

NO. 805

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF KENTUCKY  
(At Bowling Green, October 16,  
1962)

UNITED STATES OF AMERICA

PLAINTIFF

V.

2,635.04 ACRES OF LAND, DEFENDANTS  
ETC. (TRACTS 125, 127,  
130, 131 - FRANKLIN BERRY  
AND RUBY BERRY)

TRANSCRIPT OF EVIDENCE AND PROCEEDINGS

Before:

His Honor, Mac Swinford, Judge of Said Court

Appearances:

For the Plaintiff

Mr. George Logan  
Assistant U. S. Attorney

For the Defendants

Mr. Joe Orr  
Bowling Green, Kentucky

Mr. Dan Walton  
Bowling Green, Kentucky

I N D E XEVIDENCE FOR THE  
LANDOWNER

	Direct	Cross	Redirect	Recross
Franklin Berry	9	28	44	-
Ruby Berry	45	46	-	-
James Slinker	47	57	62	63
Earl Cain,	64	73	-	-
William Grissom	83	95	105 109	107 110

## EVIDENCE FOR THE GOVERNMENT

Maurice Pfeffer	111	113	117	-
Raymond Bell	119	143	158	-
Frank Newman	159	169	-	-

EVIDENCE FOR THE  
LANDOWNERPageExhibit 1.

Exhibit 2. Map of U. S. Department of Interior Geological  
Survey, Lucas Quadrangle Kentucky. . . . . 96

# EXHIBITS FOR THE GOVERNMENT

Page

<u>Exhibit 1.</u> Aerial map showing Berry and adjoining tracts. . . . .	136
<u>Exhibit 2.</u> Plat of W. E. Holder Subdivision, Port Oliver Lake, Allen County . . . . .	136

---

Opening statement for landowner . . . . .	1
Opening statement for government. . . . .	7
Landowner rests. . . . .	111
Government rests . . . . .	185
Instructions of Court. . . . .	188
Verdict of jury. . . . .	203
Reporter's certificate . . . . .	204

(Reporter's note: On October 16, 1962, case No. 805, United States of America v. 2,635.04 Acres of Land (Berry Tracts) was called for trial, the parties announce ready and a jury was regularly impaneled, accepted and duly sworn. The following then occurred:)

THE COURT: State your case, Mr. Orr.

MR. ORR: May it please the Court, ladies and gentlemen of the jury. As the Court advised you, this is a case involving the condemning or the taking of certain lands by the United States Government in connection with the construction of the Barren River Reservoir No. 2, sometimes referred to as the Port Oliver Dam.

As the Court also told you, there is no issue that the United States has a right to take such land for the use of the public generally, provided of course that they pay adequate compensation, which is the fair cash market value of the land on the date of the taking. The date of this taking was July 13, 1961, or last year.

Now, this map that I have before you (indicating) here is a survey of the General Woods farm. That is a farm that contains some two to three thousand acres originally and in about 1929. It was known prior to that time as the Satterfield Farm. This has been one of Allen County's largest and best known farms. Now, in 1929, it was divided in tracts and sold. This is a

replica of the original map that was used at that time. The colored areas or the areas involved are owned by Mr. and Mrs. Berry in this particular taking. The line outlined here is Barren River and it comes on back and makes another bend (indicating on map). Now, the roadway, the road to get to it follows right along here (indicating). There is their house, now right along this area here, this is high land or upland all the way along here (indicating). There is a bluff beginning right here. This is a narrow strip right along here (indicating). The bluff sets in at this particular point and that I believe you would say is the orange or brown color (indicating). All of the remaining land in these colored tracts is bottom land, no bluff land involved. What we have located right here (indicating) is an approximately three-acre locust grove. This colored in blue is indicated as the tillable bottom land (indicating) but will be referred to as the best bottom land. That colored in green will be indicated as what we refer to as the wet or second-grade bottom land. The black areas are the drains or the slues or the ditches that appear in all bottom areas.

Now, I want you to pay particular attention to this if you will please. You will notice this line here is indicated as the bank line of the river or the water gauge of the river. Now, the property line sets back on the line as indicated there or the inside

line and it runs from approximately 40 to 75 feet in width, all along the river. Now, when this land was surveyed and sold in 1929, that is the manner in which it was sold. It was not sold to the middle of the river, but it was sold to the property line. Now, Mrs. Berry owns this tract over here (indicating), of 99.05 acres. Now, the government may contend that there is more acres in there on the basis of saying that it goes to the middle of Barren River. We do not have a deed to it, we do not have a deed to the middle of the river. The remainder of this land is owned by Franklin Berry. Franklin Berry and Wilma Berry are husband and wife. Mr. Berry acquired the first tract of this land in 1929. This tract, 99.05 acres of Mrs. Berry, was owned by her aunt for many years. It has been farmed by Mr. Franklin Berry as a part of this operation. Mrs. Berry's aunt died some two or three years ago and Mrs. Berry was the recipient of that through her will.

Now, the total number of acres of Mr. Berry and Mrs. Berry is 430 acres before the government's taking. The government is taking 410 acres, according to the survey. If you utilize the middle of the river for the amount of land taken, it is increased by 29 acres. Now, the amount that is left to Mr. Berry will be 29 acres, which is a narrow strip, between the bluff

20  
acres

and the blacktop highway and they leave as improvements one barn, which is in poor condition, a tenant house right there (indicating), and also a tenant house here (indicating). There are incidentally a couple of smaller out buildings that are inconsequential in value.

Now, this whole area in this bottom of what is known as the General Woods farm, all of this has been utilized generally-as a cash grain farm for many, many years and that is the way that Mr. Berry has operated and Mrs. Berry operated their portions.

Now, if you will notice, there are roadways laid out coming to all of these various tracts that will permit ingress and egress to all of these different tracts.

Now, these areas here that are not colored do not enter into this litigation at all because they are owned by other people and what we are interested in are only these tracts that are colored and this white area (indicating) between the road and the bluff.

Now, when this taking has been completed, the government took all of Mrs. Berry's 99.05 acres, all of the other colored land of Mr. Berry's, leaving him two tenant houses, a barn, a narrow strip of land between the blacktop highway and the bluff, with approximately five acres of tillable land. The rest of it was edging down to the bluff and was with small, unmarketable timber. As I say, this taking was on July 13,

1961.

You will be asked to fix the value of the land taken. Our proof will be of what the Berry tracts were worth--market value of them--at the time of taking, which is July 1961. There will be proof as to what the value of what remained is on that same day. The difference between those two amounts is the amount that we will ask you to compensate Mr. and Mrs. Berry for. Now, Mrs. Berry's interest is referred to as a complete taking. They take all of the land. They leave her nothing. Therefore the market value of her land on July 31, 1961, is the amount of damages that she will be entitled to. Now, Mr. Berry's will be the market value as of July 13, 1961, of the land that he had less the value of what the government leaves him, the two tenant houses, and 29 acres, some of which is tillable land.

Now, as I said, on Mrs. Berry's, she acquired hers by inheritance. Mr. Berry acquired his by purchase of the first tract in '29, I believe the last tract in '58 or '59. Now, the last tract that he purchased here is marked Tract 18. Now, don't let that confuse you with the numbers that the government is using in tracts. I am referring to Tract 18 on the General Woods map. Now, the government had a copy of this map and I don't think there is any question about it, is there, Mr. Logan?



MR. LOGAN: The only question might possibly be in your classification of some of the land.

MR. ORR: Well, that would be the plaintiff's testimony. I meant the map itself. That, of course, is open for discussion, but the last tract I believe was purchased in '58 and '59, which is referred to as 76.1 acres, I believe, and 30 acres, or Tract 18.

Now, the plaintiff's proof will be somewhat varied as to the value or the total amount that we will ask you to return a verdict for in both of these cases. We will offer the best proof through the most qualified persons that were available to us, as to the value of the land. I think that the low amount as to the total compensation due the Berry's will be \$97,000. The high amount would be approximately \$135,000, which will be so that there will be a range from \$97,000 to \$135,000. We will give you as many details as we can as to the nature of the land, the improvements, the general location, and how the property was used, but we will not try to burden you with a lot of repetition. Although these cases are relatively easy to try, as the Court advised you, yet at the same time, in some of these largest tracts, there can be some complications and as to description and definition of the land, the government's witnesses will not necessarily use the same terminology as we will. But the same principle will prevail

and that is in substance what will be the testimony of the plaintiff.

MR. LOGAN: May it please the Court.

THE COURT: Mr. Logan.

MR. LOGAN: Mr. Orr. Ladies and gentlemen.

The government has given numbers to these tracts which you will hear throughout this trial, so I would like to point them out to you. This tract in here (indicating on map), which is what we call the partial taking, is labeled as Tract No. 125. This tract that adjoins it, which is the complete taking, is labeled 127. These two tracts over here, both of which are complete takings, this one is labeled 130, this one is 131(indicating): 131 is the tract owned by Ruby Berry, which she inherited from Alice Berry.

Now, as I have stated earlier, there might be some controversy between the United States and the landowner as to these land classifications, as to whether or not this is all bottom land as Mr. Orr said, or whether or not some of it is wasteland and wooded area.

Now, I have over here a map that is more difficult to see, but it will give you an indication of the entire area. This is right here (indicating) Tract No. 125, which is the partial taking.

THE COURT: Can you pull that out, Mr. Logan, so all jurors can see it?

MR. LOGAN: This is 125, this 127 (indicating). This is the area that is owned by other people (indicating). Up here is Tract 130, over here is 131 (indicating).

*Time  
limit  
for  
comparables*

Now, the United States in their proof will rely upon comparable sales, sales in the not too distant past of land in this near vicinity or certainly in Allen and Barren Counties, certainly located on the Barren River, which are comparable to these four tracts. Now, no one piece of land is exactly the same as another piece. However, a competent appraiser will take a tract say over here and he will compare that tract with this tract and he will adjust either up or down depending upon which is the better tract and by a competent appraisal procedure, he will assign a value to these tracts being condemned based on other comparable tracts that have been sold in the past.

Now, our comparable sales will be what are referred to as willing buyer, willing seller, transactions and that is the same test that we are to use here in judging what this land would be worth, if a willing buyer and a willing seller were negotiating.

I believe at this point, having pointed out just what maps we are going to use and where things

are located, that will be sufficient.

Thank you.

THE COURT: Call your witness.

EVIDENCE FOR THE LANDOWNERS

FRANKLIN BERRY

[9] being called as a witness in his own behalf, first being duly sworn, testified as follows:

DIRECT

EXAMINATION

By Mr. Joe Orr,  
Counsel for the Landowners,

Q State your name and residence,  
Mr. Berry, please, sir—full name.

A Franklin Berry, Bowling  
Green, Route 4.

Q You live on a farm?

A Yes, sir.

Q I believe that you and your  
wife, Mrs. Ruby Berry, own the property that is the subject  
of this litigation?

A Yes, sir.

Q When did you acquire the  
first portion of this property, sir?

A In '29. Would you like the  
exact date?

Q No. That is sufficient.  
And how many acres did you acquire at that time? [10]

A First 75 acres, in the same year then 103 acres.

Q Speak up a little.

A The first tract was 75 acres in 1929 and the next 103 acres in 1929.

Q All right, sir, when was your next purchase?

A The next purchase was in '37.

Q How many acres?

A Sixty-four.

Q And then the next purchase?

A '45, 25 acres.

Q All right, sir, and the last purchase?

A '59, 76 acres and one-tenth.

Q Seventy-six and one-tenth acres?

A Yes, sir.

Q Now, that was in 1959?

A That's right.

Q Now, Mr. Berry, where is this farm generally located in relation to Scottsville, the countyseat of Allen County?

A About 11 miles out of Scottsville, off of 31-E a mile.

Q Is it on a blacktop road?

75<sup>a</sup>103<sup>a</sup>64<sup>a</sup>25<sup>a</sup>76.1<sup>a</sup>333<sup>a</sup>

A Yes, sir, it is.

Q State maintained blacktop road?

A Yes, sir.

Q At the time of the taking,  
what buildings or improvements were on the farm?

A One barn and two tenant houses.

Q What condition was the barn in?

A Poor.

Q What condition were the two tenant houses in?

A One of them was good and the other one is fair.

Q What improvements were there in the bottom land?

A Not any.

Q No fencing of any kind?

A Might be a barbed wire fence around it to show the lines is all.

Q Just a barbed wire fence to show the lines?

A Just to show the lines.

Q Now, Mr. Berry, how long have you operated this land that was taken?

A Well, I started in in '29 and operated all of it as I bought it along.

Q All right. Now, the tract of Mrs. Berry, how long have you operated that?

A Approximately 20 years.

Q Was that operated along with the land that you own individually?

A Yes, sir.

Q What - did you live on this farm? - at the time of taking?

A No, sir.

Q How long had you lived here in Bowling Green?

A Approximately eight years.

Q Did you have any tenant croppers or just how did you operate the farm? What method of operation?

A At the time they were taking it?

Q Yes.

A I had one man with some boys in one house. I rented the other. They give me half of what was produced, put into the barn free.

Q You didn't furnish any of the tools or machinery?

A No, sir.

Q Any of the labor?

A No, sir.

Q What crops did you produce,  
grow on the farm?

A Corn and tobacco.

Q How much tobacco base?

A Two acres and 32/100.

Q That was burley?

A Yes, sir.

Q That was on the combined farm  
of you and Mrs. Berry?

A It was.

Q Did you have established  
at the time of taking a corn base with the ASC office?

A Yes, sir.

Q How much was that corn base?

A Three hundred and twenty-  
two acres.

Q Three hundred and twenty  
acres?

A Two acres.

Q Mr. Berry, the corn as  
produced on that farm, I am speaking of, within a matter  
of a few years before the taking, was that corn sold or  
was it fed or consumed by you on other farmland?

322<sup>ac</sup>  
corn



A A large percent of it was sold, fed some.

*Berry*  
Q How many on an average - or well, use the years, well say immediately - the years '61 and three or four years immediately preceding - what was the average cost of the fertilizer per acre of cornland?

A It was very small. I used - I always told them to use 100 pounds of 484 fertilizer on it per acre.

Q Is that in the drill?

A Yes, sir.

Q Known as starter fertilizer in the row actually?

A Yes, sir.

Q Now, Mr. Berry, how much of this land, or if you will, without telling me - how much of the bottom land was overflow land that the government is taking?

A The entire amount they are taking is overflow except what little amount they might get on the bluff, a little higher than the tides would get.

Q All of the bottom land is overflow bottom?

A Yes, sir.

Q Now, in that bottom, Mr. Berry, are there any slues or drains?

A Yes, sir.

MR. ORR: Now, this map which I would like to refer to as Landowner's Exhibit No. 1, which I used in making my opening statement, I now offer in evidence. Is there objection?

MR. LOGAN: No objection.

MR. ORR: We will refer to the map of the General Woods farm as Landowner's Exhibit No. 1. (Reporter's note: The map of the General Woods farm was subsequently marked Landowner's Exhibit 1.)

Q You notice there, Mr. Berry, that the areas taken have been colored and that the legend shows that the brown is the - first, has that been colored in accordance with your direction?

A Yes, sir.

Q On the basis of the usage of the land as you see it?

A Yes, sir.

Q And the type of land. Now, the brown, according to the legend is referred to as the bluff land, is that correct?

A That's right.

Q The blue is the tillable number one or first-class bottom land, is that right?

A Yes, sir.

Q And the green is the wet or second class bottom land?

A Yes, sir.

Q Now - and the black, indicating timber growth or drains, is that correct, sir - the black?

A Either drains or--

Q Or timber?

A Or timber.

Q Mr. Berry, what purpose do the slues and the drains play in the bottom land, if you know?

A Well, they make a good bottom, drying and draining it. Also if there should be any current in it they break the current and the water head is up those slues and banks over the rest of it.

Q Now, is there any part of this land, if you know, part of the land that is what they call wash bottom, where the current comes in and washes it out?

A Not over an acre and a half in all of it.

Q When the Barren River rises, back water, does the current shift over on to that land, the main current?

A No, sir.

Q How does - does the water come into - this is, I believe, downstream, isn't it?

A Yes, sir.

Q In other words, the river runs downstream this way?

A Yes, sir.

Q Now, when the river is up, does the water cut across and come across the bottoms that way, in other words, straighten out this bend?

A No, sir.

Q Or does it - how does it come in then?

A It comes in on the low land back here and backs in.

Q You mean it comes in as back water rather than as current or direct water?

A Yes, sir.

Q Do you or do you not mean that there is never any current over there?

A There is practically no current on any of that, most of backs in but after it gets over and gets fully covered there would be some that would flow but practically no current.

Q But never - not the main current of the river?

A No, there is never the

main current of the river.

Q Now, Mr. Berry, your land there, that you have talked about as 410 acres that the government is taking, that is you and Mrs. Berry, does not go down to the water's edge?

A No, sir.

Q According to your deeds to the property?

A According to the deeds, it does not. It just goes to where the timber is, practically - some places it didn't go up to the timber, some places in the edge of the timber, but practically to the edge of the timber.

Q Now, is there a growth of timber all along the bank of the river there?

A Yes, sir.

Q All the way along. Now, I notice over here, it is indicated a three-acre area, which is a part of - shown as locust. What use is made of that?

A I set that for posts and it has been very productive with locust posts.

MR. ORR: Can it be stipulated that this was on mail and schoolbus routes and that telephone, utilities, electricity are present, rather than have to go through it?

MR. LOGAN: I will stipulate that Mr. Berry would answer that all those things were true.

MR. ORR: Well, I will just ask him then---

Q The farm is on blacktop road as you said?

A Yes, sir.

Q Is there a schoolbus route there?

A Yes, sir.

Q Mail route?

A Yes, sir.

Q Milk route?

A Yes-, sir.

Q Do you have electricity?

A Yes, sir.

Q Is telephone service available?

A Yes, sir.

Q Where is there a blacktop road to this farm all the way to Scottsville, the county-seat?

A Yes, sir.

Q And is it about 11 miles away?

A Yes, sir.

Q What schools serve that area? Scottsville, Allen County schools?

A Allen County High School would take care of the high school children, yes, sir. Allen County High.

Q Now, Mr. Berry, what has been your - I am now asking all of the questions say for two or three years immediately preceding the taking - what has been your average yield of burley tobacco produced on that farm per year, per acre?

A Around a thousand dollars per year.

Q I said--

A You--

Q You mean in dollars?

A Pardon?

Q In dollars, around a thousand dollars?

A Around a thousand dollars per acre.

Q What would it be in pounds if you know?

A Oh, I guess- about---

Q You don't have that?

A I don't have that figured out, but it would be from about 2,000 to 2,700, I believe,

*Was the tobacco grown on this land or on the warrens land?*

different times, different weights.

Q But the dollar yield has been about a thousand dollars a year the past years?

A That is right.

Q Now, Mr. Berry, what has been your approximate corn yield, for the same period?

A Fifty bushels.

Q Per acre?

A Fifty bushels per acre to take in the entire bottoms--that would take in all of the ends that they knocked down or anything, just when you set a tract of land, it will figure 50 bushels for the tract of land. Some of it would make as high as a hundred bushel.

Q But the average that you have estimated at 50?

A Yes, sir.

Q Have you on these occasions weighed any of this corn or weighed an entire crop to determine the exact amount?

A We would weight about - sometimes weighed the entire crop and most of the time we weighed enough that it would be all of certain fields and everything so we would know where it produced that, the next summer after it was produced. It was weighed the next summer after it was produced.



Q You crib part of it, your part, most of it?

A Yes, sir.

Q And weighed it in the summer?

A Yes, sir, most of the time.

Q Now, Mr. Berry, did you ever have any crops in the bottom other than corn?

A Yes, sir. I have had hay and soybeans.

Q Soybean hay?

A Yes, sir.

Q That was sold or harvested for beans or feed?

A Feed.

Q As hay. Now, I draw your attention to what is known as the Bradshaw land, which is referred to here as Tract 18 on this (indicating Exhibit 1). Who and when did you purchase that land?

A I got the deed to it January the 4th, 1959. It was bought quite awhile before that and had to go through court but that is when I got the deed.

Q Who represented the seller in that transaction?

A Mills Alley.

Q Is he a real estate dealer

*Melza Elmore*

*Melza Elmore*

in Barren County?

A Yes, sir.

Q Just describe to the jury, if you will, the condition of that 76 acres at the time you bought it, as to its state of cultivation or its condition generally, as to growth or to productivity.

A At the time I bought it, it was in a very, very poor state of cultivation, most of it had just been laying out. I imagine had around 20 acres of corn on it, I guess.

Q Around 20 acres of corn?

A Yes, sir.

Q Was that on - which side of it?

A That was on---

Q Next to the river?

A Yes, sir, next to the river.

Q All right, sir. How was it with reference to growth, any part of it overgrown with vegetation?

A Yes, sir. It was growed up quite a bit when I got it.

Q Now, what part of that land was as you classify, class one bottom and what part of it did you classify as wet bottom or number two?

A I classified 30 acres of it as wet bottom and I bulldozed and cleared off, I figured 15 acres here to straighten this bottom out and take care of the bottom like it should be.

Q Now, was the bulldozing done in the wet part or some of it in the class one bottom?

A Most of it in the class one bottom. Very little in the wet bottom, there was some.

Q Was there a drain through there or a slue?

A Yes, sir.

Q Was any work done on that?

A Yes, sir.

Q Now, that was the bulldozer work that you did in connection with that bottom?

A Yes, sir.

Q Now, Mr. Berry, did you do anything else to it after you acquired it?

A Yes, sir.

Q What else did you do?

A I had to have a line surveyed to establish a line. Then I taken all of the wet bottom and tried to get it in grass and seeded it in and fertilized it and seeded it in grass.

Q Were you successful in

*Proof  
Bradshaw  
lands  
less 1/2  
valuable*

getting a stand of grass on it?

A No, sir. Some of it did and some of it didn't.

Q That was on your first sowing?

A Yes, sir.

Q Did you subsequently sow it again?

A Part of it I did, part of it I didn't.

Q Now, Mr. Berry, what did you pay for that land?

A \$11,000.

Q That was for the 76 acres?

A Yes, sir.

Q Now, immediately - that would be charged to - not as to normal crop production, but in your bulldozer work and in connection with the land, how much have you spent?

A \$2,000.

Q Recently, for your seeding and bulldozing work and cleaning it up?

A And the surveying.

THE COURT: Are you objecting to this, Mr. Logan?

MR. LOGAN: I was going to cross-examine him on it. I don't think it is particularly

relevant. It is in.

MR. ORR: Just a minute, Your Honor.

THE COURT: I am going to give the jury a brief recess, Mr. Orr.

Members of the jury, during the recess of the court, bear in mind all the admonitions heretofore given. Do not discuss the case or permit any one to discuss it with you or in your presence or make up your minds about it in any way until it is finally submitted to you.

Mr. Marshal, you may announce a ten-minute recess.

(Reporter's note: The court recessed for ten minutes. At the conclusion of the recess the following occurred:)

THE COURT: You may proceed, Mr. Orr.

Q Mr. Berry, in addition to the land that is presently owned here in Warren County and this land in question here, have you owned any other farmland in the past?

A Yes, sir.

Q Have you bought and sold farms in this general vicinity or in Allen, Barren County?

A Yes, sir, about eight or nine.

Q Mr. Berry, what in your opinion was the fair cash market value--when I use the word "fair cash-market value", I mean what a willing seller who was not compelled to sell and a willing buyer who was not compelled to buy, would pay for a given tract of land-utilizing that definition, what was the fair cash market value of your land at the time of the taking; those land, in your opinion?

A \$105,000.

Q What in your opinion is the value of the land left at the time, immediately after taking?

A \$5,000

Q Now, Mr. Berry, what in your opinion was the fair cash market value of Mrs. Ruby Berry, your wife's 99.05 acres at the time of taking?

A \$35,000.

Q And that was a complete taking?

A Yes, sir.

Q In other words, there is nothing left there?

A Yes, sir.

MR. ORR: You may ask.

## C R O S S

## E X A M I N A T I O N

By Mr. George Logan  
Assistant U. S. Attorney

Q That is a total then of  
\$135,000 that you want for your and your wife's farm,  
is that correct?

A I think that would have  
been a fair sale, if you had wanted to have sold it, but  
I wouldn't have taken that for it.

Q Now, Mr. Berry, I believe you  
live over here in Warren County, do you not?

A Yes, sir.

Q On a farm?

A Yes, sir.

Q Have you ever lived on  
this farm?

A Not on the particular land  
there. I have lived in that vicinity.

Q I believe you stated that  
you had a corn base of 302 acres?

A 322 acres.

Q 322?

A Yes, sir.

Q Now, this corn that is in  
the corn base, what do you do with that land?

A Pardon?

Q The part that is in the corn base, what do you do with that land?

A Part of the time I put it in the program and let them pay me for it.

Q And how much do they pay you?

A This year it was \$42 per acres.

Q \$42 per acre?

A Yes, sir.

Q For 322 acres when you put it in the corn program, is that right?

A Yes, sir.

Q And we have a total acreage involved here of about 429 acres, do we not?

A Pardon?

Q We have a total acreage involved here of about 429 acres, is that correct? Is that about right?

A Yes, sir. About 439 acres.

Q 39?

A 39 acres.

Q Now, Mr. Berry, I refer to your tobacco base that you - I believe - made about a thousand dollars a year per acre?

A Yes, sir.

This would be \$13,524.00



Q Now, is it not true, Mr. Berry, that you have transferred your tobacco base to your farm in Warren County?

A Yes, sir. I still have it. Five acres of cropland I have up there signed in with this farm and the tobacco was raised up there this year but it is signed with this farm here.

Q So you have not lost any tobacco base?

A No, sir. It is inconvenient to raise it like it is because my barn is - up there and I got my base, ain't got but five acres up there and a man won't sell for five acres.

Q Let's talk about the barn. You are talking about this barn here, I presume (indicating on map)?

A Yes, sir.

Q Now, that is right next to Mr. Hix?

A Yes, sir.

Q Does Mr. Hix ever use that barn?

A I don't think he has ever used it for anything. He may have, in a rain or something he might have pulled a wagon in or something. We are neighbors, but no practical use.

Q You say there are two tenant houses will be left up there?

A Yes.

Q They are not being taken, are they?

A No, sir.

Q You also stated I believe that this farm was located on a blacktop road, a state highway?

A Yes, sir.

Q Blacktop?

A Yes, sir.

Q And that road comes right in through here, is that correct (indicating on map)?

A That is correct.

[Q Tell me, Mr. Berry, how do you get down into this bottom land tract, this here (indicating) this 127 and the bottom of 125?

A You just go off the farm into the bottom.

Q You go off this bluff?

A No, you come off - may I get up there and point out to you?

Q Certainly.

A No, sir. You come out here where there is a grade (indicating on map), where you can

come off and come right in there to it. This road here ((indicating) there was a road that was for my own farm. Nobody else's use but it is not there any more, but it shows on the map.

Q It is a bluff there?

A Yes, sir.

Q A rather steep bluff to get back up and down?

A It is there, not where we go up and down to the bottom, the hill slopes off.

Q Now, these tracts over here ((indicating) 130 and 131, what is your access?

A You can follow this blacktop road on down. Do you want me to get down and point?

Q Right on here, do you not ((indicating)?

A Following the blacktop road.

Q Into the Spivey tract?

A Yes, sir. No, sir, it doesn't go all the way into the Spivey tract. I will get it right. Follow your blacktop road into here ((indicating on map) and go out this Spivey farm right in here and which is about a mile, a mile and a quarter.

Q In order to get to your tracts 130 and 131, you have to cross the Spivey farm, is that correct?

A Well, I can go -- I can also take this road here (indicating on map), and follow this road, there is a road through there.

THE COURT: Stand over to one side, Mr. Berry, so the jury can see.

A There is also a road where I come into this tract of land that comes through here (indicating on map).

Q To get there by that route, you have to cross two or three other landowners' land?

A A small tract here and a small tract here (indicating).

Q Have you been on that road lately?

A Yes, sir.

Q What did you use to get through?

A Pardon?

Q What did you use to get through?

A We rode through it in a wagon because we don't keep them bottom roads up when we are not using them.

Q Now, how many gates do you have to go through when you go in through Spivey?

A I wouldn't have to go

through any, but being a neighbor with him, he has two gates and a cattle guard.

Q And your access through the Spivey farm, I believe you have a regular - is it an agreement with Mr. Spivey or do you have a legal easement?

A Legal right-of-way.

Q Which I believe it is your expense to maintain?

A Well, no. We all use it and everybody that uses it, Mr. Spivey helps fix it or anybody. It is not my expense to keep it up no more than anybody else.

Q Would it be an accurate statement to say that it is not maintained at all?

A Yes, sir, it is maintained by all of us that use it. When we use it. We haven't maintained it since you all taken it because we haven't had any cause.

Q I am talking about back before it was taken. Now, I believe you stated that the river did not come across your land with any current?

A It doesn't.

Q It does not?

A It does not except about an acre or an acre and a half where it hits pretty hard.

Q Doesn't, in fact, when the

river gets high, Mr. Berry, doesn't it cut right across here (indicating on map)?

A No, sir.

Q And if you look at that---

A No, sir.

Q (continuing) --you can actually see the channel out there?

A No, sir. Let me show you here on the map. When the river first gets up, it will come in---

MR. ORR: Stand to the side, Mr. Berry so the jury can see.

A This place he is a-talking about here, if this bottom is a little higher than this bottom and that place around there is merely a growed up place around there, that is good land, not even a slue, but it is growed up. Now, they is a little place right in through here (indicating), that it doesn't eddy as much as the other, but the water comes in here and backs in here and the water comes in here and comes up over this (indicating). Then there is a little place up in here that I spoke of that the water will run over, but a very small amount, but this (indicating), this is not wash, it is only growed up around where this bottom is a little higher than this bottom.

Q Did you plant fescue in that

area to keep it from washing?

A That little place I showed you, not especially to keep it from washing, but I just thought my bottoms would be better with it there.

Q Now, Mr. Berry, this Tract 127 down here which is labeled Tract 18, I believe you said you paid \$11,000 for that?

A Yes, sir.

Q In the spring of 1959?

A Yes, sir.

Q How much do these tracts, these bottom land tracts flood, Mr. Berry?

A Well, not too often. They will flood once or twice a year in the wintertime.

Q What time do you put your corn crop in in the spring?

A Most of the time in the early part of May. I have planted some in April but mostly the first part of May.

Q When do you get that crop in?

A Since we use hybrid corn, we get it in October, when we used open pollinated corn we got it in the first days of November.

-Q How many crops have you lost by flooding?

A I haven't lost a crop.

Q Now, I believe you stated at one point that you had spent about \$2,000 in cleaning up Tract 127, is that what you said?

A Two thousand dollars and all expenses on fixing it where I could cultivate it.

Q Does that include expenses of fertilizing it?

A It included some expenses there to get that land where I could even get it in the shape to where I could sow it, but I didn't get the gross off from it. It didn't produce. That was in the wet land.

Q Didn't you tell one of our appraisers, Mr. Berry, that the improvements that you made on that tract cost you \$350 to \$400?

A No, sir.

Q I wonder if you would state again - I didn't quite catch this - how much you spent on fertilizer.

A You mean on the crop, in the other corn?

Q Pardon?

A You mean on the corn that you want fertilized?

Q Yes.

A I always tell them to put



a hundred pounds per acre, most of the time 484.

Q Now, how often do you fertilize your tract?

A Once a year in the spring to start the corn.

Q And I believe earlier you gave us a figure on your expense for fertilizer, did you not?

MR. ORR: You mean now as to the corn or in connection with Tract 18 in the proof?

MR. LOGAN: In connection with the corn, fertilization, so you can grow your corn.

A Well, I don't believe I gave you the exact amount of what the fertilizer would cost us. I don't know that I had that. I didn't bring the figures, but it would be about a hundred pounds per acre of a cheap grade of fertilizer.

Q So, how many - well, give me a figure, let's take the year 1959. Can you give me a figure as to how much money you spent on fertilizer for your corn on these tracts?

A Not give you an exact amount I could not, because I didn't bring that. I didn't know you wanted it, but it was practically - I told them to put a hundred pounds of fertilizer an acre and a cheap grade of fertilizer.

Q What price is it per hundred pounds?

A I have forgotten what I paid in '51 for it. It would be a cheap grade of fertilizer.

Q Well, generally?

A I would guess it to be about \$25 a ton. I don't know whether I am right or not.

Q Well, let's do a little calculation, Mr. Berry. I am kinda interested in how much you spent on fertilizing this tract in 1959. Now, how many acres would you fertilize?

A In '59? The entire farm?

Q Did you fertilize the entire farm?

A The entire corn. I did the entire corn.

Q Well, how many acres is that? Is that 322 or 400 or how many acres?

A I don't recall how many I had in the grain program that year and what I had in the grain program I didn't fertilize.

Q Mr. Berry, if I showed you a copy of your 1959 farm schedule on your income tax return, do you think it would refresh your memory on how much you spent for fertilizer?

A Be glad to---

MR. ORR: Object. Just a minute, please. Let me see what we got. What we are talking about.

MR. LOGAN: This is the return of him and his wife. That's both farms.

MR. ORR: Do you have any objection?

THE WITNESS: No, I would be glad to explain that.

MR. ORR: All right. Go right ahead. No objection.

Q I have drawn a pen line from the fertilizer to the amount you took for fertilizer. I wonder if you would read it off.

A That's fertilizer, though.

MR. ORR: Read it off.

A Fertilizer lime, \$1349.60. That was used on the farm down here. Let's see, I tell you, let me tell you what per cent. There would be a large per cent of that used on my upland farm down here because I didn't need it on the river farm up there and I produced my crops and things up there and fertilized this and got it in grass. I live six miles south. The road will show. It will show it has been fertilized.

Q FHas this been a profitable

farming operation for you, Mr. Berry?

A Yes, sir. It has. That is the reason I would never sell it.

Q Once again referring to 1959, how profitable was it?

A Well, I don't recall just how much I made up there in '59 right off, but I don't have those figures all in my mind, but it has been good every year.

(Reporter's note: A copy of an income tax return was given to the witness by Mr. Logan.)

A This income you have here.

MR. ORR: Your Honor, may I approach the bench a minute please?

THE COURT: Yes, sir.

(Reporter's note: An off-the-record discussion was held at the bench between counsel and the Court.)

THE COURT: Do you object to it?

MR. ORR: Yes, sir.

THE COURT: I sustain the objection. There are too many variables when you talk about growing tobacco and a thousand dollars an acre. You are not talking about all the costs that it took to produce that. Growing tobacco is a pretty complicated thing when it comes to figuring what the net income is. It might wipe the whole thing out.

*Owner  
received  
one half  
of crops  
regardless  
of expenses  
by tenant*

MR. LOGAN: So, as I understand it then, the testimony, previous testimony as to profit made, is---

MR. ORR: Didn't offer any testimony of the profit, just offered what - testimony of its capabilities.

THE COURT: Members of the jury, what we are trying to arrive at here, some of you are farmers and I know you understand this, what we are trying to arrive at here is a fair and reasonable market value of this farm. Now, Mr. Berry has a right to show the kind of land it was, what it would produce, how many bushels of corn, how many pounds of tobacco, the nature of the farm, its fencing, its buildings, but to undertake to go into the speculation of whether it made money or lost money is beyond the scope of this inquiry, because that is too complicated to give you any true picture. One farmer can make money, another loses money, that is not the point. Another thing we know when you talk about producing corn or producing tobacco, there is an expense attached to that, which if taken into consideration would indicate many times on the whole farm a loss instead of a profit. So, there are too many variables that enter into that, the matter of what fertilizer costs and other things enter into that, whether you spray it yourself or have it sprayed. There are too many things enter into it.

Now, those of us who have some little experience in farming know that that cannot give you a true picture. What we are concerned with here is a fair and reasonable market value. Now, talking about a farmer's income tax return, he has certain deductions for depreciation, fencing, equipment, all various things, which could not give you a true picture. He may show a loss on his farm and still he has made a living on it and made some money on it, because those things enter into it, tax deductions to which he is entitled and which cannot - we would have [to have a corps - of certified public accountants sitting on the jury to try a case in that way. What we are trying to get at is the fair and reasonable market value of this land on July the 13th, 1961---what it would bring in a free and voluntary sale.

Limit your examination of the witnesses to that line of testimony.

Q\_ Mr. Berry, how much Johnson grass is contained in these bottoms?

A I suppose there is some Johnson grass in all bottoms, but I have never been damaged on my crops with it.

Q Never made any difference to you?

A Never been damaged in the corn crops at all.

Q Did some of these bottoms have more Johnson grass than the others?

A They will one year and the next one another might have some more, but not enough to damage the corn crops.

Q Just to clear up one point, this tract 125 is the only one that faces on a blacktop road, is that correct?

A That is right. The other tract joins that tract.

Q After you go down a bluff?

A It joins it down there in the bottom.

Q That's right.

I believe that's all.

MR. ORR: Just one more question.

R E D I R E C T

E X A M I N A T I O N

By Mr. Joe Orr  
Counsel for the Landowners

Q Mr. Berry, these roadways that are shown that lead down to these various tracts into the bottom, they are the roadways that were set forth at the time this farm was divided in 1929, are they not?

A Yes, sir. Fifty-foot right-of-way.

Q And they are used, available and open for use of the property owners, that join?

A At any time.

MR. ORR: That is all.

MR. LOGAN: That's all.

RUBY BERRY

being called as a witness in her own behalf, first being duly sworn, testified as follows:

D I R E C T

E X A M I N A T I O N

By Mr. Joe Orr  
Counsel for the Landowners

Q Your are Mrs. Ruby Berry?

A Yes, sir, I am.

Q You are the wife of Franklin Berry?

A Yes, sir.

Q And you own this 99.5 acre tract of land that has been testified about here, part of the subject of this litigation?

A Yes, sir.

Q What is your occupation, Mrs. Berry?

A Housewife.

Q Do you do any of the farming?

A No, sir.

Q Do you do any of the land



trading and buying and selling?

A No, sir.

Q Do you have any knowledge  
as to value of land?

A No, sir.

MR. ORR: You may ask her.

C R O S S

E X A M I N A T I O N

By Mr. George Logan  
Assistant U. S. Attorney

Q Mrs. Berry, I believe you  
inherited the tract at the time---

A Yes, sir.

Q I will ask you what value you  
put on this tract when--

MR. ORR: Objection. There has  
been no inheritance tax filed on it. I will stipulate  
for the record.

THE COURT: He hasn't asked any-  
thing yet.

MR. LOGAN: That was my question.

THE COURT: I don't know.

MR. LOGAN: I was going to ask  
what value was on the inheritance tax return and I am  
advised one was not filed.

Q When did you inherit this  
tract?

A 1961, August of 1961 - no, August 1960. That's right.

MR. LOGAN: I believe that's all.

THE COURT: That is all, Mrs. Berry. Stand aside.

MR. ORR: Mr. James Slinker

JAMES SLINKER

being called as a witness in behalf of the landowner, first being duly sworn, testified as follows:

DIRECT

EXAMINATION

By Mr. Joe Orr  
Counsel for the Landowner

Q Your name is James Slinker?

A That's correct.

Q What is your age and where do you live?

A My age is 38. I live in Scottsville, Kentucky.

Q What is your business at the present time?

A I am a district sales director of the Farm Bureau Insurance.

Q Have you at any time in the past been employed by the Soil Conservation Service of the State of Kentucky or the United States?

A Yes, sir.

Q Or whoever runs that organization.

A I was employed by the United States Soil Conservation Service from 1949 to - 1948 until 1959, 11 years.

Q Where were you - what portion of that time were you stationed in Allen County, Scottsville and Allen County?

A Ten years, from July to October, lacking that much being ten years.

Q What were your general duties with the Soil Conservation Service?

A Well, I was referred to as a soil working conservationist.

Q Tell us what that means a little bit.

A Well, it brings about a situation whereby we try to instruct the farmers as to the use of the land according to its capability and treat it according to its needs. Now, that is the basic idea of soil conservation.

Q In other words, to recommend the best usage of various types of land?

A That's correct. We had a soil situation whereby we determined the best use of

that land by soil test and the best treatment of that land.

Q In your capacity as a representative of the Soil Conservation Service, did you make soil usage maps for few or many farms in Allen County, Kentucky?

A Yes, sir, I helped on several of them.

Q Well now, you mean several hundred?

A Well, I don't know how many we had. I don't remember, over a period of 10 years we had several.

Q Are you familiar with the Franklin and Ruby Berry land as shown there on Landowners' Exhibit 1, the General Woods map?

A Yes, sir.

Q Are you familiar with that particular map?

A Well, I saw it a few minutes ago, just---

Q Now, Mr. Slinker, what is the - with the exception of the ridge or row land, is all of the Berry land bottom land, generally?

A You mean all except the ridge or row land?

Q Yes.

A Yes.

Q It is all bottom farm, Barren River?

A Yes, most of it.

Q In connection with the use of land that are similar - or first what is the main problem with, if there is any in the cultivation of bottom land, river bottom land, I am speaking of?

A River bottom land, of course, is your drainage and, well, your siltation, deposition of silt on your bottom land due to the location on this river and the internal drainage of the soil has a lot to do with it.

Q In other words, drainage is the biggest problem?

A Drainage is a big problem on any type of soil.

Q On the bottom land, generally I don't know whether you take, say, types, kinds or definition, but soils that are in the bottoms of Franklin Berry, if you know, what types - I don't mean a technical classification for them, but how do you refer to them in describing the different categories - that may be the proper word.

A Well, we - is it all right to use this?

Q Yes, sir. Go ahead.

A That blue you see on there is nearly level (indicating on map), well-drained bottom land.

Q Now, how does that soil look in color and texture and so forth?

A Well, it's just - it is chocolate color. You who are farmers know what I am talking about. (It has a lot of humus in it. It is a chocolate color. The depth of this particular top soil, if you want to call it that, or the top layer, is variable over different areas, but basically you don't hit anything when you are boring a hole down in it. You don't hit anything in there that would retain this water or slow this water up enough that would make it wet for crop production. That is basically the blue land. Now, on your---

Q Now, has that got some - we may hear these technical names in this trial - is there any name applied to that generally?

A Well, we used to call that Huntington.

Q They changed those I understand?

A Well, sometimes they do.  
Yes, sir.

Q But that is generally referred to as Huntington?

A Yes, sir, that is Huntington. Well drained, nearly level bottom land.

Q That is the type you are referring to as colored there in blue?

A Yes, sir.

Q Now, any other type present?

A Also - and I don't know what color that is - yellow I suppose.

Q Well, it is a chartreuse, I guess.

A Chartreuse.

Q These ladies would probably know. That is what you are talking about (indicating)?

A Would you like me to tell them about that?

Q Yes, sir, please do, sir.

A That is a wet bottom, not such as upland, but it is a wet bottom due to your upland washing across, it being impounded back, it can't get out, so it is up here and the water runs off the upland and on it and the water falls on it. It is not basically a hard pan as you would think of it. It doesn't have a hard pan, but it is - the water seeps through it slowly and it is blocked out from getting on into your natural

drainage courses, so therefore it is wet two or three weeks longer than your other. Some of it would have some limitation on cultivation. It has a tendency to be a little bit more sour than your Huntington type soil.

The name of that soil is Newark, what we call Newark, like Newark, New Jersey.

MR. LOGAN: Will you spell that?

THE WITNESS: Like Newark, New Jersey.

A (continuing) These things run close - do you want me to go on?

Q Yes, go right ahead.

THE COURT: That so-called wet land is not good for anything, is it?

THE WITNESS: Well, we like to think it is.

THE COURT: Like to think it is, but as a matter of fact, it isn't?

THE WITNESS: Well---

THE COURT: For grass crops or anything else, is it?

THE WITNESS: Yes, sir. That land right there, according to the U. S. Soil Conservation technical guide, has a potential of some 75 to 80 bushels per acre of corn.

THE COURT: If you drain it?

*The court here is expressing an opinion about the usefulness of the soil*

*Highly suggestive - complain of this - Judge trying to lead witness*

*The judge substitutes his opinion for that of the expert*



THE WITNESS: Proper management, yes, sir. Proper management.

THE COURT: If you drained it, it wouldn't be the same type soil, would it?

THE WITNESS: Yes, it would remain the same type of soil, but your land use would change on it somewhat depending on how well it was drained but your soil would not change. It would still be the same.

*apparently there is where court just questioned - out town*  
 Q Is there any other type soil present in those bottoms?

A You don't indicate it there, but along the bluff there could be. See, there are different grades of wetness. Some are wet because you have a pan under them.

Q What do you mean by a pan, Mr. Slinker?

A Well, that is what we don't-- it is a layer of material such as silt or different things that are small particles and they fit together closely and the water when it soaks down through your top soil and gets on this layer, these little particles are so small and so tightly maneuvered together that the water won't go through it as readily as it will on your well-drained soil. That is a pan soil. It remains a pan soil even though you break this with a sub-soil or

different mechanics, but still it will sort of like gelatin run back together and again - and always be hard pan =, but this wet soil unless there is a little bit around the bluff, which I failed to determine, I didn't bore every place on there, but there could be a little right at the bluff with - you have seepage, wet-weather springs, some of us call them, that would seep out there and that would be referred to as President Taft.

Q Mr. Slinker, what - in your inspection of the Berry farm, did you discover any portion of the land that is referred to generally as washed bottom land or wash land.

A Not a good deal of it. In mapping the land capability map, you wouldn't - it wouldn't be cut out. It wouldn't be delineated from the rest of it. It could be and should be used a little differently because of the ease of cultivation. On the lower end of this blue second tract, on the lower end in the curve of the river, down on the lower end, I particularly remember there is a pull there. You know what I am talking about, where it is pulled out as the water goes off and comes on. There is a pull there. I noticed that particularly.

Q Generally, in large bottom areas, such as the Berry bottom and other land there, do what part if any do the slues or the ditches play in

cultivation and management?

A Well, there are two schools of thought on it. Acutally---

Q Give us the benefit of both then.

A Well, one school of thought is by having this vegetation such as your trees, your wet land trees, breaks the tide of this water as it comes on and at the same time as it pulls off. That way you narrow it down in certain areas, certain channels that it goes off and it creates an eddy, which when you have an eddy naturally you don't have any soil movement, so to speak. It should add deposition if the amount of water that you have, your deposits in your water are enough to bring it down. In other words, it slows the water down and lets this good soil drop out. Now, that is one school of thought.

The other school of thought is that you should remove all the vegetation such as your large vegetation, trees, then you have this sweeping action which acts similar, like peeling an orange, your water sweeps in with notihing to bother it and carries it on around, you don't slow it up. Any time you slow up water you drop out sediment, so there is one school of thought says if you remove all your vegetation and let it sweep off, then you don't have these little rills and

draws pulling out because of the tide of the water. So, I mean it is just a matter of choice.

Q Now, is there - can you draw any particular distinction, any difference between bottom lands generally appearing in the big bends of a river and those that are along straight stretches of the river.

A You naturally would, because the amount of deposition is directly proportionate to the speed of the water. So, when you have this, like that curve right there, on that lower tract, there is a curve where it goes in and runs around the bluff and turns a complete circle around, so naturally that water is going to slow down. It has to, to make that curve. It stacks up on this bluff, so to speak. When it slows down it is naturally going to drop out. And it is going to drop out as far as the force of the slowing that water, as far as slowing that water down is affected.

Q You don't have that in bottoms in long, straight stretches or where the river is relatively straight?

A That's true.

MR. ORR: Just a moment please.

You may ask him.

C R O S S

E X A M I N A T I O N

By Mr. George Logan  
Assistant U. S. Attorney

Q Did you take soil tests

when you went on this farm?

A You refer to soil tests?

Q Taking samples.

A And making chemical analyses?

Q Uh-huh.

A We did not.

Q When did you last go on this land to examine it, approximately?

A It was either Monday or Tuesday of last week.

Q Well, just recently?

A Yes, it was last week. I don't know what day. I can't remember.

Q Now, you have testified that this blue area, the darker blue, is good bottom land, well-drained bottom land. How do you conclude that? This is just for education.

A Well, we have a soil auger like a wood auger, small auger with a five-foot handle - could be longer - but we bore down and go through this soil, searching this out. In other words, we usually go down about 36 inches to see what is down there, that is how we arrived at that.

Q Now, per acre wise, do you know whether or not this drawing of all the area in dark blue accurately reflects the number of acres that are

this good well-drained bottom land?

A Very nearly so. I was looking at the scale on that. There is some 35 to 37 acres of this wet land that I mentioned.

Q Now, how many of these boring tests do you make? Well, approximately all over?

A Yeah. You usually make them when you see a change in the vegetative growth or a slope or a ridge or just wherever you think there would be a change because land doesn't change just straight off. I mean it just doesn't drop off and change all of a sudden.

Q Now, you refer to the river coming across these farms and then going on and dropping, dropping something, when this water goes on out. does it leave the land sweet or sour?

A Well, of course, your land is directly - your acidity of the soil is directly proportionate to your water in this wet land. In other words, any time you have an excess accumulation of water, you have an acid condition. That is natural.

Q An acid?

A Yes, an acid condition, but on your well-drained soil, your water, while it is on there and that maybe a day or two or three or four, I don't know how many days, the days are indeterminable, but as soon as this land dries out, this Huntington, the best

bottom land there is on the river, as soon as it dries out it is back to its normal state whereas on your wet land it doesn't run over that way and it stays longer and it tends to be a little bit more acid than your well-drained bottom. Of course, that will be - that would depend on when you put lime on it.

Q Were you on the Berry tracts, these four tracts, prior to July 1961?

A Yes, sir, I sure was.

Q You were?

A Yes, sir.

Q And did you recommend conservation methods to Mr. Berry?

A Made suggestions, yes. We never made a land-use map. We didn't make a land-use map on it. He had - it was strictly corn ground and usually those people with bottom land up there think so much of them for corn, it is hard to go with them on it. He didn't have enough, there was not enough difference in it that he would have a land-use problem there to any great extent.

Q I don't quite understand your answer. You say these people that have all these corn bottom lands, it is kinda hard to go along with them?

A Well, I mean there is so

little of this Huntington, the best bottom land, that we can find, there is so little of that over there, naturally it has no limitations on use. So, naturally, they are going to put every inch of it they can get in corn. We do make recommendations like liming and fertilizers, but as far as corn use, he is going to stay with it. He knows on his wet land he is going to be two or three weeks later getting in than on the well-drained. As far as that small acreage there, compared to the rest of the farm, it might be economically - it might be feasible that he did not drain this. I don't know. I heard him talking about finance. I don't know about that.

Q What kind of recommendations, if you recall, do you make - did you make to Mr. Berry or do you make to similar landowners as to fertilization?

A Well, it is a basic thing of course. It depends on the individual. My usual recommendation on that Huntington type soil was a matter of two tons of lime about every third year, four to eight hundred pounds of the high analysis fertilizer, which they don't ordinarily use.

Q Is that per acre or what?

A That is per acre. That is about what we recommend, but---

Q Now, when you went on these tracts, Mr. Slinker, did you find any Johnson grass?



A There was some, yes.

Q Last week did you find a lot?

A Yes, we found Johnson grass. Of course, the bottoms haven't been tended and that is another school of thought there also.

MR. LOGAN: I think that is all.

R E D I R E C T E X A M I N A T I O N

By Mr. Joe Orr  
Counsel for the Landowner

Q Mr. Slinker, I meant to ask you about the texture and the color of this Newark as opposed to the Huntington. Does it have any distinguishing texture or color

A Well, any time on your wet land you will have from the top down, the top soil will be nice chocolate brown or a phase of it and then you go into - begin to pick up little concretions, looks like wet cement, begins to show up. And the deeper you go the more you get of that and that is those small particles I am talking about. Any time you have a wet soil, the water excludes - I am giving a lecture.

Q Go ahead.

A (continuing) ---the water excludes the air, so it slows down your oxidation and reduction process, like a fence rusting, any metal rusting. That is actually what happens. Your red color is

your iron, different minerals down there that gives your soil a color. When you exclude the air, you slow down this process therefore you have a white color or a lighter color due to the fact that you don't have your air down there to bring down this breaking down process.

Q One other question, in all your experience both in bottoms on the Barren River and other rivers, have you ever run across any bottoms that were free of Johnson grass, a hundred per cent free of Johnson grass?

A That is a difficult question to answer. I would say this, it is very seldom that you run across a bottom that doesn't have Johnson grass.

Q Johnson grass properly handled in the bottoms doesn't interfere with production of corn?

A If handled properly on producing land and those fellows that live on the river usually know how to get in there early and turn it up and leave it, different things they do to combat this Johnson grass.

R E C R O S S

E X A M I N A T I O N

By Mr. George Logan  
Assistant U. S. Attorney

Q These bottom lands in between the Berry tracts and on around the bend of the river this way and around this way (indicating on map),

are they similar bottoms?

A They will be similar. Land doesn't change that rapidly. You will have a little more maybe of Taft <sup>ow</sup> on than the other and a little more Newark on another, but all your well-drained soil will be Huntington and it will usually lie right over next to your river.

MR. LOGAN: Thank you.

EARL CAIN

being called as a witness in behalf of the landowners, first being duly sworn, testified as follows:

DIRECT

EXAMINATION

By Mr. Joe Orr  
Counsel for the Landowner

Q Your name is Earl Cain?

A Yes, sir.

Q What is your age and where do you reside?

A Forty-three. Campbellsville, Kentucky.

Q What is your business or profession.

A I am a real estate broker and appraiser for Taylor County Bank in Campbellsville.

Q How long have you been in the real estate business as a broker?

A Sixteen years continuous

time. I had three years of broken time in the service.

I started a year before that.

Q How much of that time has been spent in Campbellsville?

A Sixteen years.

Q What area, general area, do you operate in as realtor or a real estate broker?

A Well, the major part of my business, of course, is in Taylor and adjoining counties, Taylor, Green, Adair - I sell some in Russell, Cumberland, I have sold some in Simpson and Logan. I sell some in Marion County and Larue County.

Q Speak up just a little bit louder, Mr. Cain.

A Did you get all that?

Q Most all of it but a little louder.

A Well, the last three counties I named I believe were Larue, Marion and Russell.

Q You said Barren and Simpson I believe.

A No. Logan and Simpson.

Q Logan and Simpson. Mr. Cain,

did you make in connection with your work as a realtor - do you buy, represent buyers, and sellers in the trading of land?

A I do.

Q All types of land?

A Yes, sir.

Q Including farm land?

A Yes, sir.

Q Do you do any appraisal work of farm land?

A Well, I appraise all the loans for the Taylor County Bank in Campbellsville, for farm land and, well, whatever property they make loans on.

Q Anyone else? Do you make appraisals for anyone else?

A No. Just individuals occasionally. I have done a little appraising for repossessed GI houses for the Veterans Administration.

Q Veterans Administration?

A Yes, sir.

Q Are you familiar with the Franklin and Ruby Berry farm in Allen County, Kentucky?

A Yes, sir.

Q For how long have you known that farm?

A I was first on that farm about 20 years ago.

Q Are you familiar generally with the community, the area where it is located?

A I believe so.

Q Where is the farm located with reference to Scottsville?

A It is 12 miles north of Scottsville, approximately two miles off of 31-E, about two miles out Port Oliver Road, approximately a mile and a half on the state blacktop north of the Port Oliver Road.

Q Mr. Cain, have you been employed by Mr. and Mrs. Berry to make an appraisal on this farm for the purpose of testifying in this hearing?

A I have.

Q Is your fee to be paid to you in any wise contingent upon the amount of money that they receive or that this jury awards them?

A No, it wasn't on a percentage basis. It was just a flat sum is all that was mentioned.

Q All right. Now, when did you first go upon this farm to make any inspection in connection with this appraisal?

A The first week in March this year.

Q How many other occasions have you been on it?

A I was there again on March the 29th and again on October 7th.

Q How do you describe generally the Berry land, Mr. Cain, as to a type of farm?

A Well, it is a cash grain and some tobacco. Fa

Q Now, what did your appraisal consist of? By that I mean what did you do in order to make the appraisal, Mr. Cain?

A Well, the first time I visited the farm, I believe I was - I told you the first week in March, with Mr. Dan Walton of the law firm, Bell, Orr & Reynolds, Mr. Berry, the owner, Mr. John Hurt, the tenant, and Colonel Melsey Elmore, of Glasgow, real estate broker.

Q What was done at that time?

A We inspected the farm.

Q All right. Now, Mr. Cain, what-- in addition to the physical inspection of the farm, what other information did you obtain or data did you assemble in order to make your appraisal?

A Well, as I said, we were back there on October the 7th. This time we had Mr. Slinker

who was on the stand ahead of me.

Q That is the soil man?

A The soil man. He was, I believe, with the Soil Conservation Department for a number of years in Allen County. And we did work with him and he advised with us as to the different grades of land and as to the fertility. After we left this farm, we tried to find some comparables, we checked the court records. We found four farms that we just considered as comparables. Once we inspected them I only found one tract that belonged to Dwight Siddens, was located 11 miles north of Scottsville on 31-E, in Barren County. It is across the river in Barren County.

Q How close is that to this particular tract?

A Well, I expect by air it would be two or two and a half miles would be my judgment.

Q Did you look at any other farm?

A Yes, yes, we looked at the Ed Long farm, which is located on 31-E, just across the highway from the Dwight Siddens farm that I have just mentioned.

We also looked at the Jackson



and Cassidy farms, on Port Oliver Road, also on Barren River. We got back about 15 miles east of Scottsville and traveled about a mile through a gated right-of-way, into a 60-acre farm, which we had seen the deed recorded on. We just didn't find them too comparable to the subject farm, however---

MR. LOGAN: Pardon, I didn't hear the last of that answer. Did not find---

A (continuing) Did not find these farms too comparable to the subject farms, however one tract of this Dwight Siddens farm to me was the most comparable land that we found. Mr. Siddens walked over the land with us. He had bought this 110 acres. He had bought--

MR. LOGAN: If the Court please, before he goes into that farm, I would like to inquire which Dwight Siddens farm it is. There are two of them located there together.

THE WITNESS: That is what I was explaining.

MR. LOGAN: Well, which one is it?

THE WITNESS: The 110-acres. You just missed me when I said 110.

MR. LOGAN: Is that north of the other one?

A That is north of the 161-acre tract. Uh-huh.

Q Go ahead, Mr. Cain.

A Give me just a second to find my notes on it (pausing).

THE COURT: Well, he made inquiry there, examined other farms which he thought were along the same line, is that right? He doesn't have to go into the description of all these other farms.

MR. ORR: No, no, he is not going into the description.

THE WITNESS: Just the ones that I find comparable, Your Honor.

A (continuing) That was this 110-acre tract that belonged to Dwight Siddens located on Highway 31-E, approximately 11 and a half miles north of Scottsville in Barren County. At the time Mr. Siddens bought this tract, May 13, 1955, it was an unimproved piece of land with the exception of one old tile silo which was in bad need of repair and I think he told me then it was originally---

THE COURT: Now, are you talking about the Siddens tract?

THE WITNESS: Yes, sir.

*Does not allow Cain to give evidence in regard to comparables*

THE COURT: I sustain the objection. Don't go into detail. Just say you examined the Siddens tract. You can't go into all the details of what has been done. If you considered it was comparable with this farm you can just say so and that is sufficient without going into all---

Q All right. You considered the Siddens 110 acres comparable. What other farms were comparable?

A Well, I didn't find any of the other farms too comparable to the subject land because the others are mixed bottom and upland farms.

Q The others were mixed bottom and upland?

A That's right.

Q And this farm, the taking is only the bottom land, is that right?

A That's right.

Q Now, based on your inspection of these various farms and the comparables and this land and all the investigation that you did, what in your opinion, Mr. Cain, was the fair cash market value of the Franklin Berry farm, at the time of taking?

A Now, you mean the 340.4 acres,

*Don't allow  
bottom to  
give  
evidence  
to establish  
value  
of land*

*Don't take  
evidence  
from  
Cain*

including the upland tract.

Q Not the Ruby Berry, the Franklin Berry.

A Well, I have shown this 29.54 acre tract that he is keeping also, I put it on, included in the 340.4 acres, and later I have taken it off.

THE COURT: Just add it all up there, Mr. Cain, just what is it, all of it. Add it up. What in your judgment is the fair and reasonable

A \$84,852 for the Franklin Berry land which is being taken.

Q Well, the Ruby Berry land, its market value?

A \$33,662.

MR. ORR: You may ask him.

C R O S S

E X A M I N A T I O N

By Mr. George Logan  
Assistant U. S. Attorney

Q You discussed numerous farms that you went on and checked out as being comparable or to see if they were comparable and trying to find a comparable for these farms. When did you do that?

A On October 7th and 8th.

Q Of this year?

*Here again, the Court is forcing the case, the taking over the land of this case is a determination of the witnesses - He took the case away from the witnesses.*

A Yes, of this month.

Q Two days?

A Right.

Q Did you take every sale in a 25-mile radius of these tracts?

A No, sir.

Q That were sold in the last 10 years?

A No, sir. The only ones we found that we thought we might use as comparables were those four that I mentioned.

Q I don't believe you mentioned the Luther House sale along the same river bottom which joins right here (indicating on map). Did you look at that tract?

A I didn't know that that tract had been sold. No, sir.

MR. ORR: Will you identify the year when you make reference to these, Mr. Logan? I want to see if they are in time or not.

MR. LOGAN: 1954.

MR. ORR: Objection.

THE COURT: Objection sustained.

*Time  
of  
sale  
limit  
also land  
had been  
much improved  
with bulldozer*

What is it - 1954? I will let him testify for what it is worth. Overrule the objection.

Q Did you consider that one?

A I didn't look at it, no, sir.

Q Did you consider the tract, the 127 that Franklin Berry bought himself, in 1959?

A Yes, sir.

Q Did you consider that he only paid \$11,000 for that tract?

A Yes, I knew what he paid for it.

Q Now, on this Dwight Siddens farm, which you say is the only comparable in your opinion?

A I didn't say it was comparable. I mean I believe I said it was the nearest comparable farm I could find.

Q Well now, is the Siddens farm a better farm than the Berry farm?

A No, sir.

Q It is not?

A Not in my estimation, no, sir.

Q Does the fact that it is located right on 31-E---

A The location would probably

add a little to it, the location to a gentleman farmer; to a dirt farmer it probably wouldn't.

Q You say there was one tile silo on there?

A Yes, sir.

Q Now, was there also a barn on there?

A There was an old barn that had to be removed and he built a new barn the following year after he bought it in '56.

Q After he bought it?

A Yes, sir.

Q Now, I believe you stated all three of the Franklin Berry farms that the value of that was \$88,852, is that right?

A Right.

Q What value did you place on the 29.56 acres of land at the top of the hill on the blacktop road which is not being taken?

A I put this land on with the buildings for \$8,817, which gave me a total of \$93,669.02. I subtracted it from that sum, and \$8,817, I don't see any damage there, I think it is worth - it will be worth as much to him after the taking as it was before.

Q Eighty-eight hundred?

A I am not making any adjustment for that one tract.

Q Now, have you appraised much or little farmland in Allen County or Barren County?

A Not too much, in fact not any in Allen.

Q This is your only experience?

A In Allen County, yes.

Q Now, making your appraisal on Berry tracts, how much did you allow for the tobacco base Mr. Berry has?

A Well, that didn't enter into it with me.

Q Now, you have placed a value of \$33,662 on the Ruby Berry tract, 131 down here (indicating on map).

A Right.

Q I wonder if you would tell me how you arrived at that figure.

A Well, as I told you, we worked with Mr. Slinker and he advised me that it was real first-class bottom land and it shows for itself, as we went over it, it is a choice piece of land. And here is one



factor that to me meant something. That tract of land to me is 88.4% productive bottom land, with 11.6% of the land in slues and waste, which is a real high percentage.

Q Well, the value you put on it, did you arrive at that value by comparing it to the price paid for the Siddens farm?

A No. Of course, I worked this appraisal of the two Berry lands altogether.

Q Did you find any Johnson grass in there?

A There is some Johnson grass, yes.

Q There is a lot of Johnson grass, isn't there?

A Well, I don't think it would be detrimental to a crop.

MR. ORR: Object to the Johnson grass unless he is talking about it when the government took it. Now, it has been down there, vacant land, for over a year now. Of course, there is Johnson grass all over it now. He can ask about the particular month.

Q What did it look like on July the 13th, 1961?

A I wasn't on it July the 13th, 1961. I was on it in March, March of 1962.

Q How did you get on these tracts?

A We rode down on a wagon.

Q On a wagon?

A Down the road.

Q Why didn't you drive your car?

A Well, it was in March, it was rather soft and I didn't take the chance.

Q Did you drive the car in October?

A No, sir.

Q Go on a wagon again?

A Yes, sir.

Q Did you have to go through the Spivey farm to get here?

A Well, we went down the Berry road, made our inspection of his entire farm and we came back through the Spivey road as you turned back to the highway.

Q You went down this way over the bluff?

A Yes, sir.

Q And came back around and out?

A Right.

Q This is, I believe, called Swamp Road, is it not?

A I really don't know. I didn't hear that mentioned.

Q How many gates did you go through when you came out through Spivey's?

A I believe it's three.

Q Three gates. Did you notice the channel---

A (continuing) There is three gates and a cattle crossing, I believe.

Q Did you notice the channel going across this field where the river cut through it?

A There is some evidence of a low place there.

Q And considering your appraisal, did you consider frequency of flooding of these tracts in the past?

A I was told that this land hadn't lost a crop on it in years and years.

Q And you did not consult any records, though, as to the flooding?

A No, sir.

Q Now, going back to the L. P. House tract, which adjoins it, this is 113.8 tract which

sold for \$16,000---

MR. ORR: Objection.

Q (continuing) ---are you familiar with that comparable sale?

THE COURT: Objection sustained.

A I remember riding through it. I didn't make an inspection.

THE COURT: Objection sustained.

There is no evidence of that fact.

MR. LOGAN: I am asking if he is familiar with it.

THE COURT: Objection sustained.

Q Well, I am having a little trouble, Mr. Cain, finding out how you arrived at the value you put on these tracts. You considered Siddens you say, but you didn't take the price he paid per acre and relate it to these?

A Well, to a certain extent I did, but as I told you before, Siddens land is not comparable to this land really in fertility.

Q Well, if Siddens is not comparable then you did not rely upon it?

A I said we considered it as a comparable up to a certain point, but not comparable to

this land.

MR. LOGAN: I think that's all.

MR. ORR: Stand aside, Mr. Cain.

May we approach the bench? ~~X~~

~~XXX~~  
THE COURT: Yes, sir.

(Reporter's note: An off-the-record discussion was held at the bench in the presence of counsel and the Court, out of the hearing of the jury.)

THE COURT: Members of the jury, this clock is a little slow, it is 10 minutes of 12 and we need a little recess here for a matter, so I am going to let you go for noon recess and come back at 1 o'clock.

Bear in mind all admonitions. Do not discuss the case and do not permit anyone to discuss it with you or in your presence or make up your minds about it in any way until it is finally submitted to you. I know that there is a temptation to discuss a case either among yourselves or with someone with whom you may come in contact over the recess, but it is highly important that you do not do that. You should reach your conclusions from the evidence you hear here in the courtroom and I ask you to strictly observe those admonitions.

Mr. Marshal, you may announce a

recess until 1 o'clock this afternoon.

(Reporter's note: The court recessed until 1 o'clock, at which time the parties were present in person or by counsel, the members of the jury were present, and the following occurred:)

THE COURT: Call your witness.

MR. ORR: William Grissom.

WILLIAM GRISSOM, *case*

being called as a witness in behalf of the landowners, first being duly sworn, testified as follows:

DIRECT

EXAMINATION

By Mr. Joe Orr  
Counsel for the Landowners

Q Your name is William Grissom?

A Yes, sir.

Q What is your age and where do you live please, sir?

A My age is 42 years. I live at Glasgow, Kentucky.

Q What is your occupation and how long have you followed that occupation?

A I am a realtor, auctioneer and appraiser and I have been in the business for eight and a half years.

Q And what special training if any have you had in the field of real estate or appraisal work, particularly appraisal work?

A I have had - other than my experience, I attended two courses and successfully completed in real estate appraising sponsored by the American Institute of Real Estate Appraisers at the University of Kentucky.

Q Approximately how many appraisals of various kinds have you made, Mr. Grissom, few or many?

A Well, over the past eight and a half years, 70 or 80 maybe.

Q Are you a licensed realtor in the State of Kentucky?

A Yes, sir. I am licensed by the Kentucky Real Estate Commission. I am a member of the National Association of Real Estate Boards, the National Institute of Real Estate Brokers, the International Traders Club and the Kentucky Real Estate Board.

Q Now, have you been employed by Mr. and Mrs. Franklin Berry to make an appraisal of their farm land for the purpose of testifying in this hearing?

A Yes, sir.

Q Is your agreement as to compensation in any wise contingent upon the amount of recovery that the Berrys shall receive at the hands of this jury?

A No, sir.

Q Now, Mr. Grissom, tell the jury in making this appraisal what you did, the figures that you utilized and the manner in which the appraisal work was done.

A Well, first I would like to say I have sold farms, residential, commercial real estate throughout South Central Kentucky. The majority of my experience has been in the Barren, Allen, Metcalf, Hart, Monroe, Warren, Cumberland County area. My firm averages about one auction sale a week as well as private transactions and I have made appraisals for many large concerns such as Shell Oil Company, Kentucky Trust Company, Small Business Administration for loan purposes, Department of Economic Security, local banks, North American Copper Company, New York, insurance companies and individuals and have served as court-appointed appraiser for property to be disposed of by court order.

I began my appraisal of the subject property September the 17th, 1962, and completed it October the 13th, 1962. The purpose of this appraisal was to



prepare to testify in this trial as to market value as of July the 13th, 1961. Now, market value is defined as the highest price in terms of money that a property will bring on the open market, providing a reasonable time for a ready, will and able seller to find a ready, willing and able buyer, both acting without compulsion, both parties being fully informed as to the advantages and disadvantages of the property and both acting intelligently.

To determine market value, it is determined by compiling general data pertaining to the region and the community and specific data pertaining to the lands and improvements of the subject property and comparable properties and correlating this data into a final estimate of market value.

Now, this property, the subject property is located 9.2 miles northeast of Scottsville, Kentucky. Now, that is the first boundary off the highway and of course if you extend off down into the bottoms, it is a little further from Scottsville. It is on the left bank of the Barren River. The surrounding community is made up of well-maintained, productive farms, most of them have been in the same families for many years.

There is a paved public road extending to U. S. Highway 31-E. The Allen County school system at Scottsville, Kentucky, serves this community with schoolbus service to the farm. Church facilities are within two miles. The farm is served by electricity, telephone, mail and milk route services. Good markets are available at Scottsville and Glasgow, Kentucky.

*Refer to Judge  
Remond*

(The land consists of 340 acres, more or less, of well-drained, deep, rich, every-year overflow bottom land; 48 acres, more or less, of wet bottom land, that is productive if properly managed; 22 acres of upland and 30 acres of bluffs and drains. The burley tobacco basis 2.32. The improvements are two occupied tenant houses, a 40 x 80 barn, two smokehouses, three chicken houses, and a utility shed. Mr. Berry has been operating this farm for many years as a cash grain and tobacco farm and I consider this farm as operated a very good investment with a minimum amount of expense and management burden, as it requires very little supervision by the owner.

To replace this farm, situated so, with a similar one would be---

MR. LOGAN: I object.

THE COURT: Objection sustained.

Q Go ahead.

A To replace this---

Q (interposing) Without - the objection was with reference to replacement, where you used something about the replacement of this farm.

MR. LOGAN: Object to any testimony as to replacement.

THE COURT: Objection sustained.

MR. ORR: Not replacement value.

A (continuing) I made a physical inspection of the subject property to become familiar with the boundaries. I also went to the ASC offices at Scottsville and Glasgow and inspected the aerial photographs and records pertaining to the subject property and other farms recently sold. I prepared appraisal maps of the subject property and other farms. I went to the courthouse at Scottsville and Glasgow and compiled the data from the deeds and plats of the subject property and other farms. I went to the Soil Conservation Service at Scottsville and Glasgow and gathered data on the subject property and other recent sales.

After preparing my data, accompanied

by Mr. Berry and Mr. John Ray Hurt.

Q (interposing) Now, just a minute. Who is Mr. John Ray Hurt?

A He is the tenant now on the farm.

I physically located and carefully inspected each field, then I physically located and inspected and measured each building to become thoroughly familiar with the subject property.

As for comparable sales, I physically inspected 12 other farms that have been sold in the last six years on or near Barren River, personally interviewing the present owners and real estate agents involved. I re-inspected many of these farms on different occasions until I was thoroughly familiar with them. I then took the data compiled on the subject property and the 12 recent sales and classified and compared each sale with the subject property as to date of sale, sale price, price per acre, size, location, land improvements and motive, selecting the three recently sold farms that contained bottom land as they were more closely related to the subject property.

And based on the comparables and my findings, the complete investigation, it is my opinion that the fair market value of the subject property as a

whole---

Q (interposing) Now, just a minute, Mr. Grissom. Is that combined now, on Ruby and Franklin Berry tracts?

A Yes, sir, it was all operated as one farm unit so I arrived at my opinion of fair market value as of July the 13th, 1961, of the entire unit, the 440-plus acres.

Q All right, sir.

A And that was \$99,000. The value after the taking, which was 29.54 acres, in my opinion the fair market value was \$2,000. In my opinion the fair market value of the property of the taking, as of July the 13th, 1961, was \$97,000. Allocated to Mr. Franklin Berry, 310.7 acres, the fair market value was allocated at \$72,500. That is Mr. Franklin Berry.

Q How much is that?

A \$72,500. Mrs. Ruby Berry, 99.5 acres was allocated a fair market value of \$24,500, or total of the taking of \$97,000.

Q Now, Mr. Grissom, did you find any farm as a comparable that was comparable in size and was comparable in the nature of the land as this particular taking, without making any adjustment?

A No, sir.

Q What farms did you - if you will and identify them - that you used as being the most nearly comparable.

A The Cassidy farm, the seller was Whitney, the date of the deed was January the 15th, 1961, the sale price---

Q Pardon. What was the date?

A The date of the deed, January the 15th, 1961.

Q That was - who was the seller?

A Seller was Whitney.

Q And the buyer?

A Cassidy.

Q What was the price?

A The price per acre was \$223

per acre.

Q That was the average price per acre?

A Yes, sir. Improvements---

Q How much of that was bottom land and how much upland?

A Sixty acres of bottom land and 52 acres of upland.

310  
223  
---  
930  
620  
---  
691300

Q What about - what did the improvements consist of?

A Small tenant house, a barn and machine shed.

Q All right now. What other farm did you use?

A The Siddens farm, the Riley - Riley was the seller. Now, that is the northern most farm up next to Peters Creek bridge. The seller was Riley, to Siddens, date of deed was May the 15th, 1955, sale price \$20,000, price per acre \$181, total acres 110.1 acres, 40 acres of good, well-drained bottom land, 70 acres of upland. At the time of purchase this had a one acre tobacco base. Improvements, silo.

Q Did you make any - inasmuch as that farm was sold in 1955, did you make any adjustment, Mr. Grissom, to bring that up to what you considered as market value of the farm at the time of taking?

A Yes, sir.

MR. LOGAN: I am going to object at this point unless it is established there has very definitely been an increase in this area in market value.

THE COURT: Read the question. I didn't hear the question. What did you ask?

MR. ORR: I asked him this, Your Honor, did he make any adjustment on the Riley farm to bring - so as to be able to say what was in his opinion the fair market value of it as of the date of the taking of this farm.

THE COURT: I sustain the objection unless you show that there has been an enhancement in value not as a result of the taking of this land.

Members of the jury---

MR. ORR: Excuse me.

THE COURT: All right. Go ahead.

Q Mr. Grissom, if you will, state to the jury and elaborate in any manner you think appropriate as to what in your opinion has happened to the market value of farmland in this community that we are interested in from the period 1955 to 1961, the date of taking.

THE COURT: Just a minute. That is not to be answered, Mr. Grissom. If there has been an enhancement in value, you are not to consider that if that enhancement was brought about by this development. Do you understand? In other words, you are not to consider the fact that the development there in Allen County, in Barren County, the building of this reservoir, resulted in

would  
not allow  
witness  
to bring  
price  
up to  
1961  
price

Rule that  
project  
can not  
enhance  
value  
of land



increased value. In other words, it is as if there had been no reservoir built, has there been an enhancement or has farmland in this locality increased in value? Just assuming there had been no development and no talk of a development.

THE WITNESS: Yes, sir.

A Disregarding the development, after investigating the Riley to Siddens sale, I discussed it with not only the buyer, but also with the real estate agent, Mr. Omer Calvert, who handled the transaction, and Mr. Riley had a farm---

Q (interposing) Don't quote what someone said now. That is not admissible.

THE COURT: The question is, do you know. If you don't know, just say--

MR. ORR: From whatever sources you may have.

A Yes, there has been.

Q What has it been, if you can express it in either dollars or cents or percentage or whatever way you feel it best to describe it?

A On an average of three per cent to four per cent per year.

*million  
value*

MR. ORR: You may ask him.

C R O S S

E X A M I N A T I O N

By Mr. George Logan  
Assistant U. S. Attorney

Q Now, so that I understand the comparable, I believe you refer to it as the Cassidy comparable that you referred to?

A Yes, sir.

Q J. E. Whitney was the purchaser-- is that the right one?

A Yes, sir.

Q A 263.7 acre farm, is that the size of it?

A A hundred and 12 acres.

Q Excuse me. This is the Whitney was the seller, is that right, not the purchaser?

A Whitney was the seller. He sold to Cassidy and Cassidy purchased 112 acres.

Q Where is that Cassidy farm located?

A It's located by road five miles down the river from the subject property. I can point it out here on the map if I may, sir.

Q There is an aerial. You can

give us a general idea which way.

A Well, I have a map here, which I can locate it on, if you like. I have a topo map here.

MR. ORR: Now, just a minute. Let's let the jury see it. They are the ones who need to see it. We lawyers don't.

Let's identify this map before you go any further, if I may, Mr. Logan. I believe it's U. S. Department of Interior Geological Survey, Lucas Quadrangle Kentucky. Got a date on it anywhere? Well, it's the last exhibit.

MR. LOGAN: That is all right. No objection to it.

MR. ORR: We would like to identify it as Plaintiff Landowner's Exhibit 2. *Exhibit 2*

(Reporter's note: The U. S. Department of Interior Geological Survey, Lucas Quadrangle, Kentucky, map was marked Landowner's Exhibit 2.)

A (continuing) First I would like to locate the subject property. Let me get my bearings in here. Actually, right in here is the - this is the subject property (indicating on map), the blue pin, Difficult Creek runs in. It's this tract right here

(indicating). Here is the subject property and by road five miles you come out and hit the road to Port Oliver and it is just below, right here, right in here (indicating on map).

Q Would you point where the dam site is?

A The dam site right in here (indicating).

Q This is just on the other side of the dam site then?

A Yes, sir.

Q From where the Berry tract is?

A Yes, sir. I would say it is below the dam site.

Q In your opinion, did this Cassidy sale - was it in any way influenced by the reservoir?

A Well, it was an arms length transaction. Mr. Cassidy purchased it from Mr. Whitney because he needed more land. Now, it may be that the dam was - was the reason he needed more land, so it might have influenced - I would say it influenced Mr. Cassidy to buy the land from Mr. Whitney, but he could have gone out in the market somewhere else.

Q Was Mr. Cassidy being relocated?

MR. ORR: Objection.

MR. LOGAN: I think it is very pertinent, Your Honor.

THE COURT: I overrule the objection. He may answer that.

A Mr. Cassidy being - no, sir. Now, if I understand your question, he is still living in the same house that he lived in before and after the dam. He is still in the same home.

Q Did Mr. Cassidy own adjoining property?

A Yes, sir. The home that he was living in, he lived there before and after the dam and he bought the 112 acres in addition to the land that he already owned.

Q So that he might have additional land, I take it, adjoining what he already had?

A Yes, sir.

Q All right. Now, Mr. Grissom, I believe you did not see the tract on July 14th or 13th, 1961?

A Now, which tract are you referring to?

Q The subject tract, the Berry tract.

A No, sir. I wasn't on it July the 13th, 1961.

MR. ORR: Your Honor, I would like to stipulate there that - they make reference to this witness didn't see the tract on the day of the taking. The day of the taking is the day that the United States filed action in this court and---

THE COURT: That's right.

MR. ORR: (continuing) ---and none of these landowners could be there, so I don't want the jury to get the inference that he has been derelict in his duties.

THE WITNESS: I was familiar with it.

Q Now, Mr. Grissom, are you a MAI? That is, you know what that refers to?

A No, sir.

Q You attended some courses under their direction, though, I believe you stated?

A Yes, sir.

Q In your opinion, the most competent real estate appraisers - and I mean competent

appraisers as opposed to just laymen's opinion - do they generally have a - do they generally see pretty well eye-to-eye in the appraisal values of property?

A No, sir. Appraisal is a judgment since it is an estimate, it is based on the data that you compile.

Q It is an informed opinion, isn't it?

A It may be right, it may be wrong, depending on how good your data is. If you investigate further and do enough research and comparisons, why, that is how good your appraisal is based.

Q Now, how many other tracts, other sales in this area did you check out to see if they were comparable or not?

A May I go to the map?

Q Well, I just - just give me a figure. I don't care to list each one. I just want to know how many.

A Well---

Q I think you said 12 originally?

A Twelve, yes, sir, but I can locate them on the map if you would like for me to.

Q Did you compare the soil of the

Berry tract to the Siddens tract?

A Yes, sir.

Q Did you find them to be similar soil?

A Some parts of each were similar.

Q Which one had the better soil?



A The Berry overall. Either the Riley or Siddens tract had about 40 acres of good, deep, well-drained bottom land, the Riley-Siddens tract.

Q What do you base that opinion on?

A Observation and the type of soil, the subsoil, the depth of the subsoil.

Q Did you have soil tests made?

A No, sir.

Q Did you consult the records of someone who did make the soil analysis?

A Yes, sir. Mr. Slinker accompanied me, who testified previously.

Q Mr. Slinker, I believe he testified that he didn't make a soil test?

A Not a soil analysis as such as the soil scientist would make, no, sir.

Q Now, Mr. Grissom, let's talk for a minute about the access to the four Berry tracts. Quite frankly, is the access to Tract 130 and 131 good or bad?

A For typical river bottom land, I would say it was average or better than a lot due to the way that the abrupt slope and you can go into the bottom.

Q Compare to the Siddens

tract, to which you refer. Compare them in that aspect.

A No, sir. The Siddens tract is located right along U. S. Highway 31-E, but it is limited as to the upland due to five tiles running across the highway that comes over the high ridgeland. These five tiles through the highway drain water through, right on to the upland of the Siddens and just spreads it out, the three below the store. I am talking about the whole tract now.

Q But it is easy to get on the Siddens tract, isn't it?

A Well, it's easy to get off the highway.

Q What do you have to do to get on the Franklin Berry and Ruby Berry tract, 130 and 131?

A Well, I have a map here, sir, that shows the roads. I have driven all over it in a pickup truck. I don't mean all, all of it, but up and down the roads and through the bottom. I will show the jury (getting map). Here is the Berry tract (indicating on map), here is the other outlined in the dark. You can either go down through the Pitchford and by this road by Spivey and around (indicating), follow this road around the bottoms, from one bottom to another, or you can go back up through here (indicating) and you can come out

through the Spivey tract.

Q You can go this way down through Pitchford, House and Harston to get to the Franklin Berry tract which is 130, is that correct?

A Yes, sir.

Q Now, is that known as Swamp Road?

A Yes, sir.

Q Now, very frankly, is that a good road or not?

A I would classify it as a good wagon road, for tractor and wagon, to haul corn out of the bottom.

Q The Siddens tract did have some improvements on it, did it not?

A The Riley Siddens tract that I was referring to?

Q Yes, sir.

A It had a silo, tile silo, and he replaced the barn with a new barn, cost him \$3,200.

Q And with the exception of the one tract that is a partial taking, on which the government is not taking, in other words, what the government is taking, there are no improvements on the Berry tracts, are there?

A Not in the taking, no, sir.

Q Is there Johnson grass in the Berry bottom land?

A Yes, sir.

Q Can you kill Johnson grass?

A It is infested with Johnson grass and cockle-burrs. Johnson grass can be controlled under proper management, but bottom land will be infested at one time or another with Johnson grass.

Q It is expensive to control it is it not?

A Yes, sir. You have to work at it.

Q Are you familiar with the flooding record of Tract 125?

A From my investigation, they will lose a partial crop down there on an average of about once every 10 years - I am talking about in the river bottoms, all up and down the river, through this section.

Q How many improvements were on this Cassidy tract?

A There was a - the tenant house, which had been remodeled at the time I inspected it, and a barn and what I call a machine shed beside the barn.

Q Did you place a value on those improvements?

A Not as a cost less depreciation value, but a value in use, as they relate to the farm, because you don't sell buildings separately from farms. When you buy a farm it is on an acre, including improvements and land.

Q Did you place a value on the Cassidy farm?

A Yes, sir. I used it.

Q Did you consider the Cassidy farm better than the Berry farm?

A I used the sales price value because it was January of '61 and the taking of the Berry farm was July '61.

Q On your total value of the Berry tracts of \$99,000, what does that figure out per acre?

A Two hundred and thirty -- let's see, I have it here. On the total thing, \$225 an acre, as a whole.

Q And I believe you stated there was in your opinion 340 acres of good bottom land?

A I will check to make sure. I believe I have a breakdown here - 340 acres, yes, sir, more or less.

MR. LOGAN: I believe that is all, Mr. Grissom. Thank you.

THE COURT: Stand aside.

MR. ORR: Just a minute, Mr. Grissom.

R E - D I R E C T

E X A M I N A T I O N

By Mr. Joe Orr,  
Counsel for the Landowner,

Q The defense asked about - in your opinion and experience, does Johnson grass make acceptable hay?

A Yes, sir, it can be utilized as hay or feed.

Q Now, isn't part of it actually, if you know, being cut by either the government or its lessees in this area at the present time? - has been the last few weeks?

A In my inspections down there in the last few weeks, why, they are mowing and baling hay.

Q Now, on these roads, reference is made to roads in the bottom, do you normally expect - do you normally find blacktop roads in overflow river bottoms?

A No, sir.

Q What type of roads do you expect to find in river bottoms and do find in river bottoms?

A Typical wagon roads, we call them.

Q Roads that are usable to get in and out of and get crops in and out, is that right?

A Yes, sir.

Q Any trouble to get cars around down in that bottom?

A Not while I was there doing my inspection.

Q Did you see any?

A Yes, sir. They were coming down to look at the hay to see about buying it in the field and there was quite a few, quite a bit of traffic down there.

Q Did you see any government cars down there while you were down there?

A Yes, sir.

Q How long, Mr. Grissom, in either hours or days would you say that you spent in making this appraisal that you have told this jury about?

A I would hate to try to estimate. I have done the field work during the daytime since the 27th of September and I have worked every night until around 1 o'clock analyzing the data, every night except

on week-ends.

Q What would be your estimate as to the number of days in the field and the number of hours in the office making your calculations and computations?

A Well, let's see - oh, this is just a guess, 150 hours.

MR. ORR: That is all unless you have something further, Mr. Logan.

R E C R O S S E X A M I N A T I O N

By Mr. George Logan,  
Assistant U. S. Attorney,

Q What is your fee for this appraisal, Mr. Grissom?

MR. ORR: May I approach the bench please?

(Reporter's note: The following occurred at the bench, in the presence of counsel and the Court, out of the hearing of the jury:

MR. ORR: You have already asked and he said that it is not based on any contingency.

THE COURT: That's right.

It is competent to show what his fee is, like a doctor or anybody else.

Are you making any objection?



MR. ORR: No, no. I'm not making any objection.

THEREUPON THE COLLOQUY AT THE BENCH ENDED)

MR. ORR: Go ahead and answer.

THE WITNESS: Will you repeat the question please?

Q What is your fee?

A Seven hundred and fifty dollars.

Q Does that count the whole thing?

A Yes, sir.

Q Count testifying and computation of the appraisal?

A Seven hundred and fifty dollars and a hundred dollars a day for every day in court. A man testifying---

MR. LOGAN: I understand. I know the time in court - you are not being paid to testify.

Q Mr. Grissom, did you consider the Luther House comparable?

MR. ORR: Object.

THE COURT: I think you asked him.

MR. LOGAN: I haven't asked this

witness if he considered that comparable.

MR. ORR: He just ruled it wasn't

*Ruled same  
not comparable  
but prompts  
D.A. to ask  
question as  
asked  
himself*

comparable. The last time you wouldn't let me ask the price.

THE COURT: You are asking now if he considers a certain farm comparable?

MR. LOGAN: Yes.

THE COURT: That is competent. Overrule the objection. I will let him answer it.

(Reporter's note: An off-the-record discussion was held at the bench.)

Q Did you or did you <sup>Not</sup> consider it?

A I investigated it and of course inspected it.

Q Just answer, did you or did you not consider it.

A No, sir. Not as a comparable.

MR. LOGAN: Thank you. That's all.

R E-D I R E C T

E X A M I N A T I O N

By Mr. Joe B. Orr  
Counsel for the Landowner

Q Explain why you didn't consider it as a comparable, Mr. Grissom.

A Well, at the time of my inspection, of course the property had already been tried in court and that would be classified as a forced sale, so I--

R E C R O S S

E X A M I N A T I O N

By Mr. George Logan  
Assistant U. S. Attorney

Q I am not talking about that sale. I'm talking about when Mr. House bought the property.

A Yes, sir. I investigated that. That was February 1954.

MR. ORR: You brought it up.

A (continuing) February 1954.

Q Did you consider that comparable?

MR. ORR: That is the one you ruled out.

A I don't like to go that far back.

THE COURT: I permitted him to answer about 1954. I permitted that this morning. Go ahead.

Q Did you consider it to be comparable or not comparable?

A Not after my investigation and the motive behind the sale and---

Q The motive behind the sale in '54?

THE COURT: He considered it not

comparable. That is his answer.

A I considered it not comparable.

THE COURT: That is his answer.

MR. LOGAN: All right. That's all.

THE COURT: Stand aside, Mr. Grissom.

Call your next witness.

MR. ORR: That's the case for the  
landowner.

THE COURT: The landowner rests.

Call your witness.

EVIDENCE FOR THE GOVERNMENT

MAURICE PFEFFER

being called as a witness in behalf of the government,  
first being duly sworn, testified as follows:

Q State your name please, sir.

A Maurice Pfeffer.

Q And what is your business, Mr.  
Pfeffer.

A I am with the Corps of Engineers  
as engineering technician, with work in agronomy.

Q And as a part of your duty, do  
you make soil analysis on tracts of land?

A I do.

Q Did you make a soil analysis

on the three tracts of Frankline Berry and the one Ruby Berry?

A I took the samples and they were analyzed by a county agent and presented to me.

Q Which is customary procedure, I believe?

A Correct.

Q Did you also take soil analyses of the Luther House tract?

A I did.

Q And the Dwight Siddens farm?

A Correct.

Q Did you find or did you not find any comparability between the soil in the Luther House tract and the soil in these four Berry tracts?

A May I refer to my notes?

Q Certainly.

A The analyses as determined by the county agent presented an acidity and alkalinity test and a phosphorus availability and a potash availability.

Q And with reference to the House and the Berry tracts did you find them to be comparable or not comparable soil?

A The House tract and the Berry tracts were very comparable. I can read the figures if they are required.

Q I don't think it's necessary unless you want to. They turned out to be comparable. What about the Berry tracts as compared to the Siddens tract, the soil in that tract?

MR. ORR: Which Siddens are you speaking of?

MR. LOGAN: This is the - you took them on both Siddens tracts, I believe?

THE WITNESS: I did.

Q With reference to both Siddens tracts did you find them comparable or one better than the other?

A The Siddens tracts tested higher.

Q Higher than the Berry tract?

A Than the Berry tracts, correct.

MR. LOGAN: That's all.

C R O S S

E X A M I N A T I O N

By Mr. Joe B. Orr  
Counsel for the Landowner

Q You didn't make these tests?

A I did not.

Q May I ask you this, are you

familiar with them, how they are made?

A I am, sir.

Q They are the same ones that the farmer can take in a little sample of soil to the soil testing lab and if he tells them what has been growing on the land for this year and what he wants to grow on it next year, they will tell him whether he needs to put this on his land or that on his land, is that correct?

A That is correct.

Q Now, how long - at the time you have taken these soils, how long would you say that those tests mean anything, a year, six months?

A I would say---

Q What would be your best estimate?

A One year.

Q One year.

A Without flooding. Now, no flooding in these bottoms.

Q All right. Now, suppose that-- those tests mean nothing in regard to the soil capability, do they?

A These do refer to the capabilities.

Q Now, capability or actual ability

at the time they are tested?

A Well, these results will be in effect for one year.

Q Well, I asked you - I ask you then, what you say, it is actual, not its inherent capability, but its ability as of the time of testing for approximately one year, is that right?

A Correct.

Q Now, did you prior to making these tests, did you inquire of the landowner, take the landowner with you, ask him what did you grow on this field last year, how much fertilizer did you put on it, what was its chemical composition?

A I did not.

Q Then what you are really doing is giving - trying to give a test here that showed what the chemical composition is, maybe as affected by commercial fertilizer, isn't it?

A At the low count as reported.

Q Now, just answer my question. If you don't know what fertilizer has been applied to that land, within 12 months, what the chemical content of it was, what do these tests mean?

A These tests mean that there is



so much available nutrients to the plant life that might be put in there.

Q For one year?

A For one year.

Q All right. Now, if the farmer got through, just a few months before that, putting a thousand pounds of, say, oh, 20-20, it would show in all probability that it had an abundance of available nitrogen-- I mean of potash and phosphate, wouldn't it?

A Right.

Q Now, the next field to it, the same nature of soil, that thousand acres hasn't been applied there, wouldn't show it, would it?

A Right.

Q Now, you go back to one it did show 12 months from then and you take your test and where are you?

A Well, it's not questionable for one year.

Q In other words, all you say by your soil tests is that if he is going to put one of these fields in today here are the available elements?

A Right.

[Q Not nitrogen. You can't test

for nitrogen, can you?

A Right.

Q You can for phosphate and lime  
or Ph?

A Right.

Q But that doesn't get to the  
basic capability of the land as to whether it is a strong,  
well-drained land or whether it is a second-grade land  
that has been recently fertilized?

A That's correct.

MR. ORR: That is all.

R E D I R E C T

E X A M I N A T I O N

By Mr. George Logan  
Assistant U. S. Attorney

Q Will it reflect if land has  
been recently fertilized?

A It will.

Q Had these lands, the Berry  
tract, been recently fertilized when you made your analy-  
sis?

A No, they had not.

MR. LOGAN: That is all.

MR. ORR: No further questions.

MR. LOGAN: May I approach the

*this tends to prove  
earlier testimony 100% accurate*

bench please?

THE COURT: Yes, sir.

(Reporter's note: The following occurred at the bench in the presence of counsel and the Court, out of the hearing of the jury:

MR. LOGAN: The situation is such that I think perhaps it is grounds for mistrial, Your Honor. I have noticed the No. 6 juror and Mr. Berry, Franklin Berry, exchanging winks. This would seem to reflect to me that his answers as to whether or not he knew Mr. and Mrs. Berry were not true, and I would have struck him if he did.

THE COURT: Which one?

MR. LOGAN: This one on the far end in the back.

THE COURT: Exchanging winks?

MR. LOGAN: Laughs and winks. He looks over and Mr. Berry winks back.

THE COURT: I don't think that is sufficient without more showing. I will overrule your motion.

THEREUPON THE COLLOQUY AT THE BENCH ENDED)

*S. X. X.*  
RAYMOND BELL, *capo &*

being called as a witness in behalf of the government,

*first being* sworn, testified as follows:

*duly sworn*

[119]

D I R E C T

E X A M I N A T I O N

By Mr. George Logan,  
Assistant U. S. Attorney,

P Q. State your name, please, sir.

A. Raymond Bell.

Q. Mr. Bell, what is your business?

A. I am a real estate appraiser.

Q. Mr. Bell, have you made many  
or few appraisals?

A. I have made several.

Q. Speak up please.

A. Yes, sir.

Q. With reference to the Barren  
Reservoir, have you examined many tracts in that area?

A. Several hundred tracts.

Q. And have you gathered data---

A. Yes, sir.

Q. (continuing) ---as to sales  
in that vicinity in the past ten years - how many years?

A. In the last 18 months it has  
been my duty to - a great percentage of my time, to make  
a market research in the Barren River project and I have  
I believe checked practically all of them, all the recent  
sales.

Q. Now, would you state whether [120]

or not you are an employee for the Army Corps of Engineers?

A Yes, I have been an employee for the Army Corps of Engineers for the past four years.

Q But is it your job with that Corps of Engineers to make appraisals or do you on occasions make appraisals?

A I am assigned to appraisal work.

Q All right, sir. Now, have you at the request of my office made an appraisal of the four Berry tracts, the three Franklin Berry and one Ruby Berry tract?

A I have, yes, sir.

MR. ORR: The question is experience before he gives it, in making appraisals.

Q Tell us your qualifications as an appraiser.

A I have been a staff appraiser and reviewing appraiser for the Corps of Engineers for the past eight years. I was 18 months senior right-of-way agent for the Commonwealth of Kentucky, assigned to appraisal work, and 13 years prior to that in the real estate business as a real estate broker.

Q You will have to speak up.

A Real estate broker, appraisal

work, and property management. I have had appraisal assignments for Mutual Life Insurance Company of New York, Federal Housing Commission, Veterans Administration, Kentucky Utilities Company and both county and state courts.

Q Do you believe that you are familiar with the value of real estate in the Allen and Barren Counties?

A I do.

Q Now, directing your attention to the Berry tracts, I wonder if you would just tell us what your procedure was in making the appraisal on these four tracts.

A I took the maps and the photos that were furnished me.

Q Speak up please.

A I took the maps and the photos that were furnished me and made a thorough inspection of the land, by walking it.

Q Go on.

A Classifying, checking the locations, access, and in general made a thorough inspection of all the land.

Q Describe to us in whichever

procedure you want to, what you found to exist on these tracts.

A Well, on the tract - may I start with 131?

Q Any place you like.

A The land on Tract 131, that is Alice Berry tract, the farm consists of 55 acres of good, well-drained bottom land, and 15 acres of fair, poorly drained, 20 acres of woods, and the balance in wash land, river bank and bed, the balance being 16.---

Q Any improvements?

A No improvements.

Q Go to Tract 130.

A Tract 130, this tract has 106 acres of good, well-drained bottom land and eight acres of fair, poorly drained soil, 19 acres of woodland, with a balance of 16.7 in marsh, river bank and bed.

Q Go to 127.

A Now, this tract consists of 47 acres of good, bottom land, 15 acres of fair, which is poorly drained, 12 acres of woodland and 8.1 acres of river bank and bed and marsh.

Q All right. What about the last tract, 125?

*Testimony  
of note  
than deed  
called for  
and put in  
waste land  
that lowered  
the appraisal  
value*

A The last tract consists - the other tract with no improvements - the 125 tract consists of 47½ acres of good, bottom land, eight acres of poorly drained bottom land, three acres of upland, cropland, seven acres of slightly rolling hill and hill pasture, 55 acres of woodland, two home sites, 8.6 acres of bank, brush and marsh land area.

Q And barn - did you mention a barn?

A Beg pardon?

Q Did you mention a barn?

A The improvements on this tract consist of a tenant house, well, two tenant houses actually, a stock barn, a combination barn, and six miscellaneous out buildings.

Q Now, Mr. Bell, in arriving at your appraisal value on these four tracts, did you consider the access that the owner has to the bottom lands of these tracts?

A I considered it in this way. I think I have used the comparables that are similarly located with a similar access.

Q In other words---

A The comparable sales that I have used in estimating the value of these tracts, particularly the 131, 130 and 127.



Σ124

Q In other words, access is poor as it relates to comparable tracts?

A It is.

Q All right, sir. Now, I wonder if you would describe just briefly what the access is on these four tracts. You may refer to this map here.

A The 125 tract, of course, is located on the blacktop road (indicating).

Q That is 125?

A Yeah. The upper, the land that lies on the upper elevation is on the blacktop road. And then down over the cliff, this here (indicating) is known as the - some old right-of way that ran through there.

Q You have will have to speak up, Mr. Bell.

A I am sorry. The access to this up here (indicating) is on the blacktip road. Access to the bottom portion of Tract 125 is through two other tracts, down to the old, I believe, Canal Road, it is known as.

Q Is there a bluff there?

A That is a steep bluff, yes, sir.

Q What about 130 and 131? How

did you get into them?

A 130 and 131 goes on down the blacktop road and goes through the Spivey tract and again hits the old - hits this continuation of this old road here (indicating).

Q All right, sir. Now, resume your seat if you would,---

A Uh-huh (resuming the witness stand).

Q (continuing) ---and tell us what comparable sales you considered in arriving at your value of this tract.

A In analyzing the overall market in that general area, I selected seven, I believe.

Q Let me ask you, did you consider the Luther House tract?

A The what?

Q The Luther House tract. Did you consider it as a comparable?

A Yes, sir, I have. Excuse me just a minute.

Q I wonder if you would describe that tract for us.

A The House tract consists of

113.8 acres, sold for \$16,000 in 1954.

*Principal point of error*  
MR. ORR: Objection.

THE COURT: Objection sustained.

A. (continuing) It consists of---

MR. ORR: Objection. Wait a minute.

MR. LOGAN: Your Honor, I thought we had been through the Houst tract, that it was admissible to discuss.

MR. ORR: It is the one you sustained on this morning, Your Honor.

MR. LOGAN: We went through it twice before.

THE COURT: Approach the bench please, gentlemen.

(Reporter's note: The following occurred at the bench in the presence of counsel and the Court, out of the hearing of the jury:

THE COURT: Now, state the grounds of your objection.

MR. ORR: Two reasons. First, it is too far in time and in the second place, he is quoting the the price that House paid for it and it in turn was subject to condemnation. I say that because it is too remote in time, in the first place, 1954; this is 1961. The second reason, that if it is used then I would be

entitled to state what the jury found it was worth in 1961, the most recent sale.

THE COURT: It wasn't a free and voluntary sale, though.

MR. ORR: I know, but that is coming back and saying here it is, they are trying to compare these lands and yet---

MR. LOGAN: Well, it is comparable. It is right next to it.

THE COURT: As far as the remoteness of circumstances, that goes to the weight of the evidence. I think he is entitled to testify, explain what this House land was, whatever it was, and you can argue it to the jury whether it was competent or incompetent.

MR. LOGAN: It goes to the weight.

THE COURT: I think he has a right to testify. Let him go ahead and testify. You have no right to show that other, Mr. Orr. That is a different situation entirely.

MR. ORR: Here is what they are going to do, take the House tract, at \$16,000, which was 1954 price, and the man didn't see it. Now, he is going to come along and compare that and say, "How does that

compare to the Berry land?"

THE COURT: That is all right.

MR. ORR: No, wait a minute, Judge.

Here when he did compare it at the time, the jury turned around and gives \$185 an acre, \$22,000 for it.

MR. LOGAN: No. They gave \$21,200.

THE COURT: Well, I am going to let him testify. I don't think it is of too much value personally, but I am going to let him testify.

MR. ORR: It just gets down to it is going to cut my throat.

THEREUPON THE COLLOQUY AT THE BENCH ENDED

Q Describe the Luther House sale, if you would please.

A That consists of 113.8 acres, of which 85% or 95 acres of it is bottom land, five acres of woodland, 13.8 acres of wasteland. It adjoins Tract No. 127 and it is very similar except it has a little better percentage of usable land or bottom land,---

Q Now, I am going to ask you---

A (continuing) ---as to the overall.

Q I am going to ask you if that is where this tract is (indicating).

A I can't tell much about that

*at this point  
what would be  
the value*

map. I think it is.

Q Well, let's look over here on this map then.

A It is this tract right here (indicating).

Q Which joins tract 127?

A On the north.

Q Which would then make it this tract right here (indicating)?

A Yes, sir.

Q In your opinion, as an appraiser, is the Luther House tract that you have just described similar and comparable to the four Franklin Berry tracts?

MR. ORR: Objection?

THE COURT: Overruled.

Q Is it?

A It is similar except as it has a little more percentage of usable land than the other tract. I have that broke down here.

Q No. Let's don't go into that much detail. Just is it comparable or is it not?

A It is.

Q All right, sir. And that sale

price I believe you said was \$16,000?

MR. ORR: Objection.

THE COURT: Overruled.

A Sixteen thousand.

Q All right. What tract of all did you consider to be the most comparable that you could find?

A The most comparable is Tract 127 or the sale from Bradshaw to Berry.

Q Speak up now.

A Bradshaw to Berry.

Q In other words, the most comparable tract is Mr. Berry's own tract?

A Right.

Q What he paid for it?

A Right.

Q When did he buy that tract?

A January the 14th, 1959.

Q And what was the purchase price?

A \$11,000.

Q I don't guess we need to argue whether or not that is similar to Tract 127.

A That is very similar.

Q All right, Mr. Bell. Let's take it on a tract by tract break-down and I will ask you with reference to Tract 131, what is the value that you put on that entire tract, in your appraisal?

A \$13,350.

Q And on Tract 130?

A \$22,650.

Q And on Tract 127?

A \$11,500.

Q And now Tract 125 I believe is the partial taking, that is the last one?

A That's right, sir.

Q What is your value on Tract 125?

A The before value?

Q Yes, sir.

A \$17,500.

Q And the after value?

A \$15,000.

Q Making a damage to the land-owner of?

A \$2,500.

Q How did you arrive at that Tract 125, Mr. Bell?

A I gave much consideration on

142



this tract as being a partial taking, as to the highest and best use before the taking and the highest and best use afterwards.

Q What was the highest and best use before the taking?

A Farmland.

Q And what is the highest and best use of that, of the remainder of that tract, after the taking?

A Based on the activities in the real estate market and particularly a development which is within one mile of the subject property, the highest and best use---

MR. ORR: Objection. Approach the bench?

MR. LOGAN: May we be heard, Your Honor?

MR. ORR: Yes, sir. I want you to be heard.

(Reporter's note: The following occurred at the bench in the presence of counsel and the Court, out of the hearing of the jury:

MR. LOGAN: I have some memorandum of law that I would like to submit. I think this might

be applicable first. It refers to the Miller rule.

THE COURT: All right.

MR. LOGAN: They work together, they interrelate, the Miller rule and the statute.

You are familiar with the Miller rule. You have already instructed on that. Any enhancement due to the reservoir is not to be considered.

THE COURT: Well, this is just the same rule.

MR. LOGAN: That is the Miller rule, but that works right in with the other memorandum. The other one is the point which we are to now.

THE COURT: What do you have to say, Mr. Orr?

MR. ORR: I say to introduce proof at this time as to what this witness thinks it might be is pure speculation.

MR. LOGAN: Well, I want to be heard before ruling on whether or not it is speculative or not. I have proof that it is not speculative.

THE COURT: Well, here is the proposition, the rule as I understand it, in the statutory provision there, is that he has a right to state what prospective reasonable possibilities to which the land

might be put, taking into consideration the damage to the remainder.

MR. ORR: Its best use.

THE COURT: By reason of the development, as to its best use. Now then, the statute is not only clear, but I think a fair statute. Now, that doesn't have to be speculative. That is argumentative, but he does have a right to express his opinion, if it is based on a proper showing, he has to qualify him to do that.

MR. LOGAN: That's right. Whether or not it is speculative, is something you go into on cross.

THE COURT: That's right. You can't have just a naked statement of it. I might say that the site of this post office would be a grand place to build a flower building, but that would be so absurd. It has to be within reason. I think the Court would have to overrule your objection in the light of the statute, so let it be overruled.

*Another point of error*

You have a right to cross-examine him and let him argue on it.

THEREUPON THE COLLOQUY AT THE BENCH ENDED)

Q Now, Mr. Bell, I believe you were about to state what you believed was the highest and best use of this tract after the taking. Would you please state what you believe it to be?

A The remaining is an ideal spot in my opinion for a camp site area, a lakeshore development.

Q Now, on what do you base that opinion?

A Mr. and Mrs. Holder, in the spring of 1960, entered into a contract with Mr. Oscar Wheeler, to act as agent in developing the sale of a 22-acre tract, located---

Q Pardon me, how big an acreage?

A Twenty-two acre tract, located within less than a mile northwest of subject property.

Q I wonder if you would point on this map here, just---

A It starts right in this area (indicating) the road comes right here (indicating).

Q This is the end corner, I believe?

A Yes, sir.

Q This is the end corner, I believe (indicating)?

A Yes, sir.

Q Now, there is a 22-acre tract (indicating)?

A Twenty-two acre tract.

Q What is the size of the remainder of the Berry tract?

A 29.56 acres, to be exact.

Q Now, what have they done with this 22-acre tract?

A Well, first they developed and laid it out for 63 building sites, which consist of---

Q Now, I am going to show you what purports to be a plat, of W. E. Holder, on Port Oliver Lake, Allen County, and ask that it be identified as Government Exhibit - make it 2 - make the aerial 1 - and it also has on there the attestation of the Allen County clerk that this is a copy - and ask you if that is the subdivision that you are talking about.

(Reporter's note: The plat of the W. E. Holder subdivision on Port Oliver Lake, was marked Government Exhibit 2, and the aerial map of the area was marked Government Exhibit 1.)

L EMO

A That is the plat.

Q All right, sir. How many lots was this subdivided into?

A Sixty-three lots, plus a street, a long street and three or four small cross streets.

Q About what size are these lots?

A They average one-third of an acre.

Q Most of them were 100 x 125.

Q How many of these lots have been sold off to date?

A I don't know to date, but I do know that during the year of 1960, they sold 34 from a range of 250 a lot to \$600 or an average of \$910 an acre, excluding the area that was taken.

Q Now, you say each lot is about one-third an acre?

A Right.

Q And your calculations on the 34 sold off in 1960 bear out to \$910 an acre, is that right?

A Right.

Q Now, what about the cost of developing this subdivision? Did you consider that?

A We made a study on that and came up with approximately 33 1/3%.

Q As---

A As being the cost, the engineering, the overhead, interest and the selling cost.

Q All right, sir. So that would make an average net profit per acre of how much?

A Around \$600.

Q Per acre?

A Yes, sir.

Q All right, sir. Now, describe if you would, and compare this Holder subdivision, which I hold, the tract, its physical layout, as to whether or not it is similar or dissimilar to the remaining 29½ acres of the Franklin Berry tract.

A The 30 acres, or 29.56, remaining, consist of a 4,600 foot road front, with about the same lake shore front, running back a maximum of 450 feet down to a - I mean the distance between the lake and the road, a minimum of 200 and a maximum of 400. And a practical development there would be, say a hundred feet per lot, would be a more desirable - that would develop 46 lots - I believe would be more desirable than

the shallow or the less deep lots that sold in this subdivision.

The developing and cost of sales, I estimate to be about the same.

Q Let me stop you at this point before we get away from the physical description.

Is the Holder subdivision located at - well, what you would call on a bluff or on the top of a bluff or a steep hill?

A It is on a bluff. It is on a bluff sloping down to the highway. similar highway to the Holder tract.

Q Wait a minute. Is the Holder tract similar in physical description to the remaining Berry tract?

A It has a lesser depth. It has a lesser depth. You will notice on the exhibit, they ran the street through here, sold lots on each side of the street (indicating). Also on the road. Whereas

I can't believe that the Berry tract would be practical street through there.

Q Well, is the Berry tract in on from observing both of them, would it be more suitable tract to develop into this type



subdivision property than the Holder tract?

A It would be about the same.

Q About the same?

A About the same.

Q Well, do you consider it to be comparable?

A Yes, sir.

Q And once again, what is the value?

THE COURT: He has already stated.

MR. LOGAN: All right.

Q I believe I interrupted you. You were in the process of describing the further breakdown in the cost. Had you completed that?

A No. The cost would be about the same, which those lots should bring, that size lot should bring, seven-tenths of an acre should bring---

Q Speak up.

A ---six to six-fifty a lot.

Q Now, that is net profit, I believe, on a lot?

A No, that is gross.

Q All right. A lot. All right, sir, going to the Berry tract that will be left, does

it front exactly on the government front, exactly on the government fee land?

A Lakeshore front. It comes right to the front of the lake shore property.

Q In other words they abut?

A Yes, sir.

Q There is no flowage easement in between?

A No, sir.

Q How far is this lot from the dam site or these Berry lots from the dam site?

A From the dam site about a mile and a half.

Q Will there be a lake in front of the Berry tract?

A Yes, sir.

Q No question about it?

A It is in the process.

Q Well, unless they quit building?

A Yes. It has been approved and is being constructed.

MR. LOGAN: Excuse me one moment.

Q One last question, Mr. Bell, would you give us the total amount due the landowner, the Berrys, on these four tracts.

A The total amount in all, all four at once?

Q Well, do you have it broken down, three for Franklin Berry and one ---

A Well, start with 125---

Q No, give us the total figure.

A Total, \$50,400.

Q Is this counting Tract 125?

A That is included, 125 included.

Q What was that total again?

*even he won't touch it or how low it is*  
I think you are adding wrong.

A \$50,400.

Q That is the amount due the landowner?

A All four tracts, uh-huh.

THE COURT: Is that all?

MR. LOGAN: Yes, sir. I believe

so.

THE COURT: Cross-examine.

## C R O S S

## E X A M I N A T I O N

By Mr. Joe B. Orr  
Counsel for the Landowner

Q Mr. Bell, did you say you had been working for the Corps of Engineers for about 18 months?

A No. I have worked for the Corps of Engineers since November 1948.

Q Were you a licensed real estate broker prior to that time?

A Yes, sir.

Q Where?

A Cynthiana, Kentucky.

Q How long ago was it since you were in the real estate business there?

A I still have my broker's license.

Q I know, but how long has that been?

A Been active since '55.

Q Did you ever engage in the real estate business in Allen or Barren County, Kentucky?

A No, sir.

Q Did you ever make any sales down there?

A No, sir.

Q When did you make this inspection and make - to get your information, so you could make the appraisal, Mr. Bell?

A Last week.

Q Is that the first time you went around, on the land?

A No. I have been over the land. I was on the land in the spring of 1960.

Q And then the next time you went on it was last week?

A Oh, I have been in there several times since then, but within the last six months I would say.

Q But you made your appraisal last week?

A Right.

Q Now, how many acres did you say there was in the Ruby Berry tract as you added it up?

A I have 106.5 acres.

Q Well, I understood from the taking that there wasn't but 99.5 acres in it.

MR. LOGAN: If the Court please, I can clear this up very quickly.

MR. ORR: Let the witness do it if you will please.

MR. LOGAN: Now Mr. Orr is getting into something that he is responsible for, and I don't think that he should try to confuse the jury.

MR. ORR: I just want him to try to explain where he got his 106 acres.

THE COURT: Let the witness answer.

A The deed is, as I understand it, for - from my engineers and title folks, called for a lesser acreage and the description called to the top of the river bank or cliff. There was an area of land that we call "no-man's land" between those, what the deed called for and the center of the river, and it was deemed by some authority necessary to include that additional acreage.

Q Well, that would be seven acres then of this tract, is that right, sir?

A No, sir. That would be---

MR. LOGAN: That's right. We will stipulate that.

MR. ORR: All right.

Q Now, how many acres of bank and river and so forth did you include?

A Including this area that we are talking about?

Q Yes.

A A hundred---

Q No. I mean in the one Ruby Berry tract.

A Six and a half acres.

Q Then all of the bank and the woods you talk about is included in this extra acreage and not actually is in the deeded description of the land, is that right?

A Right.

Q That same thing applies to all the other tracts along the river, does it not?

A Right.

Q You are giving them more acreage?

A On these tracts, yes, sir.

Q All the other Berry tracts that are on the river?

A Yes, sir.

Q In other words, this part that you talk about in breaking yours down as being the river and the water and the bank and so forth, is not actually included in the land taken, is it? Or if it is you add 39 acres to the total amount of acres taken, is that right?

A I haven't got it calculated like that. It would take some time---

Q Sir?

A It would take some time.

Q Well, I mean this 29 acres, in other words, instead of taking 410 acres, it's 439 acres, the total taking, if you include bank and river belonging to Berry?

A Right.

Q That is what I am trying to get at. So we are talking about the same thing?

A Uh-huh.

Q Now, the House land that you spoke of, and the Bradshaw land that you spoke of as being comparable, when did you make your inspection of those?

A Well, that was after my first trip in there. I would say on two occasions in 1960, spring and summer.



Q You made a formal appraisal as to dollars and cents at that date?

A Right. No, I didn't make the appraisals. No.

Q Sir?

A No. I checked these sales out.

Q When did you make your appraisal?

A The appraisal on this?

Q No, on the ones that you used as comparables. You had to appraise those also, didn't you?

A That was in the spring and summer of 1960. I misunderstood.

Q And you put an actual dollar value on it at that time?

A No. I analyzed what land classification the man got for his money.

Q Let me ask you this, you were down there looking at that last week. Now, that House tract, in July of 1961, what was the market value on that tract?

MR. LOGAN: I object to that, Your Honor

MR. ORR: He has qualified---

MR. LOGAN: He testified that he went on there for the purpose of comparability.

MR. ORR: Well, he is supposed to know market value. That is the basis of what we are talking about here.

THE COURT: He may answer. He may tell what he did.

MR. ORR: Go ahead, Mr. Bell.

THE COURT: If he didn't appraise the value, he can say so.

Go ahead.

A Excuse me. I merely made a thorough inspection of the sale to determine what---

Q What does a man do when he walks down and makes a thorough determination of a sale and if there is a deed in one hand and the piece of land sitting there in front of him? Just tell me what you do.

A I walk over the land.

Q Sir?

A I walk over the land.

Q You walk over the land?

A Yes, sir.

Q And is that all you do?

A With the help of a map that is furnished, a planimeter is useful, the woodland and wasteland---

Q Does a dollar and cents figure ever get into it or do you just say, "This is equal or not equal," how do you go about it?

A That is very complex.

Q I know it is. That is the reason I want you to tell me about it.

A We use the - to determine or estimate the value of the woodland portion of this, by analyzing the sale of straight woodland, which is in the general - we have sales of that nature. We estimate the value of the bottom land usable by sales of bottom land, that is all bottom land, check that against the sale.

Q All right, sir. Now, you have talked about that House land and I believe you said that you talked about a 1954 sale at \$16,000. Now, do you mean to tell the jury that this other land of Berry's which you said was comparable now in 1961 would also be on that same basis?

[ MR. LOGAN: I don't understand the question.

THE WITNESS: I don't either.

MR. ORR: Well, I will try to state it again for you.

Q You said in 1954 you used as a comparable the House land, you said you analyzed that sale and the sale price of it was \$16,000, right?

A Right.

Q Then didn't you say that this Berry land that you compared it with was next to it, the Berry land wasn't quite as good?

A The House - Holder sale had a greater percentage of bottom land on it than any of the Berry tracts.

Q In other words, you don't attempt to, in making those to convert anything from 1954 values to 1961 value?

A Not on that type land. Our research showed that land with bad access, all through the project, which I covered, that maybe one might justify one-half or one per cent increase.

Q You didn't - you mean one and one-half percent?

A One-half to one per cent.

Q A year?

A No, from 50 to 1960

Q A one-half per cent---

A One-half to one per cent.

Q (continuing) ---increase from 1950 to 1960? *Soil sample would increase in more than that*

A Right.

Q That is all the increase there was according to your research?

A Yes, sir.

Q Did you - now on this Bradshaw I believe you testified about that, too, didn't you? The Bradshaw sale of Mr. Berry's in 1959?

A Yes, sir. Yes, sir.

Q And I believe you valued it now at \$11,500 you said?

A I did. Yes, sir.

Q Sir?

A Yes, sir.

Q Did you make any determination as to whether any additional land had been cleared, any work had been done on it, anything during that time?

A I estimated about three acres had been cleaned, cleared since.

Q Three acres is all you found?

*He admitted in previous testimony he was not on the property until 1960. He could not possibly make an estimate.*

A Yes, sir.

Q All right. Now, in getting at this value on this increase of one-half to one per cent, during 1950 to 1960, you of course have conferred with the local real estate people in Glasgow and Scottsville who were handling these sales, to get their opinions on that, haven't you?

A Not necessarily.

Q Well, did you? Not necessarily. Did you?

A Part. I contacted some. That was not---

Q Now, did any of them tell you that there had been an increase of one-half to one per cent in that period? If they did, which ones told you?

A I certainly didn't discuss that increase in market with any of the real estate---

Q Oh, you mean you don't want to find out what the market is then?

A It wasn't necessary.

Q I say---

A We have a better way.

Q I say you don't discuss it with the people who handle it and buy it and sell it, is

that right, Mr. Bell?

A We don't depend on that.

Q You don't even sample it, is that right? You just don't go around them, just stay away from them, is that right?

A That's right.

Q O, K., sir. Now, let's talk a little about the subdivision business. How many - if you know - acres - no - miles of shoreline will be involved in the Barren River Reservoir impoundment?

A I do not.

Q Could you look over here with all of these records and give me some reasonable estimate of how many?

A I have that record but it is not there.

Q Could you give me any opinion, would it be a thousand, two thousand, three thousand, five thousand or just how many?

A It would be purely a guess.

Q Well, let's give me the benefit of your best guess.

MR. LOGAN: I'm going to object to pure guesses.

THE COURT: Objection sustained.

Q Do you have any idea at all how much it would be?

MR. LOGAN: He said no, about four times.

A No, sir.

Q You don't have any at all?

A No, sir.

Q Who would you suggest that among the representatives of the United States Government, Corps of Engineers, would have that information? I understand it is available.

A The area manager at the Glasgow office could furnish that.

Q But you wouldn't think anybody other than him would have that information?

A I don't.

MR. LOGAN: Your Honor, if Mr. Orr is interested in that, that should have been part of his case. He has had a year and about six months now to prepare for this trial.

Q All right, sir, let me ask you this then, in making this subdivision appraisal here---

A Yes, sir.



Q (continuing) ---could you give me or give this jury the benefit of how many lake shore lots, a hundred feet wide, there would be on Barren River if all of the available land was used for it?

THE COURT: Objection sustained. It would take an IBM to figure that out and we haven't got time.

Q Well, let me ask you if it would be many or few?

A I would say many.

Q Now, what requirements do you have to meet, if you know, sir, with the State Board of Health, and other agencies to open up a subdivision for houses for human use?

MR. LOGAN: Answer if you know.

MR. ORR: Well, he certainly can't answer if he doesn't know.

A I don't know.

Q Do you know anything about percolation requirements?

A No, sir.

Q A little matter of whether or not the land is such that you can put in sanitary toilet facilities?

A No, sir.

Q Do you think that is important in establishing a subdivision, to know that, or do you think that these will all sell good out here with all outdoor facilities?

A I am basing my opinion on this highest and best use for the residual subject property on the activities-

Q Well, I am cross examining you on the highest and best use right now, too, and you tell me whether or not you think the matter of whether or not they could have indoor plumbing would have anything to do with whether a subdivision was - lots were available or not.

A Sure.

Q All right, sir, now when you come here to tell this jury and you told this jury that you think the best use is to take up a bluff here and cut it up into lots and subdivide it - that is what you have told them, isn't it?

A That is what I do and I--

Q Don't you think also in getting to that best use, that you also - it is necessary that

before you say it is that use, you determine whether or not the land is such to meet the requirements of the State Board of Health so that those facilities can be had?

A Yes, sir.

Q In other words, if it will not perk, it is not very usable for what you have suggested its best use to be, is it?

A Right.

MR. ORR: Thank you, sir. That's all.

R E D I R E C T

E X A M I N A T I O N

By Mr. George Logan  
Assistant U. S. Attorney

Q Mr. Bell, within less than a mile is there a subdivision development of a site almost identical to the Berry's?

A There is, yes, sir.

Q Now, Mr. Bell, in other reservoirs in other states, is the development of lake front lots common?

MR. ORR: Objection to what it is everywhere else.

THE COURT: Objection sustained.

MR. LOGAN: That is all.

THE COURT: I am going to give the jury a brief recess.

Members of the jury, bear in mind all admonitions heretofore given. Do not discuss the case or permit anyone to discuss it with you or in your presence until it is finally submitted to you.

Mr. Marshal, you may announce a ten-minute recess.

(Reporter's note: The court recessed for ten minutes.

At the conclusion of the recess the following occurred:)

FRANK NEWMAN, *aps &*

being called as a witness in behalf of the government, first being duly sworn, testified as follows:

DIRECT

EXAMINATION

By Mr. George Logan,  
Assistant U. S. Attorney.

Q State your name please, sir.

A Frank Newman.

Q And Mr. Newman, where do you live?

A Bowling Green.

Q And what is your business?

A Real estate business.

Q Are you an appraiser?

A Yes, sir.

*Stallie*  
✓

Q In real estate?

A Yes, sir.

Q Do you primarily do appraisal work?

A Yes, sir.

Q Well, without me dragging you through them, would you give us your qualifications as an appraiser?

A Well, educational wise, I have successfully completed various courses throughout the United States conducted by the American Institute of Real Estate appraisers. I have made documented appraisals for corporations, economic feasibility reports and evaluation of property for other governmental agencies.

Q Mr. Newman, have you made few or many appraisals in the Barren County farmland?

A Several.

Q Are you familiar in your opinion with the price of land in that area?

A Well, I feel like I have made a rather careful investigation of what property has sold for.

Q Do you feel competent to testify

as to value?

A Well, I like to feel so, yes, sir.

Q Mr. Newman, have you caused to be made or have you made appraisals on these four Berry tracts?

A Yes, sir, I have.

Q Why don't you just start where you want to and tell us briefly what you have found and what your appraisal consists of?

A Upon receiving the assignment to make an appraisal on these tracts---

Q Speak up now.

A All right. The first thing I did was to contact Mr. Berry, to go over this property with him, to try to make the best analysis with Mr. Berry at that time. Upon doing that, I made an investigation of sales in the vicinity, taking into consideration the sales, their location, their access, how they relate to these properties. At that time, after making that investigation I arrived at an estimate of value.

Q And with regard to the subject tracts, themselves, what did you consider and look at on those tracts?

A The points that were considered

*Black Top  
highway to  
farm*

on the tracts was the location and access and the type of operation. I might say specifically location and access to these tracts were of considerable importance to me.

Q And is the access to them good or bad?

A Well, in my judgment, it's poor, poor access.

Q We have been through that pretty much so far, so maybe we will pass on. Did you thoroughly examine the four tracts?

A Yes, sir.

Q And I believe one of them is a partial taking, is it not?

A Yes, sir, that's true.

Q Starting with Tract 131, Mr. Newman, would you give us your opinion as to the value of that tract?

A On Tract 131, the estimated market value of that tract is \$10,575.

Q All right, sir. Now, that is a full taking?

A That is a full taking.

Q On 130 give us the same thing.

A \$17,497.

Q All right, moving down to Tract 127.

A \$12,176. *Object*

Q And I believe 127 is the same tract that Franklin Berry paid \$11,000 for?

A That's correct.

Q Now, you give \$12,1---

A And 76.

Q (continuing) --two years later.

Now, as regards comparables on these tracts, what comparables did you consider?

A Well, I considered, of course, the Berry tract, Tract 127 that he purchased two years prior. I also considered the Luther House tract, which is immediately adjacent to it, and I also considered the Siddens tract, out on U. S. 31-E.

Q All right, sir. Now, let's talk just for a minute about the Siddens tract out on 31-E. With reference to the north tract or 110-acre tract--

A Yes, sir.

Q (continuing) ---I believe it

*unfair to  
show him  
the tract*



was testified earlier that figures out \$181 an acre?

A That sounds real close, yes.

Q It is \$20,000 sale price.

In your opinion is that the most comparable tract to these Berry tracts?

A No, not truly---

Q What makes it not truly comparable?

A Well, the access to the tract on U. S. Highway 31-E, U. S. 31-E, goes along this tract for the entire distance of it and, of course, these tracts in question here, do not have that type of access.

Q There is also an improvement on the Siddens farm, too, isn't there?

A Yes.

Q All right now, Mr. Newman, you mentioned you thought the House tract, I believe, was comparable. Describe briefly why you think it's comparable.

A Well, it's - its access and location wise, you have to get to the Luther House tract exactly in the same fashion that you do in these Berry tracts. It's down in between Tract 127 and 130. So, from access and location wise, it is almost identical and from the standpoint of the type of soil it is almost

*He did  
know how  
it was  
when  
Siddens  
bought  
property  
as there  
was not any*

identical.

Q Can you tell when you go from one Berry tract to the House tract?

A Well, if you have a map or if you have someone there to---

Q Advise you where the boundary is?

A ---advise you where the boundary line is.

Q Now, Mr. Newman, have you considered the flooding record of Tract 125?

A Yes, sir, I have.

Q I believe the bottom part of this Tract 125 gets down lower than the rest of these four tracts, is that correct?

A Yes, right.

Q And what do the flooding records reflect as to that tract?

A Well, in the past 20 years flooding records indicated flooding three to five years.

Q Three to five different years that tract did flood out?

A Yes.

Q Was that in the summer?

A Yes.

Q And that is percentage of loss of crop of how many years - not years - what percent of loss would that be?

A Well, that would be 15 to 20 per cent, 15 to 20 per cent.

Q And your information as to flooding is consulting what?

A With the - I believe the hydraulics engineer of the Corps.

Q Hydraulics records?

A Yes.

Q Of the Corps of Engineers?

A Yes, sir.

Q All right. Mr. Newman, let's move on to Tract 125. That is the only one you haven't given a value for.

A Yes, sir.

Q What is the before value of that entire tract?

A The before value---

Q Of the entire tract.

A ---\$14,561.

Q And what is the after value of that tract?

A \$11,250.

Q Which leaves an amount due to the landowner of how much?

A Of \$3,311.

Q Now, Mr. Newman, upon what basis do you judge your appraisal of that tract?

A On what basis? I base it on the market value estimate of July 13th, 1961, before any enhancement in value, to the entire tract.

Q All right.

A But the part that remains, taking into consideration the enhancement to the part that remains.

Q Is the remainder going to be benefited by its fronting on the lake?

A In my judgment, yes.

Q And is there any other similar type development in the area or neighborhood which would imply that that is a valid judgment you have?

A Yes, there is.

Q You didn't just pick it out of the sky, did you?

*being  
enhancement  
on one  
appraisal  
and not  
the other  
part*

A No.

Q I refer you to that plat right next to you there, the Holder tract. Did you make a study of that subdivision?

A I have.

Q Is it comparable, not counting-- is the physical layout of that entire tract, the 22 acres, comparable to the 29½ acres that Franklin Berry is going to have left?

A It is quite comparable to a great deal of the Berry tract that remains, yes.

Q In your opinion is it desirable, sensible, to develop the remainder of the Berry tract into a subdivision of lake front sites?

A Yeah, I think a prudent person would give it a great deal of consideration now, with the enhancement of the reservoir.

Q It is going to be right on the lake, isn't it?

A Right on the lake, yes, sir.

MR. LOGAN: One moment please.

You may ask.

## C R O S S

## E X A M I N A T I O N

By Mr. Joe B. Orr.  
Counsel for the Landowner

Q Mr. Newman, how much did you testify - I didn't get your figure right here - that after you got through plus and minusing, how much did you say that the Berrys are entitled to have?

MR. LOGAN: Let me ask him. I never did ask him the total value. What is the total price to the landowners?

THE WITNESS: \$43,600.

MR. LOGAN: All right. That is all.

Q How many acres does that involve, Mr. Newman?

A Now, 469.40 acres, that is the total acreage for all tracts.

Q How much is that an acre? Calculate it, if you will.

MR. LOGAN: Get it down to the acres being taken.

A You want the acres being taken?

Q Yes.

A 439.84.

Q 439.84, that would be less than a hundred dollars an acre, you think in your opinion is the value of this land?

A That is right.

Q And that is what you think is the value of this land, Mr. Newman?

A Well, now, I didn't say that.

Q Well, what did you say then, Mr. Newman?

A We have to take into consideration the benefits that offset some of the taking.

Q You think that this bluff over here - have you tried to go up and down that bluff?

A Yes.

Q No trouble. It's right straight up and down, isn't it?

A The bluff part is, yes.

Q Well, isn't that the land along here where you are going to develop this subdivision?

A No, I am afraid not.

Q Where are you going to develop it?

A Between that and the highway.

Q Well, you said this - how would you suggest getting to the lake then?

A How do you suggest?

Q Yes. Down the bluff, over a grapevine or down this road that you say is not any good?

MR. LOGAN: May I inquire of the Court if Mr. Orr is now contending that this is inaccessible, going down---

MR. ORR: I am just cross-examining him is all.

THE COURT: Overrule the objection.

Q Go right ahead, Mr. Newman.

A I am not making any contention that they are, but from market transactions on other late sales, the people who bought the other lots weren't concerned with that fact.

Q Are you saying that this would in your opinion - you would recommend this, wholeheartedly in your business, to me, as being a good buy for subdivision as it sets right now?

A For development, yes, sir, I would.

Q You would recommend that?

A Yes, sir.



*Start*  
Q Without question?

A Yes, sir.

Q Now, without any inquiry as to what the requirements would be for water, for sewage, at all?

A Well now---

Q Yeah.

A ---typical buyers of lots in this other section have not made any inquiry at all.

Q How many houses have been built over there?

A I don't know how many houses have been built. There have been a few.

Q Now, would you say just because - now if you testified along in -let's just say this, does the demand have anything to do with market value, Mr. Newman?

A A great deal to do with it.

Q All right. Now, there is going to be an awful lot of lake frontage, isn't there?

A A lot of it.

Q Do you think all of it can be developed?

A No, sir, I don't.

Q Sir?

A No, I don't think it all can be developed.

Q Well, do you think it is fair to sit in here and say because we are trying this issue today, to tell these ladies and gentlemen of this jury, that, "Cut the Berrys because their piece might be used for it," when there might be thousands of miles more could be used for it, is that correct? Is that good appraising?

A Now, wait a minute.

Q I ask you, is that good appraising in your opinion?

A Well now, wait just a minute though.

Q All right. I am waiting.

A We are talking about - you are talking about miles of lake shore front.

Q Yes, sir.

A That goes through farms.

Q Yes, sir.

A Might have to go half a mile through a farm to get to a lake front.

Q Might do.

A This is set right on a blacktop road.

Q How many other miles to your knowledge?

A I can't give you an answer.

Q You have been studying this pretty thoroughly? But there is a lot of it?

A I don't know.

Q But you think the proper way is in this case, to get just compensation of fair market value, is go and load that down as subdivision property?

A In my judgment.

Q In your judgment?

A Yes, sir.

Q Now, Mr. Newman, you have been doing appraisal work for the Department of Highways, State of Kentucky, haven't you?

A Yes, sir.

Q You have been doing appraisal work for TVA?

A Yes, sir.

Q And been doing appraisal work for the Corps of Engineers?

A Yes, sir.

Q I believe you have worked on the right-of-way on the Kentucky toll road?

A Yes, sir.

Q For the Kentucky Highway Department. You are now going to work on I-65, south of Bowling Green, for the State of Kentucky?

A That is the future. I have no---

Q Well, you have been contacted and been out and looked at part of the property?

A I have looked at a few of them, yes, sir.

Q You did the appraisal for the State of Kentucky on the extension of the Scottsville Road here in Bowling Green?

A Yes, sir.

Q Called recently and testified on behalf of the Corps of Engineers in Paducah in regard to the taking for the government, haven't you?

A Yes, sir.

Q Now, in all this appraisal work, have you, in any of this condemnation, have you ever testified for the landowner?

A On this particular action, no, sir.

Q Did you ever testify for the landowner in connection with highways?

A No, sir, I have not.

Q Now, you are eminently familiar with the procedure, in connection with this type of condemnation proceeding we are having right now. This is nothing new to you? I mean you have gone through this several times?

A Right. Well, a few times, yes, sir.

Q Yes, sir. Now, you are aware-- in other words, when you are employed in this, you are given certain records, aren't you, by the Corps of Engineers, data?

A Yes, sir.

Q Now, before - as to time of filing one of these condemnation proceedings, there is a deposit made, isn't there?

A Yes, sir. That is my understanding that there is, yes.

MR. ORR: All right, now---

MR. LOGAN: May I approach the bench, please, sir?

THE COURT: All right.

(Reporter's note: The following occurred at the bench in the presence of counsel and the Court, out of the hearing of the jury:

MR. LOGAN: That is the most outrageous violation of the rules of evidence I have ever heard.

MR. ORR: You wait just a minute now. I contend that I have a right to ask him if he knows the amount of the deposit, before he ever goes out.

MR. LOGAN: I have authority on it if you would like to see it.

THE COURT: Wait a minute.

MR. ORR: Here is what I contend. I want this to go in the record, if I may, because - for this reason, that the deposit in this case is, I think, approximately \$64,000.

MR. LOGAN: That's wrong.

MR. ORR: Well, what is it?

MR. LOGAN: Sixty to sixty-one.

MR. ORR: Now, the government made an appraisal by somebody and they came up with that deposit and they said that is just compensation. Now, here are two witnesses who have come forward, who are

representing the government, presenting what they say is fair market value to this taking, one of them says \$50,000, the other one says \$43,000.

Now, I say that the landowner is entitled to inquire into that because it seems to me that it is getting close to---

THE COURT: There is---

MR. ORR: (continuing) ---close to bad faith.

THE COURT: There is no question of bad faith. You can't start bringing into this what somebody else - that is a violation of the hearsay rule if nothing else. what somebody else said.

MR. ORR: I can't bring every soul in the United States Government down here and inquire how they arrive at that.

THE COURT: The only issue in this case is not what some engineer thought; That is what we are trying the case for, not what somebody else thought. He had his reason, not here subject to cross-examination, but we are offering here evidence as to what is the reasonable market value and that is the sole issue in the case.

MR. ORR: I understand that.

THE COURT: You are trying to bring something else into it.

MR. ORR: Look, I may be wrong---

MR. LOGAN: It is a fundamental rule of law if somebody made a mistake, the government is not bound by it. That is a fundamental rule.

MR. ORR: I am not talking about a mistake.

MR. LOGAN: Your Honor, these two men have appraised it.

THE COURT: I sustain the objection.

THEREUPON THE COLLOQUY AT THE BENCH ENDED)

Q Mr. Newman, did you consider it comparable to - consider a transaction in 1961, between Whitney and Cassidy, for your comparables?

A No, sir, I did not.

Q You have now been advised of that property, have you not? You know about it?

A Know about it now?

Q Yes, sir.

A Well, I know about it from hearsay.

Q The testimony on that was that



the sale price was \$25,000 or \$223 per acre.

MR. LOGAN: I object to Mr. Orr testifying.

THE COURT: Objection sustained. Don't do that, Mr. Orr. There is no proof like that.

Q In the House case - Mr. Newman, did you use that as a comparable?

A Yes, sir.

Q I believe that that property was purchased in what year?

A 1954, I believe. I will check it and make sure, but I think it is in '54.

Q All right. Did you adjust that price up to 1961 value?

A Yes, sir, I did.

Q Did you adjust it up to what it actually sold for in 1961?

MR. LOGAN: I object. Mr. Orr knows that was tried here last spring in another condemnation action.

THE COURT: Objection sustained.

Q On the Siddens tract, that was sold when, Mr. Newman?

A Just one minute - 1955.

*He would not allow adjustment of price up to the year of 1961*

Q Did you find any crawfish mounds, cattails in that Siddens bottom?

A Did I find any?

Q Yes, sir.

A I didn't see any, no, sir.

Q All right, sir. Did you see those five tiles going under 31-E there, that drain water from over on that hillside down through it?

A Well, he tiled that after he purchased it.

Q I said the roadway tiles.

A Oh the roadway tiles, I didn't.

Q The big tiles that come off that bluff?

A I didn't.

Q You didn't notice it.

A I didn't get the question.

Q I say, did you see five tiles across the road to carry water from the opposite side across the upper part of that bottom?

A No, sir.

Q Didn't see those. Did you go over on the island?

A No.

Q Do you know how many acres over there in the island?

A In the island?

Q Yes.

A Mr. Siddens told me, but I don't recall right now.

MR. LOGAN: Excuse me. Are you inquiring about the island on the Berry tract?

MR. ORR: Siddens. Siddens, sir.

MR. LOGAN: All right. I just want to know.

Q Make any soil test over there on the island?

A I personally did not make any soil tests, no.

Q In fact, you didn't even go over there?

A Yes, I did.

Q Sir?

A Yes, sir.

Q You went over on the island?

A No, not on the island. No, sir.

Q Then that 40 acres you didn't -  
did you include that 40 acres in your appraisal that  
you didn't see, on the island?

A Well, he purchased a hundred  
acres there for a stated sum of money.

Q A hundred and ten acres.

A A hundred and ten acres, yes,  
for a stated---

Q How about the other Siddens part  
that was purchased?

A He bought two tracts.

Q Yes, sir. But you never did  
go on the island part of it, then you didn't have anything  
to do with---

A On the island part, no, sir,  
I didn't.

Q Is there any drainage work  
been done in that bottom, Siddens bottom?

A Yes, sir, he has done some work  
in it.

Q Any tiling?

A Yes, sir, he has done some  
tiling.

Q A big ditch dug out with a bulldozer?

A Yeah, I believe, and he pointed out where he had drained some land he bought, but that is on the south tract, not the north tract.

Q The roadway down in the bottom of the Berry tract, Mr. Newman, that is usable for purposes for which that land is set up, that is farming, corn farming?

A It is usable for that purpose, yes.

Q They are usable for that purpose?

A It is usable for that purpose, yes, sir.

Q Would you say based on all your observations down there there that the blue colored land there is good, well-drained bottom land?

A Not all of it - all of it in blue? Right here (indicating)?

Q Yes, sir. How many acres did you figure were in well-drained bottom land?

A In well-drained bottom land?

Q Yes.

A Two hundred and forty-nine

acres, about.

*Show witness  
confused  
replied 1 & 2*

Q Two hundred and forty-nine  
acres?

A Yes.

Q And what did you value that at  
an acre?

A On the best bottom?

Q Yes.

A My estimate---

MR. LOGAN: I am going to object  
to that. It is a breakdown appraisal. The total---

MR. ORR: I think we are entitled---

THE COURT: Overruled. He has a  
right to examine it.

A Two hundred dollars an acre  
for the best, yes, sir.

MR. ORR: That is all.

THE COURT: Call your witness.

MR. LOGAN: That is the case for  
the United States.

~~X X X X~~  
THE COURT: Anything in rebuttal?

MR. ORR: Just a minute, Your Honor.

*Stop*

(Reporter's note: There was a short pause in the proceedings.)

MR. ORR: No rebuttal, Your Honor.

THE COURT: What will you do with the case, gentlemen?

How much time do you want?

MR. LOGAN: May I approach the bench for a moment?

THE COURT: Yes, sir.

(Reporter's note: The following occurred at the bench in the immediate presence of counsel and the Court, out of the hearing of the jury:

MR. LOGAN: I would like to inquire in advance of argument a little bit about instructions. I know generally what you give, but I am interested in inquiring as to---

THE COURT: Do you want to offer any instructions?

MR. LOGAN: No.

THE COURT: Under the rule, if you want to offer instructions for either side---

MR. ORR: I don't.

MR. LOGAN: I am just interested to

know whether or not you plan to read the statute and comment on the statute.

THE COURT: You can argue that if you want to. I am going to give the simple proposition, I am going to give the jury pencils and paper and let them go over and write down what these witnesses have said. You know the rule. After they are instructed, if you want to take any exceptions, you have to do it before the jury retires.

(Reporter's note: By agreement of counsel, the closing arguments were not reported. Closing argument was made by Mr. Logan in behalf of the government and by Mr. Orr in behalf of the landowners.)

THE COURT: Approach the bench, gentlemen.

(Reporter's note: The following occurred at the bench in the presence of counsel and the Court, out of the hearing of the jury:

---

THE COURT: Do you want two verdicts on this case or just one?

MR. ORR: I think if we get one we can separate it.

THE COURT: Is that agreeable with you?



MR. LOGAN: (Nodding affirmatively)

MR. ORR: We will agree to separate it. I think it would be easier for the jury.

THE COURT: Just let the jury bring in one sum. That is all right with your clients? They are the ones concerned.

MR. ORR: We will agree on it.

THE COURT: I suppose the government doesn't mind.

MR. LOGAN: No, sir.

THEREUPON THE COLLOQUY AT THE BENCH ENDED)

THE COURT: Members of the jury, I am going to very briefly instruct you as to the law in this case and to explain to you just what it is that you have to decide. There are quite a number of figures used in this case by different witnesses and I assume there is no objection on the part of either side so I will give the jury pads and pencils that they might make notes if they want to,---

MR. LOGAN: That's fine.

THE COURT: ---because it is hard to carry all these figures in their mind. Mr. Marshal, if you will just hand those around to the jurors please.

I don't mean that you have to take down these figures but if you want to, they are there, a pad and pencil for your convenience.

Members of the jury, as I stated to you in qualifying you for jury service in this case, this is an action and a type of thing which I think lends itself peculiarly well to determination by a jury. The issue is very narrow and that is for you to decide one figure, that is all you have to bear in mind, one figure, one sum of money, what this land that the United States has taken for this development of this Barren River Reservoir, what it was worth on the 13th day of July, 1961, and that worth is called in law its market value, which is the fair and reasonable sum in cash which a willing buyer, one who wanted to buy the land but did not have to buy it, would pay to a willing seller, one who owned the land, but did not have to sell it, wanted to sell it but did not have to, what he would take for it. In other words, what we call in Kentucky a free, voluntary sale.

The evidence in the case is not extensive. In federal courts it is the privilege and sometimes the duty of the trial judge to comment on the

evidence. I will give you these reviews of what these witnesses have testified to with reference to the figures as best I can and you may take them down if you care to do so. It is not my function, however, as the presiding judge to try to tell you how to make your verdict or what your verdict should be. You are not to accept what I may say as being all of the important evidence or all of the evidence on a given point. You are the triers of the facts and it will be for you to decide what that evidence was.

Now, I have every faith in this jury. I have every faith that you are going to try to arrive at and make a legal verdict. I tell you that very frankly. If your verdict is not in accordance with the law and not in accordance with the evidence, it has to be set aside and we have to try the case over. So it is important for you to determine from all the evidence and all reasonable inferences which may be drawn from it, what is the fair and reasonable market value, on July the 13th, of this tract of approximately 439 acres of land.

Now, the land is divided into two tracts and two different owners, Mrs. Berry and Mr. Berry,

but by agreement of the parties you will not have to divide it. You will just find one sum and then they will make the division themselves.

Now, as I say, I have every faith in this jury deciding this case and deciding it fairly and justly. The United States had a right to take this land. You may not agree with that policy, you may think the United States condemns too much land, but that is not your concern and if you let that guide you, you are not living up to your oaths. You are not to concern yourselves, on the other hand, with the fact that maybe the law should be changed, maybe there shouldn't be such a law, to condemn private land for public use, but we are not to concern ourselves about that at all. We are not to penalize the United States because it happens to be the United States and capable of paying its debts and we are not to say that because it is the government rather than a private citizen that our verdict should be one thing, while we know down deep in our hearts if it was a private citizen it would be less.

In other words, this is not an opportunity to gouge the government. You treat the government here as if it were a private litigant, seeking to take this land, and arrive at a fair value.

The United States has a right to take the land. It is not our concern. I am not, we are not passing on whether we agree with it or disagree with it, but it hasn't a right to take the land unless it pays a fair and reasonable market value for it. So you are not to penalize these landowners. You are not to say, "Well, after all, they only paid so much for the land, they are getting a pretty fair profit." That is not your idea because you don't know what has gone into making the land, changing time, changing conditions, whatever change there may have been to their advantage. It could have been to their disadvantage. So you are not to let that enter into it. You are not acting as a real estate agent here and saying, "Well, you ought to sell the land because you are getting a pretty good profit." That is not your function. These people are entitled to the fair and reasonable market value of that land, irrespective of what they paid for it, whether it was given to them or whether they got it any other way. They are entitled to your consideration on that point. They have to take it, that's all they can do, it's gone, the land is already taken. The United States takes the land when it files the complaint in the court, under declaration of taking, title passes immediately and all

*good to go*

the landowner can do if he is not satisfied with the sum is come into court and ask a jury such as this to determine what the fair value is as of the date of the taking. So that is all these landowners can do and they are entitled to your consideration on that. They are not to be penalized, they are not to be rewarded. You are not to let any emotional feelings get into this case. Look at it purely intellectually, fairly and squarely, just as if you were the United States or you were the defendant and you would want the jury to decide a case for you.

Now, this land that is described is primarily river bottom corn land, 322 acres I believe Mr. Berry testified to was adapted to corn. It is in a comparatively, from what the witnesses say, isolated section, in the way that it is not immediately accessible, all of which goes into determining its fair and reasonable market value as we all know as a matter of common sense, irrespective of its productivity and fertility. If it is not accessible, it has a bearing on its market value.

On the other hand, it is shown that much of this land is overflow land and according to Mr. Berry, who testified, he had never lost a crop. In other words, the river overflows and lays this silt or loam

upon the soil, at a season of the year when it is not in cultivation. That is a strong circumstance in its favor and there is nothing in here so far as I recall to refute that testimony.

MR. LOGAN: Your Honor---

THE COURT: Yes, sir.

MR. LOGAN: (continuing) ---one witness testified to the contrary.

THE COURT: Well, the jury will recall what that was, but as I recall - one witness testified in his opinion that it would have an overflow of one out of five, something to that effect. Mr. Berry testified that he had never lost a crop. Nobody ever testified that he did lose a crop, so that stands uncontradicted in itself.

Your verdict, ladies and gentlemen, I know you want to make a fair verdict and a sensible verdict - you are not to take the highest figure and the lowest figure and strike an average. That's not good. You are not to hold a primary election and say so many this and so many that and whoever has the most votes on the jury, that will be the verdict. That is a quotient verdict and it is not a good verdict and would have to be set aside. You may take the testimony of one

witness, you may take the testimony of two witnesses, but you should take into consideration the testimony of all the witnesses and all of the reasonable inferences which may be drawn from it and in your mind believe that that is the value of the land. Not because it happens to come out a quotient after you have added up and divided, but it is the actual value of the land, taking into consideration all of its attributes and all of its liabilities.

The first witness who testified in this case was Mr. Berry, who owned the land, and he gave his qualifications and he said he owned another farm in Warren County and he operated these two farms as something of a unite, as I recall, with reference certainly to the raising of tobacco, that this had two and some fraction acre tobacco base and he realized as his part approximately a thousand dollars an acre each year from his tobacco, out of the 2.32 acres; that he had a 322 acre corn base. Some of this, as I recall, he put in the soil bank, others he cultivated and that he had a tenant who lives on the farm and he and the tenant divided equally whatever came off the farm and he did raise each year a substantial crop. He went ahead to



give boyh on direct and cross examination some of his methods of farming which you will recall and that he had owned the land, some of it, since 1929, and at various times since that time - that the land which Mrs. Berry owned she had inherited I believe in 1960 - first she said '61 and then recalled '60.

Mr. Berry testified that the value of the land in his judgment was \$105,000 for the value of his land, less \$5,000 for the land that was left over, making a hundred thousand, and the 99.5 acres of Mrs. Berry's land was \$35,000. So he set a total value on the whole tract of \$135,000

The next witness was Mrs. Berry. She said - she acknowledged her interest in the land, interest in the case as a litigant, but said she knew nothing of the farm values or nothing of land values.

The next witness was Mr. Slinker who testified that he had made tests of the land and that it gave a reaction or a chemical analysis which showed that it was of certain good type soil and compared favorably with other soil of other farms in that locality, if not better than some of them.

The next witness was Mr. Cain. He testified as to the total value of the land, gave you his

qualifications and his knowledge of the land and he said that Franklin Berry's farm was worth \$84,852 and that Mrs. Ruby Berry's was worth \$33,663, making a total of something over \$117,000 - \$118,515, I believe. I am adding this in my head as I go along. I think that is right, \$118,515. That was his testimony.

Then Mr. Grissom, who testified that he knew the farm, he made an examination of it, he had experience in dealing in real estate, he knew land values and had been on the farm a number of times and that in his opinion the whole farm was worth \$90,000, and that there would be \$2,000 left, leaving a value which he thought of the land that was taken of \$97,000.

I will go over those figures just briefly again. Mr. Berry testified that the farm was worth \$135,000, Mr. Cain testified it was worth \$118,515, and Mr. Grissom, that it was worth \$97,000.

The United States offered witnesses. The first witness was Mr. Pfeffer, who testified as to certain chemical analysis which he found in the land and in the soil as compared with another tract of land which had been compared with it, that he found it to be -  
he found the Berry land was of less value than the other

land.

Then Mr. Bell testified, he gave you his qualifications and the times that he had been on the farm, and looked over it, and his analysis of how he had arrived at his figures, and in his opinion the total value of the farm was \$50,400.

The last witness who testified was Mr. Newman, who gave you his qualifications as a real estate broker in this locality, here in Bowling Green, and his experience in that connection and he broke it down for you and his value was \$43,600.

I believe, ladies and gentlemen, that is all of the evidence or rather that concludes the number of witnesses, all witnesses who testified. I have not undertaken, as I say, to give you detail of all the testimony but you will recall what that testimony is.

Now, there are a number of things that entered into this value. One thing that has been brought out here is comparable farms, in other words, comparable land. Well, that is good evidence. It is something which may be some guide to you and you should give it very careful consideration, comparable farms, comparable lands that sold in that locality under free,

voluntary sale conditions. However, I think we all know, those of us who live in the country communities, that sometimes it is deceiving when a farm can be right next to another and one can be very valuable and the other not very valuable. You know how that is. It is I think largely a matter of common sense. It depends on how they have been handled and we know from our own farms that one field will be more fertile than another field. So, when considering comparable values, you should give it every consideration, because it is a good indication of what might be a reasonable value of land of similar nature in that locality, however we should modify that consideration with a common sense approach, which I think that you understand and will give.

A unanimous verdict is required.

Elect one of your number foreman and the foreman will sign the verdict for the jury.

I have written out here a form of verdict, "We, the jury, find for the landowners the sum of \_\_\_\_\_". Just fill in one figure, whatever you find is the value of this four hundred and some odd acres of land. You don't have to separate it. It is in four tracts as described to you, but you don't have

to separate it, break it down. Just one sum. Elect one of your number foreman and the foreman will sign the verdict for the jury.

Now, Mr. District Attorney, do you have any further instructions to request?

MR. LOGAN: I would like to approach the bench if I may.

(Reporter's note: The following occurred at the bench in the immediate presence of counsel and the Court, out of the hearing of the jury:

MR. LOGAN: You commented what Mr. Berry testified to on direct examination about his tobacco base and on cross it came out that he had moved his tobacco base and he had had no loss. I am fearful that the comment just on the direct and not on the cross might--

THE COURT: All right.

MR. LOGAN: Mr. Newman testified that he had looked at the flood record and that one tract had 15 to 20% loss and also I am going to request that some comment be made by the Court with reference to the law on special direct benefits because the jury does not know that the law provides for special and direct benefits.

THE COURT: All right.

MR. LOGAN: And if the Court is not inclined to give it, I will except to it.

THE COURT: All right. I will give it.

MR. ORR: The think the Court, with this exception, there was testimony now that--I think your comment, Judge, you indicated that this land was not accessible, near a main highway. Now, the part we are talking about not being accessible is just down in the bottom. I mean you left the impression that you just couldn't get to it. This is a thriving community, the land itself isn't---

MR. LOGAN: Mr. Berry did not lose any tobacco base, he just transferred it.

THEREUPON THE COLLOQUY AT THE BENCH ENDED)

THE COURT: Members of the jury, my attention has been called by the attorneys to one or two things that I want to call to your attention.

In the first place you are to take into consideration there was proof to the effect that some of the land, this 29 acres left there, might be of special benefit because of its location and adaptability to camp sites or developments which have been brought

about and brought into being by this reservoir and you have a right to and should take this into consideration in fixing your value, whatever value to the landowners that might have been derived from the development of the reservoir, of course, is going to inure to them as a monetary advantage and you should take that into consideration if you believe that such is a fact from all the evidence.

*Just the land  
this may mean or  
to - especially on  
to Mrs. Berry - this  
that is totally different  
for him -*

Another thing, I commented that Mr. Berry said that he had two and thirty-two hundreds tobacco base. I believe he also testified on cross-examination that he had moved that base or part of it to Warren County, although he testified that it was inconvenient, and was growing a part of it, as I recall, there on this farm at that time. It was inconvenient, because he had his barns on one place and was going to have tobacco on another place.

Now, I probably did say - my attention is called by one of the attorneys - I said something about the accessibility of this land. I did not mean to state or to imply that this farm is not in a good location as far as the general farming situation is concerned. It is on a blacktop road, but the farm, the

corn land and the accessibility of the corn land, that is talked about here, is some little distance, as one of the witnesses, I believe Mr. Berry himself testified, giving the distance from the town to his place.

*only confirm  
jury  
no help &  
each  
side*

I think you pretty generally understand what you are to do and can make a fair and just verdict.

Mr. Marshal, you may show the jury to the jury room to consider the case.

(Reporter's note: The jury retired from the courtroom and subsequently, on the same day, returned into the courtroom, and the following occurred:)

THE COURT: Hand in the verdict, Mr. Foreman. Call the jury, Mrs. Harris.

(Reporter's note: The names of the jurors were called and all were present.)

THE COURT: Read the verdict, Mrs. Harris.

THE CLERK: "We, the jury, find for the landowners the sum of \$69,800. Signed T. A. Neal, Foreman."

THE COURT: So say you all, members of the jury.

\*\*\*\*\*



I, Ella E. Dunifer, Official Reporter,  
U. S. District Court, Eastern and Western Districts of  
Kentucky, do certify that the foregoing constitutes a  
true, full and accurate transcript of all the evidence  
introduced and heard, or offered to be introduced and  
rejected, and all objections concerning the same, as well  
as a description of all papers or documents offered to  
be or used as evidence in Case No. 805, United States of  
America v. 2,635.04 Acres of Land, Tracts 125, 127, 130,  
131, of Franklin Berry and Ruby Berry, in the United  
States District Court for the Western District of Kentucky,  
at Bowling Green, on October 16, 1962, before His Honor,  
Mac Swinford, Judge of said Court.

IN TESTIMONY WHEREOF, Witness my  
official hand as reporter, this the 15th day of May,  
1963.

---

Official Reporter