IN THE SUPREME COURT OF FLORIDA

DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES,

Petitioner,

v.

CASE NO. 74,048

MID-FLORIDA GROWERS, INC., and HIMROD & HIMROD CITRUS NURSERY, a Partnership composed of Joe Himrod and Joe B. Himrod,

Respondents.

DCA CASE NO. **88-01369**

ANSWER BRIEF OF RESPONDENTS

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TABI OF CONTENTS

TABLE OF AUTHORITIES

Pase Numbers

Cases

Other

STATEMENT OF THE CASE AND FACTS

The Department's Brief omits critical facts, advances argument and non-record speculation as established fact, and asserts disputed evidence and inferences as if uncontroverted. Respondents are compelled to submit their own statement to correct possible misimpressions created. Respondents also attach an appendix, references to which are prefaced by "A".

The Respondent Citrus Nurseries alleged (and this Court previously determined) that the Department effected a taking of their citrus stock in October **1984.** By Amended Complaint, Respondents alleged that the Department's separate action incident to the destruction of stock, initially ordering them not to resume production for a two year period, later reduced to 3-4 months, also required compensation. (R: **147, 163, 190)** The Department did not oppose the amendment, and the Circuit Court allowed this claim to be submitted to the jury. (R: **190)**

I. Compensation for Citrus Stock

Prior to the Department's destruction of their growing stock in October **1984,** Respondents had citrus plants in various stages of development: seedlings, liners, budded trees in **4"** citra pots, and in Mid-Florida's case, budded trees in **6"** and **7.5"** (three gallon) citra pots. The different tree stages and container sizes were shown to the jury. (T: **247-48)**

The Nurseries' business was to sell mature budded trees for resetting in groves. They did not sell seedlings, liners, or immature budded trees. (T: **230, 249, 300-01)**

Both Nurseries normally sold mature budded trees in 4" citra pots. In July 1984, three months prior to the burning, they jointly purchased 50,000 six inch citra pots to be shared equally. Use of the 6" pots allows the trees to grow larger root systems which growers prefer (T: 142-44, 226-28); these trees command a higher price. (T: 280-81) Mid-Florida had transplanted some 12,000 budded trees into 6" pots, and intended to use all its 25,000 six inch pots for the upcoming season. (T: 143-44, 227-28) Himrod had not yet begun this transplanting process, but likewise intended to move 25,000 of its trees into the 6" pots. (T: 247, 280-81)

All of the growing stock would be ready for marketing in the spring and summer of 1985 and would have been sold during 1985. (T: 248, 284-85) Seedling trees in both nurseries were large and well-developed, and ready to be moved into 4" citra pots as liners. (T: 189, 250-51, 282) Within 8 to 13 months, they would become mature trees ready for sale during 1985. (T: 139-40, 162, 164, 250)

The trees had a good "shelf life"; they could be held in the greenhouses 12-18 months without diminution of value. (T: 164-67, 246, 278) The greenhouses protected the Nurseries' stock from the record freeze of 1983-84. (T: 246) The District Court summarized:

> Each nursery in this case grows containerized product inside greenhouses. This is a relatively new method for starting citrus. It allows the nursery to avoid

> freeze damage to its stock and to receive the higher prices for its product which typically follow grove-damaging freezes. (A: **2)**

In August **1984,** the Department discovered a disease at Ward's Nursery which it suspected of being citrus canker. The following month the Department imposed a quarantine upon the movement of all citrus material. (T: **156)** The effect of the quarantine was to prohibit the purchase or sale of citrus plants, and thus the Nurseries' stock could not have been marketed while the quarantine remained in effect. (T: **156, 242, 250-51, 257-59, 269-70, 407-08)**

There was no dispute on this point. Even the Department's Canker Eradication Project Supervisor, Richard Gaskalla, so testified on cross-examination, definitively stating that seedlings could not be sold during the quarantine. (T: **407-08)** The District Court concluded: "During the quarantine, citrus nursery stock could not be legally sold in Florida." (A: **2).**

The testimony cited in the Department's Brief does not suggest otherwise. At T: **156-57,** Mid-Florida's president discusses sales he brokered in April **1985,** after the quarantine was lifted. At T: **266,** nursery owner William G. Adams discusses his price list for plants in October **1984,** but then reveals his confusion on dates because he thought the quarantine was imposed in October **1984.** (T: **267)** He acknowledged that no marketing of plants was allowed during the quarantine and that his stock was not sold until after the market reopened. (T: **257-59, 269-70).**

The Department speculates that the quarantine may not have

precluded contracts for delivery after the quarantine. But no evidence was presented at trial of any such contracts, or of prices established by any such contracts.

The Department contends that its Action Plan effective November 19, 1984 indicates some movement of seedlings might be allowed during the quarantine. The Department never introduced this document as evidence before the jury; it was simply inserted as an Appendix to this Court and should not be considered.[1]

The lifting of the quarantine and reopening of the market on April 1, 1985 coincided with the Nurseries' practice to sell into the spring market. (T: 228, 248) The primary market for citrus nurseries selling mature budded trees as grove resets begins in February and runs through fall; growers are reluctant to buy resets in the winter. (T: 228, 277-78) The Department's destruction in October 1984 thus prevented the Nurseries from growing their stock to maturity and selling mature budded trees in a customary manner in 1985.

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[1]Even if considered, this Plan is not evidence that any seedling plants were actually marketed. The Respondents certainly could not have sold any seedlings under the referenced provision of the Plan since they were classified as exposed nurseries and did not deal exclusively in seedlings. Moreover, by the time this Plan was effective, Respondents' large seedlings would have been transferred into pots and become liners. The Department concedes there was never any market for liners. (T: 188, 329, 509) The Action Plan therefore underscores the absence of any market for any of Respondents' stock during the quarantine.

The following chart shows Mid-Florida's losses:

	Status in October 1984 (T: 145-46)	Status in Spring 1985 (T: 297)
Seedlings	30,000	
Liners	22,404	
4" Budded Trees	45,576	72,980
6" Budded Trees		25,000
7.5" Budded Trees	40,000	40,000
Total (Mid-Florida)	137,980	137,980

At Himrod, the losses were as follows:

	Status in October 1984 (T: 283)	Status in Spring 1985 (T: 319-20)
Seedlings	56,800	
Liners	62,004	
4" Budded Trees	24,790	118,594
6" Budded Trees		25,000
Total (Himrod)	143,594	143,594

These figures take into account normal losses during the maturation process. Such losses were excluded or netted out from both the original and the resulting counts. (T: 145, 366-70) The seedlings inventoried were all expected to yield mature trees. (T: 144-45, 189-90, 352)

The prices for citrus nursery trees had been moving upward since the freeze of December 1983. (T: 164) By August 1984, the demand for grove replacements had used up available trees, and prices reached $3.50 to $3.85 for a 4" tree. (T: 154) The Department's quarantine then suspended the market completely.

During early January 1985, another record freeze occurred, which coupled with the scarcity caused by the prior winter's freeze, caused the price of 4" tree to rise to $4.25 - $5.50 when

the market reopened. (T: **155** R: **501)** The market continued strong at this level or higher throughout **1985** and **1986.** (T: **259, 260, 264,; R:** 501-chart of prices)

The Nursery owners presented their own valuation testimony as to the price for which their destroyed stock would have sold as mature budded trees in the Spring **1985** market. The following chart summarizes this testimony:

	Ausust **1984** (T: **191, 266, 288)**	Spring **1985** (T: **156, 285)**
4 inch	**$3.50**	**$4.50**
6 inch	**$4.90**	**$6.50**
7.5 inch	**$6.75**	**$7.50**

The Nurseries also presented testimony of William G. Adams, the largest citrus nurseryman in the state. Mr. Adams testified that his 3-acre greenhouse nursery operation was not destroyed by the Department in the fall of **1984,** and that when the quarantine was lifted, he sold his nursery stock at Spring **1985** market prices. (T: **253, 260-63, 268-70)**

The Nurseries also presented expert testimony from Dr. John P. Cooke, an Associate Professor of Economics at the University of South Florida. The Department accepted Dr. Cooke as an expert witness. He testified that a market approach to value should be used to place the Nurseries in as good a position economically as if the stock had not been destroyed. **(T: 295-96)**

Dr. Cooke testified that spring **1985** market prices should be used to determine market value. Because of the quarantine, this was the first available market into which the stock could have

been sold. The stock would have matured into and otherwise been available for this market. (T: **299, 302, 327, 359)**

Dr. Cooke testified that use of August **1984** market prices was inappropriate because that market was no longer available. The calendar could not be turned back to retrieve a lost market; the only market available at the time of the destruction was the next following market in the Spring of **1985.** (T: **299, 327)**

Based on his analysis of the Nurseries' operations, Dr. Cooke reduced the Spring **1985** market values by the amount of expenses saved in not bringing the stock to maturity and in not improving **50,000** plants to **6"** pot size. He stated his opinion that the remainder was the value of the destroyed stock to be compensated. (T: **304-07)** His calculations are summarized in Plaintiffs' exhibits **1** and **3** received into evidence. (A: **10-13)** The value of the stock reflected in his testimony was **$739,462** for Mid-Florida and **$696,173** for Himrod.

Significant unavoidable and fixed expenses such as essential payroll, mortgage payments, and taxes continued for the most part even though the Nurseries had no inventory of stock to sell. (T: **146, 151, 364).** Dr. Cooke did not back-out these costs because they were not saved. (T: **302-03, 309).**

The Department presented its own expert economist witness, Ron Muraro, who offered alternative approaches to valuation, including a cost reimbursement approach. (T: **475-78)** The Department conceded that the value of the Nurseries' destroyed

stock was at least **$611,721** (DX **5),** or about **43%** of the total sought by the Nurseries.

Muraro admitted on cross-examination that upon market shutdown, it was reasonable to look to the next available market to determine the value of stock which could be held and marketed at that time:

> **Q.** I want you, as an economist... to assume for me that there is a nonexistent market because everything is shut down. You can't sell. Nobody can. I want you to assume that. Now, would it be reasonable to look to the next available market in order for me to know how much my inventory is worth from a market standpoint?
>
> A. Only if you carried your inventory to that point in time. **(T: 503)**
>
> * * *
>
> **Q.** And I think you've told me that it would be reasonable...if I could hold those goods, to hold them over until the next market came, say spring of **'85.** I think you've told me that that would be a reasonable thing to do.
>
> A. That would be an option in that. Yes, yes I would say that. The owner would have to decide what he wants to do with those plants.
>
> **Q.** Okay. And the price that I got or could get in that market, then, would truly measure the worth of inventory I had?
>
> A. If they were, if they had reached that point in time.
>
> **Q.** And if they were marketable then?
>
> A. And if they were marketable then.
>
> **Q.** Or could be made marketable?
>
> A. Yes, sir. **(T:506)**

It was never disputed that the Nurseries could have reached the spring **1985** market. Thus experts for both sides endorsed the probable net yield approach in the circumstances of this case.

The Circuit Court instructed the jury that, as "further explained below" (i.e. later in the instructions), market value need not be determined as of October **1984** if the market for nursery stock was non-existent then or if the stock were to be marketed later (i.e. immature and not yet ready to market then), in which events future market price *may* **be** considered. (T: **545-46, 609-10).**

The Department's Brief complains of the particular wording of this instruction, belatedly advancing an out-of-context interpretation. At trial, however, the Department agreed to the wording of this instruction, objecting only to the concept that future market prices could be considered. (T: **523, 532-35,** 545-**48, 550-57)** Furthermore, the Department did not raise this instruction as a point on appeal to the Second District, but contended only that Dr. Cooke's testimony was improperly admitted. (A:**18-19).**

The Court thereafter instructed the jury **(T; 609-12):**

1. To value the stock in accordance with the highest and most profitable use for which it is reasonably adapted or is likely to be needed in the near or foreseeable future.

2. To consider all facts and circumstances.

3. That market value is not an exclusive standard but a tool to assist in determining full compensation.

4. That the State is not required to pay more or less than any other purchaser on the free and open market.

5. To consider normal market conditions and exclude from consideration any conditions of market shut down.

6. That it may consider the value of immature stock as if it were brought to maturity and sold, reduced by the costs saved in not bringing the immature stock to maturity.

7. That if any immature stock had a market value at the time of their destruction, to consider that value.

The entire jury instructions on valuation appear at **A: 14-17**. The instructions were intended to allow consideration of all methods of valuation advanced by the parties, so that both sides would have arguing grounds for their theories. (T: **542-44, 549-50**). The Court gave the Department's only requested substantive instruction, advising that if any immature stock had a market value at the time of destruction, that market value could be considered. (T: **551-56**; A: **16**).

The Department did not request a special verdict as to how the jury determined the value of the destroyed stock.

The Second District, upon review of the entire record, upheld the admissibility of the probable net yield approach. The Court's reasoning, extracted from various parts of the opinion, was as follows **(A: 3-6)**:

> Because of the quarantine, there was no legal market in October **1984** for the nurseries seedlings, liners or budded trees. Thus, the Department's analysis is based upon a hypothetical market in October **1984**, with prices derived from the earlier fall market.

> The nursery owners reject the analysis based upon earlier prices. Instead, they base their analysis upon the next true market which existed in April **1985.** If the nursery owners' product had not been destroyed in October **1984,** it would have continued to grow during the quarantine.
>
> In light of the State quarantine, the jury in this case was authorized to find that a market did not exist for the nursery owners' product in October **1984.** Thus, the jury had no practical option but to consider evidence of earlier or later market prices. In this case, the lower court did not compel the jury to adopt the future market approach.
>
> In a condemnation proceeding, the value of the property is an issue wisely left to the jury's province. (cite omitted) The jury... should be free to evaluate all evidence which assists in establishing a value and does not result in speculation. In this case, the "future" market is in the past. The jury did not need to speculate or to rely upon mere promises.
>
> While there is evidence of a market for seedlings and budded trees a month preceding the taking, there is also evidence that the state quarantine had effectively eliminated the nurseries' market in October **1984.** Thus the lower court did not err in allowing the jury to consider both the past and the future market.
>
> In this case, the spring prices are not drastically higher than the fall prices. Most of the nursery stock was intended for sale in the spring market. The competitors of these nursery owners, in fact, received the higher spring prices for their healthy nursery stock. It does not seem unfair to provide these nursery owners with the same full compensation which their competitors received in the intended market.

The Second District also upheld the reduction of probable yield value by costs saved. The Court noted that to deduct costs actually incurred would deny full compensation by effectively deducting those costs twice, and would put Respondents in a worse position than if the taking had not occurred. (A: ***6-7***).

However, the Second District eliminated prejudgment interest from the date of taking to the date the market reopened,

reasoning that Respondents' stock would not be sold under the probable net yield approach until the market reopened. (A: **6**).

The only question certified to this Court regarding the valuation issue was whether a citrus nursery owner whose stock was destroyed during a quarantine can measure its loss by prices prevailing when the market reopens. (A: **9**)

11. Compensation for Use Prohibition

In addition to burning Respondents' existing stock, the Department ordered the Nurseries in September **1984** not to begin any new production at their premises. (T: **151-52, 194, 248**) The Department alone (not USDA as implied in the Department's Brief) issued this order. (T: **228-29, 407-10, 429**) The Department imposed the prohibition upon citrus nurseries deemed **"exposed"** to canker as a new emergency policy in September **1984**. (T: **423, 426, 432**) The prohibition applied only where the Department burned stock; it was imposed on Respondents because their stock had been burned. (T: **411**) As the District Court found: "From the record in this case, it appears that the decontamination process only occurred in nurseries where the Department also destroyed the stock under an immediate final order." (A: 3)

The prohibition period included a **"decontamination"** procedure. (T: **409-11, 424**) It is now known that the Respondent Nurseries were healthy so that neither the burning nor the accompanying prohibition and decontamination were justified.

The prohibition interrupted the Nurseries' planned production cycle which must be continuously carried out to have

mature stock to sell. (T: **138)** Because the Nurseries' seedlings were ready to become liners, the Nurseries were preparing to begin a new production cycle in late September or October. (T: **189-90,** 250-51).

Because the Nurseries harvested seed and started about **35,000** new plants every **90** days, the District Court indicated their productive capacity was about **140,000** plants. However, there was no evidence that the Nurseries could not exceed this normal level. Their ability to accommodate additional plants was never questioned below.

The prohibition was particularly disruptive because the Nurseries were initially told that the prohibition period would last for two years. (T: **151-52, 410, 431-33)** The initial two year prohibition against use of their prepared premises forced Mid-Florida to clear, drain and irrigate adjoining property to establish a new greenhouse site to attempt to stay in business.[2] (T: **191, 194)**

The prescribed (but unnecessary) **"decontamination"** was completed in December **1984,** and the Nurseries were then allowed to begin new production in January **1985.** (T: 152, **399, 434)** The economic effects of the prohibition were severe. (T: **138-39,** 168) The Circuit Court recognized that **"the** businesses did not

[2]**The** Department claims that this new greenhouse somehow lessened the impact of the burning and prohibition. There is no evidence whatsoever to substantiate this claim. On the contrary, additional expenses were unnecessarily incurred to prepare a new site before the initial two year prohibition policy was changed. There was no evidence as to when, if ever, the new greenhouse was completed, or that it reduced Mid-Florida's losses.

work unless every day you put a seed in a pot. * * * Long after they were able to sell these plants that they had, they would run out of stock for several months because they were not able to do anything." (T: **311-12)**

The economist expert witness, Dr. Cooke, computed the value of the lost production based on average monthly production less production costs saved. (T: **315-18).** The Department offered no evidence to value Respondents' loss and conceded that if the production prohibition was compensable, Dr. Cooke's calculations were proper. (T: **602)** The jury awarded **$105,717** for Mid-Florida's lost production and **$128,352** for Himrod's. (T: **618)**

The Second District ruled that the lost production claim was not compensable as such, but certified the question as one of great public importance. (A: **7-9)** The District Court held, however, that the Nurseries could assert a claim for temporary taking based on the use prohibition, and remanded for further proceedings on that issue. (A: **1, 9)**

SUMMARY OF THE ARGUMENT

I. VALUE OF CITRUS STOCK

The jury properly considered the probable net yield approach to value. This approach is universally recognized for growing plants that are sufficiently developed to allow reliable prediction of yield within a reasonably foreseeable time but are not yet ready to market. The owner receives what he actually would have received at maturity of the plants, less costs

actually saved. This highest and best use of the growing stock is reflected and the owner is placed in as good a position financially as if the taking had not occurred. The Department cites no authority holding this approach should not be considered.

By definition, the probable net yield approach looks to market prices prevailing when the growing stock would be marketed. The actual value of immature plants is the revenue they would generate upon sale at maturity. In this case, spring 1985 prices necessarily were used. Only these prices would determine what the Nurseries would have received.

The Department's imposition of a quarantine which suspended the market at the time of taking also supports use of the probable net yield approach. The evidence at trial unequivocally showed, and the jury was entitled to find, that because of the Department's quarantine, no market existed for any of the Nurseries' growing stock. The jury could therefore value the loss by prices prevailing when the market reopened. The jury could also consider the increased value from improvement of 50,000 plants by their intended transfer into larger 6" pots.

The Department presented various approaches to value the immature growing stock. The jury had good reason to reject these approaches as inadequate to compensate full value in the circumstances. The Nurseries' whole operation is geared to the sale of mature budded trees. If only cash costs incurred up to the moment of destruction were reimbursed, as the Department

suggested, fixed expenses allocable to the destroyed stock, as well as a commensurate profit determined by the actual market, would not be returned as part of value. Competitors whose trees were spared realized these amounts.

The jury also rejected the Department's approach to use August 1984 (prequarantine) market prices to value the mature stock. The Nurseries' expert testified that the earlier market had passed and would not reflect economic reality. Even the Department's expert agreed that the stock was worth what could be realized if it survived the quarantine. Probable net yield would not result in a windfall since the Nurseries planned to sell most of their mature trees into the spring market anyway.

Many of the issues raised in the Department's Brief, such as the wording of jury instructions, were never raised below and may not be injected here. In any event, the jury was correctly told that it should consider market value on the date of taking, if possible, as well as alternative approaches to value. The Department did not request a special verdict and must accept the supported general verdict on valuation.

11. LOST PRODUCTION/TEMPORARY TAKING

This Department's use prohibition implemented and fulfilled its policy of destroying existing stock due to suspected canker. Since the destruction was not justified, neither was the use prohibition. The use prohibition was a separate action incident to a foundation taking; the resultant loss is part of the taking and is compensable in proceedings related to the taking.

In the alternative, as the Second District ruled, the Nurseries should be allowed to establish a temporary regulatory taking consistent with the holding of First English. The length of the deprivation, the lack of justification, and the extent of the loss are sufficient to establish a taking on remand.

ARGUMENT

I. VALUATION OF DESTROYED STOCK

A. THE CIRCUIT AND DISTRICT COURTS CORRECTLY RULED THAT THE JURY COULD CONSIDER PROBABLE NET YIELD AS PROBATIVE OF THE ACTUAL REALIZABLE VALUE OF GROWING STOCK FOR WHICH NO MARKET EXISTED ON THE DATE OF TAKING.

The objective of the constitutional guarantee of full compensation is to compensate the owner for what he has lost. City of Jacksonville v. Henry G. DuPree Co., 108 So.2d 289 (Fla. 1959). The probable net yield approach measures this loss precisely, by the actual net revenue the owners would have received if their property had not been taken.

The probable net yield approach is particularly compelling where no market exists for the property on the date of taking. The property taken included immature plants, which were not ready to market and would not be marketed before maturity. Furthermore, the prior market for mature budded trees (and seedlings for nurseries that sold them) was suspended by the Department's quarantine. Under these unusual circumstances, none of the stock could be bought or sold on the date of taking, and

the market before and after the quarantine should be considered. The Nurseries had no choice but to hold their stock for sale in the next available market. The probable net yield approach, based on the only real choice available to them, is a rational, fair and realistic method to measure the stock's actual worth.

In order to make the owner whole, juries are allowed to consider all facts and circumstances relating to the loss occasioned by the taking. 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); Swift & Co. v. Housing Auth., 106 So.2d 616 (Fla. 2d DCA 1958).

The owner of property taken is allowed to testify concerning value. Hill v. Marion County, 238 So.2d 163 (Fla. 1st GCA 1970). Expert testimony concerning value is admissible in condemnation proceedings unless the method used is totally inadequate and unauthenticated. Rochelle v. State Road Dept., 196 So.2d 477 (Fla. 2d DCA 1967).

Valuation on the date of taking must consider the property's likely adapted, highest and most profitable use. See, e.g., Swift & Co. v. Housing Authority, above; Division of Bond Finance v. Rainey, 275 So.2d 551 (Fla. 1st DCA 1973) (jury may consider effects of foreseeable rezoning on value of realty); Casey v. Florida Power Corp., 157 So.2d 168 (Fla. 2d DCA 1963) (all uses to which property adaptable may be considered).

Proper valuation for any given case is inextricably bound up with the particular circumstances of the case. Dade County v. General Waterworks Corp., 267 So.2d 633, 639 (Fla. 1972). The Court there noted that all valuation methods, including fair market value, are merely tools to achieve full compensation, and may be used or rejected in particular cases. Id. at 641.

Even if market value exists on the date of taking, it is only a tool to be used to determine full compensation; it is not the exclusive standard. Florida Eminent Domain Practice and Proc., Section 11.5 (4th Ed. 1988) (citing cases). The jury in this case was properly allowed to consider all evidence, and chose the approach that, in its opinion, most fairly compensated value taken.

The probable net yield approach is universally accepted in condemnation, contract and tort cases to determine the value of growing plants. See esp. Lee County V. T & H Associates, Inc., 395 So.2d 557 (Fla. 2d DCA 1981), in which the court described this approach as "at least as probative" as alternative evidence to value growing stock. Id. at 560. The condemnor, like the Department here, objected to consideration of weather and market conditions occurring after the taking which would have increased the actual revenue from the plants in question. The Court rejected this argument, however, because the retrospective evidence of value that would have been received was the "best possible evidence available" and the "most reliable evidence available." Id. at 561.

This Court, in Corneal v. State Plant Board, 95 So.2d 1 (Fla. 1957), and again in State Plant Board v. Smith, 110 So.2d 401 (Fla. 1959), required that evidence of net revenue be considered in valuing the plants taken. The Court ruled that the owner's loss of profit must be compensated as "a plain dictate of justice and of the principle of equality." Corneal, above, at 6-7; Smith, above, at 403. Smith and Corneal leave no room for the Department's argument that the profits the owner would have received from the market cannot be considered in compensation.

Lee County, Corneal, and Smith did not involve a regulatory quarantine that suspended the market on the taking date. These decisions recognize that, even in a normal market, growing stock can be valued based on its probable net yield. In this case, the regulatory quarantine makes probable net yield evidence even more appropriate to value immature stock, as well as mature stock which could not lawfully be sold on the date of taking and had to be held to the next available market.

The Nurseries presented an Amicus Brief in the pending case Dept. of Agriculture and Consumer Services v. Polk, Case No. 73,842.[3] That Brief cites numerous authorities from Florida, as

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[3] Polk differs from this case in two respects. First, there was evidence of some disease at the Polk nursery, although the disease was found to be harmless. There was no disease found at the instant Nurseries. No question was raised as to any fear evidence regarding Respondents' stock. Indeed Respondents presented affirmative evidence that their trees would have been purchased when the market reopened. (T: 242) Second, the quarantine imposed by the Department from September 1984 to April 1985 makes market evidence on the taking date unavailable in this case. No such quarantine appears to have been present when Polk's plants were destroyed in September 1985.

well as other jurisdictions, discussing the use of probable net yield evidence in valuing growing plants in condemnation, contract and tort cases. (A: 21) Every case cited upholds the admissibility of probable net yield evidence, even in a normal (unquarantined) market, to value growing stock. The Department has had the benefit of these citations in preparing its Brief in this case, and yet has not offered a single authority where the probable net yield approach was held inadmissible.

The Department relies on a general rule in federal condemnation practice that fair market value should be used unless too difficult to find or resulting in manifest injustice. But this rule does not preclude the use of probable net yield evidence for growing plants in the circumstances presented here. Probable yield measures true market value. Federal courts use this approach. **See** United States v. 576.734 Acres, 143 F.2d 408 (3d Cir. 1944), cert. denied, 323 U.S. 716 (1944); Dailey v. United States, 90 F. Supp. 699 (Ct.Cl. 1950), United States v. 729.773 Acres, 531 F.Supp. 967 (D.Haw. 1982). In United States v. 131.68 Acres, 695 F.2d 872 (5th Cir. 1983), cert. denied, 464 U.S. 817 (1983), the court upheld an award to lessees for their growing sugar cane crop, valued based on probable net revenue from the first harvest. The trial court also properly considered the lessees' evidence showing the probable net yield from the second and third years of the sugar cane growing cycle, but held it duplicated the fee owners' claim.

The Department's approaches to value, based on assumptions that a hypothetical market existed on the taking date, are subject to serious flaws. First, the use of a variable cost plus percentage markup would not compensate the Nurseries for their fixed and unavoidable costs. Respondents sold only mature budded trees. Their investment and attendant costs were geared to production of this final product. By analogy, one might as well confiscate a winemaker's choicest product in the early stage of production and offer the market price for wine vinegar as compensation. Second, the Nurseries would have sold into the spring market anyway, and should have the benefit of a rising market to compensate them for the risk (and loss) of a declining market in other years. The variable cost plus percentage markup approach falls short of compensating the Nurseries for what they actually lost, i.e., the actual net revenue they would have received. Probable net yield is the fairest approach to compensation.

Probable net yield should also be considered to value mature stock in a quarantined market. In a normal market, the market value of mature plants ready for market equals the probable yield, i.e., the revenue from sale in that market. If the market is suspended due to quarantine, then the market price in the next available market (if the plants can be held) is a fair indicator of value. None of the Department's cases considers the effect of a suspended market. A hypothetical willing buyer/willing seller

model cannot be the only approach to value when sales cannot even take place.

Where abnormal market conditions exist, other approaches must be considered. As stated in Florida Eminent Domain Practice and Procedure, supra, Section 9.37: "Presumably an owner would not offer his property for sale during a period of temporary depression but would hold it until the market recovers." The special or inherent value of the condemned property should be considered. See 4 Nichols on Eminent Domain Section 12.32[2], p. 12-551 (3rd Ed. 1977). Also see Sinclair Refining Co. v. Jenkins Petroleum Co., 298 U.S. 689, 699, 53 S. Ct. 736, 739 (1938): "The market test failing, there must be reference to the values inherent in the thing itself, whether for use or exchange."

Certainly in the absence of any market, probable net yield is as reasonable as the Department's speculation about a hypothetical sales price. No case cited by the Department holds otherwise.

The Department pronounces (Brief at 38) that Respondents should be limited to August 1984 prequarantine prices because their stock was considered suspect. The Department neither presented nor proffered any so-called fear evidence in this case. On the other hand, the Nurseries presented disinterested competent testimony (and more witnesses were lined up for rebuttal if necessary) that their stock would have been purchased at spring 1985 market prices when the quarantine was

lifted. (T: 242) By the time the market reopened, Respondents' surviving stock would have been demonstrably healthy.

Assuming a market existed for Respondents' stock during the quarantine (as the Department speculates), and assuming such market was temporarily distorted by the Department's actions (as it pronounces), then probable net yield best eliminates that temporary distortion and restores actual value. The temporary absence of a normal market for Respondents' stigmatized stock is all the more reason why probable net yield based on the next available normal market should be considered.

The Department suggests that use of spring 1985 prices departs from valuation on the date of taking, and draws an analogy to contract law which measures damages on the date of breach. Again, probable net yield and use of the first available market are consistent with this principle. Florida courts have long recognized in contract cases that loss with respect to growing plants can be measured by probable net yield. Twyman V. Roell, 123 Fla. 2, 166 So. 215 (Fla. 1936); R.A. Jones & Sons, Inc. v. Holman, 470 So.2d 60, 70-71 (Fla. 3rd DCA 1985), rev. dism., 482 So.2d 348 (Fla. 1986). Other jurisdictions hold likewise. See e.g. Frankfort Oil Co. v. Abrams, 413 P.2d 190, 199 (Colo. 1966)(on breach of mineral lease, value of immature hay crop may be measured by probable net yield or other methods).

Lake Region Paradise Island, Inc. v. Graviss, 335 So.2d 341 (Fla. 2d DCA 1976), cited by the Department, involves an entirely different valuation issue. The holder of an option to buy an

equity interest in a business was not allowed to value that interest as of the date of trial. The value of the business on the trial date would be due to the owner's efforts after breach, and could not represent the lost benefit of the bargain. By contrast, the Nurseries do not seek to value their stock as of the date of trial. They ask only for the benefit they would have had through their own efforts as measured by the first available market, not the date of trial.

The Department speculates that under the jury instructions, probable net yield may have been used to value stock for which a market may have existed. This contention presumes that some market existed during the quarantine contrary to the undisputed evidence. The Circuit Court instructed the jury to consider market value on the date of taking, if possible. (A: 11). The first part of the next instruction applies to all stock, and the second part applies to immature stock that normally would be marketed in 1985.[4] The Court expressly refers to subsequent instructions concerning valuation of immature stock which clarify this instruction. One of the subsequent instructions was the Department's own request that the jury could consider the market value of any immature stock that had a market value at the time of destruction. These instructions must be considered together rather than in isolation. Gaston v. Sevor, 156 Fla. 157, 23

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[4] The Court eliminated the phrase "or if the stock was immature at the time" because the subsequent instructions made this limitation clear. (T: 544-49) No objection was made to the amended language.

So.2d 156 (1945).

If the Department had any concern that the wording of the instructions was ambiguous or confusing, it should have made an appropriate objection and suggested proposed revised wording. No objection was made except to the concept of probable net yield. (T: 548-49) Any objection to the wording was waived. See Pase v. Cory Corp., 347 So.2d 817 (Fla. 3d DCA 1977). Also see State Dept. of Transportation v. Brevard, 545 S.W.2d 431, 436 (Tenn. Ct. App. 1976)(if charge could be misunderstood by jury in an eminent domain case, counsel's duty was to object to the language used and offer a special request to correct same; considering charge as a whole, jury was not misled). Furthermore, the Department did not raise the wording of any instruction as a point on appeal, and doubly waived any objection. (A: 18-19)

The jury could obviously use probable net yield because there was no evidence of any market for any stock on the taking date. The Department could have requested a special interrogatory verdict to expose the jury's rationale, but failed to do so. Under the "two issue" rule, since the general verdict on value of the destroyed stock has a lawful basis, the Department cannot speculate now that it may have been based on some possibly improper theory. See Colonial Stores, Inc. v. Scarboroush, 355 So.2d 1181 (Fla. 1978).

The Department then makes a jury argument that value should be determined from the market closest in time to the date of taking. The universally accepted probable net yield approach

looks to the market in which the stock would actually be sold. Experts for both sides agreed to the reasonableness of measuring value on the basis of what could be derived when the market reopened, assuming the stock could be held until then. The Nurseries were not free to go backward in time and recapture a market no longer available to them. Sale in the next available market would place them in the same position as if no taking had occurred. The jury rejected the Department's argument as not comporting with economic reality. Compensation in an eminent domain case is committed for final determination to the jury. See Roadway Express, Inc. v. Dade County, 537 So.2d **595** (Fla. 3rd DCA **1989).**

The Department argues that price increase in a future market is admissible only if the Nurseries expected the future price increase at the time of the taking. The Nurseries expected to sell their trees in the **1985** market, good or **bad.**[5] Their investment in expensive greenhouse facilities shows that they expected cold weather eventually and expected to benefit from any resulting price increase. When the government destroyed their product, the government's solemn obligation is to restore them to as good a position financially as if no taking had occurred.

The Department contends that seedling trees should have been valued as if sold as seedlings in the **1985** market. No

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[5]If the destroyed stock had been field grown, and the Department could have shown that it would have been destroyed anyway in the freeze, the Department presumably could present such facts to the jury and claim that a probable net yield approach would not return any value.

evidence was presented to indicate that the plants' growth would have been arrested for six months; nor did the Department support or argue this bizarre and unrealistic valuation theory at trial. How then could the Department hope to convince the jury to value these plants as if they would not mature and appreciate in value by the time the market reopened (and as if unavoidable costs would not continue)?

Finally, the Department suggests that the probable net yield approach would give the Nurseries a profit margin greater than their profit margin for the previous year. The Nurseries cannot sell according to a planned markup. They are "market takers" who accept the prevailing price set by the market, high or low, and hope that the average price generates a profit. (T: **231-32)** This business is vulnerable to economic fluctuations caused by weather and other natural forces. There is no fairer way to measure their loss than by the market price they would actually have received.

In summary, the Department's argues that only its valuation theory is correct, and that probable net yield can never be considered, even though probable net yield is the "best possible evidence available," Lee County; **"a** plain dictate of justice," Corneal and Smith; the "most widely accepted method" and the **"most** satisfactory method", **A-12;** and conceded by the Department's own expert to be reasonable in the circumstances of this case.

The Department has shown no reason to overrule the jury's valuation verdict based on probable net yield.

B. THE CIRCUIT AND DISTRICT COURTS CORRECTLY ALLOWED THE JURY TO CONSIDER THE PRODUCTION COSTS SAVED IN DETERMINING THE VALUE OF THE DESTROYED STOCK.

The only purpose in reducing prospective revenue is to prevent recovery of any costs that were actually saved. Costs not saved, i.e., that were actually incurred despite the destruction, should be recaptured as part of compensation. All fixed and unavoidable costs must be recovered out of the price received at maturity. If incurred costs are backed-out, the Nurseries are not compensated for them as the market would have done.

The Department had the burden to prove any amount claimed as a setoff or recoupment against the Nurseries' prospective revenue. Jacksonville Paper Co. v. Smith & Winchester Mfg. Co., 147 Fla. 311, 2 So.2d 890 (1941). See generally City of Fort Lauderdale v. Casino Realty, Inc., 313 So.2d 649 (Fla. 1975) (condemnor's burden to prove offsetting benefit to remainder). If the Department disagreed with these amounts, or felt that some costs were unreasonably incurred, it was free to develop the issue by cross-examination, presentation of rebuttal witnesses and argument to the jury. The Department now seeks to turn an adverse factual determination into an issue of law, and require that the prospective net revenue be reduced by costs actually

incurred. As the District Court of Appeal observed, this would in effect require the Nurseries to pay these costs twice.

The issue was thoroughly discussed in Wm. G. Roe & Co. v. Armour & Co., 414 F.2d 862 (5th Cir. 1969), cited with approval in R.A. Jones & Sons, Inc., supra, 470 So.2d at 70-71. There the Court ruled that the costs of producing and marketing citrus should be deducted from the damage award only to the extent that such costs were actually saved as a result of the injury. Id. at 872. Accord, **see** Elwood v. Bolte, 403 A.2d 869, 872 (N.H. 1979) (damages determined by lost apple production less any saved production expenses).

The only case cited by the Department, Daily v. United States, 90 F.Supp. 699 (Ct.Cl. 1950), determined compensation based on the gross anticipated revenue from the squash crop, less the costs for fertilizing, irrigating, cultivating and harvesting of the crop that were "not incurred." **Id.** at 701-02. There was no evidence as to what expenses were actually saved, so the court simply estimated, based on the age of the crop, that three-quarters of the total production costs had been saved. Id. at 702. Here the courts have a record of expert economic testimony as to costs actually saved and properly accepted the jury verdict based thereon.

The unspoken assumption behind the Department's argument is that Respondents should have liquidated their businesses to eliminate any further expense after their trees were destroyed. Respondents were not obliged to default on their mortgages and

taxes, or to give up their ability to continue in business. Unless the Department wishes to pay for their businesses too, it should not quibble that Respondents continued to meet necessary expenses to mitigate the effect of the taking as best they could.

II. COMPENSATION FOR LOST [redacted]

The Department gives scant attention to the lost production issue certified as one of great public importance. (Brief pp. 31-33) The Department instead concentrates on the temporary taking issue which the Second District did not certify but remanded to the Circuit Court for de novo proceedings. The certified question is properly addressed first.

A. THE DEPARTMENT'S PROHIBITION OF PRODUCTION INCIDENT TO THE TAKING OF HEALTHY STOCK REQUIRED ADDITIONAL COMPENSATION.

The Department did not attempt to argue that the prohibition was justified in any way. It did not dispute that the prohibition caused the Nurseries to suffer a substantial loss. The Department presented no alternative measure of loss, and conceded to the jury that Dr. Cooke's measurement of the loss was undisputed.[6] (T: 602) The only issue raised and preserved on

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[6] Dr. Cooke properly computed lost production by the same probable net yield approach used in valuing the destroyed stock. See Elwood v. Bolte, above; Phillips v. Rollins-Purle, Inc. 387 So.2d 1148 (La. 1980). See also State Dept. of Roads v. Dillon, 121 N.W.2d 798 (Neb. 1963) (where owner establishes a right to recover for growing crop or deprivation of right to produce such crop, probable yield approach is correct).

appeal, therefore, is whether this unjustified and undisputed loss should be compensated.

The order prohibiting production, initially for two years, but subsequently modified to allow production to resume after "decontamination," was imposed to implement the burning of stock. The burning and the prohibition were interrelated activities of the same canker eradication program.

In State Plant Board v. Smith, 110 So.2d 401 (Fla. 1959), the Supreme Court noted that an owner whose healthy plants were destroyed by a state program should be compensated "for at least loss of profits." Id. at 403. The Court then defined the "program" in question to include both the destruction of the trees and the fumigation of the premises where the trees had grown. Id. at 409. The Court appears to require that compensation be paid for all loss caused by the program as a whole, including both the destruction of plants and the incidental or complementary action of fumigation.

The Nurseries are not fully compensated here unless the program's entire effect, i.e. all the actions connected with the taking, are considered.

Where a condemnor, by a separate act incident to a taking, deprives the condemnee of the use of other property not taken, the courts have recognized a constitutional right to compensation for that additional deprivation. In Anhoco Corp. v. Dade County, 144 So.2d 793 (Fla. 1962), this Court upheld an outdoor theater owner's claim for compensation for temporary loss of access to

its facilities. This loss was occasioned incident to the taking of the theatre's fee interest in a roadbed being converted to a limited access highway.

The State Road Department, pursuant to an easement, had dug a ditch in 1957 that destroyed egress from one theater, and a second ditch in 1958 that destroyed all access to the other theater. This Court then held, in Florida State Turnpike Auth. v. Anhoco Corp., 116 So.2d 8 (Fla. 1959), that the Department and the County were required to condemn the underlying fee interest in the existing road to create the limited access highway, and to compensate Anhoco for the destroyed access rights.

When the condemnation action was brought, however, the Road Department showed it had restored all access to the theaters after 14 months by a frontage road paralleling the new limited access highway. On the second appeal, this Court held that the temporary destruction of access to the premises incident to the taking of the underlying fee interest in the roadbed required compensation. Significantly, the Court held that its ruling was not dependent on any statutory requirements, thereby indicating that it is based on the Constitution. Id., 144 So.2d at 797.

The Department attempts to avoid Anhoco by calling it a severance damage case. This analysis omits the essential fact that the temporary presence of the ditches on the State's easement, not the subsequent condemnation of the roadbed fee, caused the temporary loss of access to the premises and required

additional compensation. The temporary loss of access was not based on any "severance" at all.

In Div. of Administration v. Mobile Gas Co., 427 So.2d 1024 (Fla. 1st DCA 1983), rev. den., 437 So.2d 677 (Fla. 1983), the Court ruled at 1026-27 (citations omitted)(e.s.):

> . . .[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.

The Department attempts to recharacterize Mobile Gas as a breach of promise case. It seems unlikely that the Court would have described the case as an inverse condemnation case, id. at 1025, or cited exclusively eminent domain authorities, id. at 1027, if it only intended to recognize a breach of promise. The cases relied upon indicate that the condemnor's separate action causing damages incidental to the taking is treated as a compensable extension of the eminent domain proceeding.

The Second District held that Respondents' lost production claim represented "business damages" which are compensable only

by legislative grace. The Court did not discuss Anhoco or the Mobile Gas line of cases which compensate damages resulting from the condemnor's separate action incident to the taking. This feature separates this claim from a typical "business damage" claim, which involves losses resulting directly from the loss of the property taken, such as lost goodwill in moving the business to a new location.[7] Compare Lee County, above at 560.

The situation here is not comparable to speculative business damages, but presents a well-defined and measurable loss from the incidental deprivation of use of property other than the property taken. The lost production flows from the attendant prohibition against use of the premises, not the destruction of healthy stock. The Constitution should not, in fairness, allow this additional unjustified and undisputed loss to go uncompensated.

B. THE UNITED STATES CONSTITUTION RECOGNIZES, AND THE FLORIDA CONSTITUTION SHOULD RECOGNIZE, A TEMPORARY TAKING IN THIS CASE.

The District Court of Appeal compared the United States Supreme Court's decision recognizing temporary taking claims in First English Ev. Luth. Church v. County of Los Angeles, 482 U.S. 304, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987), with Florida

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[7] The Nurseries experienced business losses as a direct result of the taking of their inventory without compensation for over four years: lost cash flow, departure of trained employees, lost goodwill and customer base, lost opportunities, and lost credit rating. The Nurseries have refrained from seeking compensation for these losses, because of the "business damages" rule.

intermediate appellate cases which rejected such claims, and concluded that the difference may be rhetorical rather than substantial. (A: 5) The issue is really a balancing test in which the length and degree of deprivation, and the justification for the deprivation are considered in the factual context of each case. This is a sensible rule, which recognizes that a temporary taking can often be as disabling as a permanent taking.[8]

It is difficult to see how a temporary/permanent distinction would serve the constitutional purpose in Florida of providing full compensation for property taken. Would this Court refuse to require full compensation if the State only took a temporary construction easement? What if the State occupied a parcel temporarily for a series of 3-month periods?

This Court does not appear to have previously addressed the temporary taking issue, although the Anhoco decision discussed above indicates that temporary deprivation of the use of property is compensable at least where it is ancillary or incident to a permanent taking. The Court has previously stated its inclination to construe Florida constitutional protections to conform with federal constitutional protections. See State Road

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See Kimball Laundry Co. v. United States, 338 U.S. 1, 69 S.Ct. 1434, 93 L.Ed. 1765 (1949); Cooper v. United States, 827 F.2d 762 (Fed. Cir. 1987). Also see Yuba Natural Resources, Inc. v. United States, 821 F.2d 638, 641 (Fed Cir. 1987): "The Court has recognized that temporary reversible taking should be analyzed in the same constitutional framework applied to permanent irreversible takings and has fashioned appropriate remedies.

Dept. V. Chicone, 158 So.2d 753, 756 (Fla. 1963). The United States Supreme Court having confirmed that a temporary taking must be compensated under the Fifth Amendment, and this Court having announced no contrary construction, Article X, Section 6 of the Florida Constitution should be construed to conform with the federal counterpart. See Dept. of Agriculture and Cons. Services v. Mid-Florida Growers, 521 So.2d 101, 103-104, n.2 (Fla. 1988), citing First English Evangelical with approval in relation to the Florida Constitution.[9]

The Department's reliance on Morton v. Gardner, 513 So.2d 725 (Fla. 3d DCA 1987), rev. den., 525 So.2d 879 (Fla.), cert. den., 109 S.Ct. 305 (1988), is misplaced. That decision concerned the lawful seizure of property as contraband based on probable cause to suspect its use in a crime. The seizure was permissible under Article I, Section 12, Florida Constitution, which prohibits only "unreasonable" seizures, and is construed in conformity with the Fourth Amendment.

Seizure of the vessel in Morton was a practical necessity. Since vessels are mobile, the failure to seize and search it immediately would have resulted in the loss of all opportunity to establish the violation and impose the forfeiture penalty. The forfeiture laws would be unenforceable if the court had ruled that mere detention upon probable cause constituted a taking.

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[9] If anything, Florida's Constitution provides more protection for private property rights then the federal constitution. See Basic Rights enumerated in Art. I, Section 2, Fla. Const., for which there are no express federal counterparts.

Thus Morton balanced the justification involved and did not require compensation in the particular circumstances. In this case, the burning and decontamination were unnecessary, and no practical difficulty would have resulted from allowing use of the premises. The quarantine prevented Respondents from selling or transferring any new plants. The plants could have been studied, sprayed, or destroyed if they were ever shown to be diseased.

The Department's defense of good faith error in this case was fully considered and rejected in the liability appeal. 521 So.2d 101. That ruling is now established law of the case. The Department is foreclosed from contending that the same error relieves it of the duty to fully compensate for deprivation of use of the premises incident to the adjudicated taking. The prohibition was an extension of the unjustified destruction and is likewise a taking.

The Department relies on Flake V. Dept. of Aqriculture and Consumer Services, 383 So.2d 285 (Fla. 5th DCA 1980), in which the court upheld a quarantine regulation. The court in Flake observed that there was no destruction of healthy trees, which is the foundation taking in this case. **Id.** at 288. Indeed, the trial court's order, quoted with approval by the appellate court, recited that an order for destruction of healthy citrus material had been struck down. **Id.** at 287. The quarantine therefore did not interfere with existing production nor prohibit new production. This distinction undermines the Department's position. Flake does not preclude recognition of a temporary

taking here, particularly in light of the unified nature of the destruction/prohibition actions as part of the same program. See State Plant Bd. v. Smith and related text above at p. **32**.

Many of the other cases cited by the Department involve accidental government actions, which are compensable as torts, rather than intentional policy decisions or program implementations that do not form the basis for tort claims.

The Department advances the remarkable contention that a valid prohibition against the use of property under the police power is never a compensable taking under the United States Constitution. This Court, in its previous opinion in this case, analyzed federal decisions and reached the opposite conclusion. **521** So.2d at **103**.

The Department discusses Miller v. Schoene, **276** U.S. **272, 48** S.Ct. 246, **72** L.Ed. **568 (1928),** and its progeny. Miller was extensively argued in the liability appeal to this Court and in the certiorari petition to the United States Supreme Court. Miller is distinguishable because the cedar trees there were infected and posed a real danger to a much more valuable species; and because the dangerous trees were not destroyed but rather cut down and remained valuable as lumber.

Miller and its progeny deal with situations where plants or animals are infected or diseased and therefore have no value and pose an imminent danger. The other cases cited by the Department involve reasonable quarantine, as permitted in Flake above. None of the cited cases involve situations where compensation is

sought for the destruction of healthy stock and prohibition of use of the premises incident thereto. Cases involving diseased stock or quarantines are inapposite here.

Loftin V. United States, 6 Cl.Ct. 596 (1984), aff'd, 765 F.2d 1117 (Fed. Cir. 1985), cited by the Department, is instructive by comparison. A dairy farmer's herd contracted tuberculosis. Although not all the cattle were infected, the farmer elected to have the entire herd destroyed in return for financial assistance. Neither the required destruction of the tubercular cattle, nor the voluntary destruction of the remainder, was found a taking for which compensation was due. The farmer also claimed compensation for the loss of profits suffered during the downtime necessary to decontaminate the dairy. Because some portion of the herd was actually diseased, decontamination was justified. The court observed that decontamination caused no loss of profits, because the farmer could not have sold milk from a tubercular herd anyway. Here, the stock was healthy, and therefore compensable losses ensued from destruction and from the attendant prohibition of use of the premises.

The Department quotes a passage from In Re Chicaso, Milwaukee, St. Paul & Pac. R.R., 799 F.2d 317 (7th Cir. 1986), cert. denied, 481 U.S. 1068 (1987). That decision held that a judicially supervised sale of a bankrupt railroad line to the second high bidder did not constitute a compensable taking of property. The court's isolated suggestion that mistaken

destruction of a healthy animal would be a tort rather than a taking is pure dicta. It is unsupported by any citation of authority that actually considered the issue and is contrary to the analysis of many courts, including this Court. Federal cases recognize that harm mistakenly inflicted by intentional government activity can be a taking. See e.g. Owen v. United States, 851 F.2d 1404 (Fed. Cir. en banc 1988) (erosion of waterfront property resulting as a direct consequence of government navigation project was a taking, overruling prior misstatements); Yuba Goldfields. Inc. v. United States, 723 F.2d at 884, 888-889 Fed. Cir. 1983) (letter directive prohibiting right to mine while government in good faith contested ownership of mineral rights was a temporary taking of the right to extract gold):

> "The purpose and function of the (Fifth) Amendment being to secure citizens against governmental expropriation, and to guarantee just compensation for property taken, what counts is not what government said it was doing, or what it later says its intent was, or whether it may have used the language of a proprietor. What counts is what the government did. Hushes v. Washinston, 389 U.S. 290, 298, 88 S.Ct. 438, 443, 19 L.Ed.2d 530 (Stewart, J., concurring)(1967)."

The Second District noted that lost production would not appear to accurately measure temporary taking compensation under First English. While this is technically correct, potential productivity is an element that may be considered in determining the value of the property interest taken. See especially, Lee County v. T & H Associates, supra, where the value of a leasehold

was determined by the probable net yield of the crop to be grown there. The Court in Yuba Natural Resources, supra, 821 F.2d at 640-641, observed that compensation for a temporary taking can be measured in various ways depending on the circumstances of each case, and no general formula should be used for that purpose. See also Annot., 7 A.L.R.2d 1281, discussing the measure of compensation for temporary takings.

C. THE ISSUE OF DOUBLE COMPENSATION WAS NOT RAISED BELOW AND SHOULD NOT BE CONSIDERED.

The loss of existing inventory and the loss of use for further production are separate losses that do not duplicate one another. The Department conceded as much when it failed to dispute that loss of production was properly measured. The Nurseries' testimony that they intended to hold their stock until the spring and start a new production cycle creates an inference that they were able to do both, and this inference was never challenged. The Department cannot now hypothesize, without any record, that the storage of the existing inventory would have precluded starting the new production cycle.

D. **SUMMARY**

It would be grossly unfair not to compensate the Nurseries for the additional loss occasioned by the unjustified prohibition. A simple hypothetical bears out the logic of this claim. If the Nurseries had begun a new citrus production cycle during the prohibition period, as they normally would, the Department would have destroyed the new plants when it burned the

existing stock or at decontamination. Under these circumstances, the Nurseries clearly would have been permitted to recover. The inescapable conclusion of the Department's argument is that because the Nurseries complied with its prohibition, they are not entitled to recover for lost production, whereas if they had violated the order, they would be entitled to recover. This would not be a logical or fair application of the full compensation requirement. Compare Yuba Goldfields, supra, 723 F.2d at 887-88 (owner may be compensated without taking risk of defying the government's prohibition).

Respondents should be compensated for the entire loss occasioned by the taking, including deprivation of use of their premises. The Department cannot burn a healthy crop, and salt the earth to prevent next season's crop, yet expect to pay only for the burning.

CONCLUSION

The District Court of Appeal's ruling on valuation of existing stock should be affirmed. The Court's ruling on compensation for loss of production should be reversed, and the Circuit Court's original judgment reinstated. In the alternative, Respondents should be allowed to proceed with a claim for temporary taking of their premises and recover full compensation appropriately measured.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to the below listed persons by U. S. Mail this 16th day of June, 1989.

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