IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 83-C-2379 UNITED STATES OF AMERICA, Plaintiff, v. SHELL OIL COMPANY, Defendant.	CONSOLIDATED
Civil Action No. 83-C-2386 STATE OF COLORADO, Plaintiff, v. UNITED STATES OF AMERICA, et al., Defendants.	

UNITED STATES MEMORANDUM OF LAW
ON REPRESENTATION OF FEDERAL AGENCIES
BY THE DEPARTMENT OF JUSTICE

On June 24, 1988 this Court directed the parties to file briefs addressing whether the Department of Justice ("DOJ") had a conflict of interest due to its responsibility to represent the United States in this litigation which involves issues concerning both EPA, the agency charged with overseeing cleanup of Rocky Mountain Arsenal, and the Army, the agency partially responsible for the contamination of the Arsenal. In response, the United

States submits that there is no conflict either factually or legally. [1]

Both state and federal governments are composed of various branches and departments, not all of which function in complete harmony. It falls to the executive branch of state and federal governments to ensure that when the "government" speaks, it speaks with one voice. In that sense the Attorney General's Office of the State of Colorado might also be asked if it too has a conflict. Such a question, however, need not be put to the State Attorney General, nor in this context, to the Department of Justice. Obviously, in the course of negotiating this Consent Decree and accompanying agreements, there were some disagreements. Those disagreements, however, were properly resolved in the context of the federal Executive branch's decision-making process. The State has done a disservice by confusing those inter-agency and intra-agency deliberations with the issue of DOJ's legal representation of the federal government. As evidenced by each concerned agency's signature on the modified Consent Decree, the Decree now before the Court represents the position of the various Executive departments and agencies. Because that Decree represents a unified federal position, reached through the Executive branch's decision-making process, there is no conflict in DOJ's representation of the United States, acting through the federal agencies signatory to this modified Decree. Moreover, as set forth below, the Justice Department may never have a "conflict of interest" in representing federal agencies.

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[1] CERCLA provides that in addition to the Army and the Environmental Protection Agency ("EPA"), the Department of the Interior ("DOI") and the Agency for Toxic Substances and Disease Registry ("ATSDR") shall have a role in Arsenal clean-up, CERCLA §§ 122(j) and 104(i), 42 U.S.C. §§ 9604 and 9622.

Proper consideration was given to the perspectives of the agencies which participated in the formulation of this Decree as is evidenced by the declarations of Colonel Wallace Quintrell, Program Manager for Rocky Mountain Arsenal, and Mr. Jim J. Scherer, Regional Administrator, Region VIII, EPA, (attached respectively as Exhibits I and II). As those affidavits indicate, the modified Decree, including the provisions on use restrictions, represent the uniform decision of the responsible federal agencies. DOJ's role here is limited to the vigorous representation of the United States' legal position with respect to that modified Consent Decree. As set forth below, DOJ's simultaneous representation of several federal agencies is not uncommon and indeed is a duty mandated by statute.

Section 5 of Executive Order 6166 clearly establishes DOJ as the United States' chief legal office. That order states, "As to any case released to the Department of Justice for prosecution or defense in the Courts, the function of the decision whether and in what manner to prosecute, or to defend, or to compromise, or to appeal or to abandon prosecution or defense, now exercised by any agency or officer, is transferred to the Department of Justice."[2]

Subsequent statutory codification incorporates the essence of that order by providing that the Attorney General of the United States, through the offices of the Department of Justice, except as otherwise authorized by law, is empowered to conduct all litigation in which the United States, an agency or officer thereof, is a party or has an interest.[3] Indeed the head of an executive department or military department may not employ any attorney or counsel for the conduct of litigation in which the United States or agency thereof is a party, or is interested,

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2 5 U.S.C. § 901 (June 10, 1933).

3 28 USCS §§ 501, 516, 517 and 518.

without the consent of the Attorney General. Rather, such matters shall be referred to DOJ.[4]

Aside from those general statutory provisions addressing the authority of the Attorney General, Congress in Sections 122(d) and (h) of CERCLA, 42 U.S.C. § 9622, expressly provided for the DOJ's participation in both cleanup and settlement agreements. Section 122(d)(1)(A) of CERCLA requires prior approval by the Attorney General for any remedial action agreement under Section 106 which is entered in Court as a Consent Decree by the President. Section 122(h)(1) of CERCLA further stipulates that where the cost of response exceeds $500,000, prior written approval of any settlement must be made by the Attorney General. DOJ's role in the instant litigation is consistent with the duties specified in these provisions of CERCLA.

Moreover, in addressing the President's enforcement responsibilities under CERCLA, 42 U.S.C. § 9615 et seq., Executive Order No. 12580 expressly states that, "[T]he conduct and control of all litigation arising under the Act shall be the responsibility of the Attorney General."[5] The Presidential intent to centralize CERCLA litigation in the hands of the Attorney General could not have been made more clear.

Caselaw recognizes that where an agency of the government is party to an action, Courts must look through the nominal party and treat the case as one in fact against the United States, Harlem River Produce Co. v. Aetna Cos. & Sur. Co., 257 F. Supp. 160, 165 (S.D.N.Y. 1985). See also Union Nat. Bank of Clarksburg W. Va. v. McDonald, 36 F. Supp. 46, 47 (N.D.W.Va. 1940). Here the United States is the nominal party as well as the real party in interest.

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4 5 USCS § 3106.

5 E.O. 12580, Jan 23, 1987, 52 F.R. 2923.

Under 28 U.S.C. §§ 516, 518, Congress has granted the Attorney General plenary power and supervision over all government litigation, including litigation involving regulatory agencies United States v. Jones & Laughlin Steel Corp., 804 F. 2d. 348, 352 (6th Cir. 1986). See also Confiscation Cases, 7 Wall, (74 U.S.) 454, 458; 19 L.Ed. 196 (1868).

Courts have long recognized that the Attorney General is charged with the duty of representing the United States and its various agencies including the Army and EPA. "The Attorney General is charged with the duty of rendering all legal services essential to the operations of the Executive Branch. He also carries the burden of litigation to which the United States or any of its agencies is a party. These responsibilities are discharged through the Department of Justice, and the department's legal business embraces the requirements and activities of various governmental agencies." Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, 40 F.R.D. 318, 325 (D.DC. 1966) (Emphasis added).

Sound reasons exist for vesting central authority for the conduct of litigation involving the United States in the Attorney General. As Justice Blackmun recently stated, "Among the reasons for reserving litigation in the Court to the Attorney General and the Solicitor General, is the concern that the United States usually should speak with one voice before this Court, and with a voice that reflects not the parochial interests of a particular agency, but the common interests of the Government and therefore of all the people". United States v. Providence Journal Company, 56 LW 4366, 4370 (May 2, 1988) (Emphasis added). Justice Blackmun's observation was not merely a comment on the confusion that might result if legal representation of the United States was not centralized in the Attorney General. His comment bespeaks a firm understanding of the proper relationship between

the President, the Executive and Military Departments and the Department of Justice. An earlier Court addressing that same point summed up that relationship, and the reasons therefore as follows, "The principal not only centralizes responsibility for the conduct of public litigation but enables the President, through the Attorney General, to supervise the various policies of the Executive Branch. The alternative would allow a proliferation of policies among and within the various agencies". I.C.C. v. Southern Ry. Co., 534 F. 2d 435, 536 (5th Cir. 1976).

Former Assistant Attorney General Mr. F. Henry Habicht II in a statement to Congress, emphasized the Justice Department's duty to ensure that such a "proliferation of policies" does not occur. As Mr. Habicht noted, "[T]he Justice Department does not support one meaning of a statute in one action and another in a different lawsuit. The United States government has an obligation to the public it serves to decide on a view of the law and adhere to that view in all its dealings with the courts and public."[6]

The consequences of failing to conform to this division of responsibility are made clear in State of Tennessee v. Dole, 567 F. Supp 704 (M.D.Tenn. 1983). In that case the Department of Transportation ("DOT") attempted to withhold monies from the State of Tennessee's account with the Federal Highway Administration because of the State's recovery of some program funds from its contractors. DOT initiated action without considering that an Assistant Attorney General in the Anti-Trust Division had rendered an opinion that the United States had no claim on such monies recovered by the State. In a ruling which focused on the Attorney General's plenary power to control all

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[6] Statement of F. Henry Habicht II, Assistant Attorney General, Land and Natural Resources Division, before the Subcommittee on Oversight and Investigations, Committee on Energy and Commerce, House of Representatives, Concerning Federal Facility Compliance with Environmental Laws, April 28, 1987.

litigation in which the United States or an agency is party, the Court held that inconsistent positions taken by Executive agencies constituted misconduct and fundamental unfairness. In holding that DOT was estopped from recovering funds from Tennessee, the Court deferred to the Attorney General as the spokesman charged with attending to the interests of the United States in a case pending in federal or state court, State of Tennessee v. Dole, Supra at 720. This case makes clear the need for the United States to speak with one voice before the Court and further recognizes that, with minor exceptions, that voice is the voice of the Attorney General of the United States.

In its capacity as the chief legal office of the United States, the Department of Justice has frequently represented government agencies with divergent interests. Nowhere are those interests drawn more sharply into focus than in cases involving the adjudication of water rights by Indian tribes. In those cases the United States acts as trustee for the tribes and represents the interests of various federal reclamation projects. In White Mountain Apache Tribe v. Clark, 604 F Supp 185 (D. Arizona, 1984), The White Mountain Apache Tribe ("Tribe") brought an action seeking to permanently enjoin the Attorney General from asserting water rights claims on behalf of the United States as trustee for the Tribe in an ongoing water adjudication in Arizona State Court. The Tribe asserted, inter alia, that the Secretary of the Interior and other federal government officials were unable to represent the Tribe or its interests in the current water adjudication in state court due to a conflict between the Government's representation of the Tribe's interest and its representation of the interests of various federal reclamation projects. The Tribe alleged that this conflict had resulted in gross mismanagement of the reservation by the Secretary of the Interior, White Mountain Apache Tribe, Id. at 189. In addressing the conflict of interest issue the Court noted two recent Supreme Court cases that clearly rejected any notion of such a conflict

of interest. Quoting Nevada v. United States, 463 U.S. 110, 103 S Ct 2906, 77 L.Ed. 2d 509 (S.Ct. 1983), the Court reaffirmed that "the Government does not 'compromise' its obligation to one interest that Congress obliges it to represent by the mere fact that it simultaneously performs another task for another interest that Congress had obligated it by statute to do", Nevada, Id. at 2906. See also Arizona v. California, 460 U.S. 605, 103 S.Ct. 1382, 75 L.Ed. 2d 318 (S.Ct. 1983).

In specifically addressing the Tribe's allegation that the United States Attorney General should be enjoined from representing the Tribe because of the alleged conflict of interest the Court in White Mountain Apache Tribe stated, "The Court [has] determined that no statute exists under which the Court could exercise jurisdiction over the Attorney General's exercise of litigating judgement", Id. at 190. The decision in White Mountain Apache is relevant to this Court's considerations for two reasons. First, it recognizes that various agencies may have disparate duties given the statutory mandates under which each operates. Further though, it acknowledges that the mere fact that such is the case does not mean a fortiori that one interest is compromised. In the instant case no such statutory conflict exists as the Army, EPA, DOI and ATSDR under CERCLA are all tasked to clean up the Arsenal in a safe and expeditious manner and in a manner which is also "cost-effective". No contrary statutory mandate exists. Secondly, the Court in White Mountain Apache Tribe by refraining from review of the Attorney General's conduct of litigation evidences a prudent respect for the doctrine of separation of powers between the judiciary, legislative and executive branches of government.

Perhaps more to the point in the present case is the comment of the Court in Nevada v. United States, Supra at 2921, 2922, n.15. There the Court discusses the Department of Justice's involvement in the "Orr Ditch Litigation". Speaking to the

subject of the Departments representation of both DOI and the Bureau of Indian Affairs it noted, "[T]his conflict of purpose was apparent prior to and during the Orr Ditch proceedings and was resolved within the Executive department of government by top-level executive officers acting within the scope of their Congressionally-delegated duties and authority and were political and policy decisions of those officials changed with that responsibility --- the government lawyers in Orr Ditch, both departmental, agency and bureaus, as well as those charged with the responsibility for the actual conduct of the litigation, are not chargeable with an impermissible conflict of purpose or interest in carrying out the decisions and directions of their superiors in the Executive department of government . . . ."

The same conclusion reached by the Court in Nevada, must be the result here. Both EPA and the Army, by statute and inter-agency agreement, are charged with specific responsibilities for the clean-up of Rocky Mountain Arsenal. The provisions of the modified Consent Decree are consistent with the respective statutory duties of those agencies. No statutory "conflict" in their respective obligations exists. Moreover, to the extent that differences in approach and interpretation between the Army and EPA, as well as DOI and ATSDR existed, those differences were resolved in deliberations between each concerned agency. It cannot be said that by carrying out the joint decisions and directions of those executive branch agencies, the attorneys charged with the conduct of this litigation suffer from an impermissible conflict of interest. Indeed, as demonstrated above, such a conflict may not exist within the federal system. United States v. Providence Journal Co., Supra, 56 LW at 4370.

Respectfully submitted,

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