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NEWS NOTES

SIX GOVERNMENT ATTORNEYS WIN ANNUAL YOUNGER FEDERAL LAWYER AWARDS FROM FEDERAL BAR

September 12, 1968: Six outstanding young lawyers in federal service, including three from the Department of Justice, were presented the 1968 Younger Federal Lawyer Awards from the Federal Bar Association. The presentations were made by Supreme Court Justice Potter Stewart at the Federal Bar Convention at the Shoreham in Washington, preceding an address by New York City Mayor John V. Lindsay. The award winners and the citations read for the three Department of Justice lawyers are as follows:

Warren Davison, Associate Chief, Appellate Court Branch, National Labor Relations Board.

George K. Dunham, Attorney with the Regional Counsel, Mid-Atlantic Region, Internal Revenue Service.

Paul Merlin, Chief of the Litigation Branch, Old-Age, Survivors and Disability Insurance Division, Department of HEW.

Robert St. Leger Goggin, Chief of the Criminal Division in the U. S. Attorney's office, Philadelphia, Pennsylvania (accompanied by his sponsor Drew J. T. O'Keefe, U. S. Attorney, Philadelphia). As Chief of the Criminal Division in the United States Attorney's Office, Philadelphia, he has performed outstanding service as both trial and appellate advocate. He is responsible for a complete revision of the internal procedures of the Office relating to criminal matters, increasing the effectiveness of the docket system. In addition to his regular duties, he has contributed his professional talents to the community and to the organized bar.

Hugh P. Morrison, Jr., Attorney in the Antitrust Division, Department of Justice (accompanied by his sponsor, Edwin M. Zimmerman, Assistant Attorney General, Antitrust Division). As an Attorney in the Antitrust Division, Department of Justice, he has played a significant role in the litigation of cases of far-reaching importance. Although he has been with the Antitrust Division for only five and one-half years, he has been assigned primary responsibility for several cases--a tribute both to his outstanding legal talents and to his ability to analyze complex factual situations.

Morton L. Susman, U.S. Attorney, Southern District of Texas (accompanied by his sponsor, Warren Christopher, Deputy Attorney General). Since his appointment by the court, he has served as one of the youngest United

States Attorneys in the country. In his ten-year legal career, he has tried approximately one hundred twenty jury cases, including several of national prominence. Despite the demands of supervising the sixth largest United States Attorney's Office, he has been able to devote time and talent to professional and civic activities in Houston.

PATRICK MURPHY NOMINATED AS ADMINISTRATOR OF LEAA

September 13, 1968: President Johnson has nominated Patrick V. Murphy, Public Safety Director of Washington, D. C., to be the Administrator of the Law Enforcement Assistance Administration. Murphy began his career in law enforcement as a foot patrolman in New York City in 1945. He rose to become commanding officer of the City's police academy before becoming Chief of Police in Syracuse, New York, the job he held before moving to the Nation's capital last year. The President also nominated two Associate Commissioners for LEAA: Dr. Ralph Siu, a Hawaiian-born chemist who is now Deputy Director of Development of the Army Material Command; and Wesley Pomeroy, who was Under-sheriff of California's populous San Mateo County before becoming Attorney General Ramsey Clark's Assistant for Law Enforcement this year to help coordinate the anti-crime activities of the Federal Government. Under the general guidance of the Attorney General, the three men will distribute grants to states and cities aimed at improving law enforcement programs at those levels.

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POINTS TO REMEMBER

BAIL BONDS AND RESTRICTIONS ON THE DEFENDANT'S ACTIVITIES

In the United States v. Egan, et al. (C. A. 2, April 24, 1968, 394 F. 2d 262; D. J. 12-017-51) the Second Circuit set out procedures that should be followed when a surety posts bond in a case where the court adds restrictions on the defendant's activities at the time of release or at a later date. Such restrictions or conditions which are not part of the standard bond form should be recited in the body of the bond itself or, if on a separate paper, they should be referred to in the bond as an attached supplement. They may also be written as a separate supplement to the original bond if executed again by all parties concerned and with sufficient information to identify it as an amendment to the original bond. Modifications of restrictions should likewise be set out as an attached rider or a newly written bond executed in the same fasion as the original bond.

In the event that the court modifies the terms of the bond on its own motion, the clerk of the court should give advance notice to the Government, the defendant and the surety. This is in order to permit any of the parties to be heard prior to the effective date of the modification or to permit the surety to take whatever steps it deems necessary to surrender the defendant to custody. If the Government moves to modify the terms of the bond it must give reasonable notice to the surety. If the defendant so moves the surety must look to the defendant for notice of the motion or discover it itself from checking the court docket.

Regardless of who the movant is, if the court orders a material modification of the terms of the bond, the defendant must immediately post a new, properly executed bond or rider to the original bond setting forth the amended conditions. If such an instrument is not filed forthwith, the court must order the defendant held in the custody of the Attorney General until such a bond is furnished.

BANK PROTECTION ACT OF 1968
P. L. 90-389

A. Background of the Act

On July 7, 1968 the Bank Protection Act of 1968 (P. L. 90-389) was signed by the President. The Act provides for security measures for banks and other financial institutions.

The purpose of the Act is to stem the tide of external crimes against financial institutions and to aid in the apprehension of the criminals. Federal Bureau of Investigation statistics reveal that between 1963 and 1967 violations

of the Federal Bank Robbery Statute rose from 1548 to an all-time high of 2551, an increase of more than 60 percent in 4 years. The dollar losses are in the millions. Of even greater concern is the inestimable loss in terms of human life and limb that occurs as a result of these crimes which endanger the safety of bank employees, customers, and law enforcement officers. The House Committee on Government Operations, 88th Congress, recognized the need for legislation in this field and in the report dated February 20, 1964 (House Rep. No. 1147, 88th Cong., 2d Sess.), the Committee found there is a direct relationship between a lack of security and incidence of external crimes.

B. The Effect of the Act

H. R. 15345, which was sponsored by the Department of Justice, was introduced in the House of Representatives on February 15, 1968, and was reported out of the House Committee on Banking and Currency, with amendments, on April 30, 1968 (House Rep. No. 1317, 90th Cong., 2d Sess.). The bill passed the House on May 6, 1968, passed the Senate, with additional amendments, June 19, 1968 (114 Cong. Rec. S743i (daily ed. June 19, 1968)) and the House concurred in the Senate amendments June 24, 1968 (114 Cong. Rec. H5340 (daily ed. June 24, 1968)).

The Act directs the Federal supervisory agencies--the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation and the Federal Home Loan Bank Board--to promulgate within six months from the date of the Act, rules establishing minimum standards with which each bank or savings and loan association must comply with respect to the installation, maintenance, and operation of security devices and procedures. The agencies are also to establish time limits within which banks and savings and loan associations shall comply with the standards and requires such institutions to submit periodic reports with reference to the installation, maintenance, and operation of the security devices. A bank or savings and loan association which violates a rule promulgated pursuant to this Act shall be subject to a civil penalty which shall not exceed $100 for each day of the violation.

The Act further directs the supervisory agencies to consult with companies which offer insurance against external crimes against financial institutions, and state insurance supervisors, to determine the feasibility of premium rate differentials based on compliance with the security requirements of this legislation, and to report back to the Congress with respect to the same not later than two years after its enactment. This provision was added by the House Committee on Banking and Currency.

The Act also amends Section 406(c) of the National Housing Act (Section 1729(c) of Title 12, United States Code), and provides under what conditions

the Federal Home Loan Bank Board shall have the power and jurisdiction to appoint the Federal Savings and Loan Insurance Corporation as sole receiver of an insured state-chartered savings and loan association. These amendments were added by the Senate Banking and Currency Committee.

C. Comments

The supervisory agencies have six months from July 7, 1968, to promulgate rules establishing minimum standards with which each financial institution must comply. The length of time the institutions will have to install the security devices will be set by the agency rules. It is expected that there will not be many cases where it will be necessary to seek the recovery of a $100 per day civil penalty for non-compliance, and this provision will be the subject of a separate communication at a future date. The obtaining of security devices to meet the minimum standards will be the responsibility of each financial institution, and the promotion of the sale of a particular device or material does not come within the scope of the functions of the Department of Justice. The Act does not require any action by United States Attorneys at this time.

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ANTITRUST DIVISION

Assistant Attorney General Edwin M. Zimmerman

DISTRICT COURT

SHERMAN ACT

COURT DISMISSES SUIT ARISING OUT OF ANTITRUST ACTION.

Hancock Bros., Inc. v. Lyle L. Jones, et al. (Civ. 49700; N.D. Calif, August 30, 1968; D.J. 60-146-40)

On July 30, 1968, Hancock Bros., Inc., filed the above action for a declaratory judgment pursuant to 28 U.S.C. 2201 against Lyle L. Jones, chief of the San Francisco antitrust field office; the clerk of the District Court for the Northern District of California; and the plaintiffs in two private antitrust cases based on the Government's criminal price fixing case against Hancock Bros. and other ticket manufacturers (U.S. v. Hancock Bros., Inc., et al.; Cr. 41530; N.D. Calif.), which was terminated by pleas of nolo contendere by all defendants. The private plaintiffs had earlier served a deposition subpoena duces tecum on Mr. Jones, requiring production of copies of two pre-sentencing memoranda prepared by the Government trial staff under his supervision in connection with the sentencing of the defendants in the criminal case. The Government had moved to quash the subpoena on the ground that the memoranda in question contained grand jury material which could not be disclosed without a court order under Rule 6(e) of the Federal Rules of Criminal Procedure; however, in an accompanying memorandum of points and authorities, the Government had stated that disclosure of the second pre-sentencing memorandum might be an appropriate exercise of the court's discretion in view of the fact that this memorandum had been made available to defense counsel prior to sentencing. The Government cited the decision of the Ninth Circuit Court of Appeals upholding disclosure in a similar situation, U.S. Industries v. U.S. District Court, 345 F.2d 18 (1965), cert. den. 382 U.S. 814 (1965). Hancock Bros. and the other corporate defendants in the criminal case also had filed motions to quash the subpoena and had argued against disclosure of either memorandum. Additionally, Hancock Bros. had filed a motion in the criminal case to seal the two memoranda, since no formal sealing order had ever been entered even though the memoranda had been lodged with the court on a confidential basis along with the report of the Probation Office.

In the above declaratory judgment action, Hancock Bros. sought an order to the effect that any disclosure of the pre-sentencing memoranda would be unlawful. Its grounds were the same as those relied upon by it in connection with the proposed sealing order and the motion to quash: (1) there was no showing of particularized need as required by Rule 6(e); (2) disclosure was prohibited by Rule 32(c) of the Federal Rules of Criminal Procedure, dealing with pre-sentencing reports; and (3) the adoption of a rule making pre-sentencing reports available to private antitrust plaintiffs when they had been disclosed to the criminal defendants would, as a practical matter, prevent the criminal defendants from taking advantage of the opportunity to examine the reports and fully protect their interests in the criminal case, thereby depriving them of due process of law. The Ninth Circuit had not specifically considered the latter two arguments in the U.S. Industries opinion.

Melvin J. Duvall, Jr., of the San Francisco antitrust field office filed a motion on behalf of Mr. Jones to dismiss the declaratory judgment action on the grounds that (1) it could serve no useful purpose since the legal issues it raised would necessarily be determined in the other pending actions; (2) the complaint failed to allege a justiciable controversy; and (3) there was a failure to join an indispensable party, the United States, which had not consented to be sued. During oral argument, it became apparent that Hancock's chief purpose in bringing the declaratory judgment action was to insure that it would have a right of appeal from the district court's decision with respect to disclosure of the pre-sentencing memoranda. However, it was argued on behalf of Mr. Jones that the district court's decision on the motions to quash the subpoena and on the proposed sealing order could be brought before the Ninth Circuit by means of a writ of mandamus, as was done in U.S. Industries. At the conclusion of the oral argument on August 30, 1968, Judge Oliver J. Carter stated that he did not believe the declaratory judgment action would serve a useful purpose, and that Hancock would have adequate opportunity for appellate review in the other pending actions by means of mandamus. He therefore dismissed the declaratory judgment action.

Judge Carter has taken under submission the motions to quash the deposition subpoena served on Mr. Jones and the motion to seal the pre-sentencing memoranda.

Staff: Melvin J. Duvall, Jr. and Shirley Z. Johnson (Antitrust Division)

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CIVIL DIVISION

Assistant Attorney General Edwin L. Weisl, Jr.

COURTS OF APPEALS

EMPLOYEE DISCHARGES -- SCOPE OF REVIEW

EMPLOYEE DISCHARGE WILL BE SUSTAINED IF AGENCY FOLLOWED APPLICABLE PROCEDURAL STEPS AND DISCHARGE WAS NOT CAPRICIOUS -- EMPLOYEE HAS NO CONSTITUTIONAL RIGHT TO CROSS-EXAMINE WITNESSES.

Leora J. Bishop v. William F. McKee, et al. (C. A. 10, No. 9545; August 26, 1968; D. J. 35-60-3)

Plaintiff was removed from civil service status as an employee of the Federal Aviation Agency for cause. At her hearing, she was confronted by and had the opportunity to cross-examine certain witnesses produced by the agency. She demanded the presence of other witnesses, but made no attempt herself to provide for their attendance, as required by the applicable regulation.

Plaintiff then brought this action to overturn her discharge. The district court granted summary judgment in favor of the Government, and the Tenth Circuit affirmed. In doing so, it found only "three issues that can survive within the jurisdictional limitations accorded judicial review in this court": (1) "Did the Agency substantially comply with all required procedural steps in effectuating appellant's removal?"; (2) "Was appellant improperly denied a constitutional right to examine her accusers?"; and (3) "Was the Agency action in imposing the remedy of removal so harsh as to reflect only caprice in view of the total circumstances?"

The Court found that all applicable procedures had been followed, and that there was no constitutional requirement that the agency go further than the regulations required and produce all witnesses requested by the employee. See Williams v. Zuckert, 372 U.S. 765. It further found that the remedy of discharge was "peculiarly and necessarily within the discretion of the Civil Service and cannot be disturbed on judicial review absent exceptional circumstances not here present".

In limiting review to questions of procedural regularity and capriciousness, the Tenth Circuit joined the Second, Fourth, Fifth, Seventh, Eighth, and Ninth Circuits in refusing to allow substantial evidence review of agency determinations in this area. See McTiernan v. Gronouski, 337 F. 2d 31, 34

(C. A. 2); McEachern v. United States, 321 F. 2d 31, 33 (C. A. 4); Brown v. Macy, 340 F. 2d 115 (C. A. 5); Brown v. Zuckert, 349 F. 2d 461 (C. A. 7); Jenkins v. Macy, 357 F. 2d 62 (C. A. 8); Seebach v. Cullen, 338 F. 2d 663, 664 (C. A. 9). Contra, Dabney v. Freeman, 358 F. 2d 533 (C. A. D. C.).

Staff: United States Attorney B. Andrew Potter and Assistant United States Attorney Robert L. Berry (W. D. Okla.)

FEDERAL DRIVERS ACT -- IMMUNITY OF DRIVER FROM SUIT BY FEDERAL EMPLOYEE

FEDERAL DRIVERS ACT IMMUNIZES GOVERNMENT DRIVER FROM PERSONAL LIABILITY ARISING FROM NEGLIGENT DRIVING IN SCOPE OF HIS EMPLOYMENT, EVEN THOUGH PLAINTIFF HAS NO TORT REMEDY AGAINST UNITED STATES BY VIRTUE OF EXCLUSIVITY PROVISIONS OF FEDERAL EMPLOYEES COMPENSATION ACT.

Vantrease v. United States (C. A. 6, No. 18, 222; September 4, 1968; D. J. 145-5-3140).

Vantrease was injured while in the scope of his Government duties when he was struck by a vehicle driven by a Government driver, also acting in the scope of his employment. Vantrease sued the driver in a state court; that action was removed to the United States district court and the United States was substituted as defendant pursuant to the Federal Drivers Act, 28 U. S. C. 2679(b)-(e).

The Government then moved for summary judgment on the ground that Vantrease, as a federal employee, could not maintain a tort action against the United States but was limited to compensation benefits under the Federal Employees Compensation Act. Vantrease moved to remand the case to the state court for reinstatement of his suit against the driver. The district court granted the motion for summary judgment and denied the motion to remand.

On plaintiff's appeal, the Sixth Circuit affirmed. The Court held that the provision of the Drivers Act (28 U. S. C. 2679(d)), which directs a remand to the state court where a Tort Claims Act remedy is "not available against the United States," is applicable "only when the government driver is found to have been acting outside the scope of his employment at the time of the incident." But, in this case, since the Tort Claims Act remedy was "not available" to plaintiff by virtue of the exclusivity provisions of the Federal Employees Compensation Act, the remand provision did not apply, and the driver continued to enjoy the full protection of the Drivers Act.

The Court also expressly reaffirmed, in the context of the Drivers Act, the settled principle that a Tort Claims Act remedy will not lie against the United States where the plaintiff is eligible for and received compensation under the Federal Employees Compensation Act.

Staff: William Kanter (Civil Division)

NATIONAL BANK ACT -- BRANCHING

ARMORED CAR MESSENGER SERVICE AND OFF-PREMISES RECEPTACLE CONSTIUTE A "BRANCH" WITHIN MEANING OF 12 U.S.C. 36(f); DEFINITION OF "BRANCH" IN FEDERAL STATUTE MUST BE INTERPRETED IN LIGHT OF STATE LAW CONCEPTS.

Dickinson v. First National Bank In Plant City (C.A. 5, No. 25,173; September 12, 1968; D.J. 145-3-865)

The First National Bank of Plant City, Florida, in an arrangement approved by the Comptroller of the Currency, set up an armored car messenger service to pick up customers' deposits at their places of business and transport them to First National's banking house. It also provided an off-premises receptacle one mile from the bank where customers could place their deposits to be picked up by the messenger service. The bank and its customers agreed that the messenger service would act as agent for the customers, and that deposits would not be deemed received until they actually reached the banking house.

After the Comptroller of the State of Florida advised the bank that these activities violated state branching law, First National brought an action against the State Comptroller for declaratory and injunctive relief to establish the validity of these practices. The Comptroller of the Currency (of the United States) joined on the side of the bank.

The district court held that the exclusive definition of a "branch" bank was found in 12 U.S.C. 36(f): "any * * * place of business * * * at which deposits are received, or checks paid, or money lent." Since these requirements were not met by the messenger service or the off-premises receptacle, it held that no new branch had been created regardless of state law.

The Fifth Circuit reversed, citing the "competitive equality" principle between state and national banks set out in First National Bank of Logan v. Walker Bank & Trust Co., 385 U.S. 252. It concluded that, under Florida law, the activities in question appeared to constitute an unlawful branch. However, since another case was pending in the state courts involving the identical

issue, it remanded the instant case to the district court to retain jurisdiction until the state case is decided.

Staff: John C. Eldridge and Robert E. Kopp (Civil Division)

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EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS
Acting Director John K. Van de Kamp

APPOINTMENTS

UNITED STATES ATTORNEY

New York, Western - Andrew F. Phelan

Mr. Phelan was born January 2, 1932 in Brooklyn, New York and is married. He served in the Air Force from 1950 to 1954. He received his B. A. degree (1958) from the Niagara University and his LL. B. (1962) from the University of Buffalo School of Law. Mr. Phelan was admitted to the Bar of the State of New York in 1963. From 1962 to 1964 he was with the Criminal Division, Department of Justice, and from 1964 until his court-appointment, Mr. Phelan was an Assistant United States Attorney for the Western District of New York.

ASSISTANT UNITED STATES ATTORNEYS

California, Northern - MICHAEL H. METZGER; University of Michigan Law School, LL. B., and formerly an Assistant District Attorney for the County of New York.

District of Columbia - ROBERT A. ACKERMAN; Columbia Law School, LL. B., and formerly in the Civil Rights Division of the Department of Justice.

Illinois, Northern - ROBERT J. BREAKSTONE; DePaul University Law School, J. D., and formerly a law clerk in the Illinois Court of Appeals, and in private practice.

Michigan, Eastern - FRANKLIN G. KOORY; Wayne State University Law School, J. D., and formerly in private practice.

New Mexico - LEON TAYLOR; Washburn University School of Law, J. D., and formerly an Assistant County Attorney in Kansas, legal advisor to the Navajo Tribe, and Special Assistant Attorney General for New Mexico.

New York, Southern - ROSS SANDLER; New York University School of Law, LL. B., and formerly in private practice.

AUSA RESIGNATIONS

New York, Southern - ROBERT J. MORVILLO, to join law firm of Reavis & McGrath.

Virginia, Western - JAMES P. BRICE, to become judge of Municipal Court.

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LAND AND NATURAL RESOURCES DIVISION

Assistant Attorney General Clyde O. Martz

DISTRICT COURT

HELIUM

INCLUSION IN OIL AND GAS LEASES; VALUE; CLASS SUIT; NOTICE OF JUDGMENT TO THOUSANDS.

Northern Natural Gas Co. v. United States (Civil No. KC-1969, and seven consolidated actions, decided September 7, 1968, D. J. 90-1-18-650)

In 1962 and 1963, a number of actions were filed in the state and federal courts in Oklahoma and Kansas to determine ownership of the helium content of natural gas being processed for helium extraction. The helium is being extracted in five plants and sold to the United States for storage to meet future needs. The plants are owned and operated by four private companies and the helium is sold to the United States under contracts which run for a period of 22 years. It is a part of the long-range helium conservation program authorized by Congress in 1960.

Eight of the cases in the federal courts were consolidated for trial in the United States District Court for the District of Kansas. Judge Wesley E. Brown presided.

Two of the consolidated actions were suits by the landowners against the United States in which it was asserted that the United States was converting their helium to its use. Claims were also made that the United States took the landowners' helium under the power of eminent domain, that the landowners were third party beneficiaries under the contracts between the helium extraction companies and the United States, and that they should recover on the basis of unjust enrichment. The attorneys for the landowners estimated that the value of the helium which it was alleged would be converted during the 22-year term of the contracts would exceed three billion dollars.

The remaining six cases were interpleader actions brought by pipeline and helium extraction companies against producers and landowners, in which the court was requested to determine who is entitled to the payments made by the United States under the contracts for purchase of the helium. Numerous cross-claims and counterclaims were filed in the interpleader actions.

The claims of the landowners and of the producers were prosecuted as class actions in behalf of all individuals having claims similar to those

asserted by the named parties. It has been estimated that the two classes include more than 30,000 individuals.

The landowners asserted that the oil and gas leases covering the property from which the natural gas is produced do not cover the helium content of the gas. Gas produced from approximately 200 fields in Kansas, Oklahoma, Texas and Colorado is involved.

The producers asserted that the oil and gas leases covered the helium content of the gas but that the gas sales contracts under which they sold and delivered the gas to the pipelines did not convey title to the helium. They further asserted that, if the contracts were found to convey title to the helium, they were not being paid for it under the contracts, and also that the rates fixed by the Federal Power Commission were not applicable to the helium content of the gas.

The trial before Judge Brown, which extended over a period of 13 weeks, was limited to the question of the liability of the producers, the pipeline companies, the helium extraction companies and the United States. Judge Brown filed his opinion September 7, 1968. It is 130 pages in length and its substance is as follows:

1. The oil and gas leases under which gas is produced, which is later processed for helium extraction, convey to the lessees everything formed by natural processes and produced in gaseous form, unless expressly reserved by the leases. This includes hydrocarbons and nonhydrocarbons, including helium.

2. The contracts under which the producers sell the gas to the pipelines likewise convey the entire gas stream, both hydrocarbons and nonhydrocarbons, including helium, unless expressly reserved by the contracts. Payments made under those contracts are for the entire stream, including helium, and this is so whether payment is made at the rates prescribed by the gas sales contracts or at the rates fixed by the Federal Power Commission.

3. Section 11 of the Helium Act Amendments of 1960 does not abrogate the oil and gas leases or the gas sales contracts. It does not render illegal or insufficient royalty payments or payments for gas sold.

4. Neither the landowners nor the producers are entitled to additonal payments based upon the claim that title to the helium did not pass under the leases or gas sales contracts, that payments made under the contracts were not payments for the helium, or on the basis of third party beneficiaries or unjust enrichment.

The court also held that it did not have jurisdiction over claims for additional royalties under the oil and gas leases.

The prevailing parties were ordered to give notice of the proposed judgment to members of the classes of landowners and producers. Entry of final judgment will be delayed until notice is given.

Staff: Assistant United States Attorney Bernard V. Borst (D. Kansas); Floyd L. France, W. H. Churchwell, and Robert M. Perry (Land and Natural Resources Division)

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