

LAWRENCE R. WEBSTER

ATTORNEY AT LAW

MAIN STREET  
P.O. DRAWER 712  
PIKEVILLE, KENTUCKY 41501

July 21, 1992

LAWRENCE R. WEBSTER  
H. MICHAEL LUCAS

*Pikeville*

G. Wix Unthank, Judge  
P.O. Box 5112  
London, Kentucky 40745 -5112

RE: Civil Action No. 91-62  
Tract Nos. 1045, 1045E-1, 1045E-2

Dear Judge Unthank:

I've copied your jury instructions after comparing them to Palmore's Standard Kentucky jury instructions and find them to be quite acceptable. My secretary has retyped them in their entirety making appropriate blanks on the last page as needed and appropriate.

If you have any questions, please feel free to call.

Yours truly,

*H. Michael Lucas*  
H. Michael Lucas

HML/jt  
Encl.

cc: Hon. David Y. Olinger, Jr.

P'beville

**LAWRENCE R. WEBSTER**

ATTORNEY AT LAW

MAIN STREET  
P.O. DRAWER 712  
PIKEVILLE, KENTUCKY 41501

July 21, 1992

LAWRENCE R. WEBSTER  
H. MICHAEL LUCAS

TELEPHONE  
(606) 437-4029

G. Wix Unthank, Judge  
P.O. Box 5112  
London, Kentucky 40745 -5112

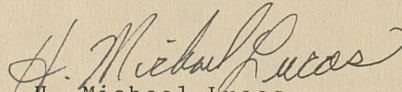
RE: Civil Action No. 91-62  
Tract Nos. 1045, 1045E-1, 1045E-2

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cc: Hon. David Y. Olinger, Jr.

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF KENTUCKY  
PIKEVILLE

COURT'S INSTRUCTIONS TO THE JURY:

EMINENT DOMAIN

This action by the United States is brought in the exercise of the Federal Government's power of eminent domain. It is sometimes called a condemnation proceeding.

The Government has the right and the power to take private property for public purposes, and that power is essential to the independence of the Government. Otherwise, any landowner could delay or even prevent public improvements, or could force payment of a price exceeding the fair market value of the property taken.

Exercise of the power of eminent domain is subject always, however, to the requirement of the Fifth Amendment of the Constitution that payment of "just compensation" shall be made to the owner for all estates or interests in property so taken.

The burden is on the defendant property owner to establish, by a preponderance of the evidence in the case, that the fair market value of his property at the date of taking was as much as he claims. To establish by a preponderance of the evidence in the case means such evidence as, when considered and compared with that

opposed to it, has more convincing force, and produces in your mind belief that what is sought to be proved is more likely true than not true.

"Fair market value" means the price in cash, or its equivalent, that the property would have brought at the time of taking, considering its highest and most profitable use, if then offered for sale in the open market with a reasonable time allowed to find a purchaser.

In other words, "fair market value" means the amount a willing buyer would have paid a willing seller in an arm's length transaction with both parties being fully informed concerning all of the advantages and disadvantages of the property, and with neither acting under any compulsion to buy or sell.

In arriving at your determination of fair market value, you should take into account all factors which could fairly be suggested by the seller to increase the price paid, and all counter-arguments which the buyer could fairly make to reduce the price. Your determination is to be made in the light of the opinions of the various witnesses and all facts affecting value, as shown by the evidence in the case.

On some occasions, the mere fact that the

Government plans to take certain property may either increase or decrease the fair market value on the date of the taking without regard to any threat of a taking.

The jury is instructed that no consideration shall be given to nor allowance of compensation made for either:

- (1) Any unwillingness of the property owner to part with his interest, or
- (2) Any frustration of the personal plans of the property owner, or
- (3) Any opportunities the property owner may have lost by reason of the taking of their land.

#### HIGHEST AND BEST USE

An owner is entitled to just compensation for the fair market value of the property for its reasonable highest and best use. In making such a determination the jury shall consider the highest and most profitable use for which the property is adaptable and needed or is likely to be needed in the near future. A potential future use of condemned property should be considered not as the present measure of value but only to the extent that the prospect of demand for such use would have affected the price a willing buyer would have offered for the property just prior to the taking.

Four elements must be proven by the landowner before a potential use can be said to have influenced the fair market value of condemned land:

- (1) the potential use must not require a substantial expenditure of capital,
- (2) the project must not be highly uncertain,
- (3) the property must be physically adaptable to the potential use, and
- (4) a market for the property must have existed, in fact, at the time of the taking or must have been reasonably likely to exist in the near future.

While the term "highest and best use" by its meaning and definition is self-limiting and a property may

have only one highest and best use; nevertheless, property may have and be adaptable to more than one use. Where property is adaptable to multiple uses, the jury is instructed that the law does not permit multiple uses to be pyramided, combined, tacked on, nor added so as to exceed the fair market value of said property for its reasonable highest and best use.

#### FAIR MARKET VALUE

In determining fair market value, the best evidence is the sale of the same property in an arm's length transaction reasonably near in time on the open market. If there is no such sale, the next best or preferred evidence is a sale of similar or comparable property or properties, sometimes referred to as market comparison. No two properties are identical in all respects, but the sale should be an arm's length transaction reasonably near in time on the open market and the similarities should substantially outweigh the dissimilarities. The comparable sales admitted into evidence should be considered insofar as such sales, looking at the circumstances of each instance, may evidence or throw light upon the present fair market value of the property to be taken, unaffected by the condemnation of such property for public use.



In the absence of any relevant and probative evidence of comparable sales, the next best or preferred evidence of fair market value is net income capitalization. However, before this method may be considered it must be established by substantial and convincing evidence, such as the conclusion of an industry expert, that the property is or reasonably may be income-producing and has an economic life from which a determination may be made for the recapture of the value of the investment, plus a reasonable and proper rate of return on the investment, minus a reasonable discount for the shortened economic life.

An additional method, where the property is unique or there is insufficient evidence of comparable sales or net income capitalization, is the cost or reproduction costs method. In this method depreciable improvements are added to the value of the raw land minus any allowed depreciation. However, the cost or reproduction costs method may not be utilized to exceed the fair market value of the property in its existing condition on the date of taking.

Finally, a jury may receive as evidence of fair market value the opinion of a witness who is qualified by reason of education, training and experience and the weight and credibility of such evidence is within the

discretion of the jury in accord with the Court's instructions.

Although a method or formula may be preferred as the best evidence, the law is not wedded to any particular formula or method. In determining fair market value an interaction of these formulas or methods may be the basis for such determination if there is substantial and convincing evidence as to any such method or formula considered and utilized.

The law requires, and the judgment to be entered by the Court upon your verdict will provide, payment of interest by the Government to compensate the property owner for any delay in payment caused by the Government, after the date of taking. So, you are not to consider any delay in payment in arriving at your verdict, and you are not to include in your verdict any interest or other compensation for the delay.

INTERROGATORY NO. \_\_\_\_\_

(1) The jury finds, by a preponderance of the evidence, that the highest and best use of the property in controversy on the date of taking to be:

- (a) Residential subdivision development;  
Yes \_\_\_\_\_ No \_\_\_\_\_
- (b) Mineral development;  
Yes \_\_\_\_\_ No \_\_\_\_\_
- (c) Farm land;  
Yes \_\_\_\_\_ No \_\_\_\_\_

(2) The jury finds, by a preponderance of the evidence, that the best method of determining the market value of the property in controversy on the date of the taking to be:

- (a) Market comparison (comparable sales);  
Yes \_\_\_\_\_ No \_\_\_\_\_
- (b) Net income capitalization;  
Yes \_\_\_\_\_ No \_\_\_\_\_
- (c) Cost or reproduction costs;  
Yes \_\_\_\_\_ No \_\_\_\_\_

(d) Testimony of realty expert(s) alone;

Yes \_\_\_\_\_ No \_\_\_\_\_

(If the answer to (d) is "Yes", please list the name or names of such expert(s)):

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

The jury, finds by a preponderance of the evidence, that as of February 26, 1991, the date of taking, the fair market value of the 100' x 100' lot of land with its improvements of a home and an apartment/office building owned by the Defendants, Kirk Family Charitable Trust, John Wilson Kirk, Trustee, William H. Kirk, Trustee, and Bernice R. Kirk, Trustee, to be:

\$ \_\_\_\_\_.

(Not to exceed the sum of \$ \_\_\_\_\_, nor less than the sum of \$ \_\_\_\_\_, as contained in the evidence.)

DATE: \_\_\_\_\_

\_\_\_\_\_  
JUROR

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF KENTUCKY  
PIKEVILLE

CIVIL ACTION NO. 91-62

UNITED STATES OF AMERICA,

PLAINTIFF,

VS:

ORDER

0.27 ACRES OF LAND,  
MORE OR LESS, ET AL.,

DEFENDANT.

\* \* \* \* \*

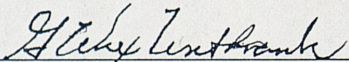
Assistant United States Attorney David Olinger having informed the undersigned's staff that the parties have agreed upon a trial date of January 20, 1993,

IT IS HEREBY ORDERED that:

(1) the jury trial in the above-styled action shall be held on January 20, 1993 at the Pikeville Courthouse; and

(2) the trial having been postponed, the parties are given until December 4, 1992 in which to submit their proposed jury instructions and interrogatories.

This the 24<sup>th</sup> day of July, 1992.

  
\_\_\_\_\_

G. WIX UNTHANK,  
Senior Judge

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF KENTUCKY  
PIKEVILLE

CIVIL ACTION NO. 91-62

UNITED STATES OF AMERICA,

PLAINTIFF,

VS:

ORDER

0.27 ACRES OF LAND,  
MORE OR LESS, ET AL.,

DEFENDANT.

\* \* \* \* \*

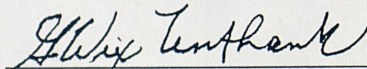
The Court having been advised that certain witnesses will be unavailable on the August 13, 1992 jury trial date set at the pre-trial conference,

IT IS HEREBY ORDERED that:

(1) the August 13, 1992 trial date is SET ASIDE;

(2) the parties shall confer with their witnesses and among themselves as to the possibility of scheduling the trial at the Pikeville courthouse during the week of January 19, 1993; counsel shall inform the Court by telephone (606-878-2731) within five days of the date of entry of this order as to which dates are acceptable within the stated time frame.

This the 22<sup>nd</sup> day of July, 1992.

  
\_\_\_\_\_

G. WIX UNTHANK,  
Senior Judge

(EDky-111)

United States District Court  
EASTERN DISTRICT OF KENTUCKY

Pikeville

CIVIL MINUTES — GENERAL

July 17, 1992

Case No. 91-62 At London

Style U.S.A. vs. 0.27 ACRES OF LAND, etc., et al.

DOCKET ENTRY

PRESENT:

HON. G. Wix Unthank, JUDGE

Shirley Denny  
Deputy Clerk

Nathan Perkins  
Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFFS:

David Olinger

ATTORNEYS PRESENT FOR DEFENDANTS:

Michael Lucas for Lawrence Webster

437-4029

ORDER

PROCEEDINGS:

This matter was called for pretrial conference with above noted parties present. The Court having heard counsel and being sufficiently advised,

IT IS ORDERED that this matter be scheduled for jury trial at Pikeville on August 13, 1992 at 9:00 A.M. The parties shall submit their proposed jury instructions to the Court by July 28, 1992.

This 17<sup>th</sup> day of July, 1992.

G. Wix Unthank  
G. WIX UNTHANK, JUDGE

Copies:

Initials of Deputy Clerk \_\_\_\_\_

Eastern District of Kentucky  
FILED

JUN 1 1992  
LESLIE G. WHITMER  
CLERK, U.S. DISTRICT COURT

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF KENTUCKY  
PIKEVILLE

CIVIL ACTION NO. 91-62

UNITED STATES OF AMERICA, PLAINTIFF,

VS: ORDER

0.27 ACRES OF LAND, MORE OR LESS, ET AL., DEFENDANT.

\* \* \* \* \*

The parties having filed their status report of record,

IT IS HEREBY ORDERED that:

(1) all pre-trial motions shall be filed within thirty days of the date of entry of this order;

(2) the final pre-trial conference is scheduled for Friday July 17, 1992 at the hour of 1:00 p.m in the Magistrate's Courtroom in the basement of the London, Kentucky Federal Building and Courthouse; and

(3) the parties are referred to the undersigned's previous order entered December 16, 1991 regarding the procedures related to said conference.

This the 1<sup>st</sup> day of June, 1992.

*G. Wix Unthank*

G. WIX UNTHANK,  
Senior Judge

Certificate of mailing:  
Lawrence R. Webster  
U. S. Attorney  
6/2/92 mb

*[Signature]*  
Lexington Clerk  
London Clerk

23



CIVIL DOCKET CONTINUATION SHEET

PLAINTIFF PIKE 91-62 UNITED STATES OF AMERICA	DEFENDANT 0.27 ACRES OF LAND MORE OR LESS ETC ET AL	PIKE 91-62 DOCKET NO. _____ PAGE ____ OF ____ PAGES
--	---	---

DATE	NR.	PROCEEDINGS	
1991 12/16	17	ORDER:(GWU) sig. 12/13/91 ent. CONTINUED.... other related matters, the undersign hereby incorps by ref stand ord of 4/29/83 formerly used by undersign when an active jdge in charge of Pikeville docket (5) The dep-incharge of Pikeville Clerk's office shall provide parties w/a copy of the undersign aforesaid std ord of 4/29/83; at same time copies of this ord are furnish; to aid the parties the clerk shall also furnish a copy of undersign updated ord of 11/6/85 regard intro of exhbs. COM. w/attach std orders of Judge Unthank.	mb
1992			
2/7/92	*18	JOINT MOTION of parties for ext of time for disc deadline. w/PROP Rf#19 ORDER	rt
2/18	19	ORDER:(GWU) sig. 2/14/92 ent. ORD On joint mot parties ORD (1) tyhe disc dead- line be & is extend to & inc. 3/23/92; & (2) As the parties have as yet request no oth exts of time they are remind that a Stat Rept is due for fil on or bef 4/3/92 in ord that the undersign may assess whet any furth time is necess bef. the sched of pretrial conf. COM.	mb
4/23	20	ORDER: (GWU) sig 4/22 ent 4/23; (1) parties shall file status report w/Clerk of Court w/in 30 days of entry of this order to advise Court relating to above-referenced matter. COM	rt
4/29	21	U.S. MARSHAL's 285 forms RETURNED UNEXECUTED on 4/28/92 no acknowlegements received by KIRK FAMILY CHARITABLE TRUST, JOHN WILSON KIRK, TRUSTEE, WILLIAM H. KIRK, TRUSTEE, BERNICE R. KIRK, TRUSTEE, and JOHN WILSON KIRK.	rt
5/26	22	JOINT STATUS REPORT of U.S. Note Plead not sig. <i>C</i> Signed copy rec'd 5/29/92.	mb

*Please attach  
attachment  
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in - done*

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF KENTUCKY  
PIKEVILLE

CIVIL ACTION NO. 91-62  
TRACTS NOS: 1045, 1045E-1 1045E-2

UNITED STATES OF AMERICA,

PLAINTIFF,

VS:

ORDER

0.27 ACRES OF LAND, MORE OR LESS  
SITUATE IN PIKE COUNTY, COMMONWEALTH OF  
KENTUCKY, AND KIRK FAMILY CHARITABLE  
TRUST, ET AL.


DEFENDANTS.

\* \* \* \* \*

On the joint motion of the parties, and the Court  
having reviewed the record,

IT IS HEREBY ORDERED that: (1) the discovery  
deadline be and is extended to and including March 23,  
1992, and (2) as the parties have as yet requested no  
other extensions of time, they are reminded that a status  
report is due for filing on or before April 3, 1992 in  
order that the undersigned may assess whether any further  
time is necessary before the scheduling of the pretrial  
conference.

This the 14<sup>th</sup> day of February, 1992.

  
G. WIX UNTHANK  
SENIOR JUDGE

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF KENTUCKY  
PIKEVILLE

CIVIL ACTION NO. 91-62

UNITED STATES OF AMERICA,

PLAINTIFF,

VS:

ORDER

0.27 ACRES OF LAND, MORE OR  
LESS, ET AL.,

DEFENDANT.

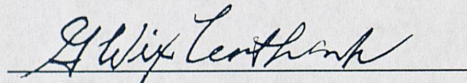
\* \* \* \* \*

Examination of the record has revealed that the parties have not filed a status report or reports in order that the undersigned may assess what further deadlines may be set and to determine when the pre-trial conference should be scheduled. Accordingly,

IT IS HEREBY ORDERED that:

(1) the parties shall file a status report with the Clerk of this Court within thirty days of the date of entry of this order to advise the Court relating to the above-referenced matter.

This the 22<sup>nd</sup> day of April, 1992.



G. WIX UNTHANK,  
Senior Judge

IN THE DISTRICT COURT OF THE UNITED STATES ~~Eastern District of Kentucky~~  
FOR THE EASTERN DISTRICT OF KENTUCKY  
AT PIKEVILLE

FILED

JAN 9 1984

CIVIL ACTION NO: 77-167  
TRACT NO: 307

AT LEXINGTON  
LESLIE G. WHITMER  
CLERK, U. S. DISTRICT COURT  
PLAINTIFF,

UNITED STATES OF AMERICA,

VS: MOTION TO AMEND JUDGMENT  
ENTERED DECEMBER 29, 1983

251.93 ACRES OF LAND, MORE OR LESS, SITUATE  
IN JOHNSON COUNTY, COMMONWEALTH OF KENTUCKY,  
AND BAPTIST CHURCH, ET AL,

DEFENDANTS.

\*\*\*\*\*

Comes the United States, by counsel, and moves the Court to amend the Judgment entered herein on December 29, 1983 to credit the United States in the final Judgment with the sum of \$3,440.00, the salvage value of the improvements and the oil and gas payments received, as stipulated by the parties, and by the sum of \$11,872.27 in advance relocation payments, and to direct the United States to deposit into the Registry of the Court the difference between the final judgment and the deposit, the salvage value of the improvements and the oil and gas payments, and the advance relocation payments, plus six per cent (6%) interest thereon from the date of taking, April 1, 1977 until paid into the Registry of the Court, to satisfy the final judgment.

The Court is advised that the defendants, William and Hazel Turner, purchased the improvements at a salvage value of \$650.00 and received oil and gas payments of \$2,790.00 on property belonging to the United States. The parties agreed to stipulate said amount would be credited against the final judgment.

The Court is further advised that the defendants were paid \$20,773.00 in relocation payments based on the deposit of \$66,200.00. Based upon the judgment of \$179,200.00, said defendants are only entitled to relocation payments of

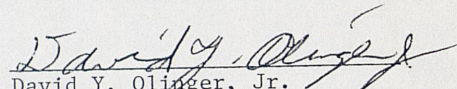
148

\$8,900.73 and should remit the sum of \$11,872.27 to the plaintiff.

Therefore, the United States moves the Court to amend the judgment of \$179,200.00 to credit the total sum of \$15,312.27 to the United States and direct the United States to deposit the difference between the final judgment and the deposit plus \$15,312.27, plus six per cent (6%) interest thereon from April 1, 1977 until paid into the Registry of the Court, to satisfy the final judgment.

In support of this motion, plaintiff attaches hereto its Memorandum of Law.

LOUIS DeFALAISE  
UNITED STATES ATTORNEY

  
David Y. Olinger, Jr.  
Assistant U. S. Attorney

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF KENTUCKY  
PIKEVILLE DIVISION

Eastern District of Kentucky  
**FILED**

JAN 16 1984

06/65  
AT PIKEVILLE  
LESLIE G. WHITMER  
CLERK, U. S. DISTRICT COURT

CIVIL ACTION NO. 77-167  
TRACT NO. 307

UNITED STATES OF AMERICA,

PLAINTIFF,

VS.

AMENDED JUDGMENT AND ORDER

251.93 ACRES OF LAND, MORE OR LESS,  
SITUATE IN JOHNSON COUNTY, ET AL.,

DEFENDANTS.

\* \* \* \*

The defendant landowners, William Turner, Jr., and Hazel Turner, by counsel, have moved the Court, pursuant to FRCP 59(e), to amend the Final Judgment entered by this Court on December 29, 1983, to reflect that the landowners are entitled to interest at the rate of six percent (6%) per annum on the total amount awarded in said judgment as of the date of taking, pursuant to 40 U.S.C. §258(a).

The plaintiff has also moved the Court to amend its Final Judgment to reflect the aforementioned interest, as well as the stipulations to which the parties agreed in open Court concerning the salvage value of the improvements and the oil and gas payments received by the defendants. Plaintiff also submitted that the Final Judgment should be reduced by \$11,872.27, the amount of the excess Advance Relocation Payment received by the defendant landowners.

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The Court has considered the motions of the parties, the memoranda filed in support of the parties' respective motions, and being so advised,

IT IS HEREBY ORDERED, as follows:

1. The Court adopts in its entirety the Final Judgment for the defendant landowners, William Turner, Jr., and Hazel Turner, entered by the Court on December 29, 1983, and said judgment is incorporated herein by reference.

2. The defendant landowners are entitled to interest at the rate of six percent (6%) per annum on the value of the land at the date of taking (\$179,200.00), less the deposit made by the plaintiff into the Court Registry of \$66,200.00.

3. The judgment of \$179,200.00 is now reduced by \$11,872.27, the amount of the excess Advance Relocation Payment received by the defendants.

4. The judgment is further reduced by the salvage value of the improvements and the oil and gas payments received by said defendants, as stipulated to by the parties in open Court, in the amount of \$3,440.00.

5. This Amended Judgment is a final judgment as to the defendants, William Turner, Jr., and Hazel Turner.

This the 16<sup>th</sup> day of January, 1984.

Copies: 2-Certified 3 attest  
{ US Ctty

11-84  
m- { Charles J. Brennan  
William D. Graham  
David Lemaster  
Mary Aembree

G. Wix Unthank  
G. WIX UNTHANK, JUDGE

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF KENTUCKY  
PIKEVILLE

Eastern District of Kentucky  
**FILED**

JAN 09 1984

CIVIL ACTION NO. 77-167

AT PIKEVILLE  
LESLIE G. WHITMER  
CLERK, U. S. DISTRICT COURT

UNITED STATES OF AMERICA,

PLAINTIFF,

VS: MEMORANDUM OF LAW FOR LANDOWNERS

251.93 ACRES OF LAND, MORE OR LESS,  
SITUATE IN JOHNSON COUNTY, COMMONWEALTH  
OF KENTUCKY and BAPTIST CHURCH, et al,

DEFENDANTS.

\* \* \* \* \*

MAY IT PLEASE THE COURT:

The Judgment entered December 29, 1983 herein reflect-  
ed the Court's findings and conclusions that the fair market  
value of the subject property as of the date of taking,  
April 1, 1977, was the sum of \$179,200.00.

The purpose of the motion to amend the Judgment  
filed herein by landowners is to provide greater certainty,  
and to provide more specifically, the award of interest to  
landowners as required by 40 USC Sec. 258a and the Constitution  
of the United States.



IN ADDITION TO THE PRINCIPAL SUM  
OF \$179,200.00, WHICH THE COURT  
DETERMINED WAS THE FAIR MARKET  
VALUE OF THE SUBJECT PROPERTY AS  
OF THE DATE OF TAKING, LANDOWNERS  
ARE ENTITLED TO INTEREST ON SAID  
PRINCIPAL AMOUNT FROM THE DATE OF  
TAKING UNTIL PAYMENT PURSUANT TO  
40 USC SEC. 258a.

The right of landowners to interest in addition to the award of the principal amount of the fair market value of their property as of the date of taking, is a matter of constitutional right and is further established by 40 USC Sec. 258a, which provides that upon filing of the declaration of taking the right to just compensation for the property taken vests in the persons who held title to the property, and further that "said compensation shall be ascertained and awarded in said proceeding and established by judgment therein" and further that:

" . . . the said judgment shall include,  
as part of the just compensation award,  
interest at the rate of 6 per centum per  
annum on the amount finally awarded as the  
value of the property as of the date of tak-  
ing, from said date to the date of payment;  
but interest shall not be allowed on so much  
thereof as shall have been paid into the court!"

40 USC Sec. 258a.

The government deposited into court at the time of the taking for Tract No. 307 the sum of \$62,100.00.

This Court by the Judgment entered December 29, 1983 determined that the fair market value of the property on the date of taking was \$179,200.00.

Accordingly, landowners are entitled to interest at 6% per annum on the difference, from the date of taking, April 1, 1977, until paid.

Although the provision for interest is made by federal statute, the right to interest emanates originally from the requirement of just compensation of the Fifth Amendment of the Constitution, and the corollary that just compensation must be full compensation. Case decisions which have recognized a constitutional right to interest in eminent domain proceedings include US -v- 100 Acres of Land, 468 F. 2d 1261 (9th Cir., 1972).

Scholars who have treated the subject include 3 Nichols, Eminent Domain, Sec. 8.63:

" . . . when land is taken by eminent domain . . . payment . . . should be coincident with the taking or injury, and if for any reason payment is postponed, the right to interest from the time that payment ought to have been made until it is actually made follows as a matter of strict constitutional right!"

Perhaps no more precise statement of the rule can be found than that provided in United States -v- 355.70 Acres of Land, 327 F. 2d 630 (3rd Cir., 1964):

"In deciding what is just compensation for a public taking of private property, courts normally determine and award the fair value of the property at the time of taking. But usually the taking occurs at the beginning of the condemnation proceeding, while the award comes at the end. This means that there is likely to be a substantial period during which the owner has neither his land nor equivalent value in money. In such circumstances, just compensation must include, in addition to fair value at the time of taking, an award for the intervening deprivation. To supply this essential element of just compensation, Congress has required that the United States pay 6 per cent interest upon the value at taking from that date until the award is made and paid. 40 U.S.C. § 258a!"

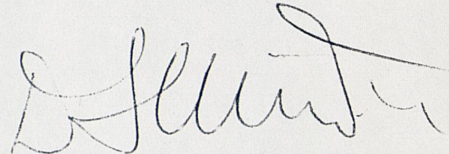
327 F. 2d at 632.

The United States Court of Appeals for the Sixth Circuit has held that a motion to amend the judgment under Rule 59(e) is a proper vehicle by which to correct the omission of a provision for interest in the original judgment. Gray -v- Dukedom Bank, 216 F. 2d 108 (6th Cir., 1954).

CONCLUSION

For the foregoing reasons landowners respectfully request this Court to enter appropriate orders and judgments to properly and clearly and specifically reflect the award to landowners of interest at 6% per annum, on the unpaid portion of the total market value of the property as of the date of taking, from said date of taking until paid.

Respectfully submitted,



DAVID LEMASTER  
ATTORNEY FOR LANDOWNERS  
WILLIAM TURNER., JR., and  
HAZEL TURNER  
95 Main Street  
Paintsville, Kentucky 41240  
(606) 789-6531

CERTIFICATION

This is to certify that true and correct copies of the foregoing Memorandum of Law have been mailed to the United States Attorney for the Eastern District of Kentucky, the Hon. David O'Linger, Assistant United States Attorney, Post Office Box 1490, Lexington, Kentucky 40509, the Hon. Charles Brennan, Department of Justice, Land & Natural Resources, Safeway Building, 521 12th Street NW, Washington, D.C. 20044, and the Hon. Mary K. Hembree, Attorney, Department of Justice, Land & Natural Resources Division, Ninth & Pennsylvania Avenue, N.W., Washington, D.C. 20530, on this the 7th day of January, 1984, and that said service has been accomplished by mailing true and correct copies of same to the above said attorneys by United States Mail, postage pre-paid.

*[Handwritten Signature]*

ATTORNEY AT LAW

UNITED STATES DISTRICT COURT Eastern District of Kentucky  
EASTERN DISTRICT OF KENTUCKY  
PIKEVILLE

FILED

JAN 09 1984

CIVIL ACTION NO. 77-167

AT PIKEVILLE  
LESLIE G. WHITMER  
CLERK, U. S. DISTRICT COURT

UNITED STATES OF AMERICA,

PLAINTIFF,

VS: MOTION TO AMEND JUDGMENT PURSUANT  
TO RULE 59(e)

251.93 ACRES OF LAND, MORE OR LESS,  
SITUATE IN JOHNSON COUNTY, COMMONWEALTH  
OF KENTUCKY and BAPTIST CHURCH, et al, DEFENDANTS.

\* \* \* \* \*

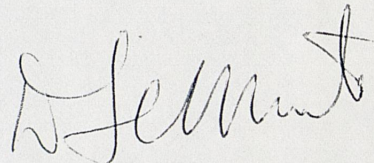
Come now the landowners of Tract No. 307, William Turner, Jr., and Hazel Turner, by counsel, and respectfully move this Court, pursuant to Rule 59(e), to amend the Judgment herein entered on December 29, 1983 to provide specifically for the payment to said landowners of interest as required by law, in addition to the principal amount of \$179,200.00, fixed by the Court as the fair market value of Tract No. 307 as of the date of taking, April 1, 1977.

As grounds for same, landowners state that both as a matter of constitutional right, and pursuant to the mandate of 40 USC Sec. 258a, landowners are entitled to interest at the rate of 6% per annum on the total amount awarded as the value of the property on the date of taking, less the amount previously paid into Court, said interest to run from the date of taking until the date of final payment of the total amount.

It is obvious that this Court intended that the Judgment provide for said interest in addition to said principal. Thus, for greater certainty, said Judgment should be amended to so provide and reflect the award of said interest.

In support of this motion, landowners hereto attach their Memorandum of Law.

WHEREFORE, landowners pray for proper orders of this Court amending the said Judgment.

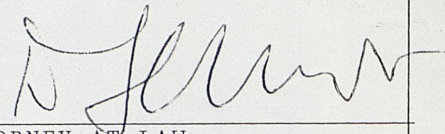


DAVID LEMASTER  
ATTORNEY FOR LANDOWNERS  
WILLIAM TURNER, JR., and  
HAZEL TURNER  
95 Main Street  
Paintsville, Kentucky 41240  
(606) 789-6531

CERTIFICATION

This is to certify that true and correct copies of the foregoing motion to amend judgment pursuant to Rule 59(e) have been mailed to the United States Attorney for the Eastern District of Kentucky, the Hon. David O'Linger, Assistant United States Attorney for the Eastern District of Kentucky, Post Office Box 1490, Lexington, Kentucky 40509, the Hon. Charles Brennan, Department of Justice, Land & Natural Resources, Safeway Bldg., 521 12th Street NW, Washington, D.C. 20044, and to the Hon. Mary K. Hembree, Attorney, Department of Justice, Land & Natural Resources Division, Ninth and Pennsylvania Avenue, N.W., Washington, D.C. 20530, on this the 7th day of January, 1984, and that said service has been

accomplished by mailing true and correct copies of same to  
the above said attorneys by United States Mail, postage pre-  
paid.

A handwritten signature in cursive script, appearing to read "D. J. [unclear]", written in dark ink.

ATTORNEY AT LAW



Eastern District of Kentucky  
FILED  
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AT PIKEVILLE  
LESLIE G. WHITMER  
CLERK, U. S. DISTRICT COURT

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF KENTUCKY  
PIKEVILLE

CIVIL ACTION NO. 77-167

UNITED STATES OF AMERICA

PLAINTIFF,

VS:

MEMORANDUM OPINION AND ORDER

251.93 ACRES OF LAND, MORE OR LESS,  
SITUATE IN JOHNSON COUNTY, COMMONWEALTH  
OF KENTUCKY AND BAPTIST CHURCH, et al

DEFENDANTS.

\* \* \* \* \*

The pleadings and evidence reflect, and the Court finds, that on or about the 1st day of April, 1977, the United States of America condemned and took 251.93 acres of land situated in Johnson County, Kentucky. The defendants, William Turner, Jr. and Hazel Turner, acquired title to Tract No. 307, consisting of 188.40 acres on Glade Branch, off Stone Coal, in the Volga Community, prior to the date of taking and were the owners and possessor of said property at said time.

The controversy was heard by the Court with an advisory jury. Upon the conclusion of the evidence and the return of special interrogatories by the jury, the Court requested of counsel, memoranda of points and authorities upon the appropriateness of such findings. The primary issue is the fair market value of the defendants' property on the date of taking, which consisted of land and improvements.

After considering the pleadings and evidence, together with memoranda of parties, the Court finds that the highest and best use for which Tract 307 was capable

and adaptable at the time of taking was residential subdivision development. The Court finds that the method of valuation for Tract 307 is the market data approach. The Court finds that 128.40 acres of the tract was timberland, which had a fair market value of Five Hundred (\$500) Dollars per acre; the tract contained 60 acres of cleared land which had a fair market value of One Thousand (\$1,000) Dollars per acre. The total fair market value of the land at the time of the taking was in the sum of One Hundred Twenty-four Thousand and Two Hundred (\$124,200) Dollars. The Court finds that Tract 307, at the time of taking, had the following named improvements thereon, with a fair market value as indicated:

(a)	Main dwelling house	FMV . . . . .	\$52,000
(b)	Second dwelling house		13,400
(c)	Two-story barn		6,400
(d)	One-story Barn		2,000
(e)	Three Out-buildings (Each \$400)		1,200
			<hr/>
	TOTAL FAIR MARKET VALUE OF IMPROVEMENTS		<u>\$75,000</u>

The Court finds that to adapt the property to the highest and best use for which it was capable at the time of taking, it was necessary for the defendants to expend the sum of Twenty Thousand (\$20,000) Dollars. By reason of the taking the defendants were saved said expense and the plaintiff is entitled to deduct said savings from the fair market value of said property for its highest and best use at the time of taking.

The Court finds that the fair market value of the property and improvements at the time of taking, less said deduct, to be in the total sum of One Hundred Seventy-nine Thousand, Two Hundred (\$179,200) Dollars. The Court further finds that this valuation

is within the range of the valuations established by the testimony of the experts of the parties herein.

A judgment will be prepared and entered pursuant to this Memorandum Opinion and Order.

This 29<sup>th</sup> day of December, 19 83.

G. Wix Unthank  
G. WIX UNTHANK, JUDGE

Copies {  
w/ notice of } 2 Certs + 7 attest  
Entry } U. S. Atty  
David Lemaster  
Charles J. Bunnan  
William H. Graham  
Mary Hembre  
12/29/83  
mt-

Eastern District of Kentucky  
FILED

DEC 29 1983

03104  
AT PIKEVILLE  
LESLIE G. WHITMER  
CLERK, U. S. DISTRICT COURT

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF KENTUCKY  
PIKEVILLE

CIVIL ACTION NO. 77-167

UNITED STATES OF AMERICA

PLAINTIFF,

VS:

FINAL JUDGMENT FOR THE DEFENDANTS,  
WILLIAM TURNER, JR. AND HAZEL TURNER

251.93 ACRES OF LAND, MORE OR LESS,  
SITUATE IN JOHNSON COUNTY, COMMONWEALTH  
OF KENTUCKY AND BAPTIST CHURCH, et al

DEFENDANTS.

\* \* \* \* \*

Pursuant to Memorandum Opinion and Order entered this date,

IT IS ORDERED AND ADJUDGED:

That judgment be and is entered for the defendants, William Turner, Jr. and Hazel Turner, declaring the total just compensation for the interests of said defendants in Tract No. 307, consisting of 188.40 acres on Glade Branch, off Stone Coal, in the Volga Community, said tract being a part of the 251.93 acres of land situated in Johnson County, Kentucky, the subject matter of the above named and numbered eminent domain proceeding, to be in the sum of One Hundred Seventy-nine Thousand, Two Hundred (\$179,200) Dollars.

The Court directs that the appropriate deposits be disbursed from the Registry of this Court, subject to the provisions of Title 28 U.S.C. 2042.

1165

This is a multiple-party and issue action and the judgment herein is a judgment upon fewer than all the claims as to all the parties; however, there is no just reason for delay upon the issues as to these defendants. The judgment herein is a **FINAL JUDGMENT**.

This 29<sup>th</sup> day of December, 1983.

G. Wix Unthank  
G. WIX UNTHANK, JUDGE

Copies w/notice  
of Entry } Mary Hembre  
William J. Graham  
Charles J. Brennan  
David Lemaster  
U.S. Atty - 2 Certified  
+ 7 attest

12/29/83  
ml

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF KENTUCKY  
PIKEVILLE

CIVIL ACTION NO. 77-167  
TRACT NO. 307

UNITED STATES OF AMERICA,  
PLAINTIFF,

V.

251.93 ACRES OF LAND, MORE OR  
LESS, SITUATE IN JOHNSON COUNTY,  
COMMONWEALTH OF KENTUCKY, AND  
BAPTIST CHURCH, ET AL.,  
DEFENDANTS.

GOVERNMENT'S MEMORANDUM  
WHETHER THE COURT SHOULD ACCEPT  
THE FINDINGS OF THE ADVISORY JURY

Comes now the United States of America and for its Memorandum  
states:

I

The government endorses the advisory jurors advice that the  
market data approach is the correct method of valuation for Tract  
No. 307. The government also endorses the advisory jurors advice  
that the highest and best use of subject tract is not for mineral  
development. However, the government contends the highest and best  
use of Tract No. 307 as of April 1, 1977, was as a farm. This con-  
tention is founded on the following:

1. Present use of Tract No. 307 as of April 1, 1977.

Tract No. 307 has always been used as a farm. It was so used until

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Eastern District of Kentucky  
**FILED**

OCT 21 1983

AT PIKEVILLE  
LESLIE G. WHITMER  
CLERK, U. S. DISTRICT COURT,

the present acquisition. It was purchased by defendant on the understanding it would be kept in the family. And it was so kept until the present acquisition.

The evidence is that a substantial amount of labor was expended by defendant in repairing the various farm buildings, fencing, and the farmhouse. This is consistent with the view Tract No. 307 is a farm. Mr. Paul Brown testified that when he inspected defendant's farm, defendant made no mention of the suitability of his land for subdivision. The evidence is abundant defendant Turner is sophisticated in regard to real estate matters; real estate appraisal; and condemnation practices - yet he did not mention any subdivision potential to Mr. Brown. The Courts tend to consider the existing use at the time of the taking as the highest and best use; and although there is no judicially declared legal presumption to that effect, the result is similar. United States v. Buhler, 305 F.2d 319 (5th Cir 1962).

2. Physical characteristics of the subject property.

Subject is about 67 percent wooded land. This wooded land is mostly hillsides. Only about 60 acres of Tract No. 307 are open and in the hollows and draws. Development of more than the 60 open acres on Tract No. 307 would cause extensive drainage problems that tend to inhibit development and sale of the wooded portion.

3. Access to the subject property. It is obvious the main farm access was from Glade Branch Road and thence across Glade Branch Creek to the main dwelling on Tract No. 307. This access is a "red

dog" road. The large rocks thereof require careful maneuvering by traffic. The minor access near what defendant has called the "ball park" requires substantial improvement, which would remain a one-lane approach. This is because there is private property on both sides of this access between Tract No. 307 and the public road.

4. Location of Tract No. 307. Tract No. 307 is located in rural Johnson County, Kentucky, about 8 miles northwest of Paintsville. The evidence is uncontested that subdivision development in Johnson County is within a 1- to 2-mile radius of Paintsville and although there is some evidence of subdivision of 10- to 12-acre tracts in rural areas of the county, larger subdivided tracts do not exist in the general vicinity of Tract No. 307.

5. Farm value of Tract No. 307. The fair market value of Tract No. 307 is based on an agricultural highest and best use. The only land sales in evidence comparable to Tract No. 307 are those offered by the government and received in evidence by the Court. These sales clearly indicate the upper limit of fair market value as of April 1, 1977, was \$400.00 per acre or approximately \$75,000.00.

6. Defendant's farm value evidence. The only specific evidence defendant offered in reference to farm value involved the purchase of Tract No. 307 by Mr. Turner from his wife's uncle, Mr. Everett LeMaster, for \$16,000.00 in 1968 and the uncorroborated evidence of Mr. Turner that he spent \$100,000.00 to repair improvements of subject property. The expenditure to repair does not increase contributory value. It merely maintains that value. Further-



more, the cost of such maintenance may or may not be reflected in the fair market value of the property. But even if the alleged \$100,000.00 is added to the only agricultural land value in the case (submitted by Messrs. Brown and Knight) at approximately \$400.00 per acre, the outer limit of agriculture value Tract No. 307 could have as of April 1, 1977, would be \$175,500.00. Beyond doubt this sum exceeds the true fair market value of the subject property by a very significant amount.

Fair market value is the price which a purchaser, willing but not compelled to buy, and a seller, willing but not compelled to sell, would probably agree upon at the time of taking by the government. United States v. Miller, 317 U.S. 369, 374-375 (1943); Olson v. United States, 292 U.S. 246, 257 (1934). It does not necessarily reflect the amount of money invested in a tract of land.

II

The determination of the fair market value of Tract No. 307 should include consideration of the highest and best use for which the property is clearly adapted. By highest and best use is meant either some existing use on the date of taking, April 1, 1977, or one which the evidence shows was so reasonably likely in the near future that the availability of the property for that use would have affected its market price on the date of taking and would have been taken into account by a purchaser under fair market conditions. Olson v. United States, 292 U.S. 246, 255 (1943). In determining the uses of which the property is capable, it is necessary to have regard to the existing demands or wants of the community, or such as may be reasonably expected in the immediate future. United States v. Foster, (CCA Iowa) 131 F.2d 3, cert. den., 63 S.Ct. 760; United States v. Buescher, CCA Iowa, 131 F.2d 3; Morton Butler Timer Co. v. United States, CCA Tenn., 91 F.2d 884; United States v. 3969.59 Acres of Land, (D.C. Idaho). Mere speculative, conjectural, imaginary, or remote uses, or value, cannot be considered. United States, ex rel. and for Use of Tennessee Valley Authority v. Powelson, N.C., 63 S.Ct. 1047, 318 U.S. 266, cert. den., 64 S.Ct. 612, 321 U.S. 773. There must be some probability the property will be used within a reasonable time for the particular use to which it is adapted. Wateree Power Co., C.A.S.C., 220 F.2d 226; United States v. Sanitary District of Chicago, C.C.A. Ill., 149 F.2d 951, cert. dismissed, 66 S.Ct. 94, 326 U.S. 687, and there must be a

present demand for the land for such purpose, or a reasonable expectation of such demand in the near future. Olson v. United States, C.C.A. Minn., 67 F.2d 24, affirmed, 54 S.Ct. 704, 292 U.S. 246.

The defendant has the burden of proving, by a preponderance of the evidence, his claim as to the value of the land being taken from him by the government. United States ex rel. T.V.A. v. Powelson, 319 U.S. 266, 273 (1943); Wilson v. United States, 350 F.2d 901, 908 (C.A. 10, 1965); United States v. Sowards, 370 F.2d 87, 92 (C.A. 10, 1966); United States v. Evans, 380 F.2d 761, 762 (C.A.10, 1967); Welch v. T.V.A., 108 F.2d 95, 101 (C.A. 6, 1939), cert. denied, 309 U.S. 688 (1939); United States v. 765.56 Acres of Land, etc., 164 F. Supp. 942, 949 (E.D.N.Y., 1958), aff'd sub nom; United States v. Glanat Realty Corporation, 276 F.2d 264 (C.A. 2, 1960).

In this case defendant contends Tract No. 307 is suitable for subdivision development as of April 1, 1977. The government disagrees. But for purposes of argument, Tract No. 307 will be examined from this point of view, in light of the above law.

1. Physical Characteristics. Tract No. 307 is inhibited for use as a subdivision by its physical characteristics. About 67 percent of the property consists either of rising slopes, ridges, creek beds, or mountain forest lands. Only approximately 60 acres is in hollows; that is, in open land, physically adaptable for subdivision in the reasonably foreseeable future.

2. Location and Access. Tract No. 307 is encumbered by location and access difficulties. The main access is approximately

8 miles from Paintsville, Kentucky, over a "red dog" type road. The uncontested evidence is that most subdivision development in Johnson County, Kentucky, occurs within a 1- to 2-mile radius of Paintsville; and, that such development enjoys access on high type, "all weather" roads.

3. Size. The uncontested evidence is that Tract No. 307 is about three times larger than the largest subdivision in Johnson County, Kentucky. This indicates 67 percent of the land area of Tract No. 307 is superfluous for subdivision development.

4. All comparable sales in evidence. The comparable sales offered and received in evidence on both sides of this case do not support the jurors' responses to the Court's interrogatories in regard to fair market value of Tract No. 307. Even if the 60 open acres on Tract No. 307 were valued at the highest rate of defendant's evidence, the value of that 60 acres would not approach these responses. It must be true that the steeper slopes and forest-covered lands of subject become increasingly less valuable as ridge tops are approached. This is due to problems and costs associated with homesite preparation in regard to leveling, clearing and drainage. Assuming a decrease in value for another 60 acres adjoining the open 60 acres, the remaining 68.4 steeply sloping and ridge top acres must surely be the least valuable on the property and worth only "forest" value.

5. Defendant's sales. Defendant's sales should be given little weight in arriving at the fair market value of Tract No. 307. Those sales were significantly smaller in size than the subject

property. They enjoy superior topography. Many abutted or fronted blacktop roads or U.S. highways. Such sales command substantially higher prices than land, such as subject, that have inferior access and location. Moreover, these sales did not have the same highest and best use as Tract No. 307. For that reason alone they should not be considered. A subdivision lot sale such as used by defendant's witness, Mr. Weddington, has absolutely no bearing on fair market value even of land that may have potential for subdivision development. What is required to demonstrate that potential would be a sale or sales of about the same size, location, and access, that later developed as a subdivision. None such were offered. They do not exist in the neighborhood of Tract No. 307.

Witness Weddington's market sales were not comparable to Tract No. 307 which consisted of 188.4 acres; his largest sale, "Lemaster to RECA," being less than 2 acres in size. For this reason alone (size), Mr. Weddington's sales should be given little weight. Furthermore, the utilization of lot sales with separating the cost of the development of such sales would result in the defendant's receiving an award in which "cost to develop" the land would be included. The Courts have specifically not allowed this. United States v. 47,3096 Acres, etc. in Oxford Township, Eric County, State of Ohio, and Kenneth DeChant, et al., 583 F.2d 270 (6th Cir., 1978).

6. Mineral development affecting subdivision claim. The defendant's property was subjected to an oil and gas lease on the date of taking. The evidence showed that this lease restricted the

use of the property by its terms and conditions affecting the potential development of any subdivision as of the date of taking.

Any subdivision development would be prohibited for the ten-year terms of the lease and a larger period if the lessee (Columbia Gas) decided to develop the tract in question. The evidence showed that the defendants were accepting payments from Columbia Gas as of the date of taking.

7. The fair market value of Tract No.307. The government contends the lowest sum returned by any of the advisory jurors (\$204,000.00), in response to the Court's interrogatories, is more than \$100,000.00 above the true market value of the subject property, Tract No. 307, as of April 1, 1977.

8. Stipulation. The government stipulates that the defendants owe to the United States the sum of \$600.00 for salvage value for buildings, and the sum of \$2,790.00 for the payments received from Columbia Gas on the oil and gas lease after the date of taking.

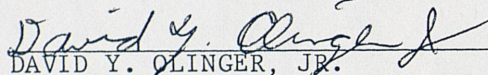
CONCLUSION

The government contends Tract 307 has a fair market value considered as an agricultural property of less than \$100,000.00 and that defendant's evidence does not justify a fair market value of the subject property in excess thereof. The government requests this Honorable Court to return an award of fair market value based only upon the credible evidence in this case.

Respectfully submitted,

LOUIS DeFALAISE  
United States Attorney

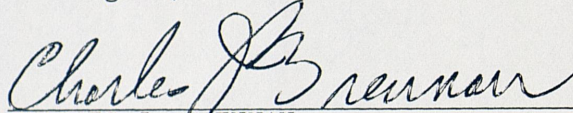
By:



DAVID Y. OLINGER, JR.  
Assistant United States Attorney  
Post Office Box 1490  
Lexington, Kentucky 40591



MARY K. HEMBREE  
Attorney, Department of Justice  
Land and Natural Resources Division  
Ninth and Pennsylvania Avenue, N.W.  
Washington, D.C. 20530

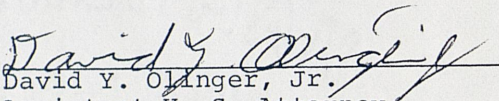


CHARLES J. BRENNAN  
Attorney, Department of Justice  
Land and Natural Resources Division  
Ninth and Pennsylvania Avenue, N.W.  
Washington, D.C. 20530

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Government's Memorandum has been served upon the defendants by mailing a true and correct copy thereof this 21st day of October, 1983, to the following:

Hon. David LeMaster  
95 Main Street  
P.O. Drawer 272  
Paintsville, Kentucky 41240

  
David Y. Olinger, Jr.  
Assistant U. S. Attorney  
P.O. Box 1490  
Lexington, Kentucky 40591



UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF KENTUCKY  
PIKEVILLE DIVISION

Eastern District of Kentucky  
**FILED**  
NOV 21 1983

NO. 77-167  
TRACT NO. 307

AT PIKEVILLE  
SHELDON G. WHITFIELD

UNITED STATES OF AMERICA,

PLAINTIFF,

VS: LANDOWNERS' MEMORANDUM

251.93 ACRES OF LAND, MORE OR  
LESS, SITUATE IN JOHNSON COUNTY,  
COMMONWEALTH OF KENTUCKY, AND  
BAPTIST CHURCH, et al,

DEFENDANT.

\* \* \* \* \*

MAY IT PLEASE THE COURT:

It is respectfully submitted that the government has, by means of its memorandum heretofore filed, furnished no valid or satisfactory reason for this court to ignore or reject the advice of the jury impaneled to assist in the determination of the fair market value of Tract No. 307.

The six separate valuations made by the jurors, ranging from \$250,000.00 to \$204,000.00, all were well within the range of expert valuation testimony adduced at the trial.

The unanimous determination of the advisory jurors that residential subdivision development is the highest and best use for Tract No. 307 is amply supported by competent, relevant, material, and highly credible testimony from various witnesses -- a number of whom with many years of experience in developing similar residential subdivision property in and around Johnson County, Kentucky, where Tract No. 307 is located.

HIGHEST AND BEST USE

The jury was no doubt greatly influenced and impressed -- as any unbiased person who heard the evidence in this case could not have failed to be -- with the shocking and complete lack of information exhibited by the government's witnesses as to residential subdivision development in rural Johnson County in the vicinity of Tract No. 307.

The opinions on highest and best use of the government's witnesses Brown and Knight (that the property was suitable for agricultural purposes but not for residential subdivision use) were necessarily rendered largely worthless and incredible by the demonstration (and their own admissions) that each witness lacked even the most basic or fundamental information concerning the substantial activity, near the time of taking, in residential subdivision development of similar properties in the same general area of rural Johnson County as Tract No. 307.

This observation is, of course, not meant to personally impugn either Mr. Knight or Mr. Brown (with both of which gentlemen the undersigned attorney for landowners is personally acquainted). Each is no doubt qualified to testify about a number of subjects. Yet, their respective surmises concerning the adaptability of, and demand for, Tract No. 307 as a residential subdivision area, were necessarily rendered highly questionable, and quite properly were rejected by the advisory jury, when each witness professed -- indeed, demonstrated -- a general ignorance of other subdivision developments on similar tracts in the vicinity, near in time to the date of taking Tract No. 307 (e.g., James Blanton subdivision, Ernest Vanhoose subdivision, Gary Endicott subdivision, ect., ect.)

Landowners must disagree vehemently with (indeed, are shocked by) the government's contention as to the law found at page 2 of the government's memorandum, that: "The courts tend to consider the existing use at the time of taking as the highest and best use!"

To the contrary, landowners respectfully submit that the prevalent rule of law is as stated by the United States Court of Appeals for the Sixth Circuit (quoting and paraphrasing the US Supreme Court's Opinion in Olson -v- United States, 292 US 246, 54 S. Ct. 704, 78 L. Ed. 1236 (1934)), in the case of US -v- 1291.83 acres of land, more or less, 411 F. 2d 1081 (1969):

"It is settled law that the landowner is to be compensated for the fair market value of his property upon the basis of the property's highest and best use . . . in determining value the highest and most profitable use for which the property is adaptable and needed, or is likely to be needed in the near future, is to be considered . . .

. . . the sum required to be paid the owner does not depend upon the uses to which he has devoted his land, but is to be arrived at upon just consideration of all the uses for which it is suitable!"

411 F. 2d at 1084, 1086.

The evidence as a whole is overwhelming, and clear and convincing (though it need, of course, only preponderate) that the subject property was easily and inexpensively adaptable to, suitable for, and needed for, residential subdivision use.

The evidence is uncontradicted that for some \$5,000.00 to \$10,000.00 only, a second improved access road from the Fish Trap highway to the subject property could have been fashioned, placing the access to this property on an equal or better footing than that of other subdivision developments in the area.

Lots could and would have been subdivided and sold for residential use, with little or no additional development expenditures by landowners.

As the record itself clearly shows, a key to this case (a central fact that the government, its agent, its lawyers, and its witnesses all have been unwilling or unable to acknowledge) is that in rural Johnson County in the vicinity of Tract No. 307 near in time to the date of taking, large or elaborate expenditures of money for paved streets, paved sidewalks, utility poles, street lights, storm sewers, sanitary sewers, and other such amenities simply were not required or customarily provided for successful subdivision developments.

The testimony of the witnesses Robinson, Weddington, Daniels and Endicott, introduced by landowner, furnishes more than ample justification for the conclusion that, at the time of taking, there was a strong demand for similar subdivision property in Johnson County, and that Tract No. 307 was suitable and situate and adaptable for that use.

The evidence shows without contradiction that enormous commercial activity took place in Johnson County in the 1970's, and in that decade the population increased at a rate of some 40% -- from 17,000 in 1970 to 24,000 in 1980. More land for residential use was needed in Johnson County at and about the time of taking. Landowners contemplated and planned such a use for their property, having had their engineer prepare a subdivision plat.

The record also demonstrates, abundantly, that the force of the testimony of the witnesses Robinson, Weddington, and Endicott is especially augmented by virtue of their years of practical experience, and personal financial investments, in residential subdivision development of properties similar to Tract No. 307 in eastern Kentucky, particularly in Johnson County.

The jurors' unanimous finding that residential subdivision development was the highest and best use of the property was the one clearly compelled by the evidence. It is respectfully submitted that this finding should be adopted by this Honorable Court.

#### VALUATION

The jurors' separate valuation verdicts reflected a range of from \$250,000.00 down to \$204,000.00 for the fair market value of Tract No. 307 on the date of taking, April 1, 1977. The average or median is in the vicinity of \$231,000.00.

Even the verdict of \$250,000.00 amounts to substantially less than \$1,500.00 per acre for this 188.40 acre tract. Yet, examination of a number of sales of comparable but less favorably situated tracts, alluded to in their testimony by landowners' witnesses, reveals per acre prices in the \$1,500.00 or higher range. With all adjustments properly considered, the range of evaluation opinion testimony adduced by landowners was \$329,700.00 to \$520,000.00.

Even the so-called comparable sales furnished by the government can be said to point to a fair market valuation above \$300,000.00 for Tract No.307. For example, the Ace's Creek Tract, which sold for \$22,000.00, was mainly of unusable land, "steep as a mule's face," as one witness put it. Only two acres of the Ace's Creek Tract was usable land, whereas, even by the government's grudging admission found at page 6 of its memorandum, at least 60 acres of the subject property is usable or, as the government concedes, "physically adaptable for subdivision in the reasonably foreseeable future!" Consequently, Tract No. 307 contains some 30 times as much usable land as the government's Ace's Creek comparable sale. Simple multiplication reveals that 30 times the government's comparable sale price of \$22,000.00 is the sum of \$660,000.00. Viewed in this context, landowners' valuation witnesses range of \$329,700.00 to \$520,000.00 certainly must be seen as fair and reasonable.

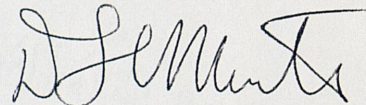
Not to be overlooked is the fact that the government's valuation testimony assumed only agricultural use of the land, not residential subdivision development use. Both the government's valuation witnesses agreed and acknowledged that a change of use classification from agricultural to residential subdivision development will increase the value of the appraisal of the land.

The suggestion in the government's memorandum that \$100,000.00 would be a fair sum for this property ignores the uncontradicted evidence in the record that landowners spent more than that amount renovating the numerous buildings and clearing and improving the land prior to the date of taking. The government's suggestion also ignores the substantial evidence produced by landowners' valuation witnesses, supported by market data studies and comparable sales in Johnson County, placing the fair market value of the tract at between \$329,700.00 and \$520,000.00 on the date of taking.

CONCLUSION

It is respectfully submitted that this Honorable Court should either accept and adopt the \$250,000.00 advisory valuation verdict, or, alternatively, enter judgment for landowners for a sum of not less than \$300,000.00.

Respectfully submitted,



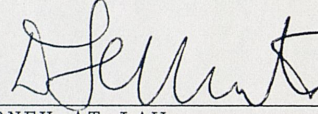
DAVID LEMASTER  
ATTORNEY FOR LANDOWNERS  
WILLIAM TURNER, JR., and  
HAZEL TURNER  
95 Main Street  
Paintsville, KY 41240  
(606) 789-6531



CERTIFICATION

This is to certify that I have this date mailed a true and correct copy of the foregoing LANDOWNERS' MEMORANDUM to the Honorable David Y. O'Linger, Jr., Assistant United States Attorney, Post Office Box 1490, Lexington, KY 40591; Honorable Mary K. Hembree, Attorney, Department of Justice, Land and Natural Resources Division, Ninth and Pennsylvania Avenue, N.W., Washington, D.C. 20530; and to the Honorable Charles J. Brennan, Attorney, Department of Justice, Land and Natural Resources Division, Ninth and Pennsylvania Avenue, N.W., Washington, D.C. 20530.

DATED: This the 21st day of November, 1983.



ATTORNEY AT LAW

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF KENTUCKY

CIVIL MINUTES - TRIAL

Pikeville  
Case No. 77-167 At Pikeville Date September 22, 1983  
Dr. No. 307  
Style United States of America vs. 251.93 Acres, More or Less, Situate in Johnson County, Commonwealth of Kentucky and William Turner, Jr. and Hazel Turner

DOCKET ENTRY ORDER: Trial resumed. Out of the presence of the jury, a conference was had pursuant to Rule 51. The jury returned a special verdict in the form of answers to interrogatories, finding for the defendants, William Turner, Jr., and Hazel Turner. The plaintiff shall file memorandum of points and authorities on whether the Court should accept the findings of the jury within thirty (30) days, on or before October 21, 1983. The defendants shall file responsive memoranda within thirty (30) days, on or before November 21, 1983. The plaintiff shall file reply memoranda within fifteen (15) days thereafter, on or before December 6, 1983, at which time the matter shall stand submitted for consideration by the Court.

PRESENT: HON. G. Wix Unthank, JUDGE  
M. Lewis, Deputy Clerk  
S. Lindstrom, Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFFS:  
Charles J. Brennan  
Mary L. Hembree  
David Olinger, Jr.  
Catharine Redd

ATTORNEYS PRESENT FOR DEFENDANTS:  
David Lemaster

Eastern District of Kentucky  
FILED  
SEP 26 1983  
28102  
AT PIKEVILLE  
LESLIE G. WHITMER  
CLERK, U. S. DISTRICT COURT

Case called and continued to \_\_\_\_\_ for trial.

COURT TRIAL  
Advisory  
JURY TRIAL The Jury impaneled and sworn ~~is as follows:~~ on September 19, 1983.

(1) \_\_\_\_\_ (3) \_\_\_\_\_ (5) \_\_\_\_\_  
(2) \_\_\_\_\_ (4) \_\_\_\_\_ (6) \_\_\_\_\_

(1st Alternate) \_\_\_\_\_ (2nd Alternate) \_\_\_\_\_

Introduction of evidence resumed for plaintiff ~~begun~~ and concluded;

\_\_\_\_ Introduction of evidence for defendant begun, ~~not~~ concluded;

Rebuttal evidence; NO Surrebuttal evidence

\_\_\_\_ Continued to \_\_\_\_\_ further trial.

Jury retires to deliberate at 3:15 P.M.; Jury returns at 4:10 P.M.

\_\_\_\_ Ordered Jury be taken to \_\_\_\_\_; \_\_\_\_\_ be lodged for night.

SPECIAL ANSWERS TO INTERROGATORIES  
 JURY VERDICT. ~~SEE SPECIAL VERDICT~~ Jury polled.  Polling waived.

\_\_\_\_ JUDGMENT BY COURT for \_\_\_\_\_ Plaintiff; \_\_\_\_\_ Defendant; for \$ \_\_\_\_\_

\_\_\_\_ Findings, Conclusions of Law, Judgment to be prepared by \_\_\_\_\_ Plaintiff; \_\_\_\_\_ Defendant.

\_\_\_\_ Submitted.  BRIEFS to be filed 10-21-83 Plaintiff 11-21-83 Defendant 12-6-83 Reply

This the 26<sup>th</sup> day of September, 1983.

G. Wix Unthank  
G. WIX UNTHANK, JUDGE  
Copies: Mary Lewis (Deputy Clerk) mlw  
Charles J. Brennan  
David Lemaster  
Catharine Redd 9-26-83 138  
USA

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF KENTUCKY

CIVIL MINUTES - TRIAL

Pikeville  
Case No. 77467 At Pikeville TR. NO. 307 Date September 21, 1983  
Style USA vs: 251.93 acres, more or less, situate in Johnson County, Commonwealth of Kentucky and William Turner, Jr and Hazel Turner

DOCKET ENTRY ORDER: Trial resumed. Out of the hearing of the jury, oral motion of the plaintiff for a directed verdict, be, and hereby is, OVERRULED. This matter be, and hereby is, CONTINUED to Thursday, September 22, 1983, at 9:00 A.M.

This the 22nd day of September, 1983.

G. Wix Unthank  
G. WIX UNTHANK, JUDGE

PRESENT: HON. G. Wix Unthank, JUDGE  
M. Bevins Deputy Clerk S. Lindstrom Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFFS: Charles J. Brennan  
Mary K. Hembree  
David Dlinger, Jr  
Catharine Redd  
ATTORNEYS PRESENT FOR DEFENDANTS: David Lemaster

Eastern District of Kentucky  
FILED  
SEP 22 1983  
08102  
AT PIKEVILLE  
LESLIE G. WHITMER  
CLERK, U. S. DISTRICT COURT

Case called and continued to \_\_\_\_\_ for trial.

COURT TRIAL  
Advisory  
JURY TRIAL The Jury impaneled and sworn ~~is as follows:~~ on September 19, 1983

- (1) \_\_\_\_\_ (3) \_\_\_\_\_ (5) \_\_\_\_\_
- (2) \_\_\_\_\_ (4) \_\_\_\_\_ (6) \_\_\_\_\_
- (1st Alternate) \_\_\_\_\_ (2nd Alternate) \_\_\_\_\_

Introduction of evidence for plaintiff begun, ~~not~~ not concluded;  
 Introduction of evidence for defendant resumed ~~begun~~ and ~~not~~ concluded;  
Rebuttal evidence: \_\_\_\_\_ Surrebuttal evidence \_\_\_\_\_  
 Continued to 9-22-83 further trial, at 9:00 A.M.  
Jury retires to deliberate at \_\_\_\_\_; Jury returns at \_\_\_\_\_  
Ordered Jury be taken to \_\_\_\_\_; \_\_\_\_\_ be lodged for night.  
JURY VERDICT. SEE SIGNED VERDICT. \_\_\_\_\_ Jury polled. \_\_\_\_\_ Polling waived.  
JUDGMENT BY COURT for \_\_\_\_\_ Plaintiff; \_\_\_\_\_ Defendant; for \$ \_\_\_\_\_

Findings, Conclusions of Law, Judgment to be prepared by \_\_\_\_\_ Plaintiff; \_\_\_\_\_ Defendant.  
Submitted. \_\_\_\_\_ BRIEFS to be filed \_\_\_\_\_ Plaintiff \_\_\_\_\_ Defendant \_\_\_\_\_ Reply

Copies: Charles J. Brennan  
Mary K. Hembree  
US Atty  
Catharine Redd  
David Lemaster } 9-23-83  
Initials of Deputy Clerk mb  
136

(EDKy-112)

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF KENTUCKY

PIKEVILLE

CIVIL MINUTES - TRIAL

Case No. 77-167 At PIKEVILLE  
TRACT NO. 307

Date September 20, 1983

Style UNITED STATES OF AMERICA VS: 251.93 ACRES, MORE OR LESS, SITUATE IN JOHNSON COUNTY, COMMONWEALTH OF KENTUCKY AND WILLIAM TURNER, JR., ET AL

DOCKET ENTRY ORDER: Trial continued and recessed at 9:10 A.M. in order for the Court to take the jury to view the subject property. WHEREAS, upon completion of the jury view, trial proceedings resumed at 2:00 P.M., with presentation of evidence on behalf of the defendant continued but not concluded. This matter be, and hereby is, CONTINUED to Wednesday, September 21, 1983, at 8:45 A.M.

This the 21st day of September, 1983.

G. Wix Unthank  
G. WIX UNTHANK, JUDGE

PRESENT:

HON. G. WIX UNTHANK, JUDGE

M. Bevins  
Deputy Clerk

S. Lindstrom  
Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFFS:

ATTORNEYS PRESENT FOR DEFENDANTS:

Charles J. Brennan  
Mary K. Hembree  
David Olinger, Jr.  
Catharine Redd

David Lemaster

Eastern District of Kentucky  
FILED

SEP 22 1983

08102  
AT PIKEVILLE  
LESLIE G. WHITMER  
CLERK U. S. DISTRICT COURT

Case called and continued to \_\_\_\_\_ for trial.

COURT TRIAL  
ADVISORY

JURY TRIAL The Jury impaneled and sworn ~~XXXXXX~~ on September 19, 1983.

(1) \_\_\_\_\_ (3) \_\_\_\_\_ (5) \_\_\_\_\_

(2) \_\_\_\_\_ (4) \_\_\_\_\_ (6) \_\_\_\_\_

(1st Alternate) \_\_\_\_\_ (2nd Alternate) \_\_\_\_\_

Introduction of evidence for plaintiff begun, ~~not~~ <sup>and</sup> concluded;  
 resumed

Introduction of evidence for defendant ~~not~~ <sup>not</sup> concluded;  
~~XXXXXX~~

Rebuttal evidence; \_\_\_\_\_ Surrebuttal evidence

Continued to 9-21-83 further trial, at 8:45 A.M.

Jury retires to deliberate at \_\_\_\_\_; Jury returns at \_\_\_\_\_

Ordered Jury be taken to \_\_\_\_\_; \_\_\_\_\_ be lodged for night.

JURY VERDICT. SEE SIGNED VERDICT. \_\_\_\_\_ Jury polled. \_\_\_\_\_ Polling waived.

JUDGMENT BY COURT for \_\_\_\_\_ Plaintiff; \_\_\_\_\_ Defendant; for \$ \_\_\_\_\_

Findings, Conclusions of Law, Judgment to be prepared by \_\_\_\_\_ Plaintiff; \_\_\_\_\_ Defendant.

Submitted. \_\_\_\_\_ BRIEFS to be filed \_\_\_\_\_ Plaintiff \_\_\_\_\_ Defendant \_\_\_\_\_ Reply

Copies: David Lemaster  
Catharine Redd  
Charles J. Brennan  
n. s. atty  
Mary K. Hembree } 4-23-83  
mb

Initials of Deputy Clerk \_\_\_\_\_ MB

135

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF KENTUCKY

CIVIL MINUTES - TRIAL

Pikeville  
Case No. 77-167 At Pikeville Date September 19, 1983  
Tract No. 307

Style United States of America vs. 251.93 Acres, More Or Less, and William Sumner, Jr and Hazel Sumner

DOCKET ENTRY ORDER: The matter was called for trial by advisory jury with the jury being selected and sworn. Oral renewed motion of plaintiff for the jury to view the subject property, be, and hereby is, SUSTAINED. The jury will view the said property on Tuesday, September 20, 1983, at 9:00 A.M. WHEREAFTER, upon completion of said viewing, matter be, and hereby is CONTINUED for further trial proceedings.

This the 20th day of September, 1983.

G. Wix Unthank  
G. WIX UNTHANK, JUDGE

PRESENT: HON. G. Wix Unthank, JUDGE  
M. Bevins Deputy Clerk S. Lindstrom Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFFS:  
Charles J. Brennan  
Mary Kathryn Hembree  
David Olinger, Jr.  
Kathryn Kidd, Corps.  
of Engineers

ATTORNEYS PRESENT FOR DEFENDANTS:  
David Lemaster

Eastern District of Kentucky  
FILED  
SEP 21 1983  
08102  
AT PIKEVILLE  
LESLIE G. WHITMER  
CLERK, U. S. DISTRICT COURT

Case called and continued to \_\_\_\_\_ for trial.

COURT TRIAL  
 Advisory  
JURY TRIAL The Jury impaneled and sworn is as follows:

- (1) Melvina C. Hall (3) Loger Danell Musick (5) Danny Ousley
  - (2) Hazel Dawahare (4) Donald Lee Little (6) Doris Hall
- (1st Alternate) \_\_\_\_\_ (2nd Alternate) \_\_\_\_\_

Introduction of evidence for plaintiff begun, <sup>not</sup> and concluded;  
 Introduction of evidence for defendant begun, <sup>not</sup> concluded;  
Rebuttal evidence; \_\_\_\_\_ Surrebuttal evidence  
 Continued to 9-20-83 further trial. at 9:00 A.M  
Jury retires to deliberate at \_\_\_\_\_; Jury returns at \_\_\_\_\_  
Ordered Jury be taken to \_\_\_\_\_; \_\_\_\_\_ be lodged for night.  
JURY VERDICT. SEE SIGNED VERDICT. \_\_\_\_\_ Jury polled. \_\_\_\_\_ Polling waived.  
JUDGMENT BY COURT for \_\_\_\_\_ Plaintiff; \_\_\_\_\_ Defendant; for \$ \_\_\_\_\_

Findings, Conclusions of Law, Judgment to be prepared by \_\_\_\_\_ Plaintiff; \_\_\_\_\_ Defendant.

Submitted. BRIEFS to be filed \_\_\_\_\_ Plaintiff \_\_\_\_\_ Defendant \_\_\_\_\_ Reply

Copies: U. S. Atty  
Catharine Kidd  
Mary Hembree  
David Lemaster  
Charles J. Brennan }  
Initials of Deputy Clerk mt  
9-23-83  
mo  
134

(EDky-111)

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF KENTUCKY

PIKEVILLE

CIVIL MINUTES -- GENERAL

Case No. 77-167 At: PIKEVILLE  
TRACT NO. 307

Date June 27, 1983

Style UNITED STATES OF AMERICA VS: 251.93 ACRES OF LAND, MORE OR LESS,  
SITUATE IN JOHNSON COUNTY, COMMONWEALTH OF KENTUCKY AND BAPTIST CHURCH, ET AL  
DOCKET ENTRY

Eastern District of Kentucky  
**FILED**

JUN 29 1983

LB99

AT PIKEVILLE  
LESLIE C. WHITMER  
CLERK, U.S. DISTRICT COURT

PRESENT:

HON. G. WIX UNTHANK, JUDGE

M. Bevins  
Deputy Clerk

S. Lindstrom  
Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFFS:

David Olinger, Jr., Assistant  
United States Attorney

Charles J. Brennan  
William Graham

ATTORNEYS PRESENT FOR DEFENDANTS:

David Lemaster

PROCEEDINGS: PRE-TRIAL CONFERENCE

The matter was called for proceedings with counsel present as noted. The Court heard counsel and being sufficiently advised,

ORDERED HEREIN:

- (1) Motion of plaintiff, in limine, to limit the evidence of the defendants as to the highest and best use of Tract No. 307, be, and hereby is, TAKEN UNDER ADVISEMENT;
- (2) The parties shall file proposed jury interrogatories for consideration by the court, on or before July 8, 1983;
- (3) By agreement of the parties, the disclaimer of Columbia Gas Transmission Corporation, be, and hereby is, FILED this date;
- (4) On the court's own motion, this matter shall be tried by an Advisory Jury;
- (5) This matter be, and hereby is, CONTINUED to Wednesday, July 20, 1983, at 1:00 P.M., for trial, by Advisory Jury, in the United States Federal Courthouse, Pikeville, Kentucky.

This the 29<sup>th</sup> day of June, 1983.

G. Wix Unthank  
G. WIX UNTHANK, JUDGE

copies:  
 US Atty  
 William J. Graham  
 Charles J. Brennan  
 Kay Doyle  
 James W. Brown  
 David Lemaster  
 Eastern Ky. Production Credit  
 Sheriff Johnson County  
 County Court Clerk Johnson Co.

6-29-83  
 JW

Initials of Deputy Clerk MB

128

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF KENTUCKY  
PIKEVILLE

Eastern District of Kentucky  
FILED  
JUN 27 1983

CIVIL ACTION NO. 77-167  
TRACT NUMBER 307

AT PIKEVILLE  
LESLIE G. WHITMER  
CLERK, U. S. DISTRICT COURT

UNITED STATES OF AMERICA

PLAINTIFF

VS:

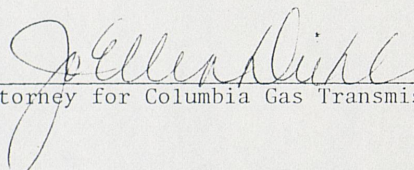
D I S C L A I M E R

251.93 ACRES OF LAND, MORE OR LESS,  
SITUATED IN JOHNSON COUNTY, COMMONWEALTH  
OF KENTUCKY, AND BAPTIST CHURCH, ET AL.

DEFENDANTS

\* \* \* \* \*

Comes Columbia Gas Transmission Corporation, by its proper attorney and disclaims any interest in any award herein based on its seven-eighths (7/8) working interest in its oil and gas lease on the subject tract being Columbia Gas Transmission Corporation Lease Number 67941 recorded in Lease Book 48 at Page 767 in the Johnson County Clerk's Office.

  
\_\_\_\_\_  
Attorney for Columbia Gas Transmission Corp.

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