United States Attorneys

Bulletin

Published by Executive Office for United States Attorneys
Department of Justice, Washington, D.C.

VOL. 17 OCTOBER 17, 1969 NO. 27

UNITED STATES DEPARTMENT OF JUSTICE

Vol. 17 October 17, 1969 No. 27

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POINTS TO REMEMBER

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Washington, W.	Eugene G. Cushing	Seattle
West Virginia, No.	John H. Kamlowsky	Wheeling
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Wisconsin, E.	David J. Cannon	Milwaukee
Wisconsin, W.	John O. Olson	Madison
Wyoming	Richard V. Thomas	Cheyenne

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ANTITRUST DIVISION

Assistant Attorney General Richard W. McLaren

DISTRICT COURT

SHERMAN ACT

CORPORATION FOUND GUILTY OF PRICE FIXING IN CHLOR-ALKALI INDUSTRY.

United States v. FMC Corp. (E.D. Pa., No. 37123; August 22, 1969; D.J. 60-122-78)

On August 22, 1969, Judge A. Leon Higginbotham, Jr. of the U.S. District Court for the Eastern District of Pennsylvania, after a 19-day trial in January 1968, adjudged the FMC Corporation to be in violation of Section 1 of the Sherman Act by reason of a conspiracy to eliminate price competition in the sale of chlor-alkali products (chlorine, caustic soda, soda ash). The complaint, filed December 24, 1964, followed extensive grand jury proceedings in 1961 and 1962. FMC was the only defendant going to trial of nine defendants originally charged, the other eight having opted for a consent decree.

Chlor-alkali products are basic industrial chemicals used in water purification and the manufacture of a variety of products, including rayon, paper and pulp, soap and detergents.

The single violation of Section 1 charged in the complaint was that the defendants had engaged in a continuing agreement, understanding, and concert of action to eliminate price competition in the sale of chlor-alkali products. However, the complaint also alleged that to effectuate this combination, the defendants had conspired to increase chlorine prices, caustic soda prices, and soda ash prices on five specific occasions. In addition, the complaint charged that at certain specified meetings the defendants had exchanged competitive information and discussed chlor-alkali price changes for the purpose of increasing prices. Judge Higginbotham found that although the evidence was insufficient to support a finding that the defendants had conspired to increase the prices of chlorine, caustic soda and soda ash on the specified occasions, there was sufficient evidence that the defendants had "engaged in a course of conduct during the period covered by the complaint which had as its purpose and effect, the stabilization of the price of caustic soda . . ."

The nature of the agreement found by Judge Higginbotham "was to exchange the information necessary to eliminate any gaps in knowledge or

disparity in practice which may detract from the goal of maintaining a stable rather than a deteriorating price for caustic soda which was in chronic long supply during the period covered by the complaint". Previously, the court had concluded that there was insufficient credible evidence to support a finding or inference that there existed among the defendants "any agreement or conscious commitment to a concerted course of action" to make the specific increase. At best, Judge Higginbotham said, the evidence showed that a representative of the defendant had solicited others to join him in a conspiracy to fix the prices of caustic soda but apart from the increase itself, there was no evidence that the solicitation was acceptable.

But Judge Higginbotham found that the defendants had attended the meetings and exchanged the information alleged in the complaint when necessary to impart information concerning departures from established list prices "or disparities in quoting freight rates which portended industry-wide repercussions if not controlled in their impact". He referred to specific situations when it was necessary for competitors to know the precise extent of a discount, or the exact freight rate which another had offered "so that each could quote the same price to customers rather than possibly miscalculate the scope of the price change or rely upon possibly erroneous or misleading information obtained from the purchasing agents for buyers, thereby precipitating further price erosion".

The court also referred to an incident when the defendant had arranged a contract with an important industrial customer but before consummation revealed to its competitors, at a meeting, the full terms of its offer precisely detailing the discount to be accorded. This was done, said the court, "with the specific intent to minimize the impact of the proposed discount and to control its application, by informing the chlor-alkali industry of the limited nature of the discount. Under the prevailing marketing pattern of the chlor-alkali industry, this was in effect informing all that it would be unnecessary, hence undesirable to grant a deeper or broader discount. This purpose was communicated to the competitors; it was an economic reality recognized by them, and acted upon /by one of them/ when it shortly thereafter proposed identical terms /to the customer/."

The court also referred to another incident when another of the defendants had decided to grant a five percent discount to one class of customer. Concurrently with the notification to its customers, it communicated this fact to its competitors at one of the frequent informal meetings. Judge Higginbotham found that it was "considered important that the industry know the amount of the discount and its limited scope lest other producers mistakenly respond to the demands by their customers for similar discounts by according ones of even broader scope, thereby costing the industry a substantial amount of money". In making its disclosure to its competitors the defendant which had initiated and granted the discount was contemplating

joint action on the part of all chlor-alkali producers. Its competitors knew its intent and responded in the manner contemplated by lowering their prices in the precise manner outlined to them. This purpose on the part of the chlor-alkali competitors to limit the amount of the discount can be said, the court declared, to be an arrangement which "materially interfered with the operation of the price mechanism of the market place" similar to that found in United States v. Container Corporation.

The court also commented upon the occasions when the defendant met at informal meetings to exchange information as to freight rates, including difficult to obtain intra-state freight rates and had agreed upon the definition of quantities which would have qualified for shipment by barge and had agreed not to recognize a new locality as an equalization point. These situations, said the court, reflected clear attempts by the defendants to act in concert and were examples of a continuing agreement to exchange information necessary to quote identical prices.

The "recurring communications and agreements between the competitors facilitated the quotation of identical prices by eliminating any uncertainties or disparities in practice which might tend to detract from this goal", he said.

Judge Higginbotham stated that he was unable to find a conspiracy to make the specific price increases because there were other reasonable explanations, absent agreement, to justify the contemporaneous and uniform price actions taken by all of the chlor-alkali producers. He found that the Government's evidence relied almost entirely on the testimony of the defendant's former sales manager which was "so vague and indecisive as to be unexplainable by the mere passage of time". His testimony had not been refreshed after portions of the grand jury testimony had been read to him. Thereupon, the Government had requested that the transcript of his grand jury testimony be received as a "past recollection recorded" exception to the hearsay rule since the testimony had been given under oath in a setting calculated to impress the witness with the impact of the oath and because the witness had asserted on the witness stand that, although he could not remember the events about which he testified before the grand jury, or even remember being asked the questions which he answered, he "recognized" the truth of his testimony. But Judge Higginbotham held that inadequate safeguards existed to insure the accuracy and trustworthiness of the grand jury testimony and therefore denied its admission as substantive evidence. Judge Higginbotham relied mainly on the circumstance that the witness could not testify as to whether he might at least have been mistaken in his testimony before the grand jury five or six years previously, about events which took place four to eight years prior to that.

The court concluded his opinion with the statement that although there was ample evidence to establish that there was not a total absence of competition in the industry there was, nonetheless, a disposition on the defendants' parts to avoid the pitfalls of market fluctuations caused by a lack of knowledge of relevant marketing information on any of their parts. They resolved to avoid this by constantly communicating to one another all material details of significant deviations in the prevailing marketing practices which any of them made. Yet, the defendant has been found to have violated the Sherman Act not merely because of its exchanges of information in a manner and with an effect proscribed by the Supreme Court in United States v. Container Corp. of America, supra. For FMC and its competitors did more than exchange information with one another under an implied agreement to supply information whenever requested, and use the information obtained to stabilize the market. The record of this case disclosed instances of direct assurances, as well as implied assurances and agreements, that "the disposition of men to follow their most intelligent competitors"*/ would be reinforced by a concert of action, in which all would willingly participate, to restrain the normal competition and fluctuations of the market place.

Staff: John W. Neville, L. Barry Costilo, Julius H. Tolton and Jon D. Hartman (Antitrust Division)

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*/ American Column & Lumber Co. v. United States, 257 U.S. 377, 399, 42 S.Ct. 114, 117 (1921).

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CIVIL DIVISION

Assistant Attorney General William D. Ruckelshaus

COURTS OF APPEALS

FEDERAL TORT CLAIMS ACT

CRASH OF PRIVATE PLANE FROM ICING ATTRIBUTED TO NEGLIGENCE OF PILOT IN FLYING INTO REGION OF PREDICTED ICING CONDITIONS WITHOUT DE-ICING EQUIPMENT.

Thomas G. Somlo v. United States (C.A. 7, No. 16717; September 10, 1969; D.J. 157-23-799)

In January, 1963, Mr. Somlo was flying his plane with five passengers from Florida to Chicago. The aircraft did not contain de-icing equipment. The Bowling Green, Kentucky, flight service station gave Somlo a weather advisory predicting icing conditions in the Chicago area for the time of his arrival. The next flight service station at Lafayette, Indiana, however, negligently did not give any weather advisory to Somlo. Upon entering the Chicago area, Mr. Somlo found that ice began building up on his wings. He persisted in flying to his original destination, O'Hare Airport, instead of making an emergency landing at Midway Airport, which was the first Chicago airport he passed while encountering the icing. Between Midway and O'Hare the plane crashed due to the build up of ice.

The district court found that the crash was proximately caused by the negligence of Mr. Somlo, and that the negligence of the Government at the Lafayette flight service station was not a proximate cause of the crash. The Court of Appeals found the district court's determination not to be clearly erroneous, and affirmed. The Court held that the Government's negligence in not giving the advisory to Mr. Somlo at Lafayette was not a proximate cause of the crash, since it was merely "a failure to repeat information already given".

Staff: Robert E. Kopp (Civil Division)

SOCIAL SECURITY ACT - SUBSTANTIAL EVIDENCE

PETITION FOR REHEARING IS PENDING IN CASE HOLDING THAT WRITTEN MEDICAL REPORTS CANNOT BE "SUBSTANTIAL EVIDENCE" TO SUPPORT SECY.'S DENIAL OF DISABILITY BENEFITS UNDER SOCIAL SECURITY ACT.

Cohen v. Perales (C.A. 5, No. 26238; May 1, 1969; D.J. 145-9-221)

Pedro Perales brought this action to obtain judicial review of the administrative rejection of his claim for disability benefits under the Social Security Act. The evidence that the claimant was not disabled consisted of (1) written medical reports by physicians who had examined the claimant, and (2) the oral testimony of an expert medical witness who had not examined the claimant but who expressed opinions based on the medical evidence in the case. The district court held, in this case and in several others, that, since written medical reports were hearsay, they were inadmissible at administrative hearings of social security disability claims.

On the Secretary's appeal, a panel of the Fifth Circuit (per Judge Skelton of the Court of Claims) accepted our view that, under the governing statute and regulations (42 U.S.C. 405(a), (b); 20 C.F.R. 404.926, -.927, -.928), written medical reports are admissible at the administrative hearings. The Court went on to hold, however, on a matter not briefed, that medical reports, although admissible, are, standing alone, "uncorroborated hearsay" which cannot be regarded as substantial evidence. (The Court held that the opinion of a medical advisor, which is based on the medical reports and not on an examination of the claimant, cannot corroborate those reports.)

Since this decision was rendered a great many district courts have relied on its holding, or an extension thereof, to reverse the Secretary in disability cases. In order that United States Attorneys handling these cases in the district courts might be prepared to respond to arguments based on Perales we set forth below the content of the petition for rehearing and suggestion of rehearing en banc which was filed on June 26, 1969.

The petition stated that the panel's decision had, in effect, adopted the "residiuum rule" (which requires a reviewing court to set aside an administrative finding unless the finding is supported by at least a "residuum" of evidence which would be admissible in a jury trial). It then urged that the residuum rule should be rejected, as it has received universal condemnation from the commentators (see 1 Wigmore, Evidence, Sec. 4b, pp. 40-41; 2 Davis, Adm. Law Treatise, Sec. 14.10, p. 292; 2 Larson, Workmen's Compensation, Sec. 79.23, pp. 292-293); has been rejected by at least two Circuits (Ellers v. Railroad Retirement Bd., 132 F.2d 636, 639 (C.A. 2); Marmon v. Railroad Retirement Bd., 218 F.2d 716, 717 (C.A. 3)); and, as applied here, totally fails to consider the general reliability and probative value of the medical reports which it rejects as "insubstantial", but instead simply tacks on the "hearsay" label without regard to any consideration of the inherent value of the reports. The only basis for the adoption of the "residuum rule" is the statement in Consolidated Edison v. NLRB, 305 U.S. 197, 230, that "mere uncorrobated hearsay or rumor does not constitute substantial evidence"; but the

petition for rehearing points out that that statement was made in response to a contention that the administrative decision had relied on "remote hearsay" and "mere rumor" which, unlike the medical reports involved in Perales, was completely lacking in probative value.

Until the Court acts on the petition for rehearing, it may be helpful for United States Attorneys, when handling disability cases, to advise the district court that the petition for rehearing is pending and to explain to the court the substance of the Government's opposition to the "residuum rule" adopted by the panel.

Staff: Kathryn H. Baldwin and Michael C. Farrar (Civil Division)

NATIONAL GUARD

DEPLOYMENT OF NATIONAL GUARD NOT RESTRICTED TO PURPOSES OF MILITIA CLAUSE OF THE CONSTITUTION.

SP5 William S. Johnson, et al. v. Lt. Gen. Beverly E. Powell, et al. (C.A. 5, No. 27211; July 29, 1969; D.J. 25-76-1330)

Plaintiffs enlisted in the Kentucky National Guard. At the time of their enlistment, they signed agreements that they were enlisting in the "Army National Guard of Kentucky and as a Reserve of the Army with membership in the National Guard of the United States". In May 1968 plaintiffs' unit was ordered to active duty, and was shortly thereafter deployed in Viet Nam. Plaintiffs then brought this suit challenging their activation and their deployment overseas. The district court denied relief, and the Court of Appeals affirmed.

Plaintiffs' principal argument on appeal was that their activation was an unlawful deployment of National Guardsmen in derogation of Article I, Section 8, Clause 15 of the Constitution, which empowers Congress to call forth the Militia "to execute the Laws of the Union, suppress Insurrections, and repel Invasions". Plaintiffs contended that since none of these contingencies had occurred, their activation was unlawful. The Court of Appeals, however, noted that the Constitution also empowered Congress in Article I, Section 8, Clause 12 "to raise and support Armies", and that Congress had organized the modern National Guard so that all Guardsmen would also be reservists in the Army. The fact that National Guardsmen were also reservists of the Army had been made explicit in plaintiffs' enlistment contracts. The Court of Appeals concluded that this "dual enlistment system was a proper exercise of power necessary and proper to the raising and supporting of armies. It follows that there was no constitutional inhibition against placing appellants on active duty."

Staff: Robert E. Kopp (Civil Division)

OFFICIAL IMMUNITY

SUIT AGAINST EMPLOYEES OF ARMY AVIATION MATERIEL COMMAND ARISING OUT OF CIVIL SERVICE DISCHARGE PROCEEDINGS HELD PROPERLY DISMISSED UNDER BARR v. MATTEO, 360 U.S. 564

Ruderer v. Meyer, et al. (C.A. 8, Nos. 19,133-5, 19-170-174, 19,182; July 7, 1969; D.J. 145-4-1608, 145-4-1614, 145-4-1611, 35-42-7, 145-4-1605, 145-4-1624, 145-4-1621, 145-4-1590)

The Court of Appeals affirmed the dismissal of these libel and slander suits under Barr v. Matteo, 360 U.S. 564. Plaintiff, Ruderer, a former civilian employee of the Army Aviation Materiel Command in St. Louis, charged that defendants had libelled and/or slandered him through utterances made in the course of administrative proceedings conducted to test the validity of his discharge as a Government employee. The Court of Appeals discussed the immunity doctrine at length; this is probably the most thorough exposition of the Barr doctrine in the Eighth Circuit.

Staff: Assistant United States Attorney Irvin L. Ruzicka (E.D. Mo.)

PRE-EMPTION

CT. HOLDS THAT ST. REGULATION OF CHRYSLERS' "SUPER-LITE" IS NOT PRE-EMPTED BY FED. SAFETY STANDARD 108, ISSUED PURSUANT TO NATIONAL TRAFFIC AND MOTOR VEHICLE SAFETY ACT OF 1966.

Chrysler Corp. & Chrysler Motors Corp. v. Rhodes, et al. (C.A. 1, No. 7283; decided June 26, 1969, petition for rehearing denied July 25, 1969; D.J. 145-18-31)

The State of New Hampshire attempted to ban the sale of Chrysler's 1969 Dodge automobiles containing the "Super-Lite", an auxiliary, optional, light installed on the front grill of the vehicle to supplement low beams. New Hampshire officials found that the light emitted blue rays which caused confusion with police and other emergency vehicles. Chrysler sued in the district court to enjoin the State regulation of the "Super-Lite" on the ground that Federal Motor Vehicle Safety Standard 108, issued by the Federal Highway Administration pursuant to the National Traffic and Motor Vehicle Safety Act of 1966, pre-empted the attempted State regulation. The Federal Highway Administration, participating as an amicus, urged that Standard 108 did not deal with the aspects of performance of the "Super-Lite" that the State sought to regulate, and that, therefore, there was no pre-emption under the express pre-emption section in the Safety Act. The district court ruled against Chrysler, and the Court of Appeals unanimously affirmed.

The Court of Appeals noted that the Safety Act contained an express pre-emption provision which permitted State regulation of safety standards on new motor vehicles or motor vehicle equipment so long as the State regulation did not cover the "aspects of performance" covered by a Safety Standard issued by the Federal Highway Administration pursuant to the Safety Act. In the instant case, the Court ruled, the Federal Safety Standard 108, dealing broadly with "lighting", did not cover the category of auxiliary lights into which the "Super-Lite" fell. The Court concluded that the "aspects of performance" of "Super-Lite" which the State sought to regulate were not covered by Standard 108, and therefore there was no pre-emption.

Two other States, New York and Vermont, have similarly sought to bar the sale of "Super-Lite". District courts in two suits by Chrysler held that the State regulations were pre-empted, and the appeals in those cases were argued before the Second Circuit on September 16, 1969 (Nos. 33,509 and 33,497).

Staff: Morton Hollander & Leonard Schaitman
(Civil Division)

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CRIMINAL DIVISION
Assistant Attorney General Will Wilson

COURT OF APPEALS

NATIONAL MOTOR VEHICLE THEFT ACT (18 U.S.C. 2312) - EVIDENCE

POLICE REPORTS TOGETHER WITH INSURANCE COMPANY RECORDS THAT CAR WAS STOLEN ARE ADMISSIBLE UNDER 28 U.S.C. 1732, FED. BUSINESS RECORDS ACT, BUT CANNOT BE USED TO PROVE TRUTH OF FACT THAT CAR WAS STOLEN.

Woodrow W. Shiver v. United States (C.A. 5, No. 26723; August 21, 1969; D.J. 26-19M-230)

Conviction of Shiver for violation of the Dyer Act, 18 U.S.C. 2314 reversed. At trial in the district court, the owners of the stolen vehicle did not testify. However, the court allowed police and insurance company reports that the car was stolen to be admitted to establish the fact the car was stolen. Additionally, testimony by a police detective that the car was reported "stolen out of Miami" was admitted without objection. The Government also showed that defendant was in possession of the car two days after it was reported stolen, that he claimed to have won the car in a card game, that the identification number on the bill of sale was different from the one on the car, that there was no certificate of title, that the defendant persuaded his brother unlawfully to obtain license tags for the car, and that the car was not listed on a bankruptcy schedule filed subsequent to the acquisition of the car by the defendant.

The Court of Appeals, citing United States v. Graham, 391 F.2d 439 (C.A. 6, 1968), held that while police reports are business records under the Federal Business Records Act, they are not admissible under the Act for establishing the truth of the matter asserted, but would be admissible as proof that the car to which they referred had been reported stolen. The Court then found that since the police reports and insurance company records could not be used for the purpose of establishing the element that the car was stolen and the remaining evidence was insufficient to prove this element the conviction could not be sustained.

This decision makes it inadvisable to bring Dyer Act prosecution unless the owner, custodian, or some other individual with first hand knowledge is present to testify to the fact that a car was stolen and not just to the fact that it was reported stolen.

Staff: Former United States Attorney Floyd M. Buford;
Assistant United States Attorney Denver L. Rampey (M.D. Ga.)

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LAND AND NATURAL RESOURCES DIVISION
Assistant Attorney General Shiro Kashiwa

COURTS OF APPEALS

FEDERAL PROGRAM

SUPREMACY; LACK OF AUTHORITY OF STATE PUBLIC UTILITY TO CONDEMN PROPERTY OF R.E.A. COOPERATIVE.

Public Utility District #1 of Pend Oreille County v. United States et al. (C.A. 9, No. 23,539; September 17, 1969; D.J. 90-1-3-1814)

Under the Rural Electrification program, the United States largely financed Inland Power & Light Company, furnishing power in rural areas in 10 counties in Washington and two counties in Idaho. Public Utility #1 of Pend Oreille County, Washington, sought to condemn the Inland facilities within that county, primarily to save the P.U.D. the expense of constructing competing lines. Under Washington law, the decision of the P.U.D. board of directors to take property from a private utility is practically conclusive.

The first attempt to take Inland's properties failed because the United States was held to be a necessary party by the State Supreme Court. Thereafter, proceedings were brought under 28 U.S.C. 2410 which, as amended November 1966, permitted joinder of the United States as a party to condemnation proceedings as to property as to which it had a lien. The district court sustained the condemnation authority, holding that a section of the R.E.A. Act prohibiting a borrower from selling or disposing of its property without the consent of the R.E.A. Administrator did not apply because this was not a sale.

On interlocutory appeal, the judgment was reversed. The Court did not reach the problem of construction of the statute. It took the broader ground that the Supremacy Clause, Article VI, Clause 2, of the Constitution, prohibited the condemnation, saying:

> Congress has declared the federal purpose to electrify the American farm. No matter how we characterize the vehicle which gets the electricity there, a state law so written that a state-favored utility can by its unilateral action interfere with the federal purpose can not stand under the supremacy clause of the Constitution of the United States.

Staff: Roger P. Marquis (Land & Natural Resources Division)

PUBLIC LANDS

SURVEY; WHEN SUBSTANTIAL AMOUNT OF LAND IS OMITTED FROM SURVEY OF PUBLIC LANDS BORDERING ON WATER COURSE, MEANDER LINE IS TREATED AS BOUNDARY LINE.

Paul T. Walton & Helen E. Walton v. United States (C.A. 10, No. 9645; September 3, 1969; D.J. 90-1-5-828)

The Government brought an action to quiet title to 323 acres of land situated on the east bank of the Snake River in Teton County, Wyoming. The United States had patented a total of 111 acres in Lots 1 and 2 in Section 24 and Lots 5, 6 and 7 in Section 13, Township 41 North, Range 117 West, following surveys in 1893 and 1918. The meander lines established by these surveys were supposedly along the mean high water mark of the main channel of the Snake River. However, there are approximately 323 acres between the meander line and the main channel of the Snake River. After trial, during which the Waltons attempted to show that the main channel of the Snake River had materially shifted since the 1893 and 1918 surveys, the district court concluded that the main channel had not materially shifted and that, when the land in the abutting lots (111 acres) is compared with the omitted lands (323 acres), it is clear that a substantial amount of land was omitted from the surveys and that the meander line should therefore be considered a boundary line. The district court quieted title to the 323 acres in the United States. The Court of Appeals affirmed holding that the "substantial area test" applied by the district court had been approved by the Supreme Court and that its examination of the record did not reveal any basis for determining that the district court's findings of fact were clearly erroneous.

Staff: Frank B. Friedman (Land & Natural Resources Division)

CONDEMNATION

ADMISSIBILITY OF SALES INVOLVING AN EXCHANGE OF PROPERTY, CHARITABLE CONTRIBUTION, AND COMPULSION; NON-PREJUDICIAL REFERENCE TO UNEXERCISED OPTION; REJECTION OF REQUESTED INSTRUCTIONS ON SALES; REFERENCE TO GOVT.'S FAILURE TO CALL PARTICULAR APPRAISER.

United States v. Certain Land in City of Ft. Worth, Texas, & Mary C. Cooper, et al. (C.A. 5; No. 26462, A.J. Cooles, Parcel 6; No. 26698, B.H. Wilson, Parcel 2; August 21, 1969; D.J. 33-45-1017)

The Government condemned the fee title to seven parcels of land for parking facilities. The district court determined compensation to be

$122,720 for the taking of Parcel 2; jury trial of Parcel 6 resulted in a verdict of $82,621. The Government appealed.

The Court of Appeals affirmed, holding in both cases that the district court did not abuse its discretion in permitting testimony concerning a sale involving three parties, an exchange of land between two of them, and a charitable contribution to the seller of the sale property, the Salvation Army, which received cash only. Reference to a purchase by another condemnee to replace property taken was similarly approved as involving compulsion or motivation of an economic, but not a legal, nature.

In No. 26698, admission of testimony of an unexercised option to purchase Parcel 2 was held to be nonprejudicial error because the owner's experts did not base their valuations on the option.

In No. 26462, the Court of Appeals ruled that rejection of the Government's requested instructions, pertaining to consideration of sales, including the recent prior sale of Parcel 6, was discretionary and proper on this record--area land values were increasing, there was testimony of more recent sales, the requested instructions were focused on the prior sale and would have unfairly prejudiced the landowner's case, the Government was not prejudiced, and the instructions given were full and fair. No error was found in permitting reference to the Government's failure to call as a witness a particular appraiser who had been hired prior to trial, in the situation where that appraiser was better qualified to testify and the witness-appraiser had had a personal disagreement with the landowner.

Staff: Raymond N. Zagone (Land & Natural Resources Division)

DISTRICT COURTS

NATIONAL FORESTS

RECOVERY OF FIRE SUPPRESSION COSTS: FIRE DID NOT ESCAPE DEFENDANT'S PROPERTY.

United States v. Morehart (C.D. Calif., No. 68-1195-EC; August 11, 1969; D.J. 90-1-9-730)

The Government recovered a verdict against Roger Lytle Morehart. The United States Forest Service had expended $9,700 to suppress a fire that was burning upon the Morehart property and was a threat to the adjoining National Forests. The defendant claimed that he should not be required to pay as he had not requested help in putting out the fire. The

court disagreed. The cause of the fire was in dispute, but the jury sided with the opinions of the Government witness that it was caused by sparks emitted from a diesel-powered tractor which was engaged in land clearing. The defendant has filed a notice of appeal.

Staff: Assistant United States Attorney Thomas H. Coleman (C.D. Cal.) and Nelson H. Grubbe (Land & Natural Resources Division)

INJUNCTION GRANTED AGAINST TRESPASSING CLAIMANTS FOR INDIAN ALLOTMENTS IN NATIONAL FOREST.

United States v. John W. Ratterree & United States v. Jimmy Doyle Fish (C.D. Cal., Nos. 69-929-HP and 69-930-CC; September 3, 1969; D.J. 90-1-10-859, 90-1-10-841)

In 1968, defendants Jimmy Doyle Fish and John W. Ratterree filed applications for Indian allotments with the Department of Agriculture under the Forest Allotment Act, 25 U.S.C. 337. Defendants then entered upon the claimed parcels of land and placed several items of personal property thereon. In addition, defendants built several open campfires in the heart of Los Padres National Forest in California. Defendants' claims were denied administratively, and these decisions were affirmed by the Secretary of the Interior.

Since a final decision on defendants' claims had been reached, the Government sued to eject defendants. The court promptly awarded the Government preliminary injunctions in these cases, directing defendants to cease occupying the land, clearing vegetation, erecting structures and building campfires pending final determination of these cases.

The Government then moved for summary judgment. At the hearing on this motion, counsel for defendants failed to appear and judgment was entered for the Government. The decision upheld the discretion of the Secretary of the Interior to grant or deny Indian allotments and accepted the Secretary of Agriculture's determination that the lands applied for were more valuable for National Forest purposes than for agricultural or grazing purposes.

Although the test for an allotment under the Forest Allotment Act is whether the land is more valuable for "agriculture or grazing purposes than for the timber found thereon", the court implicitly held that the "timber found thereon" includes all National Forest purposes, in accordance with the Multiple Use Sustained Yield Act of 1960, 16 U.S.C. 528-531. This Act states that the National Forests are to be administered with a wide range of purposes, including but not limited to timber management.

Staff: United States Attorney Wm. Matt Byrne, Jr.; Assistant U.S. Attorney James R. Akers, Jr. (C.D. Cal.); Jonathan U. Burdick (Land & Natural Resources Division)

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