

FEDERAL TRADE COMMISSION DECISIONS

Findings, Opinions and Orders

IN THE MATTER OF

THE CITY OF NEW ORLEANS

ORDER IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL
TRADE COMMISSION ACT

Docket 9179. Complaint, May 10, 1984—Order, Jan. 3, 1985

This Order withdraws the Commission Complaint alleging that the City of New Orleans violated Sec. 5 of the FTCA by conspiring with taxicab operators to increase fares and limit the number of taxicab licenses, with the effect of eliminating competition. Following enactment of legislation by the State of Louisiana which provided that "[T]he policy of this state is to require that municipalities . . . regulate [taxicabs] and not to subject municipalities or municipal officers to liability under federal antitrust laws" and which specifically empowers cities to regulate entry and control fares for taxicabs, the Commission determined that continuing this matter would not presently serve the public interest.

COMPLAINT

The Federal Trade Commission, having reason to believe that The City of New Orleans, a municipal corporation subject to the jurisdiction of the Commission, hereinafter sometimes referred to as Respondent or the City, has violated the provisions of the Federal Trade Commission Act, as amended (15 U.S.C. 45), and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges as follows:

For purposes of this complaint, the following definitions shall apply:

(A) *Taxicab* means a motor vehicle that is duly licensed to be operated as a taxicab by the City, that has a normal seating capacity of less than ten (10) passengers, and that is used for the transportation of passengers for hire primarily over streets of New Orleans by a route or to a destination controlled by the passenger(s).

(B) *CPNC* means a certificate of public necessity and convenience issued by the Director of the Department of Utilities of the City pursuant to the requirements of Section 12-4 of Chapter 12 of the

Code of the City of New Orleans permitting an individual or company to operate a taxicab in New Orleans.

(C) *Taxicab company* means any business organization, corporation, partnership, cooperative or person that as of the date of this complaint has a trade name and color scheme registered with the Taxicab and For Hire Vehicle Bureau as specified by Section 12-162 of Chapter 12 of the Code of the City of New Orleans for the purpose of operating taxicabs or providing services related to the business of owning, operating and/or driving taxicabs to taxicab owners, operators and/or drivers authorized to do business by the City.

PARAGRAPH 1. Respondent is a municipal corporation organized under the laws of the State of Louisiana and is a person or corporation within the meaning of the Federal Trade Commission Act, as amended (15 U.S.C. 45). The City has passed and enforces certain ordinances that regulate the taxicab business in New Orleans.

PAR. 2. At all times relevant herein, Respondent's acts and practices have affected the businesses of taxicab companies and taxicab owners, operators and/or drivers that maintain, and have maintained, substantial courses of business, including the acts and practices as hereinafter set forth, which are in or affect commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, and Respondent is subject to the jurisdiction of the Federal Trade Commission. The acts and practices alleged herein are in or affect commerce by affecting at least the following activities that are in or affect commerce:

(A) Taxicabs and taxicab companies provide a primary method of transportation for interstate travelers between New Orleans International Airport and destinations in New Orleans.

(B) Taxicabs and taxicab companies provide transportation for interstate travelers between New Orleans and nearby cities in Mississippi.

(C) Taxicabs and taxicab companies provide transportation to interstate travelers between train stations, bus terminals and ports and other destinations in New Orleans.

(D) Taxicabs and taxicab companies provide transportation to interstate travelers between hotels, motels, convention centers, and tourist attractions and other destinations in New Orleans.

(E) Taxicabs are manufactured in other states and are transported into and sold in Louisiana.

(F) Items and services purchased in substantial quantities such as gasoline, tires, taximeters, two-way radios and various replacement parts for taxicabs originate in other states and are sold for use in and

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Statement

(G) Employment opportunities as a New Orleans taxicab driver have attracted persons from other states.

PAR. 3. For many years and continuing up to and including the date of the issuance of this complaint, the City has combined, contracted or agreed with taxicab companies, to pursue the following policies and do the following acts, among others:

(A) To encourage taxicab companies to combine and to agree upon proposals to increase fares for taxicabs in New Orleans.

(B) To adopt uniform fares applicable to all taxicabs upon request by taxicab companies.

(C) To limit the number of CPNC's in New Orleans and to prohibit by other means, new entry of taxicab drivers, owners and operators into New Orleans.

(D) To raise unreasonable barriers to entry to new taxicab companies in New Orleans.

(E) To prohibit competition from vehicles-for-hire licensed outside New Orleans.

PAR. 4. The acts and practices of respondent, as alleged in Paragraph Three, have been and are now having the effects, among others, of:

(A) eliminating and preventing substantial competition between competitors and potential competitors in the operation of taxicabs in New Orleans;

(B) strengthening the market power of currently authorized taxicab companies operating in New Orleans taxicab market;

(C) raising, fixing, stabilizing, maintaining, or otherwise interfering or tampering with the rates charged for taxicab service in and from New Orleans; and

(D) depriving interstate and intrastate consumers of taxicab services in and from New Orleans of the benefits of free and open competition in taxicab services.

PAR. 5. The acts and practices of Respondent, as alleged herein, were and are to the prejudice and injury of the public and constituted and constitute unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, as amended. The acts and practices, as herein alleged, are continuing and will continue in the absence of the relief herein requested.

STATEMENT OF CHAIRMAN JAMES C. MILLER III

After extensive consideration of the issue, I have voted today to

issue complaints in accordance with my statutory responsibility to act when there is reason to believe that the law has been violated.

The action taken by the Commission today is based upon allegations of monopoly power and alleged violations of the U.S. antitrust laws in the taxi markets of Minneapolis [105 F.T.C. 304] and New Orleans. As a technical matter, the way a case is brought most effectively in such situations is to address regulations enacted by the city governments. I wish to stress that our concern is with allegations of monopoly power in taxi markets, and is not driven by any interest in limiting the lawfully-exercised powers of the cities themselves.

I also wish to stress that our concern is solely with restraints on *competition*; we have no concerns with rules affecting safety, insurance, and other related service standards.

The Commission's decision today comes after a 10-year staff study of taxi markets, after extensive inquiries and discussions with city officials and taxi operators, and after thorough briefing of the Commission by the agency's career staff.

STATEMENT OF COMMISSIONER MICHAEL PERTSCHUK* DISSENTING
FROM THE ISSUANCE OF COMPLAINTS AGAINST THE CITIES OF
MINNEAPOLIS AND NEW ORLEANS

I dissent from the Commission's decision to issue complaints against the cities of Minneapolis [105 F.T.C. 304] and New Orleans charging each city with an illegal combination or conspiracy in violation of the Sherman and FTC Acts. The complaints allege that each city conspired with taxicab owners and drivers to restrain trade in the provision of taxicab services through the enactment of municipal regulations that establish fixed taxi fares and create barriers to entry into the market.

For the Commission to succeed under the theories alleged in these complaints, it must first prove that the challenged regulations were the result of an illegal combination or conspiracy rather than lawful actions taken by the cities in the interest of their citizens. I am troubled by the idea that a city's adoption of taxi regulations after consultation with the industry—when consultation is a necessary element of responsible government—transforms the city's regulations into an illegal conspiracy.

Second, when the federal antitrust laws come in apparent conflict with regulations enacted by a governmental entity such as a municipality, the Commission must be especially confident that federal intervention is warranted. Here it is at the very least unclear whether the economic theory of these complaints fits the facts as we know them. Studies commissioned by the Department of Transportation

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and others of cities where taxi service was deregulated do not demonstrate that the public benefited. Fares often rose and there is considerable doubt whether service improved. Finally, Congress is currently considering legislation which would exempt most municipal regulations from antitrust scrutiny. I note that the Assistant Attorney General in charge of the Antitrust Division has recently testified in support of that legislation. While the Commission need not consider pending legislation when deciding whether to act, the unpredictable effects of the Commission's action on the taxi market and the legitimate regulatory interests of the cities counsel restraint in these cases.

ORDER

Complaint counsel have moved for withdrawal of the complaint in this matter, on the ground that state legislation enacted after the complaint was issued makes effective relief impossible. The Administrative Law Judge has certified that motion to the Commission. The complaint alleges that the City of New Orleans has combined, contracted or agreed with taxicab companies in a number of respects relating to fare increases, fare uniformity, limitations on the number of certificates of public necessity and convenience issued, and barriers to entry, in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45.

After the complaint was issued, the State of Louisiana enacted a statute that provides:

[T]he policy of this state is to require that municipalities . . . regulate [taxicabs] and not to subject municipalities or municipal officers to liability under federal antitrust laws.¹

The statute also specifically empowers cities to regulate entry and control fares for taxicabs.² After careful consideration, the Commission has determined that continuing this matter would not presently serve the public interest.³ We have therefore concluded that the complaint in this matter should be withdrawn. In taking this action, we express no opinion as to whether the liability of the City of New Orleans could have been established at trial, or whether an independent judicial proceeding might establish that federal statutes embodying the national policy of competition préempt the new Louisiana

¹ Act of June 6, 1984, NO. 518 (to be codified at LA. REV. STAT. ANN. Section 33:4792 A(e)).

² *Id.* Sections B(1), (2).

³ See *Community Communications Co. v. City of Boulder*, 455 U.S. 40, 55-56 (1982); *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980); *New Motor Vehicle Board of California v. Orrin W. Fox Co.*, 439 U.S. 96, 109 (1978); *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 410 (1978).

statute. We also express no opinion as to the merits of the complaint issued against the City of Minneapolis in Docket No. 9180.

Accordingly, *it is ordered*, that the complaint issued against the City of New Orleans in Docket No. 9179 be, and it hereby is, withdrawn.

IN THE MATTER OF

SOUTHWEST SUNSITES, INC., ET AL.

FINAL ORDER, OPINION, ETC. IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket 9134. Complaint, April 29, 1980—Final Order, Jan. 15, 1985

This order requires four companies and three individuals engaged in the advertising and sale of undeveloped land, among other things, to cease representing misleadingly or without proper substantiation that the purchase of any land is a sound financial investment; involves little or no monetary risk; and will benefit the purchaser economically as a result of profitable resale, mineral rights, exploration or extraction. The firms are prohibited from representing that any land is currently usable as a homesite, farm or ranch, unless that land can be used immediately for the represented purpose without any substantial improvement or development by the purchaser; and barred from misrepresenting the availability or cost of obtaining electric power, potable water, telephone service or sewage disposal. The order further requires that the firms prepare and furnish consumers with a fact sheet containing detailed information regarding the availability and cost of water, electric power, sewer disposal and telephone service, unless a federal property report accompanying sale transactions includes such information. The companies must also insert in advertisements, promotional material and sales presentations specified statements warning that investment in land is risky and prospective purchasers should consult a qualified professional before buying. Such warnings must also be included in contracts, as well as a clause giving purchasers seven days in which to cancel their transactions. Additionally, the firms are required to provide consumers with cancellation forms; honor all valid cancellation requests; and send prescribed notices to past purchasers advising them of the Commission's order; explaining the land's actual value and suitability for use, and outlining the alternative options available to these consumers. The order further requires that the companies provide their sales representatives with a copy of the order; institute a surveillance program designed to reveal those that fail to comply with the terms of the order; and maintain certain records for a specified period of time.

Appearances

For the Commission: *Gary D. Kennedy.*

For the respondent: *Glenn A. Mitchell and David U. Fierst, Stein, Mitchell & Mezines, Washington, D.C.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Southwest Sunsites, Inc., Green Valley Acres, Inc., and Green Valley Acres,

Inc. II, corporations; Sydney Gross and Edwin Kritzler, individually and as officers or former officers of said corporations; Porter Realty, Inc., a corporation; and Irvin Porter, individually and as an officer or former officer of said corporation, hereinafter sometimes collectively referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges with respect thereto as follows:

PARAGRAPH 1. Respondents Southwest Sunsites, Inc., Green Valley Acres, Inc., and Green Valley Acres, Inc. II, hereinafter sometimes referred to as "corporate subdivider respondents," are corporations organized, existing and doing business under and by virtue of the laws of the State of Texas, with their offices and principal places of business located at 16000 Ventura Boulevard, Encino, California.

Respondents Sydney Gross and Edwin Kritzler are officers or former officers of some or all of the corporate subdivider respondents. They formulate, direct and control, and for some time last past have formulated, directed and controlled, [2] the acts and practices of the corporate subdivider respondents, including the acts and practices hereinafter set forth. Their address is the same as that of the corporate subdivider respondents. Corporate subdivider respondents and respondents Gross and Kritzler are sometimes hereinafter referred to collectively as "subdivider respondents."

PAR. 2. Respondent Porter Realty, Inc., hereinafter sometimes referred to as "corporate broker respondent," is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Florida, with its office and principal place of business located at 717 Ponce de Leon Boulevard, Coral Gables, Florida.

Respondent Irvin Porter is an officer or former officer of the corporate broker respondent. He formulates, directs, and controls, and for some time last past has formulated, directed and controlled, the acts and practices of the corporate broker respondent, including the acts and practices hereinafter set forth. His address is the same as that of the corporate broker respondent. Corporate broker respondent and respondent Irvin Porter are sometimes hereinafter referred to collectively as "broker respondents."

PAR. 3. All respondents mentioned herein cooperate and act together in carrying out the acts and practices hereinafter set forth.

PAR. 4. Subdivider respondents are now, and for some times last past have been, engaged in the business of acquiring undeveloped land, subdividing said land into five acre, ten acre and forty acre lots and advertising, offering for sale and selling said lots to the public, directly and through the use of agents, brokers and others. Among the

properties offered for sale and sold are Sunsites Ranch Unit I and Sunsites Ranch Unit II of Southwest Sunsites, Green Valley Acres and Green Valley Acres II, all located in Culberson or Jeff Davis Counties, Texas. The acreage of these properties, hereinafter sometimes referred to as "the subdivisions," is approximately forty thousand (40,000) acres.

PAR. 5. Subdivider respondents sell lots in the subdivisions to purchasers by use of standard form contracts whereby the purchaser agrees to pay monthly installments over terms ranging up to ten years. According to the provisions of the contract, title to the lots is retained by the subdivider respondents until the final payment is made. The contract specifies that title is to pass to the purchaser within a reasonable time after the final payment is made. Purchasers pay interest to subdivider [3] respondents during the contract term on the unpaid balance owing on the contract.

PAR. 6. Broker respondents are now, and for some time last past have been, engaged in the business of selling lots in the subdivisions to the public through telephone solicitations and direct mailings. Broker respondents have sent and are now sending through the mail brochures, fact sheets, contracts and other sales literature to potential purchasers. Signed contracts and downpayments are sent directly by purchasers to the subdivider respondents for acceptance. Broker respondents are paid by subdivider respondents a predetermined fee or commission over the course of the contract.

PAR. 7. In the course and conduct of their aforesaid businesses, respondents now cause, and for some time past have caused, their advertisements, promotional materials, contracts and various business papers to be transmitted through the U.S. mail and other interstate instrumentalities from their various places of business to agents, representatives, employees, customers and prospective customers in various other States of the United States and in foreign countries. Subdivider respondents have maintained and operated places of business in the various States of the United States and both subdivider and broker respondents have made and are now making substantial sales to purchasers in various States of the United States and in foreign countries. Respondents maintain, and at all time mentioned herein have maintained, a substantial course of trade in undeveloped land in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended.

PAR. 8. In the further course and conduct of their aforesaid businesses, subdivider respondents disseminate and have disseminated commercials through television and radio broadcasts and, both prior and subsequent to sales, subdivider respondents and broker respondents disseminate and have disseminated promotional materia

through the U.S. mail and in person to members of the public, and make and have made oral sales presentations by means of telephone calls, in-home solicitations, on-site presentations and free dinner parties.

I

PAR. 9. By and through the means described in Paragraph Eight, respondents have represented and are representing, directly or by implication, that the lots which respondents are offering for sale are a good investment [4] at the price respondents are offering them for sale, and that there is little or no financial risk involved in the purchase of said lots at said prices.

PAR. 10. In truth and in fact, lots which respondents have offered and are offering for sale, at the prices respondents have offered and are offering them for sale, have not been and are not good investments involving little or no financial risk to purchasers. Therefore, the acts and practices alleged in Paragraph Nine are unfair or deceptive.

PAR. 11. In the further course and conduct of their aforesaid businesses, respondents have offered and are offering lots for sale to prospective purchasers who have beliefs, regarding the potential investment and lack of financial risk, contrary to material facts not disclosed. Such facts are that said lots, at the price respondents are offering them, are a risky investment in that, *inter alia*, the future value of the lots is uncertain and the purchaser probably will be unable to sell his lot, or his interest in the lot under the contract, at or above the purchase price. Such facts, if known by certain purchasers, would be likely to affect materially their consideration of whether to purchase a lot from respondents. The failure to disclose such facts clearly and conspicuously is an unfair or deceptive act or practice.

II

PAR. 12. In the further course and conduct of their aforesaid businesses, by and through the means described in Paragraph Eight, respondents have represented and are representing, directly or by implication, that the lots in the subdivisions are suitable for use by purchasers as homesites, farms and ranches.

PAR. 13. In truth and in fact, all or most of the lots in the subdivisions, in the size parcels in which they are sold, are not suitable for use by purchasers as homesites, farms or ranches because of, *inter alia*,

(a) the unavailability of, or high cost of obtaining, utilities, water, financing, equipment, improvements and other amenities;

(b) the failure of subdivider respondents to install promised improvements to the subdivisions; and [5]

(c) certain practices of subdivider respondents which substantially impair the ability of purchasers to live on or use their lots.

Therefore, the acts and practices alleged in Paragraph Twelve are unfair or deceptive.

PAR. 14. In the further course and conduct of their aforesaid businesses, respondents have offered and are offering lots for sale to prospective purchasers who have beliefs, regarding the suitability for use of said lots as a homesite, farm or ranch, contrary to material facts not disclosed. Such facts, if known by certain purchasers, would be likely to affect materially their consideration of whether to purchase a lot from respondents. The failure to disclose such facts clearly and conspicuously is an unfair or deceptive act or practice.

III

PAR. 15. In the further course and conduct of their aforesaid businesses, respondents have induced and are continuing to induce purchasers of lots in the subdivisions to make payments due on their contracts, as well as additional payments substantially in advance of their due dates as provided for in said contracts. Respondents induce such due payments and such advanced payments on subdivision lots which are of little or no value to purchasers as an investment, homesite, farm, or for any other reasonable use as described in Paragraphs Nine through Fourteen above. Such purchasers have made and are making such payments toward the purchase of lots in reliance upon the aforementioned oral and written unfair and deceptive statements, representations and practices, and pursuant to continuing efforts by respondents to induce further payments by means of collection letters, prepayment discount offers, and numerous representations, including deceptive representations, concerning or relating to the subdivisions. Pursuant to respondents' continuing inducements as set forth herein, respondents have received and are receiving substantial sums of money and have failed to offer to refund or refused to refund such money to purchasers.

PAR. 16. The use by respondents of the practices described in Paragraph Fifteen and their continued retention of the monies collected, as aforesaid, are unfair acts or practices.

PAR. 17. The use by respondents of the aforementioned false, misleading, unfair and deceptive statements, representations, acts and practices, directly or by implication, and the failure of respondents to

disclose [6] the aforementioned material facts, has had, and now has, the capacity and tendency to mislead members of the public into the erroneous and mistaken belief that said statements and representations were, and are, true and complete, and into the purchase of substantial quantities of respondents' lots by reason of said erroneous and mistaken belief.

PAR. 18. The acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and constituted, and now constitute, unfair or deceptive acts or practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act. The acts and practices of respondents, as herein alleged, are continuing and will continue in the absence of the relief herein requested.

INITIAL DECISION BY

THOMAS F. HOWDER, ADMINISTRATIVE LAW JUDGE

JULY 29, 1982

PRELIMINARY STATEMENT

The Commission's complaint in this matter was issued on April 29, 1980, alleging three counts of unfair or deceptive acts or practices in the sale to the public of undeveloped parcels of land in far West Texas. [2]

Three corporations and two individuals were named as "subdivider" respondents, *viz.*, Southwest Sunsites, Inc., Green Valley Acres, Inc., and Green Valley Acres, Inc. II, together with Messrs. Sidney Gross and Edwin Kritzler who were alleged to "direct and control" these corporations.

The complaint also named Mr. Irvin Porter and Porter Realty, Inc. as "broker" respondents. Prior to the hearings, the "broker" respondents and complaint counsel entered into a consent agreement, and the charges as to these respondents were not litigated.¹

Count I charged respondents with falsely representing the land to be a good investment at the offered price, having little or no financial risk (pars. 9-10). Secondly, it alleged that respondents failed to disclose certain material facts concerning the risky nature of investing in the land by purchasers holding contrary beliefs. The undisclosed facts were identified as "*inter alia*, the future value of the lots is uncertain and the purchaser probably will be unable to sell his lot or

¹ Accordingly, the use of the word "respondents" in this decision will normally refer only to the subdivider respondents.

his interest in the lot under the contract, at or above the purchase price" (par. 11).

Count II charged respondents with falsely representing the subdivided lots as suitable for use as homesites, farms and ranches. Factors listed as precluding such use were: (1) the unavailability or high cost of obtaining utilities, water, financing, equipment, improvements and other amenities; (2) the failure of respondents to install promised improvements; and (3) certain practices of respondents which substantially impair the ability of purchasers to live on or use their lots. Count II alleges further that respondents failed to "clearly and conspicuously" disclose material facts concerning their lots (pars. 12-14).

Count III charged respondents with unlawfully inducing purchasers to make payments on their lots, which allegedly "are of little or no value to purchasers as an investment, homesite, farm, or for any other reasonable use . . ." Such payments are alleged to be made in reliance upon the representations and practices previously described, and "pursuant to continuing efforts by respondents to induce further payments by means of collection letters, prepayment discount offers, and numerous representations, including deceptive representations, concerning [3] or relating to the subdivisions." Respondents were also charged with receiving substantial sums of money, and with failing to offer to refund or refusing to refund this money (par. 15).

The acts and practices of respondents, as set forth in the three counts of the complaint were alleged to violate Section 5 of the Federal Trade Commission Act (par. 18).

Respondents answered, admitting the nature of their business and certain corporate data, but essentially denying all charges.

Prehearing conferences were held in Washington, D.C. on July 7, 1980, August 8, 1980 and January 16, 1981. Adjudicative hearings commenced in Dallas, Texas on April 13, 1981 and continued from time to time in that city and in Van Horn, Texas and in Albuquerque, New Mexico until completion of the case-in-chief and the defense in November, 1981. A brief rebuttal hearing was held in Washington, D.C. in January, 1982.

The record was closed for the reception of evidence on February 9, 1982, following the various record-correction activities of the parties. Extensive proposed findings were submitted, the final submission occurring on March 26, 1982.

Any motions not previously specifically ruled upon, either directly or by the necessary effect of the conclusions in this decision, are hereby denied.

This proceeding is before me upon the complaint, answer, testimony and other evidence, and the proposed findings of fact and conclusions of law filed by counsel. The proposed findings of fact, conclusions

and arguments of the parties have been considered, and those findings not adopted either in the form proposed or in substance are rejected as not supported by the evidence or as involving immaterial issues not necessary for this decision.

Certain abbreviations, such as the following, are used in this decision:

- CX - Commission's exhibit.
- CPF - Complaint counsel's proposed finding.
- RX - Respondent's exhibit.
- RPF - Respondent's proposed finding.

The transcript of testimony is usually referred to with the last name of the witness and the page number or numbers upon which the testimony appears. [4]

Having heard and observed the witnesses, and after having reviewed the entire record in this proceeding, I make the following findings:

FINDINGS OF FACT

I. THE RESPONDENTS

1. Respondent Southwest Sunsites, Inc. ("SWS") is a corporation organized, existing and doing business under and by virtue of the laws of the State of Texas. Its office and principal place of business is located at 16000 Ventura Boulevard, Encino, California. (complaint par. 1; answer, par. 1).

2. SWS was incorporated on February 26, 1973 under the name Southwest Land Sites, Inc. The name was changed to SWS on November 5, 1973, by amendment to the articles of incorporation (CX 1B, D).

3. Respondents Green Valley Acres, Inc. ("GVA") and Green Valley Acres, Inc. II ("GVA II") are likewise Texas corporations, with their offices located at 16000 Ventura Boulevard, Encino, California. GVA was incorporated on March 11, 1976 and GVA II was incorporated on May 9, 1977 (complaint, par. 1; answer, par. 1; CX 14B; CX 23B).

4. The business engaged in by SWS, GVA and GVA II is that of acquiring undeveloped land, subdividing this into smaller parcels of 5, 10, 20 or 40 acres, and selling these lots to the public (complaint, par. 4; answer, par. 4; Gross 296-98).

5. Individual respondents Sydney Gross and Edwin Kritzler, of the same business address, are alleged to formulate, direct and control the activities of the above corporate respondent (complaint, par. 1; answer, par. 1).

above corporate respondents (Gross 302-03; CX 13L).² Mr. Gross, a real estate broker, financed the purchase of the subject properties by the corporate respondents (Gross 296, 307). [5]

7. Respondent Gross, d/b/a Sydney Gross Collection Agency, is the sales agent for SWS (Gross 296; Shonfield 1245). That entity shares the function of sales agent for GVA and GVA II with Blue Chip Realty, another Gross enterprise (Shonfield 1245).

8. Mr. Gross' primary duties for the corporate respondents are financial and policymaking (Gross 314-15). Respondent Edwin Kritzler, also a real estate broker, shares in policymaking responsibility, and in addition is generally responsible for the day-to-day operations of the three companies, reporting to Mr. Gross (Gross 314; Kritzler 462-68). Mr. Kritzler, a vice president of SWS, serves as the general manager for each of the three corporate respondents (Kritzler 467).

9. Together Mr. Gross and Mr. Kritzler selected the three properties purchased by the corporate respondents (Gross 312). They decided upon the resale prices to be charged, the promotional materials and TV commercials, as well as the contract forms (Gross 309-12).

10. Respondent Porter Realty, Inc. through agreement signed by its president, respondent Irvin Porter, was retained by SWS in June 1974 to sell its land (CX 37). In addition, Porter also sold land in GVA and GVA II (Kritzler 592-93). These arrangements ceased in March 1978 (Kritzler 637; Porter 2359; Elfont, 4167).

II. THE PROPERTIES

11. As noted, this case involves the sale of undeveloped land in three subdivisions, *viz.*, SWS, GVA and GVA II, which in the aggregate total approximately 40,000 acres. The location of these properties in Culberson and Jeff Davis Counties, Texas (complaint, par. 4; answer, par. 4).

12. I, the Administrative Law Judge, personally toured and observed these lands, accompanied by counsel, on July 1, 1981. During subsequent hearings held later in the year in Van Horn, Texas, I had a second opportunity to observe the general vicinity of the properties. From time to time this initial decision may reflect the result of observations. [6]

A. Southwest Sunsites

13. The Southwest Sunsites tract was acquired by respondent SWS in 1973.³ This land is located approximately 10 to 20 miles east of

² None of these family members is involved as a practical matter in the business activities of the corporation (Gross 303-04).

³ Technically, SWS was purchased by SWS, Inc., following a loan for this purpose to it by respondent SWS. The purchase price was \$1,000,000, which breaks down to a cost of \$20 to \$33.50 per acre (CX 3; CX 4).

town of Van Horn, Texas, itself located approximately 120 miles east, and somewhat to the south of El Paso. The property lies to the immediate north of Interstate Highway 10 (CX 86G-H; CX 87E-F).

14. By way of background, SWS originally contained about 20,000 acres (Bray 3770), generally being used as grazing land (Wolfe 4568). In 1968, it was sold by one, Hugh Wolfe, to Southwest Land Corp., which began to subdivide and sell the property (Wolfe 4551; Bray 3770). Approximately 2,000 acres of this property was sold in bulk to certain purchasers from Chicago (Wolfe 4552-53).⁴

15. In 1973 Southwest Land Corp. declared bankruptcy, and the property was repossessed by Mr. Wolfe. Subsequently, in December, 1973, the land was sold by Mr. Wolfe to respondents (Kritzler 474; Wolfe 4552; CX 3, 4A-C).⁵

16. SWS, consisting of 17,467 acres, is located entirely in Culberson County, in an area known as Wild Horse Valley, immediately north of Michigan Flats (Reed 2608, 2624; Compere 3227; RX 67 at 4).⁶ This valley lies generally between the [7] Sierra Diablo Mountains and the Diablo Plateau on the west, and the Apache Mountains on the east (RX 67 at 4, 33).⁷

17. SWS is subdivided into approximately 1,800 parcels of 5, 10, 20 and 40 acres.⁸ The larger lots are located in the eastern portion of SWS, where the property enters the foothills of the Apache Mountains, with its rougher topography.

18. Before its purchase by respondents, the western portion of SWS had been subdivided into 5 acre parcels by Southwest Land Corporation (Kritzler 4093). Subsequently, the eastern portion was platted by respondents under the name Sunsites Rancho (Lara 3883, 3885). (For purposes of this case, the name distinction does not appear to be significant, although the two properties used different contract documents and have different sized parcels.)

B. *Green Valley Acres and Green Valley Acres II*

19. Green Valley Acres was acquired by respondents in 1976.⁹ This

⁴ These 2,000 acres, located in the center of SWS, were never platted (Wolfe 4552; Lara 3884). In August, 1981, they were reacquired by Mr. Wolfe at a cost of \$100 an acre (Wolfe 4552-53).

⁵ Respondent Kritzler testified that Southwest Land Corporation is in no way affiliated with the respondent SWS (Kritzler 647). Mr. Wolfe testified that SWS in reality "took over" the contract he had with Southwest "through the bankruptcy court," with both parties honoring previous sales of parcels to the public (Wolfe

⁶ Wild Horse Valley is sometimes referred to as Wild Horse Flat or Flats (RX 67).

⁷ The Baylor and Beach Mountains also lie to the west of the SWS property, and the Wylie Mountains lie to the east (See, e.g., RX 67, figure 7).

⁸ Kritzler furnished the following "ballpark" breakdown: 650 5 acres; 500-700 10 acres; 100 20 acres; and 100 40 acres (Kritzler 481).

⁹ The purchaser of record in this instance was respondent Sydney Gross. Respondent Kritzler executed the contract as "attorney-in-fact." The purchase price was \$750,000, which breaks down to a cost of \$40.48 per acre (Compere 3271-72).

property is located from 18 to 25 miles south of Van Horn (Kritzler 488; CX 88; CX 89).

20. GVA, consisting of approximately 15,000 acres in Culberson and Jeff Davis Counties, is located in an area known as Lobo Valley (Kritzler 491; Reed 2608-09).¹⁰ This valley is bordered by the Chispa Mountains on the east and the Van Horn Mountains on the west. GVA is in the western portion of Lobo Valley, and the western border of the property extends into the foothills of the Van Horn Mountains (Reed 2608-09; Holtz 3036; RX 67, figure 11). [8]

21. Prior to its purchase by respondents, GVA was used for grazing and some farming activity (Gross 309). Subsequently the property was subdivided into approximately 1,200 parcels of 5, 10, 20 and 40 acres.¹¹

22. GVA II was acquired by respondents in 1977.¹² This property is located in close proximity to GVA, in Lobo Valley south of Van Horn (Kritzler 488).

23. GVA II consists of 9,611 acres (Compere 3273). As in the case of the other properties, this property was similarly subdivided by respondents, into approximately 900 parcels. Because of the roughness in the terrain in the southern portion of GVA II, surrounding Needle Peak (RX 37), the land there was subdivided into 40-acre parcels. According to Mr. Kritzler, the use of this land is intended to be for camping or hunting (Kritzler 4098-4100; Gilmore 3961).

III. RESPONDENTS' MARKETING PRACTICES

A. *The Houston And Dallas Offices*

24. Respondents opened sales offices in Houston in 1973, and in Dallas in 1975, to sell SWS land (Kritzler 475). Upon the acquisition of GVA in 1976, and GVA II in 1977, both sales offices were charged with selling these properties as well (Gross 375).¹³ [9]

25. Mr. Ted Rose was hired as a salesman by respondent Gross upon the opening of the Houston office (Rose 677-78).¹⁴ Mr. Rose remained in that capacity for a period of some months, following which he became operations manager (Rose 679). In 1975, he was sent to Dallas to open up and manage that office (Rose 679-81). Mr. Victor Novaez eventually succeeded Mr. Rose as manager of the Houston office (Kritzler 475-77; Novaez 858).¹⁵ Both office managers reported directly to respondent Kritzler, and Mr. Novaez testified that Mr. Kritzler

¹⁰ Lobo Valley is sometimes referred to as Lobo Flat (RX 67).

¹¹ Mr. Kritzler furnished the following approximations: 200 five-acres; 800 ten-acres; 100 twenty-acres; and 100 forty-acres (Kritzler 489).

¹² Green Valley Acres, Inc. was the "purchaser" of record in this instance, with execution by Mr. Kritzler. The purchase price was \$602,550, which breaks down to a cost of \$60.64 per acre (Compere 3272-73).

¹³ There is some testimony which indicates that, at least in the Dallas office, sales efforts were concentrated on GVA and GVA II, following their appearance on the market (Rose 684).

¹⁴ As it happened, Mr. Rose's father was a cousin of Mr. Gross's wife (Rose 677).

¹⁵ Mr. Novaez began as a salesman in the fall of 1976, and became operations manager in the spring of 1977, replacing a Mr. James Layne (Novaez 858-59).

kept a close watch over the Houston office, visiting it personally "probably every three weeks or so" (Novaez 863; *see* Rose 688 and Novaez 862).

26. Both the Houston and Dallas offices remained open and active until 1978 (Kritzler 475; Rose 679, 686; Novaez 858). While the number of salespersons tended to fluctuate, as many as eight or nine persons were engaged in sales activity during peak periods (Kritzler 476; Hammer 649; Rose 682; Novaez 884). The operations managers were authorized to hire, supervise and fire office personnel, while respondents Gross and Kritzler maintained control over sales policies and contractual terms (Kritzler 476-77, 584; Rose 688-89; Novaez 861).

27. Respondents' Houston and Dallas sales personnel did not operate under written contracts of employment (Gross 376-77; *see* Hammer 651; Novaez 859-60; Rose 694). Previous sales or real estate experience were not prerequisites for employment (Rose 696; Hammer 650-51).¹⁶ Compensation was solely by commission (Hammer 651-52; Rose 687).¹⁷ [10]

28. There were no organized formal training sessions for newly-hired sales personnel. Neither were there any training manuals (Kritzler 587; Hammer 652-53; Rose 697; *see* Novaez 864-65). Prior to being sent out alone, a newly hired salesman would be provided with sales materials, given instructions what to say, and accompanied by experienced salesmen on their visitations for a few days (Hammer 652-54).

29. It was the testimony of respondent Edwin Kritzler that, under company policy, salesman were basically limited in their presentations to the written words contained in the brochure (CX 87), the fact sheet (CX 79), and the contract (CX 74) (Kritzler 4107). All sales personnel who testified maintained that they did not deviate from this policy (Hammer 652, 657, 660; Rose 695, 698, 714-17; Novaez 861, 864).

30. In respondents' Houston and Dallas operations, leads were typically generated through media advertisements, on TV, radio or in the newspaper. Interested prospects responded to an answering service (Rose 689; Novaez 871).¹⁸ Subsequently, these callers were contacted by phone by employees of respondents (apparently women in the "phone room"), who undertook to answer preliminary questions. Arrangements would then be made for a personal visit by a salesman

¹⁶ Most of respondents' sales personnel were not licensed to sell real estate in Texas (Rose 696; Hammer 650-51, 654). It appears, however, that a salesman's license was not required in Texas during the relevant time period (Hammer 673; Rose 696). In any event, Mr. Kritzler testified that he had a Texas broker's license (Kritzler 589-90).

¹⁷ Total commission amounted to 10% of the selling price. This included 70%-75% of the downpayment, with the remainder being paid the salesmen as "residuals," so long as the purchaser continued payments on the contract (Novaez 860).

(Rose 690; Novaez 873-74).¹⁹

31. If the salesman was successful in his efforts, a purchase agreement would be executed (CXs 74-78). While, as noted, the salesman was not authorized to alter the purchase prices set by Messrs. Gross and Kritzler, he was permitted a certain leeway in negotiating the down payment (Rose Tr. 689). All purchase agreements declare themselves not to be binding contracts prior to acceptance by respondents' home office (CXs 74A, 75A, 76A, 77A, 78A).²⁰ [11]

32. Both the Houston and Dallas offices became inactive in 1978, although mailing addresses were still maintained in those cities at the time of trial (Kritzler 475-77; R. Ad. 354, 355). Mr. Novaez, in Houston, attributed the diminished market to "saturation", but testified that he still answers a telephone for Green Valley (Novaez 884, 888).

B. Respondents' Home Sales

33. In or about the latter part of 1978, respondents commenced selling parcels from their home office in Encino, California (Gross 375-76). Two salesmen were used for this purpose, Mr. Brody and Mr. Frank, neither of whom were called as witnesses (Kritzler 565-66). These salesmen did not solicit new customers, but merely contacted previous purchasers for the purpose of selling them additional land (Kritzler 565).

34. According to Mr. Kritzler (Kritzler 566):

They would call the customers that were on the books, tell them of recent events in reference to the property; and if there was a parcel of land that was next to theirs and they appeared interested, to sell them that piece of land.²¹

C. On-Site Sales

35. According to Mr. Kritzler, respondents do not have an on-site sales program, as such (Kritzler 474). However, since approximately 1975, respondents have employed an on-site representative whose duties have included selling land when the occasion called for it (Kritzler 471-72). Mr. W.D. Smith was respondents' representative until 1978, when he was replaced with Mr. Gilmore (Gilmore 983). [12]

36. Mr. Smith testified that he sold "some" (Smith 941) and "very little land" (Smith 917), although he was authorized to sell all three properties at the standard 10% commission (Smith 913).

36a. Mr. Gilmore, who described himself as an "on-site salesman,"

¹⁹ Salesmen were assigned by Mr. Rose on a rotational basis (Hammer 655-56).

²⁰ CXs 74 and 75, pertaining to SWS are entitled "Purchase Agreement." The forms pertaining to both Green Valley properties are entitled "Agreement for Deed and Purchase of Real Estate."

²¹ Mr. Brody apparently passed on information concerning a newly-built cotton gin, and concerning a rubber producing "Guayule" plant (Kritzler 567-74). If Mr. Brody was unable to make telephone contact, the customer would be sent a "special memo" requesting a collect call to Mr. Brody (CX 115).

had previously worked as a salesman for Southwest Land Corporation (Gilmore 983-84). He testified that since the inception of his employment with respondents in November, 1978, he had only sold about eight pieces of the three properties (Gilmore 984-85). He also stated that no on-site sales had been made for about one year prior to his appearance as a witness in April 1981.

D. Sales Through Brokers

37. In addition to their own efforts, respondents have engaged the services of independent real estate brokers to sell their properties. Respondents provided these brokers with brochures, fact sheets and contract forms (Gross 383-84). The purchase prices for the properties and the terms and conditions of sale were established by respondents (Kritzler 591-96).²² Brokers had no authority to alter these terms, and respondents retained the right to approve or disapprove all sales (Kritzler 593).

38. Following the formation of SWS, Inc., a broker named Mr. O'Brien was hired in Boston, Massachusetts (Kritzler 470). Mr. O'Brien performed in this capacity for approximately nine months or a year (Kritzler 470).

39. For a brief time respondents also employed broker services in El Paso, Texas in the mid-1970's (Kritzler 470).

40. But it is the events which occurred by virtue of respondents' arrangements with Porter Realty of Coral Gables, Florida, which form the focus of the broker-sales aspect of this case. [13]

41. As heretofore noted, the listed respondents in the caption of this case include the names of Porter Realty, Inc., and its president Irvin W. Porter (*supra*, p. 2). Because of the execution of a consent agreement the charges against them were not litigated in this proceeding.

1. Sales Through Porter Realty

42. Respondents dealings through Porter Realty commenced in June, 1974 and lasted until April of 1978 (CX 37A; Kritzler 4117; Porter 2262, 2336).

43. Porter Realty was incorporated in Florida in 1972 (CX 33). Its principal base of operations was in Coral Gables, near Miami (Kritzler 585).²³ During the time of its association with respondents, it sold only respondents' properties (Porter 2263).

44. Porter Realty used both in-house personnel and outside sub-

²² See CX 37A, para. 2. This agreement between respondents and Porter Realty with regard to SWS sales is the only such written agreement in evidence. Apparently agreements with Porter to sell other properties of respondents', as well as respondents' agreement with other brokers, were made orally (Kritzler 592-93).

²³ Prior to its arrangements with respondents, Porter Realty (and especially Mr. Irvin W. Porter) had been involved in selling other properties (Porter 2238-39, 2241-45). At least one of these properties was located in the vicinity of Sanderson, Texas, which according to the map is located in the southwestern part of the state (Porter

brokers to sell respondents' properties.²⁴ Unlike respondents' own local operations in Houston and Dallas, Porter did not employ media advertising (Porter 2325). All, or virtually all, of its selling was done by telephone (Porter 2325).

45. To obtain leads, customer lists would be purchased from any one of the numerous land sales companies which had such lists available (Porter 2325). The lists consisted of the names of previous purchasers of land. These prospects would then be [14] contacted by telephone (Porter 2325).²⁵ In this manner sales were made throughout the United States (Porter 2325).²⁶

46. The record shows that Porter Realty was very successful in selling respondents' properties. In fact, the company outsold all other sellers, even respondents' sales force which ranked number two in such sales (Kritzler 591). It was Mr. Kritzler's testimony that Porter accounted for approximately 55% to 60% of all sales, and up to 70% in 1977 (Kritzler 591, 4117).

47. According to more specific information in the record, even these figures may be on the low side. Mr. Kritzler's estimate of the number of present purchasers of respondents' three properties totals 2,600 (Kritzler 481, 490, 492 (SWS-1400; GVA-650; GVA II-550)). The number of purchasers reported by Mr. Porter totals 2150 (CX 38B). If these figures are accurate, and my calculations correct, the resultant overall percentages of Porter sales of respondents' properties would be over 80%.

48. As noted, respondents terminated their business relationship with Porter Realty in April, 1978. Respondent Sydney Gross described this action as "mutual," and indicated that sales had been tapering off (Gross 381-82). According to Mr. Porter, "it was sort of a 50/50 affair", with respondents desiring "to get out of the phone business" (Porter 2336). Mr. Porter further testified that respondents Gross and Kritzler felt that "there might be too much being relied on about oil or whatever" (Porter 2359).

49. In the view of Mr. Kritzler, the reason for the termination was the steadily increasing instances of representations by Porter sales personnel concerning oil exploration activity on respondents' GVA and GVA II properties (Kritzler 596-97, 4126). While earlier complaints about Porter representations had involved whether purchasers would be able to resell their properties at a profit, "toward the end of 1977 and the beginning of 1978 the oil situation did arise" [15]

²⁴ Mr. Porter testified that the greatest number of persons employed at any one time to sell the properties were approximately 12 in-house and 5 or 6 sub-brokers (Porter 2255).

²⁵ The lists purchased by Porter Realty would be given only to in-house personnel. It was left up to the sub-brokers to obtain their own leads. For this reason, and for using their own telephones and facilities, sub-brokers were entitled to a higher commission on sales (Porter 2326, 2251-52; CXs 437-42).

²⁶ Calls were not placed to every state, however. Mr. Porter explained that there were a "handful" of states where such method of solicitation was not permitted (Porter 2325).

Kritzler 598). According to Mr. Kritzler, the percentage of Porter sales involving oil representations rose during that time from 10% to perhaps 60% (Kritzler 598).

50. Of particular objection to Mr. Kritzler was the use by Porter salesmen of an "oil map" (CX 129A-C). While Mr. Porter testified that Mr. Kritzler was aware of its use by Porter Realty, Mr. Kritzler testified that he did not become aware of this use until "the late fall of 1977," and that respondents had not previously authorized its use (Porter 2314; Kritzler 4124-25). Mr. Kritzler stated that he "[c]alled Porter immediately and told him not to use the map, that it was outside of his jurisdiction to do that" (Kritzler 4125). When in early 1978, Mr. Kritzler learned of its continued use, he testified that he again "told him to absolutely discontinue using the map" (Kritzler 4126). When the use of the map continued, and further instances of oil representations occurred, respondents, according to Mr. Kritzler, terminated the association with Porter Realty (Kritzler 4126).

2. Sales Through Diversified Realty

51. Respondents also employed the services of another Miami area broker, Diversified Realty Investment Corporation (Gross 377-78).²⁷ Diversified was not listed as a respondent in this case, and its principal officer, Mr. Louis Beck was not called as a witness (Gross 391-92; Kritzler 609).

52. Diversified accounted for the third largest total sales of respondents' properties, following Porter Realty and respondents' own sales force (Kritzler 591).

53. As in the case of Porter Realty, respondent Kritzler became aware of problems arising from Diversified's sales representations (Kritzler 609). Generally speaking, their problems were of the same nature as those associated with Porter, *viz.*, quick-profit-resale and oil (Kritzler 610). In approximately early 1978, Mr. Kritzler came to learn that Diversified too was using an oil map (Kritzler 610-12). [16]

54. As Mr. Kritzler put it: "In the beginning they [number of oil complaints] were smaller and then they grew to a proportion which caused us to dismiss them as a broker" (Kritzler 610).

55. CX 221 is a letter dated February 24, 1978, from Mr. Gross to Mr. Beck terminating their relationship in view of Mr. Beck's "recent difficulties with the Federal Grand Jury, regarding your association with another land company." Mr. Gross testified that this was a reason for termination, and that a possible additional reason might have been "one or two" complaints regarding Diversified which Mr. Kritzler handled (Gross 391).

²⁷ Diversified's employment with respondents probably commenced in the year 1976, when GVA came on the market (Gross 381). That company apparently sold GVA and GVA II property, not SWS (Gross 378).

3. Sales In South Pacific

56. A broker named Mr. Holgin was engaged by respondents in 1978 to sell GVA II property in the South Pacific (Kritzler 586, 612; Gross 382). This relationship was apparently ended in 1980 (Kritzler 586-87). Mr. Holgin's activities included sales to citizens of Tuvalu, a small island nation in the South Pacific (Gross 390). Mr. Kritzler testified that subsequently a group of Tuvalu purchasers visited their Texas properties, accompanying a Mr. Lauti, the Prime Minister, who apparently was himself a purchaser (Kritzler 621, 4145-47).

IV. COUNT I

57. As earlier noted, Count I of the complaint charged respondents with falsely representing the SWS, GVA and GVA II properties as being a good investment at the offered price, with little or no financial risk involved.

A. *The Representations Concerning Investment And Financial Risk*

1. TV and Radio Advertising

58. As previously found (Finding 30), respondents employed TV and radio advertising in their Houston and Dallas operations. TV advertising was also done at various times in [17] Boston, Atlanta and Midland, Texas (R. Adm. 4, 5, 6, 7, 11, 21).²⁸

59. CXs 42 through 71 were admittedly utilized by respondents as scripts for the preparation of TV and radio advertising for SWS, GVA and GVA II (R. Adm. 17). The two commercials whose script appears on CX 72B were aired on KHTV in Houston in April-June 1978, approximately 80 and 110 times, respectively (R. Adm. 13, 14, 15, 16). CX 395 is a TV commercial script also aired in Houston, in 1977 (Kritzler 579-81).

60. I have examined these materials and can find no reference in them, with one or two possible exceptions, to investment or accompanying financial risk. While the point is emphasized that the offered price is affordable, the messages are all oriented toward the uses which may be made of the land by purchasers, not resale profitability. Over and over again the theme is repeated: *viz.*, fertile valley; sunshine; clean air; quiet environment; mountain scenery; abundant water; farming; ranching; hunting; camping; retirement; satisfaction in owning land. While "combating inflation" is prominent in several of the scripts, it appears nearly, if not always, to be in the context of using the property to produce one's food, thereby reducing expenses (See CXs 51, 52, 58, 59, 60).

²⁸ The abbreviation "R. Adm." used in this portion of the initial decision refers to respondents' responses to complaint counsel's requests for admissions. These responses are dated October 14 and December 11, 1980.

61. On the other hand, CX 43, in offering inflation protection advice, contains the statement "Land is always your best buy." This representation is set forth in a context which includes references to an individual's independence, the fertility of the land, and the availability of water.

62. Only one of the scripts mentions the word "investment," CX 58 (it was crossed out in CX 43, above, and the word "buy" substituted). It refers to "five acres of fertile farm and investment property." This is represented as "the answer to inflation and the drugery of city life." The script goes on to state (CX 58):

Your five-acre site is awaiting you near the pleasant West Texas [18] community of Van Horn . . . where the soil is fertile and water plentiful. This fertile land will grow fruits, vegetables, meat and poultry . . . for your *own* table as well as sale to others. So stop worrying about inflation and the hectic city life. Think about it! Your own five acres of fertile land. . . .

Another script speaks of "just holding [the land] for the future," as an alternative to using the property for hunting and farming (CX 67). This material features a "celebrity", James Drury, the Virginian. Mr. Drury or his name also appear in other scripts, which often contain references to the hunting available on or in the vicinity of respondents properties (CXs 61-68, 72).²⁹

2. The Brochures, Fact Sheets And Contracts

63. According to respondents, their sales policy from the beginning was to furnish prospective purchasers only such information as was contained in the brochure (CX 87), fact sheet (CX 79) and the contract (CX 74; Kritzler 4097, 4107). Respondents sales representatives testified to like effect (Rose 695, 698, 714-15; Hammer 652, 657, 660; Novaez 861).

64. In examining these documents, it does not appear that either the various fact sheets (CXs 79-85) or the contracts (CXs 74-78) contain any reference to or representation concerning investment or risk.

65. On the other hand, there are certain references to "investment" in the brochures (CXs 86-89).

66. CX 86A-N was the brochure used by Southwest Land Corporation prior to its going out of business in 1973 (*see* Findings 14, 15, *supra*; Kritzler 644). When sales of SWS [19] began, respondents continued to utilize the brochure for a period of perhaps 60 to 90 days (Kritzler 644). During this interim period respondents assertedly pre-

²⁹ Other individuals featured in the scripts are a Dewey Compton, described as a "prominent" and "respected" agronomist (Kritzler 4096; CXs 44-52, 58-60); a Murray Cox (CXs 42, 53-55); a Harold Gunn (CXs 56-57, 72); and

pared their own brochure, CX 87A-L, which thereupon replaced CX 86A-N (Kritzler 645).

67. On CX 86B, the following statement appears:

This is Van Horn, Texas. Home of Southwest Sunsites. The new prime investment spot in the Southwest.

68. On the replacement document, CX 87B, the second sentence of that language was revised to read: "The prime land spot in the Southwest."

69. Also on the same page of the old brochure, CX 86B, is the statement "Its the ideal spot for investors." This language remained unchanged in the new brochure (CX 87B).

70. On CX 86E, the old brochure, appears the statement "For the investor, Van Horn offers potential as rich as the land itself." The same statement is in the later SWS brochure (CX 87D).

71. On CX 86I, in answer to the question "What can you do with your five-acre sunsite?", it is stated:

The land uses are almost limitless. Obviously, a five-acre or larger tract offers you infinitely more possibilities both as an investor, or a prospective resident, than the smaller lots generally offered by developers. The value of acreage in the Southwest is leaping every year. Last year alone, this land increased in value by over 20%. Its future growth potential is even greater.

72. This language was revised in the new brochure, CX 87J, to read:

The land uses are almost limitless. Obviously, a five-acre or larger tract offers you infinitely more possibilities both as an investor, or a prospective [20] resident, than the smaller lots generally offered by developers. The value of acreage in the Southwest is leaping every year. Its future growth potential is unlimited.

Mr. Kritzler testified that the changes—the deletion of reference to a 20% increase in value, and of the statement concerning even greater future growth potential—were made because "we were not selling an appreciation of the land. We were selling use" (Kritzler 4103).

73. As for CXs 88 and 89, the brochures prepared for GVA and GVA II, which originated in 1976 and 1977, respectively, further changes were made (Kritzler 4103-06). There is no reference in these brochures to "investment" or "investor." According to Mr. Kritzler, these steps were taken because of the questioning by various regulatory agencies, state and federal, of the use of such terminology in connection with the sale of land (Kritzler 4105).

74. Apart from the foregoing, each of the brochures (CXs 86N, 87L, 88K, 89L) contains quotations of historical American figures concerning the monetary benefits which derive from land ownership general-

ly. Respondents' proposed findings describe these quotations as "aphorisms" (RPF 40), and Mr. Kritzler belittled reliance upon them as a basis for purchasing respondents' properties (Kritzler 4144).

3. Other Sales Aids

75. Both respondents' own salesmen, as well as its hired brokers, sometimes employed various pictures and articles in connection with their sales presentations to prospective purchasers.

76. I have examined these materials and can find little or no probative evidence that the land was represented as a good investment carrying little or no risk.

77. According to former salesman Hammer, CX 170B-Z20 is a "picture book" which was used by respondents' salesmen in home visitations. It contains "various and sundry pictures and articles relating to the area and to the property itself" (Hammer 662). The purpose of the "picture book" was, according to Mr. Hammer (Hammer 663): [21]

Here, again, to help—for those that may be unfamiliar with the area, as to what they could expect when they got there. It was to how the land would look to them. It was raw land and some people just—you can't explain well enough for them to comprehend what raw land is. So we hoped that with these pictures we could make it a little clearer to them, what they could expect to find.

78. Apart from the pictures, there are a number of articles and statements in the book generally extolling the land (CX 1706V, X and Z-6, 17, 18, 20).

79. As earlier described, it was respondents' practice, following sales of property, to keep purchasers informed of newsworthy items generally affecting their purchase, or of specific interest in the Van Horn area (Gross 353-54). I have examined these materials, and cannot conclude from them that purchasers were thereby informed that they had made a risk-free investment.

80. These communications, often in the form of newsletters, include the following: CXs 90, 91, 92, 93, 94, 95, 96, 98, 99, 100, 102, 103, 109, 110, 111, 112, 113, 116, 117, 119, 120A-B, 127, 128, 131, 187, 170T, 237, 239, 242 and 491.

4. Representations To Purchasers

81. The former members of respondents' sales force who appeared in this proceeding uniformly testified that they had adhered to the policy of limiting the dissemination of material information to the documents furnished them by respondents for that purpose (Hammer 657, 660; Rose 698, 713-19; Novaez 866-71). Mr. Novaez, respondents' former Houston manager, testified that he never responded to a customer's question about investment, and would tell him to go to the

property personally and investigate, before answering the question for himself (Novaez 878-79). Mr. Smith, the on-site manager, testified that he "never told anybody they was going to get rich or be able to sell it for a profit" (Smith 940).

82. The testimony of complaint counsel's consumer witnesses does not reflect a pattern, at least on the part of respondents' employee sales force of good, risk-free investment representations (Baldrige 834; Buck 1498-1577; Sowell 2501-19). [22]

83. We turn now to analyzing more specifically the testimony of purchasers contained in this record.

84. There is nothing in the testimony of *Norma Baldrige* which goes to Count I of the complaint (Baldrige 804-36; *See especially* 833-34).

85. In her testimony, *Paula Bear* indicated that respondents' salesman represented the property as a good investment because of oil considerations and Texas A&M projects (Bear 1117-18). According to Mrs. Bear, she was informed that within 2 or 3 years the land would triple in value (Bear 1118). She later amended this testimony to "double or triple" (Bear 1168). However, an examination of her testimony reveals that it was so contradictory and her memory so faulty that it cannot be credited. The salesman's visit occurred in 1973, nearly 8 years prior to her appearance as a witness (Bear 1116). She admittedly was present for only about half of the sales presentation, and she admitted not knowing what the salesman said to her husband in her absence or what documents were furnished (Bear 1120, 1150). She agreed with respondents' counsel that she really didn't pay much attention to the transaction at the time (Bear 1161). Many other particulars can be recited, but it is quite apparent that Paula Bear's testimony is not reliable and probative enough upon which to base an accurate finding of fact.

86. Witness *Clement Switaj* testified that he was informed by a Porter Realty representative that he could profit from reselling his land, and that this could be done in a short period of time (Switaj 1276, 1279-80, 87). However, on cross-examination it was brought out that this witness understood that in making this investment he was incurring a risk, and that he nevertheless invested despite such risk (Switaj 1332-32).

87. Witness *Richard Morley* was allegedly informed by a Porter representative that the property was a short-term investment involving a 2 or 3 year period (Morley 1340-42). He testified that he believed he would make a "little money" based upon a possible resale of his land to Texaco, or if this fell through, make some money from "a little farming" during his retirement (Morley 1341, 1350-51). The witness, however, revealed himself to be aware that the Porter salesman's

alleged "deal" with Texaco could fall through, and that negotiations to buy or sell land do not necessarily work out (Morley 1379, 1382-84). He also realized there was an uncertainty as to resale prices (Morley 1383).

88. Witness *James Limpp* testified that he purchased GVA property from Diversified Realty on the primary representations [23] that oil might be found on the property and that Diversified would attempt to resell his land for him (Limpp 1391, 1394-95). Mr. Limpp expressed an interest only in a short term investment (Limpp 1399-1400, 1402). On cross examination the witness admitted that he knew there was risk in exploring for oil and further admitted that he knew there could be no guarantee as to any resale of his property by Diversified (Limpp 1422, 1433).

89. Witness *Daniel Grygleski* testified that his purchases of respondents' property were designed to be short term investments only, with quick resale (Grygleski 1446, 1453, 1456, 1474). It is clear from the record that he knew there was financial risk involved. He described his purchase as "a shot in the dark" and "gambling" (Grygleski 1473, 1488). On cross examination he acknowledged there was uncertainty with respect to resale of the land, and the price at which this could be done (Grygleski 1477-78).

90. Witness *Catherine Buck* testified she did not purchase her property as an investment but as a place to live (Buck 1502). The only reference to investment in her testimony concerns statements regarding the purchase of property for her 19-year old son. Allegedly he was told by respondents' salesman that purchasing property from respondents would be a "very good investment," in that "in a few years, double its value" (Buck 1503). On cross examination the witness agreed with counsel's characterization that if the land were held long enough he "might be able to resell it in the future for a profit" (Buck 1563). The witness further asserted that there was no certainty in her mind as to when the property could be resold (Buck 1564).

91. Witness *Pasquale Allienello* testified that he purchased respondents' property not to live there but solely as an investment with an eye to making a profit (Allienello 1624, 1626). Based upon what the salesman told him he thought that the property was a "good investment" (Allienello 1627). It is not entirely clear whether or not Mr. Allienello believed his purchase to be without financial risk inasmuch as his testimony is couched in terms of "profitability," "possibilities," and "potential" (Allienello 1624, 1651).

92. The testimony of witness *John Davis* cannot be credited because of the haziness of, or the total lack of recollection of, his memory. This point is amply illustrated in the record (see 1674, 1680-81, 1696-97, 1701 1710-13).

93. Witness *Ronald Goldstein*, who was contracted by a representative of Diversified Realty by phone, testified that the property was represented to him as a "fine" or "very fine" [24] investment, in view of oil and gas exploration in the area and of the land's potential for farming (Goldstein 1719, 1720-22, 1760-62). The witness recognized, however, that there are risks involved in purchasing land, with associated uncertainty as to when the land could be resold and at what price (Goldstein 1958, 1976-77).

94. Witness *John Lambert* testified that he purchased a parcel of respondents' property at the age of 19 upon the representation to him by respondents' sales representative Mr. Novaez, that it would be a good investment with the price sure to rise in the immediate future and that the property could be resold (Lambert 1284-88, 1297). Some months following this sale the witness received a phone call from "California" and he was solicited to purchase more property upon the representation that the price of the land was going up (Lambert 1288).

95. Witness *Steven Lueckel* testified that he was contacted by a Porter Realty representative concerning undeveloped investment property with quick turnover profit potential (Lueckel 1823). He was informed about proposed legislation concerning a product known as guayule from which rubber could be produced and which could be grown in certain areas of the southwest. Mr. Lueckel was allegedly told that rubber companies would repurchase the lands in the development, and that upon this occurrence the witness could expect to double his money or make higher profits in a matter of a few months (Lueckel 1823-25, 1827, 1829, 1831-32, 1834, 1868-69). On cross examination the witness agreed that he was not given any guarantees that these events would come about and that in fact he knew there were no guarantees (Lueckel 1865-66).

96. Witness *Ronald Robinson* testified that he purchased his parcel of land as an investment primarily, but secondly for the possible retirement of his father (Robinson 1915, 1933-34). Concerning investment potential, he testified that respondents' salesman stated (Robinson 1914):

Well, he said that it wasn't something that would just be, you know, jumping up in price, you know, quickly over the next year or maybe two years. But over the next three, four, five years, within that period of time it would be worth more than—much more than what it is—than what I was buying it for.

The witness did not assert that he believed his investment would be risk free, but did testify that he believed the salesman's [25] representations (Robinson 1934). Mr. Robinson did agree, however, in connection with certain property he owned in Alaska, that there was no

certainty as to when he would be able to sell that land or for what price (Robinson 1927).

97. The witness *John Sweets* testified he was told by Porter Realty salesman that purchasing respondents' properties would be a good short term investment with a quick turnover at a good profit (Sweets 1948-53). The witness, aged 72 and retired, testified that this is what interested him in making his purchasing decisions, and that he was also impressed by the exploration for oil in the area (Sweets 1946-47, 1959). On cross examination however, he gave the following candid testimony (Sweets 1972-75):

Q. And you know that there is no such thing as a sure thing; correct?

A. That's right.

* * * * *

Q. You still know it now; and you knew it [that there is no such thing as a sure thing] when you bought your first land in Texas, didn't you?

A. That's right.

Q. You knew it when you bought your second land in Texas, right?

A. That's right.

Q. No way of knowing how long it'll take before you earn [any] profit, and no way of knowing even if you will turn a profit; correct?

A. Absolutely not.

Q. And there's no way of knowing how much of a profit you will make if you make a profit; correct?

A. If you are talking in absolute terms, I suppose that would be correct. [26]

* * * * *

Q. You've known all along that there's no such thing as certainty on these purchases?

A. That's evident.

Q. In fact, when you made your first purchase in Texas, your attitude going into it was you'd buy it, hold it for two years and see what happens. Either you'd make a profit or you'd cut your losses; isn't that correct?

A. Right.

Q. And if you didn't make a profit, you would just default on your land and give up [on it]—this would be one investment that didn't work out?

A. That's right.

Q. And that's the attitude you went into it with, wasn't it?

A. That's right.

Q. And you had the same attitude with your second Florida—your second Texas purchase; is that right?

A. Right.

98. The witness Sweets described his experiences in purchasing respondents properties as a "gamble" (Sweets 1977).

99. Witness *Ernest Smith* testified that he purchased respondents' property solely on an investment basis, interested only in resale profit. According to the witness, he was told by the Porter representative that she would resell the 10-acre parcel within two years at a good profit (Smith 2064-65 2070). In fact, because of the witness' insist-

ence, in two years Porter Realty did resell five acres of Mr. Smith's purchase for a [27] substantial profit.³⁰ Upon the default of this purchaser, respondent Mr. Kritzler accorded Mr. Smith a full refund (Smith 2094; RX 8B). It is difficult to assess the import of this witness' testimony inasmuch as his purchase of respondents' property was expressly only in a "hope" of realizing a profit (Smith 2066) and because of the fact that he was an experienced purchaser of undeveloped land for investment purposes, and a person who had declined to purchase on numerous occasions (Smith 2101-02).

100. Witness *Howard Schlachter* testified that he purchased his property for investment purposes based upon representations of the Diversified Realty salesman that within two years the property could be resold at a profit (Schlachter 2111, 2114, 2117). Initially he testified that he could not recall any specific representations concerning specific dollar amounts of profit. He subsequently placed this figure as doubling the amount of his investment. Although the witness asserted at one point that his memory was "perfect" (Schlachter 2128), the record shows many instances of deficient recollection (Schlachter 2111-12, 2115, 2118, 2122, 2124, 2130-31, 2136-37). In any event, on cross examination the witness conceded that there is financial risk associated with any investment, including his purchase from respondents (Schlachter 2135a-b, 2138-39).

101. The testimony of witness *Otis Rawlins* does not support the allegations of Count I of the complaint. Mr. Rawlins, a professional real estate man for approximately 42 years (Rawlins 2146), purchased his property in Texas for use as a possible future homesite as well as for potential resale (Rawlins 2149-50, 2165). Indeed, the record shows that the property was subsequently resold by Porter Realty to a third party for nearly twice what Mr. Rawlins originally paid for it (Rawlins 2166). On cross examination Mr. Rawlins made clear his belief that resale at a profit had not been guaranteed by Porter, and that the discovery of oil on the property was not a certainty (Rawlins 2181-82).

102. Witness *Donald Stein* testified that he purchased his parcel on the representation of Porter Realty that this was a good short-term investment and that the property could be resold at double the money invested (Stein 2202-05, 2221-22). The [28] witness testified that he relied upon these representations on making his purchase. On cross-examination, he acknowledged that all short-term investments do not work out (Stein 2118-21).

103. The witness *Dr. Robert Danskin* testified that he made two purchases of respondents' property upon representations by Porter

³⁰ Mr. Smith purchased 10 acres of SWS in 1976 for \$6,990. In 1978, five acres of this was sold for somewhat in excess of \$6,000 (Smith 2098).

Realty that the land was a good buy and that the Van Horn area would grow and develop commercially in a number of respects (Danskin 2421-22, 2126, 2129, 2459). The witness stated that he purchased this land for capital appreciation and resale (Danskin 2426). The record shows that the witness, a dentist, is an experienced investor with holdings in an orange grove, rental property, stocks, bonds, gems, gold, antique firearms, farmland, oil and gas drilling and vacant land (Danskin 2444-46). The witness recognized in his testimony that he did not know of any investment that is perfect; that there is always some risk in an investment, and that he recognized when he purchased the properties in issue that there was risk involved (Danskin 2477).

104. The witness *John Swanson* testified that he purchased respondents' properties upon Porter Realty representations that it was open development property with good potential for resale (Swanson 2463). In addition, the witness was informed concerning oil activity in the area (Swanson 2468, *see also* 2469-71, 2475, 2477). Concerning oil, the witness stated he believed "that possibly there might be some extension of this activity where these mineral rights might result in some value to me" (Swanson 2471). On cross examination, he acknowledged that he knew of the risk and uncertainty in making his purchases (Swanson 2485-86).

105. Witness *Hugh Sowell* testified that the main reason for his purchase of SWS property was the endorsement of Mr. Dewey Compton in his appearances in respondents' TV commercials. The principal purpose for his purchase appears to be its use as a possible retirement home, although at one point in his testimony he did mention the possibility of investment (Sowell 2516). Mr. Sowell further testified that the SWS salesman represented "that your property would never go down, it had only one way to go, it would be up" (Sowell 2507-08). There is nothing in his testimony which establishes whether this witness believed that any financial risks were involved (Sowell 2501-20).

106. According to witness *George Munch*, the land was represented to him by Porter Realty as a great opportunity to make a little money and a good profit and that he could at least double his money in possibly a year (Munch 2524, *see also* 2553-57). According to the salesman, the inherent value of the land [29] for use in gardening included the availability of water, the economic development in the Van Horn area, including the possibility of a nuclear plant being built, and the fact that there was oil in the vicinity, convinced Mr. Munch "that it was a very good deal," whereas "at first it all sounded too good to be true" (Munch 2526). Mr. Munch was cross examined at

with his purchase. The witness' responses to this series of questions were to the effect that there are risks generally in business and other investments; and that while there was no guarantee of profits, and while he had a "little doubt" about the matter, that based upon his experiences in selling his Florida properties for double the prices he paid, that he believed the salesman from Porter would be able to resell his land for double the amount paid, so that he was "reasonably sure that he would make a real good profit" (Munch 2543-57).

107. None of the consumer witnesses who testified on respondents' behalf indicated that they were told the land was a good investment or that it was without risk. (Wharton 3565-3618; Muller 3619-3639; Sanchez 3683-3713; Perkins 4019-4043; Smallwood 4045-4087; G. Taylor 4587-4605; W. Taylor 4606-4621; Townsend 4622-4634).

5. The Situation Concerning Oil

108. There is no showing in the record that respondents' employees made representations concerning oil. In fact, the showing is to the contrary. See the testimony of respondents' in-house sales representative witnesses, Rose 678-721; Hammer 648-73; Novaez 857-902; W.D. Smith 904-77; Gilmore 983-1028. See also the testimony of purchaser witnesses, Baldrige 804-36; Buck 1498-1577; Lambert 1779-1815; Robinson 1904-44; Sowell 2501-19; Muller 3623; Smallwood 4048, 4081; G. Taylor 4594; Townsend 4625.

109. From 1974, when Porter Realty first began selling respondents' property until mid-1977, there were no references to oil in the sales presentations by Porter Realty's sales representatives which came to respondents' attention. Beginning in late 1977, according to respondents, it was learned that employees of Porter Realty and Diversified Realty had begun to make statements concerning the possibility that oil might be discovered in or near GVA II (Kritzler 598, 4122; Elfont 4183). Such representations were less often made about GVA (Kritzler 642). The record does not evidence that oil [30] representations were made about SWS (Kritzler 642; Elfont 4168).³¹

110. As we shall see, there were four alleged representations concerning oil: companies are exploring for oil in the area of the properties; oil is being produced in northern Culberson County; there is a possibility that oil could be discovered on or near GVA and GVA II; and a map showing land ownership and oil production was given to some customers.

111. Some witnesses testified they were told that oil exploration was underway on or near GVA and GVA II (Swanson 2474; Goldstein

³¹ Respondents acknowledge that oil representations increased during the last few months before respondents terminated their relationship with the brokers (Elfont 4185; Kritzler 4121). They claim, however, that although the percentage increased rapidly, the number of such representations did not. Respondents point out that the total number of sales was rapidly decreasing in late 1977 and early 1978 (Elfont 4170).

1719, 1760; Grygleski 1473). Others were told that such exploration might begin in the future (Limpp 1421).

112. According to the record, this representation was factually correct; there is evidence which shows that exploration did occur on the properties themselves and in the immediate vicinity (*see* Gilmore 998, 3978; Sanchez 3711; W.D. Smith 928, 955, 973; Wolfe 4570; Reed 2631; Watkins 2724, 2740, 2742, 2745; Conoly 1095; Case 4519-25, 4538; RXs 64, 65, 75).

113. Some customers were informed of the oil production in northern Culberson County (Swanson 2475, 2477; Danskin 2425; Elfont 4183).

114. According to the record, these statements were accurate (Watkins 2717-18, 2723, 2725; CXs 101, 135, 166N).

115. Several purchasers testified that they were told that no oil had yet been discovered or produced on respondents' properties themselves (Swanson 2475; Stein 2220; Limpp 1422; Grygleski 1492; Aliello 1653; Sweets 1986; Switaj 1280).

116. The witness who claimed to have been told there was a potential for discovery of oil on the property testified that they were informed that such discovery was only a possibility, [31] which could not be predicted with any degree of certainty (Limpp 1422; Grygleski 1473, 1492; Goldstein 1776; Sweets 1977; Rawlins 2181; Stein 2203, 2220-21). No witness testified that he was told that oil had already been discovered on his property.

117. The record shows that GVA and GVA II are surrounded by a major oil-producing area to the northeast (Watkins 2717, 2723), a smaller producing area to the east (Watkins 2736), and an area of major exploration by Texaco to the south, southwest, and west (Watkins 2724, 2729-36). The properties may possibly lie within the West Texas Overthrust Belt, a geographic formation which many experts believe contains oil (Watkins 2753-54). Texaco owns and leases substantial amounts of land and mineral rights in the immediate vicinity of the properties (Watkins 2745; CX 129).

118. The record contains evidence of oil exploration in and near the properties. Such exploration does not occur unless there is some perceived potential for discovering oil (RX 75 at 13-16). The results of a survey by Geotronics, Inc., which actually included magnetotelluric stations on GVA, were priced at \$97,530 (RX 65). Results of the survey were purchased by several different customers (RX 75 at 16-17).

119. Records of the General Land Office of the State of Texas show 144 current leases of mineral rights within a 60 mile by 60 mile area centered in Van Horn (RX 76). Most such leases are for a section of land (640 acres) (RX 76m), though others are for tracts ranging in size

120. The identities of some of the lessees are: Sun Oil Co.; Atlantic Richfield Co.; Kim-Brant Oil Co.; Castile Minerals Corp.; Texaco, Inc.; Border Exploration Co.; Rudman Resources, Inc.; Canada Northwest Oils, Inc.; and Keith Collins Petroleum Corp.

121. As mentioned, certain oil maps were provided by Porter Realty to some customers of GVA (CX 129). The first page of the map, CX 129c,³² shows an outline of GVA superimposed on a property-ownership map. The second page, CX 129b, shows land ownership between GVA and Van Horn. The map shows that the mineral rights on 18 sections of land south of and surrounding [32] Van Horn are owned by Texaco. The first two pages are prominently labeled "West Part of Culberson Co., Texas."

122. The final page of the map, conspicuously labeled "East Part of Culberson Co., Texas," shows land ownership about 50 miles from GVA (CXs 129a; 166N; Watkins 2717-18). Texaco, Continental Oil, Union Oil, and Exxon are shown as owning land or mineral rights in this area. An employee of Texaco confirmed the accuracy of the maps, at least as they related to mineral rights owned by Texaco (Watkins 2749).

123. Notwithstanding the above activity, it was respondents' stated policy not to employ representations concerning oil in their sales approach. As Mr. Kritzler testified (Kritzler 4121):

Q. What was the policy of the company with respect to sales personnel or brokers making mention of oil in connection with a sales presentation?

A. We called and reprimanded them, and told them that if the complaints continued that we wanted the salesman fired (Kritzler 4121).

Q. Did you, Mr. Gross, or any of the Corporate Respondents, ever authorize the use of that map [CX 129]?

A. No.

Q. When you found out according to the customer that he was given that map, what did you do?

A. Called Porter immediately and told him not to use the map, that it was outside of his jurisdiction to do that (Kritzler 4125).

* * * * *

Q. Did you take any action [when you subsequently learned that the map was continued in use by Porter Realty Company]? [33]

A. Yes. We told them to absolutely discontinue using the map. I believe that he said he would fire the salesman responsible for doing it, or salesmen for doing it. And that must have been January or February 1978.

Q. What happened after that?

A. Well, after that it came to our knowledge that he was continuing to use it, and that they were continuing to refer to oil in the area, and we terminated him.

* * * * *

³² The record shows that the pages of the map were out of order when offered into evidence. The proper sequence is CX 129c, CX 129b, CX 129a (Porter 2352-57). The record also shows a map in the proper order (C

Q. And when you found out that Diversified Realty was using the map did you take any action?

* * * * *

A. We told them to absolutely discontinue using it. . . . We terminated them (Kritzler 4126-27).

124. The evidence further shows that respondents' employee Mr. Jeffrey Elfont was assigned to telephone each customer of Diversified Realty and Porter Realty from early 1977 until the brokers were terminated in February and March 1978, respectively (Elfont 4169). After some customers first began referring to oil in late 1977, Elfont questioned each customer whether any statements concerning oil had been made (Elfont 4183, 4194). If a representation had been made about oil, Mr. Elfont made a detailed disclosure to the customer:

From the information that I had received from Mr. Kritzler and Mr. Gross, the nearest oil in production was, I believe, 50 or 60 miles away and that one of the major oil companies owned some land in the vicinity of Green Valley Development and to that point, that was all the information that I had, that there was no current exploration on the property, nor had there been in the past.

Q. Is that what you informed the customer?

A. Yes.

* * * * *

Q. What would be your response to these customers?

A. My response would be absolutely not. We have not, the Company Green Valley Acres has not heard of any development of oil, the development itself, and we don't expect that to happen.

Q. You don't expect what to happen?

A. Any oil development in the area (Elfont 4184-85).

125. Mr. Kritzler further testified (Kritzler 4122):

Q. When a call would be reported to you by Mr. Elfont that oil has been mentioned in the sales presentation, what would you do?

A. I would call the customer and talk to them, and tell them that as far as I knew there was no oil exploration near the property, and that they should not expect to benefit by that, that would be like winning the sweepstakes, chances would be very small that any benefit would come to them (Kritzler 4122; *see also* Kritzler 597).

126. In addition, according to Mr. Kritzler, if it turned out that the customer had purchased the property for its oil-producing potential, the sales contract would be cancelled, and a full refund provided (Kritzler 638-40, 4122-23; Elfont 4186; Porter 2323-24). [35]

127. There is an instance in the record of one of consumer witnesses complaining respondents' reaction to an oil-related representation. A representative of Porter Realty allegedly gave the following information to Mr. Swanson:

Mr. Bauwens in that conversation that this property fronted on a—fronted on a highway, that there was oil exploration in the area, that again I would get mineral rights to this property, and that there was a potential for return on investment through the mineral rights. . . . I do not recall any representations, in fact, I feel quite sure there was no representation of any oil wells on the property. It was mentioned that there were oil wells in the range of 20 or 30 miles away, and that there were explorations in the general area, nearby. (Swanson 2474–75).

Subsequent to this, Mr. Swanson received a telephone call from Mr. Elfont (Swanson 2478). According to the witness, when Mr. Swanson informed Mr. Elfont of the statements concerning oil, Elfont expressed surprise, and said that GVA II was not being sold for its mineral potential (Swanson 2479). Mr. Swanson was subsequently telephoned by Mr. Gross, who offered him a full refund on his property (Swanson 2479–80). Mr. Swanson accepted the offer, and was given a full refund of his money (Swanson 2480).

6. The Situation Concerning Resales

128. The contracts used by the respondents uniformly disclose that respondents would not resell property for their customers. The two SWS contracts in the record, CX 74 and 75, contain the following statement: "The Seller has no program for repurchase and/or resale of lots on behalf of its Purchasers. Purchasers desiring to resell their property would thus offer the property either on their own behalf or through independent real estate agents."

129. The contracts for GVA and GVA II contain a slightly different version of the disclosure: "The Seller, or his agents have no program for repurchase and/or resale of lots on behalf [36] of its Purchasers. Purchasers desiring to resell their property would thus offer the property either on their own behalf or through independent real estate agents" (CXs 76, 77, 78).

130. Every customer who discussed resale by a Porter or Diversified sales representative testified to having read and understood the contract (Morley 1381; Limpp 1422; Grygleski 1484;³³ Sweets 1961; E. Smith 2104; Schlachter 2137; Stein 2223; Danskin 2447; Munch 2557–58). No customer testified that he was told or believed that any of the respondents were responsible for reselling his land.

131. On the other hand, numerous witnesses testified concerning the resale activities of the real estate brokers (Switaj 1316; Limpp 1408; Davis 1685; Lueckel 1830; E. Smith 2097; Rawlins 2158; Stein 2211; *see also* Porter 2328).

132. In several instances, there was testimony concerning representations made by employees of Porter Realty after March 1978 (Switaj

³³ Mr. Grygleski testified that he assumed the Porter salesman would attempt to resell his land for him, but no such statement was made by the sales representative (Grygleski 1477).

1316-17; Davis 1682-87; Lueckel 1830-33; E. Smith 2087, 2106; Stein 2211-14, 2217, 2223; Swanson 2481).

133. The record shows that all relations between the respondents and Porter Realty were terminated in March 1978 (Gross 381; Kritzler 637, 4126; Porter 2244; Elfont 4188). Thus, at the time of the representations referred to above, there was no relationship between respondents and Porter Realty. [37]

V. COUNT II

134. Count II of the complaint charges respondents with falsely misrepresenting their properties as suitable for homesites, farms and ranches, because of (par. 13):

- (a) The unavailability of, or high cost of obtaining, utilities, water, financing, equipment, improvements and other amenities;
- (b) The failure of subdivider respondents to install promised improvements to the subdivisions; and
- (c) certain practices of subdivider respondents which substantially impair the ability of purchasers to live on or use their lots.

A. Representations Concerning Use Of The Properties

1. Representations Concerning Use As Homesites

135. Respondents admittedly represented to prospective purchasers that the parcels could be used as homesites (RPF 191).³⁴ But, according to respondents, purchasers were accurately and adequately informed that in order to do so one would have to arrange his own utilities and provide his own residence (RPF 191).

136. As orally argued by respondents' counsel, the land sold in this case was rural undeveloped land in West Texas, 120 miles from El Paso.³⁵ [38]

137. Representations to prospective purchasers concerning homesites were made chiefly in the brochures and fact sheets.³⁶ Nothing in these documents indicates that respondents undertook responsibility for improving the parcels, same for staking and providing access roads in some, but not all, of the properties (CXs 74-89).

138. Typically, the fact sheets informed purchasers that (CX 85C):

Piped water is not available to this tract. Buyer may drill his own well. The cost per foot for a drilled and cased well varies, depending on the driller. There is an irrigation well on the property now pumping from approximately 300 feet about 450 gallons per

³⁴ Respondents maintain that they did not represent that the southern portion of GVA II was usable as homesites. As noted *supra*, Finding 23, this terrain was of a rugged nature. A buyer was advised that he "would have to inspect his individual parcel to see if it was feasible for building" (RPF 191, n. 51a; CX 84B).

³⁵ Oral argument, April 14, 1982, pp. 31-32.

³⁶ I have examined the TV commercials, sales kits, and oral testimony of salesmen and find nothing significantly beyond these representations. The same is evident from the testimony of consumer witnesses.

minute. The quality of water is good; however, Green Valley Acres, Inc. II makes no guarantees, warranty or prediction as to the depth or quality of water on each individual parcel.

There is no regular in-tract sewer system. However, parcel owners may install septic tanks on acreage parcels at an approximate cost of \$1,000.00.

Electricity is available at the subdivision. However, extensions of this utility are not available to every parcel. Parcel owner must contact the power company for exact costs of extending power and initial hookup costs. Address is Rio Grande Electric Co-op., Inc., P.O. Box 1137, Marfa, Texas 79843. Approximate cost for extending power is fifty-five cents (55¢) per foot after the first quarter mile, which is free. Full cost of extension is returned if used up in power during the first five years. Furthest lot is two miles.

There is no in-tract natural gas system. Each parcel owner must contact the various [39] bottled gas companies in Van Horn for charges and hookup information.

[Telephone] is available at subdivision. Parcel owners should contact the Continental Telephone Company; P.O. Box 1510, Pecos, Texas 79772, for the extension and cost of telephone service to his parcel(s).

See the other fact sheets in evidence for similar disclosures, CX 79, 80, 81, 82, 83, 84.

139. It does not appear to be disputed in this case that the fact sheets were in widespread use (Gross 344; Kritzler 4107; see Poter 2340). On the face of all contracts, purchasers were required to sign a statement that they had received and read the fact sheet (CXs 74, 75, 76, 77).³⁷

140. Prospective customers were alerted to the existence of the fact sheet in the initial telephone call from respondents' broker representatives (CX 122 and 123—"I will mail you a brochure and a fact sheet which explains everything in more detail"). When the broker representatives mailed contracts to prospective customers, it was asserted that the packet always contained a fact sheet and a cover letter recommending that the customer read it (Porter Tr. 2340-43; CXs 126, 264 ("also read the 'Fact Sheet' and sign, signifying that you have done so, on the lower right hand corner of the Agreement")). Customers were also alerted to the fact sheet in the brokers' follow-up call after the documents were mailed. (CXs 124, 125—"Go over the brochure and fact sheet. . . . Initial the box indicating that you did receive the fact sheet").

141. Respondents' own in-house sales personnel uniformly asserted that fact sheets were given to customers as a matter of routine (Hammer 657; Rose 686; Novacy 861, 868; Gelmore 987).

142. Virtually all of complaint counsel's consumer witnesses testified to receiving and reading a fact sheet prior to executing the contract (Baldrige 810; Bear 1155; Switaj 1277; Morley 1344; Limpp 1397; Grygleski 1449; Buck 1507; [40] Allienello 1655; Davis 1675;

³⁷ Concerning Mr. Elfont's surveillance calls from February 1977 until April 1958, checking primarily on broker's sales, he testified that virtually all customers he contacted acknowledged receiving a fact sheet (Elfont 4176).

Goldstein 1725; Lambert 1781; Lueckel 1826; Sweets 1949; E. Smith 2067; Schlachter 2116; Stein 2206; Danskin 2425; Swanson 2468; Sowell 2513; Munch 2558).³⁸

143. Most consumer witnesses called by complaint counsel either did not testify about development costs beyond stating that they had received and read the fact sheet, or testified that they fully understood that they would have to pay for their own utilities (Goldstein 1719-20; Swanson 2468; Sowell 2508, 2515; Baldrige 810, 815, 817; Danskin 2447). The consumer witnesses called by respondents also evidenced the understanding that they would have to provide their own utilities (Wharton 3569; Muller 3626-27, 3637; Sanchez 3700, 3706; Perkins 4025-26, 4031, 4042; Smallwood 4062, 4078; G. Taylor 4594, 4596-97; W. Taylor 4611; Townsend 4625-27).

144. Respondents' Mr. Kritzler testified that, in his view at least, adequate disclosure was made to prospective purchasers that they would have to bear the expense of improvements (Kritzler 4109-10). Mr. Mitchell of the Van Horn Chamber of Commerce received phone calls from respondents' customers which indicated they knew of their responsibility for these costs (Mitchell 3747).

2. Representations Concerning Farming

145. While no representations concerning crop growing appear in the contracts, the fact sheets represent that "with water and ordinary care, a large variety of grasses, trees, flowers and shrubs may be cultivated. Also, numerous varieties of vegetables may be grown" (CX 81B; see CXs 79A, 80A, 82B, 83B).

146. Respondents' descriptive brochures made similar but more detailed representations. CX 86 (used for the first 60 to [41] 90 days of sales of SWS)³⁹ represented that the Van Horn area had sufficient water and a climate conducive to growing anything which can be raised in California's Imperial Valley, with the exception of citrus fruits. The brochure continues that the growing season is 222 days long and the average temperature is 63 degrees. The soil is described as "rich and fertile." The brochure states that because of the 4,000 foot altitude and arid climate there are few insects and crop diseases. The land can be used for "organic gardening, farming, or orchard development," and an owner can grow "vegetables of all types, grapes, peaches, apples, apricots, pecans as well as grasses and grains." Under the heading "Orchard, organic garden, or farm," the brochure states

³⁸ Only two customers who testified questioned whether they received a fact sheet, Messrs. Robinson and Rawlins, even though both had signed the box on the contract indicating receipt. Mr. Robinson's testimony, however, presents credibility problems inasmuch as he testified that he signed the receipt statement, knowing that such statement was *false* (Robinson 1936). Mr. Rawlins' memory appears to have been somewhat faulty. Even so, as an experienced realtor, he indicated his knowledge at the time of purchase that respondents were not to be responsible for improvements to his parcel (Rawlins 2180).

³⁹ Kritzler 498, 644.

"Imagine raising your own carrots, lettuce, tomatoes, squash, beans, onions, potatoes or fruits." It also states that a fish farm is suitable for five acres (CX 86).

147. An examination of the SWS replacement brochure, CX 87, shows that it is not significantly different from CX 86 in regard to representations about farming or gardening. The brochures for GVA and GVA II, CX 88 and CX 89, are also similar, though they do not contain the reference to fish farms.⁴⁰ All four brochures have photographs of nearby farms and produce grown on or near the properties. With the exception of CX 86, which was assertedly prepared by Southwest Land Corporation and only used until new brochures could be printed (*supra*, Finding 66), the photographs are all labelled as to whether they were taken on or near the properties.

148. Respondents' radio and television commercials which were broadcast in Houston, Dallas, and apparently in a few cities elsewhere (Finding 58, *supra*), contain consumer-oriented gardening representations. Some of these advertisements refer to the parcels as "farmettes" (CXs 45, 59, 60). Most of the advertisements, however, simply refer to the quality of the soil and the variety of plants which can be grown (CXs 42, 43, 44, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 67, 69, 70, 71, 72). One of these commercials discusses the cultivation of crops as follows:

Own your own farm. You can own your own farmette in West Texas that has five acres [42] of fertile land. It will grow everything except citrus. On this five acres you can grow all the fruit, vegetables, meat and poultry you can eat . . . plus a lot more for sale. . . . It's good, rich soil. . . . You can own this farmette for only \$2,995, or as low as \$60 down.

CX 60 (first ellipsis in original).

149. The record also contains a number of promotional materials, not of respondents' composition, but which were reproduced by respondents and mailed to customers. Most of these materials are reprints of newspaper articles published in the Van Horn Advocate or other Texas newspapers. There is no allegation nor any evidence that any of the articles were distorted or written by respondents, or that they are untrue (Gross 361). Many of these newspaper articles discuss farming in the Van Horn area. None of the articles refers to respondents' properties or explicitly discusses farming on small parcels.

150. CX 90 basically discusses the onion harvest in Culberson County. CX 91 is an article by a Mr. Murray Cox in the *Dallas Morning News*. The article recounts a visit by Mr. Cox to the Van Horn area.

151. One of the articles reprinted on CX 92 discusses the 1154 acre

⁴⁰ Neither do these brochures contain artists' conceptions of the potential uses of the properties, as set forth in earlier versions of this sales material.

Brookshire pecan orchard located near Van Horn. Pecan growing in the area is also the subject of CX 266. CX 99 is a 1979 newspaper article about an experimental grape vineyard sponsored by the University of Texas. The article states that a goal of the project is to determine if the climate and soil in the Van Horn area are suitable for grape growing. The experimental vineyard is also referred to in the article reprinted on CX 133.

152. The Powell Farm, 8,000 acres with 26 water wells, is the subject of the articles printed in CXs 100 and 101. CX 103, which is based on facts provided by the Van Horn Chamber of Commerce rather than being a newspaper reprint, is also about Powell Farms. The president of the Chamber of Commerce testified concerning the accuracy of CX 103 (Mitchell 3743-45).

153. Some of the same or similar newspaper articles, as well as photographs of neighboring farms, were included in the picture book used by some of respondents' sales personnel (Hammer 663, 673; CX 170).

154. Other written materials which refer to farming and gardening are not significantly different in nature from the [43] ones previously discussed. The record contains various communications to customers or prospective customers by respondents or their representatives, such as letters discussing the fertile soil, good quality water and beneficial climate (CXs 293, 338, 395, 473, 505).

155. In addition to the representations concerning farming found in written materials, the record also contains instances of oral statements made on this subject. Mrs. Baldrige was told via a Dewey Compton commercial that the land was good farm land, but she testified that five acres would be too small to be a real farm, although she believed it suitable for a garden or orchard (Baldrige 806, 821-22). Mrs. Buck was told that on 10 acres in GVA she could grow her own food, and maybe raise a minimal number of cows for home consumption (Buck 1500, 1502, 1506, 1512). Mr. Robinson also was told he could grow his own food (Robinson 1906). Mr. Rawlins was told the land was suitable for home gardening (Rawlings 2149). Others were told that the land was productive (Bear 1118; Morley 1342, 1351; Limpp 1389; Allienello 1624-25; Goldstein 1719-20; Lambert 1781; Lueckel 1823; Sowell 2514).

3. Representations Concerning Ranching

156. Several of respondents' TV and radio advertisements employ the words "ranch" or "ranching" in their text: "fantastic farm and ranch land" CXs 44, 55; "land for ranching" CX 46; "you too can own your own farm, ranch or outdoors retreat" CX 54; "place in the sun to farm, ranch, retire or just do a little hunting or camping" (CXs 57,

395A; *see also* CXs 69, 71). The GVA and GVA II fact sheets list "ranching" as a major industry in the area, and the brochures for these properties carry a picture of grazing cattle (CXs 83D, 84D, 88D, 89K).

157. If I properly understand complaint counsel's position, it is to the effect that these representations amount to purchasers being told that they could successfully operate a commercial ranch on 5 to 40 acres of respondents' properties (CPF, p. 108).

158. I cannot so interpret these statements. Rather, from other such advertisements in the record it is abundantly clear that what respondents are saying is that it is possible to raise enough beef on the land to feed one's self or one's family: "or raise livestock and put beefsteak back in your food budget" (CXs 47, 50; "raise beef on it and have enough of everything for your own table" CX 51; *see also* CX 48). According to Mr. Gross, this was the intendment of respondents' representations [44] concerning ranching, the witness conceding that commercial ranching on the parcels was not practicable (Gross 422-24; *see also* Kritzler 635).⁴¹

B. *The Parcels Are Usable As Homesites*

1. Utilities

159. Although the complaint apparently speaks in terms of the unavailability of utilities, as well as their high cost, that issue, as we shall see, is not really present in this case. The issue as to utilities is therefore limited to whether the obtaining of them would entail such high costs, that the use of the parcels as homesites would be as a practical matter rendered nil. We shall examine electricity, telephone, sewage disposal and gas.

a. *Electricity*

160. In the fact sheets, the following disclosures are made concerning electricity:

ELECTRICITY—Electricity is available at the Subdivision. However, parcel owner must contact the power company for exact costs of extending power and initial hookup costs. Address is Rio Grande Electric Co-op, Inc., P.O. Box 125, Bracketville, TX 78832 (CXs 81C, 82C).

ELECTRICITY—Electricity is available at the Subdivision. However, extensions of this utility are not available to every parcel. Parcel owner must contact the power company for exact costs of extending power and initial hookup costs. Address is Rio Grande Electric Co-op, [45] Inc., P.O. Box 1137, Marfa, TX 79843. Approximate cost for extending power is fifty-five cents per foot after the first quarter mile, which is free. Full cost

⁴¹ The witness Mrs. Buck was informed by respondents' salesman that it would be possible for her to raise her own beef (Buck 1503).

of extension is returned if used up in power use during the first five years. Furthest lot is two miles (CX 83C, 85C).

ELECTRICITY—Parcel owner must contact the power company for exact costs of extending power and initial hookup costs. Address is Rio Grande Electric Co-op, Inc., P.O. Box 1137, Marfa, TX 79843. Approximate cost for extending power is fifty-five cents (55¢) per foot after the first quarter mile, which is free. Full cost of extension is returned if used in power use during the first five years (CX 85C).

161. Mr. Richard Gwartney, the General Manager of the Rio Grande Electric Cooperative, Inc. (the "Co-op") testified in this proceeding (Gwartney 1184-1218). The Co-op serves approximately 45,000 square miles of rural Southwest Texas. This encompasses all of the rural areas lying beyond a two mile radius of the town of Van Horn, including SWS, GVA, and GVA II⁴² (Gwartney 1185-86).

162. Mr. Gwartney testified that the policy of the Co-op is to give a free electric line extension to new customers of up to one quarter mile for each electric meter installed (Gwartney 1201, 1205). The only cost within this distance is a connection fee and a membership fee in the Co-op of about \$20 (Gwartney 1205).

163. Accordingly, if a customer's operation required two meters, he would be given a free half mile extension. If three, then three quarters of a mile (Gwartney 1215-16).

164. In 1979, the cost of installation of single-phase (residential use) electric service was 75 cents per foot, or \$3,960 a mile from existing power lines. The cost of installation of three-phase electric service (irrigation or other commercial use) was \$1.10 per foot, or \$5,808 per mile [46] from existing power lines. The costs of installation would have to be paid prior to installation (Gwartney 1203-04). Installation costs as of April 1981 for single-phase service were \$1.20 a foot, or \$6,336 per mile; and the cost of three-phase installation were \$1.70 a foot, or \$8,976 per mile from existing power lines (Gwartney 1205).

165. This cost is offset against the customer's monthly electric bills until the full cost has been refunded to the customer within a scheduled time period (Gwartney 1201-02; *see* CXs 434, 484). Additional customers who tie into a line extension increase the rate of repayment of the original line extension cost (CXs 434, 484).

166. The record shows that there are electric lines in and near each of the three properties. Photographs show various lines crossing the properties (CXs 88I; 89J; CX 153D, E, G, H, I, J; 436, photograph pages 3, 4, 8, 10, 11, 17; RX 43, 46, 48). Many parcels are relatively close to existing lines (W.D. Smith 977; Gilmore 1015-18; *see* CXs 485; 486). There are, however, some parcels that are as much as two or three miles away (M.D. Smith 977; Gilmore 1018).

⁴² Most urban areas are served by investor owned utilities (Gwartney 1186).

167. One of respondents' salesmen testified that sales representatives basically knew where the existing electric lines were located, and would sell a lot within the free extension distance if the customer planned on using his parcel (Novaez 895). Any customer visiting the property was able to see where the electric lines were located. Thus, Mr. Wharton was able to discover the location of electric lines when he purchased onsite, and obtained electric service for a total cost of \$136.00 (Wharton 3572).

168. Respondents' contracts all permit purchasers to exchange their parcels for other available locations (CXs 74A, 75B, 76A-B, 77A-B, 78A-B). This is apparently not a complicated procedure, if the experience of witness Edward Muller is typical, who traded his property to obtain low-cost electrical service (Muller 3627-28). In fact, this witness had traded his property three times, obtaining approval from respondents' California headquarters by telephone (Muller 3633-35).

169. It is also possible that by the time a purchaser is ready to use his parcel, an electric line will have been extended in his direction. Thus, there is the testimony of Mr. Perkins that he was originally informed that the line extension to his parcel would cost \$700. However, by the time he requested service, the line had already been extended to a tract within a quarter mile of his parcel. His line extension, therefore, is without extension costs (Perkins 4031-32). [47]

170. There is no testimony in the record that the cost of obtaining electricity had dissuaded any purchaser from using his property.⁴³

b. Telephone

171. Prospective purchasers are informed in respondents' fact sheets that telephone service is available, and they are advised to contact the telephone company for information concerning the extension and cost of telephone service to their parcels (CXs 80B, 81C, 82C, 83C, 84C, 85C).

172. The record contains the testimony of Mr. Ronald Ethridge, an employee of Continental Telephone Service Corporation (Ethridge 2763-94). From 1976 until 1981, he worked in Pecos, Texas, as Customer Service Manager. His service area included the Van Horn area, and that of the subject properties (Ethridge 2764-65).

173. The costs associated with telephone service in the rural areas where the properties were located included installation charges totaling \$55; a monthly service charge of \$7.60 plus \$1 per airline quarter mile from Van Horn for a private line, or \$7.80 for a four-party line; and a line extension charge (Ethridge 2770-71). The latter worked on the principal that Continental would extend telephone lines free of

⁴³There was testimony that bottled gas could be used as an effective substitute for electricity to serve most needs (Harris 3024).

charge to rural users if they were within 1/2 mile of existing lines. If they lived farther away the charge would be, after the first 1/2 mile, fifty cents a foot (Ethridge 2777-78).

174. The existing lines of SWS are as follows:

On CX 87E, F, and G, a line parallel to Interstate 10 on the southern most boundary of SWS units 200, 202, 203, 204, 207, 212, 217, and 231. Additionally, the line extends for 1/2 mile on the eastern most boundary of unit 200. (Ethridge 2779-81). [48]

175. The existing lines on GVA are as follows:

On CX 88, in a line parallel to Highway 90, along Farm to Market Road 1929 in a southerly direction to a point between the southwestern portion of limit 34 and the southeastern portion of Unit 27 (Ethridge 2787).

176. The cost of extending telephone lines can be considerable. Mr. Ethridge placed the cost of a five-mile extension at \$11,880 (Ethridge 2784-85). Mrs. Buck, for example, considered getting a phone but due to the fact that her lot was approximately two miles from the closest telephone lines, it "would cost too many thousands of dollars" to install a telephone (Buck 1521). Indeed, to extend telephone lines to Unit 13 of GVA from existing lines would cost a minimum of \$6,600 (Ethridge 2788).

c. Sewage Disposal

177. Prospective purchasers are informed in the fact sheets that there is no central sewage system at the properties, and that sewage disposal is by individual septic tank. The later fact sheets estimated the cost of a septic tank including installation, to be \$1,000 (CXs 83C, 84C, 85C).⁴⁴

178. There is scanty evidence in the record regarding sewage or waste disposal. There was testimony that Mrs. Buck's septic tank cost \$790 in 1978 (Buck 1520). However, Mrs. Buck claimed she was told by Mr. W.D. Smith, respondents' then on-site representative, that a septic tank could probably be put in for less than \$100 (Buck 1512).

179. One purchaser, Mr. Wharton described how he constructed his own septic tank, working from scratch, for a cost of approximately \$20 (Wharton 3570). [49]

d. Natural Gas And Propane

180. Texas Western Municipal Gas Company, located in Van Horn, Texas, distributes natural gas to the city of Van Horn and the Wildhorse and Lobo Valley farming areas (Beasley 2845). There are no other companies that provide natural gas service in this area (Beasley

⁴⁴ Earlier fact sheets had placed this cost at \$500 (CXs 80B, 81C, 82C).

2846). Texas Western Municipal Gas Company's service area includes SWS, GVA and GVA II, but there are no company natural gas pipelines on the subject properties at this time (Beasley 2847). Some SWS property may be located as far as four to five miles from the company's existing pipelines (Beasley 2855). Some GVA property may be as much as seven miles from the company's existing pipelines (Beasley 2856, 2862). Some GVA II property may be as much as five miles from the company's existing pipelines (Beasley 2857, 2862).

181. The cost of obtaining residential natural gas service from the company includes a \$120 hot tap fee which involves tapping into the main transmission pipeline (Beasley 2847); pipeline costs of 42 cents per foot for the smallest PVC pipe available (1 inch); 25 cents per foot for ditching (digging the trench in which to lay the pipe); \$400 for labor; and \$250 for backfill (refilling the trench) (Beasley 2848-50). Therefore, total cost for installation of residential natural gas service would be approximately \$5000 per mile (Beasley 2850). A \$50 deposit is also required (Beasley 2848).

182. The cost of obtaining natural gas service for commercial use, *e.g.*, irrigation, using the smallest pipe size (1-1/4 inch) would increase installation costs by 20 cents per foot (Beasley 2851). Therefore, the cost for commercial installation would be approximately \$6000 per mile.

183. Texas Western Municipal Gas Company has never installed a natural gas pipeline for irrigation purposes on a 5-acre, 10-acre or 20-acre tract of land in this area (Beasley 2852). Most commercial irrigation systems serviced by the company utilize at least eight inch pipe, capable of irrigating 80-100 acres (Beasley 2853).

184. Average monthly cost for natural gas service can be as high as \$50 for residential use, and can range from \$10,000 to \$105,000 for commercial irrigation use (Beasley 2864).

185. The record shows that a practical alternative to natural gas service is propane.⁴⁵ In this connection, [50] prospective purchasers were advised on all fact sheets that natural gas systems were not available at the properties, and that each parcel owner must accordingly contact the various bottled gas companies in Van Horn for charges and hook-up information (CXs 79B, 80B, 81C, 82C, 83C, 84C, 85C).

186. Witness Charles Harris, Manager, testified that the Kettle Oil Company distributed liquid petroleum gas (propane) to homes, farms, and ranches in the Van Horn, Texas, area, approximately fifty miles in each direction from Van Horn (Harris 3017).

187. Installation costs for propane gas include \$350 for a 150 gallon tank (the smallest available), and \$70 for labor and parts (Harris

⁴⁵ The record contains some reference to butane, but the context is not clear (Harris 3017).

3018). However, outside of the city, a 250 gallon tank is recommended because delivery is limited to once a month. This tank sells for \$460, plus the above installation costs (Harris 3018). The purchase of a commercial propane system ranges from \$975 to \$990 for a 100 gallon tank, including installation (Harris 3020); to \$989 for a 1,000 gallon tank, plus installation charges of \$450-500 (Harris 3021-21). The cost of propane gas is 65.9 cents per gallon or \$220 to fill a 250 gallon tank (Harris 3023).

188. Kettle Oil Co. is presently providing propane gas to four families living on SWS property, and to three families living on GVA property (Harris 3022).

2. Water Availability And Cost

a. *Availability Of Water*

i. The Claims

189. There is no dispute that respondents represented that water was readily available on their properties in far West Texas.

190. Television advertisements and brochures spoke of "virtually unlimited water" and a "virtual ocean of water" (CXs 44, 47, 50, 52, 54, 56, 69, 70, 86-87).

191. Another TV commercial refers to "[a]n enormous underground water supply very close to the surface . . . just waiting to be tapped" (CX 43).

192. An SWS fact sheet places the water table under that property at between 250-400 feet (CX 79B). A GVA fact sheet [51] refers to an irrigation well on the property pumping from about 220 feet underground at 450 gallons per minute ["gpm"] (CX 83C). A GVA II fact sheet refers to an irrigation well pumping from approximately 300 feet at 450 gpm (CX 85C).

193. CX 103, "An Information Sheet for Texas Property Owners" disseminated by respondents, claims that the drilling of new wells has not caused a decrease in the water table:

The Powell Farm now has 26 wells about 1300 feet deep. The water rises to about 300 feet, the level from which they pump. Each well delivers an amazing 2200 gallons per minute. According to Mr. M.J. Mitchell, President of the Chamber of Commerce, this tremendous flow of water has not lowered the water table.

194. Purchasers testified that they were told by sales personnel that "[t]here was plenty of water available" (Lambert 1782), or that "[w]ater was abundant in the area" (Swanson 2463). Dr. Danskin testified that he was told that "this property was really quite valuable and the aspect that water is very hard to come by in Texas and that

the property had 'large pools of sweet water' readily available beneath the property" (Danskin 2423; see also Morley 1348).

195. Other purchasers testified that they were told the water on their property was "pretty shallow, below the surface" (Baldrige 818); 150 feet below (Robinson 1912); 200 feet below and good quality (Munch 2524); 240 feet from the surface (Buck 1501, 1558).

ii. The Actual Availability Of Water On The Properties

1. *Availability Of Water On SWS*

196. In September 1980, the Texas Department of Water Resources published a report entitled "Availability of Fresh and Slightly Saline Ground Water in the Basins of Westernmost Texas" (RX 67). The report recites that it was prepared by the U.S. Geological Survey under cooperative agreement with the Texas Department of Water Resources. Figures 7 and 9 of this report [52] show that SWS is located within an area containing "significant amounts" of fresh and slightly saline water. Figure 8 of the report shows wells throughout SWS and the surrounding area.⁴⁶

197. In 1972, respondents first became interested in purchasing SWS (Kritzler 4901). Mr. Kritzler testified that he met with Mr. William Bray, then a vice president of Southwest Land Corporation, to learn of the characteristics and quality of the land in SWS. One of respondents' primary concerns was the amount and quality of water (Kritzler 4091). Mr. Bray at that time reportedly had an understanding of these matters (W. Bray 3774).

198. Southwest Land Corporation was in possession of a hydrology report on the property dated March 1968, which had been prepared for Mr. Hugh Wolfe⁴⁷ by Mr. Ed Reed, an hydrologist in Midland, Texas (W. Bray 3775). According to the testimony, this report, in evidence as CX 372, was given to Mr. Kritzler (Kritzler 4091-92; W. Bray 3775).

199. Mr. Kritzler interpreted the report as showing water to be "very valuable in the area" (Kritzler 4092). The report states as follows (CX 372 at 6):

Ground water under the lands in question occurs in two reservoirs; the Quaternary alluvial section, and the Permian Reed section. . . . Static water levels in alluvial wells have been measured at depths ranging from about 230 feet to 290 feet below the land surface. Thus saturated thicknesses up to about 450 feet can be expected. . . . [I]t is

⁴⁶ SWS is not explicitly shown on Figures 7, 8 and 9 of RX 67. Its location can be estimated with a sufficient degree of accuracy. RX 49 shows that the extreme southwest corner of SWS is marked by a diagonal dirt road. The same road is shown on Figures 7, 8 and 9. The southeastern corner of SWS is near where Plateau Draw intersects the railroad line, easily visible on Figures 7, 8 and 9. Wells number 161 and 162 on RX 49 (just southeast of the southeast corner of SWS) correspond with the two wells straddling Route 10 on Figure 9.

⁴⁷ Mr. Wolfe had been a previous owner of the land which ultimately became SWS (Wolfe 4549-50).

estimated [53] that well yields of the order of 800 to 1500 gallons per minute can be expected.

200. It was Mr. Reed's preliminary estimate that the alluvial aquifer under SWS property could yield 15,000 acre feet of water per year for 74 years, or a total of 1,110,000 acre feet of water (CX 372 at 9).

201. The second reservoir noted by Reed in the report is in the Permian Reef, Capitan Reef and dolomites (CX 372 at 4-6). This reservoir is in the eastern portion of SWS. The report states that there is "an excellent possibility of developing substantial volumes of water from the reef dolomites present in this area" (CX 372 at 6).

202. A second report covering the SWS land was prepared by Mr. Reed in April 1969 for C.B.K. Industries (CX 373). The findings in this report were consistent with, but slightly different from, the findings in the earlier report. This document reported static water levels ranging from 225 to 325 feet (CX 373 at 6). The total reserves found were 628,227 acre feet (CX 373 at 6), with annual recharge of 7,200 acre feet (CX 373 at 7). The discrepancy between these total reserves and the reserves found in the earlier report was explained on the basis that the earlier report covered a larger parcel of land (CX 373 at 7-8).⁴⁸ Promotional materials used by respondents used the more conservative estimate of reserves (*See* CX 87B).

203. A third report, CX 205, was prepared in November 1977 (Reed 2599). There was testimony that this report found static levels of approximately 250 to 280, 290 feet below land surface in the alluvium (Reed 2633).⁴⁹

204. Mr. Joseph Reed, the son of Mr. Ed Reed, prepared the third report and testified as an expert hydrologist in this proceeding (Reed 2586-2667). He gave an explanation of the three reports. It seems undisputed that there are two aquifers [54] in SWS. The limestone aquifer is the deeper of the two and covers the entire property. The alluvium aquifer is on top of the limestone aquifer and covers the western one half to two-thirds of SWS (Reed 2625). The alluvium aquifer is as much as 900 feet thick, and a well any place in this aquifer will strike water at approximately the same depth (Reed 2633, 2649).⁵⁰

205. The major difference between the alluvium aquifer and the limestone aquifer is that although there is water in the limestone, it

⁴⁸ The record does not explain the difference in sizes. There is evidence that SWS was originally 20,000 acres, and that 2,000 acres were sold in bulk to an investor from Chicago (Lara 3884; Wolfe 4549-50, 4552-53).

⁴⁹ This report, although referred to in the testimony as CX 205, and so cited to me by counsel is nevertheless listed as missing from the evidentiary record. An earlier draft which is in the record placed static water levels at from 177 to 384 feet, and well yields from 300 to 1,500 gpm (CX 528E).

⁵⁰ An alluvium aquifer is made of sand and gravel with water in the spaces between the solids. The water naturally seeks a constant level. The difference in static water levels is caused by the varying topography of the surface of the ground; the surface of the water table is relatively constant.

may be possible not to find water in any specific location, because the limestone is less porous than the alluvium (Reed 2649).

206. However, witnesses familiar with the area testified that to their knowledge no driller has failed to find water in any well in the limestone in or near SWS (Gilmore 3975; Wolfe 4543-45, 4550, 4558; see W. Bray 3832).

207. Additional witnesses confirmed that, irrespective of any possibility of not finding water in any particular location in the limestone aquifer, actual experience has shown water to be available throughout the limestone area (Holtz 3068; Gunter 2881-83; Harlow 2953; Mitchell 3720). As stated by one local well driller, although it is possible that water may not be found in a well in the limestone area, water will generally be found there (Stanton 3146).⁵¹

208. The first Reed report states there is "an excellent possibility" of finding "substantial" amounts of water in the limestone aquifer (CX 372 at 6). Mr. Brooks, respondents' appraisal expert, testified "based upon hydrology studies prepared in the area there are overwhelming indications that both the quality and quantity of water were sufficient and they were in the area" (Brooks 4458).

209. According to Mr. Reed, there is a well in the limestone just north of SWS which produces water at a depth of about 600 feet (Reed 2635). The maps prepared by Mr. Ramon Lara show numerous wells in the limestone area in and adjacent to SWS [55] (See RX 49C; Lara 3907-12). RX 68, another U.S.G.S. report published in cooperation with the Texas Department of Water Resources, shows a multitude of wells throughout the area of SWS, including the area over only the limestone aquifer (RX 68 at Figure 3 and pages 28-38).

210. Mr. Compere, the appraisal expert who testified for complaint counsel, was of the view, based upon expert consensus, that there was a plentiful supply of good water available in SWS (Compere 3479-80).

211. There was testimony that where water is found in the limestone, well yields are likely to be higher than from those in the alluvium (Reed 2646). The Powell Farm, immediately west of SWS, has large capacity irrigation wells which pass through the alluvium aquifer and draw water from the limestone (Reed 2631; Mitchell 3745; CX 103).

2. Quality of SWS Water

212. Complaint counsel contend that water found on SWS property exceeds certain water quality limits (CPF 129).

213. The Environmental Protection Agency ("EPA") has promulgated regulations under the Safe Drinking Water Act, Pub. L. 93-523 (1974), establishing maximum safe contaminant levels for drinking

⁵¹ "You don't get it every time but it is a pretty good percentage chance that you will get it" (Stanton 3146).

water. 40 C.F.R. 141. No maximum level is established for total dissolved solids. 40 C.F.R. 141.11. A second set of regulations control "contaminants in drinking water that primarily affect the aesthetic qualities relating to the public acceptance of drinking water." 40 C.F.R. 143.1. It is these regulations that set a limit on total dissolved solids which allegedly is exceeded by some of the water available in some areas of SWS. 40 C.F.R. 143.3.

214. However, the two U.S.G.S. reports in the record, RX 67 and RX 68, demonstrate that slightly saline water is usable for all purposes, notwithstanding that it exceeds EPA recommended limits (RX 67 at 39-40). Figure 9 in RX 67, for example, shows that more than half the wells in Wild Horse and Michigan Flats tap slightly saline water rather than fresh water. But there is no showing that such water is thereby unusable.⁵² [56]

215. The second U.S.G.S. report, RX 68, shows that the wells in the "slightly saline" areas of SWS and the surrounding areas which exceed EPA recommended limits are used for domestic, irrigation, public supply and livestock purposes. An example is given below, taken from RPF 274, n. 72.⁵³

216. The Reed report prepared for Hugh Wolfe and given to respondents at the time they purchased SWS, states that the water in the alluvium section is of "good to excellent quality" (CX 372 at 8). The limestone water is found to be of lesser quality, having total dissolved solids in the range of 660 and 690 parts per million (Reed 2643-44; CX 372 at 9).

217. The second Reed report, also prepared prior to respondents' purchase of SWS, states that total dissolved solids are in the range of 71 to 342 milligrams per liter, again within the EPA aesthetic limits (CX 373 at 7). The report states "The quality of water obtained from the test holes is generally better than that found to the north and equal to or better than alluvial water to the northwest" (CX 373 at 7).

218. Not until November 1977 did a Reed report cast doubt on the quality of water in some portions of SWS (*see* earlier draft, CX 528H, D). Even this report, which uses terms like "high salinity hazard," makes it clear that the water is still usable for all purposes so long

⁵² Slightly saline water is usable for all purposes, as is demonstrated by the fact, for example, that most of the wells shown on Figure 7 or RX 67 are in areas with slightly saline water.

⁵³ There is a well on Route 10 just east of SWS, shown as well 161 on RX 49. Figure 3 of RX 68 shows well #601 near where Plateau Draw intersects Route 10. (Pages 1-2 of RX 68 explain the well numbering system.) This is the same well as 161 on RX 49. It is in the limestone area, and is shown in Figure 9 of RX 67 to be in an area with slightly saline water. A full chemical analysis of this well is given on page 89 of RX 68; it is the 11th well from the top of the page. The analysis shows that the water contains more than 1,000 milligrams per liter of dissolved solids; *i.e.*, it is slightly saline and it exceeds the EPA recommended limits. On page 37 of RX 68, the same well is discussed in more detail. It is the 12th well on that page. The chart shows that water is obtained at a depth of 587.95 feet from the limestone aquifer. It is used to supply a house and a service station. The use code for the well

as certain practices are followed. For example, the report states that water with a high sodium hazard can be used for "extensive irrigation for long periods of time" if gypsum and, perhaps, limestone are added to the soil (CX 528H, I). [57]

219. In his testimony Mr. Reed explained the statements in the 1977 water report concerning quality. He apparently believed that the wells he tested within SWS have water within recommended quality limits (Reed 2642-44). There is one well, however, just to the north of SWS which exceeds the recommended limits (Reed 2644). This water can be used for irrigation, consumption by animals, or any other purpose (Reed 2644). In addition, because the quality limits are merely recommended for aesthetic purposes, the water can also be used for human consumption, as similar water is used in many areas throughout the southwest (Reed 2662). Many cities have municipal water which exceeds recommended limits, and use such water on a regular basis (Reed 2663). Finally, Mr. Reed testified that water can easily and inexpensively be filtered using in-home filtration devices currently on the market (Reed 2662-63).

3. Availability Of Water In GVA

220. There appears to be no dispute as to the good quality of water in GVA (See CX 374; Buck 1566; Holtz 3094; Compere 3480; Brooks 4458).

221. The only issue with respect to the water in GVA is whether the quantity is sufficient. The only evidence which raises doubts concerning the sufficiency of water in GVA arises from a preliminary report prepared by an employee of Ed L. Reed & Associates (CX 374). The cover letter to the report states that "the water quality is good, but the quantity of water which may be available appears to be low."

222. Mr. Reed was instructed by the respondents to "give a preliminary look" at the ground water in GVA in 1976 (Reed 2610). A preliminary report is one that is based solely on readily obtainable public information (Reed 2612-13). A preliminary report does not involve any test drilling, or other collection of non-public data (Reed 2612). The GVA preliminary report was based upon measurement of a few existing wells, a review of U.S.G.S. topographic maps, and some analysis of water samples (Reed 2613). CX 374K shows that only seven wells were reviewed in making the preliminary report.

223. Mr. Joseph Reed testified that at the time of the preliminary study there were three reasons for expressing caution about the quantity of water in GVA: (1) windmill wells were pumping only two to ten gallons per minute, (2) an irrigation well on the property was abandoned because it produced insufficient water for irrigation, and (3) the aquifer appeared discontinuous from the major aquifer to the east [58]

(Reed 2617). Later information casts doubt upon Mr. Reed's three reasons for expressing caution.

224. The amount of water produced by a well is determined in large part by the diameter of the well and the size of the pump (Gilmore 3957; Stanton 3150-54). According to witness Gilmore, a windmill, the least powerful pump available, is only intended to produce up to ten gallons per minute with a four inch diameter well (Gilmore 3957-58). Thus, the fact that windmill wells in GVA produced only 10 gpm does not prove that the available quantity of water is low. A larger well or more powerful pump could produce more water from the same location.

225. A pump jack, similar to a windmill but with a 1.5 horsepower motor, produces 10 to 15 gallons per minute (Gilmore 3956). A larger pump in the same well will increase the yield of the well (Gilmore 3957).⁵⁴ According to Mr. Gilmore, one resident of GVA replaced his windmill with a three horsepower pump and increased the yield to 20 gpm (Gilmore 3958-59). One of complaint counsel's purchaser witnesses had a well drilled in GVA in 1978, two years after Reed's preliminary report. The well has an electric pump rather than a windmill and produces substantial quantities of water (Buck 1519). A well driller in Marfa estimated that a well in GVA would produce 100 gpm (G. Taylor 4596). Thus, the fact that the windmills in 1976 were producing only 2 to 10 gpm may not be significant.

226. The second reason given by Mr. Reed is the abandoned irrigation well in the northern part of the property (Reed 2616-17). The map at CX 374K shows that the witness considered four wells in the northern part of the property, labelled W-5, 609, King and 606. W-5 is described at CX 374I as "windmill—down, broken rod." Thus, this is not shown to be an irrigation well, nor abandoned because of insufficient water.

227. The second well is labelled 609. It can be located at RX 68, Figure 4, bearing the code number 51-10-609.⁵⁵ This [59] well is the first well discussed in the chart on page 57 of RX 68. It shows that the well discharged 805, 640 and 760 gpm in 1966, 1968 and 1973, respectively. The well apparently was never abandoned, and thus cannot be the well referred to in Mr. Reed's testimony.

228. The King well is the first one listed on CX 374I. It is described as producing 400 gpm from 218 feet. Again, there is no indication that it is abandoned, and so it cannot be the well referred to.

⁵⁴ Gilmore gave one example from the company-owned property in SWS. With a 10 horsepower pump the well produced 65 gpm. With a 25 horsepower pump the same well produced 180 gpm. With two 25 horsepower pumps the well produced 300 gpm (Gilmore 3957).

⁵⁵ The 51 refers to the entire area covered by Figure 4. See upper left corner of Figure 4. The 10 refers to the quadrangle covering GVA, also numbered in the upper left corner. Six hundred nine is the number of the well

229. The final well considered is 606. The description given of it on CX 374I is not understandable without an explanation by a witness. The well, however, can be located on RX 68, Figure 4, with the number 51-10-606. The chart on page 56 indicates that this is an irrigation well drilled in 1950, which corresponds to Mr. Reed's recollection that the well he referred to is an irrigation well drilled in 1949 (Reed 2616-17). The chart also shows that the well was abandoned. This must, therefore, be the one Mr. Reed described as having been abandoned because of insufficient water. However, RX 68, which was published four years after Reed's report, shows a different reason for the abandonment of the well. The chart at page 56 states "Discharged 690 gal/min 3-11-73; obstruction at 120 feet in 1973." In short, Mr. Reed was simply probably incorrect in describing the reason the well was abandoned. None of the wells in the area of GVA has been shown to be abandoned because of insufficient water.

230. The third reason given by Mr. Reed was admittedly speculative. He found a discrepancy in water depths in the Lobo Valley wells, and concluded that there may be two separate aquifers (Reed 2619). However, "this was a question that we didn't resolve in the report" (Reed 2620). Rather, Mr. Reed reported to respondents "further testing would be required to properly evaluate the yield of the aquifer" (CX 374A).

231. Here, also, Mr. Reed's speculation was apparently mistaken. RX 67, the U.S.G.S. report published four years after Mr. Reed's preliminary report, has maps of the Lobo Valley aquifer at Figures 11 and 13. Neither of these maps suggests discontinuous aquifers. Nor does the text, RX 67 at 45-54, suggest separate aquifers. [60]

232. In addition to the above, Figure 11 of RX 67 describes the area of GVA as an "area containing significant amounts of fresh water." Elsewhere, the same report indicates 1,500 feet of potentially permeable material in GVA; that is, it indicates that GVA is over a 1,500 foot thick aquifer which may contain significant quantities of water (Reed 2621-23). Mr. Reed testified that he could not fully interpret the meaning of this finding without seeing the results of pumping tests (Reed 2622-23).

233. An expert report by a Dr. Sam Little, offered by complaint counsel, concludes that "an ample supply of excellent quality water is there for any reasonable period of time in the foreseeable future" (CX 220B).

234. Since 1976, several residents of GVA have drilled wells and found substantial amounts of water (Buck 1519; Gilmore 3958-59; W.D. Smith 928; Sanchez 3690; Taylor 4597). (Taylor has not yet drilled his well, but a neighbor's well less than one quarter mile away produces sufficient water from a depth of 450 feet to irrigate 1,280

acres.) One well, located in Unit 7 of GVA, yields over 1,000 gpm (W.D. Smith 948). There are now at least 11 wells in GVA and GVA II (W.D. Smith 971; Drew 762). No witness with actual experience with a well in or near GVA testified that there was insufficient water for domestic or agricultural use.

235. The final major reason not to rely upon Mr. Reed's preliminary report is that it is countered by the large number of wells in and near GVA (W.D. Smith 927). CX 529, the map given to Mr. Reed outlining GVA, shows about 30 wells in or near GVA. RX 67 at Figure 13 shows more wells than can be conveniently counted in the area of GVA, as does Figure 4 of RX 68. Figure 11 of RX 67 shows GVA in the middle of an area labelled "area containing significant amounts of fresh water." The map prepared by Ramon Lara, RX 50, shows at least 115 wells in and near GVA. It also shows that GVA is in the midst of a heavily irrigated agricultural area. *See also* RXs 28, 39, and 43.

4. *Availability Of Water In GVA II*

236. There was testimony that the southern portion of GVA II was never sold or available for sale, except in isolated instances of sales to hunters and campers (Kritzler 4099). The presence or absence of water in that area is not therefore an important issue, and complaint counsel did not offer any [61] evidence related to the availability of water in GVA II.⁵⁶ However, the maps in RXs 67, 68, and 50 cover that area, and show it to be within the Lobo Valley aquifer and in close proximity to numerous wells.

237. As to the northern half of GVA II, even the preliminary Reed report, CX 374, indicates that the western boundary of the major source of water is several miles to the west of GVA II. Mr. Reed suggested that the western boundary of the major aquifer is FM 1523, CX 374C, which is several miles west of GVA II (RX 50). Thus, GVA II is in the area Reed found to have plenty of water at shallow depths.

b. *Cost Of Drilling Wells*

238. In connection with obtaining water for use on the properties, respondents have disclosed the following information with regard to water on SWS (CX 79A-B):

Piped water is not available to this tract. However, each Buyer may drill his own well. The cost per foot for a drilled and cased well varies, depending upon the driller. The water table will run from approximately 250 to 400 feet. A complete Hydrologist Report for the total property is available upon written request. Individual information may be obtained by property owners by contacting the author of the Hydrologists Report.

⁵⁶ Mr. Reed's preliminary report on GVA did not include GVA II (CX 529). GVA Inc. II was not yet in existence in 1976 when the GVA preliminary report was compiled.

239. And CX 80A states:

Piped water is not available to this tract. However, each Buyer may drill his own well. The cost per foot for a drilled and cased well varies, depending upon the driller. A complete Hydrologist Report for the total property is available upon written request. [62] Individual information may be obtained by property owners by contacting the author of the Hydrologists Report.

240. Similarly CX 81B states:

Piped water is not available to this tract. However, each Buyer may drill his own well. The cost per foot for a drilled and cased well varies, depending upon the driller and water table. A complete Hydrologist Report for the total property is available upon written request. Individual information may be obtained by property owners by contacting the author of the Hydrologists Report.

241. With regard to GVA, the fact sheet states (CX 83C):

WATER: Piped water is not available to this tract. However, each Buyer may drill his own well. The cost per foot for a drilled and cased well varies, depending upon the driller. There is an irrigation well on the property now pumping from approximately 220 feet at about 450 gallons per minute. The quality of water is good, however, Green Valley Acres, Inc. makes no guarantees, or warranty or prediction as to the depth or quality of water on each individual parcel.

242. With regard to the northern portion of GVA II, the fact sheet states (CX 85C):

WATER AND MINERAL: Seller's water rights are being conveyed to all Property owners. Piped water is not available to this tract. Buyer may drill his own well. The cost per foot for a drilled and cased well varies, depending upon the driller. There is an irrigation well on the property now pumping from approximately 300 feet about 450 gallons per minute. The quality of water is good, however, Green Valley [63] Acres, Inc. II makes no guarantees, warranty, or prediction as to the depth or quality of water or each individual parcel.

243. With regard to the southern portion of GVA II, the following information is disclosed in the fact sheet (CX 84B):

WATER AND MINERALS: Seller's water rights are being conveyed to all property owners. Piped water is not available to this tract. However, each Buyer may drill his own well. The cost per foot for a drilled and cased well varies, depending upon the driller. Green Valley Acres, Inc. II makes no guarantees, warranty, or prediction as to the depth or quality of water on each individual parcel.

244. Mr. Harlan Stanton testified regarding the costs of drilling well. Mr. Stanton, a licensed well driller in Texas, had been the owner of a drilling company for eighteen years. He had been engaged drilling for water since 1950, all of such drilling having taken place

within 150 miles of Pecos, Texas, which is 90 miles from Van Horn (Stanton 3135-37). Mr. Stanton has drilled water wells in Culberson and Jeff Davis counties and in the Van Horn area (Stanton 3137, 3143). The underground geological formations encountered in the Van Horn area are alluvium and limestone or volcanic rock (Stanton 3143). Mr. Stanton has drilled commercial irrigation wells on Powell Farms, adjoining the northwest corner of SWS (Stanton 3247).

245. The evidence shows that the cost of a well is determined by the depth to the water, the diameter of the well, and the size pump (Stanton 3150-55). As with the cost of goods and services generally, the cost of well-drilling has increased in recent years.

246. According to Mr. Stanton, a domestic water well, for household use only, requires a well capable of producing 10 to 20 gallons of water per minute (Stanton 3149). A six and one quarter inch well (casing size) would be necessary to produce 10 to 20 gallons per minute. The cost to drill a six and one quarter inch well would be \$13 a foot (probably more than that today) (Stanton 3150-51). Therefore, to drill to approximately 400 feet, the cost would be \$5,000 for drilling costs, plus \$1,500 for a pump (Stanton 3151). Respondents dispute this estimate, contending that for purely domestic use, a well capable of producing five gpm is sufficient (Holtz 3072; [64] Mitchell 3729). A home and moderate garden would require only 10 gpm, according to Mr. Mitchell (Mitchell 3729).

247. Grapes require three gpm per acre of irrigation (Campbell 3655). Thus, a house with a garden and a four and a half acre vineyard would need a well capable of producing about 25 gpm. Pecans require less than one gpm per acre (W. Bray 3784, 3786).⁵⁷ A windmill producing 10 gpm with a storage tank would be sufficient to irrigate 10 acres (RX 44; Gilmore 3957; 3968). Mr. Stanton testified that irrigation requires about eight gpm per acre (Stanton 3157). Mr. Holtz, a district conservationist with the Soil Conservation Service, testified that 10 gpm is sufficient to irrigate an acre (Holtz 3073). And sprinkle or drip irrigation would reduce the amount of water necessary (Holtz 3074). The irrigation wells on the Powell Farm (adjacent to SWS) produce 500 gpm and irrigate 500 acres, that is, five gpm per acre (Gunter 383). In addition, there was testimony that an eight inch well, which is just slightly larger than the six inches normally used for purely domestic purposes, is sufficient to irrigate approximately 80 or 100 acres (Beasley 2853).

248. The county extension agent of the Texas Agricultural Extension Service informs potential small scale farmers that a well suitable for domestic and home gardening use will cost only \$3,000 (Harlow

⁵⁷The Brays have 1200 pecan trees on 28 acres. Mr. Bray testified that they use 21 gpm to irrigate the entire yard (Bray 3784-86).

2971).⁵⁸ Mr. Holtz, the district conservationist, testified that a well sufficient to provide for domestic use and 4 1/2 acres of irrigation in an area with a water depth of 400–500 feet would cost \$5,000–\$10,000 (Holtz 3072–73). An experienced irrigation engine salesman and former president of the Van Horn Chamber of Commerce testified that \$6,000 to \$8,000 would be enough for a well sufficient to irrigate as much as 15 acres (Mitchell 3736–37). Respondent Kritzler estimated that a well in the properties would cost from \$4,000 to \$7,500 (Kritzler 628).

249. Several customers testified that they had drilled wells, or had some other basis for ascertaining the cost of a well. Mr. Wharton was quoted a price for his prospective well in SWS of \$7,000 to \$8,000 (Wharton 3577). He testified that he believes he can have the well installed for as little as \$4,000, [65] if he does some of the work himself or uses a smaller driller (Wharton 3577). Mr. Muller is in the process of building a house in GVA. He anticipates his well may have to be as deep as 600 feet, and cost less than \$10,000 (Muller 3637).

250. A well driller was reported as quoting a price to Mr. Sanchez of \$10,000 to \$12,000 for a well in the hills of GVA (Sanchez 3700). However, he testified that he found some private drillers willing to drill the well for only \$2,000 to \$3,000 (Sanchez 3700–01). Thereafter, they drilled to 600 feet, and found water at 500 (Sanchez 3701–02). However, the well is crooked, and thus presently unusable. Consequently, he paid the drillers only \$1,000 (Sanchez 3700–01, 3703). He anticipates it will cost another \$1,000 to have the well straightened and to add the casing (Sanchez 3709). He plans to power it with a windmill, and therefore will not need a pump or electricity (Sanchez 3704). Thus, his total cost will be \$2,000 plus the cost of a windmill.

251. The Brays installed a well on their property adjoining SWS in 1978 (W. Bray 3784). The well is 520 feet deep with water at the 90 foot level (W. Bray 3784–85). It produces 40 gpm, which is sufficient for domestic use, to irrigate 1,200 pecan trees and a large home garden, and to fill a one acre lake (W. Bray 3784–85).

252. Mr. Perkins, who is in the process of moving to GVA, was quoted a price of \$7,000 to \$8,000 for his well, but expects to have it done for less by doing some of the work himself (Perkins 4038, 4041).

253. George and Wilda Taylor were in the midst of constructing their house in GVA when they testified in November 1981 (G. Taylor 4595–96). They had contracted with a well driller named Brown in Marfa, Texas, to drill a well. Mr. Brown estimated that the well would be 450 feet deep and would yield 100 gpm (G. Taylor 4596). The cost will be \$11 per foot, or an estimated total of \$4,950, plus a pump (G. Taylor 4596).

⁵⁸ In the last couple of years, inflation has raised the cost beyond \$3,000 (Harlow 2971).

3. Financing

254. There is little evidence in the record regarding the availability of financing. There was testimony that the Van Horn branch of the Pecos Savings and Loan will not take land in SWS, GVA or GVA II as collateral (Stuard 3130).

255. However, there was also testimony that financing was available from other nearby sources, or by using other collateral (Smallwood 4054; Buck 1529). [66]

4. Equipment

256. The evidence offered by complaint counsel demonstrates that new farm equipment for a large farm, such as the equipment shown in RX 34, is beyond the financial capacity of an ordinary consumer (Gilmore 3987-88).

257. On the other hand, the record shows that equipment of the size and sophistication appropriate for an owner of 5 to 40 acres is available at reasonable prices (Wharton 3617).

5. Improvements

258. The only record evidence regarding "improvements," concerns the construction of a golf course in SWS, staking of the properties, and the construction and maintenance of roads.

a. *Golf Course*

259. The sales contracts used in the purchase of SWS property contain the following provision on the reverse side:

Seller agrees to construct a nine-hole golf course before March 1, 1978. Upon completion of the golf course, Seller will form Sunsites Golf Club and will convey the golf course to Club, which shall thereafter be solely responsible for the operation and maintenance of the golf course. Buyer will become a charter member of the Golf Club at not charge. Buyer agrees to pay such fees as may be assessed by Club for course upkeep and maintenance, and Buyer further agrees that his rights and privileges in the golf course shall be subject to rules and regulations adopted by said Club (CX 74, 75).

The identical provision is included in the fact sheets for SWS (CX 79, 80, 81, 82). [67]

260. The face of the SWS contracts provide as follows:

Upon becoming a charter member of the Sunsites Golf Club, referred to on the reverse side hereof, the Buyer will be responsible for whatever dues and/or assessments such Club might require, and nonpayment of such amounts may result in a lien of Buyer's property in favor of such club, if the rules and regulations to be promulgated by such club so state (CX 74, 75).

261. There were no representations concerning a golf course made for the GVA and GVA II properties. Hence, this aspect of the complaint relates only to SWS.

262. There was testimony that in mid to late 1978 respondents hired William Bray⁵⁹ and Bill Gilmore to construct the SWS golf course (Kritzler 484-85; Gilmore 1005). Mr. Bray thereafter designed the course, including the irrigation system, greens and tees, and the water hazards (W. Bray 3811). Mr. Gilmore handled the actual construction (W. Bray 3812). According to respondents, construction of the course cost approximately \$80,000 (Kritzler 484; Shonfield 1258-59; *see* CX 10).

263. There was testimony that the course was completed around November 1978 (Gilmore 1007; Shonfield 1260; Compere 3224; Lowry 3117). An aerial photograph of the golf course is included among the photographs in Mr. Compere's appraisal report (CX 436 at the seventh page of photographs). The course is also somewhat visible in RX 49A. According to the testimony, at the time of completion the irrigation system was completed, the greens were in, and the fairways were beginning to grow (Kritzler 484). There is some dispute as to whether the newly seeded course was playable. Mr. Bray does not believe the fully constructed course was yet playable (W. Bray 3830), though an [68] employee of respondents, who was president of the property owners association ("POA"), testified that it did receive some minimal use (Shonfield 1260-61).

264. The SWS property owners association was incorporated in October 1978, and the golf course was deeded to it (CX 416; Shonfield 1260).

265. Shortly after construction work on the course was completed, it was destroyed by a massive rainfall (Kritzler 484-85; Shonfield 1266; W. Bray 3830; Gilmore 1008-09).

266. Thereafter, respondents undertook to reconstruct the course. Again, according to the testimony, the course was completed (Kritzler 485; Gilmore 1010). There was testimony that after the course was completed the second time, it was playable (Gilmore 1010). Mr. Wharton first visited SWS in March 1980 (Wharton 3566). This witness testified that the course was fully operational and well-maintained (Wharton 3608).

267. Subsequently, the Van Horn area was subjected to a severe drought, which destroyed the course a second time (Kritzler 486; W. Bray 3830). The course was not rebuilt.

268. The assessments collected by the POA had been inadequate

⁵⁹ Mr. Bray had some experience in golf course construction. As the assistant city manager of Tucson, Arizona, he testified that he supervised the engineering, design and construction of an 18 hole course, where the T National Golf Tournament is now played. He testified that he also supervised the construction of a golf course southeast Arizona (W. Bray 3767-69).

pay for maintenance and upkeep, and SWS paid for maintenance in addition to construction (Kritzler 485; Shonfield 1266-67; CX 416). In October 1980, the POA decided that given the low level of interest expressed in the course by the purchasers, and the failure of many purchasers to pay their dues, it would not be possible to continue maintenance of the golf course (CX 416).

269. The total expenditures by SWS for construction, reconstruction and maintenance of the golf course was in the range of \$150,000 to \$170,000 (Kritzler 485; Shonfield 1267). About half of this money was expended after SWS had fulfilled its contractual obligation to construct the course (Kritzler 485).

b. *Staking Of The Parcels*

270. For some, but not all, of the parcels of the properties sold by respondents a contractual obligation existed to stake the parcels. [69]

i. SWS

271. In SWS there was no contractual obligation to stake parcels (see CXs 74, 75). Nevertheless, there is evidence showing that lots in SWS were staked (see CXs 79B, 80B, 81D, 82D; Lara 3929). From June 1977 through December 1978, SWS, Inc. spent \$71,683 on lot staking (see CX 10).

ii. GVA And GVA II

272. The contract for GVA provides "It is anticipated that the Seller will commence staking parcels by January 1977, and completion is estimated in 1978" (CX 76). The same provision is included in the GVA II contracts, though the commencement date is 1978 and the estimated completion date is 1979 (CXs 77, 78).

273. The firm of Cremans, Inc. was retained to stake the parcels (Lara 3929). Mr. Lara, of Cremans, testified that his firm had staked some of the parcels, but not all, and that he had no idea as to the percentage of parcels staked (Lara 3929). Concerning this, Mr. Gilmore, respondents on-site representative, testified (Gilmore 3975):

- Q. Are you familiar with whether the lots which are offered for sale are staked?
- A. All that we sell are staked, yes.
- Q. Is that one of the things you have oversight of?
- A. Yes, that's one thing I check is stakes.
- Q. Judge Howder:
- A. It's not staked you don't sell it?
- Q. Witness:
- A. Unless the people want it, then we call the man—if we can't find the stakes we have the man to come out and restake it.

The witness Lara confirmed that his firm had in fact been summoned to stake individual parcels (Lara 3929). [70]

274. Mrs. Buck testified that she visited her property in GVA in February 1978. She contacted W.D. Smith in Van Horn, but he was unable upon their visit to GVA to show Mrs. Buck her specific plots. They could find no survey stakes designating the boundaries of the lots. Mr. Smith showed them land that was "off by two or three lots" (Buck 1511). Mrs. Buck testified that she visited GVA again in April 1978. The stakes to their parcels could not be found initially because they were buried about 18 inches deep under the ground (Buck 1515-16). In late November or early December 1978, there was testimony that Mrs. Buck and several other landowners at GVA contacted Mr. Kritzler regarding some of the conditions at GVA. They told Mr. Kritzler that many of the people living on GVA were unable to locate their specific boundary lines because the stakes could not be located (Buck 1533-34).

275. Another purchaser living on GVA on the land testified to similar problems with regard to staking. When Mrs. Smallwood purchased her lot it was not staked, and she was unable to build a fence to delineate her property lines. Mrs. Smallwood kept horses, and was allegedly harassed by Mr. Smith who insisted that the horses not run free. According to Mrs. Smallwood, she repeatedly asked Mr. Smith to stake the property so that a fence could be constructed. Mrs. Smallwood, who also participated in the property owners' meeting with Mr. Kritzler regarding the roads and lack of staking, succeeded in having her property staked some several months later (Smallwood 4069-70). In addition, Dr. Danskin testified that he did not see stakes on GVA II or SWS when he visited his properties in those two subdivisions (Danskin 2436, 2438; *see also*, Lambert 1786).

276. Notwithstanding the above, the record shows that from May 1978 through March 1979, \$35,467 was spent by respondents on staking in GVA (CX 19). \$16,993 was spent staking GVA II from May 1978 through October 1978 (CX 27).

c. Road Building

277. As with staking, respondents' road building obligations differed among the three properties.

i. SWS

278. In the eastern half of SWS, known as SWS Ranch (RX 49), respondents made no contractual promise to construct roads. The contract states "Seller will not construct any roads in Sunsites Ranch - Unit II. There is a 15 foot easement reserved for public use where necessary and along the boundaries [71] of all parcels for roads and

utilities" (CX 75B, no. 10). The fact sheet further explains the lack of obligation:

ROADS AND STREETS.—Seller will not construct any roads in Sunsites Ranch - Unit II. There is a 15 foot easement reserved where necessary and along the boundaries of all parcels for roads and utilities. At its option, the Seller may form a property owners association to provide for the construction and maintenance of roads. If such association is formed, each landowner will be a member thereof and will be responsible for whatever assessments such association might require, and nonpayment of such amounts may result in a lien on Buyer's property in favor of such association, if the rules and regulations to be promulgated by such association so state.

279. In the remainder of SWS, the road building obligation is (CX 74B, no. 12):

Seller has constructed and will continue to construct dirt access roads (15 feet and crowned). The buyer is responsible for the maintenance thereof. At its option, the Seller may form a property owners association to provide maintenance. If such association is formed, each land owner will be a member thereof and will be responsible for whatever assessments such association might require, and nonpayment of such amounts may result in a lien on buyer's property in favor of such association, if the rules and regulations to be promulgated by such association so state. Assessment will probably be on a per-parcel basis and is estimated to be \$20.00 per parcel per year.

The fact sheets used for the portions of SWS where roads were to be constructed explain the road building obligation in a similar manner (CXs 79A, 80A, 81B). [72]

280. There is no record evidence which establishes that the roads in SWS were not constructed as promised.⁶⁰

281. The evidence of record shows that respondents constructed roads in the western half of SWS and, although not obligated by contract to do so, maintained such roads (Kritzler 472, 477; W.D. Smith 905, 907-11; Gilmore 1019; W. Bray 3812; CX 10). The roads are visible in the aerial photograph of SWS (RX 49A). Moreover, complaint counsel's appraisal expert conceded the existence of well constructed and well maintained roads: "On the one on Southwest Sunsites it had a base to it, what I would call a caliche road and was a reasonably well-maintained road" (Compere 3223). The quality of the roads in SWS may be seen in the photographs of CX 153E.

⁶⁰ One consumer witness, Dr. Robert Danskin, testified that when he visited SWS in 1978 he was unable to get to his property because a heavy rain had made the road impassable (Danskin 2435-36, 2452). Complaint counsel did not offer Dr. Danskin's contract in evidence. However, he testified that he purchased a 40 acre parcel (Danskin 2427). Other testimony in the record establishes that 40 acre parcels were sold only in SWS Ranch (Kritzler 4093-94). Thus, his parcel must have been in an area where there was no contractual obligation to construct any road (CX 75B).

ii. GVA And GVA II

282. As with SWS, there are two different road-building obligations in GVA and GVA II. In the southern portion of GVA II, the area in the mountains which was generally withheld from sale, there was no obligation to build roads. The contract states: "Roads and Streets—Seller will not construct roads to each parcel. There is a 20 foot easement reserved where necessary and along the boundaries of the parcels for roads and utilities" (CX 78B, no. 9).

283. In the remainder of GVA II, i.e., the portion which adjoins Route 90, and in GVA, respondents were obligated to construct dirt ranch access roads, but were not obligated to maintain them. The contracts provided (CX 76B, no. 10):

Roads and Streets—Seller will construct dirt ranch access roads to [73] each parcel. The Buyer is responsible for maintenance thereof. At its option, the Seller may form a property owners association to provide maintenance. If such association is formed, each land owner will be a member thereof and will be responsible for whatever assessments such association might require, and nonpayment of such amounts may result in a lien on Buyer's property in favor of such association, if the rules and regulations to be promulgated by such association so state. Assessment will probably be on a per-parcel basis. There is a 20 foot easement reserved where necessary and along the boundaries of the parcels for roads and utilities. It is anticipated that the construction of the roads will commence by January 1977, and completion is estimated in 1978.

The provision in the GVA II contract is identical, except that the anticipated commencement date is January 1978 and the estimated completion date is 1979 (CX 77B, no. 10).

284. A dirt ranch access road is an unpaved road without a crown and without drainage ditches.⁶¹ This was explained in detail by one purchaser of land in GVA (W. Taylor 4619-21):

Q. What is a "ranch road?"

A. That's a dirt road, flat dirt road. It's never paved or graveled or anything.

* * * * *

Judge Howder:

Are you saying that the roads in Green Valley are ranch roads in the sense of what you were used to before? [74]

The Witness:

Well, I always thought when you said "ranch road," it's an acceptable thing that that's not a paved road or graveled road. That's a road that's cut out of a pasture. You can drive across it, and its graded, and that's it.

* * * * *

Judge Howder:

In your mind, is a ranch road supposed to have [drainage] ditches?

The Witness:

⁶¹ One witness, Mrs. Buck, testified that she believed a dirt ranch access road to be a crowned road with drainage ditches (Buck 1501-02).

Oh, no, no, no.

Q. Are these roads [in GVA] graded?

A. Yes, they've been graded.

Q. And when you say "graded," what do you mean by that?

A. Well, they take a grader and go in there and push that dirt out and flatten that road out. And take that native grass that's cropped up . . . and take it out so that there's nothing there. Like the top of this desk (indicating). Except that the dirt that's taken out of the center is piled up on the side of the road. Just like you've seen a grader go down anyplace.

* * * * *

Judge Howder:

Does a ranch road, in your mind, imply a road which has a crown down the middle or just flat? What I mean, is the center higher than the sides? [75]

The Witness:

I don't know that much about it. I just know that they usually are flat—to me, the ranch roads that I'm familiar with are usually just flat roads. As a matter of fact, most of the ones that we went over [in] the places we had [*i.e.*, our previous ranches], had never been graded. We just went across the field.

285. The dirt ranch access roads were in fact constructed (Kritzler 471; W.D. Smith 905-11; Compere 3222, Lara 3917; Gilmore 3960). Numerous photographs in the record show the roads in GVA and GVA II (RX 50A, 36; CS 153I, 436, 88, 89). The roads in GVA cost \$18,800 in 1978, and in GVA II they cost \$13,000 from February 1978 to February 1979 (CX 19, 27).

286. Most of complaint counsel's evidence concerning roads in GVA and GVA II asserted not that they were not constructed, but that they have not been adequately maintained. However, the sales contracts explicitly state that it is the purchasers obligation for upkeep rather than respondents.

287. In any event, the evidence shows that most roads are maintained by the respondents at their own cost, and that the roads are in passable condition except for problems immediately following a rain (Compere 3224) ("reasonably well maintained"); (W.D. Smith 909; Gilmore 1019).

288. Those witnesses who complained that the roads are inadequately maintained admitted that the roads were constructed and that some maintenance was carried out at respondents' expense on a regular basis (W. Taylor 4617-18; Smallwood 4072, 4083; Buck 1534).

6. Practices Which Impair The Use Of Lots

289. Paragraph Thirteen (c) of the complaint alleges that the respondents engaged in unspecified practices which substantially impair the ability of purchasers to live on or use their lots. Complaint counsel identified only two such practices, *viz.*, failing to maintain improvements, and allowing cattle to graze on the properties. [76]

290. The golf course was maintained at respondents' expense al-

though the contract explicitly allocated the cost of maintenance to the POA and the buyers (CXs 74B, 75). When the cost of maintenance became excessive, and lack of interest on the part of purchasers in using the course became evident, SWS ceased maintenance (CX 416). The POA, having limited funds, and unable to collect assessments from landowners, was unable to maintain the course (CX 416). No witness testified that the lack of maintenance of the golf course affected his ability to use his lot.

291. The roads have also been maintained by the respondents, although the contracts explicitly allocate the responsibility for maintenance to the purchasers.

292. The claim that the leasing of the land for grazing impairs the ability of a customer to use his property is not reasonable. The contracts explicitly disclose that the land will be leased and that customers may fence cattle out of their property (CXs 75B, 76B, 77B, 78B).⁶² In fact, fencing cattle out of non-grazing land rather than fencing them into grazing land is the procedure encouraged by Texas' open range law (Buck 1574; *Texas Revised Civil Statutes Art.*, Section 6954 et seq.). Moreover, respondents' right to lease the land for cattle grazing will expire in 1987 (CXs 75B, 76B, 77B, 78B). Moreover, there is no evidence that any customer's ability to use his lot was substantially impaired by the grazing of cattle.

C. The Parcels Are Usable For Homesites, Farms And Ranches

1. The Parcels Are Affordable As Homesites

293. The question is raised in this case whether the cost of a well, perhaps up to \$10,000, or the cost of electricity, perhaps up to \$5,000 (refundable), or the cost of other utilities and services, render it prohibitively expensive to use the property in issue as a homesite. In addition to these costs, the cost of a dwelling must also be considered. [77]

294. There is evidence in this record that costs of mobile homes are not prohibitive, and that such dwellings are often used in the Van Horn area (CX 532B). Mrs. Smallwood's mobile home (RX 46, 47) cost only \$5,400 (Smallwood 4054). There was other testimony that mobile homes are available in the \$10,000 to \$15,000 range (Mitchell 3736). The Brays live in a mobile home (RX 40) which is 60 by 40 feet in size. It has two bedrooms, a bath, a kitchen, a dining area, a 32 foot front porch and a 20 foot screened in back porch (W. Bray 3796-97). This witness placed the total cost for the mobile home, including skirting, an evaporation cooler, and on-site delivery and anchoring, at \$13,500

⁶² Respondents do not retain the right to lease land in western portion of SWS, and there is no evidence in the record that such land was leased.

(W. Bray 3796-97). The Bucks' double size deluxe mobile home cost \$32,000 (Buck 1521, 1558).

295. Based on this information, it appears possible to commence living practically on respondents' properties for well under \$50,000.

296. The fact that the land can be used as a homesite is evidenced by the fact that some people have and are currently using such tracts as homesites (W.D. Smith 968-70; Gilmore 995; Wharton 3566; Muller 3638; Perkins 4032; Smallwood 4053-54; G. Taylor 4595-96; W. Taylor 4614). These residents who chose to live on the properties do not appear affluent. Mr. Buck operated construction equipment for the Marines (Buck 1502). Mr. Muller is a self-employed car mechanic (Muller 3629). Mr. Perkins sells insurance (Perkins 4019). Mr. Wharton is a disabled truck driver (Wharton 3601). The Taylors are retired (G. Taylor 4601; W. Taylor 4617).

2. The Tracts Are Usable As A Farm Or Garden

a. *Soil, Water and Climate Conditions Permit The Growing Of Crops*

297. SWS is in Wild Horse Valley, immediately north of Michigan Flats, while GVA and GVA II are in Lobo Valley (Reed 2608). These are presently the only farming areas in Culberson County (Holtz 3085; Harlow 2967). All three properties are surrounded by farms (RX 49, 50, 436 (photographs of surrounding farms), 170 (photographs of neighboring farms); Gilmore 1021-22; 3944-55, 3962-63, 3966; Conoly 1060; Gunter 2907-08; Harlow 2984; Campbell 3640; Mitchell 3763-64; W. Bray 3783-84, 3801; H. Bray 4002; Lara 3915, 3923; [78] Smallwood 4045; Kritzler 4091, 4139; Wolfe 4555; Wharton 3578; Campbell 3640; RXs 27, 28, 29, 30, 31, 32, 33, 34, 38, 43)).⁶³

298. These neighboring farms raise a wide variety of crops. Powell Farms adjacent to SWS grows cotton, maize and barley commercially, and vegetables for home consumption (Gunter 2878, 2917). The Brays raise pecans on land adjoining SWS (W. Bray 3784). A large pecan orchard is located less than two miles from SWS (Gilmore 3947). A farm across Route 10 from SWS raises hay and grapes (Gilmore 3952-54). The University of Texas has an experimental vineyard raising grapes just south of SWS (Campbell 3640). Cotton, corn, milo, lettuce and onions have been cultivated in the areas of the properties (Mitchell 3726; Gilmore 3944-52). Potatoes are grown approximately a mile from SWS (Gilmore 3948). Rye or wheat is grown immediately north of GVA (Gilmore 3983).

299. Farms in the Van Horn area raise cotton, wheat, barley, grain

⁶³ The ten photographs numbered RXs 27-34, 38, 43 were identified and explained by witness Gilmore at 3944-55.

sorghum, alfalfa, potatoes, pecans, and onions (Holtz 3042, Harlow 2927). The county agriculture extension agent informs prospective farmers or gardeners that the crops grown in the area include pecans, grapes, apples, pears, plums, peaches, carrots, lettuce, turnips, cantalopes, tomatoes, cabbages and onions (Harlow 3987; CX 532). Newspaper articles refer to area farms growing onions, pecans, and grapes (CXs 90, 92, 99, 133, 266).

300. Mr. Kritzler testified that when respondents first purchased the three properties, they were aware of the extensive agriculture in the area (Kritzler 4091). He testified that the respondents visited the properties and the surrounding areas, looked at the farms, sought information from the county extension agent and the local chamber of commerce, and formed the belief that the soil was fertile, the water excellent in quality and abundant in quantity, and that the properties could be used productively (Kritzler 4091). The district conservationist with the Soil Conservation Service was also consulted. He testified that he told the respondents that the soil, water and climate were conducive for farming (Holtz 3078).

301. Dewey Compton, an agronomist respected by respondents (Kritzler 4096), took samples of the soil in SWS and submitted them to the Soil Testing Laboratory of Texas A&M University and the Agricultural Extension Service. The subsequent report [79] suggests, *inter alia*, that "a very small amount" of fertilizer would be necessary, along with some zinc if fruit trees were to be grown (CX 237).

302. Information was also sought from a Dr. Sam Little concerning soil fertility in Lobo Valley. Dr. Little reported favorably as to the climate, soil and water (CX 220A-D). As to the climate, he reported that it "would no doubt come as close to 'ideal' as you could probably ever hope to get" (CX 220A).

303. Dr. Little analyzed the soil in the level areas of GVA, the moderately sloping areas with a sandy to gravelly surface, and the gentle slopes with a sandy surface. As to the first of these, he found that the soils "are deep, are dark brown in color with about 36 inches of topsoil underlaid with brownish colored subsoil about 60 inches deep." The soils are "relatively high in humus and are high in calcium, magnesium, potassium, phosphorous and nitrogen." He concluded that the soils "are especially well suited to producing excellent yields" of grain sorghums, cotton, soybeans, corn, wheat, barley, alfalfa, sunflowers, sugar beets, oats, onions, cantalopes, beans, tomatoes, peppers, sweet corn, squash, cabbage, lettuce, watermelon, peaches, pears, grapes, plums, apricots, pecans and figs (CX 220C).

304. As to the moderately sloping areas with a sandy to gravelly surface, Dr. Little concluded that the soils are three feet in depth, take water well, are well drained, and have very little runoff. He found

these soils suitable for any of the crops previously listed, but especially well suited for fruit and nut crops because the moderate slopes provides good air drainage (CX 220D).

305. The third type of soil is found on gentle slopes with a sandy surface. Dr. Little concluded that these soils "have an ample supply of all the needed plant foods," and are three to five feet in depth. These soils he reported to be high in humus, calcium, magnesium, potassium, phosphorous, and nitrogen. His final conclusion was that these soils are "especially well suited to producing excellent yields" of the same crops as he listed for the level areas (CX 220E).

306. Several witnesses, expert and lay, stated opinions concerning the productivity of the properties. The County Extension Agent, Mr. Harlow, testified that the soils will produce "whatever you want" with the addition of certain elements (Harlow 2925). He attested to a long growing season (Harlow 2925). He also stated that Culberson County is "roughly free of insects," and the home gardens "have very few problems with insects" (Harlow 2954). This was also voiced by one gardening resident of SWS (Wharton 3608). [80]

307. There was also testimony by the District Conservationist with the Soil Conservation Service, Mr. Steve Holtz (Holtz 3027). This witness gave the following general opinion concerning the suitability of the area for raising crops (Holtz 3042):

As far as farming, most of the area, including the wildhorse farming area northeast of Van Horn and the Lobo area to the south of Van Horn, the soils are very conducive to irrigated farm land. . . . [It] is good crop land. . . .

308. Some purchasers sought specific assistance from Texas A&M concerning farming. They reported that they were told that the properties were conducive to the raising of crops (G. Taylor 4606; W. Taylor 4612-13). Mr. Ted Rose, a sales representative of respondents, testified that he ascertained from Texas A&M and two Texas agronomists, Dewey Compton and Murray Cox, that the land and climate were suitable for farming (Rose 709-10).

309. There was also testimony by witnesses engaged in growing vegetables in or near the properties. Two witnesses testified about crops grown in home gardens not on the properties but in the local Van Horn area. Mr. Milburn Mitchell's home garden in Van Horn includes onions, beets, carrots, okra, lettuce, corn, tomatoes, potatoes and pecans (Mitchell 3728). The Brays' garden, on property adjacent to SWS, has squash, green peppers, chili peppers, tomatoes, corn, chard, strawberries, grapes, pecans, and 38 fruit trees (H. Bray 4002). Samples of the Bray's produce were handed around at the hearing (H. Bray 4002-03).

310. The record further shows that crops are grown on the three properties, both commercially and in home gardens. There is a commercial pecan orchard in GVA (W.D. Smith 906, 949; Gilmore 1003, 3966-67; RX 43). Another 170 acres in GVA is, or recently was under cultivation, 100 acres in alfalfa and 70 acres in oats (W.D. Smith 975; Gilmore 1002, 3962-63; RXs 37, 43).

311. A number of the residents described their home gardens and the results they have had. Mr. Wharton testified that his garden was about 40 feet by 15 feet, and he described it as follows (Wharton 3582-84):

A. We put out corn, sweet corn, we put out pinto beans. . . . We had carrots, [81] onions, we had black-eyed peas. . . . And watermelons.

* * * * *

Q. What kind of results did you have from your garden?

A. Unbelievable.

Q. What do you mean by that?

A. The ground will grow anything. No fertilize[r].

Q. Just water?

A. Just water.

Q. Can you give us an estimate or an indication of how much you were able to grow in the garden?

A. I've never seen beans set on as many times as the ones set on out there. The normal in even irrigated ground on pinto or northern, which I've raised both of them commercially before, you consider four settings a good crop, that's four sets of blooms, which the bloom ends up being a bean. And we had six, seven settings when I pulled them up and threw them over the fence because we were burned out on them.

* * * * *

Q. How about the watermelons?

A. Watermelons, we started eating them, the first ones we eat weighed 24 pounds a piece. We only put out two vines of watermelons. In other words, two plants. And we have eat 12 watermelons off of it. I have fed 6 or 8 to the hogs, and there is still 16 in the garden, oh, about like that (indicating). Right now they're probably about 10 pounds. [82]

Q. How big did some of these get?

A. The biggest one I give to a neighbor weighed 40 pounds. The next to the biggest one I took it up to Bill Gilmore's and the wife and I and him eat it, it weighed 35, that was the two big ones. All the rest of them, the heaviest was 25 pounds. . . . I've never seen a watermelon vine produce over four good melons before. And then the heck of it is, they're still there and they're still blooming right today [October 20].

312. And again (Wharton 5600):

Q. You mentioned in your last answer pecans, do you have pecan trees?

A. I have eight pecan trees out, and I have three grape [vines], and I'm putting in two more lines of pecans which will be nine in each line, and then they'll be five grapes, raspberries, and blackberries on the other end of the [irrigation] drippers.

313. Mr. Gilmore gave similar testimony about this garden in SWS (Gilmore 1027-28; *see also* 3978):

Q. Now Mr. Gilmore, in your—in your direct testimony, you talked about the crops, produce, that was available on your property. Be specific. What kinds of crops are you able to grow on your property? And have you grown on your property?

A. Well, carrots, rutabagas, turnips, beans, peas, cabbage, Brussel sprouts, broccoli, zucchini [sic] squash, summer squash, banana squash, acorn squash, all kinds of chilis, radishes,—[83]

Q. Domestic?

A. Tomatoes.

Q. How about potatoes?

A. Potatoes.

Q. Corn?

A. Corn. Beets, cucumbers.

Q. Do you eat this food?

A. Watermelons.

Q. Do you eat this food?

A. Oh, yes.

Q. Just describe how plentiful you can produce these crops. Not what you can do, what you have done?

A. I raised so much last year I had to take it to town and sell it or give it away.

Q. What size parcel where you raised so much?

A. Well, I had a quarter acre [under cultivation].

314. Mr. Wharton explained in very practical and understandable terms how productive his garden is (Wharton 3585-86):

Q. How much of your own diet comes from your garden?

A. Up until, oh, I'd say [until the] first of October, a good 50 percent of its was coming from the garden, maybe heavier.

Q. How much money did you have to supplement your living expenses with last summer? [84]

A. We had two months, August and September, one month we got by on \$46 and one month we got by on \$47.

Q. For your total living expenses?

A. Total living, that included butane and the electricity bill.

Q. Everything else you took from the garden?

A. Yes, sir.

315. Although Wharton has experience as a commercial farmer, he stressed that cultivation of a home garden of 10 acres does not require any particular experience, although perhaps some helpful advice (Wharton 3611-12).

b. The Cultivation Of 5 To 40 Acre Parcels

316. The only issue remaining on the subject of gardening is the feasibility of growing crops on parcels of the sizes sold by the respondents. 5 to 40 acres.

317. Mr. Holtz has resided in Van Horn for the last six and one-half years. He is the District Conservationist with the U.S. Department of Agriculture Soil Conservation Service. Prior to this position he was a ranch conservationist with the U.S. Department of Agriculture in Abilene for three years, and for one year was a ranch conservationist in Rotan, Texas. He received his B.S. from Texas A&M in Range Science, and his Masters in Range Science from Texas A&M also, the latter in 1970. He was recognized as an expert on farming and ranching conditions in Culberson and Jeff Davis Counties (Holtz 3027-41).

318. His duties and responsibilities with the Department of Agriculture in Van Horn include managing other soil conservation officers, working closely with farmers and ranchers in their operations, solving their conservation problems, giving them technical assistance in implementing such practices, and running an educational program to inform farmers and ranchers of the programs and practices that are available to assist them. Mr. Holtz's area of responsibility includes 95 percent of Culberson County, and the western half of Jeff Davis County. His total area of responsibility includes a little over four [85] million acres. The subject properties are within the area of Mr. Holtz's responsibility (Holtz 3028-30).

319. C.E. Harlow has been the Culberson County Extension Agent since 1960. He has a B.S. degree from Texas Tech University and a Master of Education from Sul Ross College. His duties are to dispense educational materials developed by land grant colleges to area farmers and ranchers (Harlow 2920-22).

320. Finley Gunter has been a farmer in the Van Horn area for over thirty years. He ran the Cottrell Farm, totaling 5200 acres, for thirty years. The Cottrell Farm is north of Powell Farm. Mr. Gunter also managed the Powell Farm for two years. Powell Farm has 11,000 acres in cultivation, including 5,000 acres in cotton and 3,000 acres in milo (Gunter 2876-78).

321. These witnesses testified concerning many aspects of farming and ranching. In the Van Horn area, costs necessary to prepare the raw land for farming include clearing the land (\$100-\$125/acre); land smoothing for irrigation purposes (\$175/acre), which involves "breaking" and "disking" up to 14 inches with land leveling equipment up to nine separate times; well drilling (\$65,000 and up for a well sufficient for 150 acres); installation of an irrigation delivery system; tractor and equipment (a cotton stripper costs between \$40-\$65,000 and a large tractor \$50-\$80,000); selecting a crop, seeding and watering it correctly, fertilizing and herbiciding it, weeding, and harvesting it (Holtz 7044-53; Gunter 2895-96). Machinery necessary to commercially farm in Culberson County include large tractors, planters, cul-

tivators, large disks (land clearing), and bedding equipment (Harlow 2936).

322. Crops grown in Culberson and Jeff Davis Counties include cotton, wheat, barley, grain sorghum, alfalfa, and some potatoes, pecans, and onions (Holtz 3042; Harlow 2927).

323. Based on Mr. Gunter's experience, the best type of crop to grow in the Van Horn area is cotton. The only vegetable Mr. Gunter has seen grown commercially in the Van Horn area is onions. However, they were not successfully grown. The cost per acre for onions using already cleared land is \$2,000/acre. This figure does include equipment costs and costs for the land (Holtz 3044-53). Mr. Gunter did not try to grow other vegetables on the farms he managed because he did not have any reason to believe it could be successfully done (Gunter 2890-92, 2908). Tomatoes are not currently being grown commercially in Culberson County (Holtz 2932).

324. Cotton is said to be the cheapest crop to grow in the Van Horn area. In Mr. Gunter's experience, it costs approximately \$350/acre to grow. Costs associated with growing [86] cotton include the costs of production, breaking and clearing the land, fertilizers, water, seed, and pesticides (\$50/acre). All crops grown in the Van Horn area must be treated with pesticides. Crop predators include bollworms, flea hoppers, and aphids (Harlow 2954). In addition, there are well drilling and irrigation system costs and harvest costs (Gunter 2886, 2892-93). The cost of tomato production is approximately \$820/acre. This includes seed, fertilizer, insecticide, herbicide, machinery, irrigation, labor, utilities and supplies, and interest on loans. Harvesting costs (labor and machinery), and hauling transportation costs are separate (Harlow 2929-30).

325. The Van Horn area has a 224 day growing season with an average rainfall of 10 inches. The climate is such that there is no dry land farming capability and all farming must be done through irrigation. Native vegetation includes grassland, most of which has been depleted and replaced by brush (Holtz 3034-36, 3042).

326. In Mr. Holtz's district, 98 percent of the land is currently used for farming and ranching. Of that, less than 1 percent is in farming (Holtz 3033-34).

327. There are only 16-17 farmers who operate commercial farms in all of Culberson and Jeff Davis Counties. The average farm size varies from 320 to 17,000 acres. In the last ten years, the number of farms has decreased, and the average farm size, which was 400-500 acres, has now increased to approximately 1,400 acres. At the present time, there are approximately 15,000 acres that are not being farmed that were farmed a few years ago. The reason for this is that production costs have "skyrocketed while product prices have not increased

substantially." Pumping costs for irrigated water have gone up dramatically as have labor costs (Holtz 3044; *see* Harlow 2928; Mitchell 3762). The minimum acreage needed to farm commercially in the Van Horn area is between 160–400 acres "but it would be a bare minimum (at) making a living and you would have to do everything just right" (Holtz 3054; *see* Gunter 2905–07). Mr. Wolfe, former owner of the SWS property, testified that it would be "totally irresponsible to think . . . Sunsites would be developed for people who wanted to move out there and make a living. Or produce a living." Mr. Wolfe further testified that "no one in their right mind could tell you, or you believe that that would be a commercial enterprise" (Wolfe 4581–83).

328. All of complaint counsel's agricultural witnesses testified that there is a substantial risk involved in farming. Mr. Harlow described the risk of commercial farming as follows: "to be a farmer you nearly have to be crazy sometimes because there is a great risk involved in making a profit but they have got to know their land" (Harlow 2935). Mr. Harlow stated there [87] was a high risk for vegetables, high interest rates made loans very expensive, and weather conditions added to the risk (Harlow 2935). Mr. Gunter described the risks associated with farming in the Van Horn area as "terrible." They include weather, timing on when to gather crops, and the problem with insects (Gunter 2896–97).

329. In Mr. Holtz's opinion, the risks of commercial farming in the Van Horn area are the very high water pumping costs, which have increased from 50¢ to \$2.25 a thousand cubic feet in the last six or seven years. Given the substantial outlay for farming costs production, a hailstorm, a cold spring or a flood is a hazard. Also, the extremely hot and dry summers aggravate any deficiency in irrigation (Holtz 3053–54).

330. Although general farming skills were deemed very important, Mr. Gunter found that people coming into the area were seldom successful in farming unless they had an understanding of the water situation and knew the importance of timing different operations. Farming in the area is determined by the depth of the water. Since the water is "pretty deep," it requires a little difference in operation compared to other areas (Gunter 2890, 2900–01). Extensive farming experience and a knowledge of the area are very important (Harlow 2955). It can take one from seven to ten years to get a return on investment (Harlow 3339).

331. Markets for crops produced in or about Van Horn are located in El Paso, Lubbock, or San Angelo, all a goodly distance away. There are few, if any, local markets (Holtz 3053) and none for vegetables or cotton (Harlow 2951). There is no local market for livestock in Culber-

son County. The closest livestock market is San Angelo, Texas, 350 miles distant (Harlow 2961).

332. On the subject of small garden type agriculture, as a result of numerous letters requesting information about the subject properties, Mr. Harlow and a Mr. Peavy, Extension Horticulture Specialist, Texas Agricultural Extension Service, Texas A&M, residing in Fort Stockton, Texas, composed a form letter (CX 532). The "Introduction" to this states as follows:

Many people dream of leaving the crowded city to move to the country to make a living off the land on a 2 to 5 acre mini-farm growing and selling fruits and vegetables as a commercial venture. This is usually a difficult venture at best, and is usually not advisable UNLESS the mini-farm is located close to a population [88] center (usually within 10 minutes driving time of the city limits of a town of 25,000 or more).

333. In the "Living Off the Land" section, CX 532 advises people that in the Van Horn area, it is necessary to have the financial resources to pay for utilities, clothing, transportation, and "It is therefore chiefly for retired people with a cash income." CX 532A describes the type of expenditures needed for water for irrigation:

Water for irrigation—You can put in a domestic well for a dwelling and a large one-tenth acre home food garden for \$3,000 but for the large amounts of water needed for 2-5 acres of crops you have to drill a deep water well 500-600 feet deep at a cost of \$10,000-\$20,000.

334. This exhibit also describes problems associated with growing conditions as follows:

Experience or know-how—Successful fruit, nut, or vegetable production in Southwest Texas requires a great deal of know-how. Growing conditions are difficult. The soil tends to be saline (salty) and low in organic matter.

Getting a stand of plants is often difficult. Nitrogen is always deficient but nitrogen fertilizer is expensive, difficult to find, and must be hauled in long distances.

A year's subsistence while you "get your feet on the ground" and get acquainted with your mini-farm. You are not likely to break even so have enough money saved for at least a year of crop failure.

Equipment and buildings required:

Small, 4-wheel tractor	\$1500
Implements for tractor	1000
Shed, barns	2000
Total Estimated	\$4500 [89]

Operating Expenses (seed, fertilizer, insecticides, etc.)—

This varies widely depending on the kind of crop and number of acres, but generally \$200-\$500 per acre must be invested in a crop to get it to harvest. You have to either furnish this operating capital yourself or borrow it.

335. The extent to which a person may become self-sufficient on his parcel was demonstrated by the testimony of purchaser-witness, Wharton, who owned 10 acres in SWS. According to the witness, he cleared five acres by hand, and five by burning the brush. Thus, he had no expenditures in clearing his land (Wharton 3579).⁶⁴ He fenced five of the acres, and in March 1981, planted a garden about 40 feet by 15 feet (Wharton 3581-82). From this small garden in the first summer of cultivation, Wharton testified that he derived much of what he needed to sustain himself, expending only about \$45 per month for electricity, gas, milk, and meat (Wharton 3585-89). Wharton also raised chickens and a few hogs, fed from scraps (Wharton 3585). He has plans to raise and sell 24 hogs each year, which he intends to feed by planting four of his ten acres in corn (Wharton 3589-90).⁶⁵

336. On his remaining acreage, Mr. Wharton testified that he will raise two calves, one of which he will butcher each year. He believes that the native grass on about five acres, after the brush is removed, will be adequate to feed two calves (Wharton 3595-99). He has also planted eight pecan trees, and will add another 18, along with some grape vines and berry bushes (Wharton 3600).

337. Mr. Gilmore, who has a full-time job as the on-site manager for respondents, has also raised a substantial amount of food for his needs in a home garden (Gilmore 1027-28). Although [90] his quarter acre garden obviously does not make Gilmore self-sufficient, he testified that it permits him to live on a salary of only \$900 per month (Gilmore 984).

338. Mr. W.D. Smith, a previous on-site representative, also testified that a person could subsist by raising a labor intensive crop (W.D. Smith 934). He gave an example of how that could be done: three acres of alfalfa, three of pinto beans and three of onions, chili peppers, melons or squash would produce a sufficient return to support a family, in his opinion (W.D. Smith 935).

339. Mr. Holtz was also of the belief that it was possible for a person to support himself on a small acreage farm with a labor intensive crop, such as onions, tomatoes, chili peppers, or cabbage (Holtz 3091, 3093).

⁶⁴ Mr. Gilmore estimated that it would cost \$400 to clear five acres if the owner did not do the work himself (Gilmore 3986).

⁶⁵ Mr. Wharton believes it will require 300 bushels of corn to feed two sows and 24 hogs, 75 bushels per acre. In his previous farming experience, he testified that he never failed to raise at least 80 bushels of corn per acre (Wharton 3589-90).

340. Mr. Harlow also testified that with a home garden smaller than one acre a person could live off his crops as well as supplement his income (Harlow 2985-86).

341. Complaint counsel's expert appraiser witness also testified that numerous studies prove that land in five to 40 acre parcels can be an economic unit; that is, land of that size can provide sufficient economic return to support a family (Compere 3189). Compere's statement in this regard is as follows (Compere 3471):

Several economic studies have been done by Texas A&M[,] University of Texas, El Paso; Sul Ross State University; and the West Texas Council of Governments, among others as to what type of improvements can be added to a small five to forty acre tract of rural West Texas land to make that tract a viable economic unit.

These studies have shown many uses. Some proven and some only hypothetical that could at least theoretically return an economic profit to the developer.

Those units studied include but are not limited to fish farm, shrimp farm, pecan orchard, grape vineyard, ornamental cactus farming and greenhouse tomatoes, which in the studies all of these ventures showed an economic profit. [91]

342. A witness employed at the University of Texas experimental vineyard testified about the feasibility of commercial grape growing on a small acreage tract (Campbell 3640; RX 26). The University has concluded that the Van Horn area, specifically Michigan Flats immediately south of SWS, can feasibly produce high quality grapes (Campbell 3647-48).

343. Campbell gave detailed testimony concerning costs involved in raising grapes, and the potential profits to be earned. The cost of planting the vines and caring for them for the first three years is \$6,000 per acre (Campbell 3653-54). This figure includes the cost of the plants, the irrigation system, labor, and all other initial costs except the well and a tractor (Campbell 3654-56). Since a vineyard needs only three gallons per minute per acre for irrigation, a domestic well can easily supply the needs of a five acre vineyard (Campbell 3655). A tractor must also be purchased, at a cost ranging from \$200 for a used tractor (Wharton 3617) to \$1,500 for a small new tractor (CX 532), to \$8,000 for a large new tractor (Campbell 3667).

344. From year four through six, there is an annual cost of \$1,000 to \$1,500 per acre (Campbell 3656-57). During these three years, the income from the grapes would offset the annual cost (Campbell 3670).

345. After the sixth year, the income from the sale of grapes will exceed the annual expenses by \$1,000 to \$1,500 per acre (Campbell 3659). The annual profit on a five acre vineyard the witness placed at from \$5,000 to \$7,500. Assuming an initial investment of \$30,000 to \$40,000 and an annual profit of \$5,000 to \$7,500, a five acre vineyard yields a return on capital of 12.5% to 25%. On a ten acre vineyard,

with an initial capital outlay of \$70,000 (\$6,000 per acre and \$10,000 for a tractor and equipment), and annual profits of \$10,000 to \$15,000, the return on capital increases to 14% to 21%.

347.* There was testimony concerning the raising of pecans on parcels of the sizes sold by the respondents. Mr. Bray planted 28 acres of pecan trees in 1978 on land adjoining SWS (W. Bray 3784). On the 28 acres, Mr. Bray planted 1,200 pecan trees, about 42 per acre (W. Bray 3785). To supply water for the orchard, as well as for his garden, home and pond, Mr. Bray had a 12 inch well drilled to a depth of 520 feet. The cost of the well and pump was stated to be \$7,500 (W. Bray 3784-85). A drip type irrigation system was installed, which permits irrigation of the full 28 acres from a well which discharges 40 gallons per minute (W. Bray 3785). Mr. Bray calculated the total cost for the trees, labor for planting, and the irrigation system to be \$13.50 per tree (W. Bray 3789). At 42 trees per [92] acre, the initial cost came to \$567 per acre, or \$15,876 for the full 28 acres. If the full cost of the well is allocated to the orchard rather than the home or garden, the full cost would be about \$23,376, which comes to \$831 per acre.

348. A pecan tree first produces nuts in the third year after planting (W. Bray 3791). The first profitable year would be the sixth year, at which time each tree will produce about 10 pounds of pecans. (W. Bray 3791). The yield per tree increases by about 10 pounds per year until a maximum of 150-160 pounds is reached (W. Bray 3815). That level is maintained for 60-70 years, after which it will decline slightly for the remainder of the tree's 150 year life (W. Bray 3815-16).

349. Mr. Bray testified that his annual costs for his 1,200 trees was \$175 for fertilizer, \$10 for zinc spray, and about \$300 for electricity to run the irrigation pump, for a total of \$485. The cost of harvest is negligible in the early years (W. Bray 3861). At the present time pecans wholesale for about \$1.10/pound (W. Bray 3863). Mr. Holt testified that there is no market shortage for pecans (Holt 3077).

350. As a general rule for pecan growing, according to Mr. Bray expenses are about 35% of the gross, and profits are 65% (W. Bray 3863). Thus, in the sixth year after planting he placed the gross income per acre at \$462 (42 trees x 10 pounds per tree x \$1.10 per pound), and the gross profit at \$300 per acre. In the seventh year, estimated the profit to be about \$600/acre. A five acre parcel, with trees on 4.5 acres, would thus return a sixth year gross profit of about \$1,350, on an initial investment of \$2,551.50 (42 trees per acre x 4.5 acres x \$13.50 per tree). Accordingly, the profit in the seventh year would be about \$2,700, equal to the entire initial cost.

351. Mr. Hugh Wolfe also testified the economics of pecan growing. Mr. Wolfe was previously the owner of Wolfe Nurseries, the lar

* There is no Finding 346.

wholesale nursery in the southwest (Wolfe 4540). Wolfe Nurseries' main production was in pecan trees (Wolfe 4540).

352. Mr. Wolfe stated that the Van Horn area had "the potential of being a tremendous pecan producing country" (Wolfe 4556), and that the soil and water in SWS have "excellent" suitability for pecan growing (Wolfe 4574, *see* 4577). Dr. Sam Little was also of the belief that the GVA area would support the growth of pecans (CX 220C, D, E).

353. Mr. Wolfe testified that he recently visited the Brookshire Orchard, a 200 acre pecan orchard four or five miles from SWS (Wolfe 4555). He reported that this orchard is in its sixth year, and this year produced 10 pounds of nuts per tree (Wolfe 4555). He confirmed that pecan production normally increases for about 20 years before leveling off (Wolfe 4556). [93]

354. Mr. Wolfe estimated that the costs of purchasing pecan trees, building an irrigation system, drilling a well, planting the trees, and caring for the trees for the six years prior to a commercial crop to be \$1,000 per acre (Wolfe 4562). He estimated the present wholesale price for pecans to be \$1.50 per pound (Wolfe 4561, 4579).

355. In sum, Mr. Wolfe was of the opinion that pecan growing on four and a half acres was an excellent long-term investment, and would be commercially feasible, especially for retired folk (Wolfe 575).

356. There is a pond on respondents' property in SWS which is stocked with catfish (W.D. Smith 971; Mitchell 3754; W. Bray 3796). There are also catfish in Mr. Bray's pond (W. Bray 3795). Mr. Bray testified to the feasibility of fish farming. He had subscribed to the magazine of the National Catfish Association, and researched the market in El Paso for catfish (W. Bray 3794-95). According to him, it is feasible to farm catfish in SWS (W. Bray 3795). He stated that the ideal lake size for catfish farming is one half acre (W. Bray 3795).

357. Reference was made in this proceeding to the guayule plant, and to two other plants jojoba and euphorbia. Guayule is a native desert shrub from which one can produce natural rubber (Bragg 2681). In 1978, Congress and the rubber industry were interested in the possible development of a guayule industry in America (Bragg 2711); *Guayule Rubber Development: Hearings on S. 1816 Before the Subcommittee on Regional and Community Development of the Committee on Environment and Public Works, 95th Cong., 2d Sess. (1978).*

358. Guayule was referred to in some of respondents' promotional materials (*see* CXs 119, 120, 300), and was reportedly mentioned to one prospective purchaser (Mr. Lueckel). CX 119 is a copy of a newspaper article dated May 5, 1978, which indicates that the Senate is likely to consider a bill authorizing a \$30 million study of the feasibility of

cultivating guayule in the southwest. CX 120 is a copy of the title page of the Guayule Rubber Development Bill introduced in Congress in 1978. The exhibit also contains a very brief description of guayule. CX 300 is a reprint of an article from Texas Business magazine published in August 1978. It is entitled "Energy grows on Texas trees," and discusses the "fledgling" petroculture industry, involving, *inter alia*, guayule.

359. Mr. Lueckel testified that in late 1977 he was told by a representative of Porter Realty that he might earn a profit on [94] land in GVA because Congress was about to appropriate \$30 million for development of the guayule industry. On cross-examination, he testified that he realized there was no assurance the bill would be enacted, and there was no assurance that if enacted the bill would benefit his property (Lueckel 1847, 1865-66).

360. An expert, Mr. Daniel Bragg, testified that in 1978 there was interest in developing a guayule industry, especially in the military, and that such interest resulted in the enactment of the Native Latex Commercialization Act of 1978,⁶⁶ which authorized the expenditure of \$30 million to develop a guayule industry in the southwest (Bragg 2711, *see* 2701). The Act authorized the Secretary of Agriculture to contract for the planting of 500,000 acres of guayule, to establish nurseries for seedlings, to construct and operate factories for extraction of rubber from guayule, and to purchase and maintain equipment for harvesting and processing guayule (7 U.S.C. 171). However, the \$30 million was never appropriated by Congress (Bragg 2702).

361. Mr. Bragg identified himself as a graduate engineer with a bachelor and master's degree in industrial engineering. His current position is that of Assistant Director of the Center for Strategic Technology, a division of the Texas Engineering Experiment Station which is part of the Texas A&M system. He has worked for Texas A&M since 1970. Among other things, the Center for Strategic Technology studies alternative energy economics and innovative crops. Mr. Bragg is also a member of a number of professional societies. He founded the Guayule Rubber Society in 1979 and is the secretary of the Texas Jojoba Growers Association. Mr. Bragg's area of specialty is the preparation of economic feasibility analyses. He has done economic analyses of jojoba and guayule and has testified before Congress with regard to these plants (Bragg 2670-78). Mr. Bragg was qualified as an expert on the growth, production, development, processing, and costs associated with guayule, jojoba, and euphorbia (Bragg 2681).

362. Guayule is shrub plant indigenous to the Chihuahu Desert in Mexico and southwest Texas (but not the immediate area of the subject properties). It is a typical desert plant that has the unique charac

⁶⁶ Pub. L. 95-592; 92 Stat. 2529 (Nov. 4, 1978).

teristic of being able to produce natural rubber. During World War II and again during the Korean War, efforts were made to develop production of guayule rubber. However, these efforts were abandoned after these conflicts ended (Bragg 2681-82; *see* CX 531). [95]

363. Jojoba is a plant indigenous to the Sonora Desert, an area in the southern extremities of Arizona, California, and parts of Mexico. Jojoba is one of two sources of a peculiar liquid that is a valuable lubricant for industrial uses. It is also used as cosmetic base (Bragg 2686-87).

364. Euphorbia is a plant that grows wild in northern California. Euphorbia is a latex producing plant that happens to have a molecular structure almost identical to that of crude oil (Bragg 2688):

365. At present these plants have little, if any, commercial usefulness. As Mr. Bragg explained (Bragg 2689):

Guayule has very little commercial potential in the wild due to the fact that it is in some respects like oil. It is not a renewable resource because no one yet knows how to get it to revegetate in a controlled manner. Being a wild plant there is no control over its yield, its growth rate, or anything like this. In order to commercialize it, an entire new approach has to be taken in terms of stimulating growth and this type of thing, selecting high yielding plants.

Jojoba up to now has only been commercial from wild plants. There are several thousand acres of domestic plantings in the ground but these have not yet reached maturity so we do not know yet what the commercial success of it is going to be.

Euphorbia lathyris has not yet been planted commercially by anyone yet. We are attempting or several people are attempting to produce seeds for small trial plots (Bragg 2688-89).

366. In Mr. Bragg's opinion, it would cost \$20,000/acre to plant and raise guayule for 20 years. Guayule does not produce a commercial crop for five years (Bragg 2694). As Mr. Bragg stated "there is no possibility of commercially producing guayule rubber at the present time (Bragg 2698). In Mr. Bragg's opinion, there is "an extremely high risk" in trying to commercially farm guayule on a small tract. A minimum of 100 acres and probably more would be needed to attempt to commercially farm guayule (Bragg 2700-01). There is no current [96] demand for guayule rubber in this country and no processing or extraction plants are in existence (Bragg 2697, 2712).

367. In Mr. Bragg's opinion, at least 100 acres is also the minimum amount needed to try to commercially farm jojoba (Bragg 2695). At the present time, there is no commercial production of jojoba. It takes approximately five years before one could expect a commercial crop and no profit for eight or nine years (Bragg 2689-96).

368. The risks involved in farming guayule, jojoba, and euphorbia include the fact that all are very difficult to grow. The plants are susceptible to being overrun by weeds, are extremely sensitive to cold

temperatures, and can be killed or damaged by temperatures below 20 degrees. Researchers have no knowledge as to how these plants will produce in a controlled environment. A grower would have no prior record for determining what problems would be encountered in terms of insects, diseases, weeds, or to know the proper pesticides or herbicides to use (Bragg 2690-91).

3. Use Of The Properties For Ranching

369. As for ranching in far West Texas, in Mr. Holtz's opinion, the minimum acreage on which an area ranch may be operated commercially would be 10,000 acres. Such acreage could support a herd of 100 head of cattle, and it is likely that one could gross \$35,000, of which more than half would go for expenses. Given the low animal carrying capacity, 10,000 acres is really a small ranch, and the rancher would be receiving a relatively low salary (Holtz 3063-64).

370. There are approximately 150 operating ranches in Mr. Holtz's district. Range size varies between 5,000 to 200,000 acres. Range capacity has declined since the turn of the century. Due to overgrazing, the delicate ecology of the area has been upset, and the natural grasses have been replaced by brush. The present carrying capacity varies from between 2-14 animal units per section, depending on what the range size or soil is and the extent to which it has been depleted. The average carrying capacity is five or six animal units per section (Holtz 3057-60). In the subject properties, the carrying capacity for cattle would be 6-10 units on SWS and 6-7 units on GVA and GVA II (Harlow 2955-58).

371. Necessary costs associated with ranching in the Van Horn area include land taxes, supplemental feed, veterinary costs, pickup truck and fuel, maintenance costs as well as labor costs. Horses are also needed (Holtz 3060-61). [97]

372. Skills required of ranches in this area include a knowledge supplemental feeds and carrying capacity, knowing the breeds that will do best on a particular ranch (flat or mountainous terrain), developing a water system and proper distribution system, knowing cat diseases, and some veterinary skills since some problems may require immediate attention and many areas are remote, far from the nearest veterinarian (Holtz 3061-62).

373. The risks associated with ranching include poisonous plants and predators, such as coyotes, that can cause loss of cattle. Fire hail can damage the range. There are disease problems, rustling problems, and drought problems. Drought is a common occurrence in the Van Horn area (Holtz 3062-63).

374. The biggest risk in ranching is the economy. Due to econ

conditions, some ranches can lay idle because of excessive costs in purchasing and raising cattle (Harlow 2963, 2965-66).

375. To raise cattle on small parcels on the subject properties would, in Mr. Holtz's opinion, probably cause a "horrendous feed cost because you are going to have to feed them everything they eat," in effect "running a miniature feed lot." Since it requires 100 acres to support a cow, the subject properties in small parcels would be too small for natural grazing purposes (Holtz 3065). Additionally, it would be necessary to build a sturdy fence and a water trough. A fence, in Mr. Holtz's opinion, would cost \$2,500 a mile (Holtz 3065-66).

376. There is evidence, however, that it is possible to raise cattle on the property. Mr. Hugh Wolfe assertedly found that an irrigated pasture could support one cow per acre rather than the normal one or two cows per section (Wolfe 4545). Mr. Sanchez testified that he raises 25 cows in GVA (Sanchez 3688-89).

377. Mr. Wharton testified that he has raised cows previously (Wharton 3595). When he cleared the brush from his land in SWS he found the returning natural grasses to be sufficient to support a planned two cows on five acres (Wharton 3595-96). Mrs. Smallwood raised five or six horses on her 10 acre parcel in GVA (Smallwood 1053-54, *see* RXs 46, 47). Both Taylors have had prior experience in raising cattle (G. Taylor 4589; W. Taylor 4607). They indicated they expect to feed five or six cows and horses from the feed grain they will grow on their 47 acres in GVA (G. Taylor 4598; W. Taylor 4615). Mr. J.D. Smith also testified that by raising feed grain a person could support a cow on five acres (Smith 932). [98]

VI. COUNT III

378. Count III of the complaint charges respondents with unlawful-inducing payments by purchasers on lots "which are of little or no use to purchasers as an investment, homesite, farm, and for any other reasonable use. . . ." It further charges respondents with unlawful-reception and retention of purchasers' money (par. 15).

A. *The Value Of The Properties*

1. Complaint Counsel's Experts

9. Mr. E.T. Compere, Jr., a real estate appraiser, testified in support of the complaint.⁶⁷ He attended Hardin-Simmons University

⁶⁷ Martha Conoly, the only active real estate broker in Culberson County, testified that in her opinion the land in SWS would be \$70 per acre, and the value of the land in GVA and GVA II would be \$50-\$70 an acre. The respondents' properties, as they presently exist, are all raw, undeveloped ranch land, that would be of little use to purchasers as an investment, homesite, farm, and for any other reasonable use. . . . (Conoly 1035-41, 1057-59). While Mrs. Conoly has been a long time resident of the Van Horn area, she is not a qualified appraiser (Conoly 1041). Because complaint counsel's primary reliance for appraisal is upon Mr. Compere, the appraisal testimony of Mrs. Conoly will be given little weight. In addition, there is the testimony of Mrs. Conoly that there is no local demand for tracts outside Van Horn

in Abilene, Texas, and furthered his education at Columbia University in New York in 1947, receiving a Bachelor of Science degree in the School of Business. He testified that he had been in the appraisal business with the firm of Compere and Compere of Abilene, Texas for 34 years. He has previously testified as an appraisal expert some 50 to 60 times, both on behalf of private parties (including subdividers of undeveloped land) and governmental agencies. Mr. Compere has [99] worked extensively in the five county West Texas area encompassing, and adjacent to, the subject properties (Culberson, Jeff Davis, Presidio, Hudspeth, and Brewster Counties). Mr. Compere has appraised both large and small tract rural lots. For example, one ranch he appraised in Presidio County totaled 100,000 acres. Another piece of property in New Mexico was also 100,000 acres, and one he appraised in El Paso County totaled 40,000 acres. Mr. Compere has also himself subdivided land in Abilene, and on lake property near Brownwood, Texas (Compere 3161-74).

380. Mr. Compere has been a member of the American Institute of Real Estate Appraisers (AIREA) since 1954. He is a senior member of the Society of Real Estate Appraisers (SREA); past president of the West Texas-New Mexico chapter of AIREA; past president of the Texas Real Estate Association; past director of the National Association of Real Estate Boards; past president of the Abilene Board of Realtors; and has been on the faculty of AIREA and SREA. Mr. Compere has taught real estate appraisal courses for AIREA and SREA from 1956 to the present. He also teaches real estate appraisal courses at Hardin-Simmons University. Mr. Compere is a past international governor of SREA, and a member of the governing council of AIREA (Compere 3166, 75-76).

381. Mr. Compere was asked by complaint counsel to appraise the value of the respondents' three properties, SWS, GVA, and GVA I to make a study of the economic area in which they were located; and to arrive at a value of a typical tract in each subdivision (Compere 3190-91). Assisting Mr. Compere was Mr. Tom Bennett, an employee of Compere and Compere.

382. Mr. Bennett's qualifications were listed in the record as follows: He received his Bachelor of Science degree in Accounting from Tarleton State University, Stephenville, Texas, in 1973; his Master Business Administration degree in 1976. Mr. Bennett was reported to have been a full-time appraisal instructor and real estate financial instructor at Clark County Community College from 1976 to 1979 and an appraisal instructor at Hardin-Simmons University in 1979.

smaller than 320 acres (Conoly 1092). On further examination, however, she acknowledged that there were 20 acre tracts outside Van Horn which were sold some years ago for \$500/acre (Conoly 1093-94). There was testimony concerning demand for small acreage tracts near Van Horn (Sanchez 3686-88; Smallwood 40 Mitchell 3733; W. Bray 3802; H. Bray 4009; Wolfe 4554).

He has worked as a full-time appraiser for Compere and Compere since January 1980, and has successfully completed a number of real estate courses offered by AIREA in pursuit of his designation as an MAI (Member of the Appraisal Institute) (Compere 3192-95; see CX 436, p. 223).

383. Mr. Compere defined a number of terms which he later used in his testimony. The term "market value" he defined as the price that a willing seller would take and a willing buyer would pay for a piece of property, neither party being under pressure to buy or sell; both fully informed; and allowing for a reasonable time for the transaction (Compere 3182). [100]

384. The term "market approach" he defined as one approach to estimating value. This involves finding sales of property comparable to, or closely comparable to, the property to be appraised, analyzing those sales, and arriving at an indication of value based on what such comparable properties are selling for (Compere 3186).

385. "Comparables" refer to properties similar to the subject property in terms of location, soil, topography, and size (Compere 3187-88).

386. The phrase "highest and best use" the witness defined as that use the subject property will most likely be used for; that would produce the greatest net return over a given period of time; and that use that is most likely to occur (Compere 3188).

387. The term "economic unit" he defined as the number of acres of a rural area that would be required for a typical family to derive living from (Compere 3189).

388. The term "promotional value" was used by Mr. Compere in connection with properties primarily in subdivisions where sales are low down payments with large amounts of the sales price carried back by the seller; and where promotional costs constitute a considerable amount of the down payment (Compere 3188). Mr. Compere also referred to "promotional value" as being that value obtainable in a tight market by the use of high-pressure sales tactics and primarily used to absentee owners (Compere 3521).

389. In arriving at his appraisal value of the subject properties, Mr. Compere and Mr. Bennett visited the lands in September 1980, with Mr. Bennett returning the following month. Upon his return, Mr. Bennett also went to abstract offices to obtain sales information about comparable properties; visited Sul Ross University to gather economic data about the area; interviewed Soil Conservation Service personnel; visited Texas A&M Experimental Stations in the area; inspected subdivisions in the area; contacted real estate brokers, bankers, savings and loan institutions; and also farmers, ranchers, and others. Mr. Compere attempted to obtain from abstractors informa-

tion concerning sales of tracts within other subdivisions, and all of the sales for the past eight or ten years of large tracts sold in the five-county area, as well as sales of small tracts of non-subdivided lands. Mr. Compere and Mr. Bennett also reviewed water studies of the relevant area prepared by Ed Reed and Associates, and reports by the U.S. Geological Survey. They reviewed brochures, fact sheets, [101] contract forms, and other sales materials of the respondents, and information regarding resales of land in the subject properties (Compere 3195-3208, 3510).

390. In arriving at his appraisal value of the subject properties, Mr. Compere used the market data approach because, in his opinion, there were enough market transactions to arrive at a fair value of the properties. The five-county area was used because, based on his research, these are generally regarded as very similar in terms of population, soil, topography, climate, and rainfall. The population of Culberson County in 1970 was 3,429 as compared to 3,319 in 1980, a decline of 3.2%. For the entire five-county area, the population was 19,970 in 1970 and 20,462 in 1980, an increase of 2.5%. The approximate physical size of the five county area is 20,760 square miles or 13,286,400 acres. This, the witness noted, is slightly larger than the combined size of the states of New Jersey, Maryland, Delaware, and Rhode Island. According to Mr. Compere, there is enough acreage in the five-county area for each person currently living there to occupy one square mile.

391. The predominate use of the land in the five-county area is for farming and ranching. In Brewster County, 64% of the total land area is in farm and ranch use. The median size of a farm or ranch there is 26,976 acres, and 99% of the total agricultural products sold are allocable to livestock and live stock products. In Culberson County which contains 2,426,660 acres, 29,567 of these were in crop land, 26% of which was irrigated. The median size of a farm or ranch in Culberson County was 22,246 acres in 1977, and livestock and livestock products accounted for 56% of total agricultural receipts. In Hudspeth County, the average size farm or ranch was 15,054 acres and 51% of total income from farming and ranching was attributable to livestock and livestock products. The median size farm or ranch in Jeff Davis County was 23,102 acres, and 96% of total acreage was range land. In Presidio County, the average size farm and ranch was 15,405 acres, with 78% of total revenues from farming and ranching attributable to livestock and livestock products (Compere 3238-

392. In Mr. Compere's opinion, the highest and best use of subject properties is for range land. He based his opinion on the fact that this is what other land in the five-county area is being used for and the fact that in addition to selling lots the subject properties

currently being used for cattle grazing; and the fact that he could find very few resales of any of the subject properties on a person-to-person basis, rather than on a promotional basis (Compere 3241-42).

393. In Mr. Compere's opinion, the number of acres that would constitute an economic unit for ranching purposes would be 6,400 acres. This opinion he based on discussions with [102] agricultural experts in the area, and the Texas A&M extension service. Such acreage he believed would support 4-10 animal units per section. The 6,400 acres would allow a family to support itself from a ranching operation. While the 6,400 acre figure is smaller than the average size ranch in the five-county area, it represents the minimum number of acres needed to generate an income to support a family (Compere 3242-43).

394. Mr. Compere considered farming as a possible highest and best use of the properties. However, because of the relatively small amount of the total land currently being used as farmland in Culbertson County, and in view of the costs involved, especially in irrigation, he did not deem it as the highest and best use (Compere 3246-47).

395. In arriving at a value determination, Compere gathered sales information regarding large tracts (413 to 103,000 acres), small non-subdivision tracts (under 413 acres), and subdivision tracts (160 acres and under). There were 50 large tract comparables used, 20 small non-subdivisions, and 13 subdivision sales (CX 436).

396. In all, he found 31 subdivisions to exist in the five-county area although he could not physically locate or visit some of these). Mr. Compere examined these subdivisions to determine if there was a market for such properties on a resale basis. Mr. Compere determined that the subdivision sales did not meet the definition of fair market value because "normal" financing was not used; there were few face-face dealings; and promotional value elements were present. Additionally, he found that abstractors could not locate any recorded sales from the original purchaser to a subsequent purchaser. Only 17 recorded deeds were found for the subject properties. The witness explained that those sales were not used in arriving at a value determination because of the same reasons that other subdivision sales were not used.

397. In preparing a statistical analysis of other subdivision sales, Compere came to believe that the standard deviation was so great that the price seemed to depend on the type of promotion being carried on rather than being a reflection of market value. He found few, if any, realtors who would list such subdivisions for resale because of lack of demand. For these reasons, he did not use small subdivision sales as comparables (Compere 3211-12, 3252-62). Subdivision sales are listed in CX 436 pp. 42-54 (Compere 3264).

398. Mr. Compere estimated the value of each of the subject properties both as a whole and in small size parcels (five, ten, twenty, and forty acres). Mr. Compere gathered sales data regarding 50 large parcels (see CX 436 pp. 58-108). From these, [103] he and Mr. Bennett selected nine as most comparable to SWS as a whole, 11 for GVA as a whole, and 12 for GVA II as a whole. According to the witness, the selected large tract parcels were most similar to the subject properties in terms of size, location, access, topography, and soil. An adjustment was made for the time of purchase (Compere 3265-74; CX 436 pp. 58-108, 140-44, 166-70, 193-97).

399. With regard to the subject properties in small size tracts, Mr. Compere and Mr. Bennett gathered sales information on twenty potential comparables (see CX 436, pp. 109-28). From these Mr. Compere and Mr. Bennett selected five tracts as most similar to SWS and GVA, and nine as most similar to GVA II. According to the witness, these parcels were most similar in terms of size, location, access, topography, and soil. Adjustments were made for time, size, and location (Compere 3269-74; see CX 436 pp. 146-48, 172-75, 209-11).

400. Mr. Compere thereafter arrived at his final value determinations regarding the subject properties. In his opinion, the values of each of the subject properties as a whole and in individual lots as of the following dates are as follows (Compere 3226-30, 3275):

January 1, 1974

Southwest Sunsites

1. 17,467 acres at \$35 per acre or \$610,000 (rounded).
2. Individual tracts (lots) from \$54 to \$62 per acre.

January 1, 1976

Green Valley Acres

1. 15,000.227 acres at \$50 per acre or \$750,000 (rounded).
2. Individual tracts (lots) from \$55 to \$62 per acre.

January 1, 1977

Green Valley Acres II

1. 9,611.002 acres at \$60 per acre or \$575,000 (rounded).
2. Individual tracts (lots) from \$90 to \$110 per acre.

July 1, 1980

Southwest Sunsites

1. 17,467 acres at \$60 per acre or \$1,050,000 (rounded).
2. Individual tracts (lots) from \$90 to \$110 per acre. [104]

July 1, 1980

Green Valley Acres

1. 15,000.227 acres at \$65 per acre or \$975,000 (rounded).

2. Individual tracts (lots) from \$70 to \$95 per acre.

July 1, 1980

Green Valley Acres II

1. 9,611.002 acres at \$80 per acre or \$770,000 (rounded).
2. Individual tracts (lots) from \$70 to \$110 per acre.

401. Although the value Mr. Compere arrived at for small tracts is somewhat higher than for the property as a whole, he considered the highest and best use of the large tracts to be for ranching purposes. The sales of small tracts do show that some, but not all, of the subject properties could sell at a slightly higher price than if the lots were sold in large tracts. Such lots he considered would be used as homesites, and not used for the highest and best use, ranching (Compere 3275-77, 3438). In Mr. Compere's opinion, the subject properties are not a good commercial investment for the highest and best use.

2. Respondent's Attack Upon Mr. Compere's Testimony

402. Respondents contend that Mr. Compere's testimony is permeated with serious errors.

403. Respondents assert that the assignment given to Mr. Compere was simple and unambiguous, *viz.*, that he was instructed to determine "the value and usability" of the "lots" in each of the three subdivisions (RX 14; Compere 3342). Nonetheless, it appears that Mr. Compere also analyzed the fair market value of the entire tracts (CX 436 page 144, 154, 170, 180, 197, 207). Respondents claim that in beginning his analysis with the full properties, 8,611 to 17,467 acres each, Mr. Compere was impelled to the erroneous conclusions that the highest and best use of the property was for ranchland (Compere 3241-42), and that this conclusion was based upon the fact that other properties of comparable size were used as ranches (Compere 3238-40). Respondents further note that Mr. Compere also concluded, based upon some studies by the Texas A&M Extension Service, that the economic unit for ranch use is 6,400 [105] acres (Compere 3242). Respondents do not challenge either of these two conclusions as applied to large tracts of rural land. The problem assertedly arose when Mr. Compere sought to impose these conclusions upon properties of 5 to 10 acres in size.

404. In this regard, Mr. Compere concluded that the highest and best use of tracts of 5 to 40 acres is the same as the highest and best use of 8,600 to 17,000 acre tracts, *viz.*, the highest and best use in ranchland (Compere 3242-47). Respondents argue that in light of his conclusion that it takes 64 acres to raise a cow and a calf, and that it takes 6400 acres to raise sufficient cattle to support a family (Com-

pere 3242-44), it is obviously an error to conclude that the most likely use or the most profitable use of a 5 to 40 acre tract is a ranch.

405. Respondents also point out that Mr. Compere admitted that Texas A&M, the University of Texas at El Paso, Sul Ross University and the West Texas Council of Governments, among others, had prepared economic studies showing that a 5 to 40 acre tract of land in West Texas can be "a viable economic unit" (Compere 3471). He listed numerous ventures which could return enough profit on small acreage tracts to support a family: fish farm, shrimp farm, pecan orchard, grape vineyard, ornamental cactus farming, and greenhouse tomatoes (Compere 3471). Nevertheless, he rejected these alternatives and found that the highest and best use of respondents' properties was for grazing, a use he deemed impossible on small parcels (Compere 3472).

406. In addition to the above, respondents complain of alleged numerous errors in, *inter alia*, Mr. Compere's data collection efforts, and his selection of "comparables" (RPF 163-88).

3. Respondents' Experts

407. To counter the appraisal testimony offered by complaint counsel, respondents offered the testimony of Messrs. Larry Brooks and Blake Maddox.

408. Mr. Brooks identified himself as a real estate appraiser and consultant. He has been an appraiser for nine years, and is now the president and managing partner of Brooks, Lomax and Associates, at which he supervises twelve appraisers (Brooks 4296-98).

409. In 1976, Mr. Brooks received the SRPA designation, which stands for senior real property appraiser (Brooks 4300). Two years later he was designated MAI, Member of the Appraisal [106] Institute (Brooks 4301). He was the youngest person ever to receive the SREA designation in 1980, indicating that he is a member of the Society of Real Estate Appraisers (Brooks 4302). He is a member of the West Texas-New Mexico Chapter of the American Institute of Real Estate Appraisers (Brooks 4308).

410. Mr. Brooks testified that he has conducted 4,000 to 5,000 appraisals of all types of property, primarily in Texas, New Mexico, Arizona and Colorado (Brooks 4303-04). Included among these appraisals are approximately 25 appraisals of rural subdivisions (Brooks 4305). He has appraised land for the Federal Home Loan Bank Board, General Services Administration, the Department of Interior and the Department of Labor (Brooks 4305-06). He did some of the field work for the Department of Justice in the criminal action against Amrep Corporation (Brooks 4506). He has also done appraisals for numerous state and local governments, including the City of Albuquerque, the

City of Sante Fe, Bernalillo County, and the Municipal Redevelopment Agency (Brooks 4307). He was currently appraising a 1,000 acre rural recreation subdivision in southeastern New Mexico for the Federal Home Loan Bank Board (Brooks 4306).

411. Mr. Brooks has testified as an expert appraiser approximately ten times, in Bankruptcy Court, District Court of the State of New Mexico, and some administrative agencies (Brooks 4307).

412. Mr. Brooks taught the principles and practice of real estate appraisal in 1978 and 1979 at the University of Albuquerque (Brooks 4308). He has lectured and sat on approximately ten seminar panels at various symposia of the SREA (Brooks 4308).

413. The first step in Mr. Brooks' appraisal was to collect information on a five-county area in West Texas, including Culberson, Jeff Davis, Hudspeth, Brewster and Presidio Counties, and about the subject properties themselves (Brooks 4320). Much of the collection of this and other data was carried out by an appraiser-associate working with Brooks, Lomax & Associates, named Blake Maddox (Brooks 4320; Maddox 4215-16). Mr. Brooks also had access to the property fact sheets, Mr. Compere's written report, and the hydrology reports prepared for the properties (Brooks 4320-21). He personally visited the Soil Conservation Service in Van Horn, the county agriculture extension agent and the Van Horn Chamber of Commerce (Brooks 4321).⁶⁸ He also obtained various government and university [107] soil tests and water reports, and a report by Texas A&M on farming and crops (Brooks 4321). He visited the three properties early in his preparation (Brooks 4322).

414. After this initial collection of information, Mr. Maddox returned to the five-county area to collect the same types of information, but in greater detail (Brooks 4322). Mr. Maddox also researched deed records in the five counties to find recorded sales of tracts of land of 100 to 120 acres in size or smaller which had been transacted from 1978 to 1981 (Brooks 4359-60; Maddox 4238-39).

415. The appraisal technique used by Mr. Brooks was to find comparable properties which had been sold in similar sized tracts in recent years (Brooks 4304). He determined the value of the comparable properties, and uses those values to calculate the fair market value of the subject properties, which is essentially the same technique employed by Mr. Compere.

416. Mr. Brooks inspected U.S. Properties, the subdivision owned by Mr. and Mrs. Bray which adjoins SWS on its northwestern border (Brooks 4330; W. Bray 3776-81; RX 69). Since the tracts in U.S. Properties were immediately contiguous to SWS, identically sized, with

⁶⁸ Mr. Maddox also interviewed two employees from the Soil Conservation Service and the county agriculture extension agent (Maddox 4258).

identical characteristics, and sold during the same time period; Mr. Brooks determined that they would be ideal comparables, if he could establish that they were arm's length sales meeting the definition of fair market value (Brooks 4331-32). Mr. Brooks therefore met with Mr. and Mrs. Bray to determine from them the manner in which they sold their properties and to obtain from them a list of purchasers (Brooks 4332; Maddox 4226). He then developed a telephone survey designed to confirm the information provided by the Brays, and to determine if the sales of U.S. Properties were market value transactions (Brooks 4332; Maddox 4234; RX 78).

417. Each of the purchasers of U.S. Properties who could be reached by telephone was surveyed (Brooks 4345). Messrs. Brooks and Maddox were able to contact approximately 13 of the 60 purchasers of U.S. Properties (Brooks 4345). Mr. Brooks concluded that these sales of U.S. Properties were market value transactions, meaning that they met the market value definition and thus were valid indicators of market value (Brooks 4346).

418. The approximately 47 customers of U.S. Properties not surveyed by telephone were mailed a written version of the survey (Brooks 4348). About 25% to 30% of these customers responded (Brooks 4349; RX 80; RX 81). [108]

419. The mail survey was also sent to purchasers of Terlingua Ranch, another potentially comparable subdivision in West Texas (Brooks 4352).⁶⁹ Responses were received from approximately 25% of the Terlingua Ranch purchasers (Brooks 4367). A second mail survey, RX 79, was mailed to all purchasers of potentially comparable land whose names had been obtained from the deed records in the courthouse in the five counties (Brooks 4351-52). This survey was sent to every recorded purchaser of small acreage in the five counties since 1978 for whom an address was found, about 240 persons (Brooks 4361). Surveys were not sent to the approximately 110 purchasers for whom no address was available (Brooks 4361).

420. Mr. Brooks received about 75 completed surveys, a response rate of slightly less than 33% of the 240 mailed out (Brooks 4362-63). Mr. Brooks's opinion is that for appraisal purposes, the response rates on all three surveys were sufficient (Brooks 4367).

421. Following the surveys, Mr. Brooks returned to the five-county area for the purpose of making an on-site inspection of the potentially comparable properties (Brooks 4367-69).

422. Following these efforts, Brooks determined that the best indicator of value for the subject properties was U.S. Properties (Brooks 4369, 4402-03). This determination was based on the physical proximity of the properties, the number of transactions, the established

⁶⁹ Terlingua Ranch was described by Mr. Blake Maddox at 4265-68.

pattern of sales, and, most importantly, the similarity in sizes of the parcels (Brooks 4369-70, 4372).

423. Mr. Brooks testified that he also relied upon person-to-person resales of land in Terlingua Ranch, which he determined to be comparable to respondents' properties (Brooks 4370, 4372). He had obtained through the mail survey of these purchasers information sufficient to persuade him that these sales were also indicative of market value (Brooks 4370).

424. After the comparables were identified and tabulated, it became necessary to compare them to the subject properties and make whatever adjustments were necessary (Brooks 4372-73). The adjustments are shown on RX 84 and RX 85. The first adjustment was to convert the total sales price into a price per [109] acre, not only to have a uniform standard of value, but because Mr. Brooks' research indicated that undeveloped rural acreage is bought and sold on a price per acre basis (Brooks 4376).

425. The second adjustment was for time, to determine the value as of July 1980 (Brooks 4376). Mr. Brooks used a paired sales analysis (*i.e.*, analysis of two identical properties sold for different prices at different times) to determine that land values were increasing at a rate of about one-half percent per month (Brooks 4377, 4379-82). Sales prices of the comparable properties were increased or decreased, as appropriate, at a rate of one-half percent per month to find the value as of July 1980 (Brooks 4377-78, 4382-83).

426. Mr. Brooks next adjusted the Terlingua Ranch sales for size, finding that in rural properties the price per acre increases as the size decreases (Brooks 4382-84).

427. Mr. Brooks did not make a size adjustment with respect to most of the U.S. Properties sales (Brooks 4403-04). The reason is that there were sufficient U.S. Properties sales in each of the relevant sizes to permit analysis without size adjustments (Brooks 4403-04). Mr. Brooks did make a size adjustment for the 40 acre parcels, because there were too few 40 acre sales in U.S. Properties to establish value without considering properties of other sizes (Brooks 4406).

428. The final step in Mr. Brooks' appraisal was to reconcile the information to achieve a value determination for the subject properties (Brooks 4408-09). As part of this process, he determined that the values in the three properties were the same (Brooks 4410).

429. Mr. Brooks' appraisal conclusion are that as of July 1980, a five acre parcel had a value of \$525 per acre, a ten acre parcel had a value of \$475 per acre, 20 acres were valued at \$375 per acre, and a 40 acre parcel was \$275 per acre (Brooks 4411).

B. Respondents' Retention Of Money

430. The record is clear that customers of respondents had ample opportunities to receive refunds. The contracts accord customers of all three properties the right to visit the property within 60 days and request a refund for any reason (Gross 461; Kritzler 4110, CXs 74, 75, 76, 77, 78):

Purchaser shall have 60 days from the consummation date of this contract to [110] make a registered personal inspection of his property on a company-guided tour, and have all moneys paid to Seller refunded if he is not satisfied in any way, provided Seller is so notified at the time of the initial inspection, on a form provided by Seller, and provided that Purchaser is current in his payments hereunder. This provision shall not apply to property purchased while On-Site or subsequent to a visit to the property, and cannot be exercised by an agent on behalf of purchaser.

431. Forms were provided to each purchaser who visited, giving him the option to receive a refund (RXs 70, 71, 72, 73).

432. There was testimony that when a customer sought a refund on a visit, it was "automatically" granted (Gross 463; Novaez 892, 902). The purchaser was not required to give a reason for requesting his refund (Novaez 892-93).

433. If for some reason a customer was unable to visit the property within 60 days, the record indicates that respondents were willing to extend that time period (Gross 462, Novaez 886, W.D. Smith 939, Kritzler 4110). And in instances where the customer had not sought an extension of time, it was respondents' asserted policy to nonetheless honor any exercise of the guarantee within a reasonable time (Kritzler 4111, W.D. Smith 939).

434. At least one third of the customers from Texas visited the property within the guarantee period (Novaez 896). From 1976 to 1978 about 400 purchasers visited the properties (W.D. Smith 939). It was reported that many of the people who visited the property bought more property during or after the visit (Novaez 896).

435. Mr. Ted Rose, the former sales manager for the Houston and Dallas offices, testified that he telephoned every customer of his new sales representatives to assure that the sales presentations were fair and accurate (Rose 678, 701). After a sales representative became more experienced, it was Mr. Rose's policy to continue to telephone his customers on a spot check basis (Rose 701). If a problem was discovered in any sales, Mr. Rose testified that he would return the downpayment and refuse to process the contract (Rose 719). [111]

436. During the last year before sales were terminated, respondents hired Mr. Jeffrey Elfont to verify sales. Beginning in February 1977 Elfont attempted to telephone every purchaser of the three properties (Elfont 4168). After about three months, Mr. Elfont discontinued call-

ing customers of respondents' in-house employees, because he had found during those three months that the employee sales raised no problems (Elfont 4169). He telephoned every purchaser of respondents' hired brokers until Diversified Realty was terminated in February 1978 and Porter Realty in March 1978 (Elfont 4188).

437. Witnesses attested to receiving these calls (Schlachter 2118, Swanson 2478). In other instances, Elfont's records evidence that the customers were contacted (Elfont 4171-74; RX 61 (Schlachter), RX 62 (Sweets), RX 63 (Lueckel)).

438. Mr. Elfont testified that he questioned each customer about the content of the sale presentation, especially about whether any statements had been made about investment or oil potential, the receipt of the fact sheet, and the customer's understanding of water and utilities (Elfont 4176, 4191, 4193-94).

439. In those instances where Elfont believed that the sales might have been transacted in a manner violative of company policy, he referred the purchaser's name to Mr. Kritzler. Mr. Kritzler then reportedly telephoned the customer, and either resolved the complaint to the customer's satisfaction or offered the customer a refund (Kritzler 638-40, 4118-23, Elfont 4178, 4181, 4182, 4186). [112]

DISCUSSION

There is no need for an extended discussion of this matter. The evidence, in my view, simply does not prove the charges.

A. Count I

Count I presents the question of whether respondents falsely represented their properties as being good investments, involving little or no financial risk to purchasers. I have examined the evidence in the record, and must conclude that the preponderance is in favor of the respondents.

Concerning respondents' TV and radio advertising, primarily in Houston and Dallas, numerous examples of these messages are found in this record. Finding 59 identifies them to be CXs 42 through 71 and CX 395. Finding 60 states as follows:

60. I have examined these materials and can find no reference in them, with one or two possible exceptions, to investment or accompanying financial risk. While the point is emphasized that the offered price is affordable, the messages are all oriented toward the uses which may be made of the land by purchasers, not resale profitability. Over and over again the theme is repeated: *viz.*, fertile valley; sunshine; clean air; quiet environment; mountain scenery; abundant water; farming; ranching; hunting; camping; retirement; satisfaction in owning land. While "combating inflation" is prominent in several of the scripts, it appears merely, if not always, to be in the context of using

the property to produce one's food, thereby reducing expenses (*see* CXs 51, 52, 58, 59, 60).

One of these commercials, CX 58, does employ the word "investment." However, the word is used in a context which features many of the factors referred to in Finding 60 (*see* Finding 62). [113]

Laying aside respondents' brochures for the moment, it may be observed that there is no reference to investment or risk in any of respondents' fact sheets or contract forms (Finding 64). Nor is there anything in respondents' "picture book" or other sales aids, or post sales materials, from which purchasers may reasonably conclude that theirs was a risk-free investment (Findings 75-80).

Concerning respondents' brochures, there were representations as to investment contained in the original brochure which respondents used for two or three months in 1974, following the purchase of the SWS property. That brochure had been prepared by another company which had previously owned the property, Southwest Land Corporation. In composing their own brochure, respondents toned down the investment claims, and later deleted them altogether in composing the GVA and GVA II brochures (Findings 65-73).

Whether or not, based on the above, respondents can be held to have represented their properties as a good investment, the consumer witnesses in this case certainly did not consider their purchases to be risk-free. Virtually all of them testified that they knew at the time of their purchase that there was no guarantee that they would profit from the transaction (Findings 86-91, 93, 95-104, 106-07).

There is little, if any, reliable evidence which establishes that deceptive statements concerning investment were engaged in by respondents in-house salesmen (Findings 81-82). There is, however, evidence that deceptive investment statements were made to prospective purchasers on the part of employees of real estate brokers hired by respondents to sell the properties. A great deal of these representations concern the discovery or possible presence of oil (Findings 87, 88, 93, 101, 104, 106, 109, 111, 113, 115).

While much of what was represented to prospective purchasers concerning oil turned out to be at least reasonably accurate (Findings 110-122), it was respondents' stated policy not to employ representations concerning oil in their sales approach (Finding 123). When respondents' efforts to prevent these representations failed, the brokers' services were terminated (Findings 50, 54).

While I am fully aware of that line of FTC cases which hold principals liable for the misrepresentations of their agents, *e.g.*, *Goodman v. FTC*, 244 F.2d 584, 592 (9th Cir. 1957, [114] there must come a point where respondent is permitted to exculpate himself. I am of the opin-

ion that the actions taken by respondents to correct the situation, including the surveillance activities of Mr. Elfont, the liberal refund policy, and the termination of the brokers, were sufficient to place respondents beyond the reach of those cases.

B. Count II

The preponderance of the evidence is also in favor of respondents with respect to the charge that they falsely represented their properties as suitable for homesites, farms and ranches.

What is in issue in this case is rural, undeveloped land situated in far West Texas, 120 miles from El Paso.

Respondents do not deny that they represented their parcels as suitable for homesites, but they maintain they always disclosed to purchasers that it was up to them to arrange for their own utilities and water.

Elaborate findings have been made in this case concerning the fact that utilities were available in a practicable sense to purchasers, *viz.*, electricity (Findings 159-70); sewage disposal (Findings 177-79); propane gas (Findings 185-88).⁷⁰ Elaborate findings have also been made concerning the presence of water beneath the properties, and the drilling of water wells (Findings 189-253). I believe the record is clear that for those who wish to use their parcels as a place whereon to live, there are no insurmountable obstacles.

It appears that complaint counsel do not challenge so much the fact that utilities and water are available, as the fact that their substantial costs are not always disclosed to prospective purchasers, especially in the case of water. This is true. But the record shows that in every instance consumers were given sufficient information to permit them to inquire further, depending on their interest (*see* fact sheets, CXs 79-85). For example, if a purchaser wished to learn more precisely what would be the cost of drilling a water well on his [115] particular property, he was directed to contact well drillers in the Van Horn area.

The record also shows that for the most part, respondents fulfilled their obligations to furnish promised "improvements" to the properties, *viz.*, golf course (Findings 259-69); staking (Findings 270-76); road building and maintenance (Findings 277-88).

As for the suitability of using respondents' parcels as a farm or ranch, there is much evidence in the record. There is nothing more clear than the fact that the properties, with irrigation, will grow practically any kind of crop (Findings 297-315). It is complaint counsel's point that the small parcels under consideration are not large enough to make commercial farming feasible (Findings 316-31).

Whether or not this is entirely true, the record demonstrates instances where individuals have taken substantial strides towards self-sufficiency (Findings 335-55). The record also shows that while commercial ranching is not feasible on the properties (Findings 369-75), it is quite possible to maintain small numbers of cattle for personal use (Findings 376-77).

C. Count III

I cannot agree with the charge of Count III that the land has little or no value to purchasers, and that respondents are unlawfully retaining their money.

On the subject of value, there is conflicting information in the record furnished by appraisal experts for both parties (Compere, Findings 379-401; Brooks Findings 407-429). Mr. Compere, complaint counsel's expert, deems the highest and best use of the land to be ranch land, and places a correspondingly low value on it (Findings 392, 400). Mr. Brooks, respondents' expert, views the property as "rural recreation" land, and places a higher value on it (Brooks 4420; Finding 429).

I do not find it necessary to rely upon expert testimony, however, in order to conclude that the subject properties are not of little or no value. Unquestionably, they are of value. As demonstrated by the evidence introduced under Count II, they may feasibly be used as homesites, and at least for personal farming and ranching. [116]

On the question of retaining money, since respondents, in my view, did not obtain the money unlawfully, there is nothing unlawful in the retention. Nevertheless, the record shows a liberal refund policy on respondents' part (Findings 430-39).

ORDER

Finding no violation of law as charged in the complaint, I hereby ORDER that said complaint in this matter be dismissed.

OPINION OF THE COMMISSION

BY BAILEY, *Commissioner*:

This matter comes before the Commission on complaint counsel's appeal of the Administrative Law Judge's order dismissing the complaint. Because we find sufficient evidence that respondents misrepresented the investment value and potential uses of the land they sold and failed to disclose to [2] consumers material facts about its investment value and suitability for use, we conclude that respondents violated Section 5 of the Federal Trade Commission Act. Thus we

decline to adopt the ALJ's order dismissing the complaint and issue instead this opinion and the attached Order. This opinion is the product of the Commission's independent consideration of the entire record in this case, including the transcripts of testimony, exhibits, pleadings, briefs, and the Initial Decision. The opinion contains findings of fact and conclusions of law that the Commission believes are supported by its review of the record as a whole. Where it is inconsistent with the findings and conclusions contained in this opinion, the Initial Decision is hereby set aside. The Order issued against respondents consists of those provisions deemed necessary to prohibit respondents from engaging in the misrepresentations and omissions of fact identified here and to deter respondents from similar unfair or deceptive practices in connection with any future land sales.

A summary of the Commission's proceedings and of respondents' operation and marketing approach is presented in Section I. In Section II, we focus on the practices alleged in the complaint to be unfair and deceptive as we discuss respondents' investment and land use representations and compare those representations to the record evidence about the land's investment value and suitability for various uses. This section also addresses the existence of certain material information about the land that was not disclosed to prospective [3] purchasers. The legality of respondents' representations and omissions of fact is considered in Section III, where we discuss respondents' liability under the FTC Act for practices they pursued directly and through agents hired to sell land on their behalf. The nature and scope of the Order entered against respondents is described in Section IV.

I. BACKGROUND

A. *The Commission's Proceedings*

This proceeding involves three corporate and two individual respondents.¹ Respondents Southwest Sunsites, Inc. ("SWS"), Green Valley Acres, Inc. ("GVA") and Green Valley Acres, Inc. II ("GVA II"), are land sales companies incorporated under the laws of the State of Texas. Their corporate headquarters are in California. Individual respondent Edwin Kritzler is the general manager of each of the three corporate respondents, is a vice president and director of SWS, and is responsible for the day-to-day operation of the corporate respondents

¹ Two other respondents were named in the complaint but are no longer included in the proceeding. Respondent Porter Realty, Inc. through its president, respondent Irvin Porter, contracted to sell land for Southwest Sunsites, Green Valley Acres, and Green Valley Acres II, and both were named in the complaint. (ID 10) Pretrial proceedings concerning Irvin Porter and Porter Realty were stayed on February 25, 1981, after a consent agreement was tentatively accepted. The consent agreement is under consideration by the Commission. The term "respondents" as used in this opinion does not include Irvin Porter or Porter Realty.

as well as for general [4] policy decisions. (ID 8)² The other individual respondent, Sydney Gross, and members of his immediate family own all three corporate respondents. (ID 6) Gross individually and through corporations he formed had the duty to "overlook and oversee" the operations of SWS, GVA, and GVA II, and he was the "exclusive sales agent" for SWS, GVA, and GVA II. (ID 7; Gross Tr. 296, 322-24) The overlapping ownership and management of the three corporations by the individual respondents and their families and the similarity and joint nature of their operation impel us to consider their activities collectively rather than separately.

At the time the Commission's complaint in this proceeding was issued, respondents were in the business of selling to the public undeveloped land in West Texas, in parcels ranging from five to forty acres. Between 1973 and 1977 respondents bought 40,000 acres of land in three tracts in Culberson County, Texas, within 30 miles of Van Horn, Texas, a town of fewer than 3,000 people. Van Horn is located 120 miles east of El Paso. Respondents marketed the parcels to the public primarily by means of agents (termed by respondents "independent brokers") and secondarily by their own sales staff. Approximately 80 percent of the parcels [5] were sold by one broker, Porter Realty, which sold the land throughout the country by telephone solicitation. (ID 45, 47) In all, about 2,600 parcels were sold from 1974 to 1979, at prices ranging from \$2,995 to \$6,000 for five acres, and up to about \$10,000 for forty acres.

The Commission's complaint issued on April 29, 1980, and alleged that respondents' land sales activities violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45 (1982).³ In brief, the three counts charged that respondents (1) misrepresented that the parcels sold by respondents were good investments involving little or no fi-

² The following abbreviations will be used in this opinion:

ID	- Initial Decision finding number
ID pp.	- Initial Decision page number
Tr.	- Transcript page number
CX	- Complaint Counsel's exhibit
RX	- Respondents' exhibit
CCAB	- Complaint Counsel's appeal brief
RAB	- Respondents' appeal brief
CCRB	- Complaint Counsel's reply brief
Rec.	- Record page number

³ On April 9, 1980, the Commission initiated an action for a preliminary injunction against respondents under FTC Act Section 13(b), 15 U.S.C. 53(b) (1982), to enjoin alleged violations of the FTC Act. The action was filed in the U.S. District Court for the Northern District of Texas. The District Court issued a preliminary injunction on May 19, 1980, restraining the respondents from further violations of Section 5, but the court declined to grant requested ancillary relief in the form of an order to prohibit respondents from continuing to accept payments on the purchase agreements and from dissipating corporate assets. *FTC v. Southwest Sunsites, Inc.*, No. 3-80-0258-F (N.D. Tex. May 19, 1980). The injunction prohibiting violations of Section 5 was affirmed by the U.S. Court of Appeals for the Fifth Circuit. The Fifth Circuit reversed the district court's conclusion that ancillary relief to freeze corporate assets could not be ordered in a Section 13(b) proceeding, and remanded the case to the District Court to determine the appropriateness of granting the requested ancillary relief. *FTC v. Southwest Sunsites, Inc.*, 665 F.2d 711 (5th Cir.), cert. denied, 456 U.S. 973 (1982).

financial risk and failed to disclose material information regarding their financial risk; (2) misrepresented that the properties were suitable for use as homesites, farms, and ranches and failed to disclose material [6] facts regarding the suitability of the properties for those uses; and (3) sold parcels that were of little or no value and unfairly retained the proceeds from the sales.

Adjudicative hearings in this case began in Dallas, Texas, on April 13, 1981, and continued until November 1981 both in Dallas and in Van Horn, Texas, in Albuquerque, New Mexico, and in Washington, D.C. The Administrative Law Judge (ALJ) filed his Initial Decision on July 29, 1982, dismissing the complaint. On Count I, the ALJ determined that while brokers retained by the respondents, primarily Porter Realty, misrepresented the investment value of the subject properties, the respondents themselves were not liable for the misrepresentations because the ALJ believed that the respondents took sufficient action to prevent them. (ID pp. 112-14) The ALJ found that no "insurmountable obstacles" prevented use of the parcels as homesites, and that some individuals were taking "substantial strides towards self-sufficiency by farming or raising small numbers of cattle," so that he found no violation of law under Count II. (ID pp. 114-15) The ALJ also concluded that information relating to the costs of development was disclosed sufficiently to consumers so that no failure to disclose information had been proved under Count II. Finally, with respect to Count III, he determined that the land was not of little or no value, and therefore that retention of money paid for the land was not unfair. [7]

Complaint counsel filed a timely appeal from the Initial Decision and after full briefing of the factual and legal issues on appeal the Commission heard oral argument.

B. *The Land*

Respondents SWS, GVA, and GVA II all engaged in the marketing and sale, primarily to out-of-state purchasers, of undeveloped land in rural areas in West Texas. The area of Texas within which the land is located is relatively arid, with ten inches of rainfall annually on average. (Holtz Tr. 3035) Respondents' property is near desert in condition. (Drew Tr. 742; W.D. Smith Tr. 911) The predominant use of land in the county in which the subject properties are located is commercial ranching, since most land, including the subject properties, is covered with native grasses or brush. (Holtz Tr. 3035; Compere Tr. 3241) The subject properties themselves are undeveloped, generally flat land with sparse vegetation and grasses.⁴

⁴ Several photographs of the properties, offered by complaint counsel and by respondents, are included in the record. (See CY 436 (photographs included in appraisal report of complaint counsel's expert witness): RXs 26-48)

In 1973 respondents purchased 17,467 acres of land about 10 to 20 miles east of Van Horn, Texas, that became SWS. Respondents paid \$469,857.50, or an average price of approximately \$27 per acre for this property. (ID 13 & n.3) From 1968 until shortly before respondents bought it, 2,000 acres of land in the property that became SWS were sold to the public by Southwest Land Corporation, which apparently was not connected [8] with SWS. (Kritzler Tr. 647) After Southwest Land Corporation declared bankruptcy in 1973, the land was repossessed by its previous owner and sold to SWS. Respondents divided the property into 1,800 parcels ranging from five to forty acres (ID 17) and sold to the public between 1,300 and 1,595 parcels at prices ranging from \$2,995 to \$3,495 for five acres, which is about \$600 to \$700 per acre. (Kritzler Tr. 487, 481-82)

The property that became GVA (18 to 25 miles south of Van Horn) was acquired by respondents in 1976 for \$750,000, or an average price per acre of \$50. (ID 19 n.9) Roughly 15,000 acres were purchased and divided by respondents into 1,200 parcels. Approximately 750 to 930 lots were sold in GVA at \$4,000 to \$6,000 for a five-acre parcel, which is about \$800 to \$1,200 per acre. (Kritzler Tr. 488-90) The 9,611 acres that became GVA II, which is adjacent to GVA, were acquired by respondents in 1977 for \$602,000, an average price of \$63 per acre. GVA II was divided by respondents into 800 parcels. Approximately 550 lots were sold in GVA II for \$4,995 to \$6,000 for a five-acre parcel, which is about \$1,000 to \$1,200 per acre. (Kritzler Tr. 491-93) Sales were continued in each property to some extent until at least 1979.⁵ [9]

⁵The record is not entirely clear as to whether respondents are still selling property in GVA and GVA II, although sales in SWS appear to have ended. In their appeal brief, respondents state that "[t]he evidence . . . shows that as of early 1978 respondents virtually ceased all sales," citing Kritzler Tr. 637, 4126, 4127, 4153-54; Elfont Tr. 4168, 4170, 4188. (RAB 59) The pages in the transcript to which respondents draw our attention, however, do not support their proposition unless we interpret "virtually ceased" to mean only that sales through brokers ceased in 1978. Kritzler testified that respondents did not use telephone brokers to sell in the properties after 1978; he did not say that respondents stopped selling land themselves. (Tr. 637) Kritzler also testified that he "terminated" Porter Realty and Diversified Realty in 1978, but again he did not say that respondents stopped selling land themselves, only that they did not hire new brokers. (Tr. 4126-27) His testimony states that respondents stopped making sales in SWS in 1978, but sales in GVA and GVA II were not mentioned. (Tr. 4153-54) Elfont's testimony states that in 1977 only 20 parcels were sold in SWS that he reviewed; sales in GVA and GVA II were not mentioned, though he noted that Porter Realty and Diversified stopped making sales. (Tr. 4168, 4170, 4188)

Although Kritzler testified in April 1981 that no sales "in any acreage" had been made in three years, *id.* at 489-90, that clearly is not the case, since there is ample evidence of sales after April 1978, albeit not at the levels of 1977. In fact, 56 parcels in SWS were sold from November 1, 1978, through October 31, 1979, (CX 13D) 24 parcels in GVA were sold from October 1, 1978, through September 30, 1979, and 52 parcels in GVA II were sold from December 1, 1978, through November 31, 1979. (CX 30D)

Gross stated at trial that the business of SWS "at the present time" was "collecting its contracts from previous sales" (Gross Tr. 297) When asked what "is" the business of GVA, he stated that "it owns property and sells land," and as to GVA II he stated it "sells property." (Gross Tr. 298)

While it is not clear whether GVA and GVA II are still selling property to new customers or selling additional parcels to existing customers, they are, like SWS, still collecting funds under purchase agreements entered into earlier.