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COMMITTEE ACTIVITY

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Department of Legal Studies, Highway Research Board

LAND ACQUISITION
MEMORANDUM #187

187-1 BENEFIT OFFSET IN FEDERAL CONDEMNATION

The Department of Justice, which is responsible for the conduct of Federal condemnation litigation, has adopted the position that the supposed distinction between general and special benefits is of little practical importance and that all benefits should be offset.

This position has been taken in the Justice Department's brief recently filed in the U. S. Court of Appeals for the Fifth Circuit in Cyrill Pokladnik, et al. v. United States of America. That Department intends to advance this position in other cases, in an effort to obtain general adoption in the Federal Courts, and perhaps elsewhere.

> Excerpt from a Brief for the United States, No. 23501, In the United States Court of Appeals for the Fifth Circuit - Cyrill Pokladnik, et al. v. United States of America:
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> C. An attempted distinction between "general" and "special" benefits only obscures, rather than clarifies, the issue. - -

In this case, as in many, the factfinding body actually ascertained compensation by deducting the market value of the remainder, including enhancement from the project, from the market value of the part taken excluding enhancement from the project. Specification of the amount attributed to "severance damage" to the remainder and "special benefits" to the remainder directed by the court and done by the commission was merely a way of breaking down a result for analysis and support. In this sense it is not unlike the real estate expert who relies on recent sales of property in the area to arrive at his estimate of the market value of the property condemned and then breaks down and supports that value by attributing specific amounts to improvements and/or, in the case of farmland, to the different categories of land. The basic principle has frequently been achieved and stated by the courts in terms of permitting the Government to offset against compensation for the part taken the benefit conferred on the remainder by the project for which the land was taken. Bauman v. Ross, 167 U.S. 548 (1897); McCoy v. Union Elevated R. R. Co., 247 U.S. 354 (1918); United States v. River Rouge Co., 269 U.S. 411 (1926); United States v. Miller, 317 U.S. 369 (1943); United States v. Crance, 341 F.2d 161 (C.A. 8, 1965), cert. den., 382 U.S. 815; United States v. Fort Smith River Develop. Corp., 349 F.2d 522 (C.A. 8, 1965); United States v. 2,477.79 Acres of Land in Bell County, 259 F.2d 23 (C.A. 5, 1958). But the principle is the same, no matter how stated.

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As the court stated in Aaronson v. United States, 79 F.2d 139, 140 (C.A. D.C. 1935):

> The owner is entitled to receive, not the exact value of the part taken, but rather to receive the difference between the value of the whole unaffected by the improvement and the value of the remainder in the light of the improvement -- "the loss caused to him by the appropriation" -- and this involves consideration of damages on the one hand and of benefits on the other.

Taken with the language of the Supreme Court in Bauman v. Ross, supra, this is, we believe, a complete answer to appellants' assertion (Br. 6-8) that the market value of the part taken must be paid in cash without regard to any increase in value of the remainder due to the project.1/ This is a necessary corollary to the principle that compensation, measured by market value at the time of taking, does not include an increase in market value due to the project itself. United States v. Miller, supra. Clearly, ascertaining compensation in this way places the owner in at least as good a position pecuniarily speaking as he would have been in had there been no project and, hence, no taking. This satisfies the Fifth Amendment. Olson v. United States, 292 U.S. 246, 255 (1934).

The difficulty with treating the situation in terms of setting off benefits is that the term "benefits" has all too frequently in the cases been qualified with adjectives, such as "direct," "indirect," "special," and "general," with only "direct" and "special" being allowed. The history of the supposed distinction stems from the assessments of benefits by States for public improvements, frequently, but not always, involving condemnation. The Federal Government, except in a very limited circumstance, has never attempted to finance Federal improvements by assessing benefits on adjacent property where no part of the individual's property is condemned. See United States v. Miller, 317 U.S. 369, 376 (1943). It is perhaps due to such assessments by States and to particular limitations in their constitutions (e.g., many allow benefits to be set off only against claims for severance damages) that the supposed distinction between "general" and "special" or "direct" and "indirect" benefits has developed. Many of the older State cases are discussed in Bauman v. Ross, 167 U.S. 548 (1897), disclosing that, although the rule as to benefits has many variants among the States, many do in fact allow the setoff of all benefits from the project, regardless of their nature.

This Court and the Court of Appeals for the Ninth Circuit have attempted to define "general" and "special" and "direct" and "indirect" benefits. United States v. 2,477.79 Acres of Land in Bell County, Texas, 259 F.2d 23 (C.A. 5, 1958); United States v. Alcorn, 80 F.2d 487 (C.A. 9, 1935). Apart from the fact that the State rules vary considerably and the Federal courts have rejected the other applicable State rules (e.g., Limiting the setoff to severance damage),

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1/ Closely related is the rule under the Miller principle that the project is treated as an entity for enhancement purposes, rather than subdivided into its constituent elements. United States v. Crance, 341 F.2d 161 (C.A. 8, 1965), cert. den., 382 U.S. 815; Woodville v. United States, 152 F.2d 735 (C.A. 10, 1946), cert. den., 328 U.S. 842.

such an approach ignores the basic concept of Federal eminent domain. We are dealing with the constitutional provision for just compensation, and the Fifth Amendment requirement is met by the realistic before and after test, without regard to niceties of definitions.

The Supreme Court held in McCoy v. Union Elevated R. R. Co., 247 U.S. 354, 366 (1918), that allowance by a State of a setoff of general benefits did not violate the Fourteenth Amendment. Clearly, the same method of ascertaining compensation satisfies the Fifth Amendment. As the Court held in Bauman v. Ross, 167 U.S. 548, 584 (1897), after discussing the State authorities, some of which allowed the setoff of all benefits:

> The Constitution of the United States contains no express prohibition against considering benefits in estimating the just compensation to be paid for private property taken for the public use; and, for the reasons and upon the authorities above stated, no such prohibition can be implied; * * *.

No distinction can be drawn from this broad holding as to the power to ascertain compensation by the simple before and after test advocated by the Government in the instant case.

Another possible source of the supposed distinction is the fact that the Rivers and Harbors Act, 33 U.S.C. sec. 595, involved in United States v. River Rouge Co., 269 U.S. 411 (1926), contains a positive command that "special benefits" shall be taken into account. Any implication from this statute that a distinction exists between "special" and "general" benefits which would exclude the latter from consideration is unwarranted. To draw such an implication would be a clear example of that all too frequent mistake of drawing a negative inference from particular phrasing. As long ago as 1897, the Supreme Court held in Bauman v. Ross that in ascertaining just compensation for property taken the benefit to the remainder should be taken into account, even in the absence of a statute so providing. See, supra, quoting from the 1829 Key case. The principle that the true measure of compensation in cases where only a part of a tract of land is taken is the market value of the whole, discounting the enhancement from the project, less the market value of the remainder, including the enhancement from the project, without the need of specific authority, was reiterated in United States v. Miller, 317 U.S. 369, 376 (1943). Clearly, none is needed, for we are dealing with the requirements of the Fifth Amendment. As a matter of fact, it is only the validity of the constitutional principle that benefits can be set off against compensation without a statute that permits such statutes to be constitutionally enacted. This is spelled out in Bauman v. Ross, supra. When the Rivers and Harbors Bill was before Congress, that body was aware that an impression (albeit erroneous) was existent in some courts, State1/ and Federal, that in the absence of some statutory command no benefits could be taken into account in ascertaining just compensation of property taken. Although some members of Congress realized that this was an erroneous impression, 33 U.S.C. sec. 595 was obviously enacted in order to assure that the Government

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1/ At the time, Federal condemnation procedure followed State law and it was often difficult to distinguish procedural questions from the substantive Federal law.

was given credit for the benefit received from the project for which the land was taken (56 Cong. Rec. 4666, 65th Cong., 2d sess. (1918).

A careful study of the Supreme Court decisions reveals that there is no constitutional distinction between general and special or direct and indirect benefits. It is apparent that the only concern was to avoid setting off unrealized, speculative and conjectural benefits which might not be benefits at all. See e.g., Bauman v. Ross, 167 U.S. 548 (1897), at 579, where a valid reason for disallowance of a so-called general benefit was "because it is so uncertain in character as to be incapable of present estimation." This is quite in keeping with the equally well-established principle that speculation and conjecture must also be excluded from the ascertainment of just compensation for property taken. Olson v. United States, 292 U.S. 246, 257 (1934); McGovern v. New York, 299 U.S. 363 (1913); United States ex rel. T.V.A. v. Powelson, 319 U.S. 266 (1943). Here no such speculation or conjecture is necessary to ascertain the benefits. Sales of similar property in the area (Statement, supra, demonstrate the fact and support the commission finding as to an increase in value.

When the U. S. Court of Appeals for the Fifth Circuit affirmed the judgment, 378 F.2d 59 (1967), the foregoing position of the Department of Justice was not commented upon. The principal contention by the landowner on this appeal is that the increase in value of a portion of the remainder of his tract was not a special and direct benefit to the tract and should not have been deducted from his compensation. In the alternative, he contended that if the increase in value was a special and direct benefit, it was too speculative to be legitimately taken into account. This U. S. Court of Appeals' decision held that increase in value of the remainder of the tract was properly deducted from condemnees' compensation.

COMMITTEE ON CONDEMNATION AND LAND USE CONTROL

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