

# USALSA Report

United States Army Legal Services Agency

## Clerk of Court Notes

### Courts-Martial Processing Times

Average processing times for general and bad-conduct (BCD) special courts-martial whose records of trials were received by the Army Judiciary during the fourth quarter Fiscal Year (FY) 1998 are shown below.

#### General Courts-Martial

	1Q, FY 98	2Q, FY 98	3Q, FY 98	4Q, FY 98	FY 98
Records received by Clerk of Court	182	185	183	164	179
Days from charges or restraint to sentence	67	68	64	69	67
Days from sentence to action	87	96	98	106	97
Days from action to dispatch	19	17	8	10	14
Days en route to Clerk of Court	11	10	9	11	10

#### BCD Special Courts-Martial

	1Q, FY 98	2Q, FY 98	3Q, FY 98	4A, FY 98	FY 98
Records received by Clerk of Court	34	37	28	51	38
Days from charges or restraint to sentence	42	41	47	49	45
Days from sentence to action	58	86	97	90	83
Days from action to dispatch	11	16	8	4	10
Days en route to Clerk of Court	9	9	11	9	10

### Courts-Martial and Nonjudicial Punishment Rates

#### Fourth Quarter, FY 98

	ARMYWIDE	CONUS	EUROPE	PACIFIC	OTHER
GCM	0.35 (1.39)	0.34 (1.37)	0.60 (2.40)	0.22 (0.86)	0.49 (1.96)
BCDSPCM	0.14 (0.58)	0.15 (0.61)	0.21 (0.83)	0.06 (0.26)	0.00 (0.00)
SPCM	0.00 (0.02)	0.00 (0.00)	0.00 (0.00)	0.00 (0.00)	0.00 (0.00)
SCM	0.29 (1.40)	0.35 (1.40)	0.15 (0.60)	0.09 (0.34)	0.00 (0.00)
NJP	23.15 (92.62)	24.28 (97.12)	23.10 (92.39)	22.75 (91.00)	23.07 (92.28)

Based on an average strength of 477,967.

Figures in parenthesis are the annualized rates per thousand.

## Environmental Law Division Notes

The Environmental Law Division (ELD), United States Army Legal Services Agency, produces the Environmental Law Division Bulletin, which is designed to inform Army environmental law practitioners about current developments in environmental law. The ELD distributes its bulletin electronically in the environmental files area of the Legal Automated Army-Wide Systems Bulletin Board Service. Volume 5, number 11 and Volume 6, number 12 are reproduced in part below.

### United States District Court For the District of Columbia Dismisses Geronimo Suit for Lack of Standing

The United States District Court for the District of Columbia dismissed a suit<sup>1</sup> brought by a *pro se* individual and an organization seeking to compel the government to repatriate the remains of Geronimo, an Apache leader who is buried at Fort Sill, Oklahoma. The plaintiffs also demanded that Geronimo be given full military honors and that his prisoner-of-war status be removed. The court concluded that the plaintiffs lacked standing to maintain this suit.<sup>2</sup>

The plaintiffs based their claim on the Native American Graves Protection and Repatriation Act (NAGPRA).<sup>3</sup> The NAGPRA was enacted to protect Native American burial sites and to ensure removal of human remains on federal, Native American, and Native Hawaiian lands. The act requires federal agencies to return human remains upon request from a lineal descendant or a Native American tribe.<sup>4</sup>

The court found that the plaintiffs did not fall into the class given repatriation rights under the NAGPRA. The individual plaintiff did not allege that he was a descendant of Geronimo, and the organization plaintiff was not a Native American tribe. The court concluded that the plaintiffs could not claim injury

even if the Army was violating the NAGPRA by harboring Geronimo's remains at Fort Sill.<sup>5</sup>

The court considered a provision of the NAGPRA that gives district courts jurisdiction over "any action brought by any person alleging a violation of this chapter."<sup>6</sup> Although this provision seems to grant standing to the plaintiffs, they must also satisfy constitutional standing requirements for an injury-in-fact necessary to establish an Article III "case or controversy."<sup>7</sup> The court relied on the decision in *Lujan v. Defenders of Wildlife*,<sup>8</sup> in which the Supreme Court reviewed a similarly broad grant of jurisdiction in the Endangered Species Act.<sup>9</sup> In *Lujan*, the Supreme Court held that although Congress could grant broad substantive rights to plaintiffs, it could not disregard the requirement that "the party seeking review must himself have suffered an injury."<sup>10</sup>

The district court found that the plaintiffs had only the "generalized interest of all citizens" in seeing that the Army complies with the NAGPRA. Because they had suffered no injury, the plaintiffs did not have standing and the court accordingly dismissed their suit. Lieutenant Colonel Howlett.

### Distinguishing Your Underground Storage Tanks (USTs) from Your Aboveground Storage Tanks (ASTs)

To most reasonable people, the terms "underground storage tank" (UST) and "aboveground storage tank" (AST) seem separate and distinct. For the most part, they are right. Underground storage tanks are regulated under the Solid Waste Disposal Act.<sup>11</sup> Aboveground storage tanks are regulated under the Clean Water Act (CWA).<sup>12</sup> The definitions are also distinct. A UST is a tank (including connected underground piping) with a volume that is ten percent or more beneath the ground's surface and used to contain "regulated substances."<sup>13</sup> Regulations governing USTs are found at 40 C.F.R. § 280.<sup>14</sup> In contrast, an

1. *Idrogo*, 18 F. Supp. 2d 25 (D. D.C. 1998).

2. *Id.* at 26.

3. Pub. L. No. 101-877, 104 Stat. 3048 (1990) (codified as amended at 25 U.S.C.A. §§ 3001-3013 (West 1998)).

4. 25 U.S.C.A. § 3005(a).

5. *Idrogo*, 18 F. Supp. 2d at 28.

6. 25 U.S.C.A. § 3013.

7. U.S. CONST. art. III.

8. 504 U.S. 555 (1992).

9. 16 U.S.C.A. §§ 1531-1534 (West 1998).

10. *Lujan*, 504 U.S. at 578 (quoting *Sierra Club v. Morton*, 405 U.S. 727, 738 (1972)).

11. 42 U.S.C.A. §§ 6901-6992 (West 1998).

12. 33 U.S.C.A. §§ 1251-1387 (West 1998). This is also known as the Federal Water Pollution Control Act.

AST is basically a storage tank that is not buried and is regulated under 40 C.F.R. § 112.<sup>15</sup> Both USTs and ASTs that store hazardous wastes are regulated under 40 C.F.R. §§ 264, 265.<sup>16</sup>

Aboveground storage tanks are sometimes regulated by the UST program and vice versa. For example, a tank system could appear completely above ground, yet, have an extensive underground piping system. If ten percent or more of the combined volume of tank and pipe are underground, the apparent AST can be considered a UST. Also, the AST program regulates certain USTs. For example, a tank that has a buried storage capacity of more than 42,000 gallons of oil is regulated under 40 C.F.R. § 112.<sup>17</sup>

The distinctions between USTs and ASTs are significant when state regulators attempt to deal with ASTs through their UST program. Because of the limited waiver of federal sovereign immunity under the UST statute,<sup>18</sup> state laws that attempt to regulate tanks beyond the reach of the UST statute are not merely “more stringent” but are “broader in scope.” Thus, serious sovereign immunity questions are raised when regulators cite UST provisions for issues concerning Army ASTs. When ASTs are regulated under state clean water acts, the efforts of state regulators may likely be upheld. This is because the waiver of sovereign immunity, under the federal CWA,<sup>19</sup> extends to any requirements related to the prevention of releases into “waters of the United States”<sup>20</sup> The CWA waiver is, in a sense, broader than that for USTs. The CWA waiver, however, does not extend to fines or penalties—whether they are imposed by federal, state, or local regulators). In contrast, the federal Environmental Protection Agency (EPA) unilater-

ally asserted that its UST penalties can be paid.<sup>21</sup> The Department of Defense (DOD) is appealing this determination. If state regulators attempt to apply state UST rules against an Army AST, they may not have the authority to do so. Mr. Bernard Schafer (Guest Contributor/Navy).

### Circuit Court Decision on Attorney Fees

In *United States v. Chapman*,<sup>22</sup> the Ninth Circuit ruled that the EPA’s assessment of response costs under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) could include reasonable attorney’s fees incurred in enforcement activities. In *Chapman*, Harold Chapman refused to comply with the EPA’s order to remove hazardous substances that presented imminent and substantial endangerment. The court found that the EPA could recover attorney’s fees because the government is not limited to the reasoning of earlier cases concerning attorney’s fees in private actions.<sup>23</sup> The Ninth Circuit was persuaded by the Second Circuit’s holding in *B.F. Goodrich v. Betkoski*.<sup>24</sup> In *B.F. Goodrich* the Second Circuit stated that in CERCLA cost recovery actions, the government’s ability to recover attorney’s fees is broader than that of private parties.<sup>25</sup> The Ninth Circuit noted that section 107(a)(4)(A) of the CERCLA defines the government’s response costs more broadly than a parallel definition for private parties’ response costs.<sup>26</sup> Policy considerations also supported the court’s ruling. If responsible parties were charged reasonable attorney fees, they may be encouraged to perform remedial action on their own.<sup>27</sup> The court remanded

13. 40 C.F.R. §§ 264, 265 (1998). Hazardous substances and petroleum products under the Comprehensive Environmental Response Liability Act (CERCLA) are examples of “regulated substances.”

14. *See id.* § 280.

15. *See id.* § 112.

16. *See id.* §§ 264, 265.

17. *Id.* § 112 (providing that spill prevention plans are required for a tank that has a buried storage capacity of more than 42,000 gallons of oil).

18. 42 U.S.C.A. § 6991(1).

19. 33 U.S.C.A. §§ 1251-1387.

20. *See id.* § 1362(7) (defining “navigable waters”).

21. *See* Environmental Law Division Note, *Debate Over the EPA UST Penalty Authority Continues*, *ARMY LAW.*, Nov. 1998, at 59.

22. 146 F.3d 1166, 1175 (9th Cir. 1998).

23. *See, e.g.,* *Key Tronic v. United States*, 511 U.S. 809 (1994).

24. 99 F.3d 505 (2d Cir. 1996).

25. *Chapman*, 146 F.3d at 1174 (citing *B.F. Goodrich*, 99 F.3d 505).

26. 42 U.S.C.A. § 9607(a)(4)(A) (West 1998). The CERCLA section relating recovery of attorney costs among private parties is 42 U.S.C.A. § 9607(a)(4)(B).

27. *Chapman*, 146 F.3d at 1175.

the case to determine which fees were "reasonable."<sup>28</sup> Ms. Greco.

### Heightened Scrutiny on Enforcement Matters

Practitioners should be aware that the Environmental Protection Agency (EPA) is expanding its interpretation of its authority over federal agencies. Last year, the EPA began fining federal agencies for Clean Air Act violations through its Field Citation Program. The Department of Justice (DOJ) rejected the Department of Defense's (DODs) challenge to these actions. This was the broadest interpretation of the EPA's authority ever issued by the DOJ. Recently, the EPA interpreted its authority under subtitle I of the Resource Conservation and Recovery Act (RCRA)<sup>29</sup> to include authority to fine federal agencies for violations of UST requirements. The legislative history of subtitle I, however, varies from the remainder of the RCRA. The DOD is conducting internal discussions with the EPA on this issue while the EPA continues to pursue UST enforcement actions. As the 22 December 1998 deadline for UST compliance approached, several installations across the DOD received voluminous requests for UST data, including requests for information developed during internal audits. These requests are often a prelude to enforcement actions. Environmental law specialists should be aware of these increasing efforts by the EPA and advise their installation environmental staffs accordingly. Colonel Rouse.

### The Price of Victory

On 11 August 1998, the United States District Court for the Central District of California decided *United States v. Shell Oil Co.*<sup>30</sup> (hereinafter the McColl case). This case involved allocation of liability under the CERCLA between the federal government and other potentially responsible parties at the McColl

Superfund site in California. The court allocated all of the cleanup costs at the site to the federal government. This decision potentially expands the scope of the government's CERCLA liability under *FMC Corp. v. United States Department of Commerce*.<sup>31</sup>

The McColl case involved four oil companies that contracted with the United States to produce aviation fuel during World War II.<sup>32</sup> The companies then contracted with Mr. Eli McColl to dispose of acid wastes that resulted from aviation fuel production. Mr. McColl accomplished this disposal by dumping the wastes on a twenty-two acre parcel of property, later known as the McColl site.<sup>33</sup> The EPA and the State of California brought an enforcement action under section 107 of the CERCLA to recover cleanup costs. The court had previously held that both the oil companies and the United States were liable under section 107 as arrangers.<sup>34</sup> The court then held a trial in February 1998 to allocate the percentage of cleanup costs to each party.<sup>35</sup>

The court allocated all of the costs to the federal government. In doing so, the court relied on three primary factors. First, the court found that holding the government liable for all of the cleanup costs would place the cost of a war on the United States as a whole.<sup>36</sup> The court noted similar reasoning in *FMC Corp.*,<sup>37</sup> where the Third Circuit found that placing the cost of war on society as a whole was consistent with the underlying policy of CERCLA.<sup>38</sup> The court stated, "it stands to reason that just as the American public stood to benefit from the successful prosecution of the war effort, so to must the American public bear the burden of a cost directly and inescapably created by the war effort, the production of [aviation fuel] waste."<sup>39</sup>

The second factor concerned the options available to the oil companies to dispose of the waste. The court reasoned that the decision to dump the waste on the McColl property directly related to the lack of tank cars available to the companies to transport the waste to another facility for recycling.<sup>40</sup> The court

28. *Id.* at 1176.

29. 42 U.S.C.A. §§ 6901-6992.

30. 113 F. Supp. 2d 1018 (C.D. Cal. 1998).

31. 29 F.3d 833 (3d Cir. 1994).

32. *Shell Oil*, 13 F. Supp. 2d at 1018, 1020.

33. *Id.* at 1023.

34. *See United States v. Shell Oil Co.*, 841 F. Supp. 962 (C.D. Cal. 1993) (holding oil companies liable).

35. The total cost of the cleanup has not yet been determined, but is estimated to be between \$70-\$100 million.

36. *Shell Oil*, 13 F. Supp. 2d 1026.

37. *Id.* at 1027 (citing *FMC Corp.*, 29 F.3d 833, 846 (3d Cir. 1994)).

38. *Id.*

39. *Id.*

found that the War Production Board (WPB) diverted the tank cars for other uses; therefore, the oil companies had no choice but to dump the waste at the McColl Site.<sup>41</sup>

Finally, the court found that the government had not provided the necessary materials to the oil companies to allow them to construct regeneration plants to reprocess the acid and acid waste.<sup>42</sup> The court noted that two of the companies had requested that the WPB provide them with the materials required to construct these regeneration plants. Since the WPB did not grant these requests, the court again concluded that the companies had no choice but to dump the wastes at the McColl Site.<sup>43</sup>

The government argued at the allocation trial that the economic benefits the oil companies received from these contracts weighed in the government's favor. Not only did the companies profit from these contracts, but they also received tax benefits from their ability to accelerate the amortization of new facilities constructed during the war.<sup>44</sup> The court, however, did not find this reasoning persuasive. The court noted that after the war, Congress enacted two statutes, called Renegotiation Acts, designed to allow the government to demand repayment of excessive profits obtained by companies during the war.

According to the court, since the oil companies were never required to repay any money to the government, their profits were not excessive. Therefore, the profits were not an equitable factor to be taken into account in the allocation process.<sup>45</sup>

This case potentially expands the reasoning of the *FMC Corp.* case. *FMC Corp.* determined operator liability under section 107 of the CERCLA based on the amount and type of control over the facility involved. The *McColl* case determined allocation. The issue was the application of equitable factors to determine costs between two liable parties. *FMC Corp.* does not provide guidance on allocation issues. Also, the *McColl* court ignored the independent decisions the oil companies made that led to the creation of the CERCLA site. Specifically, the companies chose to enter into contracts with Eli McColl for waste disposal. In addition, they expanded their plants and actively competed for aviation fuel contracts at the outset of the war. By not considering these factors, the court ignored an important principle underlying the CERCLA: requiring the persons responsible for pollution to pay for the damage they cause. In October, the judge denied the United States motion for a new trial. An appeal is likely. Major Romans.

40. *Id.* at 1028.

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.* at 1029.

45. *Id.* at 1030.