National Cooperative Highway Research Program

RESEARCH RESULTS DIGEST

DIGEST 45 - MAY 1973

Exclusion of Increase or Decrease in Value Caused by Public Improvement for Which Lands Are Condemned

A report submitted under ongoing NCHRP Project 20-6, "Right-of-Way and Legal Problems Arising Out of Highway Programs," for which the Highway Research Board is the agency conducting the research. The report was prepared by John C. Vance, HRB Counsel for Legal Research, principal investigator, serving under the Special Projects Area of the Board.

THE PROBLEM AND ITS SOLUTION

There is a major and continuing need for state highway departments and transportation agencies to keep abreast of operating practices and legal elements of special problems involving right-of-way acquisition and control, as well as highway law in general. The question of whether or not to allow valuation changes resulting from the impact of public improvements has been a vexatious one for many years. It is a problem of concern to both the condemnor and the condemnee. The need for legislative action has been apparent, due to nonuniform and at times unclear treatment of the question by the courts. As a result, Sections 301 and 305 of Title III of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 [42 U.S.C. 4651 (3)] were addressed to this problem. This paper collates the apposite cases and discusses and analyzes them in the light of the Federal legislation. Emphasis is placed on identifying and underlying rationale in recent decisions.

A careful review of the research reported herein will help state highway officials understand the highly legalistic problem of valuation changes resulting from the impact of public improvements. The discussion of 42 U.S.C. 4651(3) will assist state transportation officials in complying with this act.

RESEARCH FINDINGS

Research findings are not to be confused with findings of law. The monograph that follows constitutes the research findings from this study. *Because it is also the full text of the agency report, the above statement concerning loans of uncorrected draft copies of agency reports does not apply.*

HIGHWAY RESEARCH BOARD
NATIONAL RESEARCH COUNCIL
NATIONAL ACADEMY OF SCIENCES—NATIONAL ACADEMY OF ENGINEERING

I. Introduction

Background and statement of the problem

The subject matter of this paper is the long-standing problem of whether to include or exclude, in the valuation of lands condemned for a public improvement, enhancement or diminution in value attributable to the improvement. It is more often the case than not that in the condemnation of lands for a public improvement a considerable lapse of time takes place between the outset of the project and the time of taking. Not infrequently this may run to several years. During this period the public gains knowledge of the project, and the impact of the prospective improvement may cause sharp changes in the market value both of lands to be taken for the improvement and of lands adjacent thereto. At the time of taking comparables may be up or down as a result of the influence of the improvement. A pointed example in recent years of decline in value both of lands to be taken and adjacent lands is in the field of urban renewal. When "planning blight" sets in the properties in the affected area have not infrequently suffered a serious drop in market value between the initial stages of the project and finalization thereof. On the other hand, an example of increase in value due to the influence of a public improvement has been the sharp rise in market value of rural lands in the neighborhood of interchanges on the Interstate system. These examples serve to illustrate that market value may rise or fall, sometimes precipitously, in the interval between the initial stages of planning for an improvement and the time of actual taking, as a direct result of the impact of the improvement itself.

The problem of whether to allow or disallow enhancement or diminution in value has had a long and chequered history in the courts. It is perhaps somewhat surprising that the problem, which is one of fundamental justice as between the sovereign or condemning authority and the individual citizen, has not been handled more definitively by the courts. The decisions, more particularly the older cases, reflect not only a lack of uniformity of result, but also in many instances a lack of clarity of approach. Often the facts are insufficiently stated and the underlying rationale is vague. In some instances the precise holding of the court, and the reasoning on which it is based, approach speculation. Fortunately, the more recent cases tend toward a firmer and more harmonious approach, and the emphasis in this paper, insofar as possible, is laid on the later cases.

Provisions of 42 U.S.C. 4651 (3)

The Congress of the United States addressed itself to the problem when it enacted the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970. It provided, in Sec. 301 (3) of Title III of the Act [42 U.S.C. 4651(3)], 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.

This language is plainly mandatory in character, rather than directory. However, it appears to be qualified, perhaps heavily, by the subsequent provisions of Sec. 305 (1) of Title III of the Act [42 U.S.C. 4655(1)]. The pertinent language is as follows:

> Sec. 305. 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. . . .

The words "greatest extent practicable under State law," have not at the time of writing this paper received judicial construction.1/ If the words are to be given a literal interpretation, it seems patent that they constitute an escape hatch from compliance with the mandatory language of Sec. 301 (3) of Title III, in those jurisdictions where constitutional provisions, statute law,

or case law, support the position that enhancement shall be allowed to the condemnee, or depreciation to the condemnor.

It seems that, without doing violence to the plain language of Sec. 305 (1) of Title III, a less than literal interpretation might be placed by the courts on the language in question. If not, it would then appear, as will be seen later, that the amount of condemnation awards, and Federal participation therein, may vary. That is to say, in those jurisdictions which allow the condemnee to recover enhancement in value, the amount of the award, and Federal participation therein, will be greater than in those jurisdictions that do not allow enhancement in value caused by a public improvement. It seems idle to speculate in this paper on whether it was the plain intent of Congress to authorize such result, in employing the words "greatest extent practicable under State law." The apposite Congressional Committee Reports (i.e., Senate Report No. 91-488, 91st Congress, 1st Session, Committee on Government Operations, and House Report No. 91-1656, 91st Congress, 2d Session, Committee on Public Works), and the further history of the legislation, give no clue and yield no instruction. It also seems idle to speculate on what manner of interpretation might be placed on the language in question by the courts which would require or tend to require uniformity of compliance by the states with the provisions of Sec. 301(3) of Title III. The matter, in short, is one that cannot usefully be discussed in this paper, and clarification in respect thereto must necessarily await judicial decision and interpretation.

The scope and purpose of this paper is to review existing case law with a view to determining what problems will be presented to the states in making full compliance with the provisions of Sec. 301(3) of Title III, and also the provisions of Sec. 305 (42 U.S.C. 4655) relating to the giving of "satisfactory assurances" of compliance.

The body of case law dealing with the question of allowance or disallowance of enhancement or diminution in value due to a public improvement is quite large. The cases run into the hundreds. No attempt is made in a paper of this size to provide an exhaustive review and citation of all the decided cases. Instead, representative cases have been selected for discussion that illustrate all of the various aspects of the problem that have been treated and considered by the courts. The paper considers first the cases relating to appreciation in value, and second the cases dealing with depreciation in value.

II. Enhancement in Value Due to Public Improvement

In General

Arguments in support of and against allowance of increment in value

The basic arguments for and against the allowance of enhancement in value due to a public improvement may be summarized as follows:

(a) Enhancement in value resulting from a public improvement is a proper element of just compensation, and cannot be denied to the landowner consistent with the constitutional guarantee of payment of just compensation for private property taken for a public use. Additionally, where lands in the vicinity of a public improvement are enhanced in value by reason thereof, it is inequitable that the owners of lands taken for the improvement be denied the increment in value which inures to the benefit of the owners of neighboring lands that are not taken.

(b) The public should not be required to pay the owners of lands taken for an improvement an advanced value created by the improvement paid for by the public. The owners of lands adjacent to the 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 an increase in benefits inuring to the lands, but rather to speculation as to what the government might pay therefor.

These opposing views have, quite naturally, led to a division of authority. The great majority of the cases deny enhancement under certain conditions, and the minority rule allows enhancement under all conditions.

The Probability of Inclusion Test

Summary

In the majority of the cases the determination whether enhancement will be allowed or denied is made to turn on what some courts have termed the "probability of inclusion" test or rule. It is difficult to state this test or rule in a few words, because its application varies with dif-

ferent fact situations. However, broadly speaking, it may be said that appreciation in value will be denied if it is probable that the lands will be included in the project, and enhancement in value will be allowed if it is not probable that the lands will be included in the project. The time at which such probability or likelihood must appear varies with different fact situations.

The courts have used a variety of linguistics to define this test or rule. That is, to describe the foreseeability of inclusion of lands in the project, the courts have used such terms as "likely to be taken," "might likely be acquired," "practically certain to be acquired," "probable" or "reasonably probable" that the lands will be taken, etc. Although no standard terminology is employed, there is, on the other hand, little in the way of ambiguity or conflict of meaning in the language used by the courts to define and describe the rule.

The fact situations in which the probability of inclusion test finds application may be grouped into three categories as follows:

(1) Where from the outset or beginning of the project the probability or likelihood appears that the lands will be included in the project.

(2) Where the lands are not included within the scope of the original project and the improvement is subsequently enlarged to include the condemned lands.

(3) Where the general location of the improvement is known from the outset thereof, but the probability or likelihood that the lands will be included does not appear until a later stage in the planning process and development of the improvement.

The rules laid down by the courts respecting the allowance or disallowance of enhancement in these three factual situations may be stated as follows:

(a) In the case of (1) above, all enhancement in value caused by the improvement is denied.

(b) In the case of (2) above, the allowance or disallowance of increment in value is made to turn on whether the probability or likelihood appeared at the outset of the project that it would be subsequently enlarged to include the condemned lands.

(c) In the case of (3) above, there is a paucity of case law, but in a few recent cases the rule is announced that enhancement due to public knowledge of the general location of the improvement will be allowed until that stage or point in time in the planning process when it becomes evident that specific and definite lands will probably be taken for the project, and appreciation in value of such lands so earmarked will thereafter be denied.

It should be made clear at this point that, although there is a sharp difference in the three factual situations described, the underlying rule determinative of whether increment in value will be allowed or denied is the same in all three situations; e.g., whether at a given point in time, which is the same in (1) and (2), but different in (3), the probability or likelihood exists that the lands will be included in the project.

Representative cases dealing with the foregoing three fact situations are next for discussion.

Condemnation for an unenlarged project

Little difficulty is presented in the case of condemnation of lands for a single unenlarged project. The cases adopting the probability of inclusion test uniformly hold that if the probability or likelihood exists at the outset of the project that the lands will be included therein, all enhancement in value caused by the improvement must be denied.

This rule was announced by the Supreme Court of the United States in the early case of *Shoemaker v. United States*, 147 U.S. 282, 37 L. Ed. 170, 13 S. Ct. 361 (1893). The condemnee in this case sought to recover compensation for the increment in value inuring to his property after the passage of an Act of Congress authorizing the establishment of Rock Creek Park in the District of Columbia, for which his lands were taken. In upholding the lower court's action in disallowing the appreciation in value resulting from the establishment of the improvement, the Supreme Court approved the following instruction given by the trial judge.

> The commissioners are instructed that they shall receive no evidence tending to prove the prices actually paid on sales of property similar to that included in said park, and so situated as to adjoin it or to be with-

> in its immediate vicinity, when such sales have taken place since the passage of the act of Congress of the 27th of September, 1890, authorizing said park, but any recent bona fide sales made before the passage of said act, of lots similarly situated and adapted to similar uses, or recent bona fide contracts made before the passage of said act, with land owners, for other lands in the vicinity similarly situated, may be considered by the commissioners, looking at all the circumstances of these sales or contracts in the determination of the ultimate question of value. (Underscoring supplied.)

Kerr v. South Park Commissioners, 117 U.S. 379, 29 L. Ed. 924, 6 S. Ct. 801 (1886), also involved the taking of land for park purposes, The landowner in this case sought to introduce evidence of prices paid for properties adjacent to or within the immediate vicinity of the park which were sold after the boundaries of the park had been definitely established. The Supreme Court of the United States sustained the action of the trial court in refusing to admit evidence of such sales, and upheld an instruction of the lower court which read, in part:

> In the nature of things the lands within the proposed park, and which were to constitute it, could not have been . . . specially benefited, and the owner of the lands in question should be allowed nothing on the ground that his property was . . . specially benefited.

A frequently cited case which contains a lucid explanation of the rule is *United States v. Certain Lands,* 180 F. 260 (C.C.R.I., 1910). The question before the court in this case was whether, in the condemnation of a tract of land by the Federal government, there could be taken into consideration claimed enhancement in value resulting from the partial construction of a breakwater adjacent thereto. In denying enhancement the Court stated:

> It is true that according to the general rule damages are to be assessed as of the date of condemnation. This rule has been so applied as to compel the state . . . to pay for values created by the public improvement itself. This was illustrated in the building of the Rhode Island Statehouse. After purchasing a portion of the land, the state proceeded to condemn the adjacent lands, and was compelled to pay a price for these adjacent lands enhanced by the fact that it had, by embarking upon the building of a State Capitol and purchasing lands therefor, increased the value of all lands in the vicinity. In *re State House Commission,* 19 R.I. 390, 35 Atl. 212; *Stafford v. City of Providence,* 10 R.I. 567, 14 Am. Rep. 710.
>
> While such a rule is probably sound where the condemnation of adjacent lands is for the purpose of enlarging an old and fixed location, the rule seems of more doubtful justice in cases where, from the nature of the work, it is evident, from the moment of the passage of the legislation authorizing it, that the land in question will necessarily be required for the public improvement. Where, from the inception of the public improvement, it is known with practical certainty that the land will be required for the public project, this in itself negatives any supposed advantages which might accrue to the land held in private ownership by reason of its adjacency to the grounds of a public Capitol, park, or like improvement. If from the outset it is known that the lands must be taken for the public purpose, it is unsound to base their valuation upon any supposed advantages arising from their continuance in private hands as lands adjacent to public grounds. . . .
>
> The enhancement of price due to the public improvement, if based upon the reasonable expectation that the lands may be held by the private owner with the added advantages of adjacency to the lands improved by the public, is legitimate; but when this expectation is destroyed by the practical certainty, as distinguished from legal certainty, that the lands are not to continue in private ownership adjacent to improved public lands, then the reason fails. It is unsound to look merely at the date of filing a petition for condemnation in considering how far the value has been enhanced by the public project.
>
> In view of the fact that by the application of this rule the public has been compelled to pay private owners of lands an advanced value due to the very improvement which the public had undertaken, it would be wise, upon the institution of public works requiring the exercise of eminent domain, that officers of government, national, state, or municipal, should have some of the prevision shown by Jeremy Bentham, when, among other interesting occupations, he framed

> a project for a canal across the Isthmus of Panama, and in pursuance of his habit of foresight made provision that, in awarding compensation for lands taken, no compensation should be awarded for values created by the improvement itself.

There was assigned as error in *Rhode Island Hosp. Trust Co. v. Providence County Court House Commission,* 52 R.I. 186, 159 A. 642 (1932), rulings of the trial court excluding testimony to the effect that the value of the land sought to be condemned increased in value as soon as the Legislature authorized the taking thereof for a public project. In sustaining the action of the lower court the Supreme Court of Rhode Island stated:

> The rule is that the owner of land taken by right of eminent domain is not entitled to recover any increase in value of this land, due to the fact that the land was known to be within the area designated for condemnation and was certain to be taken.

To the same effect see also:

Olson v. United States, 292 U.S. 246, 78 L. Ed. 1236, 54 S. Ct. 704 (1934).
City and County of Denver v. Smith, 152 Colo. 227, 381 P.2d 269 (1963).
Williams v. City and County of Denver, 147 Colo. 195, 363 P.2d 171 (1961).
Cole v. Boston Edison Company, 338 Mass. 661, 157 N.E.2d 209 (1959).
Smith v. Commonwealth, 210 Mass. 259, 96 N.E. 666 (1911).
Re Munson, 29 Hun. (N.Y.) 325 (1883).

It is, of course, implicit in the rule enunciated in the foregoing cases that if it does not appear probable at the outset of the project that the lands will be included therein enhancement in value must be allowed. However, whether surprisingly or not, no case has been found involving condemnation of lands for a single unenlarged project in which the court found and ruled that the likelihood did not exist that the lands would be included in the project, and hence that enhancement must be allowed.

Condemnation for an enlarged project

From the standpoint of practical application of the probability of inclusion test more difficulty is presented in the case of condemnation of lands for an enlarged project. However, the rule itself, as applied to such fact situation, presents no difficulty. The cases uniformly hold that if from the outset of the public improvement it was probable that the initial project would be enlarged, and that lands adjacent thereto would later be taken for the enlarged project, no increment in value attributable to the improvement may be allowed owners of lands subsequently taken to effect such enlargement. Conversely, if the subsequent augmentation is to be viewed as an independent project not conceived as part of the original improvement, the owners of lands later taken are entitled to the enhancement in value resulting from the original improvement.

The leading case announcing and applying the rule is *United States v. Miller,* 317 U.S. 369, 87 L. Ed. 336, 63 S. Ct. 276, decided in 1943. However, the rule itself was enunciated and applied in numerous cases decided long before *Miller.* See by way of example the following:

United States v. Goodloe, 204 Ala. 484, 86 So. 546 (1920).
St. Louis Electric Terminal Railway Company v. MacAdaras, 257 Mo. 448, 166 S.W. 307 (1914).
Virginia & T.R.R. v. Lovejoy, 8 Nev. 100 (1872).
Nichols v. City of Cleveland, 104 Ohio St., 135 N.E. 291 (1922).
Cincinnati v. Ziegler, 16 Ohio N.P.N.S., 169, 26 Ohio Dec. N.P. 79 (1914).
In re Condemnation of Certain Lands for New Statehouse, 19 R.I. 382, 33 A. 523 (1896).
Stafford v. City of Providence, 10 R.I. 567, 14 Am. Rep. 710 (1873).
McChristy v. Hall County, 140 S.W. 2d 576 (Tex. Civ. App., 1940).
City of El Paso v. Coffin, 40 Tex. Civ. App. 54, 88 S.W. 502 (1905).
Gulf, C. & S. F. Ry. v. Brugger, 24 Tex. Civ. App. 367, 59 S.W. 556 (1900).

Illustrative of cases denying enhancement is *Nichols v. City of Cleveland,* supra. In this case suit was brought to condemn certain land in the City of Cleveland for park purposes. The trial court's ruling denying enhancement was assigned as error. The Supreme Court of Ohio conceded the proposition that "if a public improvement is made and completed and the public authorities subsequently decide to make an addition to it, or extension of it...the owner is entitled to the increased value which the original improvement gave to his land." The Court went on to hold, however, that since in the instant case the land in question was a necessary part of the park scheme, the trial court's ruling that enhancement in value due to the park project could not be considered in ascertaining value was correct. It said:

> But as already shown, these entire 4.22 acres were a necessary part of the original park scheme. The deeds of Mr. Rockefeller and other grantors were made on the express condition that this and the other tracts specified should be included in the park scheme. If it had not been, the condition of the Rockefeller and other deeds would have been violated and the land forfeited. In other words, the entire park scheme, as prepared, would have had to be abandoned. That has been the situation with reference to these particular 4.22 acres from the inception of the scheme. There never has been the establishment of the park, for it was an essential element in the park itself, and by the great weight of authority the rule stated by the trial court in this case for the determination of the value of the land taken was correct.

Illustrative of cases allowing enhancement is *McChristy v. Hall County*, supra. In this case it appeared that appellee, the condemning authority, had previously taken a right-of-way for highway purposes across a tract of 7 acres belonging to appellant. After a substantial portion of the road had been constructed, appellee instituted suit to condemn another portion of the 7-acre tract, for the removal therefrom of earth, stone and gravel for use in completing construction of the highway, and maintaining and repairing it. Testimony that the value of the land was increased by the building of the highway, and that the subject property would be a good location for a filling station, was on motion ordered stricken by the trial court, and appeal from such ruling taken. In reversing and remanding, the Texas Court of Civil Appeals said:

> . . . the condemnation proceeding was not in connection with, nor a part of, the procedure by which the original right-of-way for the road was procured. That had already been accomplished and the location of the road definitely established. Not only so, but the contract to build the road had been entered into and a large portion of the grading completed. This proceeding was not incidental to the establishment of the highway but one instituted after the highway had been established and it became desirable to use the earth, rock and gravel from this tract for use in constructing the highway. It was, therefore, an independent proceeding and, under the law, appellant was entitled to the fair market value of her land under the circumstances and conditions existing at the time it was taken only four days prior to the trial of the case. . . . It is not contended by appellee that it was absolutely necessary to condemn this particular tract in order to procure the materials necessary to construct the road, nor is the suggestion made that this condemnation proceeding is a part of, or has any connection with any procedure which had been instituted or conducted for the purpose of obtaining the right-of-way when the road was located some months before. . . . The benefits and enhancements in value that had already accrued on account of the previous improvements or the enterprise that had already been initiated to establish and build the road are not matters to be considered as offsets when subsequent condemnation such as this are instituted. The owner is entitled to such compensation as is warranted by the facts shown to exist at the time the land is taken.

As stated previously, the leading case dealing with condemnation for an enlarged project is *United States v. Miller*, 317 U.S. 369, 87 L. Ed. 336, 63 S. Ct. 276 (1943). *Miller* is significant, not only for the reason that it has been cited over and over again, but more particularly because certain language appearing in the opinion, unless satisfactorily explained, could cause difficulties in the condemnation of lands for highway projects. These difficulties and problems, not discussed at this point, are considered later under "Effect of the Miller 'Commitment' Rule."

This case involved condemnation of certain lands for relocation of a railroad, required by construction of 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 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:

> Respondents correctly say that value is to be ascertained as of the date of taking. But they insist that no element which goes to make up value as at that moment is to be discarded or eliminated. We think the proposition is too broadly 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.
>
> In which category do the lands in question fall? The project, from the date of its final and definite authorization in August 1937, included the relocation of the railroad right-of-way, and one probable route was marked out over the respondents' lands. This being so, it was proper to tell the jury that the respondents were entitled to no increase in value arising after August 1937 because of the likelihood of the taking of their property. If their lands were probably to be taken for public use, in order to complete the project in its entirety, any increase in value due to that fact could only arise from speculation by them, or by possible purchasers from them, as to what the government would be compelled to pay as compensation.
>
> . . . If, in the instant case, the respondents' lands were, at the date of the authorizing Act, clearly within the confines of the project, the respondents were entitled to no enhancement in value due to the fact that their lands would be taken. If they were within the area where they were likely to be taken for the project, but might not be, the owners were not entitled, if they were ultimately taken, to an increment of value calculated on the theory that if they had not been taken they would have been more valuable by reason of their proximity to the land taken. In so charging the jury the trial court was correct.

See among the many cases citing *Miller* and applying the rule announced therein:

United States v. Reynolds, 397 U.S. 14, 25 L. Ed. 2d 12, 90 S. Ct. 803 (1970).
United States v. 2,353.28 Acres of Land, 414 F. 2d 965 (C.A. 5, 1969).
United States v. First Pyramid Life Insurance Company of America, 382 F. 2d 804 (C.A. 8, 1967).
United States v. 172.80 Acres of Land, 350 F. 2d 957 (C.A. 3, 1965).
Standard Oil Company v. State, 287 Ala. 143, 249 So.2d 804 (1971).
Merced Irrigation District v. Woolstenhulme, 4 Cal. 3d 478, 93 Cal. Rptr. 833, 483 P. 2d 1 (1971).
People, Department of Public Works v. Cramer, 14 Cal. App. 3d 513, 92 Cal. Rptr. 401 (1971).
State, Department of Highways v. Boles, 240 So. 2d 786 (La. App., 1970).
State, Through Department of Highways v. Martin, 196 So. 2d 63 (La. App., 1967).
Cole v. Boston Edison Company, 388 Mass. 661, 157 N. E. 2d 209 (1959).
Housing and Redevelopment Authority v. Minneapolis Metropolitan Company 273 Minn. 256, 141 N.W. 2d 130 (1966).

Andrews v. State, 9 N.Y. 2d 606, 176 N.E. 2d 42 (1961).
Trinity River Authority v. Boone, 454 S.W. 2d 258 (Tex. Civ. App., 1970).
City of Dallas v. Rash, 375 S.W. 2d 502 (Tex. Civ. App., 1964).

In some of the foregoing cases the application of the *Miller* rule to the facts resulted in the allowance of enhancement, and in others the rule as applied to the facts led to the denial of enhancement.

Exemplary of cases in which enhancement was allowed is *United States v. 2,353.28 Acres of Land*, supra. This case involved condemnation of lands for the Cape Canaveral (now Cape Kennedy) lunar landing project. On August 24, 1961, the Justice Department filed a complaint in condemnation describing a 72,644-acre tract of land needed for the project. Defendants' lands were not included in the described acreage. On December 24, 1963, more than two years after the filing of the original complaint, the Justice Department filed a second complaint calling for the condemnation of an additional 14,800 acres adjoining the 72,644-acre tract already condemned. Defendants' lands were included in the new suit. The District Court found that it was probable that defendants' lands would be needed for and included in the project at the time of the filing of the original complaint on August 24, 1961, and ruled that enhancement in value occurring subsequent to that date could not be taken into consideration in the valuation of defendants' lands.

Upon reviewing the evidence the Circuit Court of Appeals noted that when on September 1, 1961, the Deputy Director of NASA appeared before the Senate Committee on Aeronautical and Space Sciences, he exhibited a map showing the 72,644-acre tract and informed the Committee that the appropriation sought would cover all the land acquisition anticipated. The Court further noted that when the Administrator of NASA appeared before the Committee on June 13, 1962, seeking an appropriation for the additional 14,800 acres, he acknowledged that this acreage was not a part of the acquisition for which funds had been sought in September 1961. In reversing and remanding, the Circuit Court of Appeals, taking its direction from the rule announced in *Miller*, stated:

> We conclude from an examination of the record before us that a buyer in the real estate market reasonably could expect, prior to June 13, 1962, that the Colton land would not become a part of the lunar landing project, but would enjoy a position proximate to the project. It appears from the evidence that NASA Administrator Webb's testimony before the Senate Committee on June 13, 1962, was the earliest disclosure by a project official that the Colton land probably would be taken. Accordingly, we hold that the district court properly should have allowed evidence of enhancement in the value of the Colton land prior to that date.

Illustrative of cases denying enhancement is *United States v. First Pyramid Life Insurance Company of America*, supra. In this case land was condemned by the Federal government for a dam and reservoir project. Creation of the reservoir necessitated relocation of a municipal pumping station. Pursuant to agreement between the city and the Federal government, condemnation was instituted by the United States to acquire the land required for relocation. The reservior project caused sharp appreciation in the value of adjacent lands for residential purposes, and the sole question before the Court was whether in the supplemental condemnation such enhancement could be allowed to the condemnee. Stating that the case was controlled by the holding in *United States v. Miller*, the Court ruled that it was foreseeable from the outset of the dam and reservoir project that supplemental condemnation would be required for the relocation of the municipal pumping station, and "the taking of lands for that purpose was within the scope of the federal project so that the government should not have been required to pay for any enhanced value accruing to the property because of its proximity to the project itself."

It will serve no useful purpose to multiply cases further to illustrate the operative effect of the *Miller* rule. The test announced in *Miller*--i.e., that allowance or disallowance of enhancement turns on whether the "lands were probably within the scope of the project from the time the Government was committed to it"--leads to opposing results, depending entirely on the facts of the particular case. As previously pointed out, there is virtual uniformity of result in the cases applying the probability of inclusion test to the taking of lands for a single unenlarged project, but there is a wide divergence of result in the cases applying such test to the condemnation of lands for an enlarged or extended project.

Condemnation for unenlarged project of lands delayed for identification

The third and remaining fact situation to which the probability of inclusion test has application is where the general location of the improvement is known from the outset, but the probability that the condemned lands will be included in the project does not appear until a later stage in the planning process and development of the improvement.

Until recently there has been an absence of case law that deals squarely with this situation. There now exist, however, a scant few, but well-reasoned, cases that treat and consider the valuation problem presented by this fact situation. These cases lay down the rule that enhancement due to public knowledge of the general location of the improvement will be allowed until that stage or point in time in the planning process when it becomes evident that specific and definite lands will probably be taken for the project, and appreciation in value of such lands so earmarked will thereafter be denied.

Merced Irrigation District v. Woolstenhulme, 4 Cal. 3d 478, 93 Cal. Rptr. 833, 483 P. 2d 1 (1971), involved condemnation of defendant's lands bordering on Lake McClure, in Mariposa County, California. It appeared that Lake McClure was subject to wide seasonal fluctuation, its waters covering a maximum of 2,700 acres during the winter months, but contracting to a mere 30 acres, surrounded by mudflats, in the summer. Merced Irrigation District, the condemnor, evolved plans for a project to eliminate the fluctuation, and increase the lake considerably in size. In 1962 the District undertook to secure federal funds to assist in financing the project, and early in 1963 several newspaper articles informed the public that the completed Lake McClure project would include recreational facilities, such as camping, boating, and fishing. The trial court made a finding that on or about January 1, 1963, the public, although unaware of "exactly what area, what spots were to be recreation," did know of the general recreational plans, and that as a result property values in the Lake McClure area began to rise. The lower court further found that by January 1, 1965, the plans for the project had progressed to a point where it became "reasonably probable" that defendant's lands would be taken for the project.

The trial judge permitted the jury to consider enhancement in value resulting from public knowledge of the project which occurred prior to January 1, 1965, but instructed the jury that it was not to consider any enhancement in value caused by public awareness of the project which took place after January 1, 1965. It was argued on appeal that all increment in value caused by the improvement should have been excluded, and that the trial court erred in permitting defendant to recover the pre-1965 increase in value.

In upholding the action of the trial court the Supreme Court of California said:

> If . . . when plans for the proposed project first became public and when the consequent enhancement of land values began, the probability was that the land in question would not be taken for the public improvement, the landowner would be entitled to compensation for some "project enhancement." During that period when it was not likely that his land would be condemned, the fair market value of the property may have appreciated because of anticipation that the land would partake in the advantages of the proposed project. The owner would be entitled to such increase in value. On the other hand, once it becomes reasonably foreseeable that the land is likely to be condemned for the improvement, "project enhancement" for all practical purposes, ceases. Thus, in computing "just compensation" in such a case, a jury should only consider the increase in value attributable to the project up until that time when it became probable that the land would be needed for the improvement.2/

See also *People v. Miller,* 21 Cal. App. 3d 467, 98 Cal. Rptr. 539 (1971), involving highway construction. The California Court of Appeal said that at the time of the trial the parties and the court did not have the benefit of the decision in *Merced,* and in reversing and remanding with directions to follow the guidelines laid down in *Merced,* the Court stated:

> In computing just compensation a jury should consider the increase in value attributable to the project up until that time when it became probable that the land would be needed for the project.

Trinity River Authority v. Boone, 454 S.W. 2d 258 (Tex. Civ. App., 1970), involved the taking of land for park and recreational purposes. The Appellate Court found upon reviewing the evidence that "there was continuous activity in connection with the project and notoriety about it must have been abroad that would affect values in the neighoorhood of its location," and ruled that the enhancement in value so caused might be considered until such time as it became foreseeable that the tract would be taken. The Court further said, in general, that when the site of a public improvement is determined but the exact extent of lands to be included therein is not known, the general increase in the market value of land in the neighborhood due to the proposed facility may be considered until such time as it becomes foreseeable that a particular tract will be taken.

The logic of the rule laid down in *Merced* and *Trinity River* would appear to be unassailable.

To allow appreciation in value due to public knowledge of a proposed improvement up until that time when it becomes foreseeable that the condemned lands will be included is wholly consistent with the theory upon which the probability of inclusion test rests, and such rule would appear to accomplish substantial justice as between the condemning authority and the individual whose private property is taken for a public use.

Denial of Enhancement Without Regard to Probability of Inclusion Test

Proximate cause test

In a few decisions enhancement in value has been denied without reference to or reliance on the probability of inclusion test. That is, in these cases the courts disallowed all enhancement resulting from the improvement without any discussion of whether or not it was probable that the lands would be included in the project. The decisions in these cases, if taken and read literally, seem to proceed on the theory that all enhancement proximately caused by a public improvement must be denied. See to this effect:

Housing Authority v. Title Guarantee Loan & Trust Company, 243 Ala. 157, 8 So. 2d 835 (1942).
Arkansas State Highway Commission v. Griffin, 241 Ark. 1033, 411 S.W. 2d 495 (1967).
Cook v. South Park Commissioners, 61 Ill. 115 (1871).
Louisville & N.R. Co. v. Ingram, 12 Ky. L. Rep. 456, 14 S.W. 534 (1890).
Louisiana Ry. & Nav. Co. v. Xavier Realty, 115 La. 328, 39 So. 1 (1905).
Opelousas, G. & N.E.R. Co. v. St. Landry Cotton Oil Co., 118 La. 290, 42 So. 940 (1907).
Opelousas, G. & N.E.R. Co. v. Bradford, 118 La. 506, 43 So. 79 (1907).
Moale v. Baltimore, 5 Md. 314, 61 Am. Dec. 276 (1854).
Bonaparte v. Baltimore, 131 Md. 80, 101 A. 594 (1917).
Carli v. Stillwater & St. P.R.R., 16 Minn. 260 (1871).
Gibson v. Norwalk, 13 Ohio C.C. 428, 7 Ohio CD 6 (1896).
Woodfolk v. Nashville & C.R.R., 2 Swan (Tenn.) 422 (1852).
State Department of Highways v. Jennings, 435 S.W. 2d 481 (Ct. App., Tenn., 1968).

It is difficult to evaluate these cases. In some, it rather clearly appears from the recital of facts that it was probable at the outset of the project that the lands would be taken, but in others it is by no means clear from the facts as stated that such reasonable probability did appear at the beginning of the project. However, whether or not the likelihood that the lands would be taken may be read into the facts is largely beside the point, since the courts eschewed use of the probability of inclusion test, and employed language which, taken at face value, would indicate that they were proceeding on the theory that all enhancement proximately caused by a public improvement must be disallowed, without regard to the foreseeability of inclusion of the condemned lands in the project. It may be noted that most of the above cited decisions are older cases that were decided before the probability of inclusion test received widespread adoption by the courts. Assuming that these cases do in fact proceed on the theory that all enhancement proximately caused by an improvement must be denied, it seems somewhat doubtful that such rule would be adopted by many courts today, if the probability of inclusion test, with the plethora of authority in support thereof, were urged upon the court as the better rule to determine the allowance or disallowance of enhancement resulting from an improvement.

Allowance of Enhancement as Proper Element of Valuation

Enhancement allowed without qualification

It has been held in some cases that enhancement in value due to a public improvement must be allowed without qualification. These cases make no reference to the probability of inclusion test. Some of the decisions proceed on the theory that increment in value attributable to a public improvement is a proper element of valuation and hold that enhancement so caused cannot be denied consistent with constitutional guarantees of payment of just compensation for private property taken for a public use. Other cases opt for the allowance of enhancement as the more equitable rule, but without reliance upon constitutional provisions relating to just compensation.

Anderson v. State Road Department, 204 So. 2d 899 (Fla., 1967).
Sunday v. Louisville & N.R.R., 62 Fla. 395, 57 So. 351 (1912).
Calhoun v. State Highway Department, 223 Ga. 65, 153 S.E. 2d 418 (1967).

Hard v. Housing Authority of the City of Atlanta, 219 Ga. 74, 132 S.E. 2d 25 (1963).
City of Douglas v. Rigdon, 116 Ga. App. 306, 157 S. E. 2d 66 (1967).
Gate City Terminal Company v. Thrower, 136 Ga. 456, 71 S.E. 903 (1911).
Sanitary District v. Loughran, 160 Ill. 362, 43 N.E. 359 (1896).
Interstate Water Company v. Adkins, 327 Ill. 356, 158 N.E. 685 (1927).
Snouffer v. Chicago & N.W. Ry., 105 Iowa 681, 75 N.W. 501 (1898).
Ranck v. City of Cedar Rapids, 134 Iowa 563, Ill. N.W. 1027 (1907).
Prudential Insurance Company v. Central Nebraska Public Power & Irrigation District, 139 Neb. 114, 296 N.W. 752 (1941).
State Road Commission v. General Oil Company, 22 Utah 2d 60, 448 P. 2d 718 (1968).
Weber Basin Water Conservancy District v. Ward, 10 Utah 2d 29, 347 P. 2d 862 (1959).
Guyandotte Valley Railway v. Buskirk, 57 W. Va. 417, 50 S.E. 521 (1905).

It is to be noted that although some of the above cited decisions are earlier cases, the rule that enhancement in value must be allowed unqualifiedly has also been adopted in recent cases.

Hard v. Housing Authority of the City of Atlanta, supra, decided in 1963, involved the taking of lands for an urban renewal project. The Supreme Court of Georgia stated that the only question before it was "whether or not, upon the trial of a condemnation on appeal, evidence, showing that the value of the subject property has been enhanced, by the general knowledge for a number of years that a large area, including it, would be taken for urban renewal . . . is admissible in fixing its value." In holding that evidence of enhancement was admissible in determining market value as of the time of taking, the Court said:

> While it might be difficult to see how knowledge of this impending taking of this particular property for urban renewal would enhance its value, yet that is conceivable, and testimony to that effect cannot be rejected. *Anything that actually enhances the value must be considered in order to meet the demands of the Constitution that the owner be paid, before the taking, adequate and just compensation.* . . . A brief filed on behalf of the state quotes extensively from Orgel on Valuation Under Eminent Domain (1953). But it fails to quote as did an opposition brief from Volume I, page 433, Footnote 16 of the same authority, the following: "In some cases all enhancement in value resulting from the improvement is expressly and unqualifiedly allowed." (Italics supplied).

The holding in *Hard v. Housing Authority of City of Atlanta* was reaffirmed in *Calhoun v. State Highway Department,* supra. Syllabus No. 2 in *Calhoun,* which concisely and accurately states the holding, reads as follows:

> The charge that in ascertaining what would be just and adequate compensation the jury could consider evidence that knowledge of the impending taking had enhanced the value of the property taken . . . was sound. It was error for the Court of Appeals to reverse because of this charge solely in virtue of the 1966 Act (Ga. L. 1966, p. 320), which purports to render such evidence inadmissible.

The last sentence of the Syllabus point has reference to an act of the Georgia legislature providing that evidence of enhancement in value resulting from a public improvement is inadmissible in a condemnation proceeding. Stating that the admissibility of evidence in a condemnation proceeding was solely a matter for the judiciary to determine, the Supreme Court of Georgia struck down the statute, holding that "for the reason that the 1966 Act is an attempt to invade the exclusive jurisdiction of the judicial department, it offends the constitutional separation of powers and is therefore void."

See also *City of Douglas v. Rigdon,* supra, wherein the Georgia Court of Appeals upheld an instruction which permitted the jury to consider enhancement in value of the condemned lands caused by the influence of the public improvement for which the lands were taken.

In *Anderson v. State Road Department,* supra, decided in 1967, it appeared that a witness for the State Road Department, in explaining the basis of his appraisal of the condemned lands, stated that he did not take into consideration any enhancement in value due to the highway project itself, since to do so would be improper. In commenting on the trial judge's action in denying a motion to strike the witness' testimony, the Florida Court of Appeal noted that the lower court's

ruling in effect permitted the witness "to tell the jury that under Florida law the defendant was not entitled to any enhancement in the market value of the property to be taken by reason of the proposed improvement." Stating that the witness' "concept of the Florida law governing the measurement of market value in eminent domain proceedings was contrary to the law of this state," the Court, relying on *Sunday v. Louisville & N.R.R.*, supra, held that the allowance of enhancement to the condemnee was required under the provisions of the Florida Constitution relating to the payment of just compensation in eminent domain proceedings. Quoting *Sunday* the Court said:

> "If the property naturally or in common with other property similarly conditioned, increases in market value in anticipation of the proposed improvement, before the appropriation, the compensation therefor is the fair actual market value at the time of the lawful appropriation."3/

A like result was reached by the Supreme Court of Utah in *Weber Basin Water Conservancy District v. Ward*, supra, decided in 1959. This case involved the condemnation of lands for a reservoir project. At issue on appeal was whether condemnees were entitled to the increment in value of their lands attributable to the project. The court analyzed the arguments for and against allowance of enhancement, as follows:

> The plaintiff urges the view adopted by some courts that the value of the property for condemnation purposes should be determined without consideration for the fact that the condemnor has entered the market and plans improvements. The argument supporting such rule appears to be that the condemnee should not be allowed an advantage from the fact that the condemnor is improving the area and the latter be required to pay a higher price and thus in effect suffer a penalty because of its own improvements. The contrary view is that eminent domain statutes are designed only to give the condemnor the power to purchase property whether the condemnee desires to sell or not, but are not supposed to give the condemnor any superior bargaining position as to price.

In holding that defendants were entitled to the enhancement in value of their lands resulting from the reservior project, the Court said:

> We are in accord with what appears to be the better view, adopted by the trial court, that the condemnee is entitled to the fair market value of his property at the time of the service of summons in the condemnation proceedings as provided by the statute; and that all factors bearing upon such value that any prudent purchaser would take into account at that time should be given consideration, including any potential development in the area reasonably to be expected.

It is evident, on the basis of the foregoing cases, that in any jurisdiction which views the allowance of enhancement as the more equitable rule, difficulties may be presented in the way of compliance with the provisions of 42 U.S.C. 4651(3) relating to the exclusion of all increase in value resulting from an improvement. It is evident that even more serious difficulties may be presented in any jurisdiction which has taken the position that enhancement is an element of valuation that cannot be denied consistent with constitutional guarantees of payment of just compensation before private property is taken for a public use. It has been seen that a statute, the effect of which would have required compliance with the provisions of 42 U.S.C. 4651(3), was held unconstitutional, as an unlawful attempt by the legislative arm of government to invade the powers of the judiciary. Thus it seems apparent that in some jurisdictions (absent a reversal of judicial opinion) difficulties are to be expected in the way of making full compliance with the provisions of 42 U.S.C. 4651(3) relating to exclusion of increase in value caused by an improvement.

Effect of Constitutional and Statutory Provisions

Construction of term "irrespective" of benefits

In some jurisdictions provisions are embodied in the state constitutions, or contained in statute law, to the effect that valuation in eminent domain shall be determined "irrespective" of benefits from or enhancement due to the public improvement for which the lands are taken. In certain states these provisions relate solely to a taking by a private corporation, but in others the language obtains with respect to condemnation by the state and its subdivisions.

The meaning of the word "irrespective," as used in such context, is ambiguous. It may be

argued that proper construction requires that value shall be determined by the inclusion of benefits, or, conversely, that value shall be determined by way of exclusion of benefits. It is, hence, perhaps not surprising that diametrically opposed results have been reached by the courts in construing the same language. In some cases the construction of the word "irrespective" has led to the allowance of enhancement, and in others to the denial thereof.

Enoch v. Spokane Falls & N. Ry. Co., 6 Wash. 393, 33 P. 966 (1893), involved the taking of lands for a railroad right-of-way. The Court had before it the construction of a provision of the Constitution of the State of Washington reading that when private property is taken for a right-of-way by any corporation other than a municipal corporation, compensation shall be determined "irrespective of any benefit from any improvement proposed by such corporation." The Court posed the question of construction presented by such language, as follows:

> Does this phrase mean that the corporation making the appropriation may show that the value of the property, a part of which it takes for a right-of-way, has been enhanced by the construction or proposed construction of its road, and then deduct such enhancement from the present value of the land, and only pay the remainder as damages? Or does it mean that a person whose land is taken for the use of a railroad is entitled to its fair market value, without regard to the causes that may have contributed to make up such value?

In opting for the latter construction the Court stated that the jury should not be permitted to consider or make any use of the fact that market value as of the time of taking was enhanced by the proposed construction by the railway company of a new line of track.

See, to the same effect, *Seattle & M. R. Co. v. Roeder*, 30 Wash. 244, 70 P. 498 (1902).

Giesey v. Cincinnati W. & Z.R.R., 4 Ohio St. 308 (1854), is on all fours with *Enoch v. Spokane Falls & N. Ry. Co.*, supra. The language of the Ohio Constitution under review was virtually identical with that of the State of Washington, providing that in condemnation by a private corporation the property owner shall be awarded compensation "irrespective of any benefit from any improvements proposed by such corporation." The case likewise involved the taking of property by a railway company. In holding that this phrase of the Ohio Constitution compelled the allowance of enhancement, the Court said:

> The word "irrespective" relates to . . . full compensation, and binds the jury to assess the amount, without looking at or regarding, any benefits contemplated by the construction of the improvement. When this is done, and this consideration wholly excluded, the jury have nothing to do but ascertain the fair market value of the property taken, which is but saying that nothing shall be deducted from that value on account of such benefits. The opposite construction, so far from requiring the assessment to be made irrespective of these benefits, in effect compels the jury to ascertain their value to the property, and to deduct so much as they have increased it; thus using a word introduced for the sole benefit of the property holder, in such manner as to deprive him of a portion of the acknowledged present value of his property, or to allow him to be paid for a part of its value in benefits; and, at the same time, fastens upon the constitution the gross inconsistency of allowing a corporation to procure the right-of-way upon easier terms than could be done by the public.
>
> . . . whether property is appropriated directly by the public, or through the intervention of a corporation, the owner is entitled to receive its fair market value at the time it is taken - as much as he might fairly expect to be able to sell it to others for, if it was not taken - and that this amount is not to be increased from the necessity of the public or the corporation to have it, on the one hand; nor diminished from any necessity of the owner to dispose of it, on the other. It is to be valued precisely as it would be appraised for sale upon execution, or by an executor or guardian; and without any regard to the external causes that may have contributed to make up its present value.

A contrary result was reached in *Portland-Oregon City Ry. v. Penney*, 81 Ore. 81, 158 P. 404 (1916). In this case, suit was instituted by a railroad company to condemn for right-of-way purposes land devoted to agricultural use. The owner of the land contended that the new line of railroad would operate to bring products grown on the land closer to market, thus enhancing the value of the land for agricultural purposes, and that he was entitled to such increment in value. An Oregon statute provided that: "No appropriation of private property shall be made until compensation be made therefor to the owner thereof, irrespective of any increased value thereof, by reason of the proposed improvement." Holding that this language required the exclusion of enhancement in determining market value, the Court said:

> . . . the statute in this state and statutes and judicial decisions in other states have said that increase in the value of the property by reason of the construction of the road shall not be considered in estimating damages, and, in effect, require the jury to estimate all the inconveniences caused by the construction of the road and to eliminate the incidental benefits which are shared in common by the other members of the community. This seems to be the law in Oregon, and, while the writer follows it with unwilling feet, the courts are bound to recognize it until it is amended.

Since the word "irrespective," as used to qualify "benefits," "enhancement," or words of like import, is ambiguous, the problem may be presented in those states having the same or similar constitutional or statutory provisions applicable to condemnation by the state, whether, in accord with *Enoch* and *Giesey,* supra, the language requires the allowances of enhancement, or whether, as in *Portland-Oregon,* supra, the language may be construed to disallow enhancement, and permit compliance with the provisions of 42 U.S.C. 4651 (3) relating to exclusion of increment in value caused by an improvement.

Effect of the *Miller* "Commitment" Rule

Application of the *Miller* rule to highway construction

It was pointed out earlier that the test announced by the Supreme Court of the United States in *Miller* to determine the allowance or disallowance of enhancement was as follows:

> The question then is whether the . . . lands were probably within the scope of the project from the time the Government was committed to it.

This language has been quoted or paraphrased over and over in the cases following *Miller.* The question is as to the effect of this language on acquisition of right-of-way for highway construction.

Any Federal-aid highway construction project will go through a number of stages. These will include, but are not limited to, the selection of a tentative route and study of alternate routes; submission of proposal to the Federal Highway Administration for consideration and approval; preparation of environmental statement; corridor hearing and FHWA approval of route location; design hearing and FHWA approval of design; preparation of plans, specifications and estimates; award of construction contracts; possible design changes after the contracts are let. At what point in this sequential chain of events can it be said that the government became "committed" to the project?

The word "commit" is defined in *Webster's Third New International Dictionary* as meaning to "contract or bind by obligation to a particular disposition," and "to pledge to some particular course or use." The word "commitment" is defined to mean "the state of being obligated or bound," and also "the obligation or pledge to carry out some action." Employing the dictionary definition, can it be said that the government is "committed" to a particular route location before the corridor hearing is held, the very purpose of which is to determine whether the proposed route meets the social, economic, and environmental postulates enumerated in P.P.M. 20-8? The question would seem rhetorical if the word "commit" is to be given its usual and ordinary meaning. Yet by the time the corridor hearing is held, enhancement due to public knowledge of the proposed project would not only have set in, but in many instances would probably have run its course. Hence, if the government can never be "committed" to a project, until at least the corridor hearing is held and route location is finally determined, the condemnee for all practical purposes would be entitled to enhancement resulting from the project.4/

Construction of the *Miller* rule

The subsequent decision of the Supreme Court of the United States in *United States v. Reynolds,* 397 U.S. 14, 25 L. Ed. 2d 12, 90 S. Ct. 803 (1970), would seem clearly to indicate that the word "committed," as used in *Miller,* is to be given something less than a literal interpretation; i.e., one consistent with dictionary ascription of meaning and common usage.

This case involved the condemnation of lands for a Federal reservoir project in the State of Kentucky. At issue, *inter alia,* was whether the condemned lands were within the original scope of the project. The Court quoted at length from *Miller,* and described the rule therein laid down as the "'scope-of-the-project' test." It appeared that attorneys for the Federal government sought clarification as to the meaning of the language used in *Miller,* since the Court said:

> Finally, the government asks us to take this occasion to "clarify" the "scope-of-the-project" test.

The Supreme Court placed the interpretation on the phrase "was committed," as follows:

> 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. (Italics supplied.)

Thus, the Court seems to be saying that the government becomes "committed" to a project at that point in the planning process when it becomes evident that the lands ultimately taken will probably be included in the project. Such construction of the phrase "was committed" serves to place the *Miller* holding squarely within the mainstream of the cases applying the probability of inclusion test. In many, if not most, highway construction cases, the "probability" that the lands finally taken will be included in the project appears well before the double hearing procedure, and the *Reynolds* interpretation of the language in *Miller* would seem to permit necessary flexibility in determining the exact stage of a highway project at which the allowance or disallowance of enhancement shall be determined.

Unless the Federal and State governments can be committed to a project for valuation purposes prior to the completion of the double hearing procedure, the cost of right-of-way acquisition would soar. It may be noted that in *Miller* the land acquisition was in connection with the construction of the Shasta Dam in California, authorized by Act of Congress. The "commitment" language of *Miller* was entirely appropriate to the facts of the case, since the Federal government was "committed" at the time of passage of the Act. The language, if taken and read literally, is, however, thoroughly inappropriate to other types of public works, such as highway construction, where no legislative act specifically authorizing and therefore "committing" the government to the project is involved. It is felt that the Supreme Court in *Miller* clearly did not envision any such unreasonable result as compelling the pyramiding of right-of-way acquisition costs, and that the later language of *Reynolds* makes it clear that the government is "committed" for valuation purposes at that point in time in the planning process when it becomes reasonably probable that the land proceeded against will be included in the project.

III. Depreciation in Value Due to Public Improvement

Summary

Although there is a split of authority in respect to the exclusion of depreciation due to a public improvement in ascertaining market value, the great majority of the cases adhere to the rule that diminution in value resulting from the improvement for which lands are condemned cannot be taken into consideration. These cases take the view that it is manifestly unjust to allow the condemnor to take advantage of a decrease in value caused by the threat of condemnation. The minority rule, which allows the depreciative impact of a proposed improvement to be considered, is based in some cases on the theory that depression in value as a result of an improvement is a matter too speculative to be weighed by a jury. In others, the reasoning is advanced that since enhancement in value must be denied diminution in value must likewise be denied.5/

Allowance of depreciation as an element of valuation

In a few cases the rule has been announced that market value at the time of taking shall reflect and include depreciation due to the impact of the improvement for which the lands are proceeded against.

United States v. Certain Lands in Town of Highlands, 47 F. Supp. 934 (D.C., N.Y., 1942).
City of Oakland v. Partridge, 214 Cal. App. 2d 196, 29 Cal. Rptr. 388 (1963).
Atchinson T. & S.F. Ry. Co. v. Southern Pac. Co., 13 Cal. App. 2d 505, 57 P. 2d 575 (1936).
Housing Authority of City of Decatur v. Schroeder, 222 Ga. 417, 151 S.E. 2d 226 (1966).
Chicago Housing Authority v. Lamar, 21 Ill. 2d 362, 172 N.E. 2d 790 (1961).

St. Louis Housing Authority v. Barnes, 375 S.W. 2d 144 (Mo., 1964).

In *United States v. Certain Lands in Town of Highlands*, supra, plaintiff, the United States, moved for an order confirming the report of commissioners of appraisal appointed in the proceeding, an action brought to condemn lands for expansion of the United States Military Academy at West Point. Objection to the report was interposed on the ground that the amount of the award was grossly inadequate. In affirming the determination of the commissioners the Court said:

> It is possible that the long lapse between the time when Congress first publicly evinced an interest in this tract for the uses of the U. S. Military Academy and the commencement of these proceedings thwarted the efforts of the claimant fully to subdivide the tract and dispose of home sites and recreational facilities. I know, however, of no method of compensating an owner for such consequences of Congressional action. Legislative debates or even unfounded rumors may affect market values favorably or adversely. The owner is entitled to no more than the market value of the property taken regardless of the myriad influences which combine to annex that value to the property.

There was assigned as error in *Atchinson, T. & S.F. Ry. Co. v. Southern Pac. Co.*, supra, involving condemnation of lands for the construction of a railroad passenger depot, the action of the trial court in refusing to permit the introduction in evidence of an order of the State Railroad Commission issued some six years prior to condemnation, authorizing and directing the construction of the depot. It was contended by the landowner that such order "stigmatized" the property and caused an area retardation which was a material factor to be considered in determining market value as of the date of filing the complaint in the instant suit. In sustaining the action of the trial court, the California District Court of Appeal said:

> The law does not . . . lend a willing ear to speculation. While appellants may have evidenced change for the worse in the demand for real estate. . . yet the trial court would have permitted an indulgence in unfathomable speculation had it opened the road to the examination of witnesses, using the order . . . as a basis . . . to determine whether there was a slump in the market in this area, and, if so, what it was due to, during that period.

Adverting to the rule denying enhancement in value caused by an improvement, the Court reasoned:

> If the benefits may not be considered, why consider the detriment? A value so derived is too remote and speculative.

The same result was reached in *St. Louis Housing Authority v. Barnes*, supra, a proceeding to condemn lands for a low-rent housing project, without, however, explicit statement of the precise theory or ground of holding. In ruling that the lower court committed no error in refusing to permit to be shown in evidence the depreciative effect of the pendency of condemnation, and in refusing to instruct the jury to consider depreciation in arriving at the amount of just compensation, the Supreme Court of Missouri did not elaborate beyond the statement that:

> If [condemnees] suffered damages for which [condemnor] is liable by reason of the condemnation action, such damages are not part of the damages for the taking and . . . are not an item of just compensation within the meaning of Section 26 of Article I of the Constitution of Missouri.

Chicago Housing Authority v. Lamar, supra, likewise involved condemnation for a low-rent housing project. At issue was whether condemnee was entitled to have market value determined as of a point in time prior to depreciation in value of the subject property that was alleged to have set in by reason of the housing project. In holding that valuation must be determined as of the date of filing of the petition in condemnation without regard to depreciation caused by the project, the Supreme Court of Illinois said that one of the conditions of ownership of property is that it may some day be taken for public use, and that land held in private ownership cannot in legal contemplation be said to be damaged by preliminary procedures looking to future appropriation for a public purpose.

Disallowance of depreciation as element of valuation

The majority of the cases dealing with depreciation adopt the rule that the amount of decrease in value attributable to a public improvement must be excluded from consideration in determining market value as of the time of taking, or, in other words, that value shall be determined without regard to the depreciative effect of the improvement.

United States v. Virginia Electric and Power Company, 365 U.S. 624, 5 L. Ed. 2d 838, 81 S. Ct. 784 (1961).
State Road Department v. Chicone, 158 So. 2d 753 (Fla., 1963).
State v. Sovich, 253 Ind. 224, 252 N.E. 2d 582 (1969).
Lipinski v. Lynn Redevelopment Authority, 355 Mass. 550, 246 N.E. 2d 429 (1969).
Housing & Redevelopment Authority v. Minneapolis Metropolitan Co. 273 Minn. 256, 141 N.W. 2d 130 (1966). [Dictum].
City of Buffalo v. J. W. Clement Company, 28 N.Y. 2d 241, 269 N.E. 2d 895 (1971).
In re 572 Warren Street (Project No. N.Y. 5-103), 58 Misc. 2d 1073, 298 N.Y.S. 2d 429 (1968).
Becos v. Masheter, 15 Ohio St. 2d 15, 238 N.E. 2d 548 (1968).
In re Appropriation of Property of Bunner, 28 Ohio Misc. 165, 276 N.E. 2d 677 (1971).
City of Cleveland v. Carcione, 118 Ohio App. 525, 190 N.E. 2d 52 (1963).

Suit was brought by the Federal government in *United States v. Virginia Electric and Power Company*, supra, to condemn a flowage easement in connection with the acquisition of lands for a dam and reservior project. The only question presented on appeal was as to the proper measure of compensation for the easement. In ruling thereon and giving direction to the District Court on remand, the Supreme Court of the United States 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, § 105 at 447 (2d ed.).

City of Cleveland v. Carcione, supra (a frequently cited decision), was an action to condemn property within an urban renewal area. An ordinance of the City Council of Cleveland authorizing the urban renewal project was passed some three years prior to the institution of suit to condemn the subject property, which was held by its owner for rental purposes. During this period the City had employed a policy of piecemeal acquisition and demolition of buildings within the project area. As inhabitants moved out the entire neighborhood suffered serious deterioration. At the time of the instant suit, rentals derived from the property had fallen off drastically. That the decline in rentals was directly attributable to the renewal project seems not to have been disputed. The question was presented on appeal as to the validity of instructions of the lower court requiring the jury to ascertain value as of the time of trial without exclusion of depreciation caused by the project. In ruling the instructions erroneous, the Court of Appeals said:

> The jury under the instructions ... determined the fair market value of appellant's property as it stood at the time of trial, virtually abandoned, vandalized and badly deteriorated, in the midst of a wasteland. Moreover, it was permitted to view the premises in such a dilapidated state for the purpose of being able to better understand and follow the evidence presented in court describing such condition and surroundings. But the fact remains that the property described by the testimony and viewed by the jury was totally different in condition and surroundings than the property that existed before the City of Cleveland had taken any affirmative steps to effectuate the St. Vincent Renewal Project. Mrs. Carcione's property at that time consisted of buildings in reasonably good condition, fully rented, and located in a built-up urban area with business activities and living conditions in keeping with the economic status of those residing in the area. The mere recitation of these bare facts, it seems to us, demonstrates that the evaluation of her property as it was at the time of the trial was unjust to her. Her property had undergone radical changes for the worse caused by activities carried on to further the very project which prompted the City of Cleveland

> to appropriate it. Yet, under the procedures pursued in the trial court, the appellant was compelled to suffer a substantial financial loss while the City was permitted to obtain her property at a much depreciated value. ...
>
> Under the facts in this case and the law applicable thereto, we conclude that Mrs. Carcione was entitled to an evaluation of her property irrespective of any effect produced upon it by the action of the City in carrying out the St. Vincent Urban Renewal Project. Hence, the standard for measuring the compensation to be awarded her should have been the fair market value of it as it was immediately before the City of Cleveland took active steps to carry out the work of the project which to any extent depreciated the value of the property. 6/

State Road Department v. Chicone, supra, was an action to condemn lands for the construction of I-64. It appeared in this case that the State Road Department of Florida first made public announcement of the proposed alignment of I-64 through the City of Orlando in 1957. The initial proceedings to acquire right-of-way for the construction of this segment of I-64 were instituted in 1957, and suit to condemn the subject lands was brought in 1960. Over objection, appraisal testimony was given by witnesses for the State Road Department which discounted the value of the property as much as 20 percent, to reflect depreciation in value caused by the imminence of condemnation. In holding that reversible error was committed in permitting evidence of value to be given which was based on depreciation caused by the highway project, the Supreme Court of Florida stated:

> The rule advocated by the Department and followed in the trial in the instant case, would permit a condemnor to depreciate property values by a threat of condemnation then take advantage of the depressed value which results by paying the landowner the depreciated value.
>
> This would amount to a confiscation of the owner's property to the extent of the depreciation in value. All of our laws, organic and statutory, are intended to prevent this happening.
>
> ...we conclude that the value of property at the time of taking as depreciated or depressed by the prospect of condemnation is not a proper basis for measure of compensation for the property taken.
>
> Effect can easily be given to this conclusion...by holding simply, as we do here, that compensation shall be based on value of the property as it would be at the time of the taking if it had not been subjected to the debilitating threat of condemnation and was not being taken.

In *City of Buffalo v. J. W. Clement Company*, supra, involving condemnation for an urban renewal project, the New York Court of Appeals, recognizing that "condemnation blight" had seriously affected the value of the property, said:

> In such cases where true condemnation blight is present, the claimant may introduce evidence of value prior to the onslaught of the "affirmative value-depressing acts" . . . of the authority and compensation shall be based on the value of the property as it would have been at the time of the . . . taking, but for the debilitating threat of condemnation.

The courts have on occasion used vigorous language in refusing to allow depreciation caused by an improvement to be considered. See, for example, *State v. Sovich*, supra, and action to condemn lands for a highway project, wherein the Supreme Court of Indiana in ruling adversely to the State's contention that "the trier of fact may properly consider in determining the value of the property being condemned, the decrease in market value occasioned by the same project for which it is necessary to take the property in the first place," stated:

> It is difficult to imagine a more specious argument. If appellant's argument were adopted by this Court it would be a simple matter for any condemnor to depress property values merely by publishing details of the planned project. 7/

By way of recapitulation, it is submitted that it would appear that the rule which does not allow a condemning authority to take advantage of a depression in values brought about by the

threat or imminence of condemnation is better suited to accomplishing substantial justice as between condemnor and condemnee that the contrary rule. The argument that evaluation of depreciation is necessarily unduly speculative seems tenuous in the light of the fact that determination of enhancement is ordinarily deemed within the competence of a jury. The further argument that since enhancement must be denied, logic requires the same result in the converse situation, would seem to have been well met by the Supreme Court of Florida, when it addressed itself to such contention in *State Road Department v. Chicone*, supra, in the language as follows:

> Adoption of a rule or principle does not by implication, inference or analogy constitute an adoption of the converse of such rule or principle.

It does not follow as a matter of logical necessity that because the condemnee cannot benefit from enhancement due to an improvement, the condemnor must be allowed to take advantage of depreciation brought about by the same cause.

Summary and Conclusion

The review of existing case law herein set forth would seem to indicate the following with respect to the feasibility of compliance by the various states with the provisions of 42 U.S.C. 4651(3) relating to exclusion of increase or decrease in value due to the effect of an improvement:

(1) In those states that have adopted the probability of inclusion test no legal problem will be presented in complying with the provisions of the Federal act. In the trial of a condemnation case, little in the way of practical problem should be presented where the taking is for a single unenlarged project. In the case of condemnation for an enlarged project, difficult problems of fact are to be expected; i.e., whether the supplemental taking is for a separate project conceived independently of the original project, or whether it was foreseeable at the outset of the project that it would be extended to include the lands proceeded against. In the situation where public knowledge of the general area of a proposed improvement has led to increment in value of lands in the vicinage, but the exact property to be taken is not known until a later stage in the planning process, the question will be presented for decision whether all increase in value caused by the improvement should be denied, or only that increase which takes place after it becomes evident that certain and definite lands will probably be taken for the project. There is a scarcity of case law in point, but the guidelines laid down in a few recent cases indicate that enhancement should be allowed until such time as it becomes probable that the lands that are the subject of suit are to be included in the project.

(2) No problem of compliance with the Federal act should be presented in any jurisdiction where case law appears to dictate that all enhancement proximately caused by an improvement shall be denied. (In this connection it may be noted that 42 U.S.C. 4651(3) is phrased in the alternative, obtaining with respect to change in value "caused by the public improvement for which such property is acquired, or by the likelihood that the property would be acquired.") Quaere, whether the probability of inclusion test might not be adopted in such jurisdictions, if urged upon the court as the better rule?

(3) In any jurisdiction that has adopted the view that the allowance of enhancement is the more equitable rule, difficulties of compliance with 42 U.S.C. 4651(3) may be encountered. Even more serious difficulties are to be expected in any jurisdiction that has taken (or may take) the position that enhancement is a proper element of valuation which cannot be denied consistent with the constitutional guarantee of payment of just compensation for private property taken for a public use.

(4) In any state having constitutional or statutory provisions, applicable to condemnation by the state and its subdivisions, to the effect that valuation in eminent domain shall be determined "irrespective" of "benefits," "enhancement," etc., the question will be presented whether such language mandates the allowance of enhancement, or whether it requires (or is permissive of) the disallowance of increment in value due to an improvement.

(5) In those states that have elected to adopt the rule announced in *Miller*, the question may be presented as to the operative effect of the "commitment" rule on highway projects. The construction placed by the United States Supreme Court in *Reynolds* on the language used in *Miller*, indicates that the government is "committed" to a highway project at that stage (whenever it may occur) in the planning process where it becomes apparent that certain and definite lands will "probably" be taken for the project. It is evident that unless the government can become "committed" to a project for valuation purposes prior to the completion of the double hearing procedure,

all or virtually all increment in value caused by the project would enure to the condemnee. Such result appears in whole contravention of the plain purpose of 42 U.S.C. 4651(3).

(6) In the case of depreciation due to an improvement, although there is some authority to the contrary, it would appear to be the more equitable rule that the condemnee should not be required to suffer diminution in value brought about by the threat or imminence of condemnation.

(7) A problem of statutory construction will be presented in reconciling harmoniously the mandatory (as opposed to directory) language of 42 U.S.C. 4651(3), relating to exclusion of increase or decrease in value, with the provisions of 42 U.S.C. 4655(1), requiring compliance "to the greatest extent practicable under State law." At the time of writing this paper these statutory provisions have not as yet been examined by the courts and construed *in pari materia*.

V. Bibliography

Table of Cases

Federal Cases

Kerr v. South Park Commissioners, 117 U.S. 379, 29 L. Ed. 924, 6 S. Ct. 801 (1886).
Olson v. United States, 292 U.S. 246, 78 L. Ed. 1236, 54 S. Ct. 704 (1934).
Shoemaker v. United States, 147 U.S. 282, 37 L. Ed. 170, 13 S. Ct. 361 (1893).
United States v. Certain Lands, 180 F. 260 (C.C.R.I., 1910).
United States v. Certain Lands in Town of Highlands, 47 F. Supp. 934 (D.C., N.Y., 1942).
United States v. First Pyramid Life Insurance Company of America, 382 F. 2d 804 (C.A. 8, 1967).
United States v. Miller, 317 U.S. 369, 87 L. Ed. 336, 63 S. Ct. 276 (1943).
United States v. Reynolds, 397 U.S. 14, 25 L. Ed. 2d 12, 90 S. Ct. 803 (1970).
United States v. Virginia Electric and Power Company, 365 U.S. 624, 5 L. Ed. 2d 838, 81 S. Ct. 784 (1961).
United States v. 2,353.28 Acres of Land, 414 F. 2d 965 (C.A. 5, 1969).
United States v. 172.80 Acres of Land, 350 F. 2d 957 (C.A. 3, 1965).

State Cases

Anderson v. State Road Department, 204 So. 2d 899 (Fla., 1967).
Andrews v. State, 9 N.Y. 2d 606, 176 N.E. 2d 42 (1961).
Atchison T. & S.F. Ry. Co. v. Southern Pac. Co., 13 Cal. App. 2d 505, 57 P. 2d 575 (1936).
Becos v. Masheter, 15 Ohio St. 2d 15, 238 N.E. 2d 548 (1968).
Bonaparte v. Baltimore, 131 Md. 80, 101 A. 594 (1917).
Calhoun v. State Highway Department, 223 Ga. 65, 153 S.E. 2d 418 (1967).
Carli v. Stillwater & St. P.R.R., 16 Minn. 260 (1871).
Chicago Housing Authority v. Lamar, 21 Ill. 2d 362, 172 N.E. 2d 790 (1961).
Cincinnati v. Ziegler, 16 Ohio N.P.N.S. 169, 26 Ohio Dec. N.P. 79 (1914).
City of Buffalo v. J. W. Clement Company, 28 N.Y. 2d 241, 269 N.E. 2d 895 (1971).
City of Cleveland v. Carcione, 118 Ohio App. 525, 190 N.E. 2d 52 (1963).
City and County of Denver v. Smith, 152 Colo. 227, 381 P. 2d 269 (1963).
City of Dallas v. Rash, 375 S.W. 2d 502 (Tex. Civ. App., 1964).
City of El Paso v. Coffin, 40 Tex. Civ. App. 54, 88 S.W. 502 (1905).
City of Oakland v. Partridge, 214 Cal. App. 2d 196, 29 Cal. Rptr. 388 (1963).
City of Douglas v. Rigdon, 116 Ga. App. 306, 157 S.E. 2d 66 (1967).
Cole v. Boston Edison Company, 338 Mass. 661, 157 N.E. 2d 209 (1959).
Cook v. South Park Commissioners, 61 Ill. 115 (1871).
Enoch v. Spokane Falls & N. Ry., 6 Wash. 393, 33 P. 966 (1893).
Gate City Terminal Company v. Thrower, 136 Ga. 456, 71 S.E. 903 (1911).
Gibson v. Norwalk, 13 Ohio C.C. 428, 7 Ohio CD 6 (1896).
Giesey v. Cincinnati W. & Z. R.R., 4 Ohio St. 308 (1854).
Gulf, C. & S.F. Ry. v. Brugger, 24 Tex. Civ. App. 367, 59 S.W. 556 (1900).
Guyandotte Valley Ry. v. Buskirk, 57 W. Va. 417, 50 S.E. 521 (1905).
Hard v. Housing Authority of the City of Atlanta, 219 Ga. 74, 132 S.E. 2d 25 (1963).
Housing Authority of City of Decatur v. Schroeder, 222 Ga. 417, 151 S.E. 2d 226 (1966).
Housing Authority v. Title Guarantee Loan & Trust Co., 243 Ala. 157, 8 So. 2d 835 (1942).
Housing and Redevelopment Authority v. Minneapolis Metropolitan Co., 273 Minn. 256, 141 N.W. 2d 130 (1966).
In re Condemnation of Certain Lands for New Statehouse, 19 R.I. 382, 33 A. 523 (1896).
In re 572 Warren Street (Project No. N.Y. 5-103), 58 Misc. 2d 1073, 298 N.Y.S. 2d 429 (1968).
Interstate Water Company v. Adkins, 327 Ill. 356, 158 N.E. 685 (1927).

Lipinski v. Lynn Redevelopment Authority, 246 N.E. 2d 429 (Mass., 1969).
Louisiana Ry. & Nav. Co. v. Xavier Realty, 115 La. 328, 39 So. 1 (1905).
Louisville & N.R. Co. v. Ingram, 12 Ky. L. Rep. 456, 14 S.W. 534 (1890).
Matlow Corporation v. State, 321 N.Y.S. 2d 734 (1971).
McChristy v. Hall County, 140 S.W. 2d 576 (Tex. Civ. App., 1940).
Merced Irrigation District v. Woolstenhulme, 4 Cal. 3d 478, 93 Cal. Rptr. 833, 483 P. 2d 1 (1971).
Moale v. Baltimore, 5 Md. 314, 61 Am. Dec. 276 (1854).
Nichols v. City of Cleveland, 104 Ohio St. 19, 135 N.E. 291 (1922).
Opelousas, G. & N.E.R. Co. v. Bradford, 118 La. 506, 43 So. 79 (1907).
Opelousas, G. & N.E. Ry. v. St. Landry Cotton Oil Co., 118 La. 290, 42 So. 940 (1907).
People, Department of Public Works v. Cramer, 14 Cal. App. 3d 513, 92 Cal. Rptr. 401 (1971).
People v. Miller, 21 Cal. App. 3d 467, 98 Cal. Rptr. 539 (1971).
Portland-Oregon City Ry. v. Penney, 81 Ore. 81, 158 P. 404 (1916).
Prudential Insurance Company v. Central Nebraska Public Power & Irrigation District, 139 Neb. 114, 296 N.W. 752 (1941).
Ranck v. City of Cedar Rapids, 134 Iowa 563, 111 N.W. 1027 (1907).
Re Munson, 29 Hun. 325 (N.Y., 1883).
Rhode Island Hosp. Trust Co. v. Providence County Court House Commission, 52 R.I. 186, 159 A. 642 (1932).
Sanitary District v. Loughran, 160 Ill. 362, 43 N.E. 359 (1896).
Seattle & M. R.R. Co. v. Roeder, 30 Wash. 244, 170 P. 498 (1902).
Smith v. Commonwealth, 210 Mass. 259, 96 N.E. 666 (1911).
Snouffer v. Chicago & N.W. Ry., 105 Iowa 681, 75 N.W. 501 (1898).
Stafford v. City of Providence, 10 R.I. 567, 14 Am. Rep. 710 (1873).
Standard Oil Company v. State, 287 Ala. 143, 249 So. 2d 804 (1971).
State, Department of Highways v. Boles, 240 So. 2d 786 (La. App., 1970).
State, Through Department of Highways v. Martin, 196 So. 2d 63 (La. App., 1967).
State v. Sovich, 253 Ind. 224, 252 N.E. 2d 582 (1969).
State Road Commission v. General Oil Company, 22 Utah 2d 60, 448 P. 2d 718 (1968).
State Road Department v. Chicone, 158 So. 2d 753 (Fla., 1963).
St. Louis Electric Terminal Railway Company v. MacAdaras, 257 Mo. 448, 166 S.W. 307 (1914).
Sunday v. Louisville & N. R.R., 62 Fla. 395, 57 So. 351 (1912).
Trinity River Authority v. Boone, 454 S.W. 2d 258 (Tex. Civ. App., 1970).
United States v. Goodloe, 204 Ala. 484, 86 So. 546 (1920).
Virginia & T. R.R. v. Lovejoy, 8 Nev. 100 (1872).
Weber Basin Water Conservancy District v. Ward, 10 Utah 2d 29, 347 P. 2d 862 (1959).
Williams v. City and County of Denver, 147 Colo. 195, 363 P. 2d 171 (1961).
Woodfolk v. Nashville & C.R.R., 2 Swan 422 (Tenn., 1852).

Law Review Articles

Anderson, W., *Consequence of Anticipated Eminent Domain Proceedings--Is Loss of Values a Factor?*, 5 Santa Clara Lawyer 35 (1964-65).
Dettelbach, T. L., *Just Compensation for Real Estate Condemnation*, 15 Clev.-Mar. L. Rev. 171 (1966).
Glaves, D. W., *Date of Valuation in Eminent Domain: Irreverence for Unconstitutional Practice*, 30 U. Chi. L. Rev. 319 (1963).
McAuliffe, J. W., and Sengstock, F. S., *What is the Price of Eminent Domain? An Introduction to the Problems of Valuation in Eminent Domain Proceedings*, 44 J. Urban L. 185 (1966).
Slavitt, A. D., *Inequities and Injustices of Condemnation Acquisitions*, 40 Connecticut Bar J. 11 (1966).
Wasserman, N., *Procedure in Eminent Domain*, 11 Mercer L. Rev. 245, 282 (1960).
Comment, *Condemnation Procedure--An Argument for Reform*, 29 Fordham L. Rev. 757 (1961).
Comment, *Enhanced Value Resulting From Proposed Improvement--Condemnation*, 15 Mercer L. Rev. 488 (1964).
Comment, *Time for Fixing Damages--Superhighway Construction*, 1 Vill. L. Rev. 105 (1956).
Comment, *Updating the Time of "Taking" in Condemnation Proceedings in Oklahoma*, 4 Tul. L. Rev. 95 (1967).

Miscellaneous

Kupferle, G. M., *Effect of Pre-Condemnation Value Changes on the Time of Taking Rule*, Hwy. Res. Circ. 4, pp. 1-7 (1965).
Highway Research Board, *Condemnation of Property for Highway Purposes; Part I*, Special Report 32 (1958); *Part II*, Special Report 33 (1958); *Part III*, Special Report 59 (1960).
3 Nichols, *The Law of Eminent Domain*, §8.5(2) (rev. 3d ed., 1965).
4 Nichols, *The Law of Eminent Domain*, §12.3151 (rev. 3d ed., 1962).
1 Orgel, *Valuation Under the Law of Eminent Domain*, §98 - §106 (2d ed., 1953).

James, L. R., Annotation, *Depreciation in Value, From Project for Which Land is Condemned, as a Factor in Fixing Compensation,* 5 ALR 3d 901.

Vartanian, P. H., Annotation, *Increment to Value, from Project for which Land is Condemned, as a Factor in Fixing Compensation,* 147 ALR 66.

House Committee on Public Works, *Study of Compensation and Assistance for Persons Affected by Real Property Acquisition in Federal and Federally Assisted Programs,* 88th Cong., 2d Sess. 11, 14 (Committee Print No. 31, Dec. 22, 1964).

1/See, as to administrative interpretation, Circular A-103, dated May 1, 1972, of the Office of Management and Budget, which provides, in part, as follows:

> 8b(2). A State agency's assurances are accompanied by a Statement in which it identifies any of the assurances required by Sections 210 and 305 which it is unable to provide in whole or in part, under its laws. In the event a State agency maintains that it is legally unable to provide all or any part of the required assurances, its statement should be supported by an opinion of the chief legal officer of the State agency. Federal agencies administering federally assisted programs shall adopt procedures setting forth the conditions, if any, in addition to the requirements of this paragraph under which projects will be approved when State agencies cannot fully comply with Section 210 or 305 because of impediments of State law.
>
> . . . .
>
> 8d. Compliance with Sections 301 and 302. A State agency as part of the assurances required by Section 305, shall provide a statement indicating the extent to which it can comply with the provisions of Sections 301 and 302. If the State agency indicates that it is unable to comply fully with any of such policies, its statement shall be supported by an opinion of the chief legal officer of the State agency. State agencies should comply with Sections 301 and 302 if, under State law, compliance is legally possible.
>
> . . . .
>
> 10.5. Federally assisted programs. The head of each Federal agency administering Federal financially assisted programs carried out by State agencies should require that State agencies reimburse owners for necessary expenses as specified in Sections 303 and 304. The head of each Federal agency also should require that all State agencies comply with the provisions of Sections 301 and 302 if compliance is legally possible under State law.

See also FHWA Notice, dated August 11, 1971, relating to compliance with the provisions of Sections 301(3) and 305(1) of Title III of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970.

2/It is to be noted that in *Merced* the trial judge made the determination as to the reasonable probability of inclusion of lands in the project. In *United States v. Reynolds,* 397 U.S. 14, 25, L. Ed. 2d 12, 90 S. Ct. 803 (1970), the issue was squarely raised as to whether it was properly within the province of the court, or the jury, to make determination as to the probability of inclusion of lands in the project. The Supreme Court of the United States, stating that "the matter could be decided either way" went on to say that the provisions of Rule 71 A(h) of the Federal Rules of Civil Procedure disclosed an intent to give the trial judge a broader role in condemnation proceedings than in conventional jury trials, and the Court concluded therefrom "that it is for the judge and not the jury to decide whether the property condemned was probably within the project's original scope." A contrary result was reached in *Standard Oil Company v. State,* 287 Ala. 143, 249 So. 2d 804 (1971), the Court ruling that the determination as to probability of inclusion of lands in the project was a factual question for the jury, and that it was reversible error for the trial judge to have made such determination.

3/Section 29 of Article 16 of the Florida Constitution, relating to payment of just compensation in condemnation, provides that value shall be determined "irrespective of any benefit from any improvement." The effect of similar language as appearing in the constitutions or statutes of other states is considered later under "Effect of Constitutional and Statutory Provisions." Neither the decision in *Sunday v. Louisville & N.R.R.,* supra, nor the decision in *Anderson v. State Road Department,* supra, was made to turn on the construction of this language.

4/Orgel has the following to say with respect to the language used in *Miller.* (Valuation Under Eminent Domain, 2d. ed., Vol. 1, Sec. 101, p. 438):

> . . . we find the language used by the Supreme Court in *United States v. Miller,* that is, when the government "was committed" to the project, of little assistance, since in the case of governments . . . the time between "contemplating," "proposing" and "being committed to" a project is difficult to draw.

5/The cases dealing with depreciation almost uniformly eschew use of the probability of inclusion

APPLICATIONS

The foregoing research should prove helpful to highway administrators, their legal counsels, right-of-way engineers, and advance planning staff. Highway officials are urged to review their right-of-way acquisition programs to determine how this research can effectively be incorporated in a meaningful way. Attorneys should find this paper especially useful in their work as an easy and concise reference document in eminent domain litigation cases.

---

test, and either exclude or include, as the case may be, all depreciation caused by the improvement. Only one case has been found which squarely invokes the foreseeability test. See *Matlow Corporation v. State*, 321 N.Y.S. 2d 734 (1971).

6/The holding of the Ohio Court of Appeals in *Carcione* was expressly approved by the Supreme Court of Ohio in *Becos v. Masheter*, supra. However, the result reached in *Becos* (exclusion of depreciation in determining fair market value) was arrived at by backdating the date of taking. It should be pointed out that the Ohio rule in this respect appears to be *sui generis*. The same result is reached in other cases by leaving the date of taking undisturbed and excluding from valuation as of that date depreciation caused by the improvement. The dissenting opinion filed in *Becos* imputes to the majority opinion, it may be noted, the result of taking from the jury the question whether depreciation occurring subsequent to the backdated time of taking was in fact caused by the improvement.

7/Outside the scope of this paper, but of related interest, are cases in which the issue was presented whether or not the pre-condemnation activities of the condemnor so depreciated the value of the property as to constitute a de facto taking giving rise to the right of inverse condemnation. See *Conroy-Prugh Glass Company v. Commonwealth of Pennsylvania, Department of Transportation*, 298 A. 2d 672 (Comm. Ct., Pa., 1973); *Fram v. City of Boston*, 292 N.E. 2d 356 (Mass., 1973). For a full discussion of the question, see article entitled "Housing Codes, Building Demolition, and Just Compensation: A Rationale for the Exercise of Police Powers Over Slum Housing," 67 Mich. L. Rev. 635, 670-675 (1968) by Daniel R. Mandelker.

HIGHWAY RESEARCH BOARD
NATIONAL ACADEMY OF SCIENCES—NATIONAL RESEARCH COUNCIL
2101 Constitution Avenue Washington, D. C. 20418

ADDRESS CORRECTION REQUESTED

NON-PROFIT ORG.
U.S. POSTAGE
PAID
WASHINGTON, D.C.
PERMIT NO. 42970