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Legal Research Digests are issued to provide early awareness and encourage application of research results emanating from NCHRP Project 20-6, "Legal Problems Arising Out of Highway Programs." These Digests contain supplements and new papers that are periodically compiled as addenda to the treatise, *Selected Studies in Highway Law*, published by the Transportation Research Board.

Areas of Interest: 21 facilities design, 70 transportation law (01 highway transportation)

Supplement to

Valuation Changes Resulting From Influence of Public Improvements

A report prepared under NCHRP Project 20-6, "Legal Problems Arising Out of Highway Programs," for which the Transportation Research Board is the agency conducting the research. The report was prepared by John C. Vance. James B. McDaniel, TRB Counsel for Legal Research, was the principal investigator.

THE PROBLEM AND ITS SOLUTION

State highway departments and transportation agencies have a continuing need to keep abreast of operating practices and legal elements of specific problems in highway law. This report supplements and updates a paper in Volume 2, *Selected Studies in Highway Law* (SSHL), entitled "Valuation Changes Resulting From Influence of Public Improvements," pp. 733 to 766-S1.

This supplement will be published in a future addendum to SSHL. Volumes 1 and 2 deal primarily with the law of eminent domain and the planning and regulation of land use. Volume 3 covers government contracts. Volume 4 covers environmental and tort law, inter-governmental relations and motor carrier law. An expandable format permits the incorporation of both new topics as well as supplements to published topics. Updates to the bound volumes are issued by addenda. The 5th Addendum was published in November 1991. Addenda are published on an average of every three years. Between addenda, legal research digests are issued to report completed research. Presently the text of SSHL totals over 4,000 pages comprising 75 papers.

Copies of SSHL have been sent, without charge, to NCHRP sponsors, certain other agencies, and selected university and state law libraries. The officials receiving complimentary copies in each state are: the Attorney General and the Chief Counsel and Right-of-Way Director of the highway agency. Beyond this initial distribution, the 4-volume set is for sale through the Transportation Research Board (\$185.00).

APPLICATIONS

The foregoing research should prove helpful to program officials, right-of-way officers, and attorneys who are involved in valuation determination. Right-of-way officials and then attorneys will better understand those components of their valuations, pertaining to project enhancements or depreciation, that might later be relied upon in court to support the legal sufficiency of valuation determinations. Finally, this material should be very useful as background reading to attorneys defending just-compensation cases, in which either project-caused enhancement or depreciation is an issue.

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SUPPLEMENTARY MATERIAL

Editor's note: Supplementary material to the paper "Valuation Changes Resulting From Influence of Public Improvements" is referenced to topic headings therein. Topic headings not followed by a page number relate to new material.

INTRODUCTION (p. 733)

In order to bring into focus and perspective, in this supplementation paper, the problem of valuation in eminent domain as affected by the impact or influence of public improvements, consideration of the recent cases will be undertaken in conjunction with a summary review of the prior case law set forth in the original paper dealing with this subject matter.¹

For the purposes of this paper the cases are broadly divided into two classifications:

1. In the first group are cases involving a fact situation wherein the location of a public improvement is known, definite, and established at the outset of the project. The general rule that obtains with respect to valuation of property taken for such type of improvement is that enhancement or depreciation in value resulting from the improvement is to be excluded in the ascertainment of the fair market value of the property taken.

2. In the second group are cases wherein the final boundaries of the improvement are uncertain or indefinite at the time of the commencement of the project. The governing rule in respect to cases included in this category is that the treatment of project-caused appreciation or depreciation will be made to turn on the application to the facts of the so-called "scope of the project" rule.

The cases in this paper are hereinafter grouped and treated according to the two above described broad classifications. First for discussion are cases wherein the land proceeded against is included within the boundaries of an improvement the location of which is known and definite from the outset of the project.

EXCLUSION IN VALUATION OF PROJECT-CAUSED ENHANCEMENT AND DEPRECIATION

The Supreme Court of the United States, at an early date, announced the rule that the public should not be required to pay the owners of lands taken for a public improvement an advanced value created by the improvement paid for by the public. (See *Kerr v. South Park Commissioners*, 117 U.S. 379, 6 S. Ct. 801, 29 L.Ed. 924 (1886); and *Shoemaker v. United States*, 147 U.S. 282, 13 S. Ct. 361, 37 L.Ed. 170 (1893).) The Court reasoned that the owners of lands adjacent to or near an improvement enjoy benefits therefrom, but the owners of lands taken for the improvement cannot enjoy such benefits, and hence are not entitled to the increment in value represented by such benefits. An increase in value of the lands taken would not be due to increase in benefits inuring

to the lands, but rather to speculation as to what the government might pay therefor. Thus, where the boundaries of a public project are known, definite, and established from the outset thereof, enhancement in the value of the lands taken for the project cannot be allowed. This result was subsequently followed and implemented by the lower Federal courts, and the same was adhered to by at least the majority of the courts of last resort of the various States wherein the question was presented for decision.

The Supreme Court of the United States reached a like result in respect to exclusion of depreciation in value. In *United States v. Virginia Electric and Power Company*, 365 U.S. 624, 81 S. Ct. 784, 5 L.Ed.2d 838 (1961), suit was brought by the Federal Government to condemn a flowage easement in connection with the acquisition of lands for a dam and reservoir project. The only question presented on appeal to the Supreme Court was as to the proper measure of compensation for the easement. In ruling thereon and giving direction to the lower court on remand, the Supreme Court said:

The court must exclude any depreciation in value caused by the prospective taking. . . . As one writer has pointed out, "[i]t would be manifestly unjust to permit a public authority to depreciate property values by a threat [of the construction of a government project] and then to take advantage of this depression in price which it must pay for the property" when eventually condemned. 1 Orgel, *Valuation Under Eminent Domain*, Sec. 105 at 447 (2d ed.)

Such ruling was again duly followed by the lower Federal courts, and the majority of the State courts found themselves in accord therewith when called to pass on the question.

However, a small minority of the State courts were committed to the opposing view, i.e., that project-caused enhancement or depreciation was not to be excluded in valuation.

Certain of these cases allowed depreciation to be considered based on the proposition that private property in legal contemplation cannot be said to be damaged by preliminary procedures looking to future appropriation for public use, or, that because market value cannot be influenced by appreciation in value, neither can it be influenced by depreciation in value.

In still other cases enhancement was allowed on the ground that the constitutional demands of "just compensation" required such result.

The position taken in these cases flew in the face of the later enacted policy provisions of the uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970. Section 301(3) of Title III of the Act (42 U.S.C. 4651(3)) provides as follows:

Any decrease or increase in the fair market value of real property prior to the date of valuation caused by the public improvement for which such property is acquired, or by the likelihood that the property would be acquired for such improvement, other than due to physical deterioration within the reasonable control of the owner, will be disregarded in determining the compensation for the property.

Section 305 of Title III of the Act (42 U.S.C. 4655), relating to compliance by the States and the giving of assurances, reads as follows:

Notwithstanding any other law, the head of a Federal agency shall not approve any program or project or any grant to, or contract or agreement with, a State agency under which Federal financial assistance will be available to pay all or part of the cost of any program or project which will result in the acquisition of real property on and after the effective date of this Title, unless he receives satisfactory assurances from such State agency that:

(1) in acquiring real property it will be guided, to the greatest extent practicable under State law, by the land acquisition policies in Section 301. . . .

Because compliance is required "to the greatest extent practicable under State law" with the policy provisions of the Act relating to exclusion of enhancement and depreciation, the vast majority of the States are now in compliance therewith.

The influence, at the State level, of the above set forth policy provisions of Sec. 301(3), Title III of the Act, is nowhere more clearly illustrated than in the case of *Redevelopment Agency of Salt Lake City v. Grutter*, 734 P.2d 434 (Utah, 1986). This was an appeal from a ruling of the trial court which precluded landowners in a condemnation proceeding from introducing evidence of enhancement in value occasioned by the project for which the property was taken. The ruling appealed from was in clear contravention of prior decisions of the Supreme Court of Utah that allowed the introduction of evidence of both project-caused enhancement and depreciation in value.

After reviewing its prior decisions to this effect, the Supreme Court of Utah pointed to the provisions of a Utah statute (U.C.A. 57-12-13) that duplicated the above set forth language of Sec. 301(3) of Title III (42 U.S.C. 4651(3)) and in reversing its prior stand on the allowance of project-caused enhancement and depreciation, stated:

... In addition to having dubious antecedents, the Utah "rule" now expressly conflicts with legislative intent and is contrary to the rule applied by a majority of other jurisdictions. Therefore, we deem it appropriate to enunciate a new rule on the valuation question.

We hold that in condemnation proceedings any enhancement or decrease in value attributable to the purpose for which the property is being condemned shall be excluded in determining the fair market value of the property. This rule conforms to legislative intent and to sound policy.²

See to the same effect *Hudson v. City of Shawnee*, 245 Kan. 221, 777 P.2d 800 (1989), involving condemnation of permanent and temporary easements for street construction purposes, wherein the Supreme Court of Kansas stated: "The general rule is that enhancement or depressing of value due to anticipated improvements by the project for which condemnation is sought is excluded in determining fair market value."

For other recent cases announcing the rule that both project-caused enhancement and depreciation are to be excluded in determining fair market value see: *County of Clark v. Alper*, 685 P.2d 943 (Nev., 1984); *Raleigh-Durham Airport Authority v. King*, 330 S.E.2d 622 (N.C.

App., 1985); *First American National Bank v. State*, 322 N.W.2d 344 (Minn., 1982); and *State v. Templeman*, 39 Wash. App. 218, 693 P.2d 125 (1984). However, a contrary result was reached in respect to the allowance of enhancement (but not depreciation) in the case of *Department of Transportation of the State of Florida v. Nalven*, 455 So.2d 301 (Fla., 1984). Consideration of this case is deferred until later herein (p. 18, *infra*), where it is fully discussed in connection with the scope of the project rule.

The rule, thus, now appears to be clearly established in the great majority of the States, that where property is taken for a public improvement the location of which is known and definite from the outset, both project-caused enhancement and depreciation in value are to be excluded in determining the fair market value of property taken for the project.

This paper now turns to a consideration of the cases involving the scope of the project rule.

SCOPE OF THE PROJECT RULE

As previously stated, the scope of the project rule (hereinafter sometimes called the SOP rule) deals with the situation where the full scope of the project is uncertain or indefinite at the time of the commencement thereof. Although a number of cases had dealt with the situation before the Supreme Court of the United States was called to pass thereon, courts and commentators are in agreement that the decision in *United States v. Miller*, 317 U.S. 369, 63 S. Ct. 276, 87 L.Ed. 336 (1943), constitutes the definitive statement of the rule.

The *Miller* case involved condemnation of certain lands for relocation of a railroad, required by construction of the Shasta Dam in California and prospective flooding of the existing railroad right-of-way. A complaint in eminent domain was filed by the United States, and the action was tried to a jury. The lands sought to be condemned lay within an area where property values had risen sharply as a result of construction of the dam. The owners offered evidence as to the fair market value on December 14, 1938, the date of filing of the complaint. Objection was interposed on the ground that the condemnees were not entitled to any increment in value after August 26, 1937, the date on which the government became committed to the project pursuant to authorization thereof by Act of Congress. The trial court sustained the objection, and the Circuit Court of Appeals reversed, holding that the witnesses should have been allowed to testify as to fair market value on the date of taking without limitation as to enhancement of value.

In affirming the action of the District Court and reversing the judgment of the Circuit Court of Appeals, thus disallowing increment in value to the owners, the Supreme Court of the United States stated:

If a distinct tract is condemned, in whole or in part, other lands in the neighborhood may increase in market value due to the proximity of the public improvement erected on the land taken. Should the Government, at a later date, determine to take these other lands, it must pay their market value as enhanced by this factor of proximity. If, however, the public project from the beginning included the taking of certain tracts

but only one of them is taken in the first instance, the owner of the other tracts should not be allowed an increased value for his lands which are ultimately to be taken any more than the owner of the tract first condemned is entitled to be allowed an increased market value because adjacent lands not immediately taken increased in value due to the projected improvement.

The question then is whether the respondents' lands were probably within the scope of the project from the time the Government was committed to it. If they were not, but were merely adjacent lands, the subsequent enlargement of the project to include them ought not to deprive the respondents of the value added in the meantime by the proximity of the improvement. If on the other hand, they were, the Government ought not to pay any increase in value arising from the known fact that the lands probably would be condemned. The owners ought not to gain by speculating on probable increase in value due to the Government's activities. (Emphasis added.)

In the later decision of *United States v. Reynolds*, 397 U.S. 14, 90 S.Ct. 803, 25 L.Ed.2d 12 (1970), likewise involving the scope of the project rule, the Supreme Court was requested by attorneys representing the Federal Government to "clarify" the *Miller* rule. In response to such request the Court stated:

We think the test was stated with admirable clarity by a unanimous Court in *Miller*: if the "lands were probably within the scope of the project from the time the Government was committed to it," no enhancement in value attributable to the project is to be considered in awarding compensation. As with any test that deals in probabilities, its application to any particular set of facts requires *discriminating judgment*. The rule does not require a showing that the land ultimately taken was actually specified in the original plans for the project. It need only be shown that during the course of the planning or original construction it became evident that land so situated would probably be needed for the public use. (Emphasis added.)

Thus the Court reaffirmed the *Miller* ruling that the critical question is whether the lands proceeded against were "probably within the scope of the project from the time the Government was committed to it," adding that the application of this rule or test to a particular set of facts requires the exercise of "discriminating judgment."

Although there are no subsequent relevant decisions of the Supreme Court of the United States, clarification of the *Miller* rule has been advanced by certain cases decided in the lower Federal courts that were handed down since the decision in *Reynolds*. A new formula was developed in these cases which aids considerably in the interpretation of the *Miller* rule. This formula is based on the identification of certain factors, not mentioned in *Miller* or *Reynolds*, that are highly useful in determining the critical question whether the lands proceeded against were "probably within the scope of the project from the time the Government was committed to it." Discussion of these cases will be undertaken after consideration is first had of those recent cases that were decided by application of the traditional *Miller* rule.

Cases Decided by Application of the *Miller* Rule

The cases that follow next were decided pursuant to the governing principles announced in *Miller*. First for consideration are cases in which enhancement in value was not allowed:

Enhancement Denied

The facts in *Fuller v. Rahill*, 391 A.2d 103 (R.I., 1978), were as follows:

Appeal was prosecuted to the Supreme Court of Rhode Island from a judgment of the trial court in a highway condemnation proceeding, petitioner asserting that her property had been undervalued in such proceeding. It appeared that in 1962 a public hearing was called by the Rhode Island Department of Public Works for the purpose of presenting to the public plans for the configuration of I-295, then being constructed in Rhode Island. At such hearing the public was informed that an interchange was planned for the intersection of I-295 with State Route 44, and that certain properties, including petitioner's property, would probably be needed for construction of the interchange. The public was further advised that the plans for the interchange were tentative and not as yet finalized.

In 1966 certain land contiguous to that of petitioner was condemned for the construction of I-295, and, in 1972, petitioner's property was taken for the construction of the interchange connecting I-295 with State Route 44.

Petitioner contended at trial and on appeal that as a result of the condemnation for I-295 in 1966, the value of her property had been greatly increased, and that she was entitled to such increment in value. In affirming the trial court's ruling to the contrary, the Supreme Court of Rhode Island, after first discussing the rulings in *Miller* and *Reynolds*, stated:

Our review of the record has failed to show that the trial justice misapplied the *Miller* rule, or that he misconceived or disregarded the evidence in making his findings. The record establishes that from 1962, the time of the initial public hearing, the public was informed of what was to be done generally in the area of the proposed junction of I-295 and Route 44. The public was put on notice . . . that the interchange would be in the area of Route 44 in the vicinity of petitioner's land and that her land would probably be needed for the interchange, although the final design and the exact location had not yet been determined. . . .

. . . Mr. Chorney, state design engineer for I-295, testified that testimony at the 1962 hearing warned the public that the interchange would be built at the intersection of I-295 and Route 44, and that any property adjacent to Route 44 in that area, such as that of petitioner, was subject to condemnation for the project. Mr. Chorney further testified that even after the . . . condemnation of property [in 1966] for construction of the main barrel of I-295, plans for the interchange were still indefinite. Thus, it was entirely reasonable for the trial justice to conclude that those lands designated at the 1962 hearing as probably within the scope of the project were not changed by any subsequent enlargement of the project because,

until the filing of plat 1353 in 1972 condemning petitioner's property for the interchange, no definite plans had been formulated that would have taken the subject parcel out of the scope of probable taking as established in 1962.

We conclude, therefore, that the trial justice did not overlook or misconceive the evidence, nor did he premise his decision upon an application of an erroneous rule of law. . . . Under the *Miller* doctrine, petitioner's property was within the scope of the project from its inception. Therefore, even if its value was enhanced by the condemnation of adjacent land under the auspices of the project, that increased value cannot be considered in determining fair market value at the time of condemnation of the subject parcel because the owner is not entitled to benefit from the known fact that her property probably would be condemned.

In *State v. Hodges*, 552 S.W.2d 400 (Tenn. App., 1977), condemnation was instituted, in December 1971, to acquire defendants' lands for an interchange to be constructed at the junction of I-40 with State Route 66. The plans in connection with such project also contemplated the relocation of a third road, known as Dumplin Valley Road. After at least two lanes of I-40 were completed, it was discovered that insufficient land had been acquired in the 1971 taking to permit a stable slope to be built, in connection with relocation of the Dumplin Valley Road. As a result, a further proceeding was instituted, in March 1974, to condemn an additional tract of 1.75 acres of defendants' lands, for use in slope stabilization. In such proceeding the trial court awarded damages based on the value of the 1.75 acres as enhanced by the construction of the interchange.

In reversing and remanding the Tennessee Court of Appeals stated that: "It is undoubtedly true, as insisted by the State, . . . that this proceeding was necessitated by relocating Dumplin Valley Road in accordance with the plans of the original project. It is likewise equally true, as insisted by the Defendants, that the State contemplated acquiring no additional land at the time the first condemnation proceeding was filed."

After full discussion of the applicability of the *Miller* rule to the facts of the instant case, the Court went on to say:

Additionally, we note that in *U.S. v. Reynolds*, . . . the Supreme Court of the United States again addressed the *Miller* rule, saying:

. . . The rule does not require a showing that the land ultimately taken was actually specified in the original plans for the project. It need only be shown that during the course of the planning or original construction it became evident that land so situated would probably be needed for the public use. (Emphasis by the Court.)

We accordingly conclude in light of *Reynolds* and under the particular facts of this case, where the original improvement contemplated relocation of a road which later necessitated acquisition of additional property and where the project had not been fully completed, that the enhanced value of the property because of the improvement may not be considered.

. . .

In conclusion, we note that to adopt the rule insisted upon by the landowners would tend to encourage the State, when acquiring property, either to obtain more land than it really felt would be necessary rather than run the risk of having to acquire additional property at an enhanced

value or, conversely, if the improvement were a detriment to the surrounding property, to acquire property piecemeal and thereby, in the subsequent proceedings, pay the landowner on the basis of its reduced value.

Thus this case is clear authority for the important proposition that under the *Miller* rule it is not necessary to show that the lands proceeded against were actually specified in the original plans, it being sufficient to show that during the course of planning and construction it became apparent that the condemned lands would probably be needed for the project.

Enhancement Allowed

In the following cases enhancement was allowed, pursuant to the previously set forth *Miller* reasoning that enhancement should be allowed in the case of lands that are merely adjacent to a public improvement and do not constitute an enlargement thereof, under the scope of the project test or rule.

State v. Alaska Continental Development Corporation, 630 P.2d 977 (Alaska, 1980), was an appeal from what began as two eminent domain proceedings. After separate master's hearings the cases were consolidated and heard in a non-jury trial. The consolidated case involved condemnation of properties for the construction of a new road (Parks Highway) and the extension of an existing road (Geist Road). The new roadway (Parks Highway) was designed to connect with the extension of the existing roadway (Geist Road) at the intersection of the new road (Parks Highway) with a third road already in existence (Chena Pump Road). All of the parcels taken were carved out of a larger tract of land owned by the named defendants. The land to be used for the construction of Parks Highway was taken in the spring of 1973, and the land to be used for the extension of Geist Road was condemned approximately one year later in the spring of 1974. Both takings were for the purpose of relieving traffic congestion in the area.

The trial judge allowed such enhancement in value of the land taken for the construction of Parks Highway as was attributable to the planned extension of Geist Road. Similarly, the trial judge allowed such enhancement in value of the land taken for the extension of Geist Road as was attributable to the construction of Parks Highway. These rulings were premised on the findings that the construction of Parks Highway and the extension of Geist Road were two separate and distinct projects, and, therefore, under proper interpretation of the SOP rule, enhancement was to be allowed. The State challenged these findings, arguing that the two projects were part of the same overall plan to restructure traffic flow through the area, and hence were to be treated as one and the same project for valuation purposes.

In affirming the findings and rulings of the trial court, the Court of Appeals stated:

. . . [T]he superior court concluded in its findings that the Geist Road extension and the Parks Highway were two separate projects for the

purposes of determining just compensation. We agree that this determination is one of fact, which on review we may reverse only if it is "clearly erroneous."¹³

... Under the "clearly erroneous" standard of review, we will not reverse a trial court's finding of fact unless "convinced, in a definite and firm way, that a mistake has been committed." [Citation omitted.] We conclude there was adequate evidence in the record here to support the superior court's findings as to separate projects. The projects were designated by the highway department under different numbers, one as a primary road and the other as a part of the secondary road system. The condemnation proceedings for the parcels taken for the Parks Highway began a year prior to that for the parcel taken for the Geist extension. ... [T]he state's appraiser ... considered the projects to be separate for the purposes of valuation, considering the Parks Highway as a given condition in appraising that parcel for the Geist extension taking. Another witness from the highway department also stated that the projects were separate. While the two roads both contributed to diverting traffic from the ... area and met at an intersection, the state did not show that constructing either project was dependent upon the completion of the other. The superior court correctly observed that the burden of proving that the projects should be considered as one for valuation purposes was on the state, the party asserting the claim.

Because the State failed to carry the burden of proof that the projects were to be considered as one project for valuation purposes, enhancement attributable to the separate and distinct projects was permissible under the SOP rule.

It is to be noted that in determining the projects were separate from one another, the Court laid emphasis on the fact that the State highway department had designated the projects under different numbers, one as a primary road, and the other as part of the secondary road system.

The facts in *State, ex rel. Commissioner, Department of Transportation v. Veglio*, 786 S.W.2d 944 (Tenn. App., 1989), were as follows:

Defendant was the owner of a tract of 19.065 acres located near the intersection of I-40 with a county road (later acquired by the State) known as Germantown Road. As a result of commercial development in the area, plans were formulated in the 1960s for the widening of Germantown Road, and for the upgrading of the interchange from a half diamond to a full diamond, thereby providing greater accessibility to traffic moving on I-40. Part of defendant's tract of 19.065 acres was first taken for the widening of Germantown Road. Subsequently, the instant proceeding was brought to acquire a further parcel out of defendant's acreage, for the upgrading of the interchange. The trial court ruled that the widening of Germantown Road was a project separate and distinct from the project to upgrade the interchange, and that although defendant could not benefit from increment in value resulting from the upgrading of the interchange, enhancement could be allowed for increased value caused by the separate road widening project. The State, on the other hand, contended that the two projects were part of the same public improvement, and that under proper application of the scope of the project

rule defendant was not entitled to any increment in value. In sustaining the trial court's ruling that the two projects were separate and distinct, thereby allowing enhancement resulting from the road-widening project, the Court of Appeals stated:

... That portion of [defendant's] property needed for the widening of Germantown Road was acquired by Shelby County in 1971. The plan pursuant to which Shelby County acquired the property did not involve the upgrade of the interchange. That plan was developed in the early 1960's as part of a comprehensive plan for Shelby County roads. The plans in regard to this section of Germantown Road were completed in 1969 and the property purchased in 1971.

I-40 at Germantown Road was completed in 1963. Plans to upgrade were not approved until 1977. In 1981 a public hearing regarding the upgrade was held, but there was no discussion of the widening of Germantown Road. An environmental impact study required for the interchange upgrade did not include consideration of the widening of the road, and even specifically states the two projects are separate. Germantown Road remained a county road until 1983 when it was acquired by the State.

After acquisition by the State, 1984 environmental impact studies of the road widening did not include the interchange upgrade, and again indicated the two projects were separate. Finally, the widening of Germantown Road is not scheduled for completion until September of 1989. The interchange upgrade was scheduled for September 1988 completion. We therefore find that the evidence does not preponderate against the trial judge's ruling.

It may be noted that the holding of the Court in this case appears accurately to reflect the admonishment of the Supreme Court of the United States, in *Reynolds, supra*, that the application of the scope of the project rule to a particular set of facts requires the exercise of "discriminating judgment."

Enhancement Allowed in Part and Denied in Part

City of Valdez v. 18.99 Acres, Etc., in the City of Valdez, Alaska, 686 P.2d 682 (Alaska, 1984), stands for the proposition that project-caused enhancement may be allowed in part and denied in part.

This case involved condemnation of land for the construction of a port facility for the City of Valdez, Alaska. The City commissioned economic and feasibility studies to aid in site selection for the facility, which studies were completed several months before such selection was actually made by the City. It was conceded that as a result of these studies the value of the land eventually condemned for the project was considerably enhanced (i.e., in respect to its highest and best use as a port site). Among the questions for decision by the Supreme Court of Alaska was whether enhancement in value due to the condemnor's own economic and feasibility studies could be considered in determining valuation. The Court concluded that this question should be met in light of the applicability of the scope of the project rule thereto. The Court then ruled that the application of the SOP rule required the conclusion that enhancement in value due to the condemnor's economic and feasibility studies was to be allowed

until that point in time when it became likely that the lands taken would be needed for the project, and thereafter denied. It stated:

... We believe that the proper time to exclude project-enhanced value from a fact-finder's calculations is when the property is likely to be condemned and its market value thus reflects the owner's chance to "hold up" the government which is planning to take it. *Until then, project-enhanced value is compensable.*...

... To this we add that whenever it becomes likely that the property will be condemned—whether or not the property was originally within the project's scope—*project-enhanced value ceases to be compensable.*... The rule thus prevents property owners from receiving many unjustified windfalls, as when, for example, formal condemnation of property which everyone knows will be taken is delayed. (Emphasis added.)

Thus, where lands taken for an improvement are not at the outset earmarked as being within the scope of the project, enhancement in value resulting from the project will be allowed until that point in time is reached when it becomes reasonably probable that the lands will be needed for the project, and thereafter enhancement due to the project will be denied.⁴

This paper now turns to a consideration of the previously mentioned formula that received development in the lower Federal courts subsequent to the decision in *Reynolds*, the application of which aids measurably in interpretation of the scope of the project rule. For the purposes of this paper, the formula is broken down into two parts, hereinafter referred to as the "three factors" test and the test of "reasonable expectations."

The Miller Rule as Explicated by the "Three Factors" and "Reasonable Expectations" Tests

The "three factors" test was first announced in the case of *United States v. 62.17 Acres of Land, Etc., in Jasper County, Texas*, 538 F.2d 670 (C.A.5, 1976) (hereinafter sometimes referred to as "Jasper"). Its evolution into the "reasonable expectations" terminology took place in the later case of *United States v. 320.0 Acres of Land, Etc., in the County of Monroe, State of Florida*, 605 F.2d 762 (C.A.5, 1979) (hereinafter sometimes referred to as "Monroe").

The somewhat complicated facts in *Jasper* were as follows.

In 1945 the Congress of the United States, by legislative enactment, authorized the construction of the Sam Rayburn Dam and Reservoir project in Jasper County, Texas. In 1953 the Department of the Interior and the Army Corps of Engineers adopted a joint policy governing land acquisition for dam and reservoir projects. Pursuant to this policy the Government would acquire land in fee simple up to the 5-year flood line—the level that the water would reach on an average of once every 5 years. The Army Corps of Engineers implemented this policy in acquiring land for the Rayburn project.

In 1958 the Army Chief of Engineers approved a calculation that the 5-year flood line lay on the contour 171 ft above mean sea level. Lines of

demarcation (inclusive of lands scheduled for fee simple acquisition) were staked out by tangent surveying, which involves the drawing of tangents between monuments placed on a line determined to be the desired contour level. In 1961 the Secretary of the Army negotiated a purchase in fee simple of so much of a parcel of 1,800 acres, owned by defendant's predecessor in title, as was included in what was then drawn and staked as the 171-ft contour line.

In 1965 it became evident that the Government had made errors in demarking the 171-ft contour, and it was not until 1969 that sufficient funds were authorized to effect a detailed resurvey that would correct these mistakes. The tract of 62.17 acres, the subject of suit in the instant case, was included within the resurveyed lands.

In January 1971, defendant American Lakes and Land Company, Inc., purchased that portion of the original tract of 1,800 acres that had not been acquired by the Government in the 1961 purchase, and, in July 1971, the Government filed the complaint in the instant case, together with a declaration of taking, to acquire the aforesaid 62.17 acres for the Rayburn project.

The trial judge allowed enhancement in value of the subject property on an estoppel theory, which the defendant conceded on appeal was not supported by the record. Defendant argued on appeal, instead, that enhancement should be allowed because of a legal presumption that the Government, in its 1961 purchase, offset against the value of the property then acquired, the enhancement to the remainder resulting from its proximity to the Rayburn project; that the subject property was part of such remainder; and, therefore, that to exclude enhancement in the instant action would result in less than full compensation.

The Court met this contention by stating that when property is acquired in an eminent domain proceeding, an evidentiary presumption obtains that enhancement of the remainder due to the taking was offset in the ascertainment of before and after value, but that no such presumption exists where property is acquired by negotiated purchase, as in the instant case. The question whether such offset had in fact (i.e., stripped of evidentiary presumption) been made, at the time of the 1961 purchase, was remanded to the district court for determination.

The Court next proceeded to a discussion of whether the scope of the project rule was applicable, noting that the trial judge had failed to pass on this critical question.

By way of threshold statement in approaching the scope of the project problem, the Court observed that:

Pellucidity does not normally attend application of the scope of the project concept; the history of the project before us and the peculiar postures of the parties to this litigation present particularly mindboggling problems. . . . Because the court below reached no explicit conclusion on the scope of the project which is an issue for the trial judge rather than the jury . . . and because ambiguities in the testimony at the pre-trial hearing lie unresolved, we remand this issue also to the district court. We hope to facilitate the proceedings on remand, however, by explicating our understanding of the legal standards triggered by this question.

Applying the *Miller* test to decide whether a particular acquisition was within reasonable prescience or departed to a totally new vista calls for discriminating judgment. . . . The test must have latitudinal and longitudinal tolerances. We cannot straitjacket the government in defining scope of the project, but on the other hand, we cannot permit global meanderings to enlave areas not reasonably to have been conceived as included at its inception.

The Court then went on to discuss a number of Federal cases dealing with the scope of the project rule, including, of course, *Miller* and *Reynolds*. Following such discussion the Court identified three factors that were to be used by the district court in determining, on remand, whether the subject lands were, or were not, within the scope of the project from the time the Government was committed to it. It stated:

Application of the scope of the project test to the case at bar requires the assessment of three factors: the foreseeability of any change in the reservoir line and of this particular tract's falling within the ambit of such a change; the length of time between the original acquisition and this taking; and the Government representations concerning the finality of the original 171 foot line.

After discussion of the effect of these factors the Court concluded:

. . . Therefore we will remand to allow the district court to resolve the factual ambiguities insofar as is possible and, employing its first hand knowledge of the facts, to apply the scope test we have outlined.

The three factors so identified have been used by the courts in subsequent decisions, both at the Federal and State levels, to aid in determining whether lands the subject of suit were or were not "probably within the scope of the project from the time the Government was committed to it." These factors may be generalized as follows:

1. The foreseeability that the original proposed dimensions of the project might have to be changed to include the lands proceeded against.
2. The length of time between the announcement of the project and the condemnation of the lands *sub judice*.
3. The representations of the Government concerning the finality of the project as originally announced.

With these factors in mind attention is now turned to the decision in *Monroe*, wherein the three factors test received a more detailed exposition.

In the opinion of the writer, *Monroe* constitutes something of a landmark decision. The scope of the project rule (requiring, as stated in *Reynolds*, the exercise of "discriminating judgment") is not noted for its clarity in application. In fact, the courts when applying the *Miller* rule frequently complain of its lack of clarity. Insofar as clarity is possible, however, the decision in *Monroe* makes progress, and because of the importance of the holding therein, a somewhat detailed analysis of the lengthy 66-page opinion is deemed requisite herein.

The public project in this case was the Everglades National Park, which covers approximately 2,000 sq mi of the southernmost portion of the Florida peninsula.

The origins of this case trace back to 1929 when the Federal Government first began to investigate the prospects of establishing a National Park in the Everglades. In 1930, the Secretary of the Interior recommended the creation of a National Park encompassing about 1,280,000 acres, and in 1934 Congress took the first steps toward establishment of the Park. However, because Congress refused to authorize purchase of lands for the Park with public money, Everglades National Park did not become a reality until 1947, when it was established and dedicated with a nucleus of 454,000 acres granted by the State of Florida. In addition to the land donations, the State of Florida made available to the Federal Government the sum of \$2,000,000 with which the Department of the Interior began the process of acquiring privately owned lands within the designated Park boundaries.

After certain changes in the Park boundaries were made by the Secretary of the Interior, Congress, by Act of July 2, 1958, officially redefined the Park boundaries, which remained unchanged since that time. The 1958 Act included within the Park, for the first time, an area known as the Northwest Extension. The properties, the subject matter of suit in the instant case, were located within the boundaries of said Northwest Extension.

Overall, the 1958 Act increased the size of the Park to 1,390,000 acres, all but 197,000 acres of which were, in 1958, owned by the United States. Of these 197,000 acres, some were contemplated to remain in private ownership, some were to be donated to the Federal Government, and 81,000 acres, including the 7,888 acres involved in the instant case, were to be acquired as appropriations became available for the purpose.

The 1958 Act authorized the expenditure of \$2,000,000 for land acquisition, but put a ceiling on future appropriations in the amount of \$2,000,000 (approximately \$24 per acre). Moreover, not even a fraction of the remaining privately held lands could be acquired immediately, since Congress did not appropriate any money for that purpose until some time later. As a result, when landowners inquired of the Department of the Interior concerning the status of their lands and the possibility of condemnation, they were advised, in a series of letters written between 1958 and 1962, that the Department did not know when Congress would appropriate the necessary funds, and that in the meantime they were completely free to sell, use, or improve their within-Park properties as they saw fit.

As matters developed, the Department of the Interior did not begin to purchase the privately held lands with Federal funds until 1966, and, when it did so, the \$2,000,000 authorized back in 1958 was quickly exhausted. It was not until 1970 that Congress remedied its initial underestimation of the money necessary to complete the acquisition program, at which time it withdrew the \$2,000,000 cap and increased the authorization to \$22,000,000. Thereafter the Department of the Interior began the process of acquiring the remaining privately held properties.

Some of these tracts were acquired through negotiation and purchase. However, hundreds more were scheduled for condemnation in the Federal court for the southern district of Florida. The lands, the subject of suit in the instant case, consisted of 52 tracts of varying sizes and descriptions, and condemnation thereof took place before the Federal judge for the southern district sitting without a jury.

The trial judge made certain critical rulings, the only one with which we are here concerned being a ruling giving effect to the scope of the project rule.⁵ By such ruling the landowners were prevented from introducing any evidence of comparable sales made after July 2, 1958, the date on which the Northwest Extension (inclusive of subject lands) was authorized by Act of Congress. One of the critical issues, on appeal to the Circuit Court of Appeals for the Fifth Circuit, was whether the trial judge erred in designating such date (July 2, 1958) as the proper date on which to give effect to the scope of the project rule.

The Court began discussion of this question by stating that:

The "scope of the project" rule can be stated easily enough: If the condemned land was probably within the scope of the governmental project for which it is being condemned at the time the Government became committed to that project, then the owner is not entitled to any increment in value occasioned by the Government's undertaking the project. But, as this case so aptly illustrates, it is not so easily understood or applied.

It is most profitably understood as one of the secondary rules refining the concept of market value as the basic measurement of compensation so that injustice does not result from a naive or mechanical determination of market value. As it so happens, the "scope of the project" rule . . . is primarily concerned with awards that are unjust from the perspective of the public footing the bill.

As such, it shares a kinship with other secondary rules or principles that have been developed to ensure that the Government, in pursuing public benefits through the power of eminent domain, is not forced to overcompensate private propertyholders. One such principle is that special value to the *taker*, or *value created solely by the taker's demand* for the property, is not compensable. (Emphasis by the Court.)

The Court stated the reasons for this rule to be as follows:

. . . First, this value is not true "market value" as determined by what a willing buyer would pay a willing seller under "fair market conditions." The Government has entered the "market" as a "purchaser" with a unique and pressing demand, and in so doing has distorted the market; absent the Government's activity as "purchaser" or condemnor, there would be no market reflecting this unique demand. That element of value created solely by the Government's activity as purchaser or condemnor is more "hold-up value" than "fair market value." Second, to force the Government to pay, because of a special public need for property, a premium over that which the property would bring on the open market absent the Government's demand, obviously would increase the cost of public projects and perhaps frustrate some public objectives. Third, to permit recovery of value that is not created by fair, open market conditions would be to award a few private propertyholders windfall gains solely because of public need and exigencies. . . . The underlying notion

of the "no value attributable to Government demand" principle, then, is that the Government, when pursuing public benefits through its condemnation power, should not have to spend more for property than would a reasonable and willing private purchaser *solely because* it is exercising its condemnation power on behalf of the public; instead, the Government is to be equated to a private purchaser buying the property for its "highest and best" nongovernmental use in an open market. (Emphasis by the Court.)

The Court then went on to point out that the SOP rule, while incorporating the above described rule or principle, at the same time recognizes that where value is not attributable to government demand, private owners of lands that are enhanced in value by reason of proximity to a public improvement, are entitled to recover such increment in value because the appreciation so caused is not due to artificial forces, but is, instead, an element of true market value, i.e., what a willing buyer would pay a willing seller in the open market for proximity to the improvement.

The Court then undertook a comprehensive review of a number of cases dealing with the application of the scope of the project rule. It concluded therefrom (in part repeating itself) that:

This review of prior decisions that have struggled with whether lands were probably within the scope of the Government's original project or not illustrates that the "scope" test announced in *Miller*, while a convenient rule of thumb in many cases, does little more than restate the problem in difficult cases. In those cases, it is often necessary to confront the underlying problem head-on: would compensation for value attributable to the very project for which property is taken be just or unjust? *Miller* and *Reynolds* teach that compensation would not be just, and therefore is not required, if the additional value reflects the Government's special demand for the property and the fact that it is acquiring private property for a public project through eminent domain. But they also teach that compensation *is* required, and just, where the increment in value attributable to the Government project is instead an element of fair market value inherent in the property's proximity to the Government project. (Emphasis by the Court.)

The Court went on to say next:

Whether or not that increment in value is attributable more to the Government's special demand for the property or more to a private market demand for benefits conferred upon the property by its proximity to the Government project is largely a function of reasonable expectations. The crucial inquiry is whether, after commencement of project *A* but prior to condemnation of property *x*, the owner or a private purchaser contemplating acquisition and development could *reasonably* anticipate that he would be able to devote that property to its highest economic use, enjoying the advantages inherent in its proximity to the nearby Government project, without serious apprehension that property *x* would soon be condemned. (Emphasis by the Court.)

Thus, the Court at this point introduced the doctrine of "reasonable expectations." It then noted that the three factors identified in *Jasper*, *supra*, were relevant to the determination of the owner's "reasonable

expectations." The three factors from *Jasper* were specified and set forth, in the Court's language, as follows:

- (i) The foreseeability that the original proposed dimensions of project A might have to be changed to include property x . . .
- (ii) The length of time between commencement of project A and condemnation of property x . . .
- (iii) Government representations concerning the finality of project A as originally announced.

The Court then went on to apply an amalgam of the three factors test and the *Miller* "commitment" rule to the facts of the instant case, and on the basis thereof reached the conclusion that the trial judge erred in giving effect to the scope of the project rule as of July 2, 1958, the date on which the Northwest Extension (including subject lands) was included in the Everglades National Park project by Act of Congress.

The Court first dealt with factor "(ii)", *supra*, i.e., the length of time between commencement of the project and condemnation therefor. It stated:

First is the sheer length of time—here, 18 years. As we observed in *Jasper County*, the length of time between commencement of a project and condemnation of property for that project can be a "factor in removing the mote of potential acquisition from the eyes of area landowners." Of course, *Jasper County* involved the more typical "scope" case—the condemnation of property on the fringes of a project pursuant to an adjustment or redefinition of the project. This case . . . is unusual as "scope" cases go in that there are no questions of probability—the lands were clearly within the scope of the project as originally defined and announced. But even in this situation, where the Government defines the bounds of a project and announces its intent to acquire *eventually* lands within those project bounds, there comes a point in the passage of time when it no longer would be just to apply the SOP rule in the Government's favor. Without any limits on the temporal reach of the SOP rule, the Government could encumber the free use and marketability of private property indefinitely by announcing a project and its intent to condemn property for that project some time in the future. Because of other factors present in this case in addition to the sheer length of time, we need not define here the "just" limits on the temporal reach of the SOP rule. We caution the Government, however, that 18 years may indeed exceed those limits. (Emphasis by the Court.)

The Court next dealt with the application of the *Miller* "commitment" rule to the facts of the instant case. It stated:

A second reason why the SOP rule should not be applied in this case as of 1958 is that the Government's "commitment" to the project in 1958 is not very convincing. True, in passing the 1958 Act the Government did enlarge the Everglades National Park to include the Northwest Extension. But with respect to a *land acquisition program*, the 1958 Act merely authorized a niggardly \$24/acre for the purchase of 81,000 acres located throughout the Everglades *without actually appropriating* any of this sum. An intent to acquire lands at some future date, unaccompanied by the appropriation of any funds for that purpose, hardly evinces a

firm commitment, especially when the Government has permitted certain lands within numerous other National Parks to remain privately owned. Furthermore, it was not until 7 or 8 years later that the Government got around to appropriating even a paltry sum for the land acquisition program, and it was not until 1966 that the Department of the Interior first acquired private lands with federal funds. In these circumstances, a finding that the Government became sufficiently committed to acquiring private property within the Northwest Extension for purposes of the SOP rule cannot be sustained. (Emphasis by the Court.)

Lastly, the Court dealt with factor "(iii)", *supra*, the representations of the Government as to the finality of the project as originally announced. It stated:

The assurances made by the Department of the Interior to area landowners constitute yet a third reason against extending the SOP rule back to 1958. In 4 letters sent between 1959 and 1962, the Department of the Interior informed the landowners that it could not begin its land acquisition program until Congress appropriated the necessary funds, that it did not know when Congress would in fact appropriate the funds, but that in the meantime the owners were perfectly free to use and sell their properties as if their lands were outside a Government project. These letters of course represent additional evidence that the 1958 "commitment" was more talk than substance. But they also indicate that, at least until 1962, there was a private market, and a fair market value, for the landowners' properties *as* benefited and enhanced by their location within the Northwest Extension of Everglades National Park. And, as discussed earlier, the landowners were entitled under *Miller* and *Reynolds* to compensation for the value of any such Government-conferred benefits. (Emphasis by the Court.)

The Court concluded this review with the following statement:

Individually and together, these three factors—the sheer length of time between the 1958 Act and the takings, the lack of any firm commitment to a land acquisition program in 1958, and the Governmental assurances that the landowners could use and sell their properties freely—compel the conclusion that application of the SOP rule to exclude any and all value attributable to the Northwest Extension from 1958 to the date of taking was erroneous.

The Court then turned to the formulation of guidelines to be used by the trial court on remand. It stated with respect thereto:

If, as we have already concluded, it would be improper and unjust to apply the SOP rule as of 1958 to exclude any and all value thereafter attributable to the Northwest Extension, then how *should* the rule be applied to these takings? . . . At this juncture we can do no more than review some of the pertinent considerations and provide a framework of analysis to guide the decision below. (Emphasis by the Court.)

...

In most cases where the condemned property has been found to have (probably) been within the scope of the project from its inception, a just "commitment" date triggering the rule will be the date the Government

announced the project. In this case, however, we have seen that three factors militate against triggering the rule as of the date of the project announcement (July 2, 1958): first, the length of time between that announcement and the takings; second, the mere token commitment at the time of the project announcement to the land acquisition program necessary to complete the project; and third, the governmental blessing given area landowners to use and sell their properties freely. The question to be decided on remand, then, is, if not 1958, at what date *would* it be fair and just to trigger the SOP rule and its presumption that alterations in value thereafter attributable to the project must be disregarded? (Emphasis by the Court.)

The Court answered this question in the following language:

As foreshadowed in our earlier discussion, the appropriate date is largely a function of *reasonable expectations*. It is the date as of which the landowners or prospective purchasers no longer could reasonably anticipate being able to devote these properties to their highest and best use in the context of the surrounding governmental project, without serious apprehension that the properties would soon be condemned. In other words, it is the date as of which the prospect of imminent condemnation becomes sufficiently definite that it would be a major factor in the decision of any reasonable person to buy or develop the property. From this date on, it may fairly be presumed that any depreciation in value is attributable to the threat of condemnation, and that any increase in value is attributable to the Government's special demand for the property and its actions as condemnor. (Emphasis added.)

Whatever the date turns out to be after a proper consideration of relevant evidence, fully and fairly presented, the rule for trial will be that compensation must be awarded without regard to any increase or decrease in value attributable to the Northwest Extension after that date. And, under the rule, the question for the fact-finder will be: what would land having the characteristics of these properties (and the characteristics include whatever beneficial uses these properties derived from the Northwest Extension as of the crucial date) be worth in the private real estate market as of May 1976 (the date of taking)? (Emphasis by the Court.)

Thus, the Court in *Monroe* announced the test of "reasonable expectations," as explicated by the "three factors" test, as the means or method of determining the date to be used in triggering the application of the scope of the project rule. This would appear to be an advance, insofar as clarity is concerned, over the traditional *Miller* rule, phrased in terms of whether the lands proceeded against were "probably within the scope of the project from the time the Government was committed to it."

Turning now from the decision in *Monroe* to a discussion of other cases, it may be said that the cases which follow next are in large measure the progeny of *Monroe*, that is to say, the influence of *Monroe* is clearly evident in the reasoning employed and results reached. This obtains both in the situation where enhancement is allowed, and the situation where enhancement is denied.

Cases reflecting the influence of *Monroe* have been handed down in both Federal and State courts. First for consideration are the Federal cases.

Federal Cases

The decision in *United States v. Eastman*, 528 F. Supp. 1177 (D.Or., 1981), was based squarely on the holdings in *Jasper* and *Monroe, supra*. The facts in this case were as follows.

In 1962 the Congress of the United States, by legislative enactment, authorized and approved the construction of the Rogue River Basin project, in Jackson County, Oregon, at a site known as Lost Creek. The principal components of the project were three dams to be built at various locations. Prior to 1970 the defendants, Thomas W. Eastman and Thelma M. Eastman, were the owners of two tracts of land, designated as parcels Nos. 203 and 204, situated along the Rogue River. These lands were used by the Eastmans for ranching purposes. The Lost Creek Dam was to be located immediately downstream from the defendants' property. Construction of the dam as originally proposed would have meant that all of tract 204 and part of tract 203 would be inundated by the impounded waters. The portion of tract 203 remaining above the water line would be located on or near the north shore of the resulting reservoir.

The boundaries for the Lost Creek Dam and Reservoir project were first drawn in 1966. They encompassed all of tract 204 and approximately two-thirds of tract 203. Later, in 1970, the boundaries were redrawn so that less of tract 203 was needed. As modified in 1970, the project was to include all of tract 204 and only the lower one-third of tract 203.

In 1970 the Government entered into negotiations with the defendants for the purchase of tract 204 and the lower one-third of tract 203. The negotiations were successful and a purchase price of \$625,000 was agreed upon. As part of the transaction, the defendants reserved rights-of-way to provide access to their remaining land. The Government had promised Jackson County that it would build a county road along the north shore of the reservoir. The defendants' reserved rights-of-way were to connect with this county road. The Government agreed with the defendants that it would construct the access approaches to the county road, but the defendants were to be responsible for constructing the actual access roads. On October 19, 1970, the defendants consummated the transaction by deeding their properties to the Government.

However, sometime before 1975 the Corps of Engineers discovered that the Lost Creek Reservoir, once completed, might suffer from a turbidity problem due to soil erosion from nearby lands. The Corps then decided that it would be necessary to revise plans for the project to control this possible problem. The Corps cancelled a recreational facility proposal for the north shore of the reservoir, and eliminated the planned county road. The Corps also revised the final taking line for the project so that the remainder of tract 203, still owned by the defendants, was included. In 1975 the Government initiated the instant condemnation action to acquire the remainder of the said tract 203.

The Government sought to exclude evidence of enhancement to the remainder of tract 203 caused by proximity to the dam project on the ground that the land was within the scope of the project from the time the Government was committed to it. The defendants took the opposite

position claiming they were entitled to the increment in value so caused because the land was not included at the time of commitment.

In ruling for the defendants and allowing enhancement in value, the Court relied squarely on *Jasper and Monroe*. After discussing these (and other) cases the trial judge wrote: "In view of the cases discussed . . . and the Fifth Circuit's insightful analysis in *United States v. 320.0 Acres [Monroe]*, I conclude that the scope of the project test should not be applied so as to exclude enhanced value from the condemnation award. The government's actions in this case place it squarely within the Fifth Circuit's discussion of *reasonable expectations*." (Emphasis added.)

The Court then stated:

. . . The crucial inquiry is whether, after commencement of project A but prior to condemnation of property X, the owner or a private purchaser contemplating acquisition and development of property X could *reasonably* anticipate that he would be able to devote that property to its highest economic use, enjoying the advantages inherent in its proximity to the nearby Government project, without serious apprehension that property X would soon be condemned. (Emphasis by the Court.)

The Court then referred to the "three factors" in the following language:

. . . [I]f the Government unequivocally represents to the landowner or the public that it will not need property X for project A, the Government in effect relinquishes property X as enhanced by its proximity to project A to private market forces. Although not as decisive, the length of time between commencement of project A and condemnation of property X may also serve to transform noncompensable value into compensable value: the longer the Government waits to condemn property X, the more it tends to abandon that property as benefitted by project A to the private market. Finally, the less foreseeable it is at the outset of project A that property X will not be needed, the more likely it is that the enhanced value is not due to the Government's special demand and its actions as condemnor, but instead is an element of fair market value that a reasonable private purchaser would pay for property X by virtue of its proximity to project A.

Regardless of how the inquiry is framed, however—whether in terms of the *Miller* [commitment] test or in terms of reasonable expectations—the object is the same: to distinguish value attributable to Government demand from true fair market value of Government-conferred benefits, and to ensure that the landowner is not awarded a premium for the former but, at the same time, is justly compensated for the latter.

The Court then went on to apply the three factors test to the facts of the instant case. In first applying the factor of governmental representations as to finality (factor numbered "(iii)," *supra*), the Court said:

. . . Although part of this land was originally designated for inclusion in the Lost Creek project, the government's subsequent actions demonstrated that the property was outside the scope of the project; or, at least an ordinary landowner or prospective purchaser could conclude as much. In 1970 the government purchased only the lower part of tract 203, promising to construct access points for the remainder of the Eastmans'

property. At the time of this transaction, the government agents also showed the [defendants] where the reservoir boundary and final taking line would be. It is thus clear that the "government representations" factor from *Jasper County* weighs heavily against the government here. By its actions, the government in effect "relinquished" the property as enhanced by its proximity to the project to private market forces.

The Court next went on to consider the factor of foreseeability (factor numbered "(i)," *supra*), stating with respect thereto:

The foreseeability factor also weighs against the government. If the project had required from the outset that land be acquired to control erosion and prevent turbidity, a different conclusion as to this factor, and as to the final result, might be compelled. . . . It would have been foreseeable that the [defendants'] remaining land would be needed for this purpose, and, therefore, it would have remained within the "sphere of probable acquisition." But, the need for controlling turbidity was not determined until some years after the start of the project, and, indeed, some years after the [defendants] sold the government their lower land. While the project always included water quality control as one of its purposes, this goal was to have been obtained simply from the dam and reservoir as originally designed. It was not anticipated that surrounding lands would need to be condemned to protect water quality. After learning of the possible turbidity problem, it was approximately four years before the Corps concluded it would be necessary to take additional land to control the problem. The most astute and informed landowner surely could not have foreseen that land would be needed to control erosion until after the Corps had reached such a conclusion.

The Court then examined the factor of delay, or length of time (factor numbered "(ii)," *supra*), in the following language:

The length of time between the commencement of the project and the taking at issue here was not, in relative terms, particularly long. Acquisition of land for the Lost Creek project began in 1968; the remainder of tract 203 was not taken until 1975. But, there was apparently sufficient time for the market value of the [defendants] property to rise. This increase in value was not derived from any anticipated government demand; on the contrary, all indications were that the government would not need the [defendants'] remaining land. The rise in the property's market value resulted from its proximity to the government project. In such circumstances, it is not unjust to allow the [defendants] to recover compensation for this increased value.

The Court concluded from application of the three factors test:

Utilizing the [three] factors, I conclude that the Fifth Circuit's "reasonable expectations" test requires that enhanced value be an element of the [defendants'] condemnation award in this case. I also conclude that the same result is required under the more traditional scope of the project test. As the decision in *Jasper County* itself points out, the three factors identified in *Jasper County* are relevant to the traditional scope of the project inquiry. Therefore, under the same reasoning discussed above, the remainder of tract 203 was not within the scope of the project and enhanced value may be considered as an element of compensation for its taking.

Appeal was taken from the district court decision to the Circuit Court of Appeals for the Ninth Circuit. In upholding the ruling of the lower court the Court of Appeals stated:

... We cannot improve on the district court's carefully reasoned opinion. ... We adopt its opinion as the opinion of this court. ...

In short, we hold that the question of whether a second taking is within the scope of the original project for purposes of applying the rule of *United States v. Miller* ... is to be answered essentially by determining the reasonable expectations of the ordinary landowner. The district court's conclusion that the [defendants] could not reasonably have expected the second taking to be within the scope of the original project was not clearly erroneous. (Emphasis added.)

Thus, the Ninth Circuit is in accord with the Fifth Circuit in adopting the "reasonable expectations" and "three factors" tests.

United States v. 13.20 Acres of Land, Etc., in the County of Lincoln, State of Washington, 629 F. Supp. 242 (E.D. Wash., 1986), also involved a dam and reservoir project, in this case, the Grand Coulee Dam, and the reservoir thereby created, known as Lake Roosevelt. The Grand Coulee Dam project was authorized by Act of Congress in 1935. The filling of the reservoir, Lake Roosevelt, was completed in 1942. Preliminary to the actual construction, the Department of the Interior had been investigating lands that the Federal Government felt might be needed for the project, and in 1934 the Interior Department filed with the Washington Commissioner of Public Lands a list of State-owned lands that would be required if the project obtained Congressional approval. Such filing was made pursuant to the provisions of R.C.W. 90.40.050, part of the State's 1905 Irrigation Code. The properties the subject of suit in the instant case were included within the filing.

In 1943 the State of Washington conveyed certain lands, including the 13.20 acres the subject of suit in the instant case, to one Julius C. Johnson, who made use of the lands for livestock grazing. Although the Federal Government did not institute condemnation until January of 1985, the Interior Department did file a notice of "Definite Description" with the Washington Commissioner of Public Lands, pursuant to R.C.W. 90.40.050, which notice identified lands including the subject tract. Also, in 1958, the Department filed a notice with the Commissioner indicating that the Department was of the opinion that because of the particular provisions of R.C.W. 90.40.050, the Federal Government considered that it was the owner of subject property. However, subsequent thereto, in 1968, R.C.W. 90.40.050 was by court decree declared invalid on the ground that it purported to allow the State of Washington to transfer lands to the Federal Government without payment of compensation. Hence, at that time it became clear that the Federal Government had no interest in the lands in question under the provisions of R.C.W. 90.40.050. As before stated, the instant proceeding to condemn the subject property was not instituted until January 1985. The issue in the case was whether, under the scope of the project rule, the subject lands were to be evaluated on the basis of their worth as enhanced by proximity to Lake Roosevelt.

The Court commenced discussion by reference to *Miller* and the holding

therein, and then stated, in respect to *Miller*: "It is clear, however, that *Miller* is not the end of the court's inquiry into just compensation. Rather, it is just the beginning point, and in difficult cases *Miller* does little more than restate the problem. [Citing *Monroe*.] ... Where the project changes in form or scope, where errors require further or different land condemnation, or where completion of the project takes an inordinately long time, the 'scope of the project' inquiry must be made with careful judicial discrimination." [Citing *Reynolds* and *Eastman*.]

The Court then made reference to *Jasper*, stating that in *Jasper* "the Fifth Circuit set forth three factors for assessment or application of the scope of the project rule." The Court then identified the three factors (in its own language) as follows:

... (1) the foreseeability that the property in question would ever be included in the project; (2) the length of time between the commencement of the project and the condemnation of the property in question; and (3) the government's representation concerning the finality of the project as announced.

The Court first discussed factor numbered "(1)," the foreseeability that the property in question would be included in the project. It said with respect thereto:

It cannot be fairly held that these landowners, in 1985, were reasonably able to foresee the government's acquiring the properties in question. Their perspective would be as follows: The Dam was begun in 1935, fifty years prior. While the government has made claims of ownership of the property as previously noted, until now, no condemnation has been initiated. While notices were filed in 1934 with the State, the State's deed to Johnson made no mention of any government acquisition rights. The lands have been used continuously since 1943, without government interference of any sort. True, another notice was filed in 1958, stating that the government owned the property, but no personal notice was given the landowner. Further, no agent ever attempted eviction, fencing off the land, or even to bill these people for livestock grazing rights. In 1968, the government's putative interests were declared null and void. Even after losing whatever interests it claimed, the government did not come forward to condemn, as surely it would if it wanted ownership.

... Given this long history of inaction, it cannot be said that the government's condemnation action, at this late date, was foreseeable. One can reasonably foresee changes in finalizing a project, even when the span is several years, but foreseeability dims when it must be passed from generation to generation.

The Court proceeded next to a discussion of factor numbered "(2)," the length of time between the commencement of the project and the condemnation of the property in question. It stated in respect thereto:

These landowners can trace clear title from 1943. The project was begun in 1935, fifty years ago. Factor two, involving the length of time between the commencement of the project and the present condemnation, weighs heavily against the government. The passage of time in this case goes far beyond being a minor limiting factor, as noted in *Jasper*. ... There, the court said that whether a delay from 1965 to 1971 was such that it might

constitute a representation to the landowner that the property would not eventually be taken was a consideration for the court on remand. In *Monroe*, . . . the court admonished the government for a delay of 18 years, stating:

But even in this situation [where there was no question the property was within the original scope of the project], where the Government defines the bounds of a project and announces its intent to acquire *eventually* lands within those project bounds, there comes a point in the passage of time when it no longer would be just to apply the SOP (scope of the project) rule in the Government's favor. (Emphasis in original.)

Here, not only has the government made no assertion that it would eventually condemn the lands, as in *Monroe*, but fifty years have passed. By insisting the scope of the project rule be applied in its favor the government is saying it has the unencumbered right to deep-freeze these lands. As succinctly stated in *Monroe* . . . "[w]ithout any limits on the temporal reach of the SOP [scope of the project] rule, the Government could encumber the free use and marketability of private property indefinitely simply by announcing a project and its intent to condemn property for that project some time in the future." The government's series of notices in 1934, in 1944, and again, in 1958, indicate that it might "eventually" take the lands. This sort of inaction is an unconscionable exercise in inverse condemnation, spanning, as it does, fifty years.

The Court concluded discussion of the three factors with an examination of factor numbered "(3)." It stated:

These assertions by the government also relate to factor three, concerning the finality of the project as announced by the government. The lake reached its intended level, MSL 1290, in 1942. At that level, approximately 7 acres of land constituting part of the original parcel were inundated. A small portion of the 23.1 acres being condemned in 1985 is at or below the 1310 MSL level, stated by the government to be its desired freeboard area. In spite of the inundation of part of these lands, and the attainment of the 1290 MSL level by the lake, the government has never condemned the property in question. There is no evidence in the record that shows the project being substantially changed so as to require acquisition of all of the property in question, including that above 1310 MSL. The lake having reached its optimum level of 1290 feet in 1942, together with the completion and long-standing operation of the dam and its power-producing equipment, all tend to show the project was final and complete. . . .

The Court concluded from the application of the three factors to the facts of the instant case, as follows:

It is clear to this court that the property owners cannot be charged with being able to foresee government acquisition, fifty years after inception of the project, especially where that project underwent no major changes requiring their lands. This span of time, fifty years, argues against the government's assertion that the scope of the project should be applied in its favor. The government's inaction in the face of the case law and its lack of follow-up to the various notices filed with the state—weigh against the government, and in favor of a determination that for the purposes of this case the project has been complete for a considerable time. Therefore,

this court determines that the subject property is no longer within the scope of the project. The rule announced in *Miller* will not be applied to these property owners, and the value of just compensation must be measured by current market value of the property, taking into consideration the value as enhanced by the proximity of Lake Roosevelt.

United States v. 49.01 Acres of Land, Etc., in Osage County, State of Oklahoma, 669 F.2d 1364 (C.A.10, 1982), also involved the three factors test. The facts in this case were as follows.

In 1950 the Congress of the United States authorized the construction of the Keystone Dam and Reservoir, as part of a comprehensive plan for flood control in the Arkansas River Basin. In 1959 the Army Corps of Engineers issued a design memorandum in which land needed for the project was tentatively designated. The memorandum specified a property line of 754 ft above mean sea level for fee acquisition, and a line of 759 ft for the acquisition of flowage easements. The lands the subject of suit in the instant case were included within these measurements.

The Corps also drew preliminary maps showing the proposed taking area. These maps, however, mistakenly excluded the lands at issue in this case. When the Corps discovered the error in 1965, it revised the maps to show that the subject lands were included within the taking area.

From 1959 to 1969 the Government purchased or condemned property necessary for the reservoir. Between 1965 and 1969, the Government negotiated for the purchase of the subject property. However, these negotiations were unsuccessful because title to the property was the subject of litigation in a State court. The Government made no further attempts to negotiate a purchase, and on January 28, 1975, the instant action was commenced to condemn the property for the reservoir.

It developed at trial that the Keystone project had been completed for a period of more than 10 years, and the reservoir filled to a level of 723 ft. As a result of proximity, thereto, the subject lands had increased in market value. The principal issue before the district court was whether evidence of such enhancement in value should be allowed. The court ruled in favor of the landowners, and the Government appealed.

The Court of Appeals in reversing and remanding applied the three factors test, as follows:

It stated first, in respect to foreseeability that the lands would eventually be acquired for the project:

In the instant case these landowners' property clearly was within the original scope of the project. The Corps of Engineers' 1959 design memorandum constituted public notice that the property was included within the taking area. The Corps' contemporaneous maps, which mistakenly did not include landowners' property within the taking area, do not prove the contrary. First, *Reynolds* does not demand that original plans precisely specify what land the government ultimately will take; it is sufficient that during the planning or construction stages it becomes "evident that land so situated would probably be needed for the public use." . . . In the instant case the Corps *did* specify in its design memorandum that the United States would take these landowners' property, since almost all of it was below the 759 foot elevation. The memorandum should have placed

the existing and subsequent landowners on notice that the government would *probably* take their property, even though the Corps' map indicated otherwise. (Emphasis by the Court.)

The Court stated in respect to the factor of the length of time between commencement of the project and condemnation, and the factor of Government representations as to finality:

Having concluded the property in the instant case was within the original scope of the project, we must determine whether landowners could have reasonably believed that the government had later removed their property from the scope of the project. Length of time between commencement of a project and condemnation of property may be a factor in determining reasonableness of a landowner's belief. [*Monroe and Jasper* cited.] The government deserves no accolades for a ten-year delay between discovering its mapping error and beginning condemnation proceedings to take this property. The government held some negotiations to acquire this land until 1969 and blames its delay on state court litigation over title to the property. However, the government had the power to condemn the fee title and need not have waited for ownership to be determined. Landowners rely heavily upon their post-1965 investment in developing the property and upon language in the Annual Report of the Chief of Engineers, U.S. Army on Civil Works Activities, which commencing with the 1971 report declared, with respect to the Keystone Lake project, "Project is complete except for additional recreational facilities." But the government's inaction and the quoted statement in the Chief of Engineers' reports is all the landowners can point to in support of their position that they reasonably believed the government no longer wanted their property.

The Court concluded from the application of the three factors:

On these facts we cannot say that landowners reasonably could believe the Corps had abandoned its intention to acquire their property. Neither the Corps' mapping error nor the government's delay in instituting condemnation proceedings requires the government to pay enhanced value. The district court should not have permitted evidence to be introduced of the enhancement of the property's value resulting from the project.

For a related case (of the same name) likewise denying enhancement in value, see *United States v. 49.01 Acres of Land, Etc., in Osage County, State of Oklahoma*, 802 F.2d 387 (C.A. 10, 1986).

This concludes the review of Federal cases. The State cases are next for consideration.

State Cases

In *Baylin v. State Roads Commission*, 300 Md. 1, 475 A.2d 1155 (1984), the applicability of the scope of the project rule was before the Court of Appeals as a matter of first impression in the State of Maryland. The facts in this case were as follows.

In 1948 Baltimore County requested the State Roads Commission to develop a plan for the construction of a limited access highway to provide a corridor between two existing State roads. This project, which became known as the Northwest Expressway, involved the relocation of U.S.

Route 140. The Northwest Expressway was budgeted as of July 1, 1954, in the State Road Commission's 12-year road construction program.

Construction drawings, prepared in the late 1950s, showed the location of the Expressway as running through the defendants' property, which consisted of a tract of 19.32 acres. In 1963 a map was prepared by the State Roads Commission again showing the location of the Expressway on said tract of 19.32 acres, but qualified by a notation on the map that the plans were "TENTATIVE AND SUBJECT TO REVISION."

In 1965 defendants acquired additional contiguous land, which, together with the 19.32-acre parcel, made up a tract of 137.341 acres of land. They employed engineers to plan the site acquired in 1965 for a regional shopping center with facilities for industrial and residential uses. The engineers obtained copies, in 1967, of the State's construction drawings for the Northwest Expressway, still showing the alignment thereof through defendants parcel of 19.32 acres, but were advised at the time by the State Roads Commission that the plans were tentative and subject to restudy.

Construction of the Northwest Expressway did not begin as originally planned because funds for the project were transferred to another project. Before monies could be reappropriated several things occurred that affected the construction of the Expressway. The National Environmental Policy Act was passed in 1969, subjecting highway projects to new developmental processes, including the preparation of environmental impact studies, and the necessity of holding public hearings. New safety standards for highways were also adopted. Additionally, the Mass Transit Administration was established, and preliminary plans were formulated for the joint development of the Northwest Expressway project with a rapid rail transit project.

In 1973 the first public hearing required under the National Environmental Policy Act was held, in connection with the preparation of an environmental impact statement. The draft impact statement considered, in addition to the Northwest Expressway proposal, a proposal for the construction of a Rapid Rail Facility of the Mass Transit Administration. At subsequent public hearings alternative plans were considered for the joint development of the two projects.

The final plan was adopted in 1976, and accepted by the Federal Government in 1977. This plan called for the acquisition of the aforesaid tract of 137.341 acres, part thereof to be used for the construction of the Northwest Expressway, and the remainder to be used for the construction of the Rapid Rail Facility. The location of the Northwest Expressway was moved approximately 1,000 ft in a westerly direction in this final plan.

In 1981 condemnation proceedings were instituted. Prior to trial defendants filed a motion to determine a question of law. They contended that all but 19.32 acres of the 137.341-acre tract proceeded against should be assessed at a value enhanced by the Northwest Expressway, because only 19.32 acres were required out of the entire parcel, at the time in 1954 that the State became committed to the acquisition of land for the Expressway project. The State, on the other hand, contended that in valuing the

137.341-acre tract, all enhancement attributable to the Northwest Expressway should be excluded, because the highway project (Northwest Expressway) and the mass transit project (Rapid Rail Facility) were to be viewed as part and parcel of the same project.

The trial judge accepted the State's argument, and ruled that there was but one on-going project, to which the State had become committed in 1954. The jury was consequently instructed to disregard any evidence of enhancement in value occurring after 1954 and before condemnation in 1981.

In reversing the ruling and action of the lower court, the Court of Appeals of Maryland stated:

The jury instruction and the ruling on opinion testimony necessarily followed from the trial court's conclusion that this was one project. After carefully examining all of the testimony presented and reviewing the numerous exhibits, we have concluded that the trial court was in error in reaching this conclusion. Our review of this record has convinced us that the construction of the Northwest Expressway and the construction of the Mass Transit facility . . . were in fact two separate projects for the purpose of determining just compensation.

The Court reached this conclusion by application of the scope of the project rule, and stated first in respect thereto:

The question is when in the continuum of the project from conception to fruition are land values to be frozen with respect to the impact of the project? The other jurisdictions to consider this issue agree that it is the date that the condemnor becomes committed to the project. All parties in the case *sub judice* agree that the state became committed to building the Northwest Expressway in 1954. Moreover, the trial judge particularly found this to be the date of commitment. In some instances the commitment date may be the date the government announced the project. However, if there is a considerable length of time between the announcement and the taking this may mitigate against using such a date.

The Court then went on to adopt the "three factors" test, stating that: "Three factors have been identified as relevant to a determination of whether, from the time the government became committed to the project, it was evident to the public that the condemned property might be taken for the project." [Citing *Jasper* and *Monroe*.]

It treated first of the "foreseeability" factor, describing the same as: "[t]he foreseeability that the original proposed dimensions of the project might have to be changed to include the condemned property." In applying this factor to the facts of the case before it the Court concluded:

In the instant case when the state became committed to build the Northwest Expressway, in 1954, the project entailed a road through appellants' property with an interchange . . . and required 19 acres of this land. At that time and for at least the next 11 years, no one contemplated building a Mass Transit Project. Even the most "astute and informed" landowner [citing *Eastman*] could not have foreseen that property surrounding the Northwest Expressway "would probably be incorporated" for the Transit facility. [Citation omitted.]

The Court next invoked the "delay" factor, identifying the same as: "[t]he length of time between commencement of the project and condemnation of the property." It stated with respect thereto:

The length of time between the commitment to the project and the condemnation was 27 years. The length of time between the commitment and the "possibility" of a rapid transit system was at least 11 years. While time "does not, in and of itself, decide the scope question" [*Monroe* cited], it is a factor to be considered. In this instance it is an important factor because of the protracted period of time involved.

Here there was sufficient time for the market value of the property to increase because of the state's announcement that the Northwest Expressway would be built, and the proximity of this land to that road. In cases where the time lapse has been much shorter landowners have been permitted to recover compensation for this increased value. "[T]he longer the Government waits to condemn property . . . , the more it tends to abandon that property as benefitted by [the original project] to the private market." [Citing *Monroe* and *Eastman*.]

Lastly, the Court applied the factor of "governmental representations," describing the same as: "[g]overnment representation as to the finality of the project as originally announced." It stated in respect thereto:

Appellee attaches great weight to the fact that the state represented the proposed plans as tentative. While this fact distinguishes this case from others where landowners received specific government assurance that their land would not be taken, it is not determinative.

For many years the Northwest Expressway was the only project included in the proposals. The centerline of the road was established and remained unchanged. The inference one could draw from the words "TENTATIVE AND SUBJECT TO REVISION" was that it related to the original expressway; a change could be made in the configuration of the Expressway. If this had happened, as it did in this case by relocating the road 900-1,000 feet to the west, appellee's position would be stronger. However, to infer that "TENTATIVE . . ." meant subject to inclusion of a Mass Transit facility is unsupportable. The Mass Transit facility was not even under study until many years later.

The Court concluded from the application of the three factors:

Utilizing all of the above factors we conclude that the land taken for the Mass Transit facility . . . was not within the scope of the project and enhanced value may be considered as an element of compensation for the taking of 118 acres. [I.e., 137.341 acres less the original 19.32 acres.]

Thus the holding in *Baylin* that there were two separate projects and hence, under the scope of the project rule, enhancement must be allowed, was based squarely on the application of the "three factors" test as announced and applied in *Jasper*, *Monroe*, and *Eastman*, *supra*.

The "three factors" test was also employed in *State, Department of Transportation v. Montgomery Ward Development Corporation*, 79 Or. App. 457, 719 P.2d 507 (1986). Defendants in this case were the owners of property on which a shopping center was located. The Oregon

Department of Transportation brought an action to condemn a portion of the property for an access road to connect with I-205, then in the process of construction. At issue, *inter alia*, on appeal, was whether the defendants were entitled to increment in value of the property taken that was attributable to the I-205 project. In upholding the lower court's ruling denying enhancement, the Court of Appeals stated:

Defendants assign error to the admission of evidence and to jury instructions concerning the enhanced value of the property taken due to the announcement and construction of the I-205 project. Oregon recognizes the principle that compensation for property taken is determined as of the date of the taking, but any increase in the value of the property, which is due to the planning, announcement and construction of the project for which the property is taken is not to be considered in making the award. . . . Defendants acknowledge the "scope of the project" rule, under which the enhanced value of property taken is not compensable if, "during the course of the planning or original construction it became evident that land so situated would *probably be needed* for the public use." [Citing Reynolds.] They argue, however, that the rule should not be applied in this case, because there was a 14-year delay between the first announcement of the project and the commencement of this action, during which plans for the taking were changed often. *Factors to be considered in applying the rule are the foreseeability of the taking, the passage of time between the announcement of the project and the taking and government representations concerning the certainty of any proposed taking.* [Emphasis added.]

The Court continued as follows:

Applying the three factors, we conclude that the trial court properly applied the scope of the project rule in admitting evidence regarding enhanced value. Although the plans changed frequently during the 14 years before the actual taking, most plans called for some kind of taking similar to that which occurred. There was no evidence of government representations which misled defendants or caused them any prejudice. Finally, we do not see how defendants were prejudiced by the application of the rule simply because there was a long delay before the taking occurred. The trial court instructed the jury that defendants could not recover the enhancement of value which was due only to the I-205 project. . . . The trial court did not err in any regard concerning the issue of enhanced value of the property taken.

See, also, *People, ex rel. Department of Water Resources v. Andresen*, 193 Cal. App.3d 1144, 238 Cal. Rptr. 826 (1987), involving condemnation of property for use as a source of rock in repairing dams, wherein, although the "three factor" test was not employed, the Court spoke throughout the opinion, in determining the applicability of the scope of the project rule, in terms of the landowner's "reasonable expectations" with respect to a taking of his property.

This concludes the review of cases employing the "reasonable expectations" or "three factors" tests. They can be summed up in the statement that they serve to make definitive the point in time at which the scope of the project rule is to be given effect.

Summary and Comment

In summing up the applicability of these tests to highway projects, it should be pointed out that in *Miller*, the date on which the Federal Government became "committed" to the project was found and declared to be August 26, 1937, the date on which the Congress of the United States, by legislative enactment, authorized and empowered the construction of the Shasta Dam in California. The important *Miller* "commitment" rule derives from this finding.

However, such firm date of "commitment" is not to be found in the case of the usual State highway project, for the reason that most such projects do not originate with a legislative enactment that specifically authorizes and empowers the construction of a particular project. In fact, most State highway projects begin, and remain for long periods of time (often years) in a stage of discussion, study, deliberation, and change. The latter may include the possibility of abandonment, due, for instance, to an economic shortfall, the adverse results of additional demographic studies, the negative effect of a damaging environmental impact study, the transfer of funds to another project, and so on. Hence, difficulties are presented in the way of determining the exact date on which the State government can be said to become "committed" to a highway project, and the SOP rule is thereby triggered.

To illustrate, can it *logically* be said that the State is "committed" to a Federal-aid highway project before the corridor and design hearings are held, the very purpose of such hearings being to determine whether the project, *as proposed*, is in the public interest, and, therefore, the State may or should become "committed" thereto and proceed therewith?

The traditional *Miller* test is phrased in terms of "whether the . . . lands were probably within the scope of the project from the time the Government was committed to it." It is submitted that the "reasonable expectations" test focuses on the "commitment" problem, and that the "three factors" test, by posing specific inquiries, serves admirably to address and clarify the problem of according the scope of the project rule a proper and just application to State highway projects.

Scope of the Project Rule Rejected

Although the scope of the project rule has been widely adopted by courts of last resort of the various State jurisdictions, an exception exists in the case of Florida jurisprudence. In *Department of Transportation of the State of Florida v. Nalven*, 455 So.2d 301 (Fla., 1984), the Florida DOT urged the Supreme Court of Florida to adopt the scope of the project rule in that jurisdiction, and the Court, after full consideration, refused to do so, interpreting the Florida Constitution as requiring that project-caused enhancement in value be allowed.

The facts in the case are uncomplicated. On February 14, 1977, the Florida Department of Transportation initiated proceedings for the condemnation of several parcels of land needed for the construction of a portion of I-75 in Manatee County, Florida. Included was a tract of

91.5 acres owned by the defendants. At the trial each side presented the testimony of one appraisal expert. The defendants' expert witness testified in respect to the sales of comparables effected in 1973, concluding on the basis thereof, that the land proceeded against had a market value of \$2,350 per acre, making a total of \$215,110 for the entire tract.

DOT's expert witness testified in respect to the same comparables, expressing the opinion that said comparables were sold in 1973 for a price greater than they would have received in the open market were it not for enhancement in value due to the anticipated construction of I-75. He valued defendants' property at \$1,440 per acre, making a total of \$131,825 for the entire tract. Defendants' counsel moved to strike his testimony, but the trial court allowed the same to stand. The jury returned a verdict fixing compensation at \$133,525, which verdict reflected jury acceptance of the testimony of DOT's witness.

The record showed that on November 7, 1974, the Department of Transportation adopted a resolution indicating the general location proposed for I-75. On February 1, 1977, the Department adopted a further resolution specifying the route and identifying the particular tracts of land needed for the construction of I-75. The Department argued, on appeal by DOT to the district court of appeal, that the sales in question were properly disregarded even though they occurred before the official acts identifying, either generally or specifically, the location of I-75. The Department contended on such appeal that even before November 7, 1974, there was general knowledge in the marketplace concerning the location of the highway; that the same was openly discussed in public meetings and in documents open to public inspection; and that the sales in 1973 were negotiated in light of common awareness of the general location of I-75.

The district court of appeal ruled that the trial court had erred in refusing to strike the testimony of DOT's expert witness, holding that "any pertinent sale of land comparable to the condemned land which occurs before the date of the taking can be considered in determining value even if the sales price is enhanced by virtue of the proposed improvement." The court then certified its decision as passing on a question of great public importance, and the Supreme Court accepted jurisdiction based on the certified question, as follows: "To what extent, if any, is a Florida property owner in a condemnation proceeding entitled to the enhancement in the value of his property caused by the anticipation of the proposed project for which the land is being condemned?"

The Supreme Court of Florida responded to the certified question as:

We answer the question by holding that a landowner in a condemnation proceeding is entitled to the fair market value of the property at the time of the taking even if it reflects the anticipation of the proposed project.

The Department of Transportation argued on appeal to the Supreme Court of Florida that the testimony of its expert witness was properly allowed at trial, and urged the Court, in support of this argument, to adopt the scope of the project rule. In attempting to clear the way for the Supreme Court to adopt the SOP rule, the Department sought to

distinguish the case of *Sunday v. Louisville & Nashville Railroad*, 62 Fla. 395, 57 So. 351 (1912), wherein the Court announced the rule that project-caused enhancement in value was to be allowed in Florida condemnation proceedings. The Court refused to accept DOT's argument in this respect, and ruled that "*Sunday* is still the controlling authority."

The Court then proceeded to consider DOT's argument for a departure from the *Sunday* rule, based on its contention that the scope of the project rule should be adopted. It stated:

We come now to the Department's plea for a change in the law. As was stated above the Department urges upon us the "scope-of-the-project" rule. Such rule, as interpreted by the state, would admit the expert's testimony that the questioned sales were to be discarded from consideration on the ground that they were negotiated at a time when the general location of the interstate highway through Manatee County was known in the real estate marketplace.

The Court first recited the facts and holding in *Miller*, and then had the following to say in respect to *Monroe*:

In support of its position, the Department relies on *United States v. 320.0 Acres of Land*, 605 F.2d 762 (5th Cir. 1979) [*Monroe*] which provided a detailed explanation of the "scope-of-the-project" rule. The Court said that the rule (1) protects the government from having to pay false, "hold-up" value attributable to the government's special need for particular property and (2) prevents the payment of compensation for value attributable to benefits conferred on the land (together with neighboring lands) by the proposed project for which the land is being taken.

In declining to accept the scope of the project rule, as announced in *Miller* and explicated in *Monroe*, the Court said:

We decline to adopt the scope-of-the-project rule. The constitution of Florida and the applicable statute control. Article X, section 6(a) of the Florida Constitution, provides: "No private property shall be taken except for a public purpose and with full compensation therefor paid to each owner or secured by deposit in the registry of the court and available to the owner." Section 73.071(2), Florida Statutes (1975), provides: "The amount of such compensation shall be determined as of the date of trial, or the date upon which title passes, whichever shall occur first."

The constitutional requirement of full compensation means that the landowner must be completely paid for that which is taken, and compensated for the whole loss occasioned by the taking. . . . (Emphasis added.)

Because the holding in *Nalven* constitutes a marked departure from the general rule, the reasoning of the Court, in rejecting the SOP rule, seems worth examining in some detail. The Court's analysis was in the language as follows:

To accept the Department's argument that the 1973 sales were properly discarded because of awareness of the project (even though they took place prior to both the general and specific announcements of the location of the route of Interstate 75 through Manatee County) would lead the courts of the state into inquiries for which there would be no clear lines of distinction. Before it was decided that Interstate 75 would traverse

Manatee County, it had to be decided that the highway would extend into southwest Florida. Before it was decided that the highway would run through southwest Florida, a decision was made that it would enter the southern half of the Florida peninsula. Before it was decided that the highway would extend into southern Florida, there was a plan for an interstate limited access highway connecting Florida with the other states of the eastern United States, which would extend into central Florida from the north. The interstate highway system and proposals for its various routes have been under discussion for decades. Fixing the date when the scope of such a project was known in the market is a task much more easily discussed in theory than performed in deciding actual cases.

The Court continued that:

When a project such as a limited-access highway is announced and the general area through which it is to pass is known to the public, but the specific location is yet to be decided, there may well be marked increases in market values in the area due to the anticipation of the project, but these increases will result from a whole host of diverse influences and market forces. For example, once it became known that Interstate 75 was to be extended into southern Florida it could be assumed that it would be placed so as to serve the rapidly growing regions of the west coast, including Manatee and Sarasota Counties. Even this much general knowledge could have and probably did cause a general increase in land values, since good interstate highway access can make a region a more desirable place to live. Similarly, by making the Manatee-Sarasota area more accessible from the north by automobile, the highway (and anticipation thereof) probably stimulated all elements of the tourism industry, thereby also having an enhancing effect on land values generally. Thus it is very difficult to determine where to draw the line against value enhancement due to project anticipation when determining fair market value for compensation purposes.

The Court then said with respect to the rule, previously discussed herein, that value attributable to government demand should be excluded in valuation:

In holding that a property owner is entitled to full compensation based on fair market value at the time of taking including increased value due to anticipation of the project, we of course do not mean to say that the state should have to pay inflated compensation based on false, "hold-up" value attributable purely to government demand for the particular parcel. It should remain open to the state to try to show through expert testimony that the valuation claimed by the landowner reflects false, "hold-up" value due purely to specific demand. But if the landowner, using established conventional appraisal methods, establishes fair market value of the land on the date of taking, the mere fact that it is greater than the value before the location of the project was announced or became known does not deprive the landowner of the right to full compensation based on fair market value at the time of taking.

The Court completed its discussion by ruling that:

Consistent with *Sunday v. Louisville & Nashville Railroad*, we hold that if the 1973 sales of the landowners' property . . . reflected market value that had increased because of public knowledge of the probable

alignment of Interstate 75 in Manatee County, such was a natural increase in market value and was not to be disregarded or discounted in determining market value at the time of the taking.

The trial court erred in refusing to strike the testimony of the Department's appraisal witness because the testimony was based on a legal proposition which we, consistent with precedent, hold to be erroneous. The district court correctly so held in reversing the judgment. The decision of the district court of appeal ordering a new trial is approved.

It is perhaps worth noting that the majority opinion in *Nalven* was the subject of two vigorous dissents. In the first of these, concurred in by two other Justices, it was said:

. . . The majority opinion grants a substantial windfall to a select few landowners at the expense of the taxpayers of this state through a specious application of the constitutional phrase "full compensation." . . .

...

The majority opinion is a property owner's bonanza and a taxpayer's nightmare. There is no constitutional justification for the majority's view. The district court's decision should be disapproved and we should adopt the scope-of-the-project rule for determining full compensation.

Thus, except for the referenced situation in which the inclusion of enhancement would reflect "false, 'hold-up' value," it appears that project-caused enhancement in value is to be allowed under Florida law, and that the scope of the project rule is to be deemed inapplicable under the law of that jurisdiction.

CONCLUSION

The rules and principles enunciated in the foregoing cases in this paper may be summarized, in broad scope and general outline, as follows:

1. In the case of condemnation of lands for a public improvement the location of which is known and definite from the outset, it is the general rule, supported by the great weight of authority, that both project-caused appreciation and depreciation in value are to be excluded in determining the fair market value of the property at the time of taking.

2. In the case of condemnation of lands for a public improvement the final dimensions of which are uncertain or indefinite at the time of the commencement of the project, the allowance or disallowance of project-caused enhancement in value is determined by application of the scope of the project rule.

3. The scope of the project rule, as announced in *Miller*, is phrased in terms of "whether the . . . lands were probably within the scope of the project from the time the Government was committed to it."

4. The *Miller* rule, as explained in *Reynolds*, does not require "a showing that the land ultimately taken was actually specified in the original plans for the project," it being sufficient to show that "during the course of the planning or original construction it became evident that land so situated would probably be needed for public use."

5. The scope of the project rule, as announced in *Miller* and explained

in *Reynolds*, was given a not inconsiderable measure of clarification by tests developed in the lower Federal courts, referred to for the purposes of this paper, as the "reasonable expectations" and "three factors" tests.

6. Whether or not increment in value of condemned land is attributable more to the government's special demand for the property (resulting in denial of enhancement), or more to private market demand for benefits conferred upon the land by its proximity to the government project (resulting in allowance of enhancement), is said to be largely a function of *reasonable expectations*. The crucial inquiry is whether after commencement of project A but prior to condemnation of property B, the owner or a private purchaser could *reasonably expect* that he would be able to devote property B to its highest and best economic use, enjoying the advantages inherent in its proximity to the government project, without serious apprehension that property B would soon be taken for the government project.

7. *Three factors* are relevant to this inquiry. They may be generalized as follows: (a) the foreseeability that the original proposed dimensions of the project might have to be changed to include the condemned lands; (b) the length of time between commencement of the project and condemnation of the property *sub judice*; and (c) government representations concerning the finality of the project as originally announced.

8. The "reasonable expectations" and "three factors" tests are usefully employed to make determination of the point in time at which the scope of the project rule is triggered into operation, and, pursuant to its application, enhancement in value is adjudged to be permissible, or impermissible, depending on the facts of the particular case.

9. The scope of the project rule appears to have been rejected in the State of Florida, in which jurisdiction enhancement in value is allowed pursuant to the judicially interpreted mandate of the "just compensation" clause of the Florida Constitution.

This concludes the review of recent case law pertaining to valuation changes that result from the influence of public improvements.

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¹ *Selected Studies in Highway Law* (hereinafter SSSL), Vol. 2, at 733.

² It is to be here noted that because of the decision in *Grutter* the case of *Weber Basin Water Conservancy District v. Ward*, 10 Utah2d 29, 347 P.2d 862 (1959), set forth in the original paper (SSHL, Vol. 2, at 750, 752), is no longer good law in the State of Utah.

³ It may be noted that the statement that determination of the scope of the project question is one of fact is at odds with the rule obtaining in the Federal courts that such determination is one of law. The Federal Rules of Civil Procedure, 71A(h), re-

serve all legal and factual questions (except the determination of just compensation in a jury trial) to the trial judge.

⁴ For prior cases reaching a similar result, see SSSL, Vol. 2, at 746-748, inclusive.

⁵ Other matters not considered, but important to the decision in *Monroe*, include applicability of the highest and best use principle and the question whether an evidentiary exclusion ruling was proper in the case. For these and other matters significant to the result reached the reader is referred to the opinion.

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