



Comptroller General
of the United States

Washington, D.C. 20548

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[REDACTED]

B-202893

September 18, 1987

The Honorable John D. Dingell
Chairman, Subcommittee on Oversight
and Investigations
Committee on Energy and Commerce
House of Representatives

Dear Mr. Chairman:

This is in response to your request of July 29, 1987, that the General Accounting Office review the Department of Energy's (DOE) report to you of August 14, 1987, concerning [REDACTED] representation of Apex Oil Company in seeking a refund from the reseller fund established pursuant to the Stripper Well settlement agreement. We have reviewed DOE's report, in which the General Counsel describes [REDACTED] role as a DOE employee in negotiating the settlement agreement and details several instances in which [REDACTED], subsequent to his resignation from the Department, represented Apex in seeking a reseller's refund from the escrow account established under that settlement agreement. [REDACTED] represented Apex before the U.S. District Court for the District of Kansas, the court-appointed Administrator for the reseller's escrow fund and the Reseller's Independent Referee.

The General Counsel has determined that [REDACTED] representation of Apex appears to have violated the post-employment ban of 18 U.S.C. § 207(a). This statute prohibits any former employee, including a former special government employee, from acting as attorney for any other person before any court, or any officer thereof, in connection with any application, request for ruling, claim or other particular matter involving specific parties in which he participated personally and substantially as a government employee.

On July 8, 1987, the Department's Assistant General Counsel for General Law reported to the Public Integrity Section of the Department of Justice that [REDACTED] filing of a February 27, 1987 motion with the District Court on behalf of Apex appeared to be in "technical" violation of 18 U.S.C. § 207(a). The characterization of this violation

as "technical" seems to be based on advice [REDACTED] received from the Administrator, Economic Regulatory Administration, indicating that there was no problem with his representation of Apex and on [REDACTED] apparent good faith in withdrawing from the case upon being advised otherwise by the designated agency ethics official. Shortly after DOE reported this matter to the Department of Justice, and a little more than 3 months after he had formally withdrawn from the case, [REDACTED] again represented Apex, this time before the Reseller's Independent Referee. In late July 1987, [REDACTED] filed Apex's "Brief in Support of Appeal from Administrator's Decision" and appeared on behalf of Apex at a hearing before the Referee. This further act of representation was reported to the Department of Justice on August 11, 1987.

Based on our review of the report and supporting documentation furnished by DOE, we believe that DOE acted properly in referring [REDACTED] case to the Department of Justice for possible prosecution under 18 U.S.C. § 207(a). As noted in the two letters of referral, [REDACTED] disagrees with DOE's determination that he is barred by subsection 207(a) from representing Apex in seeking a refund from the Reseller's share of the settlement fund. Specifically, [REDACTED] believes that his representation of Apex relates to a matter distinct from the settlement agreement in which he participated as a DOE employee. And, he views the action by Apex as one relating to internal management of the reseller's escrow fund, a matter in which he believes DOE has no interest. In this regard, we believe that the General Counsel correctly determined that the motion and hearing before the Referee and, indeed, all proceedings relating to the reseller's refund are to be viewed as part of the same matter as the settlement agreement and that the United States has a direct and substantial interest in distribution of the reseller's escrow fund.

Under 18 U.S.C. § 207(a), the ban on representation is triggered by an employee's participation in a "particular matter involving a specific party or parties" in which the United States is a party or has a direct and substantial interest. The requirement of a "particular matter involving a specific party or parties" applies both at the time the employee acts in an official capacity and at the time in question after government service. 5 C.F.R. § 737.5(c)(4). The record indicates that while employed by DOE, [REDACTED] participated personally and substantially and, in fact, negotiated on DOE's behalf, the Stripper Well settlement agreement. Prior to [REDACTED] resignation from DOE on July 7, 1986, specific parties--DOE, crude oil producers and intervenors including state governments, refiners, resellers and retailers--had become signatories

to the settlement agreement which was approved by the court on that same date. In fact, Apex itself became a signatory to the settlement agreement and executed a refiner's release on May 11, 1986. Because specific parties had become identified with the settlement agreement while [REDACTED] was participating in the negotiation and adoption of that settlement agreement on behalf of DOE, he is forever barred from representing Apex before any court or officer thereof with respect to the same particular matter as the Stripper Well settlement agreement.

The issue, then, is whether [REDACTED] representation of Apex in seeking a reseller's refund relates to part of the same particular matter as the settlement agreement in which he participated as a DOE employee. Regulations issued by the Office of Government Ethics in implementation of 18 U.S.C. § 207 make it clear that the same particular matter may continue in another form. Specifically, 5 C.F.R. § 737.5(c)(4) provides:

"* * * The same particular matter may continue in another form or in part. In determining whether two particular matters are the same, the agency should consider the extent to which the matters involve the same basic facts, related issues, the same or related parties, time elapsed, the same confidential information, and the continuing existence of an important Federal interest."

Construing the phrase "particular matter involving specific parties" as covering a "nucleus of operative facts," the courts have declined to give this statutory language a narrow interpretation. U.S. v. Medico Industries, Inc., 784 F.2d 840, 843 (7th Cir. 1986). This is consistent with the Department of Justice's view that proceedings concerning the implementation of a treaty are the same particular matters as the treaty negotiations for purposes of applying 18 U.S.C. § 207. 3 Op. Off. Legal Counsel 373 (1979). In the case of administrative proceedings, the Office of Government Ethics has viewed the remedies portion of a case as the same particular matter as the proceedings on the substantive legal issue involved. Thus, in an informal opinion (79x5) dated September 28, 1975, the Director of the Office of Government Ethics held that a former employee's participation in the Tariff Commission's injury from dumping determination involved part of the same matter as, and prohibited him from representing anyone other than the United States with regard to, the assessment of special dumping duties upon such goods.

The Stripper Well settlement agreement was the cumulation of multi-district litigation concerning overcharges made in

violation of DOE regulations. During the pendency of the action, crude oil producers deposited amounts determined to have been overcharged into an escrow fund. After the court determined that the producers had overcharged, a number of parties were granted leave to intervene in the case for the purpose of resolving the remedies issue of how best to grant restitution to those injured by the overcharges. The federal government, state governments and the intervenors reached a comprehensive settlement of their claims which resulted in a share of the overcharge fund being deposited into an escrow account for distribution to eligible resellers. [REDACTED] [REDACTED] represented Apex in actions aimed at establishing that company's entitlement to share in distribution from the reseller's escrow account. Since distribution of the escrow funds relates directly to the remedy provided for by the settlement agreement, we would concur with the view of DOE's General Counsel that the issue of Apex's entitlement to a share of the escrow fund is part of the same particular matter as the settlement agreement in which [REDACTED] participated as a DOE employee.

We have considered [REDACTED] [REDACTED] view that DOE has no interest in management of the reseller's escrow fund. As noted above, the representation ban of section 207(a) applies only to matters in which the United States is a party or has a direct and substantial interest. The Office of Government Ethics has recognized that the United States may have a direct and substantial interest in even a matter to which it is not a named party. See, e.g., 5 C.F.R. § 737.5(c)(5) (Example 1). In an informal opinion (82x13) dated August 31, 1982, the Office of Government Ethics found a United States interest in litigation brought by a state against an individual arising out of the same conduct which had precipitated action by a federal agency against the same individual. In that case, the Office of Government Ethics cited the appointment of a receiver in the federal litigation as evidence of the government's continuing interest in other litigation arising out of the same facts.

While the Stripper Well settlement agreement placed overcharge funds into an escrow account managed by a court-appointed administrator, we do not view that distribution mechanism as terminating the interest of the United States in proper distribution of the funds. We have long recognized that DOE has an interest in effecting restitution from escrow accounts established through its collection of overcharges by producers of petroleum products. B-200170, April 1, 1981. While DOE may have a less direct role in effecting restitution where the court has appointed its own escrow agent, that agent's responsibility is to carry out an agreement to which DOE was a party and in which DOE has a continuing interest. Moreover, we note that the Administrator of the

reseller's fund was appointed by the Federal District Court and, as an officer of the court, represents the United States interest in proper distribution of the fund.

Because [REDACTED] representation of Apex appears to violate the post-employment ban of 18 U.S.C. § 207(a), we believe that DOE carried out its obligation under 28 U.S.C. § 535(b) in reporting the matter to the Department of Justice. While there are criminal penalties for violations of 18 U.S.C. § 207, we note that subsection 207(j) provides for an additional civil remedy. Subject to due process requirements, this subsection authorizes the head of a department to prohibit a former employee who has violated 18 U.S.C. § 207 from representing any other person to or before that department for a period not to exceed 5 years.

We hope the above information will be of assistance to you in this matter.

Sincerely yours,

ja *Harry D. Van Cleave*
Comptroller General
of the United States