IN THE SUPREME COURT OF MISSISSIPPI

CASE NO. 2010-TS-01655

EDNA BLANCHARD DAVIDSON et al. — APPELLANTS

VS.

TARPON WHITETAIL GAS STORAGE, LLC — APPELLEE

APPEAL FROM THE SPECIAL COURT OF EMINENT DOMAIN
MONROE COUNTY, MISSISSIPPI

ORAL ARGUMENT NOT REQUESTED

BRIEF OF APPELLEE
TARPON WHITETAIL GAS STORAGE, LLC.

Counsel for the Appellee:

J. Jeffrey Trotter
[redacted]
Michele McCain
[redacted]
ADAMS AND REESE LLP
1018 Highland Colony Parkway, Suite 800
Ridgeland, MS 39157
Telephone: (601) 353-3234
Facsimile: (601) 355-9708

CERTIFICATE OF INTERESTED PERSONS

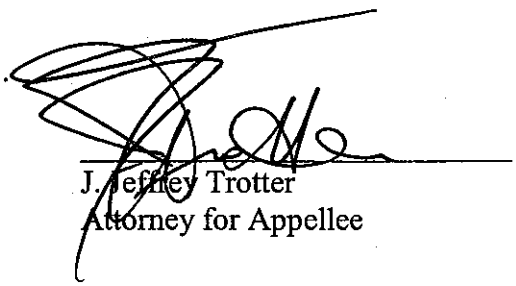
The undersigned counsel of record certifies that the following listed persons, in addition to those set out in Defendant/Appellants' Certificate of Interested Persons, have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualifications or recusal.

1. Mr. J. Jeffrey Trotter and Ms. Michele McCain – Counsel for Appellee Tarpon Whitetail Gas Storage, LLC.

2. Mr. Brad J. Blaylock and Mr. James Jeffrey Lee – Counsel for Appellants

3. Honorable Jim S. Pounds – Judge, Special Court of Eminent Domain, Monroe County, Mississippi

THIS the 13th day of September, 2011.



J. Jeffrey Trotter
Attorney for Appellee

STATEMENT REGARDING ORAL ARGUMENT

Tarpon submits oral argument is not necessary. This appeal is frivolous, raises no novel issues of law or fact, and there was no error below.

TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PARTIES i

STATEMENT REGARDING ORAL ARGUMENT ii

TABLE OF CONTENTS iii

TABLE OF CASES, STATUTES AND OTHER AUTHORITIES v

STATEMENT OF THE CASE 1

I. Nature of the Case, Course of Proceedings, and Disposition in the Court Below 1

A. Establishment of the Aberdeen Gas Storage Field 1

B. Material Proceedings in the Eminent Domain Action 3

1. Discovery Violations by the Blanchards Before First Jury Trial Setting 5

2. Entry of Scheduling Order and Second Jury Trial Setting 6

3. Further Discovery Violations and Entry of Order Excluding Appellants' Evidence 6

4. The Just Compensation Trial 7

SUMMARY OF THE ARGUMENT 11

ARGUMENT 13

I. Appellants' Issue No. 1:
The trial court made no error with respect to Miss. Code Ann. 11-27-83 13

II. Appellants' Issues No. 2 and 5:
The trial court properly admitted Tarpon's Statement of Values and testimony of Tarpon's expert appraiser. 18

III. Appellants' Issue No. 3:
The trial court properly denied the Blanchards' second "eve of trial" motion for a continuance due to egregious discovery violations. 23

IV. Appellant's Issues No. 6, 7 and 9:
The trial court correctly excluded the Blanchards from presenting undisclosed evidence at trial because of their egregious failure to cooperate in discovery. 25

V. Appellants' Issue No. 4:
The trial court properly allowed Tarpon to amend its pleadings in order to take a *lesser* property interest than otherwise allowed under the Natural Gas Act. 31

VI. Appellants' Issue No. 8:
The trial court properly denied the Blanchards' motion for a jury view of the property. 33

VII. Appellants' Issue No. 10:
The trial court did not "overturn" the jury verdict. 35

CONCLUSION 35

CERTIFICATE OF SERVICE 37

TABLE OF AUTHORITIES

A. Cases

Atlantic Seaboard Corp. v. Van Sterkenburg,
318 F.2d 455 (4th Cir. 1963) 16

Beverly v. Powers,
666 So. 2d 806 (Miss. 1995) 32

Board of Levee Com'rs v. Nelms,
82 Miss. 416, 34 So. 149 (Miss. 1903) 30

Bowie v. Montfort Jones Mem'l Hosp.,
861 So. 2d 1037 (Miss. 2003) 31

Boyd v. Lynch,
493 So. 2d 1315 (Miss. 1986) 28

Broadhead v. Bonita Lakes Mall, Ltd. Partnership,
702 So. 2d 92 (Miss. 1997) 27

CIG Contractors, Inc. v. Mississippi State Bldg. Comm'n,
510 So. 2d 510 (Miss. 1987) 33

City of Jackson v. Harris,
44 So. 3d 927 (Miss. 2010) 13, 32

Crane Co. v. Kitzinger,
860 So. 2d 1196 (Miss. 2003) 28

Coleman v. Mississippi State Highway Commission,
289 So. 2d 918 (Miss. 1974) 23, 25, 26

Columbia Gas Transmission v. Exclusive Gas Storage Easement,
776 F.2d 125 (6th Cir. 1985) 15

Columbia Gas Transmission Corp. v. An Exclusive Gas Storage Easement ("*McCullough*"),
962 F.2d 1192 (6th Cir. 1992) 20

Columbia Gas Transmission Corp. v. An Exclusive Gas Storage Easement ("*McCullough*"),
620 N.E.2d 48 (Ohio 1993) 20, 21, 22

Commercial Station Post Office, Inc. v. United States,
48 F.2d 183 (8th Cir. 1931) 16

De Beers Consol. Mines, Ltd. V. U.S.,
325 U.S. 212 (1945) 17

East Tennessee Natural Gas Co. v. Sage,
361 F.3d 808 (4th Cir. 2004), cert. denied, 543 U.S. 978 (2004) 15

Federal Sav. & Loan Ins. Corp. v. Dixon,
835 F.2d 554 (5th Cir. 1987) 17

Griffin v. McKenney,
877 So. 2d 425 (Miss. 2003) 28

Guardian Pipeline, L.L.C. v. 950.80 Acres of Land,
210 F. Supp. 2d 976 (N.D. Ill. 2002) 16

Haggerty v. Foster,
838 So. 2d 948 (Miss. 2002) 18

Harris v. Gen. Host Corp.,
503 So. 2d 795 (Miss. 1986) 28

Humphries v. Williams Natural Gas Co.,
48 F. Supp. 2d 1276 (D. Kan. 1999) 16

Iroquois Gas Corp. v. Gernatt,
272 N.Y.S.2d 291 (N.Y. Sup. Ct. 1966) 21

Kern River Gas Transmission Co. v. Clark County,
757 F. Supp. 1110 (D. Nev. 1990) 16

Ladner v. Ladner,
436 So. 2d 1366 (Miss. 1983) 27

Maritimes & Northeast Pipeline, LLC v. Decoulos,
146 Fed. Appx. 495, *2 (1st Cir. 2005) 16

MBF Corp. v. Century Business Communications, Inc.,
663 So. 2d 595 (Miss. 1995) 32

McGowen v. State,
859 So. 2d 320 (Miss. 2003) 18

McNeil v. Hester,
753 So. 2d 1057 (Miss. 2000) 13, 32

Milby v. Louisville Gas & Elec. Co.,
375 S.W.2d 237 (Ky. App. 1963) 22

Mississippi River Transmission Corp. v. Tabor,
757 F.2d 662 (5th Cir. 1985) 14

Mississippi State Highway Commission v. Hall,
174 So. 2d 488 (Miss. 1965) 19, 21

Mississippi State Highway Commission v. Hillman,
189 Miss. 850, 198 So. 565 (Miss. 1940) 19, 21, 30

Mississippi State Highway Commission v. Ladner,
243 Miss. 278, 137 So. 2d 781 (Miss. 1962) 30

Mississippi State Highway Commission v. Robertson,
350 So. 2d 1348 (Miss. 1977) 31

Mississippi Transportation Commission v. Fires,
693 So. 2d 917 (Miss. 1997) 19, 21

Miss. Transp. Comm'n v. McLemore,
863 So. 2d 31 (Miss. 2003) 18

N. Border Pipeline Co. v. 64.111 Acres of Land,
125 F. Supp. 2d 299 (N.D. Ill. 2000) 16

N. Border Pipeline Co. v. 127.7 Acres of Land,
520 F. Supp. 170 (D.N.D. 1981) 16

Northwest Pipeline Corp. v. The 20 by 1,430 Pipeline Right-of-Way,
197 F. Supp. 2d 1241 (E.D. Wash. 2002) 16

Owens v. Thomas,
759 So. 2d 1117 (Miss. 1999) 23

Prestridge v. City of Petal,
841 So. 2d 1048 (Miss. 2003) 27

Ramada Dev. Co. v. Rauch,
644 F.2d 1097 (5th Cir. 1981) 31

Rector v. Mississippi State Highway Comm'n,
623 So. 2d 975 (Miss. 1993) 32

Redevelopment Authority of the City of Meridian v. Holsomback,
291 So. 2d 712 (Miss. 1974) 34

Rivers Electric Co., Inc. v. 4.6 Acres of Land,
731 F. Supp. 83 (N.D. N.Y. 1990) 16

Schniedewind v. ANR Pipeline Co.,
485 U.S. 293 (1988) 13

Simmons v. Thompson Machinery of Mississippi, Inc.,
631 So. 2d 798 (Miss. 1994) 32

State Highway Commission of Mississippi v. Warren,
530 So. 2d 704 (Miss. 1988) 31

Southeast Supply Header, LLC v. 40 Acres in Forrest County, Miss., et al.
2007 U.S. Dist. LEXIS 95083 (S.D. Miss. Dec. 14, 2007) 17

Southeast Supply Header, LLC v. 180 Acres in George County, Miss, et al.,
2008 U.S. Dist. LEXIS 9989 (S.D. Miss. Jan. 9, 2008) 17

State Hwy. Comm'n of Mississippi v. Havard,
508 So.2d 1099 (Miss. 1987) 27

State Hwy. Comm'n of Miss. v. Jones,
649 So. 2d 201 (Miss. 1995) 27

Steckman Ridge GP, LLC v. An Exclusive Natural Gas Storage Easement Beneath 11.078 Acres of Land,
2008 U.S. Dist. LEXIS 71302, *36 (W.D. Pa. Sept. 19, 2008) 15, 17

Tenn. Gas Pipeline Co. v. New England Power, Inc.,
6 F. Supp. 2d 102 (D. Mass. 1998) 16

Transcontinental Gas Pipe Line Corp. v. 118 Acres of Land,
745 F. Supp. 366 (E.D. La. 1990) 15

USG Pipeline Co. v. 1.74 Acres,
1 F. Supp. 2d 816 (E.D. Ten. 1998) 16

Va. Ry. Co. v. Sys. Fed'n No. 40,
300 U.S. 515 (1937) 17

Varner v. Patrick,
523 So. 2d 319 (Miss. 1988) 28

Williston Basin Interstate Pipeline Co. v. An Exclusive Gas Storage Lease Hold in the Judith River Subterranean Geological Formation,
999 F.2d 546, 1993 U.S. App. LEXIS 17450 (9th Cir. 199) 21

Williston Basin Interstate Pipeline Co. v. An Exclusive Gas Storage Leasehold and Easement in the Cloverly Subterranean, Geological Formation,
524 F.3d 1090 (9th Cir. 2008) 13

Williston Basin Interstate Pipeline Co. v. Easement and Right-of-Way Across .152 Acres of Land, 2003 U.S. Dist. LEXIS 11163 (D.N.D. 2003) 16

Windmon v. Marshall,
926 So. 2d 867 (Miss. 2006) 28

B. Statutes and Rules

15 U.S.C. § 717, *et seq.* (Natural Gas Act) 2, 3, 13, 14, 15

18 C.F.R. § 284.1(a) 14

Fed. R. Evid. 408 31

Miss. Code Ann. § 11-27-1, *et seq.* 11, 15

Miss. Code Ann. § 11-27-7 ..... 6, 7, 25

Miss. Code Ann. § 11-27-19 33

Miss. Code Ann. § 11-27-81, *et seq.* 11, 13, 15, 18

Miss. Code Ann. § 11-27-83 ..... 13, 19

Miss. Code Ann. § 13-5-91 33

Miss. Code Ann. § 53-3-155 2

Miss. R. App. P. 28(a)(6) 13, 32

Miss. R. Civ. P. 15 32

Miss. R. Civ. P. 26(b)(4) 6

Miss. R. Civ. P. 37 26

Miss. R. Civ. P. 55(a) 26

URCCC 4.04(A) 28

Miss. R. Prof. Conduct 1.16 29

STATEMENT OF THE CASE

I. Nature of the Case, Course of Proceedings, and Disposition in the Court Below[1]

Reading Appellants' Brief would lead one to believe this appeal arises from the condemnation and taking of an entire 25-acre tract of land. Nothing could be further from the truth. Tarpon Whitetail Gas Storage, LLC ("Tarpon") properly exercised its eminent domain authority under the Natural Gas Act to condemn *only* an easement to store natural gas in a depleted gas reservoir 3,400 feet below ground. That easement to store gas involves no surface access rights whatsoever. In fact, no surface property, no surface property interest, and no surface property rights were condemned or taken. And contrary to another of Appellants' incorrect assertions, Tarpon voluntarily condemned and took a lesser property interest through these proceedings than it was authorized to take under the Natural Gas Act.

The Appellants ("Blanchards"), each of whom separately own small fractional interests in a 25-acre tract of land within the Aberdeen Gas Storage Field, do not contest Tarpon's right to exercise eminent domain to condemn an easement to store natural gas in the depleted gas reservoir. The Blanchards contend only that the Special Court of Eminent Domain, Monroe County, Mississippi, committed procedural error in the trial to determine just compensation due them. However, there was no error below and the Final Judgment should be affirmed.

A. Establishment of the Aberdeen Gas Storage Field

The Aberdeen Gas Storage Field is located 2 ½ miles west of the City of Aberdeen in Monroe County, Mississippi. The Storage Field encompasses approximately 4,840 acres of land. Underlying the majority of the Storage Field is a depleted natural gas reservoir, a strata of sand

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[1] Citations to the Record are designated "R.__." Citations to the Record Excerpts are designated "RE__." Citations to the trial transcript are designated "Tr.__."

the top of which is located approximately 3,400 feet below the surface. This depleted reservoir is sometimes referred to herein as the "Storage Interval."

There are many owners of property within the Storage Field. From approximately 2005 – 2007, Tarpon successfully negotiated agreements with the majority of surface and mineral owners in the Storage Field to allow Tarpon to store gas in the depleted reservoir. After obtaining voluntary consent from a majority of all the rights of the surface interest and a majority of all the interests in the depleted reservoir, as required by Miss. Code Ann. § 53-3-155, Tarpon petitioned the Mississippi State Oil and Gas Board to create the Storage Field and establish the depleted gas reservoir as an approved Storage Interval.

On December 26, 2007, the Mississippi State Oil and Gas Board established and authorized Tarpon to operate the Storage Field for the injection, storage and withdrawal of natural gas into and from the approved Storage Interval.[2] R. 38-46.

On June 19, 2008, pursuant to Section 7 of the Natural Gas Act, 15 U.S.C. § 717 *et seq,* the Federal Energy Regulatory Commission issued to Tarpon a Certificate of Public Convenience and Necessity ("FERC Certificate") to construct, own and operate the Storage Field. R. 47-79.

Tarpon's storage facility will consist principally of certain injection/withdrawal wells, salt water disposal wells, and compressors and other ancillary facilities as well as pipelines interconnecting with Texas Eastern's interstate pipeline . R. 103, ¶ 9. Significant for purposes of this appeal, none of these facilities, wells or pipelines will be located on the Blanchards' tract of land. However, natural gas pumped into the Storage Interval via these facilities will migrate

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[2] The "Storage Interval" is defined as "[t]hose strata and zones lying between the well log measured depth of 3432 feet and 3620 feet or the stratigraphic equivalent thereof as shown on the electric log of the No. 1 Senter 30-15 Well located in Section 30, Township 14 South, Range 7 East, Monroe County, Mississippi, and those strata which can be correlated therewith and are in communication therewith. This is generally known as the Lower Carter and the Sanders Sand." R. 22.

from the bottom of the injection wells throughout the depleted reservoir 3,400 feet below ground. At some point in time, then, gas stored in the depleted reservoir by Tarpon will migrate into that portion of the depleted reservoir that underlies the Blanchards' tract.

To confirm its right to store gas in the depleted reservoir below the Blanchards' tract, Tarpon first attempted to lease that right from the Blanchards. Failing to reach agreement, however, Tarpon was left with no choice but to condemn the right to store gas in the reservoir below the Blanchards' tract. Before filing this eminent domain action, Tarpon had successfully negotiated gas storage agreements with the vast majority of surface and mineral owners in the Storage Field. Ultimately, owners of over 99% of the surface acreage and 99% of the mineral acreage in the Storage Field voluntarily granted Tarpon the right to store natural gas in the Storage Interval underlying their property. R. 108-164. The Blanchards, however, did not.

Each of the Blanchards owns a small fractional interest in a 25-acre tract of land lying within the confines of the Storage Field. R. 23-27. Tarpon offered to lease gas storage rights from the Blanchards on terms comparable to that offered everyone else in the Storage Field. However, the Blanchards declined Tarpon's offer and did not otherwise agree with Tarpon for gas storage rights under their property.

B. Material Proceedings in the Eminent Domain Action

Failing to reach agreement with the Blanchards, and certain other property owners in the Storage Field, Tarpon filed the underlying eminent domain action pursuant to its authority under the Natural Gas Act, 15 U.S.C. § 717 *et seq*, in the Special Court of Eminent Domain, Monroe County, Mississippi (the "trial court") on July 29, 2009. R. 19-37. Contrary to the Blanchards' implication that Tarpon condemned their entire tract of land, Tarpon's Complaint specifically defined the limited property rights to be condemned as "Gas Storage Rights," defined as nothing more than "the right to inject, store, maintain, and withdraw natural gas from the Storage Interval

in the Field, as approved by the Board and the FERC, with the incidental right of surface and sub-surface ingress, use, and egress as reasonably necessary to construct, operate, and maintain the Project." R. 21, ¶ 5. In addition, Tarpon subsequently determined it did not require *any* surface rights in the Blanchards' 25-acre tract, and pursuant to MRCP 15(b) amended its pleadings to expressly *exclude* from definition of Gas Storage Rights the right to access the Blanchards' surface for purposes of its gas storage operations. Tarpon stipulated it would not access or use the Blanchards' surface property for any reason, would not place facilities, pipelines or wells on the property, would not use the surface to access the Storage Interval and would not cross the surface "in any way." Tr. 219-221.

On July 30, 2009, Tarpon filed its Motion to Confirm Condemnation of Gas Storage Rights and for Preliminary and Permanent Injunction Authorizing Immediate Use of Subsurface Gas Storage Interval. R. 96-100. The trial court heard Tarpon's motion on August 19, 2009. R. 186. The Blanchards' counsel appeared at that hearing and stipulated Tarpon had authority to condemn an easement to store gas in the Storage Interval pursuant to its federal permit and even stipulated that Tarpon's operations "will not disturb the possession of the four homeowners, the four homeowners of the property, and it will not disturb their quiet possession of their property." Tr. 8. Further, at this hearing, the Blanchards' counsel did not disclose any health problem or ask for a continuance.

On September 16, 2009, the trial court entered its Order finding that Tarpon's gas storage facility is required by the public convenience and necessity, is for a public use, and serves the public interest. The trial court found that Tarpon is authorized under the National Gas Act to condemn the Gas Storage Rights in the approved Storage Interval within the Storage Field, including the Blanchards' tract. Further, the trial court found that Tarpon satisfied the

prerequisites for injunctive relief and issued an injunction granting Tarpon immediate access to the Gas Storage Rights at issue. R. 191-201.

The trial court initially set January 5, 2010, as the date for the jury trial to determine just compensation due the Blanchards (and other defendants) for Tarpon's condemnation of the easement to store gas below their property. R. 212.

1. Discovery Violations by the Blanchards Before First Jury Trial Setting

Tarpon served discovery requests on the Blanchards and other defendants on October 20, 2009, November 11, 2009, and November 19, 2009, seeking identity of fact and expert witnesses, documents, appraisals and other evidence relevant to defendants' damages, if any, arising from this partial taking of property rights. R. 203-204; 249-254; 348-354.

On October 30, 2009, November 16, 2009, and November 19, 2009, Tarpon served supplemental discovery directed solely to the Blanchards, requesting them to state their fractional ownership in the 25-acre tract and their source of ownership in the tract. R. 209-210; 329-333; 348-354.

No defendant, including the Blanchards, responded to Tarpon's discovery requests.

Tarpon filed motions to compel discovery responses and the trial court entered a series of orders in December 2009 compelling those defendants, including the Blanchards, to timely serve complete responses to Tarpon's interrogatories and requests for production of documents. R. 338; 404-407; 409. No defendant, including the Blanchards, complied with the trial court's orders.

On December 18, 2009, the Blanchards' counsel filed a motion for continuance. R. 340-343. In that motion, the Blanchards' counsel first disclosed his health problems and sought a 120-day extension to allow him time to complete discovery before a valuation hearing. In light of counsel's health issues, Tarpon did not oppose that first continuance.

2. Entry of Scheduling Order and Second Jury Trial Setting

By March 2010, the Blanchards still had not provided discovery responses to Tarpon. To get the case back on track, Tarpon submitted and the trial court entered a Scheduling Order on March 23, 2010, setting deadlines for Tarpon and defendants. R. 436. That Scheduling Order set, *inter alia*, May 5, 2010 as the Blanchards' deadline to designate experts and provide all information required by M.R.C.P. 26(b)(4), set the discovery deadline as July 30, 2010, and ordered the Blanchards to submit statements of value by no later than August 20, 2010. It also re-set the jury trial to determine just compensation for August 30, 2010. R. 435. The deadlines in the Scheduling Order mirror the deadlines set out in Miss. Code Ann. § 11-27-7 for the filing of statements of value by parties to an eminent domain action. These deadlines gave the Blanchards and their counsel far more than the 120 days previously requested to comply with discovery and prepare for trial. In fact, the second trial setting was more than a year after the Complaint was filed.

3. Further Discovery Violations and Entry of Order Excluding Appellants' Evidence

Following the entry of the Scheduling Order, the Blanchards still did not comply with the trial court's orders to provide Tarpon with responses to its outstanding discovery requests. Nor did they comply with the deadlines in the Scheduling Order. And the Blanchards' counsel sought no extension of time to respond.

The only "response" by any of the Blanchards to Tarpon's discovery requests, to the trial court's Orders compelling discovery, or to the Scheduling Order was a document entitled "Defendants' statement of values" filed July 26, 2010, by eight of the Blanchards. R. 540-546. After motion and hearing, the trial court entered its Order Striking Defendants' Statement of Values because, *inter alia*, those eight Blanchards had failed to cooperate in discovery in violation of the trial court's orders compelling discovery, had failed to timely designate experts,

and their alleged "value" was inadmissible because it was based solely on a settlement offer, not fair market value. RE 1, 622-629.

As of August 24, 2010—six weeks after the close of discovery and only six days before the second trial setting—the Blanchards still had not provided any discovery response to Tarpon nor requested an extension of time to respond, nor had they complied with the deadlines in the Scheduling Order. Accordingly, Tarpon filed its Motion to Exclude Defendants' Evidence and for Entry of Default. R. 630-638.

The Blanchards did not file any opposition to Tarpon's motion to exclude their evidence. Instead, they filed another motion to continue based solely on their counsel's health problems, which motion was properly denied. R. 669.

By Order dated August 27, 2010, the trial court precluded the Blanchards from offering evidence at the just compensation trial because the Blanchards did not timely file statements of value as required by Miss. Code Ann. § 11-27-7, did not comply with the trial court's orders compelling discovery responses and did not timely designate expert witnesses. RE 2, 701-707.

4. The Just Compensation Trial

The jury trial to determine just compensation for the partial taking of an easement to store gas in the depleted reservoir was held August 30-31, 2010. Tarpon's witnesses were (1) Mr. Alan Cook, Tarpon's corporate representative, (2) Mr. Michael Dean, an expert petroleum engineer, and (3) Mr. Stephen Holcombe, an expert in the field of real estate appraisals and the valuation of easements for gas storage.

Mr. Cook testified about the gas storage facility and its operations. He testified Tarpon designed its facilities so that it needed no rights whatsoever in the surface of the Blanchards' tract. RE 3, Tr. 119-121. He testified there would be no facilities, no wells drilled, no pipelines, and no vehicular traffic across the Blanchards' tract and that Tarpon would make no use of it. *Id.*

He explained that gas would be pumped into the Storage Interval through wells located in other areas of the Storage Field and the gas would then migrate underground throughout the Storage Interval 3,400 feet below ground. RE 3, Tr. 121.

Mr. Dean, Tarpon's expert petroleum engineer, testified that the Storage Interval was a depleted natural gas reservoir that had been fully produced by the late 1980s after which the wells watered out and it was no longer possible to recover gas from the reservoir. RE 4, Tr. 144-45. In his opinion, there is no recoverable gas or oil remaining in the Storage Interval and the highest and best use of the Storage Interval is for gas storage. RE 4, Tr. 146-147. Further, there is no practical use the Blanchards could make of the Storage Interval other than gas storage and the only entity legally authorized to operate a gas storage facility in the Storage Field is Tarpon. RE 4, Tr. 148-149. Mr. Dean further explained that Tarpon's gas storage facility and its operations would not prevent other oil and/or gas producers from exploring and producing other potentially productive strata beneath the Blanchards' tract. RE 4, Tr. 149-150. Mr. Dean also testified there would be no safety or environmental impacts to the Blanchards' tract from Tarpon's operation of the gas storage facility. RE 4, Tr. 150-152.

Mr. Holcombe, Tarpon's expert appraiser, testified that this is a "partial taking" because Tarpon is taking only an easement to store gas in the underground Storage Interval, the Blanchards retained full ownership of their surface and Tarpon would make no use of the surface. RE 5, Tr. 185-187. The Blanchards' counsel agreed this is a partial taking. RE 5, Tr. 222.

Mr. Holcombe further explained that in determining the highest and best use of a property for appraisal purposes, the appraiser considers, among other things, the physically possible and legally permissible uses which provide the greatest net return to the landowner. In his opinion, based on his own investigation and on the testimony of Tarpon's petroleum

engineer, Mr. Dean, the only physically possible and legally possible use for the Storage Interval is for gas storage. Likewise, that same use brings the highest net return to the landowner. RE 5, Tr. 187-189. Thus, the highest and best use of the Storage Interval is to store gas. RE 5, Tr. 203. And the highest and best use a landowner could make of his or her rights in the Storage Interval is to lease those storage rights to a qualified gas storage company. RE 5, Tr. 203.

Mr. Holcombe also explained the available market data he considered in reaching his opinion of the value of the easement condemned by Tarpon. He considered, for example, evidence of the rental terms for gas storage leases granted by property owners in other Mississippi gas storage fields. RE 5, Tr. 190-193. He considered the terms of gas storage leases granted by owners in the Aberdeen Gas Storage Field to Tarpon before Tarpon obtained its FERC Certificate and before it had eminent domain authority. RE 5, Tr. 193-194. He explained that Tarpon had acquired more than half of all storage rights in the Storage Field through negotiations and voluntary agreements before Tarpon acquired its eminent domain authority. Such leases reflect market value based on a willing buyer and willing seller under no compulsion of condemnation. RE 5, Tr. 194.

Mr. Holcombe then explained four different methodologies he considered in valuing the easement to store gas in the Storage Interval below the Blanchards' property. First, appraisers typically consider "comparable sales" where there is adequate sales data available. But here, he found no evidence of any property owners in the Storage Field selling their storage rights in the Storage Interval. Accordingly, he did not use the comparable sales methodology. RE 5, Tr. 195-196. Next, he considered the potential for commercial production of oil and gas. If there were commercially recoverable oil or gas present, that would be an element of value an appraiser could assign to a property. Based on Mr. Dean's testimony and the findings of the Mississippi State Oil and Gas Board that there is no recoverable oil or gas in the Storage Interval, Mr.

Holcombe did not use this approach. RE 5, Tr. 196-197. However, in recognition of the fact that there were certain oil, gas and mineral leases covering the Blanchards' property at the time Tarpon filed its Complaint, he assigned a nominal value of $10/acre for this element of compensation. RE 5, Tr. 207-208.

Another approach he considered, but did not use, is the depreciation method. This method would consider the depreciation of the fair market value of the condemned tract as a whole by reason of the taking of the storage easements. RE 5, Tr. 199. But, because Mr. Holcombe found no damages to the Blanchards' tract from Tarpon's taking of the storage easement, he did not use this method. RE 5, Tr. 200; 202.

The valuation methodology Mr. Holcombe used is referred to as the "income approach." RE 5, Tr. 202. This approach is based on the fair market value of the easement based on a capitalization of retail income for the right to store gas. RE 5, Tr. 197. Based on the market data of gas storage leases in this and other gas storage fields in Mississippi, Mr. Holcombe determined a per acre value based on a discounted present value of the stream of lease payments the Blanchards could expect to receive if they leased their gas storage rights to a gas storage facility operator. RE 5, Tr. 197-199. In Mr. Holcombe's opinion, this is the only realistic way to put a value on the particular limited property right being condemned—an easement to store gas 3,400 feet below ground. RE 5, Tr. 235. Based on the data he considered, Mr. Holcombe concluded that gas storage rights in tracts larger than 1.67 acres had a fair market value of $250/acre. RE 5, Tr. 206. Mr. Holcombe also concluded, based on his market study of other fields and what other gas storage operators were paying for the right to store gas, that no other gas storage operator paid more than Tarpon offered the Blanchards for the right to store gas. RE 5, Tr. 245.

Finally, Mr. Holcombe explained how he calculated just compensation due the Blanchards for the taking of the storage easement. He considered (1) the value of the storage easement, (2) the value, if any, of any native gas remaining in the Storage Interval, and (3) the damage, if any, to the remainder of the property resulting from the taking of the easement. RE 5, Tr. 203. As to the Blanchards collectively, Mr. Holcombe testified that just compensation for the taking of the easement to store gas is a total of $6,500, comprised of the following elements: (1) $6,250 ($250/acre x 25 acres) for the easement to store gas, plus (2) an additional $250 ($10/acre x 25 acres) as nominal value for the mineral rights in the Storage Interval, and (3) $0 for damages to the remainder of the property. RE 5, Tr. 208-210; R. 393-394.

All of this evidence was undisputed. At the close of Tarpon's case, the trial court granted Tarpon's motion for a peremptory instruction. Tr. 250. The trial court then read all the jury instructions to the jury, including the peremptory instruction, which instructed the jury to return a verdict for damages in favor of the Blanchards in the total amount of $6,500. Tr. 272-277. Despite the peremptory instruction, the jury returned a verdict for damages in favor of the Blanchards in the amount of $13,000. Tr. 284; R. 731-732. Tarpon does not appeal that verdict.

The Blanchards filed post-trial motions which were denied and this appeal followed.

SUMMARY OF THE ARGUMENT

There was no error by the trial court and the Final Judgment should be affirmed. The Blanchards fail to raise any cognizable error.

Tarpon did not execute a quick-take condemnation under Miss. Code Ann. § 11-27-81, *et. seq.* Instead, Tarpon proceeded under the procedures set out in Miss. Code Ann. § 11-27-1, *et. seq.* and invoked the trial court's equitable powers. Any asserted error grounded in the quick-take statutes is misplaced.

The trial court did not abuse its discretion when it admitted Tarpon's Statement of Values and allowed Tarpon's appraiser to testify about the recognized appraisal methods he used to establish the fair market value of the condemned gas storage easement and the just compensation due the Blanchards.

The trial court properly allowed Tarpon to amend its pleadings to condemn and take a *lesser interest* in Blanchards' property than Tarpon was authorized to condemn and take under the Natural Gas Act—an amendment that caused no prejudice to the Blanchards.

The trial court properly denied the Blanchards' second motion for continuance on the eve of trial and properly excluded the Blanchards from putting on evidence at trial due to their failure to cooperate in discovery, violation of orders compelling discovery responses, violation of the Scheduling Order, failure to timely file proper Statements of Value, and failure to show good cause for same.

A jury view would have been pointless because (1) there was no dispute as to the value of the gas storage easement (2) the jury could not possibly "view" a depleted gas reservoir 3,400 feet below ground, (3) the Blanchards stipulated that Tarpon's operations "will not disturb the possession of the four homeowners, the four homeowners of the property, and it will not disturb their quiet possession of their property," and (4) Tarpon stipulated it would not take or use any part of the surface of the Blanchards' tract. Assuming such a motion was made (which it was not), it was properly denied as the Blanchards can show no prejudice.

Finally, contrary to the Blanchards' assertion, the trial court did not overturn the jury verdict.

ARGUMENT

I. Appellants' Issue No. 1: The trial court made no error with respect to Miss. Code Ann. 11-27-83.

The Blanchards first argue that the "trial judge violated the procedural safeguards of Miss. Code Ann. 11-27-83 by failing to require the filing of a lis pendens notice, failing to appoint an independent appraiser, and failing to allow the Blanchards to withdraw 85 percent of the independent appraiser's valuation." Appellant's Brief, p. 8. This argument is misplaced.[3]

As an initial matter, the Blanchards cite no relevant authority to support this "error," therefore it should be deemed abandoned. *City of Jackson v. Harris*, 44 So. 3d 927, 935 (Miss. 2010) (City barred from contesting damages award because it failed to cite authority in support of assignment of error); *McNeil v. Hester*, 753 So. 2d 1057, 1075 (Miss. 2000) ("It is the duty of an appellant to provide authority in support of an assignment of error. This Court considers assertions of error not supported by citations or authority to be abandoned.") (*citations omitted*); Miss R. App. P. 28(a)(6) ("The argument shall contain the contentions of the appellant with respect to the issues presented, and the reasons for those contentions, with citations to the authorities, statutes and parts of the record relied on.")

Should the Court consider this alleged error, it should note the Blanchards incorrectly argue Tarpon engaged in a "quick-take" eminent domain proceeding. Tarpon did not proceed under the provisions of Miss. Code Ann §11-27-81 *et seq.* Tarpon proceeded pursuant to its eminent domain authority under the Natural Gas Act, 15 U.S.C. § 717. Tarpon is a "natural gas company" as that term is defined by the Natural Gas Act, 15 U.S.C. § 717a(6). *Schniedewind v. ANR Pipeline Co.*, 485 U.S. 293, 295 (1988); *Williston Basin Interstate Pipeline Co. v. An Exclusive Gas Storage Leasehold and Easement in the Cloverly Subterranean, Geological Formation,* 524 F.3d 1090, 1092 (9th Cir. 2008) ("Williston's gas storage facilities are regulated

[3] Tarpon filed its lis pendens notice on July 31, 2009. R. 80.

by FERC 'since those facilities are a critical part of the transportation of natural gas and sale for resale in interstate commerce,'" citing *Schneidewind);* see also 18 C.F.R. § 284.1(a) (providing that "[t]ransportation includes storage"). See also R. 70, ¶ 81 ("[Tarpon] will become an interstate pipeline with the issuance of a certificate to construct and operate the proposed facilities. . . .")

The issuance of the FERC Certificate granted Tarpon the power of eminent domain pursuant to the Natural Gas Act, 15 U.S.C. § 717f(h), to condemn the necessary surface and subsurface rights necessary for the construction and operation of the Storage Field. That section states:

> (h) Right of eminent domain for construction of pipelines, etc.
>
> When any holder of a certificate of public convenience and necessity cannot acquire by contract, or is unable to agree with the owner of property to the compensation to be paid for, the necessary right-of-way to construct, operate, and maintain a pipeline or pipelines for the transportation of natural gas, and the necessary land or other property, in addition to right-of-way, for the location of compressor stations, pressure apparatus, or other stations or equipment necessary to the proper operation of such pipeline or pipelines, it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such property may be located, or in the State courts. The practice and procedure in any action or proceeding for that purpose in the district court of the United States shall conform as nearly as may be with the practice and procedure in similar action or proceeding in the courts of the State where the property is situated: *Provided,* That the United States district courts shall only have jurisdiction of cases when the amount claimed by the owner of the property to be condemned exceeds $3,000.

15 U.S.C. § 717f(h). Jurisdiction was proper in the trial court below because the value of each of the Blanchards' individual small fractional ownership interests in the Gas Storage Rights below their 25-acre tract does not exceed $3,000.

Tarpon's right of condemnation under the Natural Gas Act encompasses all property rights necessary for operation of a certificated gas storage facility. *Mississippi River Transmission Corp. v. Tabor*, 757 F.2d 662, 666 n.5 (5th Cir. 1985) (after FERC issues

certificate of public convenience and necessity, gas storage company "was empowered to expropriate the property needed for the creation of the storage reservoir by 15 U.S.C. § 717f(h)."); *Transcontinental Gas Pipe Line Corp. v. 118 Acres of Land*, 745 F. Supp. 366, 368 (E.D.La. 1990) ("[s]ection 717f(h) has been consistently interpreted to encompass the right to expropriate subsurface gas storage rights."); *Columbia Gas Transmission v. Exclusive Gas Storage Easement*, 776 F.2d 125, 129 (6th Cir. 1985) (operator of certificated gas storage field has right to condemn underground gas storage easements); *Steckman Ridge GP, LLC v. An Exclusive Natural Gas Storage Easement Beneath 11.078 Acres of Land,* 2008 WL 4346405 (W.D. Pa. Sept. 19, 2008) (same).

Under Miss. Code Ann. § 11-27-1, "Any person or corporation having the right to condemn private property for public use shall exercise that right as provided in *this* chapter, except as elsewhere specifically provided under the laws of the state of Mississippi" (emphasis supplied). Tarpon is not an entity eligible to invoke the procedures under Miss. Code Ann. § 11-27-81 *et. seq.* and did not attempt to do so. The right to condemn under that statute is expressly limited to particular governmental entities in specific enumerated situations. Because Tarpon had no authority to pursue eminent domain under Miss. Code Ann. § 11-27-81, *et. seq.*, it proceeded under the procedures set out in Miss. Code Ann. § 11-27-1, *et. seq.* and invoked the trial court's equitable powers.

The trial court properly granted Tarpon a preliminary and permanent injunction permitting it immediate access to and use of the subsurface Gas Storage Interval, as approved and certificated by FERC, under the land owned by the Blanchards. R. 191-201. It is well settled that an eminent domain court has the inherent equitable authority to grant immediate entry and possession to the holder of a FERC Certificate in a condemnation action brought under the Natural Gas Act. *See, e.g., East Tennessee Natural Gas Co., v. Sage,* 361 F.3d 808, 826-828

(4th Cir.), cert. denied, 543 U.S. 978 (2004) (granting immediate possession of easements where delays in construction would generate significant unrecoverable costs and time delays in completing project); *Maritimes & Northeast Pipeline, LLC v. Decoulos,* 146 Fed. Appx. 495, *2-3 (1st Cir., 2005); *Northwest Pipeline Corp. v. The 20 by 1,430 Pipeline Right-of-way,* 197 F. Supp. 2d 1241, 1245 (E.D.Wash. 2002) ("[w]here there is no dispute about the validity of [the gas company's] actual right to the easement, denying authority to grant immediate possession would produce an absurd result"); *Guardian Pipeline, L.L.C. v. 950.80 Acres of Land,* 210 F. Supp. 2d 976, 979 (N.D.Ill. 2002) (immediate possession proper when condemnation order has been entered and preliminary injunction standards have been satisfied); *N. Border Pipeline Co. v. 64.111 Acres of Land,* 125 F. Supp. 2d 299, 301 (N.D.Ill. 2000) (same). *See also N. Border Pipeline Co. v. 127.7 Acres of Land,* 520 F. Supp. 170, 173 (D.N.D. 1981) ("the Court believes the circumstances of this case warrant the exercise of inherent powers"); *Williston Basin Interstate Pipeline Co. v. Easement and Right-of-Way Across .152 Acres of Land,* 2003 U.S. Dist. LEXIS 11163 (D.N.D. 2003) (same); *Tenn. Gas Pipeline Co. v. New England Power, Inc.,* 6 F. Supp. 2d 102, 104 (D. Mass. 1998) (same); *USG Pipeline Co. v. 1.74 Acres,* 1 F. Supp. 2d 816, 825-26 (E.D. Ten. 1998) (same); *Kern River Gas Transmission Co. v. Clark County,* 757 F.Supp. 1110, 1117 (D. Nev. 1990) (same); *Humphries v. Williams Natural Gas Co.,* 48 F. Supp. 2d 1276, 1280 (D.Kan. 1999) ("[I]t is apparently well settled that the district court does have the equitable power to grant immediate entry and possession [under the NGA]."); *Rivers Electric Co., Inc. v. 4.6 Acres of Land,* 731 F. Supp. 83, 87 (N.D. N.Y. 1990) (granting immediate possession under a statute similar to the NGA); cf. *Atlantic Seaboard Corp. v. Van Sterkenburg,* 318 F.2d 455, 460 (4th Cir. 1963) (a "condemnation court possesses the power to authorize immediate entry by the condemnor upon the condemned premises"); *Commercial Station Post Office, Inc. v. United States,* 48 F.2d 183, 184-85 (8th Cir. 1931)

(holding that government officer who exercises statutory authority to file condemnation action may take immediate possession of the property even though there is no express provision authorizing pre-judgment possession).

The United States District Court for the Southern District of Mississippi has likewise granted such equitable relief by confirming a pipeline company's right to condemn and ordering a preliminary and permanent injunction granting immediate access. *Southeast Supply Header, LLC v. 180 Acres in George County, Miss., et. al.,* 2008 U.S. Dist. LEXIS 9989 (S.D.Miss. Jan. 9, 2008); *Southeast Supply Header, LLC v. 40 Acres in Forrest County, Miss., et. al.,* 2007 U.S. Dist. LEXIS 95083 (S.D.Miss. Dec. 14, 2007). Moreover, because Tarpon is empowered by Congress to condemn the Gas Storage Rights, "[a] preliminary injunction is always appropriate to grant intermediate relief of the same character as that which may be granted finally." *Federal Sav. & Loan Ins. Corp. v. Dixon,* 835 F.2d 554 (5th Cir. 1987) (quoting *De Beers Consol. Mines, Ltd. v. U.S.,* 325 U.S. 212, 220 (1945)). The numerous authorities cited recognize the substantial public interest at stake and that equitable relief is often warranted. For example, the District Court for the Western District of Pennsylvania granted injunctive relief to a gas storage company, noting:

> there is [a] substantial public interest – the need for natural gas supply – at stake in this case. As the Supreme Court has said, courts of equity may go to greater lengths to give "relief in furtherance of the public interest than they are accustomed to go when only private interests are involved.

Steckman Ridge GP, LLC v. An Exclusive Natural Gas Storage Easement Beneath 11.078 Acres, 2008 U.S. Dist. LEXIS 71302, *36 (citing *Va. Ry. Co. v. Sys. Fed'n No. 40,* 300 U.S. 515, 552 (1937).

After the trial court confirmed that Tarpon had the substantive right to condemn the property interests at issue, it had the equitable power to grant Tarpon immediate access and use of the Gas Storage Rights and properly did so.

To secure and protect the Blanchards' rights to just compensation, the trial court ordered Tarpon to (1) deposit with the registry of the trial court the sum of $20,000.00 to stand as the cumulative total compensation and damages due the defendants for condemnation of the Gas Storage Rights and (2) post bond in the additional amount of $25,000.00 to stand as surety for the payment of just compensation, if any, over and above the amount deposited, and for the payment of such costs, damages and reasonable attorney's fees as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. R. 201. Tarpon complied with that order.

Accordingly, this point of error should be denied since all of Blanchards' arguments grounded in any alleged violation of Miss. Code Ann 11-27-81 *et seq* are misplaced and the trial court properly followed well-established law in its proceedings below.

II. Appellants' Issues No. 2 and 5: The trial court properly admitted Tarpon's Statement of Values and testimony of Tarpon's expert appraiser.

The Blanchards assert the trial court committed error by allowing Tarpon's Statement of Values and allowing Tarpon's expert appraiser, Mr. Stephen Holcombe, to testify. Appellant's Brief, pp. 10-12; 13-14. These arguments are addressed jointly below.

The well-established standard for reviewing a trial court's evidentiary rulings is abuse of discretion. *Miss. Transp. Comm'n v. McLemore*, 863 So. 2d 31, 34 (Miss. 2003); *McGowen v. State*, 859 So. 2d 320, 328 (Miss. 2003); *Haggerty v. Foster*, 838 So. 2d 948, 958 (Miss. 2002). Unless the trial court abused its judicial discretion in allowing or disallowing evidence so as to prejudice a party in a civil case, the trial court's ruling must be affirmed. *McGowen*, 859 So. 2d at 328. The trial court below did not abuse its discretion by allowing Tarpon's statement of values or allowing Tarpon's appraiser to testify.

As an initial matter, the Blanchards misstate the record by complaining that Mr. Holcombe did not "inspect the surface" when in fact he did. RE 5, Tr. 241. Likewise, the

Blanchards wrongly complain that Mr. Holcombe used "improper comparable sales." The record is clear he did *not* use comparable sales because there is no evidence of comparable sales of gas storage rights. Tr. 74.

Moreover, the Blanchards again erroneously rely on Miss. Code Ann. § 11-27-83 and further assert the "before and after" rule is the only correct measure of just compensation. They are simply wrong. While the "before and after" rule is *one* measure of just compensation in typical Mississippi eminent domain cases, it is not the only measure—there are exceptions. In fact, in the seminal Mississippi case creating the "before and after" rule, this Court noted, as an example of an exception to the "before and after" rule, the case of a large plantation where the taking of a few acres would not affect the value of the remaining plantation. In that instance, this Court noted that the valuation of the acres taken would be the proper measure. *Mississippi State Highway Commission v. Hillman,* 198 So. 565, 569-70 (Miss. 1940).

Further, in *Mississippi State Highway Commission v. Hall*, 174 So. 2d 488 (Miss. 1965) this Court noted that just compensation in cases involving a partial taking is generally the value of the part taken plus all damages suffered by residue, including diminution in value of remainder by reason of lawful use to which acquired portion will be put. *See also Mississippi Transportation Commission v. Fires*, 693 So. 2d 917, 921 (Miss. 1997) (affirming verdict supported by testimony which valued only part taken, not before and after value of entire tract).

That was the precise situation facing the trial court below. The Blanchards each own small fractional surface and/or mineral interests in the 25-acre tract. However, the only interest condemned was an *easement* to use a stratum of sandstone lying approximately 3,400 feet below the surface for the storage of natural gas. Thus, a partial taking.

The Blanchards assert that Tarpon's appraiser relied on Ohio law in making his valuation. Again, they are incorrect. The question of how to determine the compensation to be paid for

condemned Gas Storage Rights has not been judicially addressed by this Court or most other jurisdictions. Accordingly, Tarpon's appraiser considered the methodologies set out in the leading case on condemnation of underground gas storage rights, *Columbia Gas Transmission Corp. v. An Exclusive Natural Gas Storage Easement* ("*McCullough*"), 962 F.2d 1192 (6th Cir. 1992). During the *McCullough* proceedings, the United States District Court for the Northern District of Ohio certified to the Ohio Supreme Court the question of the correct measure of just compensation for the appropriation of an underground gas storage easement. *Columbia Gas Transmission Corporation v. An Exclusive Natural Gas Storage Easement* ("*McCullough*"), 620 N.E.2d 48, 49 (Ohio 1993). The Ohio Supreme Court held that the federal district court's jury instruction on this question correctly set forth five "alternative" methods to arrive at just compensation.

The first alternative method of arriving at the fair market value of a gas storage easement is to use comparable sales of easements for storage of natural gas, if such evidence exists. *Id.* As Mr. Holcombe testified, this is also a typical method of appraisal in Mississippi eminent domain cases when adequate market data of comparable sales is available. However, there was no evidence here of sales of gas storage easements. RE 5, Tr. 195-196.

A second method is to value the remaining native gas in the storage interval if there is "sufficient natural gas allowing for the commercial recovery and sale of the natural gas." *McCullough*, 620 N.E.2d at 49. This method depends on the mineral owner providing evidence that enough natural gas remains under the tract for commercial recovery and sale. *Id.* If the mineral owner makes this proof, then the fact-finder may "assess the foreseeable net income flow from the property for its productive life reduced to a present value figure." *Id.* If the native gas is not "commercially recoverable" apart from the activities of the condemnor, it has no value to the mineral interest owner and cannot be used to calculate just compensation. *Iroquois Gas*

Corp. v. Gernatt, 272 N.Y.S.2d 291, 296 (N.Y. Sup. Ct. 1966). The same holds true in Montana. *Williston Basin Interstate Pipeline Company v. An Exclusive Gas Storage Lease Hold in the Judith River Subterranean Geological Formation*, 999 F.2d 546, 1993 U.S. App. LEXIS 17450, *13 (9th Cir. 1993). Mr. Dean, Tarpon's petroleum engineer, testified there is no commercially recoverable native gas in the Storage Interval below the Blanchards' property. RE 4, Tr. 146-147. Mr. Holcombe testified that had there been any recoverable reserves, he could have added that element of damages to the just compensation. But there were no such reserves. RE 5, Tr. 196-197.

A third appropriate method of establishing value is to use "the fair market value of the storage easement based upon a capitalization of retail income for the right to store the gas." *McCullough*, 620 N.E.2d at 49. Under this method, the fact-finder is to "use the date of the filing of the condemnation as the starting point and the termination of the storage field as the ending date," and multiply "the acreage rental by the comparable storage rights to arrive at the present worth of the future income stream." *Id.* The fair market value is thus a sum that, if invested on the date of filing, "would earn income equal to the comparable storage rentals for the future." *Id.* This is the method selected by Mr. Holcombe, Tarpon's appraisal expert, because of the available historical evidence of such rental leases in the Aberdeen Gas Storage Field, as well as the Four Mile Creek Gas Storage Field and Muldon Gas Storage Field. It is also the method used as the basis for Tarpon's Statement of Values. RE 5, Tr. 197-199. That method is entirely consistent with Mississippi law as reflected by this Court's pronouncements in *Hillman*, *Hall* and *Fires*.

A fourth method recognized by the Ohio Supreme Court is to use "depreciation in the fair market value of the condemned tract as a whole by reason of the taking of the storage easement." *Id.* at 49-50. Under this method, the fact-finder would determine "the difference in the fair

market value of the entire condemned tract before and after the taking." *Id.* at 50. The amount of the difference is the fair market value of the easement. *Id. See also, Milby v. Louisville Gas & Elec. Co.*, 375 S.W.2d 237, 239 (Ky. App. 1963). "Before" value includes consideration of the underground storage space, to the extent it can be shown to enhance the actual market value of the tract. Established sale value or lease value is a basis for measuring market value. *Id.* at 240. While this approach is consistent with Mississippi's "before and after" rule, the undisputed evidence below was that there is no difference in the before and after value of the Blanchards' property as a result of condemnation of the easement to store gas and Tarpon's stipulation that it will not access or use the surface of said lands for any purposes. RE 5, Tr. 200; 202.

The fifth, and last, method involves awarding nominal damages to holders of mineral leases, "even if the presence of native oil and gas in paying quantities is not proven to a reasonable probability." *McCullough*, 620 N.E.2d at 50. Because there were several mineral leases covering portions of the Blanchards' tract as of the date the Complaint was filed (although those leases expired due to lack of production or operations before the valuation hearing), Mr. Holcombe established a value of $10/acre for this element of damage, even though the undisputed evidence showed such gas cannot be profitably produced. RE 5, Tr. 207-208.

These methods of arriving at a figure for just compensation of gas storage rights incorporate a range of scenarios and are consistent with Mississippi case law where, as is the case here, the condemned rights in the land are a small portion of the whole. Tarpon's Statement of Values clearly set out each of the elements of damages accruing to the Blanchards for the taking of the gas storage easement: (1) the value of the storage easement, (2) the value, if any, for any native gas remaining in the Storage Interval, and (3) the damage, if any, to the remainder of the property resulting from the taking of the easement. RE 5, Tr. 203. For the easement to store gas below the Blanchards' 25-acre tract, Tarpon's statement of value reflected the opinion

of its expert appraiser, Mr. Holcombe, who opined that just compensation for the taking of the easement to store gas below the Blanchards' tract is a total of $6,500, comprised of the following elements: (1) $6,250 ($250/acre x 25 acres) for the easement to store gas, plus (2) an additional $250 ($10/acre x 25 acres) as nominal value for the mineral leasing rights in the Storage Interval, and (3) $0 for damages to the remainder of the property. RE 5, Tr. 208-210; R. 393-394.

The trial court did not abuse its discretion. The trial court properly admitted Tarpon's Statement of Values and properly allowed Tarpon's appraiser to testify as to his analysis and use of these recognized methods to establish the fair market value of the easement and the just compensation due the Blanchards.

III. Appellants' Issue No. 3: The trial court properly denied the Blanchards' second "eve of trial" motion for a continuance due to egregious discovery violations.

The Blanchards assert error because the trial court denied their second "eve of trial" motion for continuance, Appellant's Brief, p. 12, but fail to mention the egregious discovery violations that led to the denial of that motion. Nor do they mention the first continuance granted by the trial court which gave them an additional nine months to prepare for trial, during which time they failed to respond to Tarpon's outstanding discovery requests and apparently did nothing else to prepare for trial.

It is within the sole, sound discretion of a trial court to grant a continuance when circumstances warrant. The standard applied for granting a continuance is whether "good cause" for such has been shown. *Owens v. Thomas*, 759 So. 2d 1117, 1120 (Miss. 1999), *Coleman v. Mississippi State Highway Commission,* 289 So. 2d 918 (Miss. 1974). The Blanchards did not show good cause.

The trial court first granted the Blanchards a continuance on the eve of trial in December 2009. R. 408. At that time, the Blanchards' counsel promised to comply with discovery and the trial court's Orders Compelling Discovery, but did not. The Blanchards only response following

the first continuance was to file a second motion for continuance on the eve of the second trial, nine months later in August 2010. R. 669.

Tarpon was sympathetic to the health problems of Blanchards' counsel and for that reason did not object when Blanchards' counsel sought a first continuance just days before the first scheduled trial in December 2009. However, during the nine months between that first continuance and the eve of the second trial setting, the Blanchards made no attempt to (i) comply with discovery, (ii) comply with the trial court's Orders Compelling Discovery, (iii) seek an extension of time to comply with discovery, (iv) comply with the trial court's Scheduling Order, (v) obtain expert witnesses, (vi) designate expert or fact witnesses, (vii) file a witness and exhibit list, or (viii) file a proper Statement of Values.

In fact, the Blanchards failed to state any reason in their second Motion for Continuance as to why they had been non-compliant with, or why they had not sought an extension of time to respond to, discovery. Instead, the Blanchards again recited only that the health problems of their counsel warranted a continuance. But in those nine months, the Blanchards had ample time to obtain new counsel to defend them in this matter if their current counsel was unable to do so.

On the other hand, Tarpon would have been severely prejudiced if another continuance had been granted on the eve of trial. Tarpon had completely prepared for the trial of this matter twice, once for the original January 5, 2010 trial date, and again for August 30, 2010, trial date. Tarpon had twice incurred substantial trial preparation expenses.

The burden of proof for showing "good cause" supporting a continuance was on the Blanchards and they failed to meet that burden. The trial court correctly denied the Blanchards' second motion for continuance.

IV. Appellants' Issues No. 6, 7 and 9: The trial court correctly precluded the Blanchards from presenting undisclosed evidence at trial because of their egregious failure to cooperate in discovery.

The Blanchards argue the trial court committed error by excluding their evidence. Appellants' Brief, pp. 14-22. To the contrary, the trial court properly excluded from evidence their statements of value and any other testimony or undisclosed evidence. RE 2. The Blanchards' egregious failure to cooperate in discovery and comply with multiple trial court orders compelling discovery, failure to comply with the Scheduling Order, failure to timely file statements of value in accord with Miss. Code Ann. § 11-27-7, and their failure to timely seek extensions or otherwise show good cause for their noncompliance are undisputed and well chronicled in the trial court's order. *Id.; see also,* Section III.

The trial court correctly held all of the Blanchards were in default for having failed to timely file their required Statements of Values. The Mississippi Code requires:

> Not less than ten (10) days prior to the date fixed for such hearing, each of the defendants shall file with the circuit clerk and serve upon the plaintiff, or his attorney, a statement showing: (1) the fair market value of the property to be condemned, determined as of the date of the filing of the complaint; (2) the damages, if any, to the remainder if less than the whole is taken, giving a total compensation and damages to be due as determined by the defendants.

Miss. Code Ann. § 11-27-7. "The statements required by this section shall constitute the pleadings of the parties with respect to the issue of value, and shall be treated as pleadings are treated in civil actions in the circuit court." *Id.*; *see also Coleman v. Mississippi State Highway Commission*, 289 So. 2d 918, 920 (Miss. 1974).

This case had been pending for over twelve months and the deadline of ten days prior to trial had elapsed with no Appellant having filed a proper statement of value nor having sought an extension of time to do so. Accordingly, each was properly treated as not having pled by the statutory deadline. Under Rule 55 of the Mississippi Rules of Civil Procedure, "When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend

as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter his default." Miss. R. Civ. P. 55(a). By failing to file their statements of value, the Blanchards failed to plead and were, therefore, in default.

The Blanchards never showed good cause for why they did not timely file their statements of value. As in *Coleman*, 289 So. 2d at 920, the Blanchards "had notice and ample time to meet that statutory requirements, but did not plead or give any reason for not doing so." Because of their default, trial must be "within the limitations of the present pleadings." *Coleman*, 289 So. 2d at 921. Having abandoned their opportunity to file pleadings, the Blanchards had no basis on which to present evidence to the jury.

In addition to failing to file Statements of Value, the Blanchards were further precluded from presenting evidence because they did not comply with the trial court's December 2009 orders compelling them to respond to Tarpon's interrogatories and requests for production of documents. Those orders compelled the Blanchards to "serve further and complete responses to the interrogatories and requests for documents propounded by Plaintiff Tarpon Whitetail Gas Storage, LLC" and to do so by a date certain following the date each order was entered. The deadlines established in those Orders passed with no response from the Blanchards, nor any request for an extension of time to respond.

Rule 37 of the Mississippi Rules of Civil Procedure expressly provides the court great latitude in imposing sanctions for discovery abuse. Specifically, Rule 37(b)(2)(B) provides, in relevant part: "If a party ... fails to obey an order to provide or permit discovery, ... the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following: ... an order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence."

Because the Blanchards did not comply with the trial court's orders and did not respond to Tarpon's discovery requests, Tarpon had no indication of what evidence the Blanchards may present, and its ability to prepare its case was severely prejudiced. Tarpon had no opportunity to prepare to meet or cross-examine any evidence the Blanchards may have offered. Accordingly, any such testimony or evidence was properly excluded. *State Hwy. Comm'n of Miss. v. Jones,* 649 So. 2d 201, (Miss. 1995) (in condemnation action, trial court committed reversible error by allowing Landowners to admit into evidence photographs without having first revealed photographs to State pursuant to request for discovery and subsequent court order compelling production of, *inter alia*, all photographs and pictorial representations Landowners planned to introduce at trial.); *State Highway Com'n of Mississippi v. Havard*, 508 So.2d 1099 (Miss. 1987) (failure to comply with request for discovery and subsequent court order compelling discovery production is grounds for exclusion of evidence at trial); *Ladner v. Ladner*, 436 So. 2d 1366, 1370 (Miss. 1983) ("If a party fails to obey a court order permitting discovery, the court may, in its discretion, refuse to allow the disobedient party to support her claims with the undisclosed evidence."); *Prestridge v. City of Petal*, 841 So. 2d 1048 (Miss. 2003) (same); *Broadhead v. Bonita Lakes Mall, Ltd. Partnership*, 702 So. 2d 92, 104 (Miss.1997) (Chancellor did not abuse discretion by excluding evidence where Plaintiff failed to comply with Defendant's discovery requests and subsequent order compelling discovery).

In addition, pursuant to the trial court's Scheduling Order, the Blanchards' deadline for designating expert witnesses was May 5, 2010, and the deadline to complete discovery was July 30, 2010. The Blanchards did not designate any expert witness nor sought an extension of time to do so. No Blanchard responded to Tarpon's discovery requests within the Scheduling Order deadline. Tarpon had no indication as to what any proffered expert may opine and Tarpon's ability to prepare its case was severely prejudiced. Tarpon had no opportunity to depose or

cross-examine any potential expert. Thus, the trial court properly ruled that the Blanchards could not put on any expert testimony at the valuation hearing. RE 2.

"Absent special circumstances the court will not allow testimony at trial of an expert witness who was not designated as an expert witness to all attorneys of record at least sixty days before trial." URCCC 4.04(A); *see also Windmon v. Marshall*, 926 So. 2d 867, 877 (Miss. 2006) (upholding exclusion of damages and insurance experts, where insureds designated them during continuance granted only to allow insureds to prepare case on liability against tortfeasor, not to further prepare case against uninsured motorist carrier); *Crane Co. v. Kitzinger*, 860 So. 2d 1196, 1203 (Miss. 2003) (upholding exclusion of testimony, where witness was not designated as expert and questions were not fact questions); *Griffin v. McKenney*, 877 So. 2d 425, 438, 441 (Miss. 2003) (holding that trial court erred by allowing expert testimony from witness whose expert designation had been withdrawn); *Varner v. Patrick*, 523 So. 2d 319, 320 (Miss. 1988) (upholding exclusion of testimony and written appraisal by plaintiff's appraiser, where plaintiff failed to respond until one day before trial to defendant's expert disclosure interrogatory and request for production of documents including appraisals); *Harris v. Gen. Host Corp.*, 503 So. 2d 795, 796-98 (Miss. 1986) (holding that by filing witness and expert interrogatories, plaintiff acquired procedural right that defendant disclose expert within reasonable time after reasonably ascertaining probability that expert would be called, and sufficiently in advance of trial to allow plaintiff to prepare to meet and cross-examine evidence to be offered by expert, and reversing trial court's allowance of testimony by undisclosed expert); *Boyd v. Lynch*, 493 So. 2d 1315, 1320 (Miss. 1986) (upholding exclusion of expert disclosed the Friday before trial beginning the following Monday).

The Blanchards' sole argument for their failure to cooperate in discovery was their counsel's health issues. But that alone is not good cause in this case. The Blanchards' counsel

disclosed his health issues on the eve of the first trial setting in December 2009. On that basis, the trial court granted an extension to allow the Blanchards time to comply with discovery and prepare for trial. R. 408. Having been granted that reprieve, however, the Blanchards and their counsel did nothing in the following nine months to satisfy their discovery obligations and comply with the trial court's orders. If counsel's health made him unable to fulfill his discovery obligations and made him unable to properly prepare for trial, he should have terminated his representation and obtained new counsel for the Blanchards.[4] There was ample time to do so within the deadlines of the Scheduling Order and before the August 2010 trial setting. But he did not.

Finally, a review of the Blanchards' proffer [Tr. 279-283] demonstrates it would have been error to allow the Blanchards to introduce their speculative testimony. The Blanchards proffered the value of "25 acres and four homes and everything they have" is $150,000 for the surface. Tr. 283. They further proffered the "underground structure" beneath their property was worth $500,000 before the taking and $150,000 after the taking. *Id.* That proffered testimony is pure speculation with no foundation. The proffer contains no representation that the Blanchards hired or relied on any qualified real estate appraiser to establish these outrageous valuations. Further, the Blanchards admitted they have no expertise in valuing subsurface rights Tr. 281. Therefore, no foundation existed for the Blanchards to offer any opinion as to the value of the easement taken.

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[4] Rule 1.16 of the Mississippi Rules of Professional Conduct states in pertinent part: "... a lawyer ... shall withdraw from the representation of a client if: ... (2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client...." M.R.P.C. 1.16(a). Further, under 1.16(d), "[u]pon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interest, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment that has not been earned."

Although this Court has held that expert training is not required for a lay witness to testify as to value of land, the lay witness must have a particular knowledge relating to the value before the testimony is allowed. See *Board of Levee Com'rs v. Nelms*, 82 Miss. 416, 34 So. 149 (Miss. 1903); *Mississippi State Highway Commission v. Ladner*, 243 Miss. 278, 137 So. 2d 781 (Miss. 1962); *Mississippi State Highway Commission v. Hillman*, 189 Miss. 850, 198 So. 565 (Miss. 1940). For example, a lay witness can offer opinion testimony as to the value of his lands if he has knowledge of land values in the area. *Ladner,* 243 Miss. at 284. For purposes of this case, the Blanchards would have to show knowledge of the value of the right to store gas in the depleted reservoir in order to testify as to the value of the gas storage rights under their lands. Without that type of knowledge, their testimony was properly excluded notwithstanding their abuse of discovery. *Id.*

Moreover, Blanchards' counsel admitted that settlement offers made by Tarpon to the Blanchards "did affect the value they attached to these subsurface rights." Tr. 280. As found by the trial court in its Order excluding the Statement of Values filed by eight of the Blanchards, RE 1, 624 , the offer of settlement in no way related to the fair market value of the gas storage rights at issue. The offer of settlement was a separate and additional agreement proposed by Tarpon, with no consideration in the proposed offer being given for storing gas. The Blanchard family heirs would have been required to execute separate gas storage agreements that would have provided for the injection, storage and withdrawal of natural gas below their lands, and for the execution of the gas storage agreement, those Blanchard family heirs would have been paid on a per acre basis. Additionally, the offer of settlement was contingent on numerous conditions being met. When those conditions were not met, the offer was rescinded by Tarpon in June 2008. RE 1, 624.

Any such offer made by Tarpon to the Blanchards was inadmissible to establish fair market value of gas storage rights. *See State Highway Commission of Mississippi v. Warren,*, 530 So. 2d 704 (Miss. 1988) (citing *Mississippi State Highway Commission v. Robertson*, 350 So. 2d 1348, 1350 (Miss. 1977). When statements are intended to be part of negotiations toward compromise, they are inadmissible under Rule 408. *Ramada Dev. Co. v. Rauch*, 644 F.2d 1097 (5th Cir. 1981) (interpreting F.R.E. 408 which is virtually identical to M.R.C.P. 408). More importantly, as outlined above, the proposed offer of settlement had nothing to do with the fair market value of an easement to store gas below the Blanchards' land.

The Blanchards' disregard of discovery throughout this entire eminent domain action, their failure to disclose witnesses, experts, documents, and any other evidence in response to Tarpon's interrogatories and requests for production, their disregard for the trial court's Orders compelling discovery and the Scheduling Order, and their reliance on settlement offers instead of relevant fair market data, were all proper grounds, individually and collectively, for the trial court to preclude them from introducing undisclosed evidence at trial and to exclude their speculative statements of value. "Our trial judges also have a right to expect compliance with their orders, and when parties and/or attorneys fail to adhere to the provisions of these orders, they should be prepared to do so at their own peril." *Bowie v. Montfort Jones Mem'l Hosp.*, 861 So. 2d 1037, 1042 (Miss. 2003). The trial court's ruling on these points was proper.

V. <u>Appellants' Issue No. 4:</u> The trial court properly allowed Tarpon to amend its pleadings in order to take a *lesser* property interest than otherwise allowed under the Natural Gas Act.

Inexplicably, the Blanchards complain the trial court erred by allowing Tarpon to amend its pleadings so as to condemn and take a *lesser interest* in the Blanchards' property than Tarpon was authorized to condemn and take under the Natural Gas Act. Appellant's Brief, p. 12-13. It is not readily apparent how such an amendment could have possibly prejudiced the Blanchards.

The Blanchards' counsel never asserted prejudice at trial. It is well settled that an amendment must cause "actual prejudice to the other party" in order to be refused. *Beverly v. Powers*, 666 So.2d 806, 809 (Miss. 1995). The grant or denial of a motion for leave to amend is within the sound discretion of the trial court. *MBF Corp. v. Century Business Communications, Inc.*, 663 So. 2d 595 (Miss. 1995). *See also, Simmons v. Thompson Machinery of Mississippi, Inc.*, 631 So. 2d 798, 800 (Miss. 1994) (Motions for leave to amend are left to court's discretion. Leave to amend should be granted unless it would cause actual prejudice to opposite party.); *Rector v. Mississippi State Highway Comm'n*, 623 So. 2d 975, 978 (Miss. 1993) (where there is no hint of prejudice in record nor did affected party assert prejudice when other party amended answer, court does not abuse discretion in granting leave to amend.)

Likewise, the Blanchards offer no explanation or assertion of prejudice, nor supporting authority, such that this issue should also be deemed abandoned. *See City of Jackson v. Harris*, 44 So. 3d 927, 935 (Miss. 2010); *McNeil v. Hester*, 753 So. 2d 1057, 1075 (Miss. 2000); Miss R. App. P. 28(a)(6).

Should the Court consider this issue, recall that Tarpon's eminent domain authority under the Natural Gas Act encompasses *all property rights necessary* for operation of a certificated gas storage facility. *See* p. 14-15 above. Thus in its Complaint, Tarpon defined the "Gas Storage Rights" to be condemned as "the right to inject, store, maintain, and withdraw natural gas from the Storage Interval in the Field, as approved by the Board and the FERC, with the incidental right of surface and sub-surface ingress, use, and egress as reasonably necessary to construct, operate, and maintain the Project." R. 21.

At trial, however, Tarpon stipulated it would not use *any* part of the Blanchards' surface. Tr. 219-220. Thus Tarpon had no need to condemn the "incidental right of surface ingress, use and egress" in the Blanchards' property. Rule 15 of the Mississippi Rules of Civil Procedure

allows amendment of pleadings when justice requires and when necessary to conform to the evidence. The *undisputed* evidence was that Tarpon had not, and would not, use any part of the Blanchards' surface property. Accordingly, the trial court properly allowed Tarpon to stipulate and amend the pleadings such that the rights it would take by condemnation in the Blanchards' property would *exclude* the incidental right of surface ingress, use or egress. Tr. 221.

VI. Appellants' Issue No. 8: The trial court properly denied the Blanchards' motion for a jury view of the property.

The Blanchards assert the trial court erred by denying their request for an inspection of the premises. Appellants' Brief, p. 18. However, the Blanchards' counsel did *not* request or move the trial court to allow the jury to inspect the premises. Apparently counsel mentioned something about an inspection of the premises when he approached the Judge's bench. Tr. 162. The Judge then questioned Blanchards' counsel on the record: "what was it you said, an inspection of the premises?" Tr. 162. To this question asked by the Judge, Blanchards' counsel replied "I don't know - - I haven't discussed with these gentlemen how they feel about it, but I haven't made a decision what my recommendation would be about it." Tr. 162. Having made no proper motion or objection, the Blanchards' counsel did not preserve this issue for appeal. *CIG Contractors, Inc. v. Mississippi State Bldg. Comm'n*, 510 So. 2d 510, 514 (Miss. 1987) (party may not present theory on appeal which was not presented at trial level).

Nevertheless, even if these obscure statements by the Blanchards' counsel constituted a motion, the trial judge correctly denied it. There are two statutes that address a jury view of land. Miss. Code Ann. 11-27-19 provides that "the jury may, in the sound discretion of the judge, go the premises . . ." (emphasis added). Miss. Code Ann. §13-5-91 provides that "[w]hen, in the opinion of the court, on the trial of any cause, civil or criminal, it is proper, in order to reach the ends of justice, for the court and jury to have a view or inspection of the property which is the subject of litigation . . . the court may, at its discretion, enter an order providing for

such a view or inspection . . ." (emphasis added). As these statutes point out, when a view of the premises is necessary to "reach the ends of justice," the trial judge, in his "sole discretion" may allow for a jury view of the property. In this case no view of the premises was necessary because (1) the easement at issue could not, in fact, be viewed because it was 3,400 feet below the surface of the earth and (2) there was no conflicting evidence as to value of that easement.

The Blanchards' reliance on *Redevelopment Authority of the City of Meridian v. Holsomback*, 291 So. 2d 712 (Miss. 1974) is misplaced because that case dealt with an actual taking of surface property. Even in such a typical eminent domain taking, a view of the premises would only prove helpful if there was a conflict in evidence relating to the value of the property. *Id.* at 715. In *Holsomback*, there was evidence presented from both sides that resulted in a dispute over the value that should be assessed for the lands in question. *Id.* at 713. Upon the request of the landowner that the jury be allowed to view the premises, the trial judged denied the motion stating that "the evidence was such that a view of the premises would serve no useful purpose." *Id.* at 715. Even with conflicting evidence as to the value of the property being presented at trial, this Court did not find reversible error and affirmed the decision of the trial court. *Id.*

The Blanchards' only argument is that a jury view "would have been the better practice as stated in case law, and would have provided additional information for the jury to consider." Appellants' Brief, p. 18. However, the trial court ruled the Blanchards could not put on evidence in this matter. The suggestion of a jury view was simply an attempt by the Blanchards to introduce evidence ("additional information for the jury to consider") in violation of the trial court's order. Tr. 162. Moreover, the Blanchards failed at trial (and in their Brief) to indicate what additional information, if any, could have been obtained by the jury's view of the property. In light of the undisputed facts that (1) the jury could not possibly "view" the depleted reservoir

3,400 feet below their property; (2) the Blanchards stipulated that Tarpon's operations "will not disturb the possession of the four homeowners, the four homeowners of the property, and it will not disturb their quiet possession of their property," (Tr. 8); and (3) Tarpon stipulated it would not take or use any part of the surface of the Blanchards' tract (Tr. 219 – 221), a jury view would have been pointless.

Accordingly, even assuming the Blanchards made an actual motion for the jury to view the property, that motion was properly denied.

VII. Appellants' Issue No. 10: The trial court did not "overturn" the jury verdict.

The Blanchard's final "error" (see Appellant's Brief, p. 23) is incomprehensible. The trial court did not overturn the verdict. The Blanchards assert that "[w]hen the jury found an amount in their favor, the court took it away." Appellants' Brief, p. 24. That is simply untrue. To the contrary, the jury returned its verdict for damages in an amount *double* that proved at trial and the trial court entered final judgment on that amount. R. 731-732.

If, as the Blanchards appear to argue, the jury verdict was tainted by bias, passion or prejudice, or otherwise contrary to the overwhelming weight of the evidence, it worked to benefit the Blanchards, not Tarpon. The Blanchards simply have no grounds to complain where the jury awarded them double the proved condemnation damages.

CONCLUSION

For these reasons, Tarpon asks the Court to affirm the Final Judgment entered by the trial court.

Respectfully submitted, this the 13th day of September 2011.

Tarpon Whitetail Gas Storage, LLC

J. JEFFREY TROTTER

OF COUNSEL:

J. Jeffrey Trotter
[redacted]
Michele McCain
[redacted]
ADAMS AND REESE LLP
1018 Highland Colony Parkway, Suite 800
Ridgeland, MS 39157
Telephone: (601) 353-3234
Facsimile: (601) 355-9708

CERTIFICATE OF SERVICE

I certify that I have caused to be hand-delivered the original and three copies of the Brief of Appellee and a condensed disk of the brief for filing to:

Ms. Kathy Gillis, Clerk
Mississippi Supreme Court
450 High Street
Jackson, MS 39201

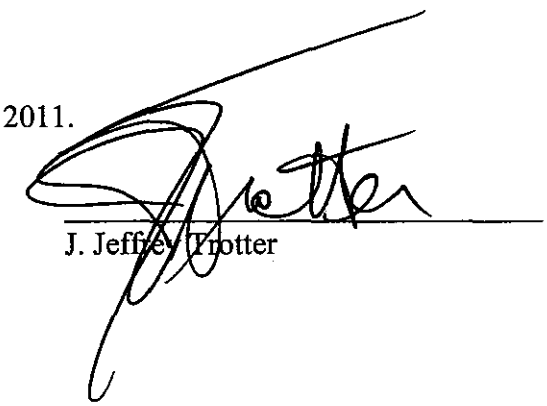
I certify that I have this day mailed by United States Mail, postage prepaid, a true and correct copy of the above Brief of the Appellee to the following:

Honorable Jim S. Pounds
Circuit Court Judge
P. O. Box 316
Booneville, MS 38829

Brad J. Blaylock
Blaylock Law Firm
P. O. Box 780
Amory, MS 38821

James Jeffrey Lee
The Law Office of J. Jeffrey Lee
1303 Madison Avenue
Memphis, TN 38104

This the 13th day of September, 2011.



J. Jeffrey Trotter