# JUDICIAL ENFORCEMENT OF THE MARINE MAMMAL PROTECTION ACT: *COMMITTEE FOR HUMANE LEGISLATION V. RICHARDSON*

The Marine Mammal Protection Act of 1972 (MMPA)[1] is the most recent piece of federal legislation protecting those marine mammals, including porpoises, endangered by the economic exploitation of the environment. In *Committee for Humane Legislation, Inc. v. Richardson*,[2] the Court of Appeals for the District of Columbia held that the MMPA must be construed literally to prohibit the killing of porpoises incidental to tuna fishing despite industry protestations that it was technologically impossible to comply with the requirements of the Act.[3] The decision represents an important step forward in the area of environmental law because the court gave its full support to the terms of the MMPA and its literal application regardless of the economic repercussions that would be felt by the tuna fishing industry.

One purpose of the MMPA is to ensure that the porpoise population is not depleted[4] by purse-seine fishing, a tuna fishing technique which uses nets and entails the incidental killing[5] of large numbers of porpoises.[6] Under the Act, purse-seine fishing is prohibited except

1. 16 U.S.C. §§ 1361-1407 (Supp. III 1973).

2. 540 F.2d 1141 (D.C. Cir. 1976).

3. 414 F. Supp. 297, 310 (D.D.C. 1976).

4. "Depleted" or "depletion" is defined as a marine mammal population which has declined over a period of years and will become extinct if such decline continues, or which is below the optimum carrying capacity for the species. 16 U.S.C. § 1362(1) (Supp. V 1975).

5. "Incidental catch" means the taking of a marine mammal (1) because it is directly interfering with commercial fishing operations, or (2) as a consequence of the method used to secure the fish in connection with commercial fishing operation. 50 C.F.R. § 216.3 (1976).

6. Before the 1960's the most common method of fishing for tuna was with a fishing pole and fresh bait. In the late 1950's a new method of catching yellowfin tuna was devised which was five times as efficient as the old fishing pole method. The new method involved using porpoises, with whom tuna frequently associate, to lure tuna into purse-seine nets. When porpoises are sighted on the ocean surface, speed boats are used to herd them to where the net will be set. The tuna follow, swimming below the

where a permit, which is consistent with the goal of protecting marine mammals, is issued[7] by the Secretary.[8] Before the Secretary can issue permits, regulations governing their issuance must be published. The regulations must include an estimate of the existing population of the species, the optimum sustainable population of the species,[9] and the expected impact of the proposed regulations on the optimum sustainable population of the species.[10]

In September, 1974, the Secretary of Commerce issued regulations which allowed the unlimited taking of porpoises, even though the Department had none of the required information regarding the present state of the porpoise population.[11] The Secretary claimed that the Department was unable to compile the requisite information because of the lack of reliable scientific knowledge about the porpoise population and the unavailability of accurate methods by which such information could be gathered.[12] Despite these omissions, a general permit was granted to the American Tunaboat Association in 1974,[13] and again in

porpoises. The porpoises and tuna are then encircled with a purse-seine net and the bottom is drawn closed with a drawstring, trapping both the tuna and the porpoises. This method may mean the death of 250,000 to 400,000 porpoises per year in the eastern tropical Pacific tuna grounds alone. 540 F.2d at 1143-44; 40 Fed. Reg. 56,900 (1975); K. NORRIS, THE PORPOISE WATCHER 241 (1974). The MMPA does not prohibit purse-seine fishing, but it does prohibit the depletion of the porpoise population as a result of the purse-seine fishing method. 16 U.S.C. § 1371(a)(2) (Supp. V 1975).

7. 16 U.S.C. § 1371 (Supp. V 1975).

8. "Secretary" means the Secretary of Commerce when the marine mammal in question is a whale, porpoise, or seal. With regard to polar bears, sea otters, walruses, and other marine mammals, it means the Secretary of Interior. *Id.* § 1362(12).

9. "Optimum sustainable population" means a population that is at a level of maximum productivity of the species, that is at the limit of the environment to sustain healthy populations indefinitely, and that does not adversely affect the ecosystem of which it is a part. *Id.* § 1362(9).

10. *Id.* § 1373.

11. 39 Fed. Reg. 32,117 (1974).

12. *Id.* at 9685; *see* K. NORRIS, THE PORPOISE WATCHER 242 (1974):

> [W]e know so little of the biology of oceanic porpoises that we cannot say what the impact upon their populations will be. We don't know how many porpoises are involved, and we don't know their normal replacement rate. We don't know whether porpoises within the tuna-fishing area are sedentary and hence subject to great fishing pressure, or whether they move long distances and thus move in and out of danger. The affected population size may be very much greater than the number of porpoises found at one time in the tuna area. Our ignorance of these and other vital facts is deep. . . . We simply do not know enough to make a rational estimate [of what level of kill porpoise schools can endure], and the secretiveness of tuna fishermen compounds the problem.

13. 540 F.2d 1141, 1146 n.15; General Permit Under the Category: Encircling Gear; Yellowfin Tuna Purse Seining, 39 Fed. Reg. 38,403 (1974).

1975,[14] to allow the unlimited taking of porpoises incidental to the purse-seine method of catching tuna.

In *Committee for Humane Legislation*,[15] plaintiffs challenged the legality of these unlimited permits,[16] asserting that they were contrary to the terms of the statute.[17] The Secretary contended that full compliance under the Act was unnecessary in this case since the congressional intent[18] was not to force tuna fishermen out of business, but rather to balance the purposes of the MMPA with the potential economic harm to the commercial fishing industry.[19] The district court found for the plaintiffs and ordered that no taking of porpoises would be allowed until the Secretary had sufficient information to comply fully with the MMPA.[20] The court of appeals affirmed, requiring that an estimated impact of any proposed taking be ascertained and that such taking may not be authorized if the impact is found to be detrimental to the mammals involved.[21]

14. 540 F.2d 1141, 1147 n.21.

15. 414 F. Supp. 297 (D.D.C. 1976).

16. Any applicant for a permit, or any party opposed to such permit is allowed judicial review of any permit issued by the Secretary. 16 U.S.C. § 1374(d)(6) (Supp. V 1975).

17. The appellees claimed that the Secretary must in all cases fully comply with the requirements of the statute. They contended that no permits should have been issued despite the economic hardships that would be suffered by the tuna industry. 414 F. Supp. at 306. They relied on the statute which states that "[t]he primary objective in [marine mammal] management should be to maintain the health and stability of the marine ecosystem." 16 U.S.C. § 1361(6) (Supp. V 1975). In addition they referred to the House Report on the proposed legislation which emphasized that the benefit of the marine mammals was the paramount consideration. "The primary objective of this management must be to maintain the health and stability of the marine ecosystem; this in turn indicates that the animals must be managed for their benefit and not for the benefit of commercial exploitation." H.R. REP. NO. 707, 92d Cong., 1st Sess. 22 (1971).

18. Strong language referred to by appellants in the legislative history states: "It is not the intention of the Committee to shut down or significantly to curtail the activities of the tuna fleet so long as the Secretary is satisfied that the tuna fishermen are using economically and technologically practicable measures to assure minimal hazards to marine mammal populations." S. REP. NO. 863, 92d Cong., 2d Sess. 16 (1972).

19. Representative Goodling made remarks on the floor to this effect, saying "[t]here must be an appropriate balancing of equities between the two extremes of a zero mortality rate and elimination of a commercial fishing industry." 118 CONG. REC. 34,643 (1972).

20. 414 F. Supp. at 314-15.

21. 540 F.2d 1141 (D.C. Cir. 1976). The court of appeals stayed the district court order until January 16, 1977. The court's reason for granting a stay was to allow the appellants time to ask Congress to change the statute to require only good faith compliance and to give them time to conduct more gear and porpoise studies. *Id.* The bill that would have effectively overruled the court's decision failed to pass the 94th Congress.

Prior to the enactment of the MMPA in 1972, there were few laws which prohibited or penalized the taking or importation of marine mammals.[22] Those laws which did exist were incomplete and ineffective due to weaknesses in statutory wording and Congress' unwillingness to protect the environment at the expense of commerce and industry.[23]

The foundation of the MMPA is the moratorium— "a complete cessation of the taking of marine mammals and a complete ban on the importation into the United States of marine mammals and marine mammal products."[24] The moratorium creates a presumption that

*Marine Mammal Amendments: Hearings on H.R. 13865 Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the House Comm. on Merchant Marine and Fisheries*, 94th Cong., 2d Sess. 171-73 (1976). *See generally* Comment, Federal Courts and Congress Review Tuna-Porpoise Controversy, 6 E.L.R. 10147 (1976).

22. *See generally* Coggins, *Legal Protection for Marine Mammals: An Overview of Innovative Resource Conservation Legislation*, 6 ENV. L. 2-10, 20 (1975).

23. One of the several pieces of legislation which purports to preserve wildlife, including marine mammals, but which provides very incomplete protection is the Fish and Wildlife Act of 1956, 16 U.S.C. §§ 742-54 (1958). The only effective regulation created therein is the prohibition against airborne hunting. *Id.* § 742j-1 (Supp. V 1975). Another such act is the Fish and Wildlife Coordination Act, 48 Stat. 401 (1934) (current version at 16 U.S.C. §§ 661-668 (1970)), which provides protection, but only for wildlife in designated preserve areas. The Act is further weakened by placing the responsibility for compliance on the applicant and taking the enforcement power away from the Commission. *Id.* § 662. *See* Iowa v. FPC, 178 F.2d 421 (8th Cir. 1949), *cert. denied*, 339 U.S. 979 (1950). A similar act providing ineffective regulations is the Fur Seal Act of 1966, 16 U.S.C. §§ 1151-1187 (Supp. II 1965-66) (current version at 16 U.S.C. §§ 1581-1587 (1970)) which prohibits the killing of fur seals and sea otters, except by natives of the Pribolof Islands. One of the most recent statutes which attempts to effectively protect animals, including marine mammals, is the Endangered Species Act of 1973 (ESA), 16 U.S.C. §§ 1531-1543 (Supp. III 1973), Pub. Law. No. 93-205, 87 Stat. 884 (1969). The ESA's power is weakened by the requirement that the administrative agency must affirmatively take steps to classify animal species as threatened or endangered and make rules for their protection before the prohibitions of the ESA become effective and the animals become protected. 16 U.S.C. § 1533 (Supp. III 1973). This method is ineffective because it is slow and places too much discretion in the hands of the administrator. *See* Coggins, *Conserving Wildlife Resources: An Overview of the Endangered Species Act of 1973*, 51 N.D. L. REV. 315, 328-33, 337 (1974).

These problems do not arise in the MMPA because the Act is unambiguous. The statute explicitly states that the MMPA is meant to protect the ecosystem and the optimum sustainable population of the species, 16 U.S.C. § 1362(9) (Supp. V 1975), rather than to maintain an optimum harvestable commercial yield. *See* H.R. REP. No. 707, 92d Cong., 2d Sess. (1972).

24. 16 U.S.C. § 1362(7) (Supp. V 1975). The moratorium was imposed by Congress in response to the depleted condition of many marine mammal stocks and the scarcity of scientific data available upon which to build management programs. 118 CONG. REC. 7701 (1972) (remarks of Congressman Udall); *id.* at 25253. *See* S. Gaines & D. Schmidt, Wildlife Population Management Under Marine Mammal Protection Act of 1972, 6 E.L.R. 50,096, 50,098 (1976).

marine mammals should be fully protected and places the burden of justifying any waiver of the moratorium on the Secretary who must demonstrate that the incidental taking of marine mammals is consistent with the population management policies of the Act.[25] Once the moratorium has been waived, the Secretary must issue general regulations pursuant to the policies of the MMPA regarding the maintenance of the optimum sustainable population of the species.[26] Lastly, the MMPA provides that the Secretary may issue permits authorizing the taking or importation of any marine mammal if the permit specifies the number and kind of marine mammals which are authorized to be taken and the applicant demonstrates that the taking will serve the purposes of the Act.[27]

The three-tiered administrative system established by the MMPA seeks to ensure the maintenance of the optimum sustainable population levels of each species.[28] At each stage in the process the administrators must demonstrate that their actions will not contravene the policies of the Act. Thus, by demanding compliance with such explicit procedures and requirements, the Secretary and the courts are seemingly allowed little or no discretion in administering the Act.

In *Committee for Humane Legislation*, the Secretary relied on statements of congressional purpose to show that Congress intended the Secretary to apply a "rule of reason" when issuing permits.[29] The district court, however, rejected this approach and relied instead on the literal meaning of the statutory language to find that Congress

25. 16 U.S.C. § 1374 (Supp. V 1975). SEN. COMM. ON COMMERCE, MARINE MAMMAL PROTECTION ACT OF 1972, S. REP. NO. 92-863, 92d Cong., 2d Sess. 8 (1972); H.R. REP. NO. 92-707, 92d Cong., 1st Sess. 18 (1971).

An exception to the moratorium requirement was initially granted by Congress for a two-year interim period from 1972-74. To minimize undue economic hardship to the tuna industry, commercial fishing operations were allowed to take porpoises incidental to purse-seine fishing techniques used to catch yellowfin tuna. 16 U.S.C. § 1371(a)(2) (Supp. V 1975). This exception, however, was directly related to the policy being promoted in the Act in that it allowed a period for the development of technology to make compliance with the act possible. *Id.* § 1381.

26. 16 U.S.C. § 1373 (Supp. V 1975). Though the scope of the regulations is discretionary with the administrator, five factors are emphasized in § 1373(b): population levels, present and future; economic and technological feasibility of implementation; ecosystem effects; existing international obligations; and conservation, development, and utilization of fishery resources.

27. *Id.* § 1374.

28. S. Gaines & D. Schmidt, Wildlife Population Management Under Marine Mammal Protection Act of 1972, 6 E.L.R. 50,096, 50,102 (1976).

29. See notes 18-19 *supra*.

enacted the MMPA to "provide marine mammals, especially porpoises, with necessary and exclusive protection against man's activities."[30]

The court of appeals, although affirming the district court decision, took a different approach than the lower court in construing the statutory language of the MMPA. Rather than confining itself to the "plain meaning" rule of statutory interpretation, the court looked to the legislative history, as well as to the statute itself, and concluded that a significant portion of the legislative record justified the decision reached by the district court.[31] Notably, the court of appeals refused to find the statute arbitrary, despite the fact that there was no basis in the record for concluding that the counting of porpoises was technologically feasible by the end of the two year interim period.[32]

The court's decision in *Committee for Humane Legislation* is of great significance because the court, by refusing to compromise with the American Tunaboat Association, effectively forced the development of technology to meet the requirements of the MMPA. The court's holding forces the Secretary to develop effective methods for determining the existing porpoise population and the effect that a "taking" would have upon the optimum sustainable porpoise popula-

30. 414 F. Supp. at 307. The plain meaning rule does not allow courts to use formal legislative reports for the purpose of construing a statute contrary to its literal meaning. The plain meaning rule may have been used by the district court in order to allow the court to avoid weighing the conflicting legislative history. Murphy, *Old Maxims Never Die: The "Plain-Meaning Rule" and Statutory Interpretation in the "Modern Federal Courts"*, 75 COLUM. L. REV. 1299, 1311 (1975). *See* United States v. Oregon, 366 U.S. 643, 648 (1961); Pennsylvania R.R. v. Int'l Coal Mining Co., 230 U.S. 184, 199 (1913); FTC v. Retail Credit Co., 515 F.2d 988, 995 n.14 (D.C. Cir. 1975); Natural Resources Defense Council v. EPA, 507 F.2d 905, 915 (9th Cir. 1974); Easson v. Comm'r, 294 F.2d 653, 656-57 (9th Cir. 1961); Gilbert v. Comm'r, 241 F.2d 491, 494 (9th Cir. 1957); *see also* 2 A. SANDS, STATUTES AND STATUTORY CONSTRUCTION § 48.14, at 220 (4th ed. 1973).

31. 540 F.2d 1141 (D.C. Cir. 1976). The court of appeals also found persuasive the statements made in an oversight hearing held after entry of the district court decision in this case. Congressman Leggett said he believed that the district court had correctly interpreted the law as written and that:

> the Secretary must first have proven to his satisfaction that any taking is consistent with the purposes and policies of the Act. That is to say that taking will not be to the disadvantage of the animals concerned. If he cannot make this finding, he cannot issue a permit. It is that simple.

*Hearings on Oversight of the Marine Mammal Protection Act of 1972 and on H.R. 13865, A Bill to Amend the Marine Mammal Protection Act of 1972*, 94th Cong., 2d Sess., Tr. at 34, 187 (May 20, 1976). The Federal courts have generally rejected the plain meaning rule of statutory interpretation. *See* United States v. Bass, 404 U.S. 336 (1971).

32. 540 F.2d 1141, 1149-50 (D.C. Cir. 1976).

tion.[33] Furthermore, the tuna industry is compelled to devise improved fishing methods and equipment so as to reduce to the maximum extent practicable the incidental taking of marine mammals.[34] Thus, the court's holding implicitly recognizes the fact that if standards which are developed are applicable only to the number of porpoises that can be ascertained through the use of presently available methods which are technologically and economically feasible, the result would serve to compromise the environment.[35]

Not until recently has this method of compelling the development of technology, called "technology forcing,"[36] become an accepted technique of encouraging individuals to search for solutions to particular problems. The effectiveness of the technology forcing mechanism in providing incentives to render solutions is clearly evidenced by the aftermath of the court's decision in *Committee for Humane Legislation*. Although the Secretary had stated at the time of the court of appeals hearing that technology would be unavailable for three to seven years to meet the requirements of the MMPA,[37] two months after the court's decision the Secretary was able to gather the necessary data[38] and publish regulations governing the incidental taking of porpoises.[39]

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33. At the time that the MMPA was enacted there was no accurate method of counting porpoises. 39 Fed. Reg. 32,117 (1974).

34. One of the new methods developed during this two-year period to help the porpoise escape unharmed is the "backdown" procedure. The porpoises tend to congregate at the extreme end of the net when the net is brought aboard the seiner, while the tuna swim back and forth. Then following the "backdown" procedure, the seiner is rapidly backed up, causing the corkline of the net to submerge at the end where the porpoises are located and allowing them to escape. The method is not foolproof, however, since several porpoises are killed every time a purse-seine net is "set." 40 Fed. Reg. 56,889 (1975).

It must also be noted that the MMPA provides financial assistance for the purpose of stimulating research for the protection and conservation of marine mammals. 16 U.S.C. §§ 1380(a), 1381(a) (Supp. II 1972). Historically, money alone has not been an adequate incentive to force private concerns to develop new technology and for this reason Congress has had to adopt the technology forcing mechanism to force development. *See generally* L. TRIBE, CHANNELING TECHNOLOGY THROUGH LAW 52 (1973).

35. This sort of technology based standard would require no major innovation but would look more to available technology and economic feasibility. La Pierre, *Technology-Forcing and Federal Environmental Protection Statutes*, 62 IOWA L. REV. 771 (1977) (hereinafter cited as *Technology Forcing*).

36. *Id.* at 771-75.

37. Brief for Appellants at 21, Committee for Humane Legislation v. Richardson, 540 F.2d 1141 (D.C. Cir. 1976).

38. 16 U.S.C. § 1373(a) (Supp. II 1972).

39. 41 Fed. Reg. 45,015-19 (1976). A list of the reports consulted in assembling this

Technology forcing today is primarily used in the environmental field of pollution control,[40] but it is becoming more prevalent in the health and safety field.[41] Technology forcing laws have been enacted in other areas pursuant to a congressional intent to both force technology and to disregard industry arguments relating to economic unfeasibility.[42] These laws, however, do not accomplish the technology forcing goal as effectively as does the MMPA because they are weakened by provisions allowing defenses based on attempts at good faith compliance and the unavailability of equipment necessary for such compliance.[43] More importantly, these statutes unlike the MMPA have been emasculated by the reluctance of the courts to support strict enforcement.[44]

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data can be found in 41 Fed. Reg. 49,859, 49,861 (1976). Final regulations were published in March, 1977. 42 Fed. Reg. 13,997 (1977).

40. Texas v. EPA, 499 F.2d 289 (5th Cir. 1974); NRDC, Inc. v. EPA, 489 F.2d 390 (5th Cir. 1974); Izaak Walton League v. Schlesinger, 337 F. Supp. 287 (D.D.C. 1971); Consolidation Coal Co. v. Kandle, 105 N.J. Super. 104, 251 A.2d 295 (App. Div. 1969).

41. Under the National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. §§ 1381-1431 (1966), the Department of Transportation set new standards requiring vehicles to be equipped with passive restraint devices (air bags) which had not yet been developed. *See* Chrysler Corp. v. Department of Transp., 472 F.2d 659 (6th Cir. 1972). Technology forcing is also prevalent in the area of occupational safety. Under the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (1970), the Department of Labor set standards limiting the exposure of persons who work with vinyl chloride to no greater than one part per million over any eight-hour period. The manufacturers claimed that this policy was technologically and economically unfeasible. The court held the regulations to be valid and declared that the Secretary of Labor is not limited to the status quo in promulgating safety and health policies under the Act. "He may raise standards which require improvement in existing technology or which require the development of new technology and is not limited to issuing standards based solely on devices already developed." Society of Plastics Industry, Inc. v. OSHA, 509 F.2d 1301, 1309 (2d Cir. 1975).

42. Clean Air Amendments of 1970, 42 U.S.C. § 1857 (1970); National Environmental Policy Act, 42 U.S.C. §§ 4321-4347 (1970); Occupational Safety and Health Act, 29 U.S.C. §§ 651-678 (1970).

43. Under the Clean Air Amendments of 1970, 42 U.S.C. § 1857 (1970) such good faith arguments can be raised. Any order issued by the Administrator directing compliance with the provisions of an implementation plan must "specify a time for compliance which the Administrator determines is reasonable, taking into account the seriousness of the violation and any good faith efforts to apply with applicable requirements." *Id.* § 1857c-8(a)(4).

> [T]his reflects Congressional intent that serious violations be corrected expeditiously, and yet recognizes that compliance may in some instances border on the impossible, despite the good faith effort of a party subject to regulation. Where such is the case, the good faith efforts of that party are worthy of consideration in terms of compliance schedules as well as the imposition of penalties.

Indiana & Mich. Elec. Co. v. EPA, 509 F.2d 839, 845 (7th Cir. 1975). *See* Union Elec. Co. v. EPA, 427 U.S. 246 (1976).

44. The court's response to statutes dealing more closely with the human environment may be due to the widespread economic repercussions of statutory enforcement

The court's response to the MMPA in *Committee for Humane Legislation* may merely reflect a willingness to enforce an environmental technology forcing law which does not have a widespread detrimental effect on the economy.[45] It is possible that the availability of an alternative method of catching tuna, the traditional pole method, may have been an important consideration to the court since this would prevent the total collapse of the tuna industry. The decision may also reflect the public's preference in allowing stringent enforcement of wildlife protection laws which do not result in a major change in lifestyle or a major hardship to the people.[46]

The decision in *Committee for Humane Legislation* represents a major advance in judicial willingness to enforce a congressional declaration which gives special status to certain wildlife species.[47] Furthermore, the previous practice of using inadequate information in issuing regulations is replaced by the requirement that the government may not act without sophisticated scientific data to support its action.[48] The case is an indication of the courts' willingness to stringently enforce wildlife protection statutes in order to protect species endangered by the economic exploitation of the environment.

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and the disproportionate impact of these standards in older industrialized urban areas. *See Technology Forcing*, note 35 *supra*, at 792.

45. Tuna fishermen and canners have limited lobbying power because of their limited numbers. Where the result would be great unemployment the legislature and the courts are rarely willing to stringently impose technology forcing. For example, EPA considered the unemployment that would result if they imposed a total ban on the production of vinyl chloride and polyvinyl chloride and instead adopted a standard based on presently available technology for asbestos emissions. 40 Fed. Reg. 59,532, 59,534 (1975).

46. *Technology Forcing*, note 35 *supra*, at 775. *See* 193 SCIENCE 744-47 (1976).

47. *See* Special Status of Wildlife Receives Judicial Approval, 6 E.L.R. 10270, 10271 (1976).

48. *See* Federal Courts and Congress Review Tuna-Porpoise Controversy, 6 E.L.R. 10147, 10149 (1976). More recently, the Ninth Circuit followed the court in *Richardson* and refused to overturn the governmental ban until proper regulations were issued. M/V Theresa Ann v. Richardson, 7 E.L.R. 20065 (S.D. Cal. 1976).