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UNITED STATES DEPARTMENT OF JUSTICE

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POINTS TO REMEMBER

PROCEDURES WITH RESPECT TO NOTIFYING THE CIVIL DIVISION OF ADVERSE TRIAL COURT DECISIONS AND OF THE FILING OF APPEALS BY OUR OPPONENTS.

Title 6 of the United States Attorneys's Manual specifies that "in any case" in which the district court decision is adverse to the Government, in whole or in part, the United States Attorney must make a full report promptly to the appropriate Division of the Department. The Manual also requires, in cases in which the Government has prevailed in the trial court, that "When an appeal to a Court of Appeals is taken in a Government case by the adverse party, the United States Attorney shall advise the appropriate Division of the Department at once * * * * ". It has come to the Department's attention, however, that in an apparently growing number of instances in Civil Division cases, these provisions have been overlooked by some United States Attorneys. In view of the critical role which the notification requirement plays in the Department's work, all United States Attorneys are hereby requested to take those measures necessary to ensure full compliance with these provisions in all cases.

(Civil Division)

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POINTS TO REMEMBER

DJ FORM 130 (REPORT OF PERSONS IN CUSTODY . . .)

Your attention is called to Memo No. 714 and to Rule 46(g), F.R.Cr.P., which require United States Attorneys to file DJ Form 130 with the district court. Failure to do so may have adverse consequences, see United States v. William H. Calloway, 505 F.2d 311 (D.C. Cir. 1974), reported at 23 USA Bulletin 131 (No. 3).

(Criminal Division)

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EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974

On January 1, 1975, certain aspects of the Employee Retirement Income Security Act of 1974 became law. Under the Act, Section 1111 of Title 29, United States Code, any person who has been convicted of certain enumerated crimes is prohibited from serving as an administrator, fiduciary, officer, trustee, custodian, counsel, agent or employee of an employee benefit fund for a period of five (5) years following either a final conviction or the end of a prison term following a final conviction. Any person who knowingly and intentionally permits any other person to serve in such a capacity violates the statute and is also subject to imprisonment for one year and a fine of $10,000, or both.

The statute bars individuals who have been convicted of the following substantive offenses: robbery, bribery, extortion, embezzlement, fraud, grand larceny, burglary, arson, a felony violation of Federal or State law involving substances defined in Section 802(6) of Title 21, murder, rape, kidnapping, perjury, assault with intent to kill, any crime described in Section 80a-9(a)(1) of Title 15, a violation of any provisions of this Act (29 U.S.C. 1111, 1131, 1141), a violation of Section 186 of this Title, a violation of chapter 63 of Title 18, a violation of Section 874, 1027, 1503, 1505, 1506, 1510, 1951 or 1954 of Title 18, or a violation of the Labor-Management Reporting and Disclosure Act of 1959 (29 U.S.C. 401). Any person who is convicted of a conspiracy or an attempt to commit any of these offenses or a crime in which any of these offenses is an element is also prohibited from serving as an employee of a benefit plan in the enumerated capacities.

As you will note, the statute, while much broader in scope and with no exception for clerical or custodial personnel, is essentially the same as the prohibitory provisions of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. 504, which was the subject of a United States Attorneys Bulletin item on July 26, 1974. It is the intent of the Criminal Division to adopt the same procedure in enforcing this statute as is set forth in that Bulletin item.

In order to secure uniformity of enforcement and to facilitate enforcement, the Management and Labor Section of the Criminal Division has been designated responsibility for originating all enforcement actions under both Sections 504 and 1111. All United States Attorneys and Organized Crime Strike Forces are therefore requested to notify in writing the Management and Labor Section of the Criminal Division of any future convictions. Such notification should include a copy of the judgment of conviction, order of sentence and any notice of appeal pertaining to the offending individual and any information concerning organizations with which he is maintaining a prohibited relationship. Upon receipt of this notification, the Management and Labor Section will, as it has in the past, notify the individual in violation and the chief executive officer, or officers of the appropriate labor organization or employee benefit plan of the prohibition contained in Section 504 or 1111 to give them the opportunity to terminate any prohibited relationship. The Management and Labor Section will furnish copies of letters of notification to the appropriate United States Attorney or Strike Force and will notify that office of any results received from the letter or notification so that the United States Attorney or Strike Force may institute prosecutions when necessary. No prosecution under either section of the statute should be commenced without prior notification to the Management-Labor Section.

(Criminal Division)

ANTITRUST DIVISION
Assistant Attorney General Thomas E. Kauper

DISTRICT COURT

CLAYTON ACT

ACQUISITION IN THE INDUSTRIAL RENTAL GARMENT BUSINESS HELD TO BE IN VIOLATION OF SECTION 7 OF THE CLAYTON ACT.

United States v. Blue Bell, Inc., et al., (Civ. 7004; February 19, 1975; DJ 60-202-037-5)

On February 19, 1975, Judge L. Clure Morton of the U.S. District Court for the Middle District of Tennessee, Nashville Division, filed Findings of Fact and Conclusions of Law in which he held that the effect of Blue Bell's July 1972 acquisition of the assets of Genesco's industrial rental garment business may be substantially to lessen competition in the manufacture and sale of industrial rental garments to rental laundries throughout the United States, in violation of Section 7 of the Clayton Act. On the same day, Judge Morton filed a Memorandum Opinion and Order holding that 14 exhibits that had been offered by the Government at trial, which were based on a survey of industrial rental garment manufacturers conducted in connection with this case by the Government, were admissible. The Court had reserved ruling on the admissibility of the exhibits at trial, which took place in May 1974.

At the time of the acquisition, Blue Bell and Genesco had been competitors in the manufacture and sale of industrial rental garments, which are work clothes of a type made for sale to industrial laundries. At trial, the Government contended that a line of commerce limited to sales of industrial rental garments to rental laundries (excluding sales of similar or identical garments to other classes of customers) was an appropriate one for judging the competitive effects of the acquisition, and that manufacturers' sales of industrial rental garments to laundries that they own should not be included in computing total sales in the market.

At trial, Blue Bell presented two lines of defense. First, Blue Bell claimed that the line of commerce should include all sales of all types of work clothing, including not only industrial rental garments sold to rental laundries but retail work clothing made for sale over the counter to individuals and work clothing made for and sold directly to industrial concerns. Second, Blue Bell claimed that whatever the market, the acquisition had no anticompetitive effect because (1) Genesco would have got out of the industrial rental garment business by liquidating its industrial rental garment division if it had not sold the division's assets to Blue Bell (although Blue Bell did not claim that the division was a failing company), and (2) the key personnel of Genesco's rental garment business had, immediately after the acquisition, joined another company which then entered the market, in effect replacing Genesco's rental garment division and eliminating whatever anticompetitive effect the acquisition might otherwise have had.

In its Findings of Fact and Conclusions of Law, the Court found in favor of the Government's position on all issues. The Court found that industrial rental garments had a number of the indicia which, under Brown Shoe Co. v. United States, 370 U.S. 294, 325 (1962), delineate a line of commerce, including industry recognition, peculiar characteristics and uses, distinct customers, distinct prices and specialized vendors. The Court agreed that the line of commerce was properly limited to sales to rental laundries, and that manufacturers' sales to their affiliated laundries were not part of the market.

In holding that the acquisition gave rise to a probable substantial lessening of competition, the Court found that Blue Bell was the largest firm in the market, with 23% of sales, while Genesco ranked fifth with 7.5%. Both firms were viewed in the industry as among the leading competitors, and both had nationwide distribution systems which gave them an advantage in competing with smaller firms in the market. The market, the Court found, was "highly concentrated," with the two largest firms accounting for 44.7% of all sales to unaffiliated laundries in the year before the acquisition, the four largest accounting for 69.7% and the eight largest accounting for

80.9%. The Court also found that there were significant barriers to the entry into the market of new firms.

Addressing Blue Bell's defenses, the Court said that Genesco's intention to divest itself of its industrial laundry division was immaterial, in the absence of facts that would establish a failing company defense. The Court held that the entry of a new company into the market using former Genesco personnel did not materially affect the market or dilute Blue Bell's market power, and that Blue Bell had shown no other facts sufficient to rebut the Government's prima facie showing of anticompetitive effect.

The Court concluded that the Government is entitled to a judgment ordering divestiture of the acquired assets under terms and conditions that will insure the prompt restoration of the acquired business as a competitive entity. The Court has scheduled a hearing for March 28, at which it will consider the terms of the final judgment to be entered.

At the same time it filed its Findings of Fact and Conclusions of Law, the Court filed a Memorandum Opinion and Order holding that 14 exhibits offered at trial by the Government, as to which the Court had reserved its ruling on admissibility, were admissible. The exhibits in question included substantially all of the evidence on which the Government had based its contentions as to the acquired and acquiring companies' market shares and the extent of concentration in the market.

Before trial, the Government had conducted a survey in order to establish the "universe" of sales in the relevant market, and to compile figures showing the extent of affiliated laundries' purchases from their affiliated manufacturers. The survey was conducted by sending a questionnaire to each firm known to or believed by the Government to have been engaged in the manufacture and sale of industrial rental garments, asking for each firm's sales of industrial rental garments to affiliated rental laundries, unaffiliated rental laundries, and all others. The term "industrial rental garments" was defined in the questionnaire to correspond to what the Government contended was the relevant product market in the case. The

results were compiled by Dr. Curtis Knight, of the Division's Office of Economic Policy, who testified at trial to lay the foundation for the admission of the 14 exhibits reflecting the results of the survey.

At trial, after a lengthy voir dire examination of Dr. Knight, Blue Bell objected to the admission of the survey exhibits. While conceding that the results of such a survey might be admissible, although hearsay, if there were sufficient guarantees of necessity and trustworthiness, Blue Bell's counsel argued that in this case neither element had been established. The element of necessity was absent, Blue Bell argued, because the Government could have obtained the information by taking depositions of the 37 companies surveyed, at which Blue Bell would have had an opportunity for cross-examination. Blue Bell argued that the element of trustworthiness was absent, contending that the terms of the survey questionnaire were ambiguous; that the responses were compiled in an inconsistent manner by the Government; that because certain of the responses were communicated to Dr. Knight over the telephone, and were not reflected in written responses by the companies, that there was no way to verify their accuracy; and that the survey didn't include every firm in the market.

In its Memorandum Opinion, the Court held that although the Government's survey evidence was not entirely free from error, it presented a sufficiently accurate picture of the industrial rental garment market and of Blue Bell's and Genesco's positions in the market.

The Court said that the element of necessity is present where survey evidence can be used to expedite proof of relatively complex issues, and where alternative methods of proof would unnecessarily lengthen the trial. While the Government could have obtained sales information by deposing each of the companies in the market, the Court said, the use of a survey was a reasonable alternative method of obtaining the objective data sought.

As to the element of trustworthiness, the Court found that there were sufficient guarantees of trustworthiness to assure the reliability of the survey results. First of all, the Court said, the questionnaire sought only objec-

tive data, which were taken from the records of the companies who responded. The terms of the questionnaire, the Court found, were clear enough to provide reasonable assurance that the data supplied were the data requested. Reliability was further guaranteed by the fact that the Government provided a copy of the survey questionnaire and a list of the companies to which it was sent to the defendants at the time it was sent out, and promptly furnished to the defendants copies of each company's response. To the extent that Dr. Knight used data that wasn't included in the companies' responses, copies of Dr. Knight's memoranda of his communications with representatives of those companies were turned over to defendant's counsel. In any event, the Court said, with few exceptions the data recorded in Government's exhibits were based on the companies' written responses. Finally, the Court said, the use of estimates by some of the companies in preparing their responses did not detract from the usefulness of the data, since company officials who made the estimates must be assumed to be familiar enough with their business to permit reliable estimation.

In concluding that there were no significant omissions among the firms surveyed by the Government, the Court relied on the testimony of industry witnesses identifying their competitors in the manufacture and sale of industrial rental garments, and on the fact that each of the firms identified by Blue Bell in response to an interrogatory asking Blue Bell to identify each of its competitors in the manufacture and sale of industrial rental garments had been included in the survey.

Staff: Charles S. Stark, James W. Winchester, Michael P. Harmonis and Curtis H. Knight

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CIVIL DIVISION
Acting Assistant Attorney General Irving Jaffe

COURT OF APPEALS

AVIATION

THIRD CIRCUIT SUSTAINS ORDER OF THE NATIONAL TRANSPORTATION SAFETY BOARD WHICH PUT AN AIRLINE OUT OF BUSINESS FOR SAFETY VIOLATIONS.

Air East, Inc., d/b/a Allegheny Commuter, et al. v. NTSB, et al. (C.A. 3, Nos. 74-1542, 74-1914 to 1918; decided March 13, 1975; D.J. 88-205 to 209).

The FAA revoked the licenses of Allegheny Commuter, an air taxi service in Pennsylvania, and four of its chief officers upon finding numerous improper and unsafe company practices such as overloading flights, falsification of pilot check records, failure to record mechanical deficiencies, improper maintenance, flying below specified altitudes, and unauthorized landing approaches. The National Transportation Safety Board sustained this decision.

On the airline's petition for review, the Third Circuit has just affirmed the revocations. The court held that due process does not require notice or hearing before the revocation because of the obvious threat to air safety, that the NTSB's hearing after the revocations was fair, that the findings against the airline were supported by substantial evidence, and that the sanction was not excessive. The Court of Appeals observed, in rejecting the airline's due process argument, that if the summary seizure of property to collect taxes meets constitutional standards, surely there can be no doubt that summary revocation of an airline's authorization to operate similarly meets due process requirements where the continued flight operations would pose a threat to the lives of the airline's passengers.

This is the first instance in which the FAA and NTSB have put an airline permanently out of business because of safety infractions. And the affirmance by the Court of Appeals should deter future negligent, deceptive and unsafe airline practices and thus reduce the mounting number of air passenger deaths.

Staff: Anthony J. Steinmeyer (Civil Division)

SERVICE CONTRACT ACT: STATUTE OF LIMITATIONS

FOURTH CIRCUIT HOLDS THAT ACTION UNDER SERVICE CONTRACT ACT NOT TIME-BARRED BY TWO-YEAR STATUTE OF LIMITATIONS OF PORTAL-TO-PORTAL ACT.

United States of America v. Deluxe Cleaners and Laundry, Inc. (C.A. 4, No. 74-1322, March 4, 1975; D.J. 77-67-344).

The United States brought this action on July 31, 1975 pursuant to section 5(b) of the Service Contract Act of 1965, 41 U.S.C. 354(b), to recover 1967 and 1968 underpayments of minimum wages due employees of Deluxe Cleaners and Laundry, Inc. The district court held the action time-barred by the two-year statute of limitations provision of the Portal-to-Portal Act of 1947, 29 U.S.C. 255. The Government appealed, contending that the Portal Act, which applies to actions for unpaid minimum wages under the Fair Labor Standards, Walsh-Healey, and Bacon-Davis Acts, was inapplicable to this suit under the Service Contract Act while 28 U.S.C. 2415(a), the six-year statute of limitations on claims of the United States founded on contract, was directly applicable. The Fourth Circuit accepted our position that "the present action was subject only to the general period of limitation of six years prescribed by 28 U.S.C. §2415" and remanded for consideration of the merits.

Staff: Karen K. Siegel (Civil Division)

SOCIAL SECURITY ACT: ATTORNEY FEES

NINTH CIRCUIT HOLDS THAT A DISTRICT COURT MAY AWARD A DISABILITY CLAIMANT'S ATTORNEY A FEE ONLY FOR THE ATTORNEY'S REPRESENTATION OF THE CLAIMANT BEFORE THE DISTRICT COURT.

MacDonald v. Weinberger (C.A. 9, No. 74-2734, March 4, 1975; D.J. 137-8-179).

After having successfully represented a social security disability claimant, an attorney petitioned the district court for an attorney's fee. 42 U.S.C. 406(b)(1) authorizes a district court to award to an attorney who successfully represents a disability claimant before the court, a "reasonable fee for such representation." In the instant case, the lower court awarded the attorney a fee for his services both before the court and at the administrative level; moreover, the fee awarded was twice the attorney's usual fee. The government appealed, contending that 42 U.S.C. 406(b)(1) authorizes an attorney's fee only for representation before the court. Since the attorney's fee award in a disability case comes directly out of the past-due benefits awarded the claimant, we also appealed, as unreasonable, the award of twice the attorney's usual fee.

On appeal, the Ninth Circuit completely upheld the government's position and held, "[t]he court has no authority to award an attorney's fee for representation of a claimant before the Secretary, that power being granted by 42 U.S.C. 406(a) to the Secretary alone." The court also found that in the instant case, the district court's award of twice the attorney's usual fee was unreasonable.

Staff: Donald Etra (Civil Division)

CRIMINAL DIVISION
Acting Assistant Attorney General John C. Keeney

FIREARMS MATTERS

JUSTICE-BUREAU OF ALCOHOL, TOBACCO AND FIREARMS PROGRAM TO PREVENT FELONS FROM BUYING HANDGUNS.

On November 1, 1974, Rex D. Davis, Director of the Bureau of Alcohol, Tobacco and Firearms (ATF), announced ATF's "Significant Criminal Enforcement Program." This program is designed to identify major criminals in each judicial district and allocate resources toward the most significant firearms and explosives cases.

In connection with this program, ATF and the Department of Justice are conducting a survey to determine to what extent felons are buying handguns by making false statements on firearms purchase forms in violation of 18 U.S.C. 922(a)(6). In November 1974 Greenville, South Carolina, was selected as the city to be surveyed.

Teams of ATF special agents were dispatched to major firearms dealers in that city. They audited dealers' books and photographically copied all those dealers' records of handgun sales for a selected six-month period in 1974. ATF Headquarters has sent approximately 2,000 names and addresses of these purchasers to the FBI for name checks to determine if any of the purchasers are previously convicted felons. A profile of felon purchasers will be developed which will include such information as age, race, the number of firearms purchased, the type of gun purchased, the type of dealer and the accessibility of the store to interstate highways, etc. This profile may help to identify locations where felons might tend to purchase firearms; e.g., discount stores, small proprietorships, etc.; the type of firearms most likely to be purchased by felons; e.g., small handguns, inexpensive handguns, etc.; and the type of felons most likely to purchase handguns. This information may be useful in a program of selected firearms record checks.

The project has identified a number of persons who purchased handguns in quantities of up to thirty in the six-month period, and investigations are being made to determine if any of them are unlicensed firearms dealers. Unlicensed dealers are a popular source of firearms for felons.

The Greenville area was chosen because in a 1973 ATF survey entitled "Project Identification," Greenville was identified as one of the major sources of illegal handguns found in New York City.

The Department of Justice and ATF are currently discussing other target cities in which surveys similar to the Greenville survey might be conducted.

Another example of ATF's continuing emphasis on significant firearms and explosives cases was the December 11, 1974, ATF mass arrest of 23 felons who had illegally purchased firearms in the Philadelphia area. In that raid, ATF Director Rex D. Davis and United States Attorney Robert E. J. Curran, (E.D. Pa.) closely coordinated a four-month investigation into the activities of firearms dealer Dominick DiPlacido, who had been selling firearms to felons in his "Old, Odd, and Otherwise Gun Shop" in Prospect Park, a Philadelphia suburb. The felons arrested were charged with making false statements in connection with the purchase of a firearm, 18 U.S.C. 922(a)(6), and the illegal receipt of a firearm by a felon, 18 U.S.C. App. 1202. More than one-half of those arrested have already pled guilty.

It is expected that ATF will conduct similar enforcement actions in other Judicial districts in the future.

LAND AND NATURAL RESOURCES DIVISION
Assistant Attorney General Wallace H. Johnson

COURTS OF APPEALS

ENVIRONMENT

SECTION 313 OF THE WATER ACT REQUIRES FEDERAL FACILITIES TO COMPLY WITH BOTH STATE SUBSTANTIVE STANDARDS AND PROCEDURAL REQUIREMENTS, INCLUDING PERMIT REQUIREMENTS.

State of California v. EPA and State of Washington v. EPA (C.A. 9, Nos. 73-2466, 73-2486, 74-1189, Feb. 13, 1975; D.J. 90-5-1-5-14, 90-5-1-5-16, 90-5-1-5-36).

When California and Washington submitted their permit program proposals to EPA for the Agency approval which is prerequisite to States assuming National Pollutant Discharge Elimination System (NPDES) permitting authority under Section 402 of the FWPCA, the Administrator approved both programs, but only insofar as they did not extend state permitting power to federal facilities. The two States filed petitions for review of the Administrator's action. At issue was the meaning of Section 313 of the Water Act, the federal facilities provision, which states that federal facilities "shall comply with Federal, State, interstate, and local requirements respecting control and abatement of pollution to the same extent that any person is subject to such requirements * * *." 33 U.S.C. sec. 1323. That provision is modeled after Section 118 of the Clean Air Act, 42 U.S.C. sec. 1857f.

The two courts of appeals which have confronted the issue of federal facility compliance in cases relating to air pollution have rendered conflicting interpretations of Section 118. Kentucky v. Ruckelshaus, 497 F.2d 1172 (C.A. 6, 1974), certiorari granted, March 17, 1975; Alabama v. Seeber, 502 F.2d 1238 (C.A. 5, 1974), certiorari pending. The Sixth Circuit concluded that federal facilities need comply only with state substantive requirements, but not with state procedural permitting requirements. In Seeber the Fifth Circuit reached a contradictory conclusion, holding that both substantive and procedural compliance with state requirements are compelled by Section 118. In

the California and Washington cases the Ninth Circuit took a position which accords with that of the Fifth Circuit in Seeber, holding that Section 313 of the FWPCA requires compliance with state substantive standards and with state permit procedures, and the court remanded the matter to EPA for action on the state permit program proposals consistent with the February 13 holding.

Key to the court's holding was its finding in Section 313 of an unambiguous waiver of federal immunity from state regulation; thus, the government contention that such a waiver went only as far as substantive discharge standards was rejected.

Staff: Raymond A. Mushal (Land and Natural Resources Division).

ENVIRONMENT

CLEAN AIR ACT, AUTHORITY OF ADMINISTRATOR TO REVIEW TECHNOLOGICAL FEASIBILITY OF IMPLEMENTATION PLAN.

St. Joe Minerals Corporation v. EPA, 7 E.R.C. 1465 (C.A. 3, No. 72-1543, Jan. 29, 1975; D.J. 90-5-2-3-44).

St. Joe Minerals Corporation, which operates a zinc smelter in Monaca, Pennsylvania, challenged EPA's approval for federal enforcement purposes of an emission limitation for control of sulfur dioxide from its zinc smelter imposed by the Pennsylvania implementation plan. The challenge was made in the Third Circuit Court of Appeals pursuant to Section 307(b)(1) of the Clean Air Act.

Upon remand to EPA, the Agency found that the emission limitation was stricter than necessary to meet the national sulfur dioxide ambient air quality standards in the area of the smelter and that it was not possible with present technology for the smelter to achieve the applicable emission limitation for sulfur dioxide. The court of appeals held that, given these particular circumstances, EPA was required to disapprove that emission limitation applicable to St. Joe Minerals Corporation's smelter.

Staff: John E. Varnum (Land and Natural Resources Division).

DISTRICT COURTS

NEPA

EIS ADEQUATE WHERE EACH SEGMENT OF URBAN RENEWAL ACTION YEAR HAS INDEPENDENT JUSTIFICATION.

Citizens Against the Destruction of Napa, et al. v. Lynn, et al. (N.D. Cal., No. C-73-1553 WHO; Feb. 3, 1975; D.J. 90-1-4-773).

Plaintiffs sought to enjoin HUD from funding a fourth "action year" of urban renewal in the City of Napa's Parkway Plaza Project under the Neighborhood Development Project of the Housing Act of 1949 and the Housing and Urban Development Act of 1968. Plaintiffs' main argument challenged the sufficiency of the final Environmental Impact Statement (EIS) prepared and filed pursuant to NEPA. The EIS discussed only the potential environmental consequences of urban renewal under the fourth action year (a three-block area) and did not discuss the consequences of future projects proposed for Napa's downtown area (an additional eight-block contiguous area).

The district court refused to apply either the "coercive effect test" or the "nexus test" developed by courts in the highway cases to require an EIS to discuss all present and future segments of a federally financed project. The court held that each segment of an urban renewal project, although interrelated, had an independent justification and furthermore that "the authors of the EIS could not, at this time, predict what development, let alone federally aided development, will transpire in the Project in the future."

The court further held that "An EIS need not be the size of the Manhattan telephone book in order to comply with NEPA; it need only inform the decision makers and the public of the environmental risks and benefits of the proposed project," and "suggest reasonable alternatives for consideration."

Staff: Gary Fisher (Land and Natural Resources Division) and Assistant United States Attorney Rodney H. Hamblin (N.D. Cal.).

JURISDICTION

SOVEREIGN IMMUNITY BARS SUIT FOR SPECIAL BENEFIT ASSESSMENT.

United States of America v. City of Adair (Civil No. 74-179-1, S.D. Iowa, Feb. 7, 1974; D.J. 90-1-5-1405).

This was an action against the City of Adair, Iowa, to recover the erroneously paid first installment of its street paving benefit assessment levied against property owned by the Commodity Credit Corporation, an agency of the United States under 15 U.S.C. sec. 714. The City claimed that authority for this assessment is found in 15 U.S.C. sec. 713a-5, which provides that any real property owned by the Commodity Credit Corporation is subject to "* * * State, Territorial, county, municipal or local taxation to the same extent according to its value as other real property is taxed."

On the United States' motion for summary judgment, the court held that 15 U.S.C. sec. 713a-5 waives federal immunity from local ad valorem taxation but does not waive the immunity of property of the United States from taxation in the form of local special benefit assessments. Therefore, the City's street paving benefit assessment was declared null and void, and the erroneously paid portion of it was returned to the Commodity Credit Corporation.

Staff: Assistant United States Attorney James R. Rosenbaum (S.D. Iowa) and Ms. Ronnie Shorenstein (Land and Natural Resources Division).

ENVIRONMENT

NEPA-CLEAN AIR ACT: CITIZENS' SUIT: FEDERAL SALE OF ELECTRICAL ENERGY.

Sierra Club, et al. v. Donald P. Hodel (Civ. No. 740-73C2, W.D. Wash., Oct. 4, 1974, Nov. 12, 1974; D.J. 90-5-2-3-367.

Plaintiffs, three environmental groups, sought in this suit to enjoin the Bonneville Power Administration from furnishing electrical power service to a subsidiary of ALCOA at a magnesium smelter being constructed in eastern Washington. The suit was grounded

on arguments to the effect that Bonneville had not prepared an environmental impact statement for the contract amendment (executed in 1970) under which the service is to be supplied, that such statement was required because of alleged environmental impacts deriving from operation of ALCOA's plant, such as air pollution, industrialization of a rural valley, noise, and increased population--all being the argued result of Bonneville's provision of electrical power to ALCOA under the contract, that additional environmental impacts of argued increased construction and operation of thermal and other power generating equipment, allegedly resulting from Bonneviole's "allocation" of electrical energy to ALCOA, are required to be studied in such a statement, and that Bonneville was participating in a violation of the Clean Air Act's "significant deterioration" proscription by furnishing electrical power to the plant.

The defense of the suit was based upon the failure of the complaint to meet the requirements of the Clean Air Act for "citizen suits" (sec. 304, 42 U.S.C. sec. 1857h-2), since no violation of an "emission standard or limitation" was alleged, and since the 60-day notice requirement was not met. Also, the action of Bonneville in building the transmission line to the plant was preceded by an environmental impact statement treating such action. The defense maintained that the EIS need not be expanded to cover all of the demographic impacts from construction and operation of the plant, since these impacts were ALCOA's impacts, not Bonneville's, and since the state and local licensing authorities had acted, as to such impacts (after preparation of impact statements under the Washington Environmental Policy Act), and had approved the ALCOA plant. Finally, the additional power to be provided ALCOA under the contract amendment was "interruptible" hydroelectric power, which is only marketed when a water surplus provides excess generating capacity which would be wasted if the power is not generated and sold; therefore, no "allocation" of electrical energy was made by the 1970 Bonneville contract amendment, and no "energy-resource" environmental impacts could result from this sale.

The district court, after hearing on motion for summary judgment, dismissed the complaint. Upon plaintiffs' motion for injunction pending appeal, the court wrote a Memorandum and Order essentially adopting the above points argued by the Government. Particularly

important is the court's statement, "Nothing in the National Environmental Policy Act or any of the other statutes cited authorizes suits brought against alleged Clean Air Act violations or vitiates in any way the limitations upon such actions imposed by the Clean Air Act itself. Also, the court distinguished the case of National Forest Preservation Group v. Butz, 485 F.2d 408 (C.A. 9, 1973), from the power supply relationship in this case.

An expedited appeal schedule has been set by the Ninth Circuit.

Staff: Assistant United States Attorney Bruce D. Carter (W.D. Wash.) and Thomas C. Lee (Land and Natural Resources Division).

PUBLIC LANDS

WILD HORSE PROTECTION ACT HELD UNCONSTITUTIONAL; POWER UNDER PROPERTY CLAUSE LIMITED TO PROTECTING LAND, NOT ANIMALS THEREON.

State of New Mexico, et al. v. Rogers C. B. Morton, et al (Civil No. 74-127, D. N.M., Feb. 28, 1975; D.J. 90-1-12-443).

This controversy arose from the roundup of 19 unbranded and unclaimed burros on public lands by the New Mexico Livestock Board in accordance with the provisions of the state estray laws, but contrary to the provisions of the Wild Free-Roaming Horses and Burros Act, 16 U.S.C. secs. 1331-1340. The Board sold the burros at public auction, and the Federal Government demanded their return to the public domain asserting right to possession to the burros under the "Wild Horse Act."

Plaintiffs initiated this action seeking to enjoin the defendants from enforcing the "Wild Horse Act" on the grounds that the statute was unconstitutional in that it prevented plaintiffs from exercising their rights of ownership of unbranded and unclaimed horses and burros under the United States Constitution and the estray laws of the State of New Mexico. Defendants answered denying any claim of title to the burros but asserting the right to their possession under the "Wild Horse Act," and, therefore, filed a motion to dismiss

or, in the alternative, for summary judgment, asserting that Congress had the right to protect horses and burros on public lands under the Property Clause and Commerce Clause of the Constitution. Plaintiffs subsequently filed a motion for summary judgment.

On February 28, 1975, the three-judge court entered a judgment declaring the Wild Free-Roaming Horses and Burros Act unconstitutional and enjoining defendants from enforcing the operation of the act. In its memorandum opinion, observing that: (1) the "Wild Horse Act" appeared to be grounded on the Property Clause (Art. IV, sec. 3, cl. 2); (2) that wild horses and burros are not "property" of the United States simply by being on public lands; and (3) that each of the three cases upholding the power of the Federal Government to kill deer on public lands involved the "protection of the public lands from damage"; the court concluded that the "Wild Horse Act" could not be sustained as an exercise of power granted to Congress under the Property Clause of the Constitution, since it was "aimed at protecting the wild horses and burros, not at protecting the land they live on." Also, finding that there was no evidence in the record to establish that the burros migrated across state lines, the court rejected defendants' reliance upon the Commerce Clause.

Staff: Assistant United States Attorney James B. Grant (D. N.M.); John E. Lindskold (Land and Natural Resources Division).

ENVIRONMENT

NEPA; PURCHASE OF LAND, ALONE, IS NOT A MAJOR FEDERAL ACTION SIGNIFICANTLY AFFECTING THE QUALITY OF THE HUMAN ENVIRONMENT.

Harry P. Biesecker, Robert W. Klurk and Kenneth W. Guise v. Rogers C. B. Morton, et al. (D. Pa., Civil No. 74-1244; D.J. 90-1-4-1116).

Plaintiffs individually and as Commissioners of Adams County, Pennsylvania, brought suit to enjoin the National Park Service (NPS) from purchasing a tract of land within the boundaries of the Gettysburg National

Military Park. Plaintiffs' primary contention was that defendants had violated Section 102 of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. sec. 4321 et seq., as no EIS had been prepared relating to the sale. Plaintiffs claimed an EIS was necessary because (1) the purchase by the NPS was the initial step in a major redevelopment plan for the Park; (2) that the purchase of land itself was a major federal action significantly affecting the quality of the human environment. Their third claim was that defendants erred in not preparing a negative EIS.

The court denied plaintiffs' claims for the following reasons. First, it found as a fact that the purchase was only part of an ongoing policy to acquire inholdings and was unrelated to a major redevelopment project. Second, it held that mere purchase of land without more does not require compliance with NEPA citing United States, T.V.A. v. Three Tracts of Land in Alabama, 377 F.Supp. 613 (N.D. Ala. 1974).

Finally, the court held that a negative impact statement was not required because NEPA does not apply to a transaction which had no environmental impact.

Staff: Assistant United States Attorney Laurence M. Kelly (M.D. Pa.).