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Julian Conrad Juergensmeyer
Haile Selassie I University

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FEDERAL RULE OF CIVIL PROCEDURE 71A (h) LAND COMMISSIONS: THE FIRST FIFTEEN YEARS

JULIAN CONRAD JUERGENSMEYER†

Slightly over fifteen years ago Rule 71A of the Federal Rules of Civil Procedure became effective. Subdivision (h) of the Rule marked an innovation in federal condemnation law by giving the federal courts discretionary power to order "that, because of the character, location, or quantity of the property to be condemned, or for other reasons in the interest of justice, the issue of compensation shall be determined by a commission of three persons... ."

This provision in subdivision (h) for referral of the issue of just compensation to a commission was largely responsible for the unprecedented length of time spent on Rule 71A by the Advisory Committee on Civil Procedure and the Supreme Court itself, and the controversy which the Rule met prior to its adoption. It is still subdivision (h) which over fifteen years later makes Rule 71A the subject of controversy in Congress, the Department of Justice, the courts, and the legal profession.

†Faculty of Law, Haile Selassie I University (formerly Assistant Professor of Law, Indiana University).

1. The United States Supreme Court adopted Fed. R. Civ. P. 71A on April 30, 1951, and the Rule took effect on August 1 of that year. Also see note 28 and accompanying text, infra.

2. Subdivision (h) in its entirety provides:

If the action involves the exercise of the power of eminent domain under the law of the United States, any tribunal specially constituted by an Act of Congress governing the case for the trial of the issue of just compensation shall be the tribunal for the determination of that issue; but if there is no such specially constituted tribunal any party may have a trial by jury of the issue of just compensation by filing a demand therefor within the time allowed for answer or within such further time as the court may fix, unless the court in its discretion orders that, because of the character, location, or quantity of the property to be condemned, or for other reasons in the interest of justice, the issue of compensation shall be determined by a commission of three persons appointed by it. If a commission is appointed it shall have the powers of a master provided in subdivision (c) of Rule 53 and proceedings before it shall be governed by the provisions of paragraphs (1) and (2) of subdivision (d) of Rule 53. Its action and report shall be determined by a majority and its findings and report shall have the effect, and be dealt with by the court in accordance with the practice, prescribed in paragraph (2) of subdivision (e) of Rule 53. Trial of all issues shall otherwise be by the court.

FED. R. CIV. P. 71A (h).

3. The first attempt at promulgating a Rule to govern federal condemnation cases was begun in 1937, shortly after the appointment by the Supreme Court of the Advisory Committee; this was fourteen years before the eventual acceptance by the Supreme Court of Rule 71A.

4. 7 J. MOORE, FEDERAL PRACTICE ¶ 71A.01[1] (2d ed. 1953) [hereinafter cited as MOORE].
Prior to the promulgation of Rule 71A, no provision was made in the Federal Rules as to condemnation actions except those on appeal. The trials themselves were conducted according to state procedure under the terms of the general conformity statute; the state procedure thus imposed upon the federal courts was difficult to describe since there was wide divergence among the states and in some instances within a particular state. Judge Clark, writing shortly before the promulgation of Rule 71A, described the state practice as follows: "In state condemnation proceedings about ten states require the use of a commission appointed by the trial court, about eighteen provide for a jury trial without a commission, and some twenty provide for a commission to act in the first instance, with the right of appeal and a trial de novo before a jury." The variety of differing descriptions underlines the confused situation from a national viewpoint.

The omission from the Federal Rules as promulgated in 1937 of a uniform rule for federal condemnation suits was controversial from the outset. The Advisory Committee seems to have concluded early not to submit a uniform rule for two reasons: that there was no need for a

5. 7 Moore §§ 71A.01[1], 71A.03, 81.01[1], 81.01[9], referring to original Rule 81 (a) (7) which was abrogated when Rule 71A took effect.
8. Approximately 5 states use only commissioners; 23 states use commissioners with a trial de novo before a jury; and 18 states use only the jury. This classification is advisedly stated in approximate terms, since the same state may utilize diverse methods, depending upon different types of condemnations or upon the locality of the property, and since the methods used in a few states do not permit of a categorical classification.


Judge Paul points out that: This conformity to the statutes of the several states was generally satisfactory to the courts and to the practicing bar—as naturally it would be, since they were trained in and accustomed to the laws of their respective states. . . . It seems probable that if it had been the policy of the government to entrust the conduct of all condemnation cases to the office of the United States Attorney for the district wherein the case was instituted there would have been no demand for such a rule.

However, a year or so after the Advisory Committee had begun its work, agitation for a rule on condemnation originated in the Lands Division of the Department of Justice, the legal staff of which was conducting most of the condemnation proceedings instituted on behalf of the United States. Paul, Condemnation Procedure Under Federal Rule 71A, 43 Iowa L. Rev. 231 (1958) (footnotes omitted).
uniform rule and the difficulty of drafting one in view of the diversity of practice. Whether these two factors were of equal importance and whether there was disagreement among the committee members is not clear.  

Whatever the exact disposition of the Committee, it was temporarily persuaded of the need for a uniform rule by Department of Justice officials and included a uniform rule for condemnation actions as Rule 74 of its April 1937 Draft. Proposed Rule 74 adopted the procedure followed in several states by providing for the appointment of a commissioner to determine compensation and for a right in either party to have a trial de novo before a court, either with or without a jury. Criticism from various governmental agencies and an abrupt change of position by the Department of Justice persuaded (or perhaps, permitted) the Committee to propose in its Final Report to the Court on November 1937 that Rule 74 be stricken. The Rules were thereby made applicable only to appeals in condemnation cases, the situation which persisted, except for certain government agencies and the District of Columbia, until the adoption of Rule 71A.

When the Supreme Court reactivated the Advisory Committee in 1942, the committee was soon confronted with renewed interest in a uniform rule for condemnation cases. The interest was doubtlessly attributable to the increased number of condemnation cases arising from wartime needs of the federal government for land. The first version of Rule 71A appeared in the Preliminary Draft of May 1944, but was omitted from the Second Preliminary Draft of May 1945 and the Final Report of Proposed Amendments of June 1946. Rule 71A reappeared in a June 1947 draft and an April 1948 revision. The Committee submitted a proposed Rule 71A to the Court on May 17, 1948.

The Committee Report accompanying the May 1948 Draft to the Court states frankly that “[o]ur principal problem has been the constitu-

9. As the textual discussion which follows points out, there has in recent years been considerable disagreement over “commissions” within the Advisory Committee. The vacillation of the Committee in this respect at the time of the April 1937 Draft suggests that the Committee may have been divided at that point in time, also.
10. 7 Moore ¶ 71A.01[1].
11. U.S. Supreme Court Advisory Committee on Rules for Civil Procedure 184-192 (April 1937). This proposed Rule 74 and the Committee Note thereto are also reprinted in 7 Moore ¶ 71A.05[1], at 2719.
13. The agencies to which this situation applied were the TVA and Alaskan Railways.
14. 7 Moore ¶71A.05[1].
16. 7 Moore ¶71A.05[1].
17. Id. ¶¶ 71A.05[2]-[3].
tion of the tribunal to award compensation. In other respects the formulation of the practice has not presented serious difficulties.\textsuperscript{18} The solution adopted by the Committee to the problem of determining just compensation was the granting of a right to jury trial, the idea followed in Rule 74 of the April 1937 Draft, thereby eliminating the commissioner or commission used in many states.\textsuperscript{19}

The Advisory Committee's General Statement accompanying Rule 71A of the May 17, 1948 Draft makes it clear that the alternative approach most considered by the Committee was the TVA condemnation procedure,\textsuperscript{20} which Congress had set forth in establishing the Tennessee Valley Authority. Determination of just compensation was to be made in the first instance by three disinterested commissioners selected by the court from a locality other than that containing the land. Either party could, of right, except to the award of the commissioners and have their exceptions heard by a panel of three district judges with further right of appeal to the Circuit Court of Appeals.\textsuperscript{21}

The Advisory Committee wrote letters of inquiry to judges and officials who had been involved with the TVA condemnation procedure. The replies from the TVA itself and most of the replies from federal district courts judges contained firm endorsements of the commission feature of the TVA procedure and expressed opposition to the substitution of a jury to determine compensation.\textsuperscript{22} The Advisory Committee declined, however, to follow the suggestion of at least one of the replying judges, Judge Paul, that the TVA commission system be extended to all federal condemnation cases,\textsuperscript{23} but it did preserve the TVA procedure for TVA cases by providing that "any tribunal specially constituted by an Act of Congress governing the case for the trial of the issue [of] just com-

\textsuperscript{18}U.S. SUPREME COURT ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE, REPORT OF PROPOSED RULE TO GOVERN CONDEMNATION CASES IN THE DISTRICT COURTS OF THE UNITED STATES IV (May 1948).

\textsuperscript{19}Id.

\textsuperscript{20}Report, supra note 18, at 20-22. Also see SUPPLEMENTARY REPORT, supra note 8, at 6133.


\textsuperscript{22}"The use of commissions in TVA cases, and, by fair inference, in cases comparable to the TVA, is supported by seventeen out of the twenty judges who up to 1947 had sat in TVA cases. The legal staff of the TVA has vigorously objected to the substitution of juries for commissions in TVA cases." SUPPLEMENTARY REPORT, supra, note 8, at 6152. "The Committee is convinced that there are some types of cases . . . in which a jury may be appropriately used . . . ." SUPPLEMENTARY REPORT supra, note 8, at 6150.

pensation shall be the tribunal for the determination of that issue."

The Court kept the proposed Rule 71A of May 1948 under advisement until December of 1948 when it held an informal conference with selected members of the Committee. At that conference the Court returned the May 1948 draft of the rule to the Committee for further consideration with respect to the manner for fixing compensation set out in subdivision (h). The Court informed the Committee that it was particularly interested in the views expressed by Judge Paul. The Committee reconsidered the matter and in its Supplementary Report of March 1951 submitted the presently effective subdivision (h) to the Court with a recommendation for its promulgation.

Subdivision (h), the product of this long history of conflict between the advocates of commissions to determine compensation and the advocates of a jury trial of the compensation issue, is in effect a "passing of the buck" to the district court judge. Neither side has achieved the victory of having the other method excluded. The dispute has not been resolved, although reduced in scale, and it has increased in frequency of occurrence. The only real resolution achieved by the Rule is the rejection of the practice of commission determination followed by "trial de novo if either party wishes," the procedure followed in many states and recommended by the Committee in 1937. It still leaves available reference to a commission, trial by jury, and trial by the district court. The arguments used by the Committee to explain its decision, after reconsideration, to draft 71A(h) so as to make the commission method of determining compensation available to federal district court judges were largely those given by Judge Paul in support of the TVA procedure.

24. FED. R. CIV. P. 71A(h). The language quoted is that of the present version of the rule.

25. SUPPLEMENTARY REPORT, supra note 8, at 6149.

26. The reasons which convinced the Advisory Committee that the use of commissioners instead of juries is desirable in TVA cases were these:

1. The TVA condemns large areas of land of similar kind, involving many owners. Uniformity in awards is essential. The commission system tends to prevent discrimination and provide for uniformity in compensation. The jury system tends to lack of uniformity. Once a reasonable and uniform standard of values for the area has been settled by a commission, litigation ends and settlements result.

2. Where large areas are involved many small landowners reside at great distances from the place where a court sits. It is a great hardship on humble people to have to travel long distances to attend a jury trial. A commission may travel around and receive the evidence of the owner near his home.

3. It is impracticable to take juries long distances to view the premises.

4. If the cases are tried by juries the burden on the time of the courts is excessive.

These considerations are the very ones Judge Paul stressed in his letter. He pointed out that they applied not only to the TVA but to other large governmental projects, such as flood control, hydroelectric power, reclamation,
The Supreme Court entered an order on April 30, 1951, providing that Rule 71A, containing the presently effective version of subdivision (h), was to become effective on August 1, 1951. Pursuant to the order, Chief Justice Vinson transmitted the Rule to Congress.27 The intra-Advisory Committee controversy over trial of the issue of just compensation was repeated in the Senate Judiciary Committee. The Committee opposed substitution of the commission for the jury trial and recommended that the Rule be disapproved. Thereupon, the Senate passed a bill which enacted all of the Court approved Rule except subdivision (h) and enacted the version of subdivision (h) recommended by the Committee in its May 1948 draft.28

Subdivision (h) was also an object of concern to the House Judiciary Committee which recommended that the effective date of Rule 71A be postponed to allow further study. The Senate’s counter proposal was simply to provide that Rule 71A as proposed not become effective. The Senate and House disagreement resulted in no affirmative congressional action before August 1, 1951; consequently, proposed Rule 71A with the presently effective subdivision (h) became effective at that time.29

**Subdivision (h) in Operation**

Subdivision (h) as recommended by the Committee and promulgated by the Supreme Court contains few guidelines for the actual operation of the commissions or for guidance of them by the appointing courts. The purpose of this article is to ascertain and evaluate the way in which subdivision (h) has been and is operating from the viewpoint of the commissions themselves, the courts appointing them, and the litigants national forests, and others. So when the representatives of the Advisory Committee appeared at the Court’s conference December 2, 1948, they found it difficult to justify the proposed provision in subdivision (h) of the rule that a jury should be used to fix compensation in all cases where Congress had not specified the tribunal. If our reasons for preserving the TVA system were sound, provision for a jury in similar projects of like magnitude seemed unsound.

Aware of the apparent inconsistency between the acceptance of the TVA system and the provision for a jury in all other cases, the members of the Committee attending the conference of December 2, 1948, then suggested that in the other cases the choice of jury or commission be left to the discretion of the District Court, going back to a suggestion previously made by Committee members and reported at page 15 of the Preliminary Draft of June 1947. They called the attention of the Court to the fact that the entire Advisory Committee had not been consulted about this suggestion and proposed that the draft be returned to the Committee for further consideration, and that was done. *Supplementary Report*, supra note 8, at 6150.

28. For a complete discussion of the congressional action on Rule 71A(h), see MOORE ¶ 71A.08.
29. *Id.*
appearing before them.\textsuperscript{30}

30. In the attempt to ascertain how and when commissions are appointed and how they operate, the writer has relied upon four principal sources of information. The first and most important of these is the cases concerning various aspects of subdivision (h). The second is the relevant material contained in law journals and treatises. See W. BARON & A. HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE §§ 1515-1530 (1958); MOORE ¶71A.90; P. NICHOLES, THE LAW OF EMINENT DOMAIN, ch. XXVII (1965); Clark, The Proposed Condemnation Rule, 10 Ohio St. L.J. 1 (1949); Collett, Rule 71A(h) Commissions—A Superior Method of Trying Federal Condemnation Cases, 22 J. Mo. B. 153 (1966); Nealy, Some Historical and Legal Aspects of Rule 71A(h) in Federal Condemnation Proceedings, 22 Fed. B.J. 45 (1962); Neusner, Federal Land Condemnations in Connecticut and Rule 71A(h), 31 Conn. B.J. 217 (1957); Paul, Condemnation Procedure Under Federal Rule 71A, 43 Iowa L. Rev. 231 (1958); Searles & Raphael, Current Trends in the Law of Condemnation, 27 Fordham L. Rev. 529 (1958-59); Wasserman, Procedure in Eminent Domain, 11 Mercer L. Rev. 245 (1959-60). The third source is the replies the writer received to a questionnaire he sent to various federal district court judges in an attempt to supplement the scanty treatment found of many important matters in the cases. The questionnaire, set forth at the end of this footnote, was sent to fifty-three randomly selected federal district court judges in August of 1966. Forty judges replied. Only nine of those judges who replied answered that they had appointed commissions, but seven of the remaining thirty-one offered comments. On a strictly numerical basis, the results of the survey are therefore somewhat sparse but, in view of the paucity of case law on many points, it is submitted that they add sufficient depth to the discussion herein to justify inclusion. Furthermore, the survey represents a higher percentage of district court judges than the mere number of replies reveals because several of the judges answered on behalf of all or at least several of the judges in their district. In fact, thirteen of the judges who returned the questionnaire indicated that they were answering for all of the judges in their district. In a few cases the judge to whom the questionnaire was sent referred it to another judge or to a clerk; one judge sent it to the United States District Attorney's Office to answer on behalf of the entire district and for years prior to the appointment of the judge to whom the questionnaire was addressed. The fourth source of information used by the writer has been his experiences over a two year period as a member of a 71A(h) land commission appointed by the United States District Court for the Southern District of Indiana.

Questionnaire Concerning Land Commissions Appointed Pursuant to Rule 71A(h) Of the Federal Rules of Civil Procedure

1. How many commissions have you appointed and how many cases have you referred to them?
2. What approximate percentage does this represent of the total number of condemnation cases which you have heard?
3. What factors influenced you in deciding to appoint a commission?
4. Was there objection by any of the parties to the appointment of a commission? If so, what was the basis of the objection?
5. What was the profession or occupation of the commissioners you appointed? Did any of those not identified as lawyers have legal training?
6. In how many cases were the decisions of the commissioners appealed to you?
7. In how many of the appeals referred to in question 6 did you overrule or modify the commission's finding? Did you send back any cases to a commission for reconsideration?
8. In how many cases was the decision of the commissioners appealed to the Court of Appeals and what was the outcome of the appeals?
9. Do you feel that the use of a commission is less expensive for the litigants and less time consuming for you?
10. Please comment on your view as to the efficacy of Rule 71A(h) Commissions, advantages and disadvantages, and your present feeling on whether you will use them in the future should the opportunity arise.
11. General comments.
Reference to a Commission

Subdivision (h) gives only vague guidelines for when a district court judge may choose to appoint a commission and refer to it the issue of just compensation. The district court may do so "because of the character, location, or quantity of the property to be condemned or for other reasons of justice." Absent history and precedent that might suggest to the contrary, the most that can be said about this phrase is that the judge must have some reason for thinking that a commission rather than the court or jury should determine just compensation. The question comes down to a matter of whether or not a federal judge may appoint a commission simply because he has a general preference for commissions as opposed to judges and juries for this task. The battle has been fought under the labels "extraordinary" and "ordinary."

The first reported court of appeals decision concerning land commissions, United States v. Theimer, appropriately concerned the standard to be used by district judges in using a commission; the result was an important victory for a restrictive interpretation of the rule. The Government sought the fee simple title to a seventy-one acre tract and an easement for aircraft flights over a twelve acre and a one acre tract. The United States District Court for the Western District of Oklahoma appointed a commission to determine compensation under Oklahoma procedure. When Rule 71A became effective the landowners filed a motion requesting the appointment of a subdivision (h) commission so as "to remove all obstacles that may cause delay and [to] bring this action to a conclusion." The court sustained the motion and overruled an objection by the Government. The Government appealed to the Tenth Circuit. The way in which that court, (per Judge Huxman) phrased the main ground of appeal indicated its restrictive view of land commissions: "[t]he Government's main contention is that the court erred in denying its motion for a jury trial and invoking the extraordinary provisions of Subsection (h) for the appointment of a commission to fix the values of the estates taken."

The court capsulized the history of the development of Rule 71A (h) and concluded:

[t]hroughout all these studies runs the thought that litigants should have the right of trial by jury of the issue of value except only in extraordinary and exceptional cases and that the

32. 199 F.2d 501 (10th Cir. 1952).
33. Id. at 502.
34. Id. at 503 (emphasis added).
commissioner provision of the Rule should be employed only in exceptional cases where because of peculiar circumstances trial by jury was inadvisable. This thought is well expressed in the Advisory Committee’s letter of March 18, 1952, to the Supreme Court, in which it states: “In this connection, your Committee interprets Rule 71A(h) as prescribing trial by jury as the usual and customary procedure if demanded to be followed in fixing the value of property taken in condemnation proceedings, and as authorizing reference to Commissioners only in cases wherein the judge in the exercise of a sound discretion based upon reasons appearing in the case finds that the interest of justice so required.”

The court reversed the case for improper reference to a commission in the following, now oft-quoted, language:

[W]e, therefore, conclude that the parties to a condemnation proceeding are ordinarily entitled to a jury under Rule 71A (h) as a matter of right and that where demand is made for the same the judge must grant a jury trial, unless under the facts as they appear in the case because of the character, location, or quantity of the property to be condemned, or for other reasons revealed by the facts of the case, the interest of justice warrants the submission of question of value and compensation to a commission.

None of the factors specifically set out in the Rule warranting the judge in taking the case from a jury are present in this case. This is a simple condemnation proceeding in which the Government sought to condemn one small tract of seventy-one acres and an easement over two other tracts of twelve acres and one acre, respectively, all lying adjacent to Tinker Field. The motion for the appointment of a commission did not set out any extraordinary facts or circumstances warranting these proceedings. It gave as reasons for the request only their desire “to remove all obstacles that cause delay and bring this action to a conclusion.” This desire may well be present in all cases but it does not constitute such extraordinary circumstances as to warrant the trial court in invoking the extraordinary provisions of the Rule. The trial court made no statement or finding of fact as to what prompted it to conclude that the interest of justice demanded the invocation of the extraordinary, rather than to permit the ordinary procedure contemplated by the Rule.

35. Id. (footnotes omitted).
While the trial court is vested with a sound discretion in determining whether the ordinary or the extraordinary provisions of the Rule should be employed in a given case, which judgment should not be disturbed on appeal save for cogent reasons, its discretion is not an unlimited or an absolute one and is subject to review and will be set aside for abuse thereof.\[686\]

A few months later the Tenth Circuit was again confronted with the question in *United States v. Wallace.*\[697\]* Wallace* involved an eighty acre tract also in Oklahoma. As in *Theimer* the United States District Court for the Western District of Oklahoma had appointed a commission to determine just compensation under Oklahoma procedure prior to the effective date of Rule 71A. Here the United States rather than the landowner acted first and demanded a trial by jury under Rule 71A(h) shortly after the rule became effective. The court, however, found "that in the interest of justice the issues of compensation . . . shall best be determined by a Commission . . . ."\[688\]

The Tenth Circuit in a two to one decision affirmed the judgment entered by the district court on the basis of the commission's findings. The majority opinion, written by Chief Judge Phillips who did not sit in *Themier* and concurred in by Judge Murrah who did sit in *Theimer,* held that the lower court in the exercise of its discretion was justified in ordering a determination by a commission. The majority based its holding in this respect on the fact that the land in question was sixty miles from the nearest federal court and that it was unusual in character since it was valuable for hunting and fishing. In reference to *Theimer* the majority state:

[W]e think the instant case is distinguishable on the facts from *United States v. Theimer,* . . . . Here, the land was situated a long distance from a Federal court town. It would have been expensive to have taken a jury from the court town to view the land. It would have been inconvenient for the local witnesses who resided in the vicinity of the land to travel to a Federal small seat court town to give their evidence. The land was of a peculiar nature in that it had a value for hunting and fishing. Only one 80 acre tract of land was involved.\[690\]

Judge Pickett, who sat on the unanimous *Theimer* court, dissented on the basis of the *Theimer* proposition that parties to a condemnation

36. Id. at 503-4 (emphasis added).
37. 201 F.2d 65 (10th Cir. 1952).
38. Id. at 66.
39. Id. at 66-67.
action are entitled to a jury trial as a matter of right "unless facts appear in the case which would bring it within an exception." As to when a case falls within an exception Judge Pickett refers to "exceptional and extraordinary circumstances." He concludes his attack on the majority opinion by stating:

[I]t is difficult to conceive of a more simple condemnation case. If the trial judge has the discretion to appoint commissioners to determine the compensation for land merely upon the grounds that it is some distance from the seat of the trial court, he would have the discretion to appoint commissioners in almost any case. It appears to me that we are laying the foundation for the establishment of the right of reference as the rule, not the exception.

Once again only a few months elapsed before there was another Tenth Circuit decision on the propriety of reference to a commission for determination of just compensation. In United States v. Waymire, the Government assailed a judgment entered by the United States District Court for the District of Wyoming on the ground that the district court erred in denying the Government's demand for a jury trial. As in Wallace the court of appeals upheld the action of the district judge in a two to one opinion. Judge Bratton, who had sat in neither Theimer nor Wallace and who was joined by Judge Murrah who sat in both those cases, approached the case from the standpoint that Theimer and Wallace had established that determination by commission is proper only under extraordinary circumstances. The majority purported to fit the case at hand into the "extraordinary circumstances" exception:

[T]his was not a proceeding for the condemnation of a single tract of land or a single unit of property uniform in kind, easy of description, and located reasonably adjacent to the place at which the court sits. In addition to other small tracts, it had for its purpose the taking of property and property rights from five ranches including various and varying improvements located more than one hundred and fifty miles from the nearest place at which the court sits. The land varied in kind, character, and adaptability. Some was bottom land, some meadow land, some bench land, and some pasture or grazing land. Some of the bottom land produced alfalfa, some was devoted to the

40. Id. at 67 (dissenting opinion).
41. Id.
42. Id. at 67-68 (dissenting opinion). Judge Pickett's dissent is approved in Note, Federal Procedure—Condemnation Proceedings, 39 VA. L. REV. 694 (1953).
43. 202 F.2d 550 (10th Cir. 1953).
production of alfalfa seed, and some was used for the growing of other crops. And due to its location and other natural conditions, some of the land furnished excellent shelter and protection for livestock in the winter. . . . The situation presented multiple circumstances calling for the consideration of various elements in arriving at just compensation. These elements included the value of land taken in fee, severance value, flowage easement value, value of improvements, and other factors inhering in the situation. In view of all these facts and circumstances considered in their totality it cannot be said that the court erred in appointing a commission to fix just compensation for the various properties and rights in properties to be condemned.\textsuperscript{44}

Judge Huxman, author of the Theimer decision dissented on the ground that there were "no extraordinary or unusual circumstances" in the case and echoed Judge Pickett's warning that "[u]nless we take care, trial by jury will become the exception and trial by commission the rule in condemnation proceedings, contrary to the spirit and intent of the rule."\textsuperscript{45}

In spite of the early flurry of activity in the Tenth Circuit, and the promise it gave of developing guidelines for deciding references to commissions, no word seems to have come from that Circuit on the question since Waymire.

The next significant court of appeals decision concerning reference to a commission came four years later from the Eighth Circuit in United States v. Chamberlain Wholesale Grocery Co.\textsuperscript{46} This case involved appeals from four cases on the ground that in each case the United States District Court for the District of South Dakota had erred in denying the Government's request for a jury trial and in referring the issue of just compensation to a commission.

In affirming the reference to a commission in all four cases, the court of appeals quoted at length from the affidavits of landowners and the Government respectively supporting and opposing determination by a commission and also from the order of the court appointing the commission. The landowners stressed the distance of the land in question from the nearest federal court (125 miles), expense and inconvenience of getting witnesses from the vicinity of the land to federal court, difficulty of getting a jury from the seat of federal court to view land because of bad weather and poor roads, the peculiar value of the land for geese and duck hunting, complexity of factors (including severance damages) to

\textsuperscript{44} Id. at 552.
\textsuperscript{45} Id. at 555 (dissenting opinion).
\textsuperscript{46} 226 F.2d 492 (8th Cir. 1955),\textsuperscript{\textsuperscript{\textsuperscript{5}}} cert. denied, 350 U.S. 989 (1956).
be considered in fixing compensation, and finally the need for uniformity of treatment with other land in the area taken for the same project. The affidavit of the Government stressed the nearness of the ranch to a federal court seat (ninety miles), good highway to federal court, the not unusual character of the land in question, and concluded with the usual plea of great expense to the Government when commissions are appointed. The court order based the appointment of a commission on the theories espoused by the landowners.

The court of appeals in approving the district court's decision spoke in broad terms as to the discretion of the district court in deciding to use a commission. Just as the Theimer court used language of the Advisory Committee to support its restrictive interpretation, the Chamberlain court used other Advisory Committee language to support its rejection of the Government position that a jury trial must be granted unless, "by virtue of circumstances peculiar to a particular case, the issue of just compensation can be determined more justly by commissioners than by a judge and jury."47 The court stated:

[T]he Committee observed that "It would be difficult to state in a rule the various conditions to control the District Court in its choice" but the Committee listed the reasons that had convinced it of the desirability of the use of commissioners in TVA cases and stated "In large projects like the TVA the court may decide to use a commission. In a great number of cases involving only sites for buildings or other small areas, where use of a jury is appropriate, a jury may be chosen. The District Court's discretion may also be influenced by local preference of the Department of Justice and the reasons for its preference will doubtless be given weight. The committee are [sec] convinced that there are some types of case in which use of a commission is preferable and others in which a jury may be appropriately used, and that it would be a mistake to provide that the same kind of tribunal should be used in all cases."48

The court concluded by noting the accord between its decision and Waymire and Wallace and then closed with the ambiguous statement: "[w]e do not find the conclusion arrived at in United States v. Theimer ... controlling here."49

Chief Judge Clark of the Second Circuit, in United States v. Bobinski,60 added a judicial expression of his opinion on subdivision (h) to

47. Id. at 497.
48. Id.
49. Id. at 498.
50. 244 F.2d 299 (2d Cir. 1957), aff'd per curiam, 254 F.2d 686 (2d Cir. 1958).
his earlier law journal opinions.\textsuperscript{51} His language is somewhat restrictive in nature and breaks the liberal trend of \textit{Wallace, Waymire}, and \textit{Chamberlain}. The restrictive effect is, at the same time, weakened and strengthened by the fact that Judge Clark volunteers the criticism of the district court even though the issue was not raised on appeal:

Although the issue has not been raised on this appeal, we are concerned as to the appointment of commissioners here. Both the language and the history of F.R. 71A(h) amply demonstrate that trial to the court is to be the usual method of settling values in Government condemnation, subject to a right in either party to make timely claim for a jury, and that reference to commissioners is to be an exception for special situations. Notes of Advisory Committee on Rules, 28 U.S.C. (1952 Ed.) pages 4355-361; Moore's Federal Rules 351-358 (1956); 7 Moore's Federal Practice 2790-2799 (2d Ed. 1955). Thus the usual trial must be had "unless the court in its discretion orders that, because of the character, location, or quantity of the property to be condemned, or for other reasons in the interest of justice, the issue of compensation shall be determined by a commission of three persons appointed by it." As is carefully detailed in the Advisory Committee's Supplementary Report, March 1951, the purpose here was to provide some means of insuring uniformity of treatment of property owners in large and far-reaching developments, of which the TVA was a notable example. Although the court here made the findings required by the rule in its order of appointment, it is hard to see the basis here, for the project was neither so large nor so distant as to make decision by the court at all difficult. The court points out that no defendant had claimed trial by jury; and since the United States had not done so, then there was applicable the provision of F.R. 71A(h) that "[t]rial of all issues shall otherwise be by the court." Unwarranted use of commissioners, like similar use of masters, is an "effective way of putting a case to sleep for an indefinite period." La Buy v. Howes Leather Co., 352 U.S. 249, 253, note 5, 77 S.Ct. 309, 312, 1 L.Ed. 2d 290, quoting Chief Justice Vanderbilt. Certainly the misadventures of this case and of United States v. 44.00 Acres of Land, 2 Cir., 234 F.2d 410, certiorari denied Odenback v. United States, 352 U.S. 916, 77 S.Ct. 215, 1 L.Ed. 2d 123, do not speak well for a course substantially re-

\textsuperscript{51} Clark, \textit{The Proposed Condemnation Rule}, 10 Ohio St. L.J. 1 (1949).
pudiated in the state as well as federal procedure.\textsuperscript{52}

The next court of appeals to examine a district court's appointment of a commission was the Fourth Circuit in \textit{United States v. Cunningham}.\textsuperscript{53} The court (per Chief Judge Parker) affirmed reference to a commission and abandoned Advisory Committee language as the source of standards for the rule:

[I]t is true that the rule prescribed "trial by jury as the usual and customary procedure to be followed, if demanded, ** and as authorizing reference to commissioners only in cases wherein the judge, in the exercise of a sound discretion based upon reasons appearing in the case, finds that the interests of justice so require." Report Judicial Conference of United States March 1952, pp. 8 and 9. The trial judge found here that the interests of justice required the appointment of the commission and this finding was made upon reasons appearing in the case and set forth in his order of appointment. There can be no question but that they were adequate. The quantity of the land, its availability for beach residential development, the elements of value presented by its availability for hunting and sport fishing, the question as to whether the discovery of ilmenite added to its value, the importance of its being carefully gone over by those who were to value it and the impracticability of having a jury do this in view of its distance from the place where the nearest federal court was held,—all these things taken together certainly justified the appointment of a commission, which would not only serve the convenience of parties and witnesses and make a personal examination of the premises, but which, composed as it was of a distinguished lawyer and two experienced real estate dealers, would bring to the difficult questions of valuation presented an expertness which could not be expected of a jury. Certainly the appointment of the commission could not be held an abuse of discretion.\textsuperscript{54}

Judge Parker cited without comment \textit{Wallace, Waymire, and Chamberlain}.\textsuperscript{55}

The Fifth Circuit was next to hand down a decision in \textit{United States v. Buhler}.\textsuperscript{56} This Court of Appeals continued the trend, established in

\begin{itemize}
  \item 244 F.2d 299, 301 (2d Cir. 1957).
  \item 246 F.2d 330 (4th Cir. 1957), \textit{rev'd and remanded on other grounds}, 270 F.2d 545 (4th Cir. 1959).
  \item \textit{Id.} at 332-33.
  \item \textit{Id.} at 333.
  \item 254 F.2d 876 (5th Cir. 1958), \textit{rev'd and remanded on other grounds}, 305 F.2d 319 (5th Cir. 1962).
\end{itemize}
all previous cases except Theimer, of affirming the district court's use of a commission and in stressing the discretionary powers of the district judge in this respect. The discretion of the district judge is, however, stated in less absolute terms than in Chamberlain and even Cunningham:

[A]ny party is given a right to a jury trial on timely demand, "unless the court in its discretion orders that, because of the character, location, or quantity of the property to be condemned, or for other reasons in the interest of justice, the issue of compensation shall be determined by a commission of three persons appointed by it." (Emphasis supplied.) To justify denial of a timely demand for jury trial, it is essential that the exercise of the court's discretion be based upon some exceptional reasons in the interest of justice, such as the character, location, or quantity of the property to be condemned.

An unsupported conclusion, that the appointment of a commission will avoid delay and be in the interest of justice, clearly will not suffice. United States v. Theimer, 10 Cir., 1952, 199 F.2d 501.

The present case is not similar to a TVA case, for the district court found that the property condemned was exceptional neither in location nor in quantity. It held that the appointment of a commission was warranted because of the exceptional character of the property, thus described in its opinion:

"The land in question is that taken and used by the United States Air Forces as Foster Air Force Base in Victoria County, Texas. Foster Air Force Base was originally built by the United States Army Air Corps about 1940 or 1941 upon the tract of land described in plaintiff's Declaration of Taking No. 1 recited to contain 1,144.71 acres of land, under a temporary lease from the defendant landowners. At the conclusion of World War II the air base was abandoned, the lease terminated, and the land returned to the defendant landowners with the permanent improvements thereon. Such improvements include 'a residence occupied by the defendant Frank S. Buhler, two barns, an incinerator building, seven warehouses, an airplane hangar building, three swimming pools, 120,000 square yards of paved roadways, 970,700 square yards of concrete airfield runways and pavement, a storm sewer system, a sanitary sewer system,
complete water distribution plant and water mains, two water wells, gas lines, fences, and 3,500 linear feet of railroad tracks. The portion of such property occupied by the warehouses, airplane hangar, and railroad tracks was being used as an industrial warehouse area at the time of the taking. That portion of the tract which has been subdivided by paved roadways was ideally suited for residential development. The remainder of the tract upon which the airfield runways and pavement were located, of course, was primarily adaptable for use as an airfield.' (Quotation from defendants' verified motion.)" United States v. 1146.32 Acres of Land, supra, 132 F. Supp. at page 682.

Other exceptional circumstances, not mentioned by the district court, are the complications arising from six separate takings of different tracts of land extending over nearly three years, the estates taken differing widely, —fee simple estates, a fee simple with a mineral reservation, a perpetual easement for drainage, and an avigation easement for a period of fifteen years; the claim that several of the takings resulted in severance damages to part of the remainder of the 4419.59 acre tract; and the determination of the loss to the rice tenants arising from at least three of the takings.

While Rule 71A(h) vests in the district court only a limited discretion to deny trial by jury, it is not strictly limited to TVA-like cases which involve property exceptional in location or in quantity, but extends also to considerations of the "character" of the property to be condemned and to "other reasons in the interest of justice" The discretion is vested primarily in the district court. Granting a jury trial should be the rule, and its denial the exception.57

In the same year it handed down the opinion in Buhler, the Fifth Circuit was again confronted with an appeal grounded partially on alleged error in appointing a commission rather than ordering a jury trial. In this case, United States v. 2,477.79 Acres of Land,58 although the court of appeals made brief reference to the need for "exceptional

57. Id. at 880-81 (emphasis added).
58. 259 F.2d 23 (5th Cir. 1958).
circumstances" in order to appoint a commission, by holding that the district judge need not make factual findings upon which to base his determination it actually softened the fairly strict language in Buhler concerning the necessity of a district judge's having specific reasons to justify appointment of a commission:

[T]he Government urges that the trial court should have made factual findings upon which it based its determination to appoint commissioners. The rule does not so require and, desirable as it may be that such a recital of findings be made, failure to do so is not error.

The court of appeals in Buhler raised the question of whether the proper procedure for questioning reference to a commission might not be to seek a writ of mandamus at the time of the commission rather than an appeal from a judgment entered on the basis of the commission's determinations. The loss of time and extra expense involved in a court of appeals' sending a case back for jury determination after a commission determination is sufficiently shocking to suggest this as one explanation of the courts of appeals' reluctance to do so and their willingness to consider the reference to a commission a matter of discretion for the district judge.

The Ninth Circuit Court of Appeals was confronted with an appeal from the appointment of a commission in the form of a proceeding for a writ of mandamus in United States v. Hall. In a per curiam opinion the court acknowledged the availability of the writ but denied it on the ground that there was no "abuse of discretion or usurpation of judicial power."

The Government contended that the district judge's reference of twenty-one cases to commissioners was for the purpose of relieving calendar congestion. The court stated:

A condition of calendar congestion standing alone is not justification for a reference to commissioners under the Rule. Cf. LaBuy v. Howes Leather Co., supra; United States v. Kirkpatrick, 3 Cir., 1951, 186 F.2d 393.

In these cases, however, the orders clearly demonstrate that the court had other considerations in mind. Compare United States v. Theimer . . . . The orders did, it is true, deal

59. "In order to justify the appointment of commissioners and the refusal of a demand for a jury trial to try the issue of compensation some exceptional circumstance must exist." Id. at 26.
60. Id. at 27.
61. 274 F.2d 856 (9th Cir.), cert. denied, 362 U.S. 990 (1960).
62. Id. at 858.
extensively with the problems of congestion facing the court. This is perhaps understandable since respondent is the Chief Judge of the District and such problems are peculiarly his concern. In addition to calendar congestion, however, the orders gave consideration to (1) the nature of the property, its varied terrain and uses; (2) the kind or type and nature of the rights or interests in the property for which just compensation was claimed; (3) the complexity of the issues involved; (4) the improbability, if not impossibility, of trying the issue of just compensation of the various properties before one jury; and (5) the probability that the appointment of commissioners would result in more uniformity of awards for like property than could be expected if each case were tried by a jury.

The United States asserts that, while mention is made of these considerations, they are not shown to apply to any specific parcel or ownership, but are mentioned generally as applying to all lands included within each other. Further, it asserts that the others wholly failed to show wherein the circumstances as to any of the considerations mentioned are extraordinary or unusual. The United States contends in this regard that a burden is upon the judge in each order of reference to show facts justifying his exercise of discretion under the Rule; that the orders are therefore insufficient to support an exercise of discretion.

This contention we reject. The United States concedes that as to each project various parcels taken are similar in character and use. In cases such as these, involving multiple takings for large governmental projects, it is our understanding that the Rule allows as proper a grouping of similar parcels for consideration, to the end that discrimination be avoided and uniformity in compensation be had. See authorities cited in footnote 3. The very use of the word "quantity" in the Rule lends support to such construction.

Each order shows upon its face that all the listed considerations were in the mind of the judge as to the lands taken for each project and were felt by him to warrant an exercise of his discretionary authority. We shall not, for lack of specification or detail, presume to the contrary. The burden instead is upon the United States to make a clear showing to this Court that such factors were not involved in these
cases. This burden the United States has failed to meet.\

In Beneke v. Weick, several landowners whose tracts had been referred to commissioners by the district court petitioned the Sixth Circuit Court of Appeals for a writ of mandamus. Unlike the Ninth Circuit, the court did not reach the merits of the petition but held reference to a commission to be a matter for review only as part of the final review. Hall was not cited but, since the Beneke decision is dated only a month and a few days after Hall, the Hall opinion was probably not available to the Sixth Circuit.

In 1961, the Fifth Circuit Court of Appeals again spoke on the propriety of reference to a commission. The appeal by the Government in United States v. Leavell & Ponder did not raise the question of whether or not the case had been properly referred to a commission but dealt with the way in which the commission arrived at its finding. The court seemingly volunteered the statement:

Although we would not consider it necessary to reverse the judgment solely because of the submission of this case to commissioners, if it were not necessary to reverse the judgment on the merits, we do conclude that on the record it was error for the trial court to make such reference.

The court discussed its decision in Buhler and then, contrary to United States v. 2,477.79 Acres of Land, seemed to require findings of fact to support its reference:

... the statements of the trial court indicate that it considered the large number of rental units and the variety of other improvements made the valuation of these leaseholds a complex problem, because, as he said, "you have several million dollars worth of property with several hundred houses of different types and character, you have different rentals, you have a town in itself." However, the court did not make any finding of fact as a basis for his conclusion that either the character, location, or quantity or for any other reason "in the interest of justice" this condemnation proceeding should fall in the exceptional class to be taken from a jury.

The Theimer overtones of the holding are emphasized by the court’s concluding paragraph on the point:

63. Id. at 859 (footnotes omitted).
64. 275 F.2d 38 (6th Cir. 1960).
66. Id. at 407.
67. Id. at 408.
Since the issue of value of this single tract of land is easily manageable by presentation of testimony of cost, opinion evidence of what is a fair rate of return on factually provable net income, and combined factual and opinion evidence as to comparable sales, if any, this is not such a case as warranted submission to a commission under Rule 71A(h). United States v. Theimer. . . . 68

Thus, the first, Theimer, and the last, Leavell & Ponder, major decisions which have come form the courts of appeal on the question of under what circumstances a district judge may decide that the question of just compensation shall be determined by a commission speak in restrictive terms of the necessity of "extraordinary" and "exceptional" circumstances, while the intervening cases indicate a liberal approach placing wide discretion in the district judge. Furthermore, the decisions of the courts of appeals are in direct conflict on two important aspects of the reference question: whether the district judge must issue findings of fact to support his reference and whether reference is a matter for immediate or only final review.

The district courts themselves have added little in the way of original discussions; only a few merit mention. In United States v. 2,792.82 Acres of Land 69 the district court, in granting the landowners motion for appointment of a commission, took note of the "extraordinary" view advanced by the Government in opposition to the motion:

A complete history of the Rule, including the matters considered by the Advisory Committee in its report to the Supreme Court recommending the Rule's adoption and those considered by the Court itself, is set forth in an annotation to the Rule in 28 U.S.C.A. This record reveals that there were two schools of thought on the subject. One group felt that all such cases should be tried to a jury when either party demanded it, whereas the other group felt that there would, at times, be circumstances and conditions under which it would be more advisable and equitable for a determination of the issue of just compensation to be made by a Commission. However, neither the Advisory Committee nor the Supreme Court believed that the exact circumstances and conditions under which a case should be referred could be spelled out, due to endless variations in them. Accordingly, in an effort to have a rule flexible enough to meet all situations, Rule 71A(h) was

68. Id. at 409.
adopted, leaving the matter of reference to a Commission up to the District Court.

It seems that this Rule, in the light of the history of its adoption, means exactly what it says—there shall be a jury trial on demand, unless, in the discretion of the Court, because of the character, location or quantity of the property to be condemned, or for other reasons in the interest of justice, the issue of just compensation should be determined by a commission.70

The district court then distinguished Theimer and quoted with approval Waymire.71

In United States v. 1,146.32 Acres of Land,72 which was affirmed sub nom Buhler, the district judge took a Theimer type approach by stating:

Where demand for trial by jury is seasonably made its denial would be error unless exceptional and extraordinary circumstances or conditions exists with respect to character, location, or quantity of the property condemned or for other reasons in the interest of justice, the court may in its discretion appoint

70. Id. at 77-78.
71. The plaintiff's attorney leans very heavily on U.S. v. Theimer, 10 Cir., 199 but that case, on its facts, does not support plaintiff's contention. In the Theimer case the government condemned only three tracts of land, one tract containing seventy-one acres, another twelve acres and a third only one acre, of approximately a thousand or more tracts as in the instant situation. In the Theimer case, 199 F.2d at pages 503, 504, the Court stated its conclusion in the following language:

language:

... that the parties to a condemnation proceeding are ordinarily entitled to a jury under Rule 71A(h) as a matter of right and that where demand is made for the same the judge must grant a jury trial, unless under the facts as they appear in the case because of the character, location, or quantity of the property to be condemned, or for other reasons revealed by the facts of the case, the interest of justice warrants the submission of question of value and compensation to a commission.

The plaintiff, in opposing the motion, also relies on U.S. v. Wallace, 10 Cir., 201 F.2d 65, and U.S. v. Waymire, 10 Cir. 202 F.2d 550; but these cases add no weight to the contention. What was held in them is summarized in the following language of the Court, 202 F.2d at page 552, in the Waymire case:

... But in the exceptional case where extraordinary circumstances or conditions exist with respect to the character, location, or quantity of the property to be condemned, or for other reason in the interest of justice, the court may in its discretion appoint a commission to determine the issue of just compensation. United States v. Wallace, 10 Cir., 201 F.2d 65.7

Applying the principle announced in the cited cases to the facts and circumstances of the instant case, the conclusion seems inevitable that good cause has been shown justifying reference to a competent commission the issue of just compensation for hearing and determination.

Id. at 78.
a commission to determine the issue of just compensation.\textsuperscript{73} The district judge held that the quantity (1,471 acres) and the distance from the federal court house, five or six miles, were not extraordinary but granted reference to a commission on the basis that the character of the land (an abandoned air force base) was extraordinary. The district judge stated:

It is my opinion that the distance from court, whether it be 5 miles, 80 miles, or 150 miles, is not, by itself, an impelling, extraordinary, or exceptional circumstance or condition in this age of good roads and good automobiles. It is my further opinion that the other exceptional and extraordinary circumstances or conditions of the case at hand are more impelling than those of the Wallace case where the land had a value for hunting and fishing and the Waymire case where the land was avried in kind, character and adaptability.\textsuperscript{74}

The district judge distinguished \textit{Theimer} \text"\ldots in that a cause of reversal in the \textit{Theimer} case was that the motion for the appointment of a commission did not set out any extraordinary facts or circumstances.\ldots\text"\textsuperscript{75} The judge concluded somewhat equivocally: "[i]n the case at hand the defendants' verified motion states specific reasons for the invocation of the rule for the appointment of commissioners and such reasons are deemed to be extraordinary or exceptional circumstances or conditions contemplated by the rule.\textsuperscript{76}

In \textit{United States v. 1,584,11 Acres of Land},\textsuperscript{77} the district judge stated:

It seems to me that the rule clearly intends that where there are uncomplicated conditions to be considered in determining just compensation, trial by jury must be granted if demanded by either of the parties, but that in exceptional cases where unusual circumstances or conditions exist with respect to the character, location or quantity of the property to be condemned or where for other reasons the interest of justice would better be served the Court may exercise its discretion in the appointment of a commission to determine the issue of just compensation.\textsuperscript{78}

\textit{United States v. 4.43 Acres of Land},\textsuperscript{79} is noteworthy as one of the

\textsuperscript{73} Id. at 682.  
\textsuperscript{74} Id. at 683.  
\textsuperscript{75} Id.  
\textsuperscript{76} Id.  
\textsuperscript{78} Id. at 721.  
\textsuperscript{79} 137 F. Supp. 567 (N.D. Tex. 1956).
few cases of record in which the Government asked for the appointment of a commission. It also contains a liberal statement as to grounds for reference to a commission:

Rule 71A(h) does in fact invest the Court with broad discretion in determining whether or not a given condemnation proceeding should be referred to a commission, and the cases above referred to, while clearly holding that the Court's discretion is not an unlimited one, certainly do not impose any very rigid restrictions upon the Court's actions. Nor can there be any doubt that the Supreme Court's Advisory Committee in drafting Rule 71A(h) intended that it should be a practical instrument to aid the Court in the performance of its duties, for the rule is couched in exceedingly general terms. In truth, it would lose much of its utility if such were not the case. 80

A good explanation of reference to a commission based on an analysis of the facts of the condemnations before the court was made in United States v. 186.82 Acres of Land. 81

[i]n these small properties it seems essential that uniformity in awards is most desirable. I think the members of this court have found that we have better uniformity under the commission system than are [sic] found with juries. Notoriously, jury trials in many instances, not only in negligence cases but also in land cases, result in verdicts, one of which has little relation to any other verdict. . . . These are certainly small land owners. Each of the owners would be entitled to a separate jury trial as to his property if the issue of just compensation were to be decided by a jury. Kinzua is 80 miles east of the Federal Court House at Erie. In land cases the witness, other than an owner, who testifies as to value must qualify as an expert. It seems to me that the constitutional guaranty of just compensation to a land owner in a condemnation case is simply an empty phrase where a land owner is required to travel 80 miles to the Court House with his expert witness and counsel to try a case involving a parcel of land valued at $4,000.00, let alone of $150.00. As in the TVA condemnations, it is impractical to take a jury from Erie to Kinzua in each trial involving a separate owner and a separate parcel of land. . . . A practical solution of the problem of fairness and uniformity would be for the commissioners to meet in the village of Kinzua.

80. Id. at 571.
to take testimony and to examine and view the land with the 
building and other appurtenances thereon. By that method a 
property owner could no doubt secure a satisfactory settlement 
of his just compensation with a minimum expense to himself 
and to the government. I take but very little stock in the 
government's argument that the appointment of a commission 
tends to create delay. I believe the contrary to be the case. 
Further, there is no evidence whatsoever that the members of 
the commission would be biased. That is simply an argument 
without substance. It can be pointed out that if jury trials were 
held, some of the jurors would no doubt come from the same 
area. This court believes that members of the commission will 
act impartially and in accordance with their sworn duty.

It is to be observed that this court has now, after many 
years, reached a current status in the trial of civil actions. The 
burden of jury trials of all of these land condemnations certainly 
would tend to again create a backlog in the court's docket. The 
Clerk has informed the court that some 493 condemnations 
have been filed in this court since 1952. By the use of the 
commissions, the court has been able to terminate these cases 
with but a handful of appeals and this particular Judge believes 
that these terminations have been satisfactorily concluded to all 
concerned.

What has been said here certainly comes under the 
authority in the rule, "for other reasons in the interest of 
justice." (Emphasis supplied). It is my view that the interest 
of justice not only permits but requires that commissioners 
hear these cases.82

In United States v. Certain Interests in Property,83 the district 
court judge denied a landowner's motion for reference to a commission 
of the taking of a single tract of land. The principal point of the land-
owner was the complexity that would confront a jury in valuing a 
leasehold and figuring replacement costs. The judge stated:

[I]t is true that in some cases the reference to commis-
ioners has been based primarily upon the fact that technical 
and complex testimony would be required to establish just com-
pensation. Other cases have held that this factor alone is not

82. Id. at 397-98. Query the reference to "sworn duty of commissioners." No standard "oath of office" or its equivalent for commissioners has been noted by the writer.

sufficient to warrant submission of the issue of just compensation to commissioners.

Admittedly this is a close case. Balancing all of the factors involved in determining whether there are exceptional circumstances which would justify reference of the issue of just compensation to commissioners, it is my opinion that the technical nature of the testimony and complexity of the factors underlying a determination of value are not sufficient in themselves to warrant reference to commissioners, particularly in view of the fact that there is but one condemnee, the proximity of the property to the place of trial, and the limited nature and use of the facilities.\textsuperscript{84}

The judge relied upon and quoted from \textit{United States v. 4.16 Acres of Land}\textsuperscript{85} in which the judge refused to refer the taking of nearly identical land and improvements and stated:

\ldots to entertain doubts about a jury's ability to understand and apply in a fair manner the testimony of technical experts is to tacitly admit that the jury system is effective only in the most simple cases. This Court is committed to a different policy. Furthermore, the location of the proposed substitute facilities is not so remote as to render unfeasible and impractical attempts to familiarize the jury with the area. While it might well be that a commission could arrive at its determination with more ease and celerity, there is nothing to indicate that such a determination would be more fair and reasonable than that which might be rendered by a jury in the case. In view of the foregoing considerations, it is the opinion of the Court that the motion for referral to a commission should be denied.\textsuperscript{86}

As previously noted, the district court opinions add little in the way of clear, general pronouncements as to when reference may be made to a commission. The opinions do, however, give valuable insights into the practical considerations upon which the decisions as to commission reference have turned. The characteristics of the land in question stressed by the district court judges as justifying reference include: the tract was an integral part of a larger unit,\textsuperscript{87} the tract taken was a source of water supply for a larger tract,\textsuperscript{88} an outstanding leasehold complicated the

\textsuperscript{84} \textit{Id.} at 527-28.
\textsuperscript{85} \textit{20 F.R.D.} 89 (N.D. Cal. 1957).
\textsuperscript{86} \textit{Id.} at 90-91.
\textsuperscript{87} \textit{United States v. 2792.82 Acres of Land}, 114 F. Supp. 76 (E.D.S.C. 1953).
\textsuperscript{88} \textit{Id.}
award of damages,\(^8\) a long delay would be necessitated by a jury trial,\(^9\) commission hearings cost less than jury trials,\(^1\) a large number of ownerships were involved,\(^2\) a large quantity was being taken,\(^3\) mineral deposits were present,\(^4\) the landowners, jury, and witness would need to travel long distances,\(^5\) the factors relating to valuation were complex,\(^6\) a uniformity of awards was desirable,\(^7\) some tracts were of such small value that the cost of trial other than by commission would deprive them of the fruits of a successful result,\(^8\) and too much of the court's time would be consumed to be fair to other litigants.\(^9\)

The cases already discussed show that the courts of appeals have approved reference to commissions in cases in which the "reasons" stated by the district judges included: distance from the federal court,\(^1\) unusual nature of land (hunting and fishing purposes,\(^2\) great variety of type,\(^3\) largeness of tract,\(^4\) development of potential,\(^5\) recent

\(^{89}\) Id.
\(^{92}\) This court has had many years' experience in the trial of eminent domain cases, and is convinced that in projects such as the Dardanelle Dam and Reservoir Project, commissioners should be appointed "in the interest of justice," and the facts set forth in the various orders . . . in this project demand that the court in the exercise of its discretion, appoint Commissioners.


\(^{99}\) Id.

\(^{100}\) United States v. Cunningham, 246 F.2d 330 (4th Cir. 1957); United States v. Chamberlain Wholesale Grocery Co., 226 F.2d 492 (8th Cir. 1955); United States v. Waymire, 202 F.2d 550 (10th Cir. 1953); United States v. Wallace, 201 F.2d 65 (10th Cir. 1952).

\(^{101}\) United States v. Cunningham, 246 F.2d 330 (4th Cir. 1957); United States v. Chamberlain Wholesale Grocery Co., 226 F.2d 492 (8th Cir. 1955); United States v. Waymire, 202 F.2d 550 (10th Cir. 1953).

\(^{102}\) Hall v. United States, 274 F.2d 856 (10th Cir. 1959); United States v. Cunningham, 246 F.2d 330 (4th Cir. 1957); United States v. Chamberlain Wholesale Grocery Co., 226 F.2d 492 (8th Cir. 1955); United States v. Waymire, 202 F.2d 550 (10th Cir. 1953).

\(^{103}\) United States v. Cunningham, 246 F.2d 330 (4th Cir. 1957); United States v.
discovery of minerals), difficult severance damage problems, complexity of estates taken, calendar congestion, complexity of issues involved need otherwise for numerous jury trials, desirability of uniformity of awards, and large number of tracts.

In the questionnaire, the federal district judges were asked, "[w]hat factors influenced you in deciding to appoint a commission?" The answers rather closely paralleled those reasons found in the cases but there was special emphasis on the practical considerations of saving time and money for the courts and the litigants:

Judge I: "The parties were far apart in their valuations and I am certainly no expert in land values and certainly not on values... (in a remote area in the district).

Judge III: "The commissioners are specialists in their field."

Judge IV: "Remoteness of ownerships, size of tracts, number of tracts within a given area, desire for uniformity of treatment within a given area, and overall case load within a division or district."

Judge V: "Large caseload with insufficient judicial man-

Waymire, 202 F.2d 550 (10th Cir. 1953).
105. Id.
107. Hall v. United States, 274 F.2d 856 (10th Cir. 1959); United States v. Buhler, 254 F.2d 876 (5th Cir. 1958).
108. Hall v. United States, 274 F.2d 856 (10th Cir. 1959). The court stated that court congestion alone is not sufficient reason for appointment of a 71A(h) land commission. The court cited as authority cases so holding in connection with reference to a master under Rule 53(b). Since commission determination and reference to a master have obvious similarities, it is understandable for the courts to look to cases concerning masters on authority for questions that arise as to commissions. There are, however, serious differences between the two institutions and the equation of the two by Hall, supra, on the instant matter seems both unfortunate and unsupported. One of the prime reasons advanced for commission determination of just compensation since its origin under TVA has been the burden placed upon court calendars by the myriad ownerships involved in large condemnation projects. See Supplementary Report supra note 8. Furthermore, as far as drawing an analogy to reference to a master is concerned, Rule 53(b) deals with reasons for reference to a master and Rule 71A(h) incorporated only Rule 53(c) and 53(d) (1) and (2).
Thus, there seems to be no basis for believing that court congestion alone could not in some instances be sufficient reason for reference to a commission. After all, Rule 71A(h) speaks in terms of other interests of justice and the court congestion resulting from a large condemnation project can easily so delay the causes of the condemnees or other litigants that justice delayed will equal justice denied.
109. Id.
power requires Commissions though convenience of parties, shorter trials, more accurate, uniform and intelligent awards, are also factors; also this system affords country lawyers greater opportunity to represent clients in home counties."

Judge VI: Enclosed his order appointing commissioners in which he gave the following reasons for appointment of commissioners: (a) large number of widely scattered tracts, (b) land 250 miles from federal court and therefore difficult to transport witnesses and give triers of the fact a first hand view.

Judge IX: "It seemed best under those circumstances (land in two states) to have a commission so that the landowners would receive more equal treatment than might come from the trial of separate actions in each state."

Judge X: "... (because of) the large number of small lots involved."

Judge XII: "... those factors set out in Rule 71A(h) Fed. R. Civ. P., i.e., large takings involving many tracts of various sizes including flowage easements."

Judge XIV: "We believe it (a Commission) will be less expensive, both for the government and the property owners."

In view of the factors which the decisions and questionnaire answers reveal, it is submitted that, in spite of vague pronouncements about extraordinary and exceptional circumstances, the practice which is followed by the district courts (with the blessing of the courts of appeals) and which should be followed is for the district judges to make reference to a commission in any case in which they believe there is reason for preferring that method to a jury trial or a determination by the court. The error of the district court reviewed in Theimer, therefore, becomes one of not having expressed its reason(s) rather than having acted improperly and Leavell & Ponder is, in this view, an unfortunate extension of Theimer because it requires not only a statement of reasons but also findings of fact to support them. The decision in 2,477.79 Acres is, of course, contrary to this proposition and any precedent setting effect of Leavell & Ponder is considerably weakened by the court's confusing statement that "... we would not consider it necessary to reverse the judgment solely because of the submission of

113. "Fortunately, the trend of decisions appears to favor granting the trial courts the right to appoint commissioners whenever in their opinion this procedure will result in fairer and more accurate awards." Paul, Condemnation Procedure Under Rule 71A, 43 IOWA L. REV. 231, 235 (1958).
this case to commissioners..."

As far the intent of the Advisory Committee is concerned, Theimer and Chamberlain show that its reports may be quoted to support either strict or liberal views of the discretion given district judges. Since the Rule, as it now stands, is more a designation of the district court as the forum for the decision than a resolution of the problem of how just compensation is to be determined, the theory behind the rule necessitates wide discretion in the district court.

In conclusion, it is submitted that the sole condition for reference to a commission imposed on a district judge by subdivision (h) is that he must have a reason, as opposed to a mere whim or caprice, for choosing determination by commission. To hold otherwise relegates to virtual meaninglessness the "or for other reasons in the interest of justice" provision of the rule. Thus the fact that the district judge in the exercise of his discretion believes the commission system is a better, or equally good but more rapid, vehicle than trial by the court or a jury to determine just compensation should be enough to allow him to refer that question to a 71A(h) commission. It is conceded that there is no case so holding, but

115. Expeditious handling of condemnation cases and the orderly movement of other court business are presented as secondary considerations which have been taken into account in explaining the other reasons in the interest of justice. In this form the judges have found the character and quantity of the subject matter to be of such nature that the interests of justice required that they grant the motion for the appointment of commissioners. By so doing they have relegated this general clause to the role of a makeweight and deprived it of its value as a practical tool.

The result is that some courts have taken an approach that conceals the real administrative reasons for the referral under Rule 71A(h) behind a mocking obedience to U.S. v. Theimer.

The present state of the law has developed from dicta in U.S. v. Theimer which apparently required that the other reasons must be revealed by the facts of the case and, by implication, that they must be effective primarily as to the parties to the condemnation action and cannot be drawn from facts extrinsic to the land being taken. The motion in U.S. v. Theimer was defective without reference to this standard, however, since it failed to state any facts whatever. Counsel merely set forth the mover's desire to expedite his hearing as the interest of justice. Nothing in the test of Rule 71A(h) requires this qualification. Its sole basis lies in the various reports and arguments before the Advisory Committee, which contend that, 'Commission trial is intended only in situations roughly comparable to that of the TVA.' While the excellent results of the T.V.A. Act are helpful in understanding the background of this rule, this is a standard born of a compromise which could become a false barrier to growth, if the courts were prevented from extending the commission to a variety of situations where efficient administration is prerequisite to the interest of justice.

it is unlikely that there ever will be one since the lesson of *Theimer* is to recite all of the factors relating to "character, location, or quantity of the property to be condemned" which support commission appointment. The common law has so long been persuaded of the uniqueness of each parcel of realty that the case which would not allow the district judge to embellish and justify his preference for a commission would be rare indeed.

**Qualifications of Commissioners and Their Compensation**

Subdivision (h) gives no guideline whatsoever as to the qualifications which the three commissioners must possess or which should guide the district court in their selection. Only two cases seem to contain more than passing or meaninglessly general reference to the matter.

In the *Wallace* case, the Tenth Circuit Court of Appeals was confronted with an appeal from the findings of a commission that had been appointed in accordance with state procedure and then reappointed when Rule 71A became effective. The majority held that, although it was improper for the district court to have appointed as commissioners persons who had previously viewed the land in question and expressed an opinion as to its value, the Government had waived its right to object. Judge Pickett dissented on the ground that reference to a commission was improper and stated as follows with respect to qualifications of commissioners:

"[C]are should be used to select commissioners who have at least the qualifications of the ordinary juryman free from any interest, opinion or prejudice, and in most cases it would appear to be advisable to have at least one who has had some training in the law of evidence."

The other case, *United States v. Lewis*, deals with the most obvious qualification—lack of bias. In one of the appeals before the court in that case, the Government urged as error the refusal of two commissioners to disqualify themselves as requested by the Government. The basis urged for disqualification was that the two commissioners, both lawyers, had used the landowner's expert witnesses in the course of their practice. The Ninth Circuit took a broad view of the discretionary powers of the district court in dealing with questions of bias and stated:

117. *Id.* at 67.
118. *Id.* at 68.
119. 308 F.2d 453 (10th Cir. 1962).
these facts of prior association would not as a matter of law constitute implied bias either in the case of a judge or a juror. Nor can it be said that actual bias has been demonstrated beyond reasonable possibility of disagreement. Disqualification was not then called for as a matter of law; nor can it be said that any factual finding other than that actual bias existed was clearly erroneous.

The question would seem to relate to an exercise of discretion. Certainly, a rational presumption against bias is far less strong in the case of an ad hoc master than in the case of a judge under tenure; and a district judge, viewing the work of the commission he had appointed, should have the discretionary power to reform his commission where doubt exists as to whether its judgment has been affected by bias.

Yet there are very real practical problems involved in situations such as this. Those qualified to act as valuation commissioners in a particular area are likely to have had prior association with those qualified to act as expert witnesses from that area. A balancing of all considerations and probabilities should be the function of the district court and, in review of its action, the test should be whether abuse appears.

Here, among other relevant considerations, it appears that the witnesses were employed before it was known who were to serve as commissioners. It was not until the hearing that the possibility of conflict appeared. The district court clearly was satisfied with the assurance of lack of bias as given by the commissioners involved. Under the circumstances, we find no abuse of discretion in the failure of the district court to remand the matter for hearing before other commissioners.120

Only through incidental statements do the cases reveal the qualifications used by the district court judges in selection of commissioners. From a standpoint of professions, the Lewis121 case reveals that two members of the Commission under review were lawyers, the Bobinski122 case refers to a commission of which two members were lawyers and the third a real estate man, and Morgan v. United States123 refers to the chairman of the commission as a lawyer. The commission in United States

120. Id. at 457. An early decision asserted the power of the district judge to appoint a nonresident of the district as a commissioner on the basis that the rule contains no limitation as to residence. United States v. 3,928.09 Acres of Land, 12 F.R.D. 127 (W.D.S.C. 1951).
121. 308 F.2d 453 (10th Cir. 1962).
122. United States v. Bobinski, 244 F.2d 299 (2d Cir. 1957).
123. 356 F.2d 17 (8th Cir. 1966).
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v. 44.00 Acres of Land\textsuperscript{124} consisted of two lawyers and an insurance broker and in \textit{Chandler v. United States}\textsuperscript{125} two of the three members were "well qualified lawyers" (the chairman had had many years of trial experience) and the third member was a real estate broker.

The questionnaire also revealed a strong preference for lawyers. The judges were asked: "What was the profession or occupation of the commissioners you appointed? Did any of those not identified as lawyers have legal training?" The replies follow:

Judge I: "No lawyers. Don't remember what the others—probably small town business men."
Judge II: "Two lawyers and some real estate appraisers depending on number of commissions."
Judge III: "Realtors, land owners, building contractors."
Judge VI: "In last commission, one member was a lawyer, the second a real estate broker who has served as state senator and member of State Board of Equalization, and the third a rancher, who had served as an officer of a national rancher's association and a corporate director."
Judge V: "In most cases all members of a Commission are lawyers, never more than one layman. No legal training required of a layman, usually they have had experience in real estate operations and public affairs."
Judge IV: "Each Commission had a lawyer chairman and two businessmen of broad experience in dealing with people and properties of the types to be encountered within the affected areas."
Judge IX: "A real estate man, a lawyer and a landowner."
Judge X: "Attorneys at law."
Judge XII: "Chairman: Retired State District Judge with many years of judicial experience. Member: Realtor. Member: Farmer with extensive farming experience."

The commission of which the writer was a member contained, in addition to himself, a practicing attorney as chairman and a retired banker as the other member.

Thus the majority of the courts seem to feel that at least the chairman of the Commission should be a lawyer or ex-judge familiar with the relevant rules of evidence and most courts seem to prefer that at least one other member of the Commission have legal training.\textsuperscript{126} It seems, and

\textsuperscript{124} 234 F.2d 410 (2d Cir. 1956).
\textsuperscript{125} 372 F.2d 276 (10th Cir. 1967).
\textsuperscript{126} The court, in the selection of a capable trial lawyer with some background in condemnation law as Chairman of the commission, can
quite naturally so, that real estate men are the next most popular category.

The allegedly high expense of compensating commissioners is one of the grounds frequently used by the Government to oppose the use of commissioners. The cases are virtually silent on the compensation awarded by the district courts and the guidelines to be used. In *United States v. 44.00 Acres of Land,*\(^7\) the Second Circuit Court of Appeals had before it an appeal from the commissioners as to the compensation awarded them by the district court judge who had awarded the chairman 4,000 dollars and each commissioner, 3,500 dollars. The Court of Appeals noted that the commission spent thirty-eight days hearing testimony, spent considerable time examining the 4,055 page record and 113 exhibits, spent twenty-five days conferring and preparing their report, and spent two weeks preparing detailed findings of fact and conclusions of law at the request of the district court. The Court of Appeals nearly tripled the district court's award by awarding each commissioner 10,000 dollars and the chairman his expenses in addition thereto.\(^8\) Chief Judge Clark concurred as to the award of compensation to the commissioners and used the occasion to approve the Theimer view:

> I agree that the amounts awarded the commissioners by the district judge were quite low for professional services and that we ought not to penalize the commissioners because their erroneous conception of governing principles robbed their work of much of its effectiveness—. . . . But having in mind the range of discretion vested in the judge and the amounts payable in comparable cases in New York and in the T.V.A. condemnations, I think a doubling of the awards made below would have been quite generous. I fear that so substantial a cost of proceedings so considerably abortive will prejudice the future use of the often convenient state practice of valuation by commissioners in governmental taking of private property. For under F.R. 71A(h) either party may claim trial by jury, and the judge has only a very limited power (which he will

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\(^8\) The district judge had “allowed a total of $11,000 as compensation.” *Id.* at 416.
naturally be hesitant to exercise) to override such claim.\textsuperscript{129}

Regretfully the judges were not asked directly what compensation they have allowed to commissions. Two examples were, however, called to the writer's attention. In one instance the judge awarded the commission chairman a per diem of 100 dollars and the commission members a sixty dollar per diem. In the other, the three commissioners were each awarded fifty dollars per day, a per diem of twelve dollars for subsistence, and ten cents per mile for traveling.\textsuperscript{130}

Although it is impossible to get a clear picture of even the range of per diem compensation, there is no indication in the cases or the Government statistics that district courts are being overly generous in terms of accepted compensation for professional services. In fact, no per diem mentioned exceeds the normal two hour charge made by most experienced lawyers for their services and most per diems were less than what an experienced lawyer would charge for one hour of his time. From the standpoint of many commissioners, at least, the compensation is far from adequate to equalize the time lost from their own business activity.

\textit{Powers and Duties of Commissioners}

In addition to giving commissions the power to determine the issue of compensation, subdivision (h) provides that the commission "shall have the powers of a master provided in subdivision (c) of Rule 53 and proceedings before it shall be governed by the provisions of paragraphs (1) and (2) of subdivision (d) of Rule 53." Subdivision (c) of Rule 53 confers powers upon a master in the following terms:

(c) Powers. The order of reference to the master may specify or limit his powers and may direct him to report only upon particular issues or to do or perform particular acts or to receive and report evidence only and may fix the time and place for beginning and closing the hearings and for the filing of the master's report. Subject to the specifications and limita-

\textsuperscript{129} \textit{Id.} at 416-17 (concurring opinion).
\textsuperscript{130} The Department of Justice presented figures for the 1959 fiscal year to a congressional subcommittee showing 180,138 dollars to have been paid to commissioners that year. It is impossible to ascertain from the presentation any concept of what this figure means of a daily, tract, or acreage basis because the table is broken down only into district, title of case, name of commissioner, amount authorized, and appointing judge. The following dialogue occurred at the hearing in question:

\begin{itemize}
  \item Mr. Bow. How many cases have had commissioners appointed in the past year?
  \item Mr. Morton. I do not have that figure here. It is a substantial number.
  \item Mr. Bow. Can you submit it for the record for a period of the last 5 years?
  \item Mr. Morton. That would involve quite a task force problem.
  \item Mr. Andretta. We can get the money involved but not the number of cases.
\end{itemize}

\textit{Hearings on Department of Justice Appropriations for 1960, Before the House Subcommittee of the Committee on Appropriations, 86th Cong., 2d Sess. 159 (1961).}
tions stated in the order, the master has and shall exercise the power to regulate all proceedings in every hearing before him and to do all acts and take all measures necessary or proper for the efficient performance of his duties under the order. He may require the production before him of evidence upon all matters embraced in the reference, including the production of all books, papers, vouchers, documents, and writings applicable thereto. He may rule upon the admissibility of evidence unless otherwise directed by the order of reference and has the authority to put witnesses on oath and may himself examine them and may call the parties to the action and examine them upon oath. When a party so requests, the master shall make a record of the evidence offered and excluded in the same manner and subject to the same limitations as provided in Rule 43 (c) for a court sitting without a jury.\textsuperscript{131}

The first sentence of subdivision (c) has only a limited application to commissions due to the fact that the only issue which may be submitted to them is that of just compensation. As a result, subdivision (c) says little that is relevant to commissions except that they shall have all powers necessary to carry out their duty. The subdivision also makes it clear that the "order of reference" by the court is to be the organic document of the commission. The general practice which has developed under 71(h) is for the court to issue instructions to the commission separate from the order of reference.

Since its promulgation in 1937, a body of case law has developed around subdivision (c) of Rule 53.\textsuperscript{132} Cases considering its applicability to 71A(h) commissions are quite rare, however. Except for general references to the applicability of portions of the rule to commissions, United States v. 3,065.94 Acres of Land\textsuperscript{133} is one of the few 71A(h) cases making reference to subdivision (c) of Rule 53. The district court held that, under the last sentence of 53(c) and the language to which it refers in 43(c), a 71A(h) commission has the duty, when a party so requests, to make a record of evidence offered and excluded.

Cases relating to powers and duties of the commission other than those given it through reference to portions of Rule 53 are also rare. United States v. Certain Land Situated in Ripley,\textsuperscript{134} discusses briefly the power of a commission to view the premises and concludes that the intent of the Advisory Committee was that the commission should have

\textsuperscript{131} Fed. R. Civ. P. 53(c).
\textsuperscript{132} Moore \textsuperscript{[53.01][1], at 2905; \textsuperscript{[53.02][6], at 2914; \textsuperscript{[53.06, at 2949.}
\textsuperscript{133} 187 F. Supp. 728 (S.D. Cal. 1960).
\textsuperscript{134} 109 F. Supp. 618 (E.D. Mo. 1952).
this power. The case also holds that a view is to be accorded the dignity of testimony in the record.

In view of the paucity of case authority and the non-specificity of 71A(h) and the portions of Rule 53 which it incorporates, it is clear that a commission is largely dependent upon the instructions by the court which, although not specifically mentioned in either Rule 71A(h) or the relevant portions of Rule 53, have their authorization as part of the order of reference referred to in subdivision (c) of Rule 53. In the earlier cases, no particular form of instructions seems to have been followed and the cases vary from no instructions at all to detailed explanations of the law of evidence and eminent domain.\textsuperscript{135}

Fittingly, the only United States Supreme Court decision dealing directly with subdivision (h), \textit{United States v. Merz,}\textsuperscript{136} considered the matter of court instructions. In one of the cases before the Court in \textit{Merz} there was no record of instructions by the district court; in the other, detailed instructions had been given. The Court in commenting on the instructions given in the cases before it laid down a rule which required detailed instructions:

\begin{quote}
[T]he first responsibility of the District Court, apart from the selection of responsible commissioners, is careful instruction of them on the law. That was done in one of the present cases. But the instructions should explain with some particularity the qualifications of expert witnesses, the weight to be given other opinion evidence, competent evidence of value, the best evidence of value, illustrative examples of severance damages, and the like. The commissioners should be instructed as to the manner of the hearing and the method of conducting it, of the right to view the property, and of the limited purpose of viewing. They should be instructed on the kind of evidence that is inadmissible and the manner of ruling on it.

The commissioners should also be instructed as to the kind of report to be filed.\textsuperscript{137}
\end{quote}

In spite of the detailed instructions apparently required by \textit{Merz}, there would still seem to be some leeway left to the district judge, so that the qualifications of the commissioners and the complexity of the issues could guide him in determining the appropriate degree of specificity.

\textsuperscript{135} See Chandler v. United States, 372 F.2d 276 (10th Cir. 1967); Morgan v. United States, 356 F.2d 17 (8th Cir. 1966); Morgan v. United States, 356 F.2d 17 (8th Cir. 1966); United States v. Easement and Right, 182 F. Supp. 899 (M.D. Tenn. 1960).

\textsuperscript{136} 376 U.S. 192 (1963).

\textsuperscript{137} Id. at 198.
Thus if the commission appointed consists of a retired judge and two experienced condemnation attorneys, detailed instructions on the law of evidence and condemnation would seem to serve little purpose. Since \textit{Mers} is written on the incorrect assumption that most commissioners are ordinarily laymen, it is submitted that it does not cover the instructions necessary for a commission whose members are already well versed in the law of condemnation.

In fact in \textit{Chandler v. United States},\textsuperscript{138} the Tenth Circuit went so far as to hold that the procedural requirements of \textit{Mers} were met in a case in which no instructions were given to the commission. Actually the appointment, hearings, and filing of the report under consideration in that case had occurred prior to \textit{Mers}, but the Court of Appeals applied the \textit{Mers} requirements. In so doing, the court stated:

\begin{quote}
[u]nder Merz, the commission should be instructed as to the conduct of the hearing, the right to view the property and the limited purpose of the view, the admissibility of evidence, the use of expert witnesses and the weight to be given to such testimony, the rules governing evidence as to value of the property, severance damages and the kind of a report to prepare and file. The commission here was appointed on the motion of appellants and they made no request for the court to give the commission instructions and none were given. In the light of the Merz opinion the composition of the commission seems to be of some importance. Two of the three members of the commission were well qualified lawyers, one of the lawyers, a man with many years of trial experience, was chairman of the commission. The third member was a real estate broker. A court reporter was in attendance upon the commission and a record was made of all its proceedings. The record shows the hearing was conducted in an orderly judicial fashion, objections to evidence were intelligently and correctly ruled upon, each side was given an opportunity to fully present its side of the case, and viewing the entire proceeding with critical judicial eyes, we are unable to find any prejudicial errors. Although no instructions were given to the commission, we believe the conduct of the hearing meets all of the procedural requirements of Merz.\textsuperscript{139}
\end{quote}

The risk of underinstructing the commission is hardly worth taking, however, and the practice which seems to have developed is to follow

\textsuperscript{138} 372 F.2d 276 (10th Cir. 1967).
\textsuperscript{139} Id. at 279.
rather closely the detailed suggestions given by Justice Douglas in Merz.\textsuperscript{140}

Subdivision (h)'s only provision for the conduct of proceedings before the commission is the incorporation by reference of paragraphs (1) and (2) of Rule 53(d).\textsuperscript{141} These provisions seem to have caused little trouble in connection with masters, and the courts do not seem to have discussed the workings of these provisions in connection with land commissions.

The apparent lack of land commission cases interpreting or applying 53(d)(1) is somewhat surprising since it contains the admonition that the commissioners are to proceed with all reasonable diligence and gives either party the right to apply to the court for an order to speed up the proceedings. The Government frequently lists long delays as one of the reasons it opposes appointment of commissions. While it is true that the proceedings are not of record, no case was found which indicated that the Government had pursued the course of action given to it by 53(d)(1), as incorporated by 71A(h), to speed up the proceedings. The provision of Rule 53(d)(1) allowing the commission to proceed ex parte if a party fails to appear, although not litigated, is mentioned in at least one case as having been utilized.\textsuperscript{142}

\textit{The Commission's Report}

Subdivision (h) by implication requires that the commission make findings and issue a report. It provides that the commission's "action and report shall be determined by a majority and its finding and report"

\begin{itemize}
  \item \textsuperscript{140} An example of post-Merz instructions believed to satisfy fully the requirements of that case is set forth as Appendix A.
  \item \textsuperscript{141} (1) \textit{Meetings}. When a reference is made, the clerk shall forthwith furnish the master with a copy of the order of reference. Upon receipt thereof unless the order of reference otherwise provides, the master shall forthwith set a time and place for the first meeting of the parties or their attorneys to be held within 20 days after the date of the order of reference and shall notify the parties or their attorneys. It is the duty of the master to proceed with all reasonable diligence. Either party, on notice to the parties and master, may apply to the court for an order requiring the master to speed the proceedings and to make his report. If a party fails to appear at the time and place appointed, the master may proceed ex parte or, in his discretion, adjourn the proceedings to future day, giving notice to the absent party of the adjournment.
  \item \textsuperscript{142} (2) \textit{Witnesses}. The parties may procure the attendance of witnesses before the master by the issuance and service of subpoenas as provided in Rule 45. If without adequate excuse a witness fails to appear or give evidence, he may be punished as for a contempt and be subjected to the consequences, penalties, and remedies provided in Rules 37 and 45.
\end{itemize}

FED. R. CIV. P. 53(d).

shall be treated in accordance with Rule 53(e)(2). While, as discussed above, early litigation over subdivision (h) dealt almost exclusively with reference to a commission, recent litigation indicates a comparable stress on the commission's report.

The early development and confusion culminated in 1964 when the Supreme Court handed down its only decision directly relevant to subdivision (h), *United States v. Merz*, an opinion that deals primarily with the question of commission reports. *Merz* so preempts the field that little need be said about the pre-*Merz* case law.

*United States v. 2872.88 Acres of Land*, one of the cases on appeal in *Merz*, contains an extensive but excellent discussion of the conflicting views of the various circuits at that time. In *2872.88 Acres* the Government based its appeal from the commission's determination on the theory that the reports of the commissioners were in such general and vague terms that it was impossible for the district court or the court of appeals to determine whether or not the commissioners' ultimate conclusions of value were based on legally correct principles or legally sufficient evidence. The content of the commission reports in question are summarized by Chief Judge Tuttle:

In general, the report of the commissioners recited the substance of the valuation testimony given by the several witnesses tendered by the landowners, on the one hand, and by the government on the other, and they made ultimate findings of the market value of the property taken and of severance damages to lands not taken and make certain specific findings as to the value of easements and fences taken, or the cost of fencing the remaining tracts. The reports did not in any manner whatever indicate which evidence the commission credited and which evidence it discredited. The reports gave no indication as to the degree to which it based its findings upon those opinions that were based on knowledge of comparable sales, nor did they give any indication as to whether indicated sales were truly comparable. The reports did not indicate to what extent it gave credence to the opinions of witnesses who, according to the summary of evidence given in the reports themselves, had little or no familiarity with the ordinary ingredients that are generally considered by the courts to be required to support an opinion of value in a condemnation case.

144. 310 F.2d 775 (5th Cir. 1963).
145. Id. at 777.
The court rejected the contention for the validity of a general verdict of value, and reversed and remanded for resubmission to the commission.

The court then discusses the conflicting decisions:

The Courts of Appeals of the several circuits are not of a uniform mind as to this, but we find ourselves fully in accord with the reasoning of the Court of Appeals for the Fourth Circuit in United States v. Cunningham, 4 Cir., 246 F.2d 330, 333, where it is said:

"The very reasons which justify the appointment of the commission, however, demonstrate the inadequacy of the commission's report. The justification of the appointment is the variety and complexity of the matters to be considered on the question of valuation and the importance of having these adequately set forth in a report so that they may be subjected to the scrutiny of the District Court and of this court upon review and the proper principles of valuation applied to them. Any adequate review of the facts or of the legal principles followed in basing valuations on the facts is defeated if a report by the commission is of such a character that it amounts to no more than a general verdict by a jury. The verdict of a jury of twelve men may reasonably be dispensed with if commissioners make a report which furnishes an adequate basis of review by the trial judge and the appellate court, but not if the report furnishes no such basis. Just as a judge in a trial without a jury is required to make adequate findings so that his conclusions may be reviewed by the appellate court so a master, in an action to be tried without a jury, is required to make findings of fact so that his conclusions may be adequately reviewed by the trial judge, who is required to accept them 'unless clearly erroneous' (Rule 53(e)(2)), and this practice with respect to the report of a master is prescribed by Rule 71A(h) with respect to reports of commissioners in condemnation proceedings."

This Court has expressly approved this language of the Fourth Circuit in United States v. 2,477.79 Acres of Land in Bell County, 5 Cir., 259 F.2d 23, where on page 29, we said:
"We find ourselves in agreement with the Government's position that the findings of the commissioners are wholly inadequate and that the judgment must be vacated and the cause remanded for proper findings and a judgment based thereon. From the report, so styled, of the commissioners nothing appears except a recital of their appointment, a statement that a hearing was had, and the commissioners' conclusions as to values. As examples of the deficiencies in the findings it may be noted that nothing is found as to how the commissioners resolved the conflicts in the testimony, no findings appear as to the uses of the land, particularly Tract 805, and no determination is made as to benefits. Without explicit findings the trial court cannot adopt or reject the findings or adopt some and reject others. Without adequate findings this Court does not have before it a record with permits of a review of the district court's adjudication. United States v. Buhler, supra; United States v. Cunningham, 4 Cir., 1957, 246 F.2d 330. [Emphasis added.]

We recognize that the view we take of this matter is at variance with that of the Court of Appeals for the Tenth Circuit as expressed in the decision of that Court in United States v. Merz, 10 Cir., 306 F.2d 39. Our view in this respect is in accord with that of the Court of Appeals for the Ninth Circuit, which has recently reversed judgment of a trial court in California which expressly stated that in a condemnation case, the Commission's finding "may be as general as the verdict of a jury, and have the same effect." In its judgment reversing this decision the Court of Appeals in United States v. Lewis, 9 Cir., 308 F.2d 453, said:

"Upon this basic difference we agree with the principles expressed in Cunningham. The district judge is not sitting as the presiding judge in a jury-tried case, but as a reviewing court. He has not heard the evidence nor supervised its admission and thus is in no position to view the commission's report simply as a jury verdict. If the court is intelligently to perform a function of review, it must be able to ascertain whether, in arriving at its value judgment, error
was committed by the commission, either in the resolution of factual disputes or in the application of principles of valuation. There must be a sufficient disclosure to the reviewing court to enable it to understand what it is that has been decided.\textsuperscript{146}

The Tenth Circuit's \textit{Merz} decision,\textsuperscript{147} expressly rejected by the Fifth Circuit in \textit{2,872.88 Acres} was the other case on appeal in \textit{Merz}.

According to Mr. Justice Douglas, author of the Supreme Court's opinion in \textit{Merz}, the Supreme Court wrote "on a clean slate against a background of contrariety of views among the circuits."\textsuperscript{148} In actuality \textit{Merz} rejects the Ninth Circuit view allowing a "general verdict" and adopts the Fifth Circuit's \textit{2,872.88 Acres} position requiring explanation by the commission as to how it reached its decision. Justice Douglas phrases the requirement for the commission in "follow their path of reasoning" terms:

\begin{quote}
[C]onclusory findings are alone not sufficient, for the commission's findings shall be accepted by the court "unless clearly erroneous"; and conclusory findings as made in these cases are normally not reviewable by that standard, even when the District Court reads the record, for it will have no way of knowing what path the commissioners took through the maze of conflicting evidence. . . . We do not say that every contested issue raised on the record before the commission must be resolved by a separate finding of fact. We do not say that there must be an array of findings of subsidiary facts to demonstrate that the ultimate finding of value is soundly and legally based. The path followed by the commissioners in reaching the amount of the award can, however, be distinctly marked.\textsuperscript{149}
\end{quote}

Many cases have applied the "show their path" standard of \textit{Merz} to commission reports. Generally these courts have merely paraphrased rather than explained the standard. The gist of the cases, at least in the Eighth Circuit in which the question of commission reports has arisen frequently since \textit{Merz}, is to apply the standard liberally in terms of whether the report is fair to all litigants in that it shows what part of their case was accepted or rejected and thereby allows the judge on appeal to determine whether it is "clearly erroneous." A brief statement

\begin{flushleft}
\textsuperscript{146} Id. at 777-79. \\
\textsuperscript{147} 306 F.2d 39 (10th Cir. 1962). \\
\textsuperscript{148} 376 U.S. 192, 200 (1964). \\
\textsuperscript{149} Id. at 198, 199. 
\end{flushleft}
of this position of the Eighth Circuit is found in *Morgan v. United States*.

We, however, read *Merz* as requiring not meticulous compliance with every particular therein mentioned, but as suggesting standards which assure fairness to both condemnor and condemnee and provide safeguards against a commission's natural tendency, when not controlled, to use its own assumed expertise.

The present report referred to a view made only in the presence of opposing counsel. It carefully indicated and outlined the testimony of every witness, per acre valuation, before and after valuations, improvements, use, severance details, exhibits, the presence of detailed crossexamination, procedural motions, an awareness of the distinction between the admissibility and the weight of evidence, flood possibilities and flood protection, obvious lack of enthusiasm for the testimony of the Morgan witnesses, and, except for the 10% upward adjustment attributed to general market increases since the stated sales, an acceptance of the testimony of government witnesses Jackson and Raley. All this constitutes, to our satisfaction, a clear path of appropriate evaluation of evidence presented and not evidence self-assured, a pattern of intelligent weighing of the testimony, an acceptable compliance with procedural requirements, and the rendition of reliable judgment.

Another Eighth Circuit decision, *United States v. Bell*, is of value in this regard because the court found that the commission report there in question did not satisfy the *Merz* standard. The court stated:

In any event, we have carefully reviewed the record in this case and have concluded that the commission's amended report does not meet the requirements of *Merz*. Our doubt centers in (a) the commission's acceptance of one expert's testimony as to before-taking value and its rejection of his testimony as to after-taking value; (b) its acceptance of the testimony of another witness for the after-taking value and its rejection of his testimony for before-taking value; (c) its failure to indicate why these particular partial selections were made and all other testimony disregarded; (d) its unexplained discount of 5% on the before-taking figure it decided to accept; (e) its

150. 356 F.2d 17 (8th Cir. 1966).
151. *Id.* at 23.
152. 363 F.2d 94 (8th Cir. 1966).
conceded use of quotients or averages; and (f) the absence of information as to its recognition and use, if and, of comparable sales, severance aspects, improvements and variations in terrain. All this leaves one ill advised as to the reasons for the award amount and as to the path which the commission followed in arriving at its result. That path and the supporting reasons are essential.153

Thus, the tendency of the courts is merely to describe the reports they consider adequate rather than to develop more definite guidelines for how the commission is to reveal the path it followed.164

**Appellate Review of Commission's Findings**

Rule 53(d) (2), which is incorporated into 71A(h), provides that the findings of the commission are to be accepted by the court unless found to be “clearly erroneous”155 and has given rise to much controversy. According to Merz, if the district court judge finds the commissioner's report clearly erroneous, 53(e) (2) specifies that he may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions.156 As far as the courts of appeals are concerned, there is disagreement as to whether they may review the commission's report or only the district court's decision concerning it.157

In view of the lack of relevance these disputes have on the actual operation of commissions themselves, other than in respect to the already discussed question of the commission's report, the question of appellate review will not be explored in this article.

**Evaluation and Conclusions**

Although no record seems to be available, even for a given year, of the number of tracts, or their acreage, which have been referred to 71A

153. *Id.* at 96.

154. In the view of the generality that this approach engenders, it is hoped that the reader will find of interest Appendixes B, D, and E consisting respectively of a commission report found not to have met the Merz standard, the district court's order referring it back to the commission for that reason, and the court shall accept the master's findings of fact unless clearly erroneous.” *Fed. R. Civ. P.* 53(e) (2).

155. If the use of those guidelines by the District Court leaves it in doubt, there are alternatives. It may 'modify' the report on the basis of the record made before the commissioners, or it 'may reject in whole or in part or may receive further evidence or may recommit it with instructions’—all as provided by Rule 53(e) (2)

156. See, e.g., United States v. 2,872.88 Acres of Land, 310 F.2d 775 (5th Cir. 1962); United States v. Carroll, 304 F.2d 300 (4th Cir. 1962); United States v. Certain Interests in Property, 296 F.2d 264 (4th Cir. 1961); Paiks v. United States, 293 F.2d 482 (5th Cir. 1961).
(h) commissions, the number is definitely quite large and represents a considerable percentage of the federal taking not settled out of the court.\textsuperscript{158} In fact, the number is large enough to cause one disgruntled Department of Justice official to describe the appointment of commissions as an "epidemic."\textsuperscript{159} The frequent appointment of commissions by federal district judges seems sufficient—even without evidence to that effect from the cases and the questionnaire answers—to demonstrate that the district judges strongly favor and are pleased with the 71A(h) commission as the body for the determination of compensation in condemnation cases.\textsuperscript{160}

\begin{itemize}
\item \textsuperscript{158} The questionnaire responses to question 2 were meaningless due to the confusion of counting "cases," "tracts," or "projects."
\item \textsuperscript{159} "Mr. Morton: It took a while for this commissioner idea to get going. I think that all I want to say at this point in the record is that this has become an epidemic."\textit{Hearings on Dept. of Justice Appropriations for 1961, supra note 130.}
\item \textsuperscript{160} I am advised that the Lands Division of the Department of Justice, which handles the bulk of the federal condemnation actions throughout the United States, favors the jury trial and strongly opposes the use of commissioners. It is convinced that a case is delayed instead of expedited by the appointment of commissioners. On the other hand, many district judges who have used the commission method disagree. I have in my files copies of letters from twenty-three district judges who expressed their views during recent congressional consideration of appropriation acts. Twenty-two of those judges favor the use of commissioners in appropriate cases. The data contained in these letters and the conclusions stated therein are interesting. For instance, one judge, speaking of a single project in his district comprising 3,000 tracts, observed that with a small percentage of settlements out of Court, a Judge spending all of his time trying these tracts to a jury would devote approximately ten years of his judicial life to the disposition of cases in just this one project. There would, by necessity, be a long delay in the disposition of these cases. Landowners would be required to wait several years at least before receiving all of their money which would be a great injustice. Another judge, citing the acquisition of property for a single project comprising 86,000 acres of land involving 10,000 separate ownerships, stated: Literally, if the question of each of those was tried to a jury, it would have completely consumed the time of the four Judges of this District for a great many years. The consensus of the judges who have appointed commissioners under Rule 71A(h) is that (1) the commission method is more expeditious and less expensive to all parties than jury trials, and (2) that commission awards are generally consistent, thus eliminating the wide disparity often found in jury verdicts.
\end{itemize}

\begin{itemize}
\item It was recommended that "no change be made in the provisions of Rule 71A(h)."
\item \textit{Special Committee on the Use of Land Commissioners, Report to the Chief Justice of the United States and the Members of the Judicial Conference of the United States (1961) (Agenda No. 17) [hereinafter 1961 Report].} The Committee based its recommendation partly upon the results of a survey it conducted. The Report includes the following summary of the survey results and the Committee's conclusions:
\begin{itemize}
\item \textit{We know that some district courts have little, if any condemnation cases.}
\end{itemize}
\end{itemize}
It is equally clear from the cases, the questionnaire, and public and private statements of Department of Justice officials that the Department of Justice continues, as it has since the inception of the idea, to oppose the commission method of determining the issue of just compensation. In a letter made available to the writer, but not for public record, a Department of Justice official wrote the following to a United States District Court Judge:

While limited funds are available for this purpose, this Department's experience is that, in general, use of commissioners multiplies problems rather than lessens them.

Cases tried by commissioners usually take longer, are more costly and frequently require more rather than less of the court's time in the process of instruction of commissioners as to each particular case or special issues that may arise as required by United States v. Merz, 376 U.S. 192 (1964), the giving of supplemental instructions when unexpected problems arise, review of the commission's report, motions and hearings in connection with the report, review of revised reports, retrials, etc.

All judges who have had such cases pending in their districts in the past several years were asked their opinion of the admissibility of the use of commissions as compared to trials by jury.

Two judges . . . are opposed to the use of commissioners, having had an unhappy experience. Twenty judges expressed themselves as believing the use of commissioners was less expensive than jury trials. For example, Judge C.C. Wyche . . . states as his opinion, 'rule 71A(h) is the best rule or statute that has ever been devised for condemnation proceedings.' His experience in condemnation proceedings, both as an attorney in private practice and through twenty-four years of service on the bench, has been vast. He does not speak in generalities, but gives figures on comparative costs. He points to savings in time, to greater uniformity, to fairer results, to increased settlements without trial.

None of these judges are [sic] wedded to the use of commissioners. Judge Miller, for example, used them in but 3 of the 13 condemnation cases he has listed as having tried.

It is the unanimous conclusion of your Committee that the use of commissioners at certain times and under certain circumstances—the determination left to the sound judicial discretion of the individual trial judge—is the preferable method of determining fair market value in condemnation cases. We believe this because (1) with proper regard for the amount of compensation to be paid, and (2) with proper regard for the character, location and quantity of the property to be condemned, it can be utilized by the courts to accomplish results—

(a) less expensive to the condemning authority;
(b) fairer to the landowner;
(c) less time consuming to litigants, counsel, and the courts; and
(d) more uniform.

We therefore recommend that no change be made in the provisions of Rule 71A(h).

This Department is convinced that a better answer to the problems caused by the numerous pending condemnation cases is to be found in its "small tract" and "major tract" programs explained in the enclosed brochures.

The success of that program is discussed in the past two annual reports of the Director of the Administrative Office of the United States Courts (pp. 5-6, 35-36 of 1964 Report; pp. I-4 to I-5, II-10 to II-12 of 1963 Report), wherein the Lands Division is especially commended on the effectiveness of its program to reduce the number of pending land condemnation cases (ibid. at pp. 6 and I-5, respectively). Our recent experience has shown that these programs are much less burdensome on the landowners as well as the Government as compared to the commission procedure. The basic reasons are that final judgments are expedited, giving the former landowner his money unconditionally sooner and saving the Government interest liability. In addition the commissioner procedure tends to discourage settlement, particularly when, as is frequently the case, any award is postponed until all parcels have been tried.161

The Department of Justice not only expresses its objection on a theoretical plane but in practice objects in nearly every case to the appointment of a commission, attempts to make money for the compensation of commissioners scarce,162 and is quite zealous in using the vague standards of Mertz to object to commission reports.163 The Department also lends its support to efforts in Congress

161. The primary cases "relied" upon by the official for support, were: United States v. Merz, 376 U.S. 192 (1964); United States v. Buhler, 305 F.2d 319 (4th Cir. 1962); United States v. Leavell & Ponder, 286 F.2d 398 (5th Cir.), cert. denied, 366 U.S. 944 (1961); United States v. Delware, L. & W.R., 264 F.2d 112 (3d Cir.), cert. denied, 361 U.S. 819 (1959); United States v. Vater, 259 F.2d 667 (2d Cir. 1958); United States v. Bobinski, 244 F.2d 299 (2d Cir. 1957); United States v. 44.00 Acres of Land, 234 F.2d 410 (2d Cir.), cert. denied, 352 U.S. 916 (1956); United States v. Kirkpatrick, 186 F.2d 393 (3d Cir. 1950); United States v. Certain Lands in the City of Statesboro, —— F.2d —— (5th Cir. #21039).


163. An example is reproduced as Appendix C. The Department of Justice, Lands Division, gave the following statistics to the Special Committee on the Use of Land Commissions for the years 1951-1960:

[the] government moved for a new trial in approximately 50% of the jury-tried cases; 66% of the commissioner-tried cases; 22% of the judge-tried cases.

The government appealed from 39% of the jury-tried cases, 51% of the commissioner-tried cases, and 17% of the judge-tried cases.


The three questions on the writer's questionnaire concerning appeals (Questions 6, 7, and 8) did not elicit much valuable information. Only seven judges answered the
to virtually terminate the use of land commissions by giving either party to a federal condemnation action an absolute right to a jury trial.\textsuperscript{164}

Although some federal judges as well as landowners and their attorneys have suggested less legitimate reasons for the Justice Department's opposition,\textsuperscript{165} the Department itself has given four principal ones: greater cost, greater delays encountered, rules of evidence incorrectly applied in commission proceedings, and commissioners tending to rely on their own expertise. As to the first two objections, the evidence consists almost exclusively of statements by Department of Justice officials that commission determination is more expensive and time consuming on the one side\textsuperscript{166} and statements by many federal questions. Judge XII reported only three appeals "out of a large number of cases handled by the Commission." None was overruled or modified and only one was sent back to the commission for further findings; there were no appeals to the court of appeals. Judge IX and X also reported no appeals. Judge IV, who had appointed two commissions and referred 125 ownerships to them, reported "about 20 appeals were perfected and 5 or 6 findings were modified. None were [sic] sent back for reconsideration." Judge V, who had appointed eight commissions and referred 500 separate tracts, reported that he had received about 150 appeals, that he had overruled or modified ten reports and remanded four, and that about forty of the appeals were taken to the court of appeals but were all dismissed before final submission. Judge VI, who had appointed two commissions and referred seven cases involving numerous tracts, reported that government appeals as to two tracts were then pending before the court of appeals. Judge I reported that the one case he had referred to a commission was appealed to him but that he dismissed the appeal and no further appeal was made.

\textsuperscript{164} Bill introduced to make jury trials mandatory by the Dept. of Justice. H.R. 126, 87th Cong., 2d Sess. (1962).

\textsuperscript{165} It is regrettable that the various agencies of the United States by which condemnation proceedings are instituted should persist in their demands for jury trials in all cases and in their attempts to have Rule 71A so amended as to give the government this right in every case. This continuing and persistent demand is made in every case irrespective of the nature of the property or of its location or its value. It is made in the full knowledge that the majority of the tracts of land which are condemned are so located or of such small value that the owner cannot afford to go to court to contest whatever valuation the government chooses to put on them. It is earnestly hoped that no modification which permits this hardship and injustice to be perpetrated on hundreds of humble people will ever be made.

\textsuperscript{166} There are, of course, some cases which refer to delay caused by improperly functioning commissions. This experience seems to suggest not some flaw in the commission system but poor or insufficiently supervised commissioners. The Government usually relies on the following cases for examples of delays experienced in
district court judges and many private attorneys that they are less time consuming and less expensive than jury determination.

The district judges were asked in the questionnaire:

9. Do you feel that the use of a commission is less expensive for the litigants and less time consuming for you?

10. Please comment on your view as to the efficacy of Rule 71A(h) Commissions, advantages and disadvantages, and your present feeling on whether you will use them in the future should the opportunity arise.

On the expense and saving of time point, all but two judges who reported having had experience with the appointment of a commission stated that a commission was less expensive for litigants and less time consuming for the court. Judge V, for example, said: "[w]ithout doubt the use of Commissions substantially reduces expense to litigants and it saves months, yes years, of the Court's time." Of the two judges not replying in the affirmative, one of the judges said he did not know. The other, Judge IX, said: "[t]he use of a commission takes less time for the Judge and I would expect that the expense would not be much different than the expense of a court trial."

Of the judges that replied they have not appointed commissions, only four made any reference to the cost-time point. Judge XIV stated that commissions were less expensive and less time consuming "[i]n certain cases with multiple units and parties—and with issues specifically defined and authority limited." Judge VII took an opposing view on the expense point and stated: "I do not feel that it would be less expensive for the litigants in the long run and am opposed to appointing a commission so long as I can handle the matter. . . ." Judge XI simply replied "No" to Question 9. Judge II stated: "[I]f properly manned 'yes' is the answer we determined by investigation." Judge XIII stated as part of his general comments: "[W]e believe it [a commission] will be less expensive, both for the government and the property owners."

Of the eight judges who reported having appointed Commissions, all but one were quite complimentary of the Commissions.167 Judge XII stated:

commission determination: United States v. Delaware, L. & W.R., 264 F.2d 112 (3d Cir. 1959); United States v. Vater, 257 F.2d 667 (2d Cir. 1958); United States v. Bobinski, 244 F.2d 299 (2d Cir. 1957); United States v. 44.00 Acres of Land, 234 F.2d 410, cert. denied, 352 U.S. 916 (1956).

167. The judges were asked: "10. Please comment on your view as to the efficacy of Rule 71A(h) Commissions, advantages and disadvantages, and your present feeling on whether you will use them in the future should the opportunity arise."
I very strongly favor use of Rule 71A(h) wherever large tracts are involved. It reduces the ridiculous disparity which often occurs when cases are tried to a jury. It is less costly to the litigant. Cases can be processed more rapidly. It has been my experience that with each new large project there has been initially objection to the use of the Commission by lawyers totally unfamiliar with how the commission works. The key to the successful use of a commission is the appointment of a good commission. The large number of cases handled in this District with no appeals is the best evidence of that. I shall continue to use the Commission whenever large tracts are involved. Where the taking involves only small tracts such as past office sites, we will continue to use the jury. I see no disadvantage in the use of the Commission provided the chairman is a good lawyer or a retired Judge who runs the proceedings like the court and the other members are capable people.

Judge VI stated in reply to Question 10 that he "would use commissioners again in a similar situation." He then referred to a memorandum he issued to the interested parties on the appointment of a commission in one case. The memorandum contains the following,

[C]ounsel for plaintiff [U.S. Government] have suggested groupings [of the tracts before the court] which would require from five to seven jury trials and estimate that the total time required would be twelve to seventeen days or an average of two and one-half days per trial. They estimate that hearings before commissioners would require twice as long.

Counsel for defendants estimate a total of thirty-three days for jury trials plus nine days for non-jury trials, and sixteen or seventeen days for commissioners' hearings. . . .

This court had a very satisfactory experience with commissioners in a comparable case. . . . Based upon my experience in that case I would anticipate that, with the cooperation of counsel, commissioners' hearings would require substantially less time than counsel for either side has estimated.

As indicated above, the results of the appointment of commissioners. . . . [in a prior case] were entirely satisfactory. The proceedings were conducted without any undue delay and at a minimum of expense. By reason of the similarity of the estates here taken, and after a careful review of the file . . . including the commissioners' reports I see no reason to anticipate the adverse effects suggested in plaintiff's memorandum;
nor do I see any reason to appoint as one of the commissioners a lawyer versed in the law of eminent domain, although I would have no objection to doing so, if counsel deem it advisable.

Judge III stated Commissions "are surely less time consuming for me. I feel commissioners should be used."

Judge V stated: "Without doubt the use of Commissioners substantially reduces expense to litigants and it saves months, yes years, of the Court's time."

A Commission composed of competent, well instructed, judicious members can save the Court months of trial work. We will continue to use them almost exclusively in this district.

One of our judges estimated that it would take one judge ten years to hold jury trials for all.

Judge IV stated: "I expect to use Commissions in the near future. . . . The Commission is a very useful tool if the members are of high caliber and if the commission is properly instructed and supervised."

Judge IX who had appointed one commission replied: "Generally speaking, I do not favor appointment of a commission, believing that a jury properly instructed can determine just compensation. I have considered, however, appointing a commission in connection with a large number of missile sites where small tracts of land are taken in a pasture and ranch land area. Most of the cases were settled, however, and I concluded not to do so."

"It is impossible to say at the moment that I will never use the commission method because I expect I may sometime but by and large I prefer the jury trial, combining as many as six or seven tracts in one lawsuit and giving the jury notebooks so that they can take notes as to the evidence in each case separately."

Of those judges replying who had never appointed commissions Judge XIII stated: "We propose to use it [Rule 71A(h) commissions] in the future. Up until recently, the government opposed the use of commissions. We believe it will be less expensive, both for the Government and the property owners."

Judge VII explained "it is not likely in the foreseeable future that condemnations will be so extensive in . . . [this state] as to require ap-
pointment of a Commission under Rule 71A(h). In my humble opinion so long as the judge, without unduly delaying other important litigation, can find or make time to handle such actions himself, he should do so. I will not use this procedure if I can possibly avoid it. In my opinion this procedure should only be used in a court where the calendar is so congested and all judges are so busy that to have the matter handled by a judge in the first instance is truly impracticable."

Neither judges nor private attorneys would seem to have at their disposal information, other than the type used by Judge VI above, that would permit more statistical support of their opinions. The Department of Justice would seem to be in a better position to present statistics as to the overall cost and time required in commission proceedings versus the time and cost of jury trials. The only statistics which are forthcoming, however, deal with the time factor and even as to it are vague and inconclusive. The writer submits that the Department of Justice has failed to rebut sufficiently the conclusions of most federal district judges, shown by their actions and statements, that commissions determination, when the commission is properly selected and supervised, is less costly and less time consuming that would be jury trials. In view of

168. The Special Committee on the Use of Land Commissioners recites the following information as having been furnished to it by the Lands Division of the Department of Justice:

from 1951 to 1960, 75 condemnation cases were tried by juries where the trial averaged 11 days, the time elapsed from the start of the trial to judgment averaged 88 days, and the time elapsed from filing of complaint to judgment, 3.28 years.

Twenty-seven commissioners' cases during that same period averaged 10 days in sitting, 98 days from beginning to end of hearings, 577 days from appointment to final report, 845 days from appointment to judgment, and 4.25 years from filing of complaint to judgment.

Sixteen judge-tried cases during that same period averaged 3 days in sitting, 180 days from start to trial to judgment, and 3.77 years from filing of complaint to judgment.

1961 Report 8 (footnotes omitted).

The Committee warns that the number of "cases" is approximate, because of duplicate motions, cross-appeals, etc." Id. at n.21. Since "cases" is not distinguished from actions filed, tracts, projects, and takings, "approximate" seems an understatement. Perhaps the best comment on the statistics is made by the Committee itself: "[t]he difficulty we here find is attempting to compare apples and oranges. It would be extraordinary if any two condemnation cases were found to be exactly alike. The use of commissioners may well occur usually in 'TVA type' cases"—i.e., many separate pieces of property.

On the other hand, the use of commissioners may seldom take place in the case of urban metropolitan one-parcel taking . . . for a post-office, customs house, courthouse, etc.

Thus it is, in our opinion, extremely difficult, and of doubtful value, to add up the number of cases of each type tried in the United States in any period of time, and draw conclusions therefrom with respect to costs or time involved.

Id. at 7. One also wonders how much of the time consumed in commission determinations was devoted to government objections and stumbling blocks due to the use of a commission.
this conclusion, a more appropriate way of obtaining money for compensation of commissioners should be adopted thereby guaranteeing that the Justice Department's control of the purse strings is not used to discourage judges from appointing commissions.169

The third principal objection voiced by the Department of Justice, that rules of evidence are frequently incorrectly applied seems so easily remedied that—even if true—it is surprising to find the Department of Justice consistently using it as an objection to the use of land commissions in general. If the evidence questions are to be especially difficult, the government attorneys should made the judge aware of this so that he may give detailed instructions to the commission or appoint experienced condemnation lawyers or former judges as chairmen of the commission. As to any evidence questions so important and complicated that they could not be handled in one of these ways, the district judge could himself arrange to be present at the commission hearing.170

The fourth objection, that commissioners tend to use their own expertise rather than confine their determination to the evidence presented to them, raises more serious questions that the other three objections. It is also the one about which the courts of appeals and the Supreme Court have expressed concern. For example, in Merz, Justice Douglas stated, “there is danger that commissioners, unlike juries, may use their own expertise and not act as a deliberative body applying constitutional

169. At present no separate appropriation is made for land commissions. Commissioners file for compensation on Department of Justice forms which are processed by the local United States Attorney's office and sent to Washington, D.C., for payment by the Department of Justice from general funds.

The 1961 Report recommended "[t]hat the responsibility for obtaining funds for compensation of commissioners be transferred from the Department of Justice to the Administrative Office of the United States Courts, at least temporarily, and immediately" and that "appropriating agencies should pay compensation of commissioners out of their own appropriated funds:"

The same committee noted "a wide disparity in the amount of compensation paid commissioners," id. at 12, and termed it "undesirable, but perhaps necessary." Id. The committee recommended further study of the matter but commented: "[p]erhaps the problem could best be met by standards established by the judicial conference for each circuit. If the costs of printing records on appeal vary by as much as 300% among the circuits, we can logically expect compensation of experts might vary as much as they have in the past." Id. at 12, n.33.

170. The general practice followed by the district court judges is to give the chairman of the commission the power to rule on questions of admissibility of evidence. See Appendix A. This is doubtless the simplest and most satisfactory arrangement. It is, however, arguable that Rule 71A(h) contemplates that all commissioners should vote on admissibility of evidence since the Rule states that the commission's action and report shall be determined by a majority. But Rule 53(c) as incorporated into Rule 71A(h) suggests that the master's powers in reference to ruling on admissibility of evidence are subject to the power of the appointing judge to make other arrangements because after granting the power to the master, it adds the qualification: "unless otherwise directed by the order of reference..."
One answer to the objection is that there is no reason to believe that commissioners are any less capable than jurors in forgetting what they "know" on their own; at least commissioners are selected for their ability as opposed to their availability as is primarily the case with jurors.

This approach, however, ignores the basic question raised by the objection: should commissioners be not only permitted but encouraged to use their expertise as long as they make such use clear in their report or in the questioning of witnesses during the proceedings? In fact, is not the greatest advantage of the commission method of determination that experts, who are familiar with the entire eminent domain project, can be used rather than laymen who hear only one case? Of course, the litigants must be protected from decisions reached on evidence "known" only to the commissioners. To treat a commission as a jury on the other hand, as the Department of Justice position seems to require, ignores the advantage of commission determination and the major justification for the rule in the first place. It is submitted that insufficient understanding of this fact or refusal to accept its validity is behind most restrictive views of commission use and value, from Theimer to the restrictive portions of Merz. As Judge Paul has stated:

When jury trials are held they are, of course, conducted with the procedure obtaining in other civil litigation. However, when commissioners are used no rigid course of procedure is prescribed nor has any yet been established by the authority of the decided cases. Some courts have displayed a tendency to surround the hearings and report of the commissioners with too much formality and to insist on observance of technicalities in procedure. In this writer's opinion this is unfortunate. Proceedings before commissioners were never intended to be invested with the technicalities of a trial at law. Originally the plan of having valuations in condemnation proceedings ascertained by a commission contemplated merely the appointment of a small number of persons to view the property and report to the court as to what would be fair compensation for its taking. These men

\[171. 376 U.S. 192, 197 (1964). The statement is particularly surprising since it seems to be inconsistent with the Judge Paul views which caused the Supreme Court to, in effect, ask for a provision for commission determination from the Advisory Committee.\]

One other unfortunate statement by Mr. Justice Douglas in Merz, supra, which has not been mentioned in the text but which is a threat to the proper operation of the rule is the intimation that it is not settled that there is no right to a jury trial under Rule 71A(h). The authorities seem clear, see Moore § 71A.90[3], at 2790, but one court of appeals has already been misled by Merz, supra—United States v. Bell, 363 F.2d 94, 97 (8th Cir. 1966).
could obtain their information as to the value from any source they chose—from inspection of the property, from their own knowledge of property values, from hearing witnesses offered by either party, or upon their own volition, questioning persons familiar with the property. They had no concern with the rules of evidence or the technicalities of procedure. The more nearly conception of a commission's duties is adhered to the more satisfactory will be the results.\textsuperscript{172}

It is this need for expertise and flexibility so sensed by the district judges, who are the closest to the problems of fixing just compensation in federal condemnation cases, which makes the Rule 71A(h) land commission a widely used and successful institution which has justifiably become a cornerstone of federal condemnation law in the last fifteen years. It is this same need for expertise and flexibility that must be impressed upon those who seek to limit or even abolish the 71A(h) land commission.

APPENDIX A

United States District Court
Southern District of Indiana
Indianapolis Division

United States of America
v.
356.25 Acres of Land, More or Less,
Situate in Monroe County, State of Indiana, and Harold W. Howell, et al., and Unknown Owners

Instructions to Commissioners

You have been selected to serve on a commission, appointed by this Court in accordance with the provisions of Rule 71A, Federal Rules of Civil Procedure, in the above captioned actions. These instructions are to guide and assist you in the performance of your duties.

Your principal duty will be to determine the amount of just compensation which the United States of America should pay to the condemnees for their respective estates or easements acquired by the govern-


\textsuperscript{173} The Commission's notes on Mr. Chitwood's testimony reveal that the \$850 discrepancy which exists between the just compensation figure and the figure one obtains by subtracting the value of the residue from the pre-taking value of the unit is attributable to Mr. Chitwood's considering an estimated \$950 fencing expense separately from other severance damages used in reaching the value of the residue. [Commission's footnote.]
ment in these condemnation proceedings. Since the object of just com-
pensation is to prevent injustice to individual landowners whose land is
taken for public purposes; the aim of such compensation is to leave the
landowner, after his land is taken, as well off financially as he was
before the taking.

In determining the amount of just compensation which the United
States of America should pay to the condemnees, there are certain rules
that you should follow. It is not contemplated, however, that these
instructions will cover all of your duties nor touch upon all matters of
procedure. In conducting hearings you have all the powers, rights and
duties provided by subdivision (c) and paragraphs (1) and (2) of
subdivision (d) of Rule 53 of the Federal Rules of Civil Procedure, to
which you should refer. These instructions are in addition to the instruc-
tions contained in the Order Appointing Commissioners.

1. The estates or easements acquired by the government in each of
these actions are particularly described in the respective declaration of
taking filed in each proceeding, and you should refer to such instruments.

2. The United States, under the Constitution and proper laws, has
the right to take any man's property for public use, provided only that
it pays the owner thereof just compensation. Such a right is a necessary
attribute of the Government, if it is to function as such. It is, therefore,
not a matter for you to consider whether the taking of this land is wise
or necessary; Congress has decided that the land is needed for a public
purpose, and has decided how much land is so needed. Your duty is to
determine only the fair and just compensation for the estate or easement
taken.

3. Just compensation includes all elements of value that inhere in
the property taken, but just compensation does not exceed the fair
market value of the lands as of the date of taking, as fairly determined
from testimony you shall hear.

It is your duty to determine from the evidence the amount of just
compensation to be paid the landowners as of the date of taking, that date
being the date set forth in the respective declaration of taking.

4. You must determine the fair market value of the property in
question on the date of taking, but you must exclude any increase in the
fair market value of the property which has occurred as a result of the
decision of the United States to undertake the public project for which the
condemnees' land is being acquired. The United States is not required to
pay for increases in market value which it has itself created either by
virtue of the project it has undertaken or by virtue of its demand for
property in the area.

5. If the Government has not acquired a respective landowner's
land in fee simple, but has condemned some other estate or easement in such landowner's tract of land, or has imposed a burden or restriction upon such land, then you shall determine the fair market value of the tract immediately before the taking by the Government of the other estate or easement described in the appropriate declaration of taking, and the fair market value of such tract immediately after such taking. The amount of just compensation is the difference in these valuations.

6. Where part only of a landowner's property has been condemned (either in fee or a lesser estate or easement or a combination thereof), and the remaining property of such landowner was held as a unit with the property condemned or other estate or easement condemned, then you shall determine the fair market value of the entire unit of property at the time of taking, and the fair market value of the property remaining after the taking. The difference of these sums is the amount of just compensation. In computing the fair market value of the remaining property you shall consider severance and resulting damages, if any.

"Severance damage" occurs when the remaining property which was held as a unit with the condemned property is damaged as a result of the partial taking by reason of the relation between that condemned and that remaining. Consequently when only a part of a parcel of land is taken, the value of that part is not the sole measure of compensation or damages to be paid to the owner; but the injury, if any, to that part not taken is also to be considered. Thus when the owner makes an additional claim that he is entitled to recover an additional amount as damage to other contiguous land that is owned by him and which has not been taken by the Government, it is to be treated as a claim for severance damage. If you find from the testimony that the market value of the contiguous land remaining after a portion has been taken by the Government has been reduced, then the landowner would be entitled to recover as just compensation for the land taken an amount representing the market value thereof for the land taken, plus the damage, if any, to the land remaining.

In determining the amount to be awarded if you find that the landowner has suffered severance damage, you should consider what the reasonable market value was, of all of the contiguous land owned by the landowner on the date of the taking, including the part that was taken, and then you will find the fair and reasonable market value of the land that is left after the taking by the Government, and the difference between these two figures will be the amount that you should award to the landowner. In that way your determination will reflect not only the reasonable market value of the land that is actually taken but will include the severance damage, if any, to the part remaining.
7. The burden of proof is upon the landowner, that is to say, the
landowner has the burden of proving by a fair preponderance of the
evidence the value of the land asserted by him. By a fair preponderance
of the evidence is meant the state or condition of proof which, after
careful and full consideration of all the evidence, is considered by you to
be most convincing, most reasonable and most satisfying to the mind and
reason.

8. The fact that these suits were brought by the Government is no
reason why you should determine a greater or lesser amount as just
compensation than you would if the suits were brought by an individual
and the contest were between individuals. In determining the value of
the land, the same considerations are to govern you as in the sale of
property between individuals, and the inquiry in these cases and the
question for you to determine is, what was the land worth on the market
at the time it was taken.

9. By fair market value is meant the price in cash or its equivalent
that the property would have brought at the time of taking, considering
its highest and most profitable use, if then offered for sale in the open
market in competition with other similar properties at or near the location
of the property, with a reasonable time allowed to find a purchaser.

10. In determining the market value, you should consider all facts
affecting the value of the land taken as shown by the evidence in con-
nection with facts of such general notoriety, if any, as not to require
proof. Elements affecting the value that depend upon evidence or a
combination of occurrences, which, while within the realm of possibility
are not fairly shown by the evidence to be reasonably probable, should be
excluded from consideration, for to consider them would be to allow mere
speculation and conjecture to become a guide in ascertaining the market
value of the land.

The market value of the land is the price it would bring when offered
for sale on the market. It is not the value of the land to the Government,
but it is the price which those having the ability and the desire to buy
are willing to pay or the price that the land would bring when offered
for sale by one who wants to sell but is not required to sell and is brought
by one who wants to buy but is not required to buy, giving to the seller
and the buyer a reasonable time in which to negotiate and to reach an
agreement as to the value. The price need not necessarily be calculated as
cash, but the amount determined to be the fair market value should be
determined as cash or its equivalent based on such usual terms of cash or
credit as might reasonably be agreed upon between a buyer and a seller
and which would ultimately amount to cash.

11. In every condemnation proceeding the problem is to determine
what the property owner has lost as a result of the taking, and not what
the Government may have gained.

Just compensation is intended to cover the loss caused the owner by
the taking of his property for public use and not the value of the property
as applied to the public use. How much the property taken may be worth
to the public for those purposes to which it will be applied is not be con-
sidered by you in any way in arriving at the fair market value of the
property at the date of the taking by the Government.

So, in determining the fair market value at the time of the taking,
you are not to consider the fact that the Government intends to take the
land; instead you are to fix the fair market value on the date of taking
and at a time immediately before the taking, without regard either to the
imminency of the taking or to the pendency of any proceedings to take the
land.

12. In determining the fair market value of property, you may
consider not only the opinions of the various witnesses who testify as to
market value, but also all other evidence in the case which may aid in
determining market value, such as location of the property, the surround-
ings and general environment, and peculiar suitability of the property
for particular uses, and the reasonable probability as to potential future
uses, if any, for which the property was suitable or physically adaptable;
all as shown by the evidence to have existed at the time of the taking.

13. You are to make a determination of the fair market value of the
property taken as a whole. All capabilities of the property cannot be
priced separately and the aggregate calculated as the true value, for such
capabilities, if any, do not exist independently of each other and cannot
be realized at the same time. In other words, market value cannot be
determined by a summation of values of each separate use even if you
should find from the evidence that the land was capable of various and
separate uses.

14. The availability of the property for use gives it a market value
and the compensation therefor to the owner is to be estimated by reference
to the use which the property is being put or for which the property is
available. Hence, you will determine the reasonably highest and best use
for which the property was available on the market as of the date of
taking.

In considering the available use to which the property might be
adapted or devoted, or the highest and best uses to which the property
could be devoted or was adaptable on the date of taking, the fair market
value is to be determined for the property as it was on that date, and
not as though already devoted or adapted to any prospective higher or
better use.
15. In determining the fair market value of the estate or interest taken, you may not consider the Government's need for the property, nor whether the defendant owner wanted to sell it. Your task is to find what was the fair market value of the tract involved as of the time of the taking, uninfluenced in any way by either the necessities of the Government or the wishes or wants or desires of the owner.

16. Ordinarily a sale of the same property reasonably near in time on the open market is the best evidence of market value if there are no changes in circumstances. If there is no such sale, then sales of similar or comparable property reasonably near in time on the open market are the best evidence of market value.

The comparable sales admitted into evidence should be considered by you in so far as such sales, looking at the circumstances of each instance, may evidence or throw light upon the fair market value of the land to be condemned unaffected by the Government's intention to acquire the land for the public use.

17. The law requires, and the judgment to be entered upon your determination will provide, payment of interest by the Government to compensate the landowner for any delay in payment caused by the Government after the date of taking. So do not consider any delay in payment in arriving at your determination, and do not include in your determination and report any interest or other compensation for the delay, if any.

18. You are not to arrive at your determination of just compensation by the quotient method; for example, you are not to take the valuations testified to by the experts of the Government and defendant and add them together and divide the results by two. In other words, your determination is not to be one of mathematical chance but one arrived at through your deliberate judgment.

19. You are further instructed that you may view the tracts of land involved in these proceedings. The viewing of such land would not be for the purpose of making yourself a witness in the case, but for the purpose of aiding you in better understanding the evidence that will be given.

20. You are further instructed that the commission will hold hearings to determine the amount of just compensation to be paid to each condemnee. You will fix the time and place for such hearings, which should be as convenient for the condemnees and the Government as possible. Appropriate notices of the hearings should be given the interested parties, or their attorneys in the event the parties are represented by counsel. Such notices should be given sufficiently in advance of the date of hearing to insure them adequate time to arrange for the attendance of their witnesses, and must be at least ten (10) days prior to the date of
hearing. The Clerk of the Court or the United States Attorney will assist you in notifying the interested parties.

21. You are further instructed that the normal order of procedure would be for you first to hear the condemnees' evidence and then to hear the Government's evidence. However, you are not bound by this method or procedure and you could hear a witness for the condemnees after the Government has introduced its evidence, or hear a Government witness before the condemnees have introduced their evidence.

22. The Chairman of the commission shall make the final determination as to the admissibility of evidence in the proceedings before the commission.

23. Each member of the commission has the right to make such examination of any witness as he may desire.

24. You are further instructed that all witnesses who are to testify at any hearing shall be placed under oath before their testimony is given.

25. Often there will be interests in a tract of land held by more than one person. In such cases you should first determine the fair market value of the entire ownership, and then apportion that amount among those possessing an interest in the land, on the basis of their respective interests.

26. With respect to a particular tract, you are further instructed that at the conclusion of the evidence for all parties, or at such other time as the commission may determine, you may hear argument from the attorneys or the interested parties.

27. You are further instructed that at the conclusion of your hearing concerning a particular tract, you shall, as soon as practicable, file a written report with the Clerk of the Court containing your findings for further consideration by the Court.

28. The action and report of the commission shall be determined by a majority.

If some unanticipated problem should arise in the performance of your duties as commissioners, you should ask the Court for additional instructions.

Dated this 7th day of October, 1965.

Chief Judge

United States District Court
Southern District of Indiana
Indianapolis Division
United States of America
v.
356.25 Acres of Land, More or Less,
Situated in Monroe County, State of
Indiana, and Harold W. Howell, et al.,
and Unknown Owners

Amendment of Instruction No. 6
of
Instructions to Commissioners
dated October 7, 1965

In the Instructions to Commissioners dated October 7, 1965, Instruction No. 6 relates to a situation where part only of a landowner's property has been condemned (either in fee or a lesser estate or easement or combination thereof), and the remaining property of such landowner was held as a unit with the property or other estate or easement condemned. You were instructed to determine the fair market value of the entire unit of property at the time of taking, and the fair market value of the property remaining after the taking, and that the difference of these sums is the amount of just compensation. The instruction omitted to state that in assessing severance and resulting damages, if any, in computing the fair market value of the remaining property, you shall consider special and direct benefits, if any, on the remaining property. Title 33 U.S.C. 595. United States v. Miller, 317 U.S. 369, 376, 63 S. Ct. 276, 281, 87 L.Ed. 336, 147 A.L.R. 55 (1943), reh. denied 318 U.S. 798, 63 S.Ct. 557, 87 L.Ed. 1162; Bauman v. Ross, 167 U.S. 548, 574-575, 17 S. Ct. 966, 976, 42 L.Ed. 270 (1897).

Accordingly, Instruction No. 6 is amended to read as follows:

6. Where part only of a landowner's property has been condemned (either in fee or a lesser estate or easement or a combination thereof), and the remaining property of such landowner was held as a unit with the property condemned or other estate or easement condemned, then you shall determine the fair market value of the entire unit of property at the time of taking, and the fair market value of the property remaining after the taking. The difference of these sums is the amount of just compensation. In computing the fair market value of the remaining property you shall consider severance and resulting damages, if any, and special and direct benefits, if any.

"Severance damage" occurs when the remaining property which was held as a unit with the condemned property is damaged as a result of the partial taking by reason of the relation between that condemned and that
remaining. Consequently when only a part of a parcel of land is taken, the value of that part is not the sole measure of compensation or damages to be paid to the owner; but the injury, if any, to that part not taken is also to be considered. Thus when the owner makes an additional claim that he is entitled to recover an additional amount as damage to other contiguous land that is owned by him and which has not been taken by the Government, it is to be treated as a claim for severance damage. If you find from the testimony that the market value of the contiguous land remaining after a portion has been taken by the Government has been reduced, then the landowner would be entitled to recover as just compensation for the land taken an amount representing the market value thereof for the land taken, plus the damage, if any, to the land remaining.

"Special and direct benefits" are those which are direct and peculiar to the particular property as distinguished from the incidental benefits enjoyed to a greater or less extent by the lands in the area of the improvement. Thus a general rise in property values in the area, because of the public improvement, is not to be considered. The benefit or advantage must be one which the public improvement brings to the owner of the remaining land because he is such landowner. To be considered, the special and direct benefit must affect the market value of the property remaining.

In determining the amount to be awarded, if you find that the landowner has suffered severance damage you should consider what the reasonable market value was, of all of the contiguous land owned by the landowner on the date of the taking, including the part that was taken, and then you will find the fair and reasonable market value of the land that is left after the taking by the Government, giving effect to special and direct benefits, if any, on the remaining land, and the difference between these two figures will be the amount that you should award to the landowner. In that way your determination will reflect not only the reasonable market value of the land that is actually taken but will include the severance damage, if any, to the part remaining.

Any objections to this instruction as amended shall be filed within fifteen (15) days from the date of the mailing hereof to counsel of record and to the parties who are without counsel.
Dated this—day of October, 1965.

Chief Judge

United States District Court
Southern District of Indiana
Indianapolis Division
United States of America
v.
356.25 Acres of Land, More or Less, Situate in Monroe County, State of Indiana, and Harold W. Howell, et al., and Unknown Owners
No. IP 62-C-241

Additional Instructions to Commissioners

The following instructions are intended to supplement the Court's instructions heretofore issued in these proceedings. They are intended to bring the Court's instructions more in conformity with the Supreme Court's requirements in United States v. Merz, 376 U.S. 192 (1964). While two of the commissioners are competent attorneys, the third member of the commission is not trained in the law and therefore these additional instructions are given.

1. The evidence in a condemnation case usually consists largely of maps, diagrams, charts, summaries, and the testimony of appraisers and other claimed experts as to the fair market value of property.

The rules of evidence ordinarily do not permit witnesses to testify as to opinions or conclusions. An exception to this rule exists as to those whom we call "expert witnesses." Witnesses, who, by education and experience, have become expert in some art, science, profession, or calling, may state an opinion as to relevant and material matter in which they profess to be expert, and may also state their reasons for their opinion.

The opinion testimony of an expert witness as to the fair market value may be based upon education, study, experience, investigation, knowledge of the property, prices paid for similar property in the vicinity, and all reasons given by the expert witness as the basis for his opinion.

You should consider each expert opinion received in evidence in this case and give it such weight as you may think it deserves. If you should decide that any such opinion is not based upon sufficient study, investigation, knowledge, or experience, or if you should conclude that the reasons given in support of the opinion are not sound, you may reject it entirely.

2. The testimony of an appraiser or an accountant as to any diagrams or charts or summaries, and any summaries or diagrams or charts admitted into evidence, are competent for the purpose of explaining or summarizing facts disclosed by his testimony, or by other testimony, or by photographs or maps or other documents which are in evidence in the case. However, such charts or diagrams or summaries are not in and of themselves evidence or proof of any fact. So, if you should find that
such charts or diagrams or summaries do not reflect facts and figures shown by the testimony or other evidence in this case, then you should disregard them.

In other words, such charts, diagrams and summaries are used only as a matter of convenience, and if and to the extent you may find that they are not in truth summaries of facts and figures shown by the evidence in the case before you, you must disregard them entirely.

3. The law permits an owner of the property taken in a condemnation proceeding to testify as to the fair market value of his estate or interest in the property at the time of taking; and the testimony of an owner as to value is to be weighed and considered by you the same as that of any other witness expressing an opinion as to fair market value at the time of the taking. That is to say, if you should decide that the reasons given in support of a landowner’s opinion as to fair market value are not sound, you may reject that opinion or give it any weight you may think it deserves.

4. A competent reporter will be made available to report the proceedings at all hearings.

5. As stated in the Court’s previous instructions in these proceedings, at the conclusion of your hearings you shall file with the Clerk of the Court a written report containing your findings for further consideration by the Court. In making your report, you are instructed to reveal which line of testimony you have adopted and the reasoning you used in deciding on a particular award of just compensation for property taken, or the amount of severance damages; in other words, explain the process by which you reached the amount of such award. Your report must be based on the testimony adduced before you and any view and inspection of the property which you may make.

Dated this———day of———, 1965.

____________________________
Chief Judge
United States District Court

APPENDIX B

*United States District Court*
*Southern District of Indiana*
*Indianapolis Division*
United States of America  

v.  

647.26 Acres of Land, more or less,  
Situated in Brown, Monroe and Jackson  
Counties, State of Indiana, and  
Floyd Mullis, et. al.,  
and Unknown Others.

No. IP-64-C-225

Tract No. 1504

Report of Commissioners Appointed  
Pursuant to Rule 71A

Findings:

That the date of taking of Tract No. 1504 was May 7, 1964. That the owners of Tract No. 1504 on the date of taking were Floyd Mullis and Janie Mullis, husband and wife, as tenants by the entirety. That the sole owner of Tract No. 1504 at the date of decision herein was Janie Mullis as the survivor of Floyd Mullis, deceased on September 3, 1964. That the highest and best use of the said tract on the date of taking was for agricultural purposes. That $29,600 is the total just compensation due landowner for the approximately 33.50 acres of land taken by the United States Government in fee simple.

Statement of Testimony:

Tract No. 1504 is an approximately 33.50 acre tract taken from a farm unit prior to the taking estimated by the United States Government witnesses to be 195.05 acres and by the witnesses for the landowner to be 206 acres. The farm is located on Stephens Creek, a tributary of the north fork of Salt Creek, approximately five miles east of the city of Bloomington, Indiana. The farm unit is traversed by Indiana State Highway 46. The Government taking was confined to a portion of the farm west of State Highway 46 and did not reach the frontage of the farm on that highway. The farm had a number of improvements none of which were included in the taking except for a pump house and a manure pit. The taking did, however, seriously impair access from the residue to a field of approximately 60 acres which had been previously accessible by fording Stephens Creek.

Floyd Mullis, Jr., son of landowner, was the first to testify on behalf of the landowner. Mr. Mullis testified in reference to the acreage in the total farm unit that there were 107 acres west of the highway, 71 of which were cropland, 31 of which were woodland, three acres of which were building sites and garden plots and two acres of which were creekbeds. Mr. Mullis stated that there were 97 acres east of State
Highway 46, 73 of which were permanent pasture and 24 acres of which were woodland. Mr. Mullis described the cattle-hog-grain operation conducted by his parents on the farm. He stated that the tillable land was generally planted in corn and occasionally in hay. He estimated the average yield per acre of corn to be 90 bushels per acre. Mr. Mullis described the soil on the property as being fertile much of which was alluvial top soil over three feet deep. He discussed the annual flooding and the deposits of good soil as a result thereof. He testified that the flooding consisted of headwaters and that the land never remained flooded for over a few hours. He further testified that the farm had approximately 290 rods of six-inch glazed tile which was placed three to four feet deep. He described the water supply on the farm as being ample coming from a well located west of the road, and from two creeks running through the property. He described the residence of the property as consisting of a wellkept frame house with dimensions of 52 x 48 feet. The house has seven rooms with bath and full basement, has running water and central heat. According to his testimony the farm had 13 outbuildings located either at the homesite or directly across the road from the homesite which were in good condition and were continuously used for the farming and livestock operation. He testified that the taking included nearly 30 acres of tillable land west of the road and that the taking would leave approximately 62 acres of land lying west of the road landlocked and inaccessible. He estimated that these 62 landlocked acres included 31 acres of tillable ground and 31 acres of woodland. He also stressed that in his testimony that the only good water supply for the farm was located within the Government taking. Mr. Mullis gave no estimate of the fair market value of the farm unit either prior or subsequent to the taking.

Mr. Kenneth Chitwood, an appraiser from Greensburg, Indiana, testified as an expert witness on behalf of the landowners. Mr. Chitwood stated that the highest and best use of the farm unit on the date of taking was for agricultural purposes. He assigned a value of $64,900 to the unit prior to the taking and a value of $28,550 to the remainder leaving a just compensation due landowner of $37,300. Mr. Chitwood placed a value of $475 per acre on the cropland and building sites prior to the taking and $50 per acre prior to the taking of the woodland and $25 per acre prior to the taking on the creekbanks and beds. He estimated the landlocked area subsequent to the taking to have a value of $75 per acre for the cropland and $50 per acre for the woodland. He presented three allegedly comparable sales in support of his valuation which sold for per acre prices ranging from $378 to $500.

Mr. Phillip Banawitz, an appraiser from Shelbyville, Indiana, testi-
fied as an expert witness on behalf of the landowner. Mr. Banawitz testified to a beforetaking value for the entire farm unit of $59,750 and fair market value of the residue of $20,000, leaving $39,750 as the just compensation due landowner. He testified as to several allegedly comparable sales which he interpreted as supporting his appraisal which had per acre sale prices ranging from $199 to $500 per acre.

Both Mr. Banawitz and Mr. Chitwood testified that their evaluation of the residue took into account severance damages thereto resulting from impaired access to a portion of the residue and to the decreased utility of the improvements due to their being deprived of connection with the large farm unit which they were built to service.

Mr. Roy E. Carter of Morehead, Kentucky, a staff appraiser for the United States Corps of Engineers testified as the sole expert witness for the United States Government. Mr. Carter testified that his appraisal procedure was primarily that of the market data approach. He testified that he analyzed a large number of comparable sales but relied primarily upon two which he interpreted as supporting his appraisal due to their similarity of size, location, and highest and best use. He estimated the fair market value of the entire farm unit on the date of taking to be $35,400 and he gave an after-taking value to the remainder of $20,000, leaving $15,400 as the just compensation due landowners. Mr. Carter testified that his appraisal took into account severance damage to the residue resulting from impaired access to the western part of the farm and loss of utility to the farm buildings.

Discussion of Findings of the Commission:

The Commission arrived at its opinion as to valuation and just compensation due the landowner based upon consideration of the testimony given by the various witnesses who testified for both the landowners and the United States Government. The Commission was aided in understanding the testimony by a view of the land in question.

In reaching its decision as to just compensation due landowner the Commission determined the fair market value of the entire farm unit including improvements prior to the taking to have been $50,400. The Commission determined the value of the residue to be $20,800. In determining the value of the residue the Commission determined a severance damage to it of approximately $19,000 due to seriously impaired access to approximately 60 acres of valuable tillable land, considerable loss of utility to the numerous improvements on the residue, and the deprivation of the residue of its existing water supply.

Date of Determination:

The foregoing determination was made by the three numbers of the
Land Commission on October 26, 1966, at a conference in Bloomington, Indiana.

Setoff:

The Commission is further informed that the landowner is indebted to the United States of America in the sum of $950.00 which sum is due and owing on account of the use of said land by the landowner after the date of condemnation; therefore, any order entered by the Federal District Court in this matter should take that into account and a deduction should be made from the total award of just compensation.

Land Commission

__________________________
James E. Noland, Chrairman

__________________________
Julian C. Juergensmeyer, Commissioner

__________________________
J. Ernest Gilmore, Commissioner

APPENDIX C

United States District Court
Southern District of Indiana
Indianapolis Division

United States of America

v.

647.26 Acres of Land, More or Less,
Situate in Brown, Monroe and Jackson Counties, State of Indiana, and
Floyd Mullis, et. al.,
and Unknown Others.

No. IP-64-C-225

Tract No. 1504

Objections to Report of Commissioners

The United States of America hereby objects to the Commissioners' Report heretofore filed in the above captioned cause of January 24, 1967. At this stage of these proceedings the sole basis for plaintiff's objections is that the Report as it is presently constituted is entirely inadequate under the law.
When a federal condemnation case is referred to a land commission pursuant to Rule 71A of the Federal Rules of Civil Procedure, as is the case in this matter, the parties are governed by rather strict requirements. Either party has the right under the law to object to the findings of the land commission. Recent case law lays down the requirement that any and all objections to a commission's report must be precise and specific in form rather than of a generalized nature. *Morgan v. United States*, 356 F.2d 17 (8th Cir. 1966); *United States v. Merz*, 376 U.S. 192 (1964). In order to be specific in objecting to a report, the report itself must contain sufficient findings to enable the parties, and the district court, to follow the path the commission took in reaching their conclusion. It is the plaintiff's contention that in the instant case the report itself is wholly insufficient, and is inadequate for judicial review.

The report is "clearly erroneous" in that it in no way meets the guidelines to be used by commissioners as set out by the United States Supreme Court in *United States v. Merz*, *supra*. In the *Merz* case the Supreme Court stated:

... Conclusory findings are alone not sufficient, for the commissions' findings shall be accepted by the court unless clearly erroneous; and conclusory findings as made in these cases are normally not reviewable by that standard, even when the District Court reads the record, for it will have no way of knowing what path the commissioners took through the maze of conflicting evidence.

The Commission in the instant case properly review the evidence submitted to it at the time of the hearing. This review comprises the bulk of this particular report. The "Discussion of Findings of the Commission" comprises only two paragraphs on the last page of the report. The Commission states in this discussion that its conclusion of valuation was based upon a consideration of the testimony of all witnesses who testified. This, it is respectfully submitted, is a mere conclusory finding which is insufficient under the law. *United States v. Merz supra*; *United States v. Cunningham*, 246 F.2d 330 (4th Cir. 1957).

The testimony of the expert witnesses who appeared on behalf of the landowner differed greatly with the testimony of the expert witnesses who appeared on behalf of the Government. Comparable sales, the primary basis of the various opinions of just compensation, were entirely different. (Compare testimony pp. 38-40, 47-48, 58-63 Tr. with testimony pp. 80-82 Tr.) All witnesses agreed that severance damages were due in this case. The experts disagreed upon the amount of severance damage. It was items such as these upon which the differences of
opinion arose. It was items such as these which the Commission should specifically refer to in their report. A general statement that the Commission has considered all the evidence is meaningless.

The Supreme Court in the *Merz* case *supra* discussed what must be done to compile an adequate report:

Commissioners, we assume, will normally be laymen, inexperienced in the law. But laymen can be instructed to reveal the reasoning they use in deciding on a particular award, what standard they try to follow, which line of testimony they adopt, what measure or severance damages they use and so on.

The report then, should reveal how the Commission reached the particular dollar amount it did. It should demonstrate how the Commission resolved the basic controversies in the case. It should show how the Commission “considered” comparable sales, and why; which witnesses it gave greatest credit to, and why; how severance damages were computed, and why. These are the basics of condemnation cases and must be covered in the report.

It is submitted that before any party can object to any part of the report with the specificity required, the report must be revised. As it is presently constituted the Commissions' Report is clearly inadequate for judicial review and therefore clearly erroneous.

Wherefore, for the reasons set out above, the United States of America respectfully moves the court to remand this cause to the Commission in order that the Report may be properly revised, and that the parties then be given the opportunity thereafter to make proper objections, should that then be their desire.

Richard P. Stein
By———

Joseph W. Annakin
Assistant United States Attorney

*Certificate of Service*

This is to certify that a copy of the foregoing pleading has been served upon the defendants by mailing a copy thereof to counsel of record, Evens, Baker, Barnhart & Andrews, P.O. Box 1234, Bloomington, Indiana 46202, this 7th day of March, 1967.

Joseph W. Annakin
Assistant United States Attorney
This cause came before the court on the report of the Commissioners appointed pursuant to Rule 71A of the Federal Rules of Civil Procedure, on the Government's objections to the report, and the objections of the landowners to the suggested setoff in the amount of $950.00.

The Government's objection is premised on the failure of the Commission to follow the standards prescribed by the Supreme Court in reporting the basis of its ultimate findings of value. United States v. Merz, 376 U.S. 192 (1964). In the Merz case the Supreme Court held that the basis of ultimate findings of value in an eminent domain proceeding must be clearly disclosed in the report of the Commission, and that conclusory findings alone are insufficient for a proper judicial review. The Commissioners are not required to make detailed findings such as judges do who try a case without a jury, but the Court stated that the Commissioners should be instructed to reveal the reasoning they use in deciding on a particular award, what standard they try to follow, which line of testimony they adopt, what measure of severance damages they use, and so on.

Here, while the Commissioners' ultimate finding of value is well within the range of conflicting testimony despite the evidentiary conflict as to the amount of damages suffered by reason of the taking, the report does not set forth sufficiently the line of reasoning followed by the Commission in arriving at the dollar amount it finds as just compensation to be awarded the landowners. The report should indicate which evidence the Commission credited; the degree to which the award is based on testimony of comparable sales (or whether the sales were, in fact, comparable), and to what extent the awards depend on opinions of non-expert witnesses, or upon the testimony of the owner.
This court does not agree with the Government that the Commission's report is "clearly erroneous." As the Supreme Court noted in the Merz case, conclusory findings as made in these cases are normally not reviewable by that standard, even when the District Court reads the record, for it will have no way of knowing what path the Commissioners took through the maze of conflicting evidence. Indeed the report appears accurate and acceptable in every respect up to the point where the report sets forth the discussion of the findings of the Commission. It is there that the report fails to meet the requirements prescribed by the Supreme Court, i.e., it fails to mark the path followed by the Commissioners in reaching the amount of the award. For that reason the report should be recommitted to the Commission for the limited purpose of defining the Commission's reasoning in arriving at its ultimate findings of value. There is little doubt in the mind of the court that the Commission can do this and thereby satisfy the Government without the necessity of detailing the state of digestion of each of its members in the process. Accordingly, IT IS SO ORDERED.

The objection of the landowners to the setoff in the amount of $950.00 as rental value for the use of certain acreage during the years 1965 and 1966 after the Government's taking on May 7, 1964, is well taken and should be, and is, sustained. At the hearing before the Commission no issue was presented concerning such a setoff and no evidence of fair rental value for use of the acreage was heard. In this regard, however, at the oral argument before the court counsel informed the court that the subject matter of the alleged setoff would be negotiated without the necessity of a hearing.

Judge
United States District Court

APPENDIX E

United States District Court
Southern District of Indiana
Indianapolis Division

United States of America

v.

647.26 Acres of Land, More or Less,
Situate in Brown, Monroe and Jackson
Counties, State of Indiana, and
Floyd Mullis, et al.,
and Unknown Owners

No. IP 64-C-225
Tract No. 1504
Reasoning of the Commission:

The captioned matter having been recommitted to the undersigned Commission by the order of the Honorable William Steckler on April 27, 1967, the Commission does hereby amend its report of November 10, 1966, so as to set out its reasoning in arriving at its ultimate finding of value.

In its report of November 10, 1966, the Commission found the just compensation due landowners to be $29,600 for the approximately 33.5 acres of land taken in fee by the United States Government on May 7, 1964.

The Commission accepted as uncontroverted the testimony of various witnesses that the farm in question lies some four to five miles east of the City of Bloomington and is crossed by Indiana State Highway 46. The Commission's view of the premises confirmed this conclusion.

In reaching its decision, the Commission accepted as true the testimony of landowner's son, Floyd Mullis, Jr., that the farm unit from which Tract 1504 constitutes a 33.5 acre taking consisted of approximately 206 acres. The Commission also accepted the son's breakdown of these acres as to use (tillable, pasture etc.). The Commission was persuaded on these points by the son's personal knowledge of the land gained from his having lived on it and farmed it and from his knowledge gleaned from his parents who lived on portions of the land for over 30 years. The Commission was presented with the mere assertion of differing figures by the sole government witness.

The Commission also accepted as true the son's testimony to the effect that the soil on the property was fertile and much of the property was covered by alluvial topsoil over three feet deep. The Commission also accepted his testimony in respect to the limited flooding by headwaters of the premises which rather than decreasing the value of the cropland added to it by depositing good soil.

The Commission also accepted as accurate the landowner's son's testimony that improvements on the premises consisted of a seven room modern house and thirteen outbuildings. His testimony that the Government taking included a shedcrib, manure pit, and a pump house was accepted as true and uncontroverted. The Commission also accepted as true the testimony of the landowner's son that the taking included the only existing and known source of good water for house-hold used on the premises.

The only evidence as to specific monetary value was presented to the
Commission by two witnesses on behalf of landowner, Mr. Chitwood and Mr. Banawitz, and by one witness on behalf of the Government, Mr. Carter. The Commission feels that in explaining the reasoning it followed, its assessment of the evidence, and what testimony it accepted and rejected it should explain that it found the testimony of the sole government witness confused, confusing, disorganized and even self-contradicting. It was therefore left with the difficult task of having only the general guidelines of the monetary figures given by the Government witnesses rather than the usual task of evaluating a fully developed and explained line of testimony on behalf of the Government as well as the landowner.

As the November 10, 1966 report of the Commission reveals, the values testified to by the three expert witnesses and the values found by the Commission are as follows:

<table>
<thead>
<tr>
<th></th>
<th>Chitwood</th>
<th>Banawitz</th>
<th>Carter</th>
<th>Commission</th>
</tr>
</thead>
<tbody>
<tr>
<td>Value of Entire Unit Before Taking</td>
<td>$64,900</td>
<td>59,750</td>
<td>35,400</td>
<td>50,400</td>
</tr>
<tr>
<td>Per Acre Value of Entire Unit</td>
<td>315</td>
<td>290</td>
<td>171</td>
<td>244</td>
</tr>
<tr>
<td>Residue Value</td>
<td>28,550</td>
<td>20,000</td>
<td>20,000</td>
<td>20,800</td>
</tr>
<tr>
<td>Just Compensation</td>
<td>37,300 (473)</td>
<td>39,750</td>
<td>15,400</td>
<td>29,600</td>
</tr>
</tbody>
</table>

In respect to the pre-taking value of the entire unit, the Commission rejected as unsupported by the evidence the testimony of the government witness to a figure of $35,400—approximately $171 per acre. The Commission concluded that the Government witness failed to take into account the high quality of the tillable land in question and the superb location of the subject tract. In connection with this latter factor the Commission concluded that the Government appraisor failed to grasp the fact testified to before the Commission in this and previous causes that the land east of Bloomington on the scenic route to Brown County [State Route 46] is some of the most sought after land in the State of Indiana. For example, the Commission understood the Government witness to state at one point that he gave a value of $100 an acre to the land along State Route 46. The Commission completely rejected such value as inconsistent with comparable sale date and the testimony of expert witnesses definitely more versed with land values in the area than the Government witness.

The Commission was also unimpressed by the sales testified to as comparable to the subject tract by the Government witness. The Commission has heard detailed testimony concerning and has personally viewed most if not all of the “comparables” mentioned by the Government witness. The Commission found them remote in time of sale, inferior in location and inferior in quality to the subject tract.

Although the Commission believed the $20,000 estimate as to the after taking value of the residue to be quite close to its actual fair market value, it rejected the method used by the Government witness in reaching
First of all, the Commission considered as entirely unsatisfactory the valuing of the 30 acres of tillable land and 30 acres of pasture now landlocked as 50% of its former value on the unsupported theory that an adjoining landowner would be willing to pay that. The Commission accepted the Government witness's testimony that the value of the farm buildings had been decreased by approximately 75% due to their loss of utility but accepted the pre-taking value of those buildings testified to by expert witnesses for the landowner rather than the insufficiently explained value testified to by the Government witness.

Although the Commission largely rejected that portion of the testimony by the Government witness that was made clear to it, it was unable to believe that its only alternative was to accept verbatim the testimony of one of the landowner's witnesses. Using that testimony as a basis but interpreting it in view of certain portions of the testimony of the Government witness and using its understanding of land values in the area gleaned from applicable testimony presented to it by both landowners and Government witnesses in previous cases it concluded the value as set-out in its report of November 10, 1967—$50,400 for the entire unit before taking and $20,800 as the value of the residue.

In reaching its findings as to pre-taking value the Commission concluded that the $450-475 per acre value placed by the landowner's witnesses on the tillable land was too high. The Commission concluded that the witnesses had overestimated value primarily because of their failure to sufficiently discount speculation influence in several of their comparable sales. The Commission concluded from its evaluation of the testimony of landowner's witnesses that $350 per acre was a more accurate market value for the tillable land.

The breakdown used by the Commission in verifying its unit value was approximately as follows:

<table>
<thead>
<tr>
<th>Description</th>
<th>Per Acre Value</th>
<th>Total Value</th>
</tr>
</thead>
<tbody>
<tr>
<td>71 acres tillable</td>
<td>$350</td>
<td>$24,850</td>
</tr>
<tr>
<td>3 acres of building site</td>
<td>350</td>
<td>1,050</td>
</tr>
<tr>
<td>2 acres creek</td>
<td>25</td>
<td>50</td>
</tr>
<tr>
<td>55 acres woods</td>
<td>50</td>
<td>2,750</td>
</tr>
<tr>
<td>73 acres of permanent pasture</td>
<td>100</td>
<td>7,300</td>
</tr>
<tr>
<td>Improvements</td>
<td></td>
<td>14,400</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td></td>
<td><strong>$50,400</strong></td>
</tr>
</tbody>
</table>

The $20,800 value placed on the residue by the Commission is approximately that of the Government witness, Mr. Carter, and one witness for the landowner, Mr. Banawitz, who both gave a value of $20,000.

The value of the land taken on a per acre pre-taking basis comes to slightly less than $11,000. In determining the fair market value of the
remainder, however, the Commission was persuaded that the entire residue could command a market price of only $20,800 meaning that the residue suffered a severance damage of approximately $19,000 or lost approximately 48% of its value. The loss of value to the farm building was in the opinion of the Commission at least 75%, and the loss of value to the landlocked area was also at least 75%. Figuring on the per acre pretaking value this comes to a total of approximately $16,000. The conclusion of the Commission was that the remaining land and residence suffered a severance loss of approximately 10% or $3,000.

Various elements of severance damage are referred to in the original report of the Commission and the Commission believes that it will suffice here to state that the farm unit was destroyed by the taking or landlocking of nearly all the tillable land leaving valuable farm buildings virtually useless.

Land Commission

______________________________
James E. Noland, Chairman

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Julian C. Juergensmeyer, Commissioner

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J. Ernest Gilmore, Commissioner