

ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 82-1994

TITLE KIRBY FOREST INDUSTRIES, INC., Petitioner v.
UNITED STATES

PLACE Washington, D. C.

DATE February 22, 1984

PAGES 1 thru 49



1 IN THE SUPREME COURT OF THE UNITED STATES
2 - - - - -x
3 KIRBY FOREST INDUSTRIES, INC., :
4 Petitioner, :
5 v. : No. 82-1994
6 UNITED STATES :
7 - - - - -x
8 Washington, D.C.
9 Wednesday, February 22, 1984
10 The above-entitled matter came on for oral
11 argument before the Supreme Court of the United States
12 at 1:41 o'clock p.m.
13 APPEARANCES:
14 JOE G. RODY, ESQ., Houston, Texas; on behalf of the
15 Petitioner.
16 HARRIETT S. SHAPIRO, ESQ., Office of the Solicitor
17 General, Department of Justice, Washington, D.C.;
18 on behalf of the respondent.
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C O N T E N T S

ORAL ARGUMENT OF

PAGE

JOE G. RCADY, ESQ.,

on behalf of the petitioner

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HARRIET S. SHAPIRO, ESQ.,

on behalf of the respondent

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JOE G. ROADY, ESQ.,

on behalf of the petitioner - rebuttal

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P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments next in Kirby Forest Industries against the United States.

Mr. Roady, I think you may proceed when you are ready.

CRAI ARGUMENT OF JOE G. ROADY, ESQ.,
ON BEHALF OF THE PETITIONER

MR. ROADY: Mr. Chief Justice, may it please the Court, this is a Fifth Amendment taking in just compensation case. It arose under an exercise of the power of imminent domain by the United States under Title 40, Section 257 of the United States Code. That is the so-called straight condemnation statute.

The purpose of the condemnation was to preserve a wilderness area in East Texas in the Big Thicket Forest area of that region of the state. Authority for that particular condemnation was given by Congress in Title 16, Section 698 of the United States Code.

We want to emphasize at the outset the importance of the purpose of this particular condemnation to the outcome of this case. The purpose was to preserve a wilderness in its pristine condition. That is a purpose which is accomplished by affecting a

1 non-use, a non-use for economic purposes, a non-use for
2 any purpose inconsistent with the wilderness
3 preservation, and in this respect we would suggest to
4 the Court that the purpose was accomplished at the time
5 that the condemnation was filed.

6 QUESTION: Mr. Roady --

7 MR. ROADY: Yes, sir.

8 QUESTION: -- was it accomplished by virtue of
9 the government exercising dominion over the property
10 from the time you state?

11 MR. ROADY: There were no acts of physical
12 possession, Your Honor. What we -- Excuse me.

13 QUESTION: Is there -- Excuse me. Go ahead.
14 Finish your answer.

15 MR. ROADY: There were no acts of physical
16 possession. What we are submitting to this Court is
17 that consistent with the takings analysis which this
18 Court has made in the police power cases, the burdens
19 which were placed upon the ownership interests in this
20 property were such that a taking occurred prior to the
21 time of the filing of the award and condemnation. Sir.

22 QUESTION: When the action was taken by the
23 government, could you sell the property to me or to your
24 colleague on the other side of the table?

25 MR. ROADY: As a legal matter, Your Honor, we

1 could sell the property, but it would have to be subject
2 to the condemnation. As a practical matter --

3 QUESTION: As a practical economic matter --

4 MR. ROADY: -- you could not, and that is --

5 QUESTION: It would be unlikely that you could
6 find a buyer who would take that chance.

7 MR. ROADY: Not only unlikely, Your Honor. We
8 think it would be a practical and economic
9 impossibility.

10 QUESTION: Do you think you could borrow money
11 at the bank on it?

12 MR. ROADY: No, sir, Your Honor, we could
13 not. That is another one of the slices through the
14 bundle of ownership rights that we have in this property
15 that this action made.

16 QUESTION: Could this unimproved real estate,
17 could you -- do you think you could build a house on it,
18 or a building?

19 MR. ROADY: You could, Your Honor, but you
20 could not recover the cost of it once the United States
21 has completed its condemnation. You would lose that
22 money. You could not borrow the money to build the
23 house on it. You could not borrow the money to develop
24 it. You could not sell it as far as the timber or any
25 natural resources on it were concerned.

1 QUESTION: But wouldn't -- as a practical
2 matter, if you wanted to borrow money from the bank on
3 the same type of security that that unimproved property
4 would have afforded you for whatever loan a bank might
5 make on it before the condemnation action was filed,
6 couldn't you borrow money on the strength of the
7 potential award?

8 MR. ROADY: I would submit not, Your Honor,
9 because what the secured interest owner would look to
10 would be the property, and the property is at that time
11 in a state of limbo insofar as the award is concerned.

12 QUESTION: Well, my experience has been that
13 banks aren't crazy about unsecured property, whether it
14 is -- unimproved property, whether they are subject to
15 condemnation proceedings or not, but are you saying the
16 banks in that part of the country would be less likely
17 to treat as security the potential award on the property
18 than the property itself.

19 MR. ROADY: That is my statement, Your Honor.

20 QUESTION: But if there is a lien on the
21 property, and then the property is condemned, surely the
22 lienholder is going to get paid if the award is large
23 enough.

24 MR. ROADY: That is true.

25 QUESTION: And I think a bank would certainly

1 know that.

2 MR. ROADY: The bank, if it had the lien
3 before the condemnation was filed, is protected, but if
4 the bank were -- Excuse me.

5 QUESTION: I know, but the bank says before
6 the condemnation, this property has got a market value
7 of X dollars, we'll loan you X over two dollars on it,
8 and after they know it is going to be condemned, isn't
9 the property just as good as security?

10 MR. ROADY: Your Honor, the problem with that
11 is --

12 QUESTION: Well, isn't it just as good as
13 security?

14 MR. ROADY: It is security to the extent of
15 the value that may be realized in the condemnation, and
16 that is the problem. There is no certainty that the
17 value which will be realized in the condemnation is the
18 value which the bank had put on it pursuant to its
19 appraisal, because the condemnation --

20 QUESTION: Well, there is no certainty any
21 time about that. When the bank -- if a bank appraises
22 property before a condemnation and says, we think it
23 will bring so much, and so we will loan you half that
24 much, they don't really know about their -- how right
25 they are about the value.

1 MR. ROADY: Well, in our view, Your Honor, the
2 practical burdens which are placed upon the property by
3 the condemnation process are such that viable economic
4 uses are no longer available.

5 QUESTION: So when do those restraints accrue,
6 in your view? When the condemnation action is filed?

7 MR. ROADY: That is the position we are taking
8 before this Court as a matter of the legal impact
9 relating to condemnation proceedings.

10 QUESTION: Mr. Roady --

11 MR. ROADY: Yes, sir.

12 QUESTION: -- what economic use was the
13 property put to prior to the filing of the complaint?

14 MR. ROADY: The property was not being put to
15 any economic use, if I understand Your Honor's
16 question. It was held by a timber manufacturing company
17 in a reserve capacity. That is to say, it would lock to
18 the property at some future date either for the cutting
19 of the timber, the sale of the timber, the sale of the
20 property for development, some purpose, but those
21 matters had not yet been formulated.

22 QUESTION: If your client were to receive
23 interest from the date of the filing of the complaint,
24 would that not be a windfall there?

25 MR. ROADY: Not at all, Your Honor.

1 QUESTION: You are not receiving any interest
2 now, are you?

3 MR. ROADY: No, sir, we are not receiving
4 interest on the property, but that is really not the
5 question. The question is, when did the government take
6 the property.

7 QUESTION: I understand, but your argument is,
8 as I understood it, that from the date of the filing of
9 the complaint there was no further economic use to which
10 the property could be put --

11 MR. ROADY: That's true.

12 QUESTION: -- and be profitable.

13 MR. ROADY: Well --

14 QUESTION: They could still go hunting on it,
15 fishing -- what they were doing on it now.

16 MR. ROADY: Your Honor, respectfully, I
17 wouldn't say that those were viable economic uses. They
18 may be recreational uses, but --

19 QUESTION: I don't know.

20 MR. ROADY: -- in the language of the Fifth
21 Amendment, we are talking about just compensation, and I
22 think that implies economic uses.

23 QUESTION: In Texas, don't people pay to hunt
24 down there?

25 MR. ROADY: They do, Your Honor. I am sure

1 that the land could be leased for hunting and some
2 income derived from that. However, that was not being
3 done in this case, and --

4 QUESTION: Well, you weren't getting any
5 income off of it.

6 MR. ROADY: That is my understanding, Your
7 Honor. That is my understanding.

8 QUESTION: Even for hunting.

9 MR. ROADY: Even for hunting is my
10 understanding. I don't know that that's --

11 QUESTION: How about the potential income on
12 inflation? Capital gains. Perhaps that is out -- off
13 the field, but let me ask you this. Could they put --
14 the owner put a timber crew in and start cutting the
15 timber?

16 MR. ROADY: We submit that that would not have
17 been possible, Your Honor. First of all, the government
18 would have intervened. They have suggested as much in
19 their briefs before this Court. Second of all, and I am
20 not certain that this is in the record, but I think it
21 is a fact which can be noted, the Big Thicket preserve
22 was a cause celebre of the group in Southeast Texas
23 which meant to and wanted to preserve the Big Thicket
24 Forest.

25 There were people who were constantly, and I

1 would say representing the public in that respect, and
2 certainly after Congress enacted this legislation in
3 1974, they were closely watching what was happening to
4 these tracts of land to prevent just what -- the
5 question involved.

6 QUESTION: Did I read in your brief or in
7 somebody's brief that your client agreed not to develop
8 the timber?

9 MR. ROADY: Yes, sir.

10 QUESTION: During the process of the passage
11 of the legislation?

12 MR. ROADY: That's correct, prior --

13 QUESTION: And so I take it that your client
14 was supporting passage of the legislation.

15 MR. ROADY: Not entirely, Your Honor. What we
16 did was --

17 QUESTION: Well, why would you agree not to
18 develop any of the timber?

19 MR. ROADY: As a good faith effort --

20 QUESTION: To what?

21 MR. ROADY: -- to demonstrate to Congress that
22 Kirby wanted to be a good citizen and not cut --

23 QUESTION: So go ahead and pass the
24 legislation.

25 MR. ROADY: It did not oppose the legislation,

1 Your Honor. It did not support it as others did.

2 QUESTION: Now, is this undertaking of yours
3 in the record?

4 MR. ROADY: Which undertaking, Your Honor?

5 QUESTION: Not to develop the timber.

6 MR. ROADY: It is an admitted fact. I don't
7 know that it is mentioned in the record specifically.

8 QUESTION: Mr. Roady --

9 MR. ROADY: Yes, Your Honor.

10 QUESTION: -- the facts that you rely on here
11 to constitute a taking, a prepayment taking, wouldn't
12 those same facts exist in any Section 257 straight
13 condemnation proceeding?

14 MR. ROADY: To a great degree, Your Honor,
15 yes.

16 QUESTION: Well, wouldn't it turn every 257
17 proceeding into a 258 proceeding, in effect?

18 MR. ROADY: The only distinction, Your Honor,
19 is that in a 257 case involving land which has
20 income-producing capabilities and is producing income,
21 that situation does not fit as readily into this Court's
22 taking analysis under the police power cases, that is,
23 those cases which say that there is no taking when there
24 is remaining, such as in Agins against City of Tiburon,
25 a viable economic use. If there is a viable economic

1 use, there may yet be the burden on the title, on the
2 ownership interest, as is present in an unimproved
3 property situation. And so, yes, there may yet be a
4 taking in an improved property situation as an
5 unimproved.

6 QUESTION: May I get back to when it was you
7 made this agreement? It was before the passage of the
8 Act, wasn't it?

9 MR. ROADY: That is correct.

10 QUESTION: And with whom did you make it?

11 MR. ROADY: The Texas Forestry Association, as
12 a group, indicated to --

13 QUESTION: Was this the group supporting the
14 Big Thicket?

15 MR. ROADY: No, sir. This was a group of
16 timbermen, owners and manufacturers which indicated to
17 the representatives of the Interior Department and the
18 Congressmen who were involved in pushing the Act through
19 to passage.

20 QUESTION: Did your client expect any
21 compensation for that agreement?

22 MR. ROADY: I would say not, Your Honor, would
23 be my supposition.

24 QUESTION: Does your position hinge on that
25 agreement? Would you make the same arguments if there

1 were no such agreement?

2 MR. ROADY: I would make the same arguments if
3 there were no such agreement, Your Honor. I have
4 referred --

5 QUESTION: You would make the same arguments
6 even if you had this vast timber land that was not
7 economically being developed, but you had a right to cut
8 down the trees any time you wanted to.

9 MR. ROADY: Yes.

10 QUESTION: You would still say that as soon as
11 they filed the complaint, you are entitled to interest.

12 MR. ROADY: Correct. Yes, sir. I would
13 indeed say that.

14 QUESTION: What was it about the filing of the
15 complaint that prevented you from cutting down the trees
16 if it had not been for your prior agreement?

17 MR. ROADY: Your Honor, our position relating
18 to the filing of the complaint is based upon the fact
19 that that was the moment when the federal government
20 asserted in a positive public way its intent to take the
21 property.

22 QUESTION: But this was not a declaration of
23 taking proceeding. This was straight condemnation, and
24 that case that Justice Reed wrote a number of years says
25 that one of the things the government is entitled to

1 look to in straight condemnation is whether it wants to
2 buy the property at the price the jury or the
3 commissioners fix.

4 MR. ROADY: That is true. We do not question
5 the right of the government to back out of a
6 condemnation once it has been filed under Section 257.

7 QUESTION: Well, maybe I am asking the same
8 question my brother Rehnquist did, but I don't
9 understand how the institution of the condemnation
10 proceedings deprived you of anything when you had agreed
11 before the proceeding was begun not to use it.

12 MR. ROADY: This, Your Honor, was the
13 impediment on the legal interests which had not existed
14 before. At the same time, the government filed a notice
15 of lis pendence. The effect of those two circumstances
16 was to place a barrier around the titles, around the
17 economic uses which might be made of this property. It
18 was at that moment, looking at the line of cases that
19 have said there may be a series of events which, once
20 there is a certainty that the government is going to
21 move forward in this respect, reaches a taking level.

22 QUESTION: Well, I don't know what the effect
23 of a lis pendence is in Texas, but I know that when I
24 practiced in Arizona, it simply was to say, advise
25 everyone that the property was subject to a condemnation

1 action. Now, that does not impair the use of the
2 property, the filing of a lis pendence, any more than
3 the filing of a condemnation action. All that does it
4 give the public notice of the filing of the condemnation
5 action. So what has the lis pendence got to do with it?

6 MR. ROADY: Your Honor, the lis pendence is
7 the confirmation in the public record in addition to the
8 condemnation petition itself that the government is
9 going forward with its intent to take.

10 QUESTION: But it is going forward and
11 proceeding by straight condemnation.

12 MR. ROADY: Correct.

13 QUESTION: But I am still not satisfied with
14 what you have said, that there were any other
15 impediments on the use of the land. I think you agree
16 that if you haven't entered into this other agreement,
17 you would have been free to cut the timber on the land.
18 Certainly you are free to place a security interest on
19 the land, if you could have gotten somebody to give you
20 a security interest on the land. I don't see how you
21 are impaired in the use of the land except the way
22 anybody is impaired in that you can't really sell land
23 after a condemnation action has been filed because
24 people are just waiting to see what the commissioners
25 find.

1 MR. ROADY: Our position, Your Honor, is that
2 the practical impediments to the economic use of the
3 property were such that after the filing of the
4 complaint and after the posting of the lis pendence
5 notice rendered all economic use unavailable, and this
6 within this Court's police power taking analysis
7 demonstrates that the burdens which the property has not
8 borne before had reached the level that a taking
9 occurred.

10 Now, one of the vital questions in this case,
11 and one which I don't believe this Court has addressed
12 before authoritatively is the question of what is a
13 taking in a Section 257 case absent physical
14 possession? Is it the accrual of the title of the
15 government, or, on the other hand, is it the deprivation
16 of the interest of the landowner?

17 We submit to the Court that it is the
18 deprivation of the interest of the landowner. In this
19 case, and this is the reason I emphasized the purpose of
20 the condemnation here, is it the effective
21 accomplishment of the purposes of the condemnation which
22 is the taking? In this case, that is what we contend.
23 If the taking occurred at the time of the payment of the
24 award, then that is tantamount to saying that it is the
25 accrual of the title of the government rather than the

1 deprivation of the interest of the landowner which is
2 the test of the taking.

3 As the Court is aware, there is a conflict on
4 this question between the Fifth and the Ninth Circuits,
5 the Fifth Court in our case, the Ninth Circuit in two
6 separate cases. The Ninth Circuit has held that in one
7 case the date of the judgment was the date of taking,
8 and in the other case that the date of evaluation of the
9 property was the date of taking.

10 The Court in our case followed the Danforth
11 decision, the 1939 decision of this Court, in holding
12 that it was the date of the payment of the award. The
13 problem with that situation as applied to this case is
14 that property was valued in March of 1979. The award
15 was not paid until March of 1982, a three-year gap.

16 QUESTION: When was judgment?

17 MR. ROADY: Judgment was in August of 1981,
18 seven months prior to the payment of the award.

19 QUESTION: Why was the property valued in
20 whatever month it was in '79?

21 MR. ROADY: Your Honor, because that was the
22 date of the beginning of the hearings before the
23 commission.

24 QUESTION: Was it stipulated?

25 MR. ROADY: There was a stipulation that the

1 beginning date of the hearings before the commission was
2 the date of taking. Yes, sir.

3 QUESTION: Was it the date of taking or the
4 date of evaluation?

5 MR. ROADY: Date of taking was the language
6 used. Yes, sir.

7 QUESTION: But it wasn't a taking for the
8 purpose of having a fixed point of reference for
9 valuation purposes?

10 MR. ROADY: Well, there is disagreement --

11 QUESTION: I mean, I don't understand. You
12 don't really argue that they are committed to that as
13 the date from which interest must run. You don't even
14 argue that primarily. You argue the complaint date.

15 MR. ROADY: We do, Your Honor. There is
16 disagreement not only among the parties, but among the
17 courts as to the effect of the stipulation. The Fifth
18 Circuit rejected it as being merely an agreement as to
19 the date of valuation rather than date of taking. The
20 District Court ignored it and found that the date of the
21 filing of the complaint was the date of taking.

22 QUESTION: Well, I take it you stipulated to
23 the date of taking that you did stipulate to because you
24 didn't think you could argue for any earlier date?

25 QUESTION: Or later.

1 MR. ROADY: That is true, Your Honor. There
2 was consideration made of arguing that the date of the
3 passage of the Act was the date of taking. However, in
4 the legislative history, it was clear that there had
5 been a provision providing for a declaration of taking
6 which was removed during the legislative process, even
7 though the Act itself states that there is hereby
8 created the Big Thicket National Preserve, which would
9 indicate an intent on the part of Congress to
10 legislatively declare that this property was going to be
11 taken and preserved.

12 There are a number of constitutional
13 principles involved in this particular matter. We want
14 to emphasize four. The first is that the word
15 "property" in the Fifth Amendment refers to ownership
16 interest, and not to the physical property itself. This
17 question was authoritatively decided in United States
18 against General Motors.

19 The second is that a taking does not require
20 physical invasion or appropriation or passage of title.
21 This proposition has, we think, also been affirmatively
22 and authoritatively decided, most recently in Penn
23 Central Transportation against the City of New York, and
24 Justice Brennan's dissent, which may very well have
25 represented a majority point of view in that case, and

1 San Diego Gas and Electric against City of San Diego.

2 The third, and the one -- one of the two which
3 we want to emphasize to the greatest extent, is that
4 value is to be determined as of the date of taking.
5 That is a constitutional mandate much supported by and
6 announced by the decisions of this Court, but not, very
7 candidly, observed in practice. The problems are, you
8 must have a date of valuation at some point during the
9 process of condemnation. That date will always be
10 before the date of the payment of the award. If the
11 date of the payment of the award is determined then to
12 be the date of taking, you cannot have a coincident date
13 of valuation and date of taking.

14 QUESTION: And that may be very good for some
15 people and very bad for others.

16 MR. ROADY: That is true, Your Honor,
17 depending on the fluctuations in the marketplace, but we
18 contend before this Court that what should be the rule
19 is a fair rule to all landowners irrespective of the
20 fluctuations in the marketplace.

21 QUESTION: Tell me, what is the significance
22 of the date of payment?

23 MR. ROADY: The significance, Your Honor, is
24 in reliance on the Danforth decision. The Danforth case
25 held that the date of the payment of the award was the

1 date of taking unless there had been some taking prior
2 to that time.

3 QUESTION: Right. What happens -- Why is that
4 the date of payment? Does title pass then?

5 MR. ROADY: That's when title passes. That's
6 when --

7 QUESTION: How do you know that? Is that
8 under case law, or is that --

9 MR. ROADY: That title passes?

10 QUESTION: Uh-huh.

11 MR. ROADY: That is the universal practice.
12 That's when title passes, when the --

13 QUESTION: Well, that's just as a result of
14 case law? That's when the United States title accrues,
15 not at judgment, but at payment?

16 MR. ROADY: Yes, Your Honor, because of the
17 constitutional --

18 QUESTION: Is that a statute, or is that a
19 decision?

20 MR. ROADY: No, it is a constitutional
21 requirement, Your Honor. The Fifth Amendment says that
22 no taking shall occur without just compensation, meaning
23 that the government cannot take the title until it pays
24 just compensation.

25 QUESTION: And so up until that time, you are

1 the owner, and the judgment really doesn't enjoin you
2 from doing anything.

3 MR. ROADY: Not so, Your Honor. It doesn't
4 enjoin in the legal sense. It certainly enjoins in the
5 practical sense. We may have the ownership rights, but
6 they have been sliced through by the actions of the
7 government in prohibiting or preventing, rather, the
8 economic use of the property.

9 QUESTION: Could the United States still back
10 out after the date of judgment and before the date of
11 payment?

12 MR. ROADY: Yes, it could, Your Honor. Rule
13 71(a) provides that at any time before the payment of
14 the award, the government may withdraw. However, if it
15 is after the evaluation, it is subject to court
16 approval, and subject to the court adjusting the
17 situation for a just compensation.

18 QUESTION: I take it property taxes --

19 MR. ROADY: Sir?

20 QUESTION: -- are assessed in the interim?

21 MR. ROADY: I beg your pardon?

22 QUESTION: I take it property taxes, state
23 property taxes are assessed in the interim.

24 MR. ROADY: In the interim, and they are paid
25 by the landowner rather than the government.

1 QUESTION: That would be by Kirby?

2 MR. ROADY: Yes.

3 QUESTION: And this would be true for the
4 period between judgment and payment.

5 MR. ROADY: That is -- That continues to be
6 true, yes, because title does not pass until the payment
7 of the award.

8 QUESTION: Well, Mr. Roady, that is exactly
9 the Congressional scheme, isn't it, to give the
10 government an opportunity to have value determined
11 before it decides whether in fact it wants to spend that
12 much money to acquire something in condemnation, and in
13 fact the government has provided a speedier way for --
14 the Congress has provided a speedier way for the
15 government to acquire property if the government is
16 willing to go ahead with the purchase no matter what the
17 valuation might be.

18 MR. ROADY: Your Honor's analysis is correct.
19 There are two methods whereby the government is
20 authorized to proceed in condemnation. However --

21 QUESTION: Sure, and if we are to agree with
22 you, it just means Congress's separate schemes for
23 condemnation won't be upheld. You would force the
24 government into immediate acquisition.

25 MR. ROADY: Not necessarily, Your Honor. What

1 we are suggesting is, as Justice Brennan suggested in
2 his dissent in San Diego Gas and Electric, that when a
3 taking occurs, there is an automatic duty on the part of
4 the government to pay just compensation. That taking
5 may be temporary. The government may in that respect
6 back out of the condemnation before it pays the award,
7 and in that respect, it has had the opportunity to test
8 the marketplace, to see whether it wants to condemn this
9 property at the price that has been determined.

10 QUESTION: But if it is dealing with a large
11 public project, a dam or a highway system, there isn't
12 really any backing out. The government has committed
13 itself to the project at whatever price they have to
14 pay, even though they can litigate it. I suppose the
15 experience is varied. In some of these public projects,
16 it may be six, eight, or more years before -- from the
17 time of filing to the time when the government actually
18 wants to flood the land or take it for a highway or a
19 bridge, and your argument, I take it, is that there has
20 been something like a constructive taking as soon as
21 they filed.

22 MR. ROADY: Yes, sir, that is our position.

23 QUESTION: Especially if it is an
24 irrevocable --

25 MR. ROADY: If it is irrevocable, then it is

1 clear that the government is not going to back out, but
2 we do not deny or contest the right of the government to
3 back out.

4 QUESTION: This case was not irrevocable.

5 MR. ROADY: Well, Your Honor, in a larger
6 sense it was irrevocable, because Congress directed that
7 the property be taken. This particular property was
8 isolated as being of the highest wilderness value in the
9 entire Big Thicket Forest.

10 QUESTION: Well, all the government did with
11 respect to your client's specific property was to file a
12 straight condemnation action against it, which allows it
13 to elect after the value has been fixed whether to go
14 ahead or not, so in your case there was no commitment
15 prior to valuation.

16 MR. ROADY: Respectfully, Your Honor, I would
17 disagree. As a practical matter, there was a
18 commitment.

19 QUESTION: Then you say, as Justice O'Connor
20 pointed out, that the distinction between straight
21 condemnation and declaration of taking and that the old
22 opinion in the flood control case by Justice Reed are
23 just no longer good law, that the government can't elect
24 after it finds out what the value is to back off.

25 MR. ROADY: No, Your Honor. What I say is

1 that if there is a temporary taking, then the government
2 must pay the cost of that temporary taking. It does not
3 -- It is not compelled to complete the taking if it
4 chooses Section 257.

5 I would like to reserve the remainder of my
6 time.

7 QUESTION: May I just ask one question? Would
8 you take the position that if they had backed out here
9 after -- right at the last moment, they had backed out
10 and changed their minds, that your client could have
11 received damages from them under the theory in Justice
12 Brennan's dissent?

13 MR. ROADY: Yes, that is --

14 QUESTION: So you are entitled either to
15 interest or damages?

16 MR. ROADY: Yes, that is consistent with our
17 position.

18 I would like to reserve the remainder of my
19 time for rebuttal.

20 CHIEF JUSTICE BURGER: Mrs. Shapiro.

21 CRAL ARGUMENT OF HARRIET S. SHAPIRO, ESQ.,

22 ON BEHALF OF THE RESPONDENT

23 MS. SHAPIRO: Mr. Chief Justice, and may it
24 please the Court, the basic procedure that the
25 government uses in exercising its power of eminent

1 domain is the straight condemnation or complaint
2 procedure. Under that procedure, the government files a
3 complaint stating that it wants to take specific
4 property, and asking the court to establish its price.
5 That is just compensation.

6 A hearing is held, and the condemnation award
7 is issued. That award establishes the price of the
8 property. If the government wants the property at that
9 price, it pays the condemnation award, and at that
10 moment takes both the title and the right to possession
11 of the property.

12 The sale, the taking occurs when the property
13 and the money change hands. This straight condemnation
14 procedure is the one involved in this case. It is
15 ordinarily the procedure that is least intrusive from
16 the landowner's point of view, because it permits him to
17 remain in possession until the price is determined and
18 paid in full.

19 In 1931, Congress added a provision permitting
20 the government to obtain immediate title and possession
21 by filing a declaration of taking. When that declaration
22 is filed, usually at the same time as the complaint but
23 not necessarily, that establishes the sale date. In rare
24 instances when the government has entered into
25 possession before it files a declaration of taking, the

1 date that it assumes possession is the date of the sale.

2 QUESTION: Isn't there one procedure where the
3 money is paid in and deposited in a bank?

4 MS. SHAPIRO: That's the declaration of
5 taking. What happens in the declaration of taking
6 situation is that the -- since the date of sale is the
7 date of the taking, the -- when the declaration of
8 taking is filed, the owner gets the estimated sale
9 price. As part of the declaration of taking, we have to
10 pay into court the estimated sale price.

11 QUESTION: To the court, but may they take it
12 out and put it in their own bank account?

13 MS. SHAPIRO: Yes.

14 QUESTION: That is the important thing.

15 MS. SHAPIRO: Yes.

16 QUESTION: I thought the court deposited it in
17 the bank.

18 MS. SHAPIRO: It is deposited into the court,
19 but Rule 71(a) provides that it shall be paid out to the
20 landowner promptly. That's the reason why he doesn't
21 get interest on the amount that has been deposited,
22 because he has that amount to use. He gets interest
23 only on the extent to which the actual award and
24 condemnation is higher than the estimated amount.

25 QUESTION: You mean on the deferred payment.

1 MS. SHAPIRO: Yes, on the difference between
2 the amount that is deposited --

3 QUESTION: -- deferred.

4 MS. SHAPIRO: Yes.

5 QUESTION: They get interest at -- is it the
6 statutory rate?

7 MS. SHAPIRO: There is a statutory rate. We
8 have agreed that since interest is part of just
9 compensation in this context, he is entitled to the
10 interest calculated at the actual interest rate. That
11 is not an issue in this case.

12 QUESTION: Mrs. Shapiro, the petitioner is
13 arguing that the effects on it of the government's
14 condemnation action here were such as to give cause to
15 -- a cause of action to them for what amounts to inverse
16 condemnation, in effect, to force payment and damages or
17 alternatively by way of interest for their loss suffered
18 before date of payment.

19 MS. SHAPIRO: Um-hm.

20 QUESTION: Now, in your brief, you indicate
21 that a landowner can get damages on an inverse
22 condemnation theory for adverse effects on the property
23 caused by the condemnation proceedings, but only for
24 effects over and above collateral consequences.

25 MS. SHAPIRO: Right.

1 QUESTION: Now, what do you mean by collateral
2 consequences? What are those? It wasn't clear to me.

3 MS. SHAPIRO: Well, there are -- In the
4 eminent domain jurisprudence, it is fairly well
5 established that there are collateral consequences that
6 are -- that may be suffered by the landowner when
7 eminent -- when his property is taken. A couple of --

8 QUESTION: What are they?

9 MS. SHAPIRO: A couple of examples would be if
10 he -- his business is destroyed, if --

11 QUESTION: Could there be any collateral
12 consequences for unimproved realty that you can think
13 of?

14 MS. SHAPIRO: Yes, I suppose financing
15 problems, or -- I mean, the collateral consequences
16 really are the -- they relate to the particular value of
17 this property to the landowner. The fact that -- Well,
18 I suppose if you have a profitable business that is
19 condemned because it is in the way of a throughway. The
20 condemnation award for that business is exactly the same
21 whether the business is profitable or whether it is a
22 losing business.

23 Obviously, if the landowner is losing money,
24 the value to him of the business is going to be smaller
25 than if it is a very profitable business. On the other

1 hand, since eminent domain deals with transferrable
2 value, what the government gets is the property.

3 QUESTION: Well, could there be any so-called
4 collateral consequences in this type situation for
5 unimproved realty?

6 MS. SHAPIRO: I find it very hard to think of
7 any, and --

8 QUESTION: What if access were cut off? Would
9 that be a collateral consequence?

10 MS. SHAPIRO: I suppose that could be a --
11 Well, no, that's the kind of consequence -- I mean, that
12 could be a situation where you would have a taking by
13 inverse condemnation.

14 QUESTION: But there would have to be a
15 remainder there for taking access. If you take the
16 whole parcel, by definition, the taking of access isn't
17 going to be any harm to the person whose entire property
18 is taken.

19 MS. SHAPIRO: Well, what I was thinking of was
20 if the landowner owns property in the middle of a
21 project, and the government takes the property -- takes
22 the property all around it so that he can't get into his
23 property.

24 QUESTION: As is so often the case in highway
25 construction. Cut right through the middle of a farm or

1 a corner of it.

2 MS. SHAPIRO: But our basic point really is
3 that those kinds of damages are -- they are damages that
4 are unrelated to the standard procedures for inverse
5 condemnation, where the government comes in and says,
6 we're going to take the property, and files their
7 complaint, and then the commission determines the value
8 of the property. The government then takes the property
9 at the -- when it pays the judgment.

10 It may be that the landowner says, look,
11 you've taken an interest in my land, you've cut off
12 access, you've taken -- you have affected my interest in
13 the property. That is a completely different suit. The
14 Tucker Act provides -- That is a suit that rests on a
15 claim arising under the Constitution. That is a Tucker
16 Act suit.

17 QUESTION: Is that an inverse condemnation
18 suit?

19 MS. SHAPIRO: That's an inverse condemnation
20 claim.

21 QUESTION: And the property owner has to file
22 an entirely separate suit?

23 MS. SHAPIRO: In the -- in the --

24 QUESTION: And the court in the condemnation
25 action can't take account of those damages in any way?

1 MS. SHAPIRO: That's --
2 QUESTION: That's your position?
3 MS. SHAPIRO: That is our suggestion, yes.
4 QUESTION: Has that been determined? That
5 seems like a great burden to impose on a landowner.
6 MS. SHAPIRO: Well, in some sense yes, it is
7 -- I mean, it is -- this is a tough question. As I say,
8 it is not in this case, because in this case there is no
9 legitimate claim of any inverse condemnation.
10 QUESTION: I am confused by your answer to
11 Justice O'Connor's question. Perhaps I shouldn't be.
12 But I have understood the collateral consequences
13 doctrine in the law of just compensation to be much like
14 the law of remote and consequential damages in law of
15 contracts, not that those kind of damages could be
16 recovered somewhere else, but that they simply could not
17 be recovered at all.
18 MS. SHAPIRO: That's right.
19 QUESTION: That just compensation did not
20 include that kind of damages.
21 MS. SHAPIRO: That's --
22 QUESTION: So why talk about bringing an
23 action under the Tucker Act for collateral consequences?
24 They wouldn't be recoverable anyway.
25 MS. SHAPIRO: That is absolutely right. My

1 only point is that what --

2 QUESTION: But your brief said they could be.
3 So I don't -- you know, I just don't understand this
4 exchange at all.

5 MS. SHAPIRO: Our point is that when -- what
6 you have in the -- under your Tucker Act, you go into
7 the Court of Claims, and the Court of Claims then has to
8 decide what you are asserting -- whether what you are
9 asserting are legitimate inverse condemnation claims or
10 whether they are simply collateral consequences, and
11 that, if they are collateral consequences, you don't get
12 any recovery for them. If they are legitimate inverse
13 condemnation claims, then you do get a recovery.

14 QUESTION: But you are quite certain that
15 they'd have to file a separate suit, the landowner,
16 which seems so unfair.

17 MS. SHAPIRO: Well, the problem is that
18 Congress has said that claims arising under the
19 Constitution against the United States are to be tried
20 in the Court of Claims only if they are over \$10,000.
21 That is a jurisdictional decision that Congress has
22 made. On the other hand, if you did say that under some
23 kind of a pendent jurisdiction notice, and conceivably
24 you could, what this would do would be to complicate
25 your condemnation proceeding very substantially, and in

1 some sense the fact that these two kinds of claims
2 involve the same property is really coincidental, that
3 what the condemnation suit is is a pricing action.

4 The government is looking to get a price for
5 the property. What the inverse condemnation suit is is
6 a claim by the landowner that you have done things to my
7 property, or you have done things to my interests that
8 affect my rights with the property. That is what has
9 happened beforehand. The eminent domain proceeding is
10 for the government to find out how much it is going to
11 cost for them to purchase the property. They are two
12 separate questions.

13 QUESTION: You are saying all the
14 commissioners value is the full fee interest --

15 MS. SHAPIRO: Well, or whatever --

16 QUESTION: If you are talking about a
17 temporary taking or something like that, you are talking
18 about something that is measured by quite a different
19 measure --

20 MS. SHAPIRO: Yes, it is simply a valuation
21 situation.

22 QUESTION: It does seem kind of difficult to
23 me if you are talking about the same piece of property,
24 if there is a claim of another kind of taking, of a
25 taking of a less than a full fee interest, that the

1 landowner would have to file an action separately in the
2 Court of Claims.

3 MS. SHAPIRO: Well, as I say, it may be that
4 there is some kind of a pendent jurisdiction, but my
5 main point is that what the landowner has to show in his
6 inverse condemnation suit is something that is far
7 beyond anything that the landowner here has even started
8 to show. It is something beyond these consequential
9 damages.

10 QUESTION: Well, is it the government's
11 position that the filing of the papers doesn't inflict
12 any injury on the --

13 MS. SHAPIRO: It certainly is. It certainly
14 is. The --

15 QUESTION: But we must know as a practical
16 matter that that -- that it does damage the property
17 owner.

18 MS. SHAPIRO: Well, what the petitioner is
19 claiming is that he has got a cloud on his title, that
20 the cloud really kind of arises gradually, it starts at
21 the point when the interest in acquiring the land
22 focuses and, you know, before the statutes passed it
23 kind of increases as the statute is passed, and then
24 when the land is identified and finally when the
25 condemnation suit proceeds.

1 QUESTION: Let's take a practical situation in
2 this area recently, Highway 66, which was seven, eight,
3 nine years in construction. The people whose homes and
4 land was being taken waited probably a long time from
5 the date when they knew they were going to lose the
6 property, lose it in the sense that it was going to the
7 government for compensation, until the date when they
8 got their money, and --

9 MS. SHAPIRO: And they remained in possession
10 all that time.

11 QUESTION: No, many of them were torn down by
12 the governmental action, demolished long before payment
13 was made.

14 MS. SHAPIRO: Well, if in fact they were --
15 the government entered into possession and filed a
16 declaration of taking, it had to make a payment at that
17 point, and to the extent that that payment didn't cover
18 the amount that was actually ultimately determined, then
19 the landowners were entitled to interest, but absent any
20 such payment or entry into possession, the landowners
21 under the federal scheme remain in possession. They
22 retain all the rights to use their property.

23 QUESTION: You don't think their prospects of
24 selling the property are impaired?

25 MS. SHAPIRO: Well, the point is, this cloud

1 on the title, it may as a practical matter affect what
2 the landowner can do, but that will be simply because of
3 the subjective reactions of the landowner and the people
4 that he wants to deal with.

5 QUESTION: Well, is that necessarily true,
6 Mrs. Shapiro? Doesn't the mere institution of the
7 condemnation proceedings have the effect of limiting the
8 use of the land? You don't think so?

9 MS. SHAPIRO: No, I really --

10 QUESTION: In the real world, you don't think
11 so?

12 MS. SHAPIRO: Well, in the real world, it may,
13 and the --

14 QUESTION: That's the one your friend thinks
15 he is in.

16 (General laughter.)

17 MS. SHAPIRO: But -- well, as far as he is
18 concerned, in his real world, he has held this property
19 since at least 1949, and the only difference -- he has
20 never cut the timber. He has never tried to develop
21 it. As far as he is concerned, any interest or use he
22 has made of the land is exactly the same until we take
23 the title and the possession. Of course, his point that
24 all we want is to preserve the land is quite incorrect,
25 because what we want is to establish a public park in

1 which there will be public access, and we don't achieve
2 that purpose until we pay the money and get the
3 possession and the title.

4 QUESTION: Ms. Shapiro, one point. You say
5 there is no damage, but you do admit there is a cloud on
6 the title.

7 MS. SHAPIRO: There is a cloud on the title.

8 QUESTION: Well, isn't that a damage?

9 MS. SHAPIRO: Well, in some cases --

10 QUESTION: Or am I just playing with words?

11 MS. SHAPIRO: In some cases, it may be a
12 damage, but the point is that in other cases, the
13 landowner may vastly prefer to remain in possession
14 rather than to be put out of possession.

15 QUESTION: Well, suppose somebody comes to him
16 and says, I would like to buy your property for \$18
17 million, but it has to be done today.

18 MS. SHAPIRO: Well, he can sell it.

19 QUESTION: You think anybody would buy it?

20 MS. SHAPIRO: Well, I doubt that anybody would
21 come to him.

22 QUESTION: That's right.

23 MS. SHAPIRO: But --

24 QUESTION: But if they did come, then he could
25 sell it?

1 MS. SHAPIRO: Sure he could sell it.

2 Absolutely. And --

3 QUESTION: Ms. Shapiro, a moment ago Justice
4 Marshall asked you if there weren't a cloud on the title
5 as a result of the condemnation proceeding, and you said
6 yes, there was. What do you understand in that sense a
7 cloud on the title to mean?

8 MS. SHAPIRO: What I understand it to mean is
9 that there is going to be -- people are going to act as
10 though the landowner can't -- I mean, they will be less
11 willing to buy and sell, or they will be less willing to
12 deal with it.

13 QUESTION: People will do what they do when
14 they know a condemnation action is --

15 MS. SHAPIRO: Yes.

16 QUESTION: You don't understand the cloud on
17 the title in that sense to suggest any question about
18 the owner's ability to pay fee title?

19 MS. SHAPIRO: Oh, no, no, no, absolutely not.
20 The other point is that since under our theory and under
21 the established principles the title to the land and the
22 value -- the valuation date is the date that the taking
23 occurs, we agree that if in fact between the date of
24 valuation here in 1979 and the date that the land was
25 actually taken there has been an increase in the value

1 of the land, then the landowner is entitled to show that
2 increase, either by a motion under Rule 60(b) asking for
3 relief from the judgment, or he can also go in under
4 Rule 71(a) and ask that it is no longer equitable
5 because of the delays to permit the judgment to be
6 executed.

7 But the point is, if you have -- and you can
8 -- if the land has increased in value, he can show that,
9 because he is entitled to just compensation at the date
10 of taking, but to say that, well, interest is kind of a
11 rough equivalent of that is just wrong, because what you
12 have to look at in deciding whether he has gotten just
13 compensation is whether land prices have increased, not
14 what has happened to the value of money. Interest rates
15 have got nothing to do with his just compensation claim,
16 which is to recover the current value of the property.

17 QUESTION: So long as he recovers interest
18 from the date of taking, if the judgment isn't paid.

19 MS. SHAPIRO: Well, if the government is
20 taking, but our point is that in straight condemnation
21 cases of course we haven't taken until we pay the
22 judgment. But what he is saying is, look, I've got --
23 back in '79 the land may have been worth less than it
24 was in '82, so I am entitled to interest to make up the
25 difference between what the land was worth in '79 and

1 what it was worth in '82, but if he can show that the
2 land was worth more in '82, then indeed he is entitled
3 to what the land is worth in '82, when we take it, and
4 interest is totally unrelated to that.

5 The landowner -- petitioner relies largely on
6 this Court's decisions involving the police power on
7 land use regulation. As we explain in our brief, in
8 those cases the Court has required a far more serious
9 invasion of property rights than petitioner has suffered
10 before it has found a constitutional taking.

11 It is worth emphasizing that even if the
12 question were closer than we think it is, there are
13 serious practical problems in carrying out the case by
14 case analysis used in land use cases in the context of
15 condemnation proceedings, so that the date of taking
16 must be litigated in each case.

17 That brings in idiosyncratic values and
18 potential complications in determining the date of
19 valuation that would seriously complicate an already
20 complex process. There is a constitutionally
21 significant difference between the two kinds of cases
22 that justifies treating them differently.

23 When the government is exercising its eminent
24 domain powers, it recognizes the landowner's right to
25 just compensation. The dispute is simply over how that

1 just compensation should be calculated, not over whether
2 the property owner is entitled to any payment at all.
3 The government should be allowed more leeway when it is
4 establishing parks and preserving scenic values by
5 condemning land and paying for it than when it tries to
6 achieve the same results by zoning and imposing the
7 burdens on the landowner without paying him anything.

8 Mayen and Dow recognize that, and the dissent
9 in Penn Central certainly sounds as though the
10 dissenters would have agreed with the majority that
11 there was no taking if the complaint there had involved
12 simply temporary interferences in the course of a
13 condemnation proceeding.

14 Long delays in paying condemnation awards of
15 course may hurt landowners, but they are not the
16 helpless victims that petitioner portrays. First,
17 because the landowner is entitled to the fair market
18 value at the time his land is taken, he is entitled to
19 show that the land has increased in value since the
20 original valuation date. That showing shouldn't require
21 a complicated supplementary hearing. Indeed, it is
22 probably going to be possible often to negotiate a
23 stipulation because all that will be involved is whether
24 comparable real estate values have gone up.

25 QUESTION: But that doesn't lay down any rule,

1 the government's situation, the fact that they can agree
2 on something.

3 MS. SHAPIRO: That's true, but the point is
4 that it's -- what you have to be concerned about is the
5 market value of the land, and not the interest rate, and
6 our point is that the proceeding is not probably going
7 to be a very complicated one. What you are talking
8 about is land values. You don't have to -- Petitioner
9 suggests that you are going to have to start the whole
10 proceeding over again.

11 QUESTION: Courts can't deal with the value.
12 That is determined by a fact-finding process, isn't it?

13 MS. SHAPIRO: It is the commission's --

14 QUESTION: Yes.

15 MS. SHAPIRO: Yes. So that -- but as I say,
16 it shouldn't be a complicated determination to make.

17 And the other point is that if the land values
18 have gone up very steeply, the payment of interest isn't
19 going to afford the landowner just compensation. On the
20 other hand, where the land values have dropped, as it
21 may well be they have here, the interest will give the
22 landowner a windfall.

23 If the landowner can't show that the land has
24 appreciated, he can also move to dismiss the
25 condemnation suit under Rule 71(a). If the District

1 Court agrees that the government's delay has been
2 unreasonable, it can dismiss the suit, and the
3 government must then pay the landowner's litigation
4 costs, including attorneys' fees. That is under the
5 Uniform Relocation Assistance and Land Acquisition
6 Policies Act.

7 A landowner in petitioner's position has a
8 third alternative. It is pretty clear that if the Park
9 Service had concluded that he was seriously considering
10 cutting his timber, the government would have filed a
11 declaration of taking, and at that point, of course, we
12 would have had to deposit the estimated value of the
13 property, and he would then have become entitled to
14 interest, just as he claims now that he is, so that he
15 had it within his power to get an immediate taking if
16 that was what he wanted.

17 Unless there are further questions.

18 CHIEF JUSTICE BURGER: Very well.

19 Do you have anything further, Mr. Roady?

20 MR. ROADY: Yes, please, Your Honor.

21 CHIEF JUSTICE BURGER: You have three minutes
22 remaining.

23 ORAL ARGUMENT OF JOE G. ROADY, ESQ.,

24 ON BEHALF OF THE PETITIONER - REBUTTAL

25 MR. ROADY: Thank you.

1 May it please the Court, what we are talking
2 about here is the paramount power of the government to
3 take property. The position of the government is that
4 that does not occur until it exercises possession or
5 control over the landowner's property. That position,
6 we submit to the Court, is totally contrary to this
7 Court's own analyses of the takings questions in police
8 power cases.

9 We have suggested to the Court that a separate
10 analysis might well be given to eminent domain cases, as
11 I think is appropriate, but in that separate analysis it
12 would be clear that the character of the taking, the
13 character of the government action which was being
14 analyzed is this paramount power to take.

15 Mr. Justice Brennan in his dissent in San
16 Diego Gas and Electric noted in a footnote that where
17 the property is to remain unused, undisturbed, and in
18 its natural state, paraphrasing, in this sense, the
19 property is being used by the public. We submit to the
20 Court that the principles which were announced in
21 Justice Brennan's dissent in that case are applicable to
22 the analysis which should be made of the power of the
23 government to take in eminent domain cases.

24 The Court -- excuse me. The government relies
25 on the Danforth decision. Danforth does not support the

1 absolutist position taken by the government. Danforth
2 held that a taking could occur in actuality before the
3 payment of the award. It also held that in order for an
4 act of the government to amount to a taking, it must
5 result in an appropriation of the property to the uses
6 of the government.

7 That is precisely what has happened here.
8 This property was appropriated to the uses of the
9 government, was being, in effect, used by the public
10 because of its preservation in a natural state.

11 The government suggests that we should go
12 through an inverse condemnation process. I submit that
13 that is totally inappropriate. What we have is a just
14 compensation question under the Fifth Amendment. To
15 relegate the taxpayer, the landowner to the Court of
16 Claims is to divide the just compensation issue. If the
17 government withdraws its condemnation, and is allowed to
18 do so by the District Court, then there may be an
19 inverse condemnation question, but once the --

20 QUESTION: What if we agree with you that
21 interest does run? What about the rate?

22 MR. ROADY: We have submitted to the Court
23 that the rate is a question which should be discussed in
24 this case. It should be a market rate. I think the
25 government --

1 QUESTION: Do you think the Constitution
2 requires that?

3 MR. ROADY: I do indeed, Your Honor.

4 Thank you very much.

5 CHIEF JUSTICE BURGER: Thank you, counsel.
6 The case is submitted.

7 (Whereupon, at 2:36 p.m., the case in the
8 above-entitled matter was submitted.)

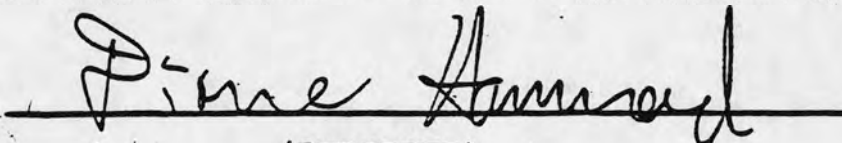
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CERTIFICATION

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