

LIBRARY

SUPREME COURT, U. S.

LIBRARY

SUPREME COURT, U. S.

In the

# Supreme Court of the United States

UNITED STATES,

Petitioner,

vs.

CHESTER FULLER ET AL.

)  
)  
)  
)  
)  
)  
)

No . 71-559

Washington, D. C.  
October 18, 1972

Pages 1 thru 47

Duplication or copying of this transcript  
by photographic, electrostatic or other  
facsimile means is prohibited under the  
order form agreement.

HOOVER REPORTING COMPANY, INC.

Official Reporters  
Washington, D. C.

546-6666

## IN THE SUPREME COURT OF THE UNITED STATES

-----	X	
	:	
UNITED STATES,	:	
Petitioner,	:	
	:	
v.	:	No. 71-559
	:	
CHESTER FULLER ET AL.	:	
	:	
-----	X	

Washington, D.C.

Wednesday, October 18, 1972

The above-entitled matter came on for argument  
at 11:40 o'clock a.m.

## BEFORE:

WARREN E. BURGER, Chief Justice of the United States  
WILLIAM O. DOUGLAS, Associate Justice  
WILLIAM J. BRENNAN, JR., Associate Justice  
POTTER STEWART, Associate Justice  
BYRON R. WHITE, Associate Justice  
THURGOOD MARSHALL, Associate Justice  
HARRY A. BLACKMUN, Associate Justice  
q LEWIS F. POWELL, JR., Associate Justice  
WILLIAM H. REHNQUIST, Associate Justice

## APPEARANCES:

HARRY R. SACHSE, ESQ., Assistant to the  
Solicitor General, Department of Justice, Washington, D.C.  
for the Petitioner.

FRANK HAZE BURCH, ESQ., Post Office Box 13528,  
Phoenix, Arizona 85002 for the Respondents.

C O N T E N T S

<u>ORAL ARGUMENT OF:</u>	<u>PAGE</u>
Harry R. Sachse, Esq., for the Petitioner	3
Frank Haze Burch, Esq., for the Respondent	23
 <u>REBUTTAL ARGUMENT OF:</u>	
Harry R. Sachse, Esq. for the Petitioner	43

- - -

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 71-559, United States against Fuller.

Mr. Sachse.

ORAL ARGUMENT OF HARRY R. SACHSE, ESQ.,

ON BEHALF OF THE PETITIONER

MR. SACHSE: Mr. Chief Justice and may it please the Court:

This case is here on a writ of certiorari to the Court of Appeals for the Ninth Circuit. The issue presented by the case is as follows:

When the government condemns land for a public project, must it pay for the value added to the land by a permit to graze cattle on adjacent public lands? And I can refine that one step further, when that permit is admittedly a revocable permit that the government can revoke without payment of compensation.

The factual situation in which the case arose is the following:

The government determined that it was necessary to build a dam as a flood-control project on the Bill Williams River in Arizona, an area that was subject to flash floods.

Mr. Fuller owned three tracts of land in the vicinity of this project. It was a total of about 1,280 acres. It was necessary for the government to take two of



those tracts that totalled 920 acres. It was not necessary for the government to take the third tract and the third tract was not taken.

In connection with this land, Mr. Fuller for a number of years had been using 30,000 acres of federal grazing land to graze his cattle on. He used that land under a permit issued under Section V of the Taylor Grazing Act, 1934 and a Section V permit -- and I'll talk about this in a little more detail later -- is the revocable permit that by statute does not create any right, title or interest in the public land.

Q Mr. Sachse, does it have a term stated, however, even though it is revocable?

MR. SACHSE: The term is not stated in the statute except that it cannot exceed ten years. As an administrative regulation and practice, the permits are issued year by year. The permit has to be reissued each year. They are customarily issued to the same person who had them the year before, but the permit is for one year.

Q There is not any formal procedure for termination -- or is there?

MR. SACHSE: I think there is a formal procedure for termination to this extent, that if a man applies for the permit for a second year and the government determines not to grant the permit the second year, the government will

allow him to -- will state its reasons why the permit is not being granted and will allow him to state his reasons why he thinks the permit should be granted. It's not -- the government won't deny a permit just out of hand but the permits are revocable and, often, when the property is needed for another purpose or the property has not been properly used, are revoked.

Now, there is a peculiarity of this case that needs to be kept in mind. The government did not revoke Mr. Fuller's grazing permit when it took these two tracts of land. The reason it did not do so is that it did not take his third tract of land and he was free to continue to use this permit in connection with the third tract.

In Arizona, the basis for having a grazing permit is having sufficient water for the cattle that will roam on federal land to use on the private land and he had sufficient water, apparently, on his third tract of land and so far as we know, Mr. Fuller is still using this permit.

Q And it is your contention, I take it, that the Department of -- what is it, Agriculture or Interior?

MR. SACHSE: It is Interior.

Q The Department of Interior will not take a jaundiced view of the renewal of his permit because he has less fee-land now than he did before?

MR. SACHSE: That is correct. It has not done so,

as far as I understand. Actually, part of what brings this case here is that the Department of the Interior has been very generous with the use of this land because if the Department of the Interior had revoked this use of the 30,000 acres of public land before it took the land in question, at least, according to the jurisprudence in the courts of appeal up to this point, there would have been no question at all that he would have had no right to ask the jury to evaluate his use of the public land along with his use of his private land and it is our contention that it is just nonsense to say that this revocable permit, creating less than a property right in the public land that could have been revoked, gives him a right to additional compensation because the government chose not to revoke it.

If the government now took his next piece of land, the third piece of land, under the ruling of the Ninth Circuit the government would have to pay again for the same permit.

Now, in the trial of the case, Mr. Fuller relied heavily on the number of cows that could be grazed on his land, plus the public lands and obtained an instruction from the trial judge that the jury could take into account his use of the public lands<sup>in</sup>, giving him compensation for his private land so long as it also took into account the fact that the public land was held under revocable permit and that those permits could be revoked without payment of

payment of compensation.

The jury returned a verdict of \$350,000 for the 920 acres of ranch land that was taken and the government appealed. The Ninth Circuit divided on the case. The majority held that because the permit had not been revoked, and distinguishing this from a situation where the permit had already been revoked, he had a right to get the value of the public land along with the value of his private land.

I should say that more accurately. He had a right, in determining the value of his private land, to have added to that any special value provided by the use of the public land.

The court was at pains to distinguish this Court's decision in United States versus Rands which, in a rather similar situation, had held exactly to the contrary, that if a man had private land along a river and he had a special value added to that land by its possible uses of port site, that the government, in taking the land, would not have to pay the special port site value that was added.

The dissenting judge found that the decision in Rands was controlling in this case.

Q Well, Rands -- has Rands been overruled by the Congress or at least in the narrow facts of Rands, it has been pretty well run over, hasn't it?

MR. SACHSE: Well, I don't think so at all, your

Honor.

Q You don't?

MR. SACHSE: Mr. Birch argues that, but I think it points out a very essential distinction. In Rands, this Court held that as a constitutional matter, the Fifth Amendment of the Constitution of the United States provides the just compensation for the taking of private property for public use does not include the value of any special use in public property and the fact situation there was the public property was the use of a waterway for a port site and the use of property -- of riparian property for a port site and the court relied on the government's navigational servitude, saying that the government decides whether someone can or cannot use navigable waters for a port site.

Now, Congress, after that case, passed an act that said that where riparian land is taken in one situation -- well, let's really back up -- that where the entirety of a riparian property is taken for harbor improvements or river improvements, that any special value that it has as a port site can be included in the evaluation of the land.

I have two points to make here. One, it is not at all unusual for this Court to say what the constitutional requirement is for just compensation and for Congress then to provide more if it thinks in a particular situation that it should do so.



And, secondly, the Congressional Act doesn't go nearly as far as the Rands case went. The Rands case created a broad principle that would apply to any riparian taken. The Congressional Act applied only if the entirety of a man's land was taken which, by the way, was not the case here.

Q Now, it's just a statutory decision without capability of overruling the constitutional decision.

MR. SACHSE: It is a statutory act without capability of overruling the constitutional decision.

Q Well, nonetheless, Congress gets its way in this case because, as you say, Congress can grant more than the Fifth Amendment because --

MR. SACHSE: And Congress could get its way in this case if Congress did something that it has not done and that is to declare that a Taylor Grazing Act, a permit -- a permit from Section III of the Taylor Grazing Act -- creates a vested right of property interest in land. Since Congress not only has not done that, it has resisted suggestions that it should do so and it particularly chose not to do so when it had both possibilities in mind.

And I would like to elaborate on that a little bit. In the 1890's, ranchers in the west used public land absolutely as if it were their own and it led to a bad situation of range warfares and to the destruction of the

rangeland through overgrazing.

In 1891, Congress for the first time tried to do something about it and it passed the Forest Service Act and included some range land in the Forest Service Act but the government under the Forest Service Act -- that was the Secretary of Agriculture -- would not permit grazing on the public land except by permits that he would issue for a limited period of time revocable if the land were needed for other purposes or if the land were abused.

Now, the ranchers in the west strenuously objected to this as taking away their vested right to use the range as they saw fit and they brought a case all the way to this Court, Light versus the United States, or the United States versus Light -- I think it is 220U.S. It is cited in our brief.

In Light, this Court strongly upheld the right of the government to treat the public domain land as it expired and to either grant or not grant rights to private individuals to use the public domain and if it granted rights to private individuals, to determine how much that right should be.

In 1934, when Congress passed the Taylor Grazing Act, it set up two separate systems. It set up one system under Section 13 of the Act in which a rancher could get a leasehold interest in a part of the public range, but it

only set that up for small, noncontiguous tracts of land. And that would be an interest to protect from expropriation without payment of its value.

Q I remember --

MR. SACHSE: Sir?

Q -- in the western part of the country there are some places -- some land borders a wilderness area and the wilderness area is one under the Act that cannot be developed or used or owned by the Federal Government for recreational purposes. Now, the location of that land, looking out over a wilderness, gives it a very enhanced market value. Would you say that that should be not taken into consideration?

MR. SACHSE: No, I think that that should be taken into consideration, that any general environmental value ought to be taken into consideration but what should not be taken into --

Q Well, that would take into consideration, then, the value of what the government is providing in a wilderness area?

MR. SACHSE: That is right and I do not want to argue -- I don't think it would be right to establish a broad principle that says that any conceivable value that the government has added to property is not a subject of compensation. What I am arguing is that when Congress has

acted and said that a single individual can use a specific part of the public land, but that he shall have less than a vested right in that land and, this, which I meant to get to and I will get to now -- and that his vested right, or less-than-vested right, that permit, is a considerable subsidy to this individual. It is a right for him to use that land at less than its value. If he wanted to rent grazing land from a private owner, he would have to pay a great deal more than he does when he pays the government.

Q But we do know that the Taylor Grazing rights are usually available only to contiguous owners.

MR. SACHSE: That is correct. That is correct. They are usually available to contiguous owners or, I think, owners in the vicinity or owners with adequate water sources or such as that.

But our main point here is that Mr. Fuller has been subsidized in a large way through the use of less than a vested right, less than a property right, of public land and he continues to have that use, in fact. And when his land is taken, to then say the government, which has paid him a benefit over the years by letting him use this land is going to pay him again --

Q Has he paid anything for the permit?

MR. SACHSE: Yes, sir, he pays something for the permit, but the value is generally considered very much less

than the true value of the use of the land.

Q Is it just some nominal sum?

MR. SACHSE: I -- well, I wouldn't want to mislead the Court. I think the sum is \$8 or \$9 a head and I think that is about a third of the commercial rate, or a fourth of the commercial rate or something like that.

Q Going back to this other situation, I suppose that if a man has a home overlooking Rock Creek Park here in Washington or up the Potomac on the Palisades area, the view that he has is -- contributes to and enhances the value of the real estate.

MR. SACHSE: That is correct.

Q But that does not give him any absolute right to the view, does it?

MR. SACHSE: No, it doesn't.

Q The government might come along and put a dam right there and spoil his view without giving him any right, I assume, to recover for spoiling his view.

MR. SACHSE: That is correct.

Q Of course, Mr. Sachse, in response to Justice Douglas' question, you stated that this is a type of right that the government ordinarily accords only to contiguous owners and I take it it is also a right that is a property right that vests in this individual himself just as opposed to the general public's right to go on other parts



of the public domain. Don't you think that makes it a little different from Rands, where I take it the right of access to the navigation was only in common with the general public?

MR. SACHSE: Well, I would like to start by saying that the right that this individual has to use the public lands is by Congress. Is a Congressional enactment less than a property right? He has a permit to use the federal lands.

Q Well, what do you mean when you say "less than a property right?"

MR. SACHSE: What I mean is this, that when Congress set up the Grazing Act, it allowed leases of land to some people and that is clearly a property right. But as to the land we are talking about, the Section 3 land, it provided in the statute -- this creates, these permits shall create "no right, title, or interest in the public domain," and it is clear that in setting up that statute, Congress was faced with the possibility, if we take these rights away, should we have to pay for them? And Congress wanted to say no, that it was granting a benefit and it should not have to pay again if it took the benefit away.

And Congress knew that cattlemen historically have wanted to treat public land as their own. Which --

Q Some of our --

MR. SACHSE: -- is in the Roosevelt administration

and they were -- didn't want it to be treated that way.

Q Some of our big ranches -- many of our big ranches out west have a little nucleus, maybe, of 200 acres owned in fee by the owners and 50,000 or more acres of Taylor Grazing Land around it that may sell into the millions of dollars on the market price.

MR. SACHSE: That is correct, and I suppose the second part of that statement would be that if Mr. Fuller is paid less than the market price, he is not getting just compensation. When the government takes that land, the government is taking back land that was its land and the government should not have to pay that value and, Mr. Justice Douglas, in a case of yours some time ago -- this may not be fair to cite -- the case was actually slightly different --

Q Well, if you sit here long enough, you can always find something to quote against.

MR. SACHSE: There was a case where the government took some tugboats -- in Cors versus the United States Government -- took some tugboats during World War II and the statute under which it took those tugboats said that it should not pay any value over the value that the -- any value created by the present emergency or something like that. The tugboats actually, at the time of the taking, were selling for quite a lot because the government was buying them up and

this Court held that a value which the government had itself created is a value which, in fairness, the government should not be required to pay.

MR. CHIEF JUSTICE BURGER: We will pick up after lunch at that point.

(Whereupon, at 12:00 o'clock noon, a recess was taken for luncheon until 1:00 o'clock p.m., the same day.)

## AFTERNOON SESSION

1:00 p.m.

MR. CHIEF JUSTICE BURGER: Mr. Sachse, you may continue.

MR. SACHSE: I just want to make one or two points and then reserve the rest of the time for rebuttal.

First, I want to reemphasize that what we are dealing with here is a subsidy that Mr. Fuller has already received in having this grazing permitted at less than its true value and then an attempt by Mr. Fuller to obtain what we consider a second subsidization when his base land was taken.

I want to emphasize also that the courts of appeal up to this point have held that if the grazing land is taken first, no compensation needs to be paid and if the base land is then taken, the the value that the grazing land might have added is not to be considered.

Q Well, when you say that the grazing land is taken first, you are not using that phrase as a word of art, constitutional "taking," are you?

You mean if they terminate first?

MR. SACHSE: If it had been terminated. If it had been terminated.

Q Or if they let it expire and refused to renew it.

MR. SACHSE: That is correct.

Q Rather than take the fee under the conventional taking process.

MR. SACHSE: That is correct. You are proper to correct me on that because there is no right title or interest in this, in the grazing land, there is nothing to take, in the constitutional sense.

Q I say there is nothing to take. That is your argument?

MR. SACHSE: That is correct. So it becomes a very anomalous situation, we think, that when the grazing land has not yet been taken, when it can still be used in connection with land that Mr. Fuller has; when he still to some extent is enjoying his subsidy, to then give him this second subsidization when his own land is taken.

Q You say he was holding. In Jaramillo, it was dicta, wasn't it?

MR. SACHSE: Well, in Cox versus the United States is the case that I am talking about. Cox was -- it seems to me -- was the major case that the Tenth Circuit decided and Cox has clearly said that the value of the grazing land could not be considered even though after you get to the real facts in Cox the grazing land had not been taken there, either, but the Court found that it would be lost as a result of the taking of the base land.

The Court held there no right to include the



special value of the grazing land and Jaramillo, as the companion case was decided immediately after it in the Court.

Q Mr. Sachse?

MR. SACHSE: Sir?

Q Suppose the Federal Government could improve the land now being taken, say, with an expensive irrigation system or something and now the United States wants to take the land, would you be making the argument you are as to the enhancement of a value?

MR. SACHSE: I don't know whether I would. I think that the case before the Court now is a much stronger case from the United States' standpoint because here there was a use of public land involved.

Now, the case you present would be that the public improves a man's private land whether the public then should have to pay for that improved value and I don't know, I had rather not try to decide that one now.

Q How would you distinguish them?

MR. SACHSE: I would distinguish them that in one the value added is by a use of public land that is still in the public domain and that in the other, the value added is a benefit somehow that the government has made to this man's private land. I would want to look into the details of that more.

Q Most often, such an improvement -- if you could call it that, was one which is shared in common by a great many people, perhaps people at different but if a new lake is created, for example, by backing up water with a dam, it enhances the value, creates lakeshore property out of what once was a pasture so that is something that is shared in common with a great many people, isn't it?

MR. SACHSE: That would be so.

Q Well, what I was thinking of, Mr. Sachse, it used to be true, I don't know whether it still is; the rural county in which I lived in New Jersey, the United States Government used to finance the digging of ponds and irrigation that way on the local farms in the county, nothing like these monster farms in the western states, they were smaller farms. They certainly added a good deal to the value of that farm.

MR. SACHSE: Well, I would say this, your Honor, with the right for the Solicitor General to change his mind if that case came up, and say the difference is this, that in that case the government would move on to private property, do some work and then leave and the government interest would be over at that time.

But in this case we are talking about a continuing use of government property and I think that is the fundamental difference, the right of the government to not have to pay for the value of the public domain. I think it is a kind of

holding that this Court has already made in the United States versus Rands and even a whole series of cases dating back into the 19th century on which Rands was supported.

Q The mere fact that you have in the past, in other words, acquired property or part of the property by gift from the government would not be relevant when at some later time the government tried to condemn the property. It is now your property.

MR. SACHSE: Correct.

Q That is the pond case.

MR. SACHSE: Correct.

Q And another point is the gift port.

MR. SACHSE: We are not speaking of broad rulings in this case. We are seeking a ruling based upon what Congress has done in the Taylor Grazing Act, the kind of interest that Congress gave under the statute.

Q On the kind of interest, suppose the state owned this land and had the exact same agreement with Mr. Fuller? Would you recognize that?

MR. SACHSE: If the state owned the land we would argue that Mr. Fuller has less than a compensable interest in the state land which he held under a tenure that was less than a lease, in that we would not have to pay for it but --

Q Why not?

MR. SACHSE: Because under what I hope are

established principles of just compensation, the government only pays for established property rights that a person holds, not the rights that are less than a type --

Q Your point is, in fact, that the Federal Government gave you this gift, as if anybody gave it to him. Is that your position?

MR. SACHSE: No, he --

Q You don't have to go that far.

MR. SACHSE: No, what I am saying is that I was not thinking of the gift case, I was talking about the use of land, state lands under less than a real property right.

But I agree with you. I don't have to go that far and what I was about to say is that I think our case is much stronger than the case would be as to state lands because here the government itself has conferred a special privilege in a revocable fashion and when the government takes this land, it seems particularly unfair and not a question of just compensation to make the government pay again for the favor that it did before.

And cattlemen in the west have received, it seems to me, quite adequate subsidies from the government without the court creating -- making a single subsidy larger.

I'd like to save the rest of my time for rebuttal.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Sachse.

Mr. Burch.

## ORAL ARGUMENT OF FRANK HAZE BURCH, ESQ.,

## ON BEHALF OF THE RESPONDENTS

MR. BURCH: Mr. Chief Justice and may it please the Court:

Counsel has indicated to the Court, I think erroneously, that -- and perhaps inadvertently in response to the question, that Fuller remained in business and he was still operating the ranch. These are statements of yours <sup>de hors</sup> in the record. They are not accurate and it simply points up the danger of applying the Rands analogy to this kind of case, as I hope I can persuade the Court in my statement to you.

Q Does it really make any difference one way or the other whether he is still there or whether he is gone?

MR. BURCH: Only that I think that the possibilities of less than adequate compensation are present and the indication would be what Counsel was saying to you, that the ranch is still in existence and operating. It is not a fact.

The mere fact of the matter was that the compensation that was received was not enough to cover the existing debts. So it is a thing the Court I don't think should consider in any event that it was there and the statement was inaccurate when it was made for the Court.

The U.S. versus Jaramillo case, which has been

remarked on to the Court in oral presentation and which is briefed is directly a point with Fuller as we understand it and I think it stands for the proposition, not as Counsel has stated that one must be paid or subsidized, but that it simply means you can take into consideration in determining the market value of a ranch, the availability and accessibility of permit lands and that is really all that the court instructed.

Judge Craig in the District Court was extremely careful not to distinguish Rands -- which he did not know about at the time -- but to follow Jaramillo which we consider to be the law and certainly a well-reasoned conclusion.

He did tell the jury, as we pointed out to you, that they must recognize the possibility of government revocation of the permits and the leases and, incidentally, there is a question I believe Justice -- one of the Justices remarked on -- there was state land involved in this. There was 30,000 acres of federal lease land, 12,000 acres of state land which the applicant owned and approximately 1,200 acres of fee land. Also, there was some indication that the reason BLM did not revoke these leases was the remainder of the fee land -- the fact of the matter is that had nothing to do with the case at all, it was isolated across the river and could not be made accessible under any set of circumstances.

Q Mr. Burch, how was the state land treated in



the judge's charge to the jury, if it was treated at all?

MR. BURCH: The judge specifically told them that they could not consider the value of those permits either, although they were ten-year leases, as I recall.

But I believe I have the full instructions set out in our brief, Mr. Justice Rehnquist and the court did, in fact, specifically state that the jury was not to consider any value given to state or federal permits as the case may be, whether they were Taylor Grazing Acts, Section 5 leases, or State of Arizona land leases for agricultural purposes or grazing purposes.

Q Well, were those ten-year leases terminable by the state?

MR. BURCH: Yes.

Q So that puts them in the same posture as an occupancy sufferance.

MR. BURCH: Somewhat different, Mr. Chief Justice, simply somewhat different/because there is a preference in Arizona that I am unaware of as to whether or not it holds over in Taylor, but in Arizona, if the state needed that land for any purpose for a length of time and then put it back on the market, the preference would go to that person who had been the prior lessee or permittee.

But nonetheless, I think the court properly instructed and the jury was properly aware that these values,

if there was any value in the permits, must not be considered and the testimony in the case was quite clear that those who testified as to value distinguished the permit land and reduced the total value of the fee land by whatever they felt was the value of the permit land.

Yes, I have a note here that the Court in its instructions said, "Give to the fee lands such value as the availability and accessibility of the permit fee land might create in conjunction with the fee."

Now, the government says --

Q State and federal permit lands were treated alike, then for purposes of fixing compensation.

MR. BURCH: Yes, sir. Coincidentally, the state was in there to get the value of its land in the proceeding, also, and that was a separate matter which was settled out of court, ultimately.

We agree with the government that permits for grazing are not compensable property right but we do not agree that a jury must take a legal fiction and say they are not accessible, they are not available, they do not exist when, in fact, you have an actual, operating, cow-calf operation and the government is going to take that operation and leave you with the permits.

Now, it does not, then, make a fair compensation if it certainly does not take into effect the work, the effort,

the improvements that that existing cow-calf operation had.

And I say it is a cow-calf operation because it is a distinguishing factor. This was not some lease of a large amount of federal acreage where someone ran a steer operation on the permit lands, bought cows or calves and fed them during early spring and they were sold in early summer. As the record revealed and as the Court of Appeals understood, the fee land was the important reason for the existence of this ranch.

Q It wouldn't make any difference to your argument if that -- if the permit land had been used that way, would it?

MR. BURCH: No. As a matter of fact, most of our appraisers, in their testimony, simply said that the permit land we put to one side. The fee land can support somewhere between 800 and 1,000 cow units per year by reason of its accessibility of water, its fertility, its Bermuda grass pastures, its alfalfa crops and we can support X number of cows. If you allowed us to consider the permit land, it would be worth this much more and that is how the testimony went and that is how the verdict was arrived at. They did not consider the permit land as having any value except that it was available in case of a good year to put those cows on and grow more feed.

Q You are saying the \$350,000 award has nothing

in it for the enhancement because of permit land?

MR. BURCH: Precisely.

Q What about the stipulation on that subject?

MR. BURCH: The -- I say this -- and perhaps I don't follow the Justice --

Q No, I thought what you just said was that there was a lot of testimony --

MR. BURCH: Yes, sir.

Q -- and that without laying the permit claims aside because of the water and --

MR. BURCH: Yes.

Q -- number of head and everything else and I was wondering if you were implying, in saying that, that the \$350,000 verdict was arrived at without reference to the value of the permit land.

MR. BURCH: I think it must have been for the simple reason that all of our experts testified that the property had a considerably larger value than that, just the fee land.

Q Well, you had the instructions to the jury that a lot of the jury knew that.

MR. BURCH: Yes, they were told to consider the availability of the land, its accessibility, but to give it no value in coming to their conclusion.

Q Well, was there some testimony that -- as to what the value would have been if you didn't consider the

availability and accessibility?

MR. BURCH: Oh, yes. Yes, indeed.

Q And what was that figure?

MR. BURCH: It is cited, I believe, in the government's brief. One man, a Mr. Perry, who was an appraiser, testified that it would be, I think, worth about \$1,150,000 with the permits and approximately \$1,000,000 without them. He gave the permits -- the permit on that land very little value, about \$150,000, as I recall.

Q Mr. Burch, would you say that he instructed the jury to consider the accessibility and availability but to give it no value?

MR. BURCH: In the sense that there is no award to be made for the permit land.

Q Well, how could you consider it if you didn't give it some value? This whole proceeding is value and money and bucks. That is all it is.

MR. BURCH: I would agree that the proceeding was to determine the value of the fee land and that that determination was to be made considering the use it was put to and the accessibility of adjacent lands which we had a permit to but that if there was to be any value given to those permit lands it could not be translated into a jury award and the court was very careful to tell them that it must not be.

Q Am I mistaken that there was a stipulation on this subject somewhere?

Q On the values?

MR. BURCH: Oh, no. No, sir.

Q Perhaps that --

MR. BURCH: In fact, the matter of value was quite bitterly fought.

Q That is in the subsequent case that they had a stipulation on alternative values.

MR. BURCH: Yes, yes. No, in our case there was a great hiatus between the appraisers for the owner, Fuller, and the government.

Q Mr. Burch, I take it the giving of this instruction by Judge Craig was quite closely contested, the government objecting --

MR. BURCH: Yes.

Q -- to it. Why did you insist on having that instruction if, in fact, your appraisers did not need it? Or am I wrong in thinking you are saying your appraisers didn't need it?

MR. BURCH: Well, we wanted to make sure that our appraisers, Mr. Justice Rehnquist, could testify as to what, in fact, a cow-calf operation was and we wanted to get before the court and the jury as much information as possible about the very nature of the operation. If it was



completely distinguishable -- as I have indicated to you -- from a steer operation we felt that any appraiser that got in and simply said, "I looked at 1,000 acres of land without understanding what it was," couldn't come up with an intelligent evaluation and we felt that that kind of testimony in the light of Jaramillo was absolutely a necessity, otherwise they would have simply been saying we have 1,200 acres or whatever the place may be, which we will pretend is not a cow-calf operation, which is its highest and best use.

I might, at this point, digress for a moment and remark on Rands and its ultimate effect, I think, upon ranches and people with riparian fast land holdings. As I read the government's case and as I understand their position in this matter, their position basically is that if you are adjacent -- in the case of Rands -- to a navigable stream or body of water and you own fee land and it is condemned by the government, then you cannot consider any use that that land might have relating to accessibility to the water -- to the navigable stream or body of water and Counsel says they want a very limited interpretation of this case and that its application, perhaps, by assumption, then, would be limited. But in all the western states, in fact, all of the states in the country bordering on big rivers, Arizona particularly where I come from, has the

Colorado, a whole city has been built on the Colorado, on fee land secured from the State of Arizona and they call it "Havasu City." They built the "London Bridge" there. That use is specifically because the Colorado River is there.

If I follow the government's reasoning in the application of Rands, what they are saying is, if it is necessary for the Federal Government to go to Havasu City, take the bridge, the houses, the resorts, the restaurants, the recreation areas on fee land immediately adjacent to that river but solely related to the presence of that river, they don't have to pay the fair market value of that land, they have the legal fiction that because it is adjacent to a navigable stream, it has value only without the application --

Q Do you think that is what Rands stands for?

MR. BURCH: Yes, sir. That is how Rands can be extended, as I read it.

Q Not since the 1970 legislation.

MR. BURCH: No, only at that -- at adjacent areas.

Q Well, let's get back to Rands itself. What were the facts, though, in Rands? The question was whether not only its value because it was located on a river, but its value as a port in which you would use the navigational servitude.

MR. BURCH: That is correct.

Q It is not just a location, it is a use.

MR. BURCH: Yes, sir.

Q Now, is this river that you speak about in Arizona a man-made river?

MR. BURCH: No, sir.

Q All right. Suppose you had a man-made river, a dam and the usual back-up of water as many of these projects, and you had great enhancement of the value of land, cities grew up, resorts, and then for some reason or other, the United States Government decides that for environmental reasons or others, they are going to terminate the dam?

MR. BURCH: Then they pay full market value, sir.

Q Terminate the dam because the water goes away?

MR. BURCH: I beg your pardon. I don't follow you.

Q I am talking about the water going away. The government put it there and now the government is taking it away.

MR. BURCH: In that instance, Rands would not apply in any event because it is not a navigable stream, as you understand. That wouldn't be the case. There, if they simply took the dam down and went away, the property owner stands there in the same position he was in before. He has received nothing and he has lost nothing because that has occurred.

Q Well, whatever he got, he got for nothing and

whatever is taken away is no loss.

MR. BURCH: Our situation here, of course, is they came and took the land. It was not a matter of taking away the facility.

Q But do you concede that if the government had refused to renew the permit at the terminal point a few months before that the situation would be different?

MR. BURCH: Only slightly different. We would then be talking about a cow-calf operation with 12,000 state acres.

As the case was, we were talking about a cow-calf operation with 12,000 state acres and 32,000 federal acres immediately adjacent. So it would only have been a small matter of degree. As our witness testified, some years on that land that the government states is a valuable subsidy, you are lucky if you can run a cow on a section. That is 640 acres. Sometimes maybe you get a cow to 1,000 acres.

The answer, if the government feels it is being undone by this subsidy is simply to raise the rental, which they have every right to do.

We have made comment in our brief to the Court that there is another point to be considered in this matter and that is simply the proposition that, while Rands may control compensation under a takings -- or did control, until the

amendment which reduced its effectiveness, and I think indicates a congressional change in the onerous rule of Rands that, while Rands may control as to riparian fast lands, that is a situation where the government has exercised its full authority in the law under the commerce laws of the Fifth Amendment that in Taylor Grazing Act land, the government has done something less than making this a full exercise of its power.

It has said to ranchers, "If you will go out and build and develop a ranch" -- and that is what occurred in this instance -- "and you make improvements, we will rent to you adjacent lands for your use," and in this instance, I think the analogy of the Monongahela case -- which we cite -- said, I believe, as I recall it though it is held sometimes if basically in the area of estoppel -- that you come in at the implied or express invitation of the government and make an improvement, then you should be compensated for it. That is an exception to the fast land cases.

The Twin City case, which we cited to the Court in our brief specifically holding against, in that instance; the landowner still stood for the proposition that if there is this implied consent -- if there is this invitation to come in and use land then the government must take you as it finds you when it determines compensation for a taking.

We feel that the cases cited to support the

government's position deal basically with loss of possible future opportunities or frustrated business opportunities or a destruction of a business as opposed to a taking of land, or possibly the loss of a renewal expectancy, when we are basically talking, in Fuller, about the taking of a thousand acres and the very heart of a cow-calf operation which could not be restored after the taking and that this operation had -- incidental to its use, of course, it was a leased land, it was there and existed -- the government leases and the state leases.

We think that the instruction of the District Court judge was a fair one and that it was calculated to make sure that the owner got just compensation, not a subsidy, but simply whatever the value of that land was in the light of his then-existing use and in the light of the adjacent land to it. The government is not --

Q What would you say if the government said that if it were clear that because of the condemnation within a year the leases -- the permits would be cancelled, there would be no more permits on that land, in that area?

MR. BURCH: Well, as I remarked to the Chief Justice --

Q Ostensibly except for the condemnation, though, the land would have sold in the open market, if things had gone along as they had, it would have sold at a higher price.



MR. BURCH: If, in fact, the government had just simply said that to us, BLM says, "No more lease after such a year," the ranch would have continued in operation. It was designed to stay there and it would have continued until it became valuable for something else or its highest and best use became apparent, if there should have been any change. The testimony --

Q But do you agree that if the government had cancelled these permits before the condemnation that the outcome would be different?

MR. BURCH: I am not certain of that, that monetarily the outcome would have been any different. I don't believe it would have been.

Q But legally, there would not have been the necessity for this instruction?

MR. BURCH: I think not, in this respect. The court would then undoubtedly have instructed, "We have the Fuller fee land and we have the State of Arizona lease land and you, jury, are entitled to consider the use of the Fuller ranch with the state land but you must not give it any value." Basically the same instruction that was given.

Now, under those circumstances, we would probably be right back up here because the government, I am sure, would object to that.

Q As Justice Marshall put it to you, how can

you consider this element if you don't take it into account and give some value on it? What is the meaning, the real meaning of that instruction in the minds of the jurors who hear it? Isn't it really a contradictory thing in the light of what you are saying? Doesn't it tell the jury you can waive the value of that Taylor Grazing land?

MR. BURCH: Yes, but I think it also tells the jury that if you feel it has no value or that it is detrimental and reduces the value of this property by the hazard involved in cancellation, you can take that into consideration, too. It cuts both ways.

Q Did the judge tell them about the hazard of cancellation?

MR. BURCH: Oh, and the government did too, at great length.

Q In arguments?

MR. BURCH: Yes. Yes, indeed. And there was a considerable argument as to whether or not this land had X value, sir, by reason of the fact of these leases and their intransigence, so to speak.

Q But isn't it -- isn't the solution to the problem rather simple for the government if you are right by having the government pay careful attention to its Taylor Grazing permits and terminate them all well in advance of any contemplated taking?

MR. BURCH: Precisely, and it seems to me that they would have no trouble doing that, except that --

Q Then you would be out.

MR. BURCH: We would be out as far as any fight from the government was concerned at all. Then the land would be paid for on whatever basis the jury determined was adequate and real.

Q So the consequence of that position really is, isn't it, that because the government allows the ranchers and farmers to use the land right up to the time of the actual taking, the government is penalized for its policy?

MR. BURCH: I don't see that the government is penalized if what it pays is fair market value. The government would be penalized if it paid more than the land was worth.

Q Well, I take it that you agree that you would not have gotten any such award as you received here if the government had cancelled or refused to renew the Taylor permits six months or a year before?

MR. BURCH: On the contrary, I think they made a bad mistake. I think in the trial of the matter I would have gained considerably more money if I had simply went in and said, this is, as it was, a unique green spot in the middle of Mohave County, the driest place in Arizona. We have a natural spring, two good wells, great grass-producing qualities and we can run a cow-calf operation on this

thousand acres.

I made a bad mistake. I should have got about \$700,000.

Q You said there was some testimony that the fee property alone was worth about a million dollars?

MR. BURCH: That is correct. That was the general carry.

Q Right.

MR. BURCH: That is why I say I think I made a bad mistake. I feel that the court's instruction hurt me in that it reduced the value and as I say, that tool can cut both ways, sir.

Q Well, if we decide against you, I suppose there will be a new trial and maybe you can make a ---

MR. BURCH: I've got to find Mr. Fuller. He is somewhere out looking for a new profession.

Q Mr. Burch, on the theory that your appraisers took and that was adopted at least in part by the jury, if they were comparing fee land as it was before this taking with the permits in existence and the fee land and the situation where the government had revoked the Taylor Grazing Act, wouldn't they, because of the demonstrated value of the second situation was less than the first, even though they are just valuing the fee lands?

MR. BURCH: I really don't know what they would

would say because each of the four men, I believe, we called, came to his valuation on a different basis. One was a professional appraiser, one was the owner, one was a rancher, one was a man skilled in buying and selling ranches. Each came up, but each stated to the court and jury that they, in coming to the final value that they put on the land, did not consider the permit land because they were instructed not to and they deducted it from any value that they put on the total property.

Now, there were various figures in the trial of the issue that they gave to the permits.

Q What was the government's testimony on the value of the land without the Taylor Grazing permits?

MR. BURCH: A government appraiser came to a figure, I believe, of \$136,000 based, not on a cow-calf operation, however, but based, I think, upon a potential resort treatment for some area. He remarked that when the lake was there it might have attractive possibilities but, actually, the truth of the matter is that the ground taken was all going to be under water as the lake arose and subsided, but that was his determination.

As a matter of fact, this is not a permanent lake, it is a flood-control dam where the water will rise and recede and it is for flood-control purposes that the land was taken.

Q Mr. Burch, if Mr. Fuller had sold his fee land to another rancher, would the permit have passed automatically or would it have been necessary for a new permit to be issued?

MR. BURCH: As a matter of custom, the transfer would have been approved. I recall no time when it has not been, and the large ranch holdings in the west are consistently sold, small fees, 50, 100, 200 acres along with 20,000 or 30,000 acres of permit land, both state and federal and the transfer, as a matter of administrative practice, for many, many years has been approved. because that is what the sale is based on.

Q But lawyers for buyers rather regularly check with the Land Office to see if they will be approved ahead of time?

MR. BURCH: Oh, I think they just can go down and get verbal confirmation.

Q But they know the power is there not to approve.

MR. BURCH: They know the power is there not to approve. They accept that and on the open market, the property has a considerably larger value when they are considering the fee sale.

Q How long had Mr. Fuller held this permit?

MR. BURCH: A number of years and I am sorry, I



cannot tell you, Mr. Justice Powell, the exact time but he had built, over a period of a number of years, a total ranch property including wells, houses, ditches, fencing. It had been, I think -- it was nothing recent. It took a number of years. I think five or ten, something of that nature.

Thank you, Mr. Chief Justice.

MR. CHIEF JUSTICE BURGER: Mr. Sachse, you have about four minutes left.

REBUTTAL ARGUMENT OF MR. HARRY R. SACHSE, ESQ.,

ON BEHALF OF THE RESPONDENTS

MR. SACHSE: I just have two things I want to straighten out. First, on the instructions to the jury: The judge said, "You may take these permits into consideration in arriving at your value of the subject land, keeping in mind the possibility that they may be withdrawn without compensation."

So the jury was instructed that they could take them into consideration.

Q Would that be there or only if some appraiser had an attack, indicated he had done so or if counsel argued in the material.

MR. SACHSE: I am about to get to that.

Q Okay.

MR. SACHSE: In the Appendix we submitted, we discussed a very small part of the record. There are

four volumes of the record. We have picked out a few places where references were made to the permit land but it is all throughout this record that maybe Mr. Burch did pick the wrong strategy for the case, but the strategy he picked was to evaluate the fee land and permit land together and try to get the value of the permit land.

We would not have had any objection if he said this is a beautiful piece of fee land with water and thus and thus and thus and so and had left out the business about the use of 30,000 acres of federal land.

Now, here, page 25 of the Appendix, is Mr. Fuller himself testifying and he is describing his land. He says, "Well, it had, of course, the fine water and the very fine climate for growing the kind of crops that we have to have. Then, we have the soil which is not quite so important but still is necessary." He says, "Then we have the availability of federal land as well as state land."

Q Mr. Sachse, if an appraiser had got on the stand and testified about the value of this, just this fee land and it sounded rather large, I would expect that you, on cross-examination, would ask him if he took into account the enhancement from permit lands, wouldn't you?

MR. SACHSE: I don't know. If we had gotten instruction from ---

Q Well, you would. You would. I would think you

would, if that appraiser testified to a value far in excess of what the government's testimony was.

MR. SACHSE: Well, I think there is such testimony in the record of this case, where the lands were treated together and the government, on cross-examination, tried to point out, well, you are figuring the two in together and then Mr. Fuller's appraiser could say, well, it is one unitary operation. You can't value one without the other.

Q Do you have in mind what Mr. Fuller's experts' value on the fee land alone amounted to? With something over a million dollars, it would have been an enormously high acre-per-acre figure, would it not?

MR. SACHSE: I believe they came out in the area of \$800,000 for an award on what they called the value of the fee land, but in figuring the value of the fee land, they figured how many cows could be raised on the fee land together with the --

Q How many acres of fee was there?

MR. SACHSE: 920.

Q 920, wasn't it? So that it was something approaching \$1,000 an acre --

MR. SACHSE: They got a good deal less than they might have gotten and a good deal more than the government thought they should have had on the basis of the fee land itself.

Q Isn't this true in most condemnation cases?

MR. SACHSE: Yes, that is often so.

Q Well, really, the only issue before us is the correctness of the instructions to the jury.

MR. SACHSE: I think that is correct. This proposition is all involved here as to whether the government has the legal --

Q That is right. They are going to try and get a lot more money even if you win the case.

MR. SACHSE: I think that is --

Q Well, suppose, during the case the U.S. attorney had said that you had to revoke the permit?

MR. SACHSE: During the case?

Q Put him on testimony and he said it is now revoked.

MR. SACHSE: Right in the middle of the trial?

Q Yes.

MR. SACHSE: I guess it would depend on what the prior testimony had been. You might have a mistrial.

Actually, I think it would -- the problem with this trial was the pretrial order that stated that the value of the permits could be considered --

Q Yes.

MR. SACHSE: -- the testimony that said it could be and the instructions.

I believe my time is up.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Sachse.

Thank you, Mr. Burch.

The case is submitted.

(Whereupon, at 1:39 o'clock p.m., the case  
was submitted.)