residents, and any others subject to Trust Territory jurisdiction, regardless of the location of the party or act. For contrast, see Trust Territory Code, Title 45, Chapter 3, Section 51.

It is the conclusion of this Court that:—

1. The District Court properly exercised jurisdiction over the appellant, Nakama Kodang, either as a Trust Territory resident or as a crewman aboard a Trust Territory vessel.

2. The Limitation on the Taking of Turtles is intended to have extra-territorial effect.

3. The District Court therefore had jurisdiction over the party, location and nature of the offense.

The decision of the District Court is hereby affirmed.

IN THE MATTER OF THE PROCEEDINGS BY THE TRUST TERRITORY OF THE PACIFIC ISLANDS, Plaintiff

v.

FOR CONDEMNATION OF THE PROPERTY OF CARLOS ETSCHEIT, LEO ETSCHEIT, ELLA ETSCHEIT JOUBERT, CAMILLE ETSCHEIT, DR. ROBERT ETSCHEIT, and Unknown Others, Defendants

Civil Action No. 298

Trial Division of the High Court

Ponape District

December 14, 1971

Eminent domain action wherein defendants challenge compensation awarded. The Trial Division of the High Court, Arvin H. Brown, Jr., Associate Justice, held that just compensation for the taking would be the fair market value at the time of the taking but defendant to not place a value on the land based upon a particular or special use.

1. Eminent Domain—Value—Burden of Proof

The owners have the burden of proof to establish the fair market value of the property taken for a public purpose, and that value is the fair market value as of the date of the taking.

2. Eminent Domain—Value—Just Compensation

In determining what constitutes "just compensation" in an eminent domain action the court is required to establish a fair value for the land. (1 T.T.C. § 4; 10 T.T.C. § 54)

3. Eminent Domain—Value—Just Compensation

In eminent domain proceedings just compensation is the reasonable market value of the land at the time the complaint and declaration of taking were filed.

4. Eminent Domain—Value—Special Uses

Although all uses to which property taken by eminent domain is adapted and is available and for which there is a current market demand may be considered in determining its value, it is improper to value a parcel of property based upon a particular or special use, such as the cutting of computed timber.

5. Eminent Domain—Value—Special Uses

Defendants, in eminent domain case, basing their estimate as to the property's value upon the potential worth of mangrove logs, sought to establish a value which was remote, contingent and speculative, and as such it was improper and could not be considered by the court.

Assessor:	None
Interpreter:	None
Reporter:	ELSIE T. CERISIER
Counsel for Plaintiff:	RUSSELL W. WALKER
Counsel for Defendants:	IN PRO PER (CARLOS and LEO ETSCHEIT)

BROWN, *Associate Justice*

On August 31, 1966, the government, pursuant to its power of eminent domain, took possession of the Island of Taketik, Ponape District, consisting of 425 acres, more or less. The taking was for a public purpose, namely, for the construction of an airstrip and related facilities, and for such other and further use as the government might in the future declare necessary.

Defendant, Carlos Etscheit, filed his answer on April 20, 1967, and admitted all of the allegations contained in the complaint except as to compensation to be awarded the owners. Defendant, Leo Etscheit, made a general appear-

ance by way of a motion for permission to file a late answer, but no such answer was ever filed. Likewise, no appearance was made on behalf of any of the other named defendants. Accordingly, when counsel for the plaintiff moved for a default judgment as to all defendants other than Carlos Etscheit, the same was granted, but the award will be available to all of the named defendants without penalty for their failure to appear.

[1] The only issue which came before the court at the time of trial was what would constitute just compensation to the owners. The owners, of course, have the burden of proof to establish the fair market value of the property taken for a public purpose, and that value is the fair market value of such property as of the date of taking. *U.S. ex rel. T.V.A. v. Powelson*, 319 U.S. 266, 63 S.Ct. 1047. *People v. Loop*, 247 P.2d 885 (Cal.). Accordingly, as it is almost invariably the case in procedures of this type, the defendants proceeded first.

One of the defendants, Leo Etscheit, testified that it was his opinion that the subject property had a fair market value, as of August 31, 1966, of $81,600.00. He arrived at this figure by estimating that the island could reasonably produce income from the sale of mangrove logs at $.80 per month per acre, or $4,100.00 per year. He estimated the size of the island at 440 acres, more or less, and stated that to receive this income from a cash investment would require a principal sum of $81,600.00.

The subject property was acquired by the defendants in 1956, and up until the time of taking by the government, no wood business was operating. Likewise, there were no offers to buy Taketik Island.

Mr. Don R. Cowell, a real estate appraiser, called by plaintiff as an expert witness, was first qualified, and stated that in 1970 he made a preliminary estimate of the fair market value of Taketik Island and a final estimate

of its fair market value in 1971. It was the opinion of this witness, based upon personal inspection and other factors, that on August 31, 1966, the subject property was a mangrove island, largely underwater. He determined that the size of the subject property was 425.49 acres. In his opinion, the highest and best use of the subject property was merely to hold the land for resale when the economy justified the same. It was further his opinion that since the cost of filling 70 acres of the land for an airport runway and adjacent facilities amounted to $1,600,000.00, it would be uneconomic for any private citizen to undertake such operations.

It was further the opinion of the expert witness that to attempt to appraise the property on an economic approach would not be feasible, since the property was producing no income and had not produced any income during any of the period of time it was owned by the defendants. Therefore, he based his appraisal by investigating some 35 real estate transactions in Ponape between 1963 and 1966.

From all of the foregoing, the witness expressed his opinion that the fair market value of the subject property as of August 31, 1966, was $10,650.00.

Mr. Kozo Yamada, Chief of Lands and Surveys for the government of the Trust Territory, testified that during 1966 he was the land management officer, Ponape District, and was familiar with the extent of public lands in that district, the same amounting to 63,000 acres, more or less, on many of which acres were to be found mangrove trees available to the public at little or no cost to the individual.

[2] Title I, Section 4, of the Trust Territory Code provides, in part, as follows:—

"No person shall be deprived of life, liberty, or property, without due process of law; *nor shall private property be taken for public use without just compensation.*" (Italics added.)

In determining what constitutes "just compensation," the court is required, under Title 10, Section 54, of the Trust Territory Code, in an eminent domain action, to "... establish a fair value for the land."

There appears to be uniform agreement that "fair value," or, as is sometimes said, "fair market value," is the proper measure of compensation, at least in the usual run of cases. *(U.S. v. Commodities Trading Corp.*, 339 U.S. 121, 123; 70 S.Ct. 547). Thus, it becomes necessary to determine what is meant by "fair market value." In *Viliborghi v. Prescott School Dist.*, 100 P.2d 178 (Ariz.), cited with approval in *People v. Ricciardi*, 144 P.2d 799 (Cal.), the court gave the following concise definition:—

"The highest price estimated in terms of money which the land would bring if exposed for sale in the open market with reasonable time allowed in which to find a purchaser buying with knowledge of all of the uses and purposes to which it was adapted and for which it was capable."

In *Little Rock Junction Railway v. Woodruff*, 5 S.W. 792 (Ark.), the Supreme Court of Arkansas said:—

"Since then, the market value is the criterion of damages, we are led to inquire what is the market value? The word market conveys the idea of selling and the market value, it would seem to follow, is the selling value. It is the price which an article will bring when offered for sale in the market. It is the highest price which those having the ability and the occasion to buy are willing to pay. The owner in parting with his property to the state is entitled to receive just such an amount as he could obtain if he were to go upon the market and offer the property for sale. To give him more than this would be to give him more than the market value and to give him less would not be full compensation. Of course, real estate is not like cotton, grain and other commercial products. It cannot be sold upon an hour's notice. To sell land at its market value sometimes requires effort and negotiation for some weeks or even some months. And when we say that the owner is entitled to receive the price for which he could sell the property, we do not mean the price he would realize at a forced sale on short notice,

but the price that he could obtain after reasonable and ample time such as would ordinarily be taken by an owner to make such sale of like property."

In *Savings and Trust Company of Indiana v. Pennsylvania R. Co.*, 78 A. 1039 (Penna.), the Supreme Court of Pennsylvania said:—

"These assignments involve a misconception of what the law means by market value in such cases. It is nothing more or less than what the subject would sell for in the open market, exposed to all bidders in the regular course of trade and competition which ordinarily obtains with respect to that particular class of subject. Nothing short of an actual sale of a tract of land in the open market can fix definitely and certainly its market value. Until so sold, what it will bring in a fair and open market, is mere matter of opinion, and wide divergence of view is in most cases to be expected, rarely, however, so marked as in the present case. Nevertheless, it is from these opinions, based on the general selling price of land, however divergent, that the laws seek to arrive at an estimate that will serve the ends of practical justice. No opinion as to the market value of land based on other considerations than such as may reasonably be expected to influence the general buyer, can be in the least helpful."

See also: *U.S. v. Petty Motors Co.*, 327 U.S. 372, 66 S.Ct. 596; *Rose v. State*, 123 P.2d 505 (Cal.).

In *Sargent v. Merrimac*, 81 N.E. 970 (Mass.), the Supreme Judicial Court of Massachusetts said:—

"What the petitioner was entitled to recover was the fair market value of the land of her testator as it was at the time of the taking. Market value in this connection does not mean the same thing that market values mean when the market value of flour or other things dealt in daily in the market is spoken of. A lot of land cannot have a market value in that sense of the word. What is meant by the market value of the land is the value of the land in the market, that is to say, for the purposes of sale."

In *Opelousas, G. & N. E. R. Co. v. Bradford*, 43 So. 79 (La.), the Supreme Court of Louisiana said:—

"The criterion of value is the market value of the property at the date of the institution of the expropriation suit, in view of any use to which it may be applied and of all the uses to which it was adapted, exclusive of any increase in value given by the construction of plaintiff's railway thereon. The question before the jury was, what price could have been obtained for the property as a whole by a prudent seller in the usual course of business? The market value means the fair value of the property between one who wants to purchase and one who wants to sell, under usual and ordinary circumstances."

In *Kansas City, Wyandotte & Northwestern R. Co. v. Fisher*, 30 P. 111 (Kan.), the Supreme Court of Kansas held erroneous the trial court's refusal to give the following instruction:—

"The market value means the fair value of the property as between one who wants to purchase and one who wants to sell, not what could be obtained for it under peculiar circumstances when a greater than its fair price could be obtained, nor its speculative value; not a value obtained from the necessities of another, nor, on the other hand, is it to be limited to that price which the property would bring when forced off at auction under the hammer. It is what it would bring at a fair public sale when one party wanted to sell and the other to buy."

[3] It must be remembered that just compensation is the reasonable market value of the land at the time the complaint and declaration of taking were filed. *In Re Ngiralois*, 3 T.T.R. 303, 307.

[4] In determining fair market value, it is improper to value land for a particular or special use or to compute the number of feet of lumber or cubic yards of minerals and multiply that figure to arrive at a speculative value of the minerals or timber. Although all uses to which the subject property is adapted and is available and for which there is a current market demand may be considered in determining its value, it is improper to value a parcel of property based upon a particular or special use, such as the cutting of computed lumber.

As was stated by the court in *The King v. Woodlock*, 15 Can. Exch. 429, 32 Dom. L. R. 664, 668:—

"It is indeed useless to juggle with figures and measure every stick of wood upon the lot, estimate the number of cords of wood upon the same, and upon that basis estimate the profits that can be realized out of the lot, to fix the value of the same according to such profits. In other words, it would mean that a lumber merchant buying timber limits would have to pay to the owner of the limits as the value thereof, the value of the land together with all the foreseen profits he could realize out of the timber upon the limits; in the result leaving to the purchaser all of the labor and giving all his prospective profits to the owner of the limits. Stating the proposition is solving it because it is against common sense and no man with a slight gift of business acumen would or could become a purchaser under such circumstances."

In *Forest Preserve Dist. v. Caraher*, 132 N.E. 211 (Ill.), the court stated:—

"Trees were a component part of the land, and there was no justification for admitting evidence of what could be realized by separating the timber from the land as personal property."

See also: *U.S. v. Sowards*, 370 F.2d 87; *East Bay Mun. Utility Dist. v. Kieffer*, 278 P. 476 *(Cal. App.)*; *City of Los Angeles v. Hughes*, 262 P. 737 (Cal.).

[5] The defendants, basing their estimate as to the property's value upon the potential worth of mangrove logs, seek to establish a value which is remote, contingent, and speculative; and this is improper and cannot be considered by the court. *People v. Reynolds*, 87 P.2d 15 (Cal. App.); *Mills v. U.S.*, 366 F.2d 78.

The only evidence presented to the court which was not speculative came from Mr. Don Cowell, the expert witness appointed by the government, and the court will not substitute its judgment for that of the expert witness in this case.

The file reveals that on August 31, 1966, there was deposited with the Clerk of Courts, Ponape District, the sum

of $2,500.00, the amount then offered by the High Commissioner as being a fair value of the subject property. In accordance with the provisions of Title 10, Section 57(b), of the Trust Territory Code, said sum shall draw interest at the rate of three percent per annum from the date of the summons until claimed by defendants or ordered paid to the defendants by the court. Thereafter, on November 17, 1971, said deposit was increased by the additional sum of $8,137.25, the same to draw interest from the date of deposit. As to the latter deposit, interest at the rate of six percent per annum is to be paid from August 31, 1966, to November 17, 1971. (*In Re Ngiralois*, 3 T.T.R. 303, 315.)

Accordingly, it is:—

Ordered, adjudged, and decreed that:—

1. Title to the subject property, being said Taketik Island, Ponape District, Trust Territory of the Pacific Islands, be, and it is, vested in plaintiff; that

2. Defendants be compensated by plaintiff in the total amount of $13,603.49, each defendant to share equally therein, and that

3. Defendants be, and they are, awarded costs incurred herein.

WILLIAM W. DEAN, Plaintiff

v.

MARY CATHERINE DEAN, Defendant

Civil Action No. 965

Trial Division of the High Court

Mariana Islands District

January 7, 1972

Action for divorce based on grounds that parties had lived apart for more than two consecutive years without cohabitation. The Trial Division of the High Court, H. W. Burnett, Chief Justice, held that two year period did not