O/a 4-5-89 25

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES,

Appellants,

vs.

RICHARD O. POLK, d/b/a RICHARD POLK NURSERY,

Appellee

CASE NO. 73,842

AMICUS BRIEF OF MID-FLORIDA GROWERS, INC., AND HIMROD AND HIMROD CITRUS NURSERY IN SUPPORT OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

Amici adopt the Statement of the Case and Facts in the Appellee Polk's Answer Brief.

Amici limit their argument to two issues which may influence the outcome of their own case, Dept. of Agriculture v. Mid-Florida Growers, Inc., 14 F.L.W. 650 (Fla. 2d DCA, March 8, 1989) (certifying questions as being of great public importance):

1. Whether evidence of probable net yield for citrus nursery stock is admissible to prove their value. (State's Point II A) (Polk's Point B-2)

2. Whether the State must compensate for loss of production when, after burning healthy stock, it also imposes a prohibition against resuming new production for an indeterminate period in order to "decontaminate" the premises, although no contamination posing a threat to the citrus industry was ever actually present. (State's Point II D) (Polk's Point B-4)

SUMMARY OF ARGUMENT

The probable net yield approach is an accepted approach to valuation for crops not yet ready for market. This approach is accepted in Florida eminent domain practice and in Florida tort and contract cases where valuation of growing stock is an issue. It is the most widely accepted crop valuation approach in other jurisdictions. The Department has not offered a single authority where this approach was ruled inadmissible. The trial court properly allowed the jury to consider the probable net yield approach.

The Department's action prohibiting Polk from beginning any new citrus stock production after the burning of his stock had the same arbitrary basis and served the same regulatory objective as the burning itself. This prohibition caused Polk to suffer a substantial additional loss which in fairness should not be borne by him alone, but should be passed on to the industry or the whole economy. Florida case law recognizes claims for compensation arising out of separate acts incident to the taking which cause additional harm. The United States Constitution requires compensation for temporary takings which deprive the owner of all reasonable economic use of the property. Under either legal theory, the loss of production should be compensated. The trial court properly awarded compensation for this loss based on the jury's verdict.

ARGUMENT

I. THE CIRCUIT COURT PROPERLY ADMITTED EVIDENCE OF PROBABLE NET YIELD AS PROBATIVE OF THE VALUE OF CITRUS NURSERY STOCK.

Probable net yield is a proper valuation approach for growing nursery stock. This approach is preferred when the absence of a normal contemporary market makes it clearly necessary to consider other approaches to value, i.e., in the case of immature trees, or when the market is suspended or otherwise abnormal.

The use of the probable net yield approach is discussed in the parties' arguments over the value of Polk's 115,434 citrus liners. The issue is otherwise moot in this case because the Department apparently conceded value measured by the probable net yield approach as to Polk's other stock, resulting in a directed verdict. There is no rational reason offered for contesting value under this approach as to liners, and conceding value under this approach for all other categories of stock.

The probable net yield approach to value has been established in Florida law as an authorized approach for valuing crops in eminent domain actions. See Lee County v. T & H Associates, Ltd., 395 So.2d 557 (Fla. 2d DCA 1981) (approach may be considered along with other approaches). Lee County dealt with valuation of a leasehold with a partially developed watermelon crop. Because there was no market for this leasehold, other evidence was considered to determine the value of the leasehold, including the value of the watermelon crop based on prospective revenue (probable net yield).

The key point is that the Court in Lee County sanctioned use of the probable net yield approach to determine the value of a crop, which is the issue in this case. Even though a contemporary market for young melons might have existed (e.g., to feed swine), the Court did not require the absence of such a market as a prerequisite to use of the probable net yield approach. Rather it allowed evidence of this and other methods to value the crop as a way to value the real estate leasehold on which the crop grew. This is roughly analogous to using an income approach to value realty, which is acceptable even where a market for the realty exists, and is clearly preferable in cases where no market exists.

This Court has also impliedly authorized this approach when it ruled in Corneal v. State Plant Board, 95 So.2d 1, 6-7 (Fla. 1957):

> In all the circumstances shown by this record, recounted above, we hold that it is not only "a plain dictate of justice and of the principle of equality" that compensation be made for, at least, the loss of profits sustained by the owner whose healthy trees are destroyed under the compulsory program of "pull and treat" but also, in our opinion, it is the clear legal duty of the Board to do so. (e.s.)

The same observation was repeated in State Plant Board v. Smith, 110 So.2d 401, 403 (Fla. 1959). The Smith Court also stated:

> . . . [A]n infested tree may be healthy, in the sense that it has not yet begun to decline, and still commercially profitable. A court might wish to consider the profits expected from such productive, although infested, tree in determining "just compensation." Id. at 408 (e.s.)

The references to lost or expected "profits" in these two cases reflects a realistic understanding that crops destroyed prior to sale are properly valued based on the anticipated revenue from their sale in a case for inverse condemnation.

The Florida courts allow a condemnee to present evidence of the highest and best (or most profitable) use to which the condemned property is reasonably adaptable in the foreseeable future. See Board of Commissioners of State Inst. v. Tallahassee Bank & Trust Co., 116 So.2d 762 (Fla. 1959); Swift & Co. v. Housing Auth., 106 So.2d 616 (Fla. 2d DCA 1958); Div. of Bond Finance v. Rainey, 275 So.2d 551 (Fla. 1st DCA 1973); Florida Eminent Domain Practice and Procedure 911.5 (Fla. Bar 4th Ed. 1988) (standard jury instruction, citing additional cases). The standard jury instruction informs the jury that fair market value is not the exclusive standard of valuation, but is a tool to assist the jury, to be considered along with all other facts and circumstances that bear a reasonable relationship to the owner's loss. This principle certainly requires, in the context of taking growing stock, that evidence of the income which the stock could reasonably be expected to produce upon sale in the foreseeable future be considered. It is unassailable under the Florida Constitution that a property owner is entitled to be placed in as good a position financially with respect to his property as if it had not been taken. Florida Eminent Domain Practice and Procedure Section 11.3 (Fla. Bar 4th Ed. 1988) (standard jury instructions, citing cases).

Florida decisions concerning contract or tort claims for the loss of or injury to a growing crop also allow evidence of prospective net yield to determine the amount of the loss. See Wicoma Inv. Co. v. Pridgeon, 137 Fla. 540, 188 So. 597, 600 (1939); Twyman v. Roell, 123 Fla. 2, 166 So.2d 215 (1936); R.A. Jones & Sons, Inc. v. Holman, 470 So.2d 60, 70-71 (Fla. 3d DCA 1985); Mulford Hickerson Corp. v. Asgrow-Kelgroe, 282 So.2d 19 (Fla. 4th DCA 1973), quashed on other grounds, 301 So.2d 441 (Fla. 1974); Wm. G. Roe & Co. v. Armour & Co., 414 F.2d 862 (5th Cir. 1969) (applying Florida law). There is no reason why compensation for a taking should be measured differently than for any other loss or destruction of a crop.1

The probable net yield approach is the most widely accepted method in other jurisdictions for ascertaining damages for the destruction of or injury to growing crops (not yet ready for market). 21 Am. Jur. 2d Crops §§ 76, 79 (1981). See also Cutler-Cranberry v. Oakdale Elec. Coop., 254 N.W.2d 234, 238 (Wis. 1977); International Harvester Co. v. Kasey, 507 S.W.2d 195, 197 (Tex. 1974) (describing probable yield as most satisfactory method, and citing Dobbs Laws of Remedies § 5.52 and McCormick Law of Damages § 126); Daily v. United States, 90 F. Supp. 699 (Ct. Cl. 1950) (condemnation case); Town of Mars Hill v. Honeycutt, 232 S.E.2d 209 (N.C. 1979) (applying probable yield approach to value fish stock being raised in a pond).

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1 Compare Garrett v. American Fruit Growers, 135 Fla. 398, 186 So. 269 (1939) (damages in conversion or trespass case are measured by value of goods at time and place of wrong). The nurseryman whose stock is destroyed is equally injured whether the destruction is by inverse taking, breach of contract, or tort.

Perhaps the fairest rule is that followed in Colorado: when a crop has sufficiently developed to be considered an immature crop, there are several methods to establish damages, any of which is appropriate, including the amount the crop would bring at sale in its immature state, and the probable net yield at maturity. The jury decides which approach is best. See Frankfort Oil Co. v. Abrams, 159 Colo. 535, 413 P.2d 190 (1966).

The Department has not cited a single authority which supports its contention that evidence of probable net yield cannot be considered in determining value.

Polk established that no market existed for his liners.[2] The Department presented evidence of various cost approaches to value. The Circuit Court admitted this evidence as well, and the jury considered it. The Department cannot ask this Court to substitute its views on value for the jury's. The jury is entitled to consider all approaches to value supported by competent evidence. See Lee County v. T & H Associates, above, 395 So.2d at 560-61 (evidence of probable yield is at least as probative as evidence of reimbursement cost, which does not appear to adequately compensate for the owner's efforts in

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[2] In Mid-Florida Growers, the Court summarized the record applicable there by stating:

> There is no evidence that a market existed for liners in the fall of 1984.
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> * * *
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> Because of the [Department's] quarantine, there was no legal market in October 1984 for the nurseries' seedlings, liners, or budded trees.

14 F.L.W at 651.

successfully bringing the crops to the stage of maturity at taking; value ought to reflect both the promise and the risk inherent in the growing of crops, as measured by actual subsequent market conditions which is the "best possible evidence available," id. at 561).

The Department attempts to make a distinction between stock that matures in the year of taking and stock that matures in the following year. There is no evidence of any horticultural or economic factor to support such a distinction. The Department was free to argue that the probable net yield of stock maturing the following year was speculative, but the jury should be free to accept or reject that argument as in any probable net yield case. The Department cannot demand that such an arbitrary distinction be imposed as a matter of law. The Second District rejected this argument in Mid-Florida Growers, 14 F.L.W. at 652.

The Department's argument that use of probable net yield evidence would avoid the requirement of valuation on the taking date has been repeatedly rejected. See, e.g., Lee County v. T & H Associates, Inc., above, and Daily v. United States, above. The value of the nursery stock when they mature and become marketable can be retrospectively calculated with certainty, and this amount is adjusted by subtracting the costs saved in not maturing or marketing the stock. The remainder is the value on the taking date. This value is based on economic reality, i.e., what the owner would have actually received, and what his or her competitors did actually receive. The stock's inherent value on the taking date is thus truly measured by the "best possible

evidence available," Lee County, above, at 561.

The standard of review for admissibility of evidence in proceedings to determine compensation is that the jury should be allowed to consider all facts and circumstances which bear a reasonable relationship to the loss. Behm v. Div. of Administration, 383 So.2d 216, 218 (Fla. 1983), quoting City of Jacksonville v. Henry G. DuPree Co., 108 So.2d 289 (Fla. 1959). An expert witness's testimony concerning valuation should not be excluded unless his or her approach requires a departure from all common sense and reason or adoption of a new and unauthenticated appraisal formula. See Rochelle v. State Road Dept., 196 So.2d 477 (Fla. 2d DCA 1967).

The probable net yield approach operates to make the condemnee whole, which is the ultimate objective of the constitutional full compensation guarantee. Jacksonville Expressway Auth. v. Henry G. DuPree & Co., above. The admission of probable net yield evidence in this trial was certainly appropriate, especially since this Court has expressly recognized that compensation for destroyed citrus stock should include profits that would have been realized, see Corneal and Smith, above. The value of growing crops or stock is represented by the prospective revenue that comes from the property itself. Lee County, above, 395 So.2d at 560. A fortiori, since there was no normal market for the citrus stock, or no market at all, on the taking date, probable net yield is the most appropriate approach to measure the inherent value of that stock, see Mid-Florida Growers, 14 F.L.W. 650.

11. A NURSERY IS ENTITLED TO COMPENSATION FOR LOSS OF PRODUCTION WHEN THE STATE, AFTER BURNING ITS HEALTHY STOCK, IMPOSES A PROHIBITION AGAINST RESUMING NEW PRODUCTION IN ORDER TO "DECONTAMINATE" THE PREMISES, ALTHOUGH NO CONTAMINATION POSING A THREAT TO THE CITRUS INDUSTRY WAS EVER ACTUALLY PRESENT.

After burning all of Polk's nursery inventory in September **1985**, on the assumption that a dangerous disease was present that threatened the citrus industry, the Department compounded Polk's loss by prohibiting him from beginning any new citrus production for an indeterminate period that lasted until May **1986**.

The purpose for the prohibition was that the Department required "decontamination" procedures to be carried out at the nursery. The Circuit Court found, based on scientific testimony, that the disease <u>suspected</u> at Polk's nursery (Canker A) was not a threat to the citrus industry, and that the Department should have known this at the time of burning; and that the disease <u>actually found</u> at Polk's (Florida nursery strain) was even less a threat.[3]

If the Court's finding is correct, any contamination at Polk's nursery was not sufficiently dangerous to the citrus industry to justify <u>either</u> the wholesale burning of stock <u>**or**</u> the subsequent indeterminate prohibition against new production.

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[3] The disease found at Polk's is now called "citrus bacterial spot" by the consensus of scientists. <u>See</u> Agrios and Kender, Report on Present Scientific Status of Citrus Canker and Citrus Canker-like Diseases, Univ. of Fla. Inst. of Food and Agric. Sciences, Feb. **22, 1989.**

The Department does not attempt to justify its prohibition, or deny that it caused additional injury to Polk. Its only argument is that as a matter of public policy Polk should absorb the entire loss from the prohibition without compensation.

The prohibition disabled Polk's nursery from starting any new production cycles. A nursery is an organization of resources, including land and fixtures, equipment, payroll, and managerial and technical expertise. During the prohibition, all of these resources remained idle for an indeterminate period. The Department does not argue that Polk could have converted his nursery to an alternative use, or relocated his nursery operations to another site. Even if Polk had the financial resources to pursue these options, the uncertainty about the duration of the prohibition period made it unrealistic to do so. It appears that Polk had no option but to sit idle for the prohibition period.

This additional loss, beyond the value of the stock destroyed, cannot in fairness be left uncompensated. The jury found that this loss was substantial, and awarded compensation in the amount of $604,103. There are two legal theories which justify this award, and the injurious prohibition is compensable under one or the other of these theories.

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[4] The Department misleadingly describes the prohibition period as a "quarantine." The term "quarantine" might be applicable if the Department had simply generally suspended the marketing or transfer of stock for a temporary period. This would not have prevented continued production or sale of stored stock when the quarantine was lifted. The prohibition of all production here was far more disabling than a quarantine.

A. Prohibition as incident to the taking of stock.

The prohibition was a separate act causing loss which was incident to, and an integral part of, the burning of healthy citrus stock. The Department felt that decontamination procedures were somehow necessary to assure that the bacteria or disease found at Polk's nursery would be eliminated. The decontamination/prohibition implemented or fulfilled the objectives of the burning. The full compensation guarantee requires in such cases that the condemnee be made whole for the entire taking, considering all facts and circumstances that bear a reasonable relationship to the loss occasioned by the taking. Jacksonville Expressway Auth. v. Henry G. DuPree & Co., above.

Florida courts have ruled that a separate act incident to the act of taking that causes additional loss to the condemnee must be compensated. In Anhoco Corp. v. Dade County, 144 So.2d 793 (Fla. 1962), the Court upheld an outdoor theater owner's claim for compensation for the temporary loss of access to its facilities. The condemnor, in acquiring a fee interest in a roadbed to build a limited access highway, had dug ditches that destroyed egress from one theater and all access to an adjacent theater. The Court ruled that these were separate acts incident to the taking which caused a temporary loss of productive use and required compensation.

In Div. of Administration v. Mobile Gas Co., 427 So.2d 1024 (Fla. 1st DCA 1983), review denied, 437 So.2d 677 (Fla. 1983), the condemnee claimed that the condemnor's departure from its original plans and promissory representations relating to a

service road in the original condemnation case had temporarily destroyed pedestrian and vehicular access to the premises, resulting in loss of income. The District Court of Appeal upheld the condemnee's claim for compensation.

> . . . [T]he condemnation judgment does not preclude a subsequent claim for injuries caused by a new and distinct act of the condemnor or by negligent or wrongful acts, or by unlawful use of the condemned property, or by the construction of the work in question in a manner different from that originally contemplated.
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> * * *
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> The initial eminent domain case preceded this action by a year. The issue of damages in this case was clearly not before the jury. The loss of income by appellee, if provable, would result not from the initial taking but from the department's subsequent failure to provide continuous accessibility to appellee and its customers as the department represented and promised at the trial on the taking. (e.s.)

Id. at **1026-27** (citations omitted).

In State Dept. of Transportation v. Shaw, 303 So.2d 75 (Fla. 1st DCA 1974), the condemnee filed a separate action against the condemnor for failure to pay a relocation housing allowance as promised in connection with the condemnation and for attorney's fees. The District Court of Appeal agreed, and upheld the claim both to the relocation allowance and to attorney's fees under the eminent domain statute, on grounds that the relocation allowance claim was "ancillary to, and a direct outgrowth of the eminent domain proceeding . . . " and "incident to the initial eminent domain proceeding." Id. at **77**.

The principle of these cases is that a subsequent separate act by the condemnor causing additional loss incident to the taking requires full compensation. Fairness would seem to require that an unjustified prohibition against use incident to the taking likewise not go uncompensated. The condemnor should be required to make the condemnee whole for any separate action related to the taking that causes additional loss.

Amici recognize that "business damages" flowing from the taking of property are not compensable under the Florida Constitution because such damages are considered uncertain and speculative. See State Road Dept. v. Bramlett, 189 So.2d 481, 484 (Fla. 1966); Lee County, above, at 560. Polk's loss of production resulting from the ancillary but distinct act of prohibiting use of his nursery is hardly so uncertain or speculative as to fall fairly within this rule. The production revenue and expenses he would have experienced by continuing the established operations at that location can be (and were) shown with reasonable certainty. All Polk has done is to measure the loss attributable to the prohibition by the probable net yield approach. This is not the same as a claim for business damages per se.[5]

Accordingly, the rationale behind the "business damages" restriction is inapplicable here. By treating the prohibition as a separate unjustified or wrongful act incident to the foundation

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[5]By contrast, Polk did not obtain remote "business damages, e.g., for the loss of customer goodwill or additional losses arising from the absence of cash flow in his business caused by the taking.

taking, the trial count accomplished the proper and fair result consistent with the framework of established Florida case law in Anhoco, Mobile Gas and Shaw, above.

B. Separate temporary taking.

If the prohibition against the productive use of uncontaminated premises is not an act incident to the taking of healthy stock, then it must be a separate act of taking for which compensation is due. Like the burning itself, the prohibition benefited the citrus industry, and in turn the whole economy, thereby conferring a benefit rather than preventing a public harm. Although property was not physically destroyed, Polk was deprived of all practical economic use and benefit. A regulatory prohibition against all practical use is just as much a taking as physical destruction would be. See Graham v. Estuary Properties, Inc., 399 So.2d 1374 (Fla. 1981), cert. denied, 454 U.S. 1083 (1981). The prohibition completely denied Polk's investment-backed expectations in the use of his property and therefore was a taking in itself.

The Florida courts have, in some instances, required compensation for the temporary deprivation of access to business premises. See Anhoco and Mobile Gas above. It requires no doctrinal upheaval to apply the Anhoco-Mobile Gas rule to the present case. There is no practical distinction to the owner between the denial of physical access, as in Anhoco and Mobile Gas, and the Department's denial of permission to use the subject premises for an indeterminate but temporary period. In both

cases the owner retains bare possessory rights to the premises, but all practical productive use is foreclosed.

The Second District Court of Appeal in Mid-Florida Growers, 14 F.L.W. at 654, ruled that the nursery owners could pursue an action for temporary taking, citing First Ens. Ev. Lutheran Church v. County of Los Angeles, 482 U.S. _____, 107 S. Ct. 2378, 96 L. Ed. 2d. 250 (1987). In First Lutheran Church, the church claimed compensation as owner of a facility for retarded children for the effect of an invalid land use ordinance prohibiting all construction or reconstruction on the premises. The restriction was only in effect temporarily from its enactment date until it was judicially declared invalid. The Court held that if this restriction temporarily denied all use of the property, then it constituted a taking for which compensation is due.

Here the record reflects no economically viable short term use for the premises during the prohibition period, other than resumption of citrus nursery operations when the prohibition ended. The record therefore establishes a temporary taking within the meaning of the Fifth and Fourteenth Amendments.

Federal case law concerning compensation for temporary takings has established that such takings may require consideration of injuries that would be considered noncompensable in the case of a permanent taking. In Kimball Laundry v. United States, 338 U.S. 1, 69 S.Ct. 1434, 93 L.Ed. 1765 (1949), the court held that the condemnee, which suspended its business for the duration of the taking, may recover for loss of value as a going concern, based on loss of established customer trade

routes. The Kimball Laundry court made the following observations about temporary taking cases which are pertinent here:

> The taking was from year to year; in the meantime the Laundry's investment remained bound up in the reversion of the property. Even if funds for the inauguration of a new business were obtainable otherwise than by the sale or liquidation of the old one, the Laundry would have been faced with the imminent prospect of finding itself with two laundry plants on its hands, both of which could hardly have been operated at a profit. There was nothing it could do, therefore, but wait. Besides, though trade routes may be capable of transfer independently of the physical property with which they have been associated, it is wholly beyond the realm of conjecture that they could have been sold from year to year or that the Laundry would have bound itself to give them up for a longer period when at any time its plant might be returned. It is equally farfetched, moreover, to suppose that they could have been transferred for a limited period and then recaptured.
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> * * *
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> When fee title to business property has been taken, however, it is fair on the whole that the amount of compensation payable should not include speculative losses consequent upon realization of the remote possibility that the owner will be unable to find a wholly suitable location for the transfer of going-concern value. But when the Government has taken the temporary use of such property, it would be unfair to deny compensation for a demonstrable loss of going-concern value upon the assumption that an even more remote possibility - the temporary transfer of going-concern value - might have been realized. The temporary interruption as opposed to the final severance of occupancy so greatly narrows the range of alternatives open to the condemnee that it substantially increases the condemnor's obligation to him. It is a difference in degree wide enough to require a difference in result.
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> * * *

Id. at 14-15 (e.s.) See also Cooper v. United States, 827 F.2d 762 (Fed. Cir. 1987); and Yuba Goldfields, Inc. v. United States, 821 F.2d 638 (Fed. Cir. 1987) (compensation for six year deprivation of right to mine minerals may involve different measure of compensation than permanent taking).[6]

It was not error to value Polk's loss by the production which would have taken place and the probable net yield that would have been received if the prohibition had not been imposed. As in Lee County v. T & H Associates, Inc., compensation for the temporary use of real property may be measured by the probable net yield of stock that could have been grown there. The Department could have offered alternative evidence of valuation, but apparently chose not to do so. The jury was free to accept Polk's evidence and attempt to restore to him the actual value he would have received but for the prohibition, and which his competitors who were not subject to a prohibition actually did receive.

The fundamental purpose of the full compensation guarantee is to make the owner whole. Jacksonville Expressway Auth. v. Henry G. DuPree Co., above. The Department cannot burn a healthy corn crop, then salt the fields so that the next year's crop will not grow, and expect to pay only for the value of the existing crop. Polk should not in fairness be forced to bear

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[6] See also United States v. General Motors Corp., 323 U.S. 373, 65 S.Ct. 357, 89 L.Ed. 311 (1945). The court held that the condemnee, which sought to remain in business at another location, could present evidence of his relocation and storage costs as relevant to the value taken, although these would not be compensable in a permanent taking.

alone the additional loss from the unjustified prohibition against new production. The Constitutional full compensation guarantee requires that the industry or the whole economy, which benefited from the prohibition, share the burden.

The prohibition was either a separate act incident to or related to the burning of stock which itself caused an additional loss, or a separate temporary taking. Under either theory, compensation for the additional loss is constitutionally required.

CONCLUSION

The Department has failed to show that the trial court's final judgment awarding compensation based on the jury's verdict was erroneous. The judgment should be affirmed.

M. Stephen Turner

and

David K. Miller by mst.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by U.S. Mail this 30th day of March, 1989 to the following:

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