it should be accepted, the U.S. Attorney should:

A. Draft and have executed a stipulation between the United States and the defendants in question (see USAM 5-15.816, *supra*). The stipulated amount should be inclusive of interest;

B. Have judgment entered on the stipulation (see USAM 5-15.826, *supra*). The judgment should provide for a setoff against the agreed compensation for any improvements or timber removed from the premises under agreement with the former owner. If no deficiency deposit will be required, the judgment should be prepared in seven copies: two for the Department (one certified and one plain), one for the U.S. Attorney's Office, one for the acquiring agency, one for the defendant, and the original and one copy for filing;

C. If a deficiency deposit is required, request a check for such deficiency from the District or Division Engineer in Army, Air Force, AEC or NASA cases, the district Public Works Officer or the Regional Office of the Bureau of Yards and Docks in Navy cases, the Regional Commissioner in General Services Administration cases and the local representative in Department of the Interior cases. A copy of the request together with two copies of the judgment should be submitted to the Department. The request is made through the Department in cases instituted on behalf of other agencies. For number of copies to be forwarded, *see* USAM 5-15.945; *supra*

D. Submit a prompt report of the settlement to the Department, using Form USA-155 (*see* USAM 5-15.868, *supra*), or furnish such information by letter;

E. The judgment (*see* USAM 5-15.826, *supra*) fixing compensation should direct that distribution be made of the award; if it does not, prepare a motion and order for distribution (*see* USAM 5-15.815, and 5-15.824, *supra*);

F. If no declaration of taking has been filed a final judgment should be entered after the judgment fixing compensation has been satisfied by payment, reciting that fact and vesting title in the United States. If a declaration of taking has been filed, the judgment should confirm title in the United States; and

G. Send the Department one certified and one uncertified copy of the stipulation (*see* USAM 5-15.816, *supra*) and judgment (*see* USAM 5-15.826, *supra*) thereon (send additional copies of the judgment, as specified at USAM 5-15.945, *supra*), together with all title evidence, the certificate of inspection and possession (*see* USAM 5-15.831, *supra*), and the receipt of the clerk, in duplicate. If a final judgment has been entered, as indicated in F above, one certified and one plain copy should be furnished the Department.

#### 5-15.953 Settlement Offer Exceeds Authority; Lack of Agency Concurrence

If the offer of settlement exceeds the U.S. Attorney's delegated authority (*see* USAM 5-15.630, *supra*) or the acquiring agency does not concur in the proposed settlement, the U.S. Attorney should:

A. Submit the offer to the Department for consideration on Form OBD 43 (*see* USAM 5-15.867, *supra*);

B. Submit his/her recommendation, with the reasons therefor in detail;

C. Submit a history of negotiations had with the land owners or their counsel prior to reaching the final figure proposed;

D. Advise of the recommendation of the local office of the acquiring agency and the same time request the local representative of the acquiring

agency immediately to forward his/her recommendation through proper channels to Washington;

E. Forward all appraisal reports relating to the tract to the Department at the same time;

F. Advise what witnesses would be used in the event of trial and the amount of their anticipated testimony;

G. Advise the probable range of the defendant's testimony of value, if known, or the amount claimed, if known; and

H. Furnish any other information which would be helpful in considering the acceptability of the offer, including any unusual legal or factual issues involved, experience in other trials, whether the government appraisers have proved to be good witnesses, etc.

#### 5-15.954 Finalizing Settlement

If Departmental authorization is received to accept the offer, the U.S. Attorney should:

A. Enter into a stipulation with the defendants involved (see USAM 5-15.813, *supra*);

B. Procure any necessary disclaimers (see USAM 5-15.833, *supra*) waivers of compensation or other releases needed to clear up title objections, including affidavits of heirship;

C. Use show cause procedure (see USAM 5-15.855, *supra*) to get parties into court on conflicting claims to share in the distribution of the award. The government has no part in these disputes, but should assist the court and take the initiative in order to expedite closing the case;

D. Have judgment entered;

E. Request a deficiency check, if necessary, as indicated at USAM 5-15.945, *supra*;

F. If a final judgment vesting title in the United States is required, it should be entered; and

G. Send the closing papers to the Department as indicated in USAM 5-15.516, *supra*.

#### 5-15.960 The Appraisal Unit

##### 5-15.961 Area of Responsibility

The Appraisal Unit assists the Land Acquisition Section in advising the Department's divisions or bureaus, and other agencies of the government, with respect to all matters relating to the evaluation of real and personal

property. In particular, the Unit handles questions of appraising for just compensation as it relates to the law of federal land acquisition. The Unit's analyses of appraisal reports result in settlement recommendations in condemnation cases and critiques as to the adequacy of appraisals for support of just compensation, or for use in trial. It furnishes recommendations as to the approval or disapproval of the employment of appraisers and the amount of appraisal fees to be obligated by the Department. The Appraisal Unit also assists the personnel of the Land and Natural Resources Division, as well as U.S. Attorneys and field attorneys, and acquiring agencies, in arranging for the employment of expert witnesses, such as appraisers, engineers, hydrologists, etc., who are required to participate in establishing just compensation for land or property being acquired by the United States or in defending claims against the United States involving real or personal property. The employment by the Land and Natural Resources Division of such experts and their remuneration, as well as the manner in which appraisals are made and reports are to be prepared, are referred to the Unit for review and approval.

In their role as in-house valuation experts of the Land and Natural Resources Division, the members of the Appraisal Unit are, when requested, prepared to confer with the U.S. Attorneys in the field, inspect properties and assist in any case or situation wherein their services are needed or desirable.

#### 5-15.962 Analysis of Appraisal Reports by United States Attorneys

Appraisals supplied by an agency to a U.S. Attorney in support of a request to condemn a tract of land should be reviewed as soon as the case is received. In this regard, the U.S. Attorney should satisfy himself/herself that he/she has received all of the appraisals, whether approved or disapproved, from the acquiring agency. He/she should also insist that the review memorandums containing the critique of the appraisals and recommendations of the acquiring agency be forwarded with the appraisals. Where there is doubt in the U.S. Attorney's mind regarding the adequacy of any appraisal report, or if large sums of money are involved, the appraisal reports should be forwarded to the Land Acquisition Section which will request the Appraisal Unit to furnish an analysis and recommendation. It is important that the U.S. Attorney act upon the Appraisal Unit's recommendations and do so in a timely manner. This will insure that sound and proper appraisals are at hand for early settlement negotiations or for trial purposes.

For further information with respect to the processing and review of appraisal reports by personnel of the office of the U.S. Attorney, the Land and Natural Resources Division, and the acquiring agencies, see USAM 5-15.982 *Uniform Appraisal Standards for Federal Land Acquisition*, and 5-15.981 *A Procedural Guide for the Acquisition of Real Property by Governmental Agencies* at page 7 and pages 57-59, respectively.

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#### 5-15.963 Obtaining Additional Appraisals

The U.S. Attorney should not obtain an additional appraisal report until the existing appraisals have been analyzed by the Appraisal Unit and its recommendations received. Generally, an additional appraisal report should be obtained when there is a wide divergence in the opinion of value between two appraisers and their differences cannot be reconciled by the U.S. Attorney. It is usually desirable to obtain an additional appraisal when good market data is not available, or where large sums of money are involved. Where demolition of improvements is contemplated, or where the land is to be inundated or otherwise changed soon after the filing of condemnation proceedings, it is important to secure immediately any additional appraisal which might be needed, in order that the appraiser may view the property in its original condition.

For further guidance on obtaining additional appraisals, see USAM 5-15.981, *A Procedural Guide for the Acquisition of Real Property by Governmental Agencies* at pages 34-37.

#### 5-15.964 Selection of Qualified Appraisers and Other Experts

The selection and approval of appraisers and other experts is a joint effort of the U.S. Attorney and the Appraisal Unit. U.S. Attorneys should insist that the acquiring agencies which they represent use only appraisers who have been approved by the Department as being acceptable for presentation of expert testimony. Where appraisers who are not adequate for this purpose are employed, money is wasted, since it will be necessary to expend more money for additional appraisals of the same property, and the government may be required to change estimates of value in midstream, thereby impairing settlement opportunities. Where full cooperation is not being received from an acquiring agency in regard to the employment of experts, the matter should be referred to the Assistant Attorney General, Land and Natural Resources Division, for resolution.

#### 5-15.965 Fees for Appraisers and Other Expert Witnesses

Where expert witnesses' services are necessary, the U.S. Attorney must insure that the proposed fee is no more than the customary price for such services in the area. Where volume appraisal work is given to an appraiser, the more advantageous fees, which are possible because of volume, should be secured. In those instances where the U.S. Attorney is uncertain as to the appropriate fee for a given assignment, or where an unusually large fee is involved, the recommendation of the Appraisal Unit should be obtained. Sound business judgment must be exercised in negotiating for services to make sure that the United States is getting full value at not more than the locally prevailing rates. Witness fees must be on a daily rate basis and per diem rates should be accurately prorated to the fraction earned, unless circumstances make this unfair. Fees for appraisal reports should be negotiated on a flat fee basis.

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