

***“In the Interest of Justice”***

**Valuation Trials by Commission  
in Federal Eminent Domain Cases**

**Rule 71A(h) Federal Rules of Civil Procedure  
In Practice**

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## I. Legal Basis for a Commission Trial

Rule 71A(h) of the Federal Rules of Civil Procedure provides:

"If the action involves the exercise of the power of eminent domain under the law of the United States, any tribunal specially constituted by an Act of Congress governing the case for the trial of the issue of just compensation shall be the tribunal for the determination of that issue; but if there is no such specially constituted tribunal any party may have a trial by jury of the issue of just compensation by filing a demand therefor within the time allowed for answer or within such further time as the court may fix, unless the court in its discretion orders that, because of the character, location, or quantity of the property to be condemned, or **for other reasons in the interest of justice, the issue of compensation shall be determined by a commission of three persons appointed by it.**

If a commission is appointed it shall have the powers of a master provided in subdivision (c) of Rule 53 and proceedings before it shall be governed by the provisions of paragraphs (1) and (2) of subdivision (d) of Rule 53. Its action and report shall be determined by a majority and its findings and report shall have the effect, and be dealt with by the court in accordance with the practice, prescribed in paragraph (2) of subdivision (e) of Rule 53. Trial of all issues shall otherwise be by the court."

Rule 53 provides in relevant part:

(c) **Powers.** The order of reference to the master may specify or limit the master's powers and may direct the master to report only upon particular issues or to do or perform particular acts or to receive and report evidence only and may fix the time and place for beginning and closing the hearings and for the filing of the master's report. Subject to the specifications and limitations stated in the order, the master has and shall exercise the power to regulate all proceedings in every hearing before the master and to do all acts and take all measures necessary or proper for the efficient performance of the master's duties under the order. The master may require the production before the master of evidence upon all matters embraced in the reference, including the production of all books, papers, vouchers, documents, and writings applicable thereto. The master may rule upon the admissibility of evidence unless otherwise directed by the order of reference and has the authority to put witnesses on oath and may examine them and may call the parties to the action and examine them upon oath. When a party so requests, the master shall make a record of the evidence offered and excluded in the same manner and subject to the same limitations as provided in the Federal Rules of Evidence for a court sitting without a jury.

(e) Report.

**(2) In Non-Jury Actions.** “In an action to be tried without a jury the court shall accept the master's findings of fact unless clearly erroneous. Within 10 days after being served with notice of the filing of the report any party may serve written objections thereto upon the other parties. Application to the court for action upon the report and upon objections thereto shall be by motion and upon notice as prescribed in Rule 6 (d). The court after hearing may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions.”

Under Rule 71A(h) of the Federal Rules of Civil Procedure, the court may authorize, in eminent domain proceedings under the law of the United States, in its discretion, order that in the interest of justice, the issue of just compensation shall be determined by a commission of three persons appointed by it. Therefore, if a judge feels that the appointment of a commission will be in the interest of justice, it may be constitutional under 71A(h) of the Federal Rules of Civil Procedure. However, unsupported conclusion that the appointment of a commission will avoid delay and be in the interest of justice will not suffice as reason for denying a jury trial in condemnation cases. United States v. Theimer., 199 F. 2d 501 (5<sup>th</sup> Cir. 1952).

Rule 71A(h) stems from the rationale that since the sovereign need not allow suits against it, Congress is free to allow suit on whatever terms it chooses, and may grant or deny a jury trial as it sees fit. McElrath v. United States, 102 U.S. 426, 26 L. Ed. 189 (1880). Further, the Supreme Court in Glidden Company v. Zdanok, 370 U.S. 530, 572, 82 S.Ct. 1459, 8 L. Ed. 2d 671(1961), held that suits against the government require a legislative waiver of sovereign immunity, therefore they are not suits at common law within the meaning of the Seventh Amendment.

Rule 71A(h) was promulgated pursuant to the rule-making power of the United States Supreme Court under the Enabling Act, 28 U.S.C.s 2072, as a means

to provide more uniform procedures in federal condemnation acts. Under the Enabling Act the Supreme Court may prescribe “by general rules, practice and procedure” of the district courts. Such rules, however, “shall not abridge, enlarge, or modify any substantive right.” The test of whether a rule exceeds the congressional mandate embodied in the Enabling Act is “whether a rule really regulates procedure, the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them.” Sibbach v. Wilson & Co., 312 U.S. 1, 14, 61 S.Ct. 422, 426, 85 L.Ed. 479 (1941).

Rule 71A(h) incorporates by reference Federal Rule of Civil Procedure 53(e)(2), which provides that the district court must accept the findings of a master unless they are “clearly erroneous.” Where a district court determines that a commission’s findings are inadequate or clearly erroneous, the court in accordance with 53(e)(2), may use its informed discretion to “ ‘modify’ the report on the basis of the record made before the commissioners, or it ‘may reject it in whole or in part or may receive further evidence or may recommit it with instructions.’” United States v. Merz., 376 U.S. 192 (1964).

However, current case law has established that challenging a commission’s finding by meeting the “clearly erroneous” standard carries an extremely heavy burden. In Morgan v. United States., 356 F.2d 17, (8<sup>th</sup> Cir. 1966), the Court of Appeals of the Eighth Circuit held that even if the court’s instructions to the condemnation commissioners were deficient, the ensuing hearing was fairly and objectively conducted and the commission’s report adequately disclosed the path followed by the commission in arriving at the award, therefore the court rule that even though the instructions were deficient it was not sufficient to constitute the

clearly erroneous standard. However, in Georgia Power Company v. 138.30 Acres of Land., 596 F.2d 644, (5<sup>th</sup> Cir. 1979), the Court of Appeals vacated and remanded a ruling which approved reports of a commission in determining just compensation because the commission had made certain clear errors and had failed to adequately explain the basis for certain conclusions regarding to the amount of compensation due. The 11<sup>th</sup> Circuit defines clearly erroneous “when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.”St. Genevieve Gas Company v. Tennessee Valley Authority., 747 F.2d 1411, 1414 (11<sup>th</sup> Cir. 1984).

In United States v. 9.20 Acres of Land., 638 F.2d 1123 (8<sup>th</sup> Cir. 1981), the Court of Appeals held that a commission was justified in crediting Government’s sole witness over landowner’s witnesses, and that the commission was justified in accepting the conclusion of the Government’s witness that the condemned parcel’s highest and best use was not sand and gravel development. The court rule that the trial court’s findings were not clearly erroneous.

## **II. The Justification for Commission Trials**

The use of a commission to resolve the issue of just compensation is justified by the facility with which commissioners may inspect a particular property and the likelihood that uniformity of an award may be realized expeditiously. United States

v. Merz., 376 U.S. 192 (1964). Some courts have recognized that under certain circumstances a commission is a useful and proper device for setting compensation in federal eminent domain proceedings. The use of a commission trial is appropriate in cases that involve large areas held by many small landowners, or property too distant for a jury to view the premises. United States v. Buhler., 254 F. 2d 876, 880 (5<sup>th</sup> Cir. 1958). The Advisory Committee Notes following Rule 71(A) attempt to justify the use of commission trials by listing four reasons why the use of commissioners instead of juries are desirable in resolving the issue of just compensation. The first justification states that the commission system tends to prevent discrimination and provides for uniformity in compensation since the jury system tends to lack uniformity. Secondly, commission trials remove the hardships of having juries travel great distances in order to attend a jury trial. They justify the use of the commission by stating that a commission may travel around and receive evidence of the owner near his home removing the travel requirement. Thirdly, the Advisory Committee states that it is impracticable to take juries on long distances to view premises. Lastly, the use of a commission removes the burden of excessive time of the courts if the cases are tried.

Whenever commissions are implemented there is a danger that commissioners, unlike juries, may use their own expertise and not act as a deliberative body applying constitutional standards. A jury, until it retires, sits under the direct supervision of a judge, who rules on the admissibility of evidence, who sees that witnesses are properly qualified as experts, and who polices the entire hearing, keeping the hearing within bounds. United States v. Merz., 376 U.S. 192 (1964). Under the commission system a lawyer is often appointed by the court to function as chairperson and to make evidentiary rulings. Moore's Federal Practice Civil Procedure §§ 71A.

Under a commission trial the commission acts as a finder of fact and as a finder of law. This system presents grave harm to the property owners of the condemned parcel of land. A master like a commission can exercise the power to regulate all proceedings in every hearing before the master and to do all acts and take all measures necessary or proper for the efficient performance of the master's duties under the order. Pursuant to Rule 53(c) of the Federal Rules of Civil Procedure provides:

The master may require the production before the master of evidence upon all matters embraced in the reference, including the production of all books, papers, vouchers, documents, and writings applicable thereto. The master may rule upon the admissibility of evidence unless otherwise directed by the order of reference and has the authority to put witnesses on oath and may examine them and may call the parties to the action and examine them upon oath.

The danger that a property owner may face under a commission trial is demonstrated in United States v. 1,955.00 Acres of Land in Geary and Riley Counties., 447 F. 2d 673 (10<sup>th</sup> Cir. 1995). In United States v. 1,955.00 Acres of Land in Geary and Riley Counties, the trial court adopted a commission's report that determined that the presence of hard commercial limestone did not add market value to the property. The commission's finding was premised on the fact that there had been no quarrying at the present time, and viewed that this fact destroyed the landowners' case for consideration of the mineral value. On appeal the circuit judge reversed the lower court's ruling, holding that the value of limestone located on the condemned

tract could not be ignored where the presence of limestone was undisputed.

### **III. Procedure of Commission Trials**

In federal condemnation proceedings, the law provides that there is no constitutional right to a jury trial in condemnation proceeding. See, e.g., United States v. Reynolds, 397 U.S. 14 (1970); Bauman v. Ross, 167 U.S. 548, 593 (1897).

Rather, the availability of a jury trial in a condemnation case brought by the United States is governed by FRCP 71A(h). In Bauman v. Ross, the Supreme Court held that "the estimate of the just compensation for property taken for the public use under the right of eminent domain is not required to be made by a jury, but may be entrusted by Congress to commissioners appointed by a court or by the executive, or to an inquest consisting of more or fewer men than an ordinary jury." Bauman v. Ross, 167 U.S. 548 (1897).

In order to obtain even the limited access to a jury provided by the rule, a party must make a timely demand for a jury trial. Unless otherwise provided by the court, a defendant must make such a demand within twenty days of service of notice of the government's complaint. Under Rule 71A(h) of the Federal Rules of Civil Procedure, a jury demand must be filed "within the time allowed for answer or within such further time as the court may fix." Under Rule 71A(e) of the Federal Rules of Civil Procedure a defendant's answer is due "within 20 days after the service of

notice.”

Fourth Circuit precedent holds that where a party makes an untimely demand for a jury trial, a district court may, in its discretion, deny that demand and instead conduct a bench trial. In Atlantic Seaboard, 318 F.2d at 457-58, the court held that it would conduct a bench trial of all issues, including that of just compensation, after denying a jury demand "on the ground that it was untimely and the court was not disposed to exercise its discretion to waive the procedural default.", with *id.* at 459 ("We find no basis for the contention that the court's denial of the tardy demand for a jury was an abuse of its discretion.").

Apart from the selection of responsible commissioners, the first responsibility of a Federal District Court, appointing a commission pursuant to Rule 71A(h) of the Federal Rules of Civil Procedure to determine the issue of compensation in eminent domain proceedings under the law of the United States, is careful instruction of the commissioners on the law, particularly with regard to the qualifications of expert witnesses, the weight to be given other opinion evidence, the best evidence and competent evidence of value, examples of severance damages and the like, the manner and method of conducting the hearing, the right to view the property, the limited purpose of viewing, the kind of evidence that is admissible and the manner of ruling on it, the kind of report to be filed, and the kind of findings to be included in the report. United States v. Merz, 376 U.S. 192 (1964).

In United States v. Merz, the Supreme Court established parameters and

guidelines to be followed when a district court refers a determination of just compensation to a commission. The Court observed that "the judge who uses commissioners . . . establishes a tribunal that may become free-wheeling" creating a "danger that commissioners, unlike juries, may use their own expertise and not act as a deliberative body applying constitutional standards." Due to this potential threat, the Court explained that the procedure adopted had to ensure that commissioners are instructed in the law and are prepared generally to explain the reasoning behind the grant of an award.

Rule 71A(h) provides that before appointing the members of a commission, the court must notify the parties of the identity of the prospective commissioners. The parties are not permitted, and may not be required by the court, to suggest nominees. The court has the discretion to permit the parties to examine the nominees, and each party has the right to object to a particular appointment for valid cause. Any objection must be addressed to the court, and not to the commissioners, and a failure to object constitutes a waiver of the right to do so.

The court may, in its discretion, appoint not more than two alternate commissioners, whose function is to hear the case and participate in the decision making process if one of the regular commissioners becomes unable to serve or is disqualified from service prior to the time the commission's report is filed. The alternates, if any, are to be appointed at the same time and in the same manner as the regular commissioners.

While the rule is silent as to the appropriate qualifications for commissioners, "it is understood that only persons possessing a background and ability to appraise real estate valuation testimony and to award fair and just compensation on the basis thereof [should] be appointed." As a practical matter, courts tend to select commissioners from the locality where the parcel to be condemned is located, although the rule contains no restriction as to place of residence, and the district court may appoint a non-resident of the district as a commissioner. While the drafters indicated that the commissioners' expertise in the relevant real estate market is desirable, there is some danger in appointing local realtors in that they "may use their own expertise and not act as a deliberative body applying constitutional standards."

Prior to the promulgation of Rule 71A, the Conformity Statute required, among other things, that the procedure governing federal condemnation proceedings conform with proceedings in similar actions commenced in "the courts of record of the State within which such district court is held." Thus, in those states providing for a jury trial on the issue of just compensation, a like procedure would have been followed by the federal district court. Rule 71A superseded the conformity statute, establishing the right to a jury trial as the usual method for determining the issue of just compensation, although the district court retains the authority under certain circumstances to refer the issue of compensation for determination by a commission.

Under state practices, just compensation is normally determined by one of three methods: by commissioners, by commissioners with a right of appeal to and

trial de novo before a jury, and by a jury, without a commission. A trial to the court or to the court including a master are, however, other methods that are occasionally used. Approximately 5 states use only commissioners, while 23 states use commissioners with a trial de novo before a jury. The remaining 18 states use only the jury to determine just compensation. This classification is advisedly stated in approximate terms, since the same state may utilize diverse methods, depending upon different types of condemnations or upon the locality of the property. Other methods used in a few states do not permit categorical classification.

In United States v. Merz, 376 U.S. 192 (1964), the Supreme Court established parameters and guidelines to be followed when a district court refers a determination of just compensation to a commission. The Court observed that "the judge who uses commissioners . . . establishes a tribunal that may become free-wheeling" creating a "danger that commissioners, unlike juries, may use their own expertise and not act as a deliberative body applying constitutional standards." Due to this potential threat, the Court explained that the procedure adopted had to ensure that commissioners are instructed in the law and are prepared generally to explain the reasoning behind the grant of an award.

In United States v. Merz, 376 U.S. 192 (1964) the Supreme Court discussed the problem of the lack of supervision by the court over a commission and stated that if a court is going to refer cases to a commission, then it must give the commission specific and detailed instructions on how to conduct its proceedings, the rules of

evidence, and the applicable law in the case. Specifically, the Court stated that the instructions to the commission should explain with some particularity the qualifications of expert witnesses, the weight to be given other opinion evidence, competent evidence of value, the best evidence of value, illustrative examples of severance damages, and the like. The commissioners should be instructed as to the manner of the hearing and the method of conducting it, of the right to view the property, the limited purpose of viewing, and the kind of evidence that is admissible and in the manner of ruling on it.

The method of instructions to commissioners by district courts varies widely. The courts of appeal have tended to read Merz permissively, expressing the sentiment that the district courts ought to give Merz instructions, but not reversing for their failure to do so, as long as there was not any apparent lack of due process in the commission proceedings, and the commission's conclusions were reasonable. It would, therefore, seem that as long as the hearing before a commission meets all procedural requirements of due process, the absence of Merz instructions is not by itself fatal to the proceeding

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