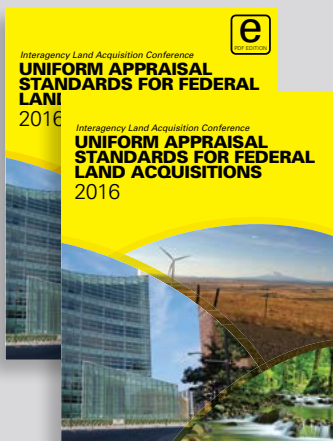


Interagency Land Acquisition Conference

UNIFORM APPRAISAL STANDARDS FOR FEDERAL LAND ACQUISITIONS 2016



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FOREWORD

This is the sixth edition of the Uniform Appraisal Standards for Federal Land Acquisitions, known to many as the Yellow Book. The valuation of real estate in federal acquisitions—serving public purposes that range from national parks and public buildings to infrastructure and national security needs—must satisfy not only appraisal industry standards authorized by Congress, but also the command of the Fifth Amendment to the U.S. Constitution: that no property shall “be taken for public use, without just compensation.” Sound appraisals are vital to ensure that government acquisitions do justice to both the individual whose property is taken and the public which must pay for it. These federal Standards, frequently cited in legislation and court rulings, have guided the appraisal process in the valuation of real estate in federal acquisitions since their original publication by the Interagency Land Acquisition Conference in 1971.

The Attorney General formed the Interagency Land Acquisition Conference in 1968. Since its inception, the Conference has been “fueled by the common purpose and dedication” of its participants—any and all federal agencies that acquire property for public uses. Their shared objectives are to promulgate uniform, fair, and efficient appraisal standards for federal acquisitions; to identify and find the best solutions to the problems incident to acquiring land for public purposes; and to consider all acquisition-related matters with the twin aims of protecting the public interest and ensuring fair and equitable treatment of landowners whose property is affected by public projects.

The Conference is chaired by the Assistant Attorney General for the Environment and Natural Resources Division, Department of Justice, and Andrew M. Goldfrank, Chief of the Division’s Land Acquisition Section, serves as Conference Executive.

In updating the Standards for the first time in 16 years, we incorporated relevant new appraisal methodology and theory, integrated new case law, and ensured appropriate consistency with professional appraisal standards. The content is also restructured and revised for clarity and readability, resulting in practical and understandable guidance for appraisers, attorneys, and the general public. The final text reflects the contributions of the Conference agencies’ representatives, who shared valuable insights and suggestions on the previous Standards and commented on drafts of the sixth edition.

The Appraisal Foundation provided technical assistance in preparing these Standards for publication. To ensure the Yellow Book is easily available to all interested users, The Appraisal Foundation is publishing this 2016 edition in both print and electronic forms under a cooperative agreement with the Department of Justice. A free electronic version is also available on the Department of Justice website.

I commend the sixth edition of the Yellow Book to all readers as the foremost authority on real estate valuation in federal eminent domain, and an indispensable resource for the appraisal of property for all types of federal acquisitions. And, I would like to single out for special recognition appraisal unit chief Brian Holly, MAI, and trial attorney Georgia Garthwaite, of the Department of Justice, who led the effort that resulted in this sixth edition of the Uniform Appraisal Standards for Federal Land Acquisitions, with the assistance of Mr. Goldfrank.

John C. Cruden, Chair
Interagency Land Acquisition Conference
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0. INTRODUCTORY MATERIAL

- 0.1. Purpose.** The purpose of the *Uniform Appraisal Standards for Federal Land Acquisitions* (Standards) is to promote fairness, uniformity, and efficiency in the appraisal of real property in federal acquisitions. Just compensation must be paid for property acquired for public purposes, whether by voluntary purchase, land exchange, or the power of eminent domain. Landowners should be treated equitably no matter which agency is acquiring their land. The use of public funds compels efficient, cost-effective practices.

The same goals of uniformity, efficiency, and fair treatment of those affected by public projects underlie the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (hereinafter Uniform Act).¹ The Uniform Act applies to federal acquisitions as well as many state and local government acquisitions involving federal funds.

In federal acquisitions, the purpose of an appraisal—whether prepared for the government or a landowner—is to develop an opinion of market value that can be used to determine just compensation under federal law. As a result, appraisals in federal acquisitions face different—and often more rigorous—valuation problems and standards than those typically encountered in appraisals for other purposes, such as private sales, tax, mortgage, rate-making, or insurance. These Standards set forth the guiding principles, legal requirements, and practical implications for the appraisal of property in all types of federal acquisitions.

These Standards may need to be modified to meet specific requirements of agency programs, special legislation, or negotiated agreements between agencies and landowners.² Any such modifications to these Standards require specific written instructions from the acquiring agency, as do modifications to comply with court rulings or stipulations between parties in litigation.

Legal questions often arise when applying these Standards to the facts of a specific appraisal assignment, requiring appropriate written legal instructions. Appraisers and agency counsel should work closely to ensure legal instructions not only are legally correct, but also adequately address the valuation problem to be solved. Federal agencies are also encouraged to consult with the U.S. Department of Justice on challenging legal and valuation issues, regardless of whether condemnation is anticipated. Appropriate legal instructions can resolve doubt about the proper method of valuation or the application of particular rules to specific factual situations. If these Standards are properly applied, under sound legal instructions,

¹ The Uniform Act, also called the URA, is discussed throughout these Standards. The Uniform Act addresses two principal areas:

- *Real Property Acquisition* policies set out agency appraisal criteria and negotiation obligations in order to encourage acquisitions by agreement, avoid litigation, ensure consistent treatment for landowners across federal programs, and promote public confidence in federal property acquisition practices.
- *Relocation Assistance* policies are designed to ensure uniform, fair, and equitable treatment of those who are displaced by government programs and projects, and to minimize the hardships displaced persons may face as a result of programs and projects intended to benefit the public as a whole.

Federal regulations direct agencies to implement the Uniform Act in an efficient, cost-effective manner, and specifically reference these appraisal Standards at 49 C.F.R. § 24.103. In turn, these appraisal Standards presume full compliance with all applicable provisions of the Uniform Act and related regulations. The full Uniform Act is codified at 42 U.S.C. §§ 4601 to 4655, and enforced by federal regulations at 49 C.F.R. Part 24.

² Some federal agencies have adopted appraisal and/or appraisal review handbooks or manuals that may modify these Standards to meet other criteria for specific acquisition programs.

the resulting appraisal will be a credible, reliable, and accurate opinion of market value that can be used for purposes of just compensation.

0.2. Governing Principles. Federal acquisitions entail different appraisal standards than other types of property transactions because they involve payment of just compensation. As the measure of just compensation is a question of substantive right “grounded upon the Constitution of the United States,” just compensation must be determined under federal common law—that is, case law.³ Federal case law holds that just compensation must reflect basic principles of fairness and justice for both the individual whose property is taken and the public which must pay for it. To achieve this, an objective and practical standard was required, and the Supreme Court has long adopted the concept of market value to measure just compensation. As a result, just compensation is measured by the market value of the property taken. “To award [a landowner] less would be unjust to him; to award him more would be unjust to the public.”⁴

“ . . . nor shall private property be taken for public use, without just compensation.”

**— U.S. Constitution,
amendment v**

Most of the case law on just compensation stems from the federal exercise of eminent domain, but the resulting practical, objective rules for determining market value have been adopted in numerous federal statutes, rules and regulations, and programs and agency policies. As a result, the federal eminent domain-based valuation requirements reflected in these Standards apply to all types of federal acquisitions.⁵ And because these Standards require appraisers to provide an opinion of market value and not just compensation, they also apply to the appraisal of property for many types of government transactions that require a reliable determination of market value without reference to just compensation, such as land exchanges under the Federal Land Policy and Management Act (FLPMA).⁶

Certain types of transactions may require exceptions to specific valuation rules contained in these Standards—for example, to comply with special legislation—but the underlying principles of just compensation remain in force. In addition, while just compensation does not exceed market value fairly determined, Congress has the power to allow or require the United States to pay more than the just compensation required under the Fifth Amendment. For example, under the Uniform Act, people and businesses displaced by public projects receive moving and relocation expenses in addition to the market-value-based just compensation received for the acquisition.

Just compensation is determined under federal rather than state law. Appraisers must apply federal law throughout the process of opining on market value, recognizing that federal and state laws differ in important respects. Most appraisals for federal acquisitions involve straightforward application of established law to the facts. But some valuation problems require nuanced legal instructions to address complicated or undecided questions of law. These Standards address both routine and complex legal issues that arise in federal acquisitions.

³ *United States v. Miller*, 317 U.S. 369, 380 (1943); see *Marbury v. Madison*, 5 U.S. 137 (1803).

⁴ *Bauman v. Ross*, 167 U.S. 548, 574 (1897).

⁵ Similarly, the appraisal requirements set forth in the Uniform Act regulations “are necessarily designed to comply with . . . Federal eminent domain based appraisal requirements.” 49 C.F.R. app. A § 24.103(a).

⁶ See Sections 1.12 and 4.10 for a discussion of special considerations arising in the appraisal of property for federal land exchanges under FLPMA, 43 U.S.C. § 1716, and other statutes.

Where just compensation is concerned, a reliable process is necessary to ensure a just result. For federal acquisition purposes, the appraisal process must result in opinions of market value that are credible, reliable, and accurate. These federal Standards governing the appraisal process protect against allowing “mere speculation and conjecture to become a guide for the ascertainment of value—a thing to be condemned in business transactions as well as in judicial ascertainment of truth.”⁷

0.3. Scope. These Standards cover the following areas:

- (1) Appraisal Development
- (2) Appraisal Reporting
- (3) Appraisal Review
- (4) Legal Foundations

Section 1: Appraisal Development sets forth the standards that must be followed in developing an appraisal for federal acquisition purposes to ensure a credible, reliable, and accurate valuation that reflects just compensation mandated by the United States Constitution. Section 1 derives from generally accepted professional appraisal standards and federal law. Competent development of an appraisal under these Standards requires an understanding of applicable law, described in Section 4: Legal Foundations and Guidance.

Section 2: Appraisal Reporting presents the content and documentation required for appraisals developed in compliance with these Standards and applicable law. Section 2 also includes a recommended appraisal report format. Agencies may modify these documentation and formatting requirements in certain circumstances to ensure appropriate flexibility to accomplish agency program goals.

Section 3: Appraisal Review addresses technical and administrative reviews of appraisals by appraisers and non-appraisers, and is derived from generally accepted appraisal review standards and federal law and regulations. The purpose of Section 3 is to ensure that appraisals used by the government in its land acquisitions are credible, reliable and accurate and have been conducted in an unbiased, objective, and thorough manner, in accordance with applicable law.

Section 4: Legal Foundations explains the federal law that dictates these appraisal Standards, which apply to appraisals for all federal acquisitions involving the measure of just compensation. Federal case law, cited throughout the section, has long held that market value is normally the measure of just compensation; the rare departures from the *market value* standard are also discussed. Appraisers who make market value appraisals for federal acquisitions must understand and apply federal law in the development, reporting, and review of appraisals in federal acquisitions. Section 4 also includes a discussion of the legal standards that apply to many recurring valuation problems, as well as guidance on specialized appraisal issues that are unique to federal acquisitions.

“[O]ur cases have set forth a clear and administrable rule for just compensation: ‘The Court has repeatedly held that just compensation normally is to be measured by ‘the market value of the property at the time of the taking.’”

— *Horne v. Dep’t of Agric.*, 135 S. Ct. 2419, 2432 (2015) (quoting *United States v. 50 Acres of Land (Duncanville)*, 469 U.S. 24, 29 (1984))

⁷ *Olson v. United States*, 292 U.S. 246, 257 (1934).

As a whole, these Standards aim to encourage uniform, reliable, and fair approaches to appraisal problems, and to ensure consistent, effective practices for evaluating appraisal reports for federal acquisition purposes. Nothing in these Standards is intended to limit the scope of appraisal investigations or to undermine the independence and objectivity of appraisers engaged in providing opinions of market value for just compensation purposes.

With appropriate modifications, these Standards—or rather, portions of these Standards—may be applied to valuations for non-acquisition purposes, such as appraisals for conveyance, sale, or other disposals of federal property. Some rules that must be followed in valuing real property for federal acquisition purposes are inapt or impossible to apply to federal disposals. As discussed in Section 1.2.8, these Standards do not prohibit adapting these valuation rules to address the distinct challenges of appraising federal property for disposal purposes.

0.4. About the Sixth Edition to the “Yellow Book.” In this sixth edition, the *Uniform Appraisal Standards for Federal Land Acquisitions* have been updated to reflect developments in appraisal methodology and theory, case law, and other federal requirements since the fifth edition was published in 2000. These Standards have also been restructured for clarity, convenience, and consistency with professional appraisal standards, as appropriate.

The four-part structure is designed to follow the appraisal process, from development, to reporting, to review, while the final section explains the legal foundations for the appraisal development, reporting, and review requirements, and provides practical examples of how the underlying law applies to actual valuation problems in federal acquisitions. This sixth edition is also broadly consistent with the structure of the current Uniform Standards of Professional Appraisal Practice (USPAP) and federal regulations implementing the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (Uniform Act or URA).

The sixth edition’s structure reflects the evolution of USPAP (which did not exist in early editions of these Standards) as the congressionally authorized minimum standards for the appraisal profession. It also continues the fifth edition’s focus on the practical effects of federal valuation requirements on appraisals in federal acquisitions.⁸ Broadly speaking, this sixth edition incorporates previous editions as follows:

Section 1: Appraisal Development addresses the appraisal process and the scope of work appropriate for appraisals in federal acquisitions, integrating appraisal development topics from the fifth edition’s Parts A, B, C, and D with USPAP’s Scope of Work Rule (created since the fifth edition);

Section 2: Appraisal Reporting incorporates the contents of the fifth edition’s Part A, Data Documentation and Appraisal Reporting Standards;

8 Recognizing that the vast majority of federal acquisitions are accomplished by voluntary means, the fifth edition placed technical appraisal requirements up front. Previous editions led off with discussion of federal law on valuation issues, primarily focusing on eminent domain litigation. To reduce confusion, topics in this sixth edition are organized by number, unlike the lettered subparts in earlier editions. A detailed cross-reference table is included in the Appendix.

Section 3: Appraisal Review incorporates the contents of the fifth edition's Part C, Standards for the Review of Appraisals; and

Section 4: Legal Foundations integrates and updates the topics in the fifth edition's Part B, Legal Basis for Appraisal Standards for Federal Land Acquisitions, and several legal topics previously in Part D as miscellaneous. Of particular note, the fifth edition's lengthy Part D-9, Comparable Sales Requiring Extraordinary Verification and Treatment, is now addressed in Section 1.5.2.4, and the legal foundations for these heightened requirements are explained in Section 4.4.2.4. A verification checklist is also included in the Appendix.

- 0.5. Policy.** In acquiring real property, or any interest in real property, the United States will impartially protect the interests of the public and ensure the fair and equitable treatment of those whose property is needed for public purposes. As a general policy, the United States bases its property acquisitions on appraisals of market value, the standard adopted by the courts as the practical, objective measure of just compensation.

“[I]t is the duty of the state, in the conduct of the inquest by which the compensation is ascertained, to see that it is just, not merely to the individual whose property is taken but to the public which is to pay for it.”

— *Bauman v. Ross*, 167 U.S. 548, 574 (1897)

1. APPRAISAL DEVELOPMENT

1.1. Introduction. These Standards reflect the application of the appraisal process to valuation assignments for federal property acquisitions. The goal of every appraisal prepared under these Standards is a well-supported opinion of market value that is credible, reliable, and accurate. These requirements and rules are set forth to ensure that the appraiser's opinion of market value can be used for purposes of just compensation under the United States Constitution. The appraisal process provides a logical framework for the identification and proper solution of an appraisal problem. The general steps of the appraisal process are:

- Problem identification
- Scope of work
- Data collection
- Data analysis
- Application of approaches to value
- Reconciliation and final opinion of market value
- Report of opinion of market value

The first step in the appraisal process is to *identify the appraisal problem* to be solved. To do so, the appraiser and the client⁹ must address seven critical assignment elements presented in Section 1.2. This discussion summarizes each of the seven elements and in particular addresses the assignment conditions associated with appraisals prepared for federal property acquisitions. The special legal rules and methods required under these Standards are identified and briefly addressed. This section is intended to assist appraisers and agencies in determining the appropriate scope of work for each appraisal assignment.

Section 1 also addresses the next four steps in the appraisal process. Section 1.3 addresses data collection concerning the subject property and the market, respectively. Section 1.4 addresses data analysis, including highest and best use, and larger parcel and market analysis. Section 1.5 addresses the application of the approaches to value including land valuation, the sales comparison approach, the income capitalization approach, and the cost approach. Section 1.6 addresses the reconciliation process and the final opinion of market value. Section 1 also contains appraisal development requirements specific to certain types of federal acquisitions including partial acquisitions, leasehold acquisitions, temporary acquisitions, natural resources acquisitions, inverse takings, and federal land exchanges. Finally, Section 1 provides guidance concerning the use of reports by other experts and the appraiser's responsibilities in litigation.

Section 1 is generally consistent with Standard 1 of USPAP, but provides more in-depth discussion of each topic to address the heightened requirements for appraisals prepared for just compensation purposes. These Standards do not cover all of the valuation problems that

⁹ See Section 1.2.1 for discussion concerning the client.

might be encountered in the appraisal of real property for government acquisitions. Instead, the Standards address the fundamental scope of work issues associated with preparing sound appraisals for federal agencies. Proper application of the scope of work will ensure that federal agencies obtain appraisals that are credible, reliable, and accurate and result in uniform, fair treatment of property owners during the acquisition process.

The acquisition of private property by government agencies can create difficult and complex valuation problems, the solutions to which must be developed with great care. It is critical that in those instances when proposed acquisitions are complex, high value, sensitive, or controversial or when the matter must be referred to the Department of Justice for litigation, the full scope of work described in these Standards must be applied. In other assignments, it is appropriate to modify the scope of work when the acquisition is noncomplex and/or to ensure the cost of the appraisal is consistent with the requirements of the client agency. Under no circumstances may the scope of work result in an appraisal that does not meet the minimum requirements under the Uniform Act.

- 1.2. Problem Identification.** The problem identification process ensures that the appraiser identifies and understands the critical assignment elements associated with developing an appraisal for federal acquisition purposes under these Standards. Federal appraisal requirements are often different than those of private clients, and the appraiser must fully understand and comply with these requirements.

The scope of work¹⁰ must address seven critical assignment elements for each appraisal assignment:

- Client
- Intended users
- Intended use
- Type and definition of value
- Effective date
- Relevant characteristics about the subject property
- Assignment conditions

- 1.2.1. Client.** The client is the party or parties engaging an appraiser in an assignment. The client is the appraiser's primary contact and provides all of the information about the assignment. Most importantly, the client is the entity to whom the appraiser owes confidentiality. The client must be established before the appraiser begins the assignment. Under these Standards, the client is the federal agency that is requesting the appraisal.

- 1.2.2. Intended Users.** All intended users of an appraisal must be identified at the outset of the assignment. Intended users often include not only the client agency but also other federal, state, or local agencies. In appraisals for land exchanges, discussed in more detail in Section 1.12, intended users may include landowners. In appraisals for acquisitions referred to the Department of Justice for condemnation litigation purposes, the intended users may include

¹⁰ THE APPRAISAL FOUNDATION, UNIFORM STANDARDS OF PROFESSIONAL APPRAISAL PRACTICE (USPAP) 17-18 (2016-2017) [hereinafter USPAP]. See Scope of Work Rule and Standards Rule 1-2.

the federal court, landowners, and their counsel. The appraiser must fully identify and understand who the intended users are before initiating the appraisal assignment.

1.2.3. Intended Use. The intended use of the appraisal is one of the most important elements of the problem identification process. In most assignments, the intended use of the appraisal is to assist the client agency in its determination of the amount to be paid as just compensation for the property rights acquired or conveyed. In those cases that have been referred to the Department of Justice for litigation, the intended use will be to assist government’s trial counsel and the court in determining market value for the purpose of just compensation.

1.2.4. Type of Opinion. In all assignments for federal acquisitions under these Standards, the type of opinion to be developed is market value. It is imperative that the appraiser utilize the correct definition of market value. In all federal acquisitions except leasehold acquisitions, appraisers must use the following federal definition of market value:¹¹

Definition of Market Value

Market value is the amount in cash, or on terms reasonably equivalent to cash, for which in all probability the property would have sold on the effective date of value, after a reasonable exposure time on the open competitive market, from a willing and reasonably knowledgeable seller to a willing and reasonably knowledgeable buyer, with neither acting under any compulsion to buy or sell, giving due consideration to all available economic uses of the property.

Appraisers should not *link* opinions of value under these Standards to a specific opinion of exposure time, unlike appraisal assignments for other purposes under USPAP Standards Rule 1-2(c). This requires a jurisdictional exception to USPAP because, as discussed in Section 4.2.1.2, the federal definition of market value already presumes that the property was exposed on the open market for a *reasonable* length of time, given the character of the property and its market.

Similarly, estimates of marketing time are not appropriate for just compensation purposes, and must not be included in appraisal reports prepared under these Standards.¹² While estimates of marketing time may be appropriate in other contexts and are often required by relocation companies, mortgage lenders, and other users, “provid[ing] a reasonable marketing time opinion exceeds the normal information required for the conduct of the appraisal process”¹³ and is beyond the scope of the appraisal assignment under these Standards.

1.2.5. Effective Date. The effective date of value for the assignment is dependent on the intended use, which depends on the legal nature of the acquisition and is further discussed in Section 4.2.1.1. In most direct acquisitions (such as voluntary purchases), the effective date of value will be as near as possible to the date of the acquisition—typically the date of final inspection. In “quick-take” condemnations under the Declaration of Taking Act, the date of value is the earlier of (1) the date the United States files a declaration of taking and deposits estimated compensation with the court, or (2) the date the government enters into possession of the property. In “complaint-only” straight condemnations under the General Condemnation

¹¹ See Section 4.2.1 for the legal basis for this definition.

¹² Marketing time refers to the period of time it would take to sell the appraised property, after the effective date of value, at its appraised value.

¹³ USPAP, Advisory Opinion 7, *Marketing Time Opinions*.

Act in which no declaration of taking is filed, there may be two valuation dates: the first date will likely be the date of final inspection; the second date is when the appraiser is asked to form a new opinion of value (a new appraisal assignment) effective as of the date of trial. In inverse takings, the date of value is the date of taking, typically established by the court. When necessary, the client must provide the appraiser with a **legal instruction** regarding the appropriate effective date of value and the legal basis for the date to be used in the assignment. For assignments in which the effective date of value is prior to the date of the report, the appraiser should consult USPAP guidance regarding retrospective value opinions.¹⁴ The identification of the effective date of value does not preclude consideration of market data after that date. Comparable sales and rentals occurring after the effective date of value may be considered (see Section 4.4.2.4.7). Market data after the effective date of value that confirms market trends identified as of the effective date of value may also be considered.

1.2.6. Relevant Characteristics of the Subject Property. The subject property is the property that is being appraised.¹⁵ In the context of these Standards the term may refer to the property that is the larger parcel. In developing an appraisal under these Standards the appraiser must complete a comprehensive study of the physical, legal, and economic characteristics of the subject property as well as the neighborhood and market in which it is located.

1.2.6.1. Property Interest(s) to be Appraised. It is the responsibility of the acquiring agency to provide the appraiser with an accurate description of the property interest(s) to be appraised in each assignment.

Often, the property interest being acquired and appraised is the fee simple estate. This is so even when the real estate has been divided into multiple estates with different owners. This is an application of the unit rule, which will be discussed in greater detail in Section 1.2.7.3.2 and 4.2.2. Federal agencies can also acquire something less than the fee simple interest in property, for example by excluding easements for roads and utilities, mineral rights, water rights, or mineral leases. Agencies can also acquire partial interests such as permanent and temporary easements, rights of entry, and leaseholds. The appraiser must fully understand the nature of the estate(s) to be acquired, and request **legal instructions** if clarification is needed, for each assignment.

1.2.6.2. Legal Description. It is the responsibility of the agency to provide the appraiser with an accurate legal description of the subject property prior to initiating the assignment. If the assignment is a partial acquisition, the appraiser should receive both a legal description of the larger parcel and a legal description of the remainder property, or alternatively, a legal description of the area to be acquired and/or encumbered. Since the larger parcel is determined by the appraiser as part of the highest and best use analysis, it is possible that a legal description for the larger parcel must be developed at that point in the appraisal development process.

The appraiser should verify the legal description (1) on the ground during a physical inspection of the property; (2) with the owner of the property (if possible); (3) by comparing it with aerial or other maps available in city, county, or other governmental offices; and (4) by comparing it

¹⁴ USPAP, Advisory Opinion 34, *Retrospective and Prospective Value Opinions*.

¹⁵ *Subject Property*, THE DICTIONARY OF REAL ESTATE APPRAISAL (6th ed. 2015).

with public records in the recorder's, auditor's, assessor's, tax collector's, or other appropriate city or county offices. If the appraiser discovers a significant error or inconsistency, the appraiser should consult the client for clarification before proceeding with the appraisal.

- 1.2.6.3. Property Inspections.** The appraiser must personally inspect the subject property in every assignment. Appraisers should recognize that they may have only one opportunity to physically inspect the property and should ensure that they have collected all information required to identify all property characteristics (land and improvements) that influence value.

In partial acquisitions in which the appraiser's inspection precedes the acquisition, the appraiser should request that the agency stake the portion(s) of the property to be acquired before the inspection so that the impact of the acquisition on the remainder can be visualized. If the appraiser's inspection occurs after construction of the government's project begins (most commonly in Declaration of Taking cases), the appraiser must learn about the property as it existed before the taking to ensure that the property characteristics influencing value before the taking are properly accounted for.¹⁶ In acquisitions of such large or inaccessible properties that a physical on-the-ground inspection may be impossible or not useful, the client may modify the scope of work to allow for an aerial inspection of the property.

In most assignments, the appraiser should also conduct a physical inspection of all properties used as sales or rental comparables. The level of detail of these inspections is dependent on the complexity of the appraisal problem to be solved. Physical inspection of all properties used as sales or rental comparables is required for any appraisal being prepared for the U.S. Department of Justice for litigation purposes.

- 1.2.6.4. Contacting Landowners.** During the course of inspecting the subject property, the appraiser is expected to meet with the property owner or, in the owner's absence, the owner's agent or representative. If a property owner is represented by legal counsel, all owner contact and property inspections must be arranged through the owner's attorney, unless the attorney specifically authorizes the appraiser to make direct contact with the owner. Owners are generally a prime source of detailed information concerning the history, management, and operation of the property.

Under the Uniform Act, the owner or the owner's designated representative must be given an opportunity to accompany the acquiring agency's appraiser during the appraiser's inspection of the property.¹⁷

- 1.2.7. Assignment Conditions.** In developing an appraisal under these Standards, appraisers must understand the special assignment conditions associated with the valuation of property being acquired by federal agencies. These special assignment conditions include the use of instructions, hypothetical conditions, extraordinary assumptions, and jurisdictional exceptions from USPAP as well as the special rules and methods required in these appraisals.

¹⁶ J.D. EATON, REAL ESTATE VALUATION IN LITIGATION 272-73 (2d ed. 1995) [hereinafter EATON].

¹⁷ 42 U.S.C. § 4651(2).

1.2.7.1. Instructions, Hypothetical Conditions, Extraordinary Assumptions. Application of these Standards may require instructions from the acquiring agency. For example, agency instructions can provide clarification about the legal description of the property to be appraised and/or the property rights being acquired. Agency instructions that result in assumptions, hypothetical conditions, or extraordinary assumptions that impact the appraisal process or the appraisal results should be carefully considered before being issued. An appraiser cannot make an assumption or accept an instruction that is unreasonable or misleading, nor can an appraiser make an assumption that corrupts the credibility of the opinion of market value¹⁸ or alters the scope of work required by the appraiser's contract. For example, it is improper (unless specifically instructed otherwise) for an appraiser to make an assumption that the property being appraised is free of contamination when there is evidence from the property inspection or the past use of the property that contamination may exist. Instructions should always be in writing, retained in the appraiser's workfile, and included in the addenda of the report.

Hypothetical Conditions. "A hypothetical condition¹⁹ may be used in an assignment only if:

- use of the hypothetical condition is clearly required for legal purposes, for purposes of reasonable analysis, or for purposes of comparison;
- use of the hypothetical condition results in a credible analysis; and
- the appraiser complies with the disclosure requirements set forth in USPAP for hypothetical conditions."²⁰

The appraiser must always consult with the client and/or counsel before employing a hypothetical condition. If utilization of a hypothetical condition is required by the facts or nature of the acquisition, then written **legal instructions** must be provided to the appraiser and included within the appraisal report. The appraiser must also comply with USPAP requirements regarding disclosure and impact on the value conclusion.²¹

Extraordinary Assumptions. "An extraordinary assumption²² may be used in an assignment only if:

- it is required to properly develop credible opinions and conclusions;
- the appraiser has a reasonable basis for the extraordinary assumption;
- use of the extraordinary assumption results in a credible analysis; and
- the appraiser complies with the disclosure requirements set forth in USPAP for extraordinary assumptions."²³

18 See Section 4.4 (Valuation Process).

19 "Hypothetical conditions are contrary to known facts about physical, legal, or economic characteristics of the subject property; or about conditions external to the property, such as market conditions or trends; or about the integrity of data used in an analysis." USPAP, Definitions, 3.

20 USPAP, Comment to Standards Rule 1-2(g), 19.

21 USPAP, Standards Rule 2-2(a)(xi), (b)(xi), 25, 27.

22 "Extraordinary assumptions presume as fact otherwise uncertain information about physical, legal, or economic characteristics of the subject property; or about conditions external to the property, such as market conditions or trends; or about the integrity of data used in an analysis." USPAP, Comment to Extraordinary Assumption, 3.

23 USPAP, Comment to Standards Rule 1-2(f), 19.

It is improper for an appraiser to classify conclusions reached after investigation and analysis as assumptions. For example, after proper investigation and analysis, an appraiser can *conclude* that a probability of rezoning for the subject property exists, but it would be improper to *assume* such a probability. The appraiser must also comply with USPAP requirements regarding disclosure and impact on the value conclusion.

Circumstances arise in which a **legal instruction** is necessary to properly complete the appraisal assignment. Examples of situations in which a **legal instruction** may be required include: unity of title questions in a larger parcel analysis, scope of the government's project questions, compensability of damages questions, special benefits questions, and effective date of value questions. Resolving questions such as these is a proper role for agency counsel (and Department of Justice trial attorneys) and appraisers must follow their guidance. In situations where the legal outcome is uncertain, counsel may direct the appraiser to develop a dual premise appraisal.

1.2.7.2. Jurisdictional Exceptions. While these Standards generally conform to USPAP,²⁴ in certain instances it is necessary to invoke USPAP's Jurisdictional Exception Rule to comply with federal law relating to the valuation of real estate for just compensation purposes. Areas of these Standards that preclude compliance with USPAP and therefore require invoking the Jurisdictional Exception Rule are briefly discussed here.

USPAP's Jurisdictional Exception Rule simply provides that "[i]f any applicable law or regulation precludes compliance with any part of USPAP, only that part of USPAP becomes void for that assignment." Further, a **Comment** in the Jurisdictional Exception Rule states, in part, "When an appraiser properly follows this Rule in disregarding a part of USPAP, there is no violation of USPAP."²⁵

As made clear below, the conflicts between these Standards and USPAP that require invocation of USPAP's Jurisdictional Exception Rule are limited and supported by clearly established federal law, which is further discussed in Section 4. The Jurisdictional Exception Rule should never be invoked lightly or without reference to the overriding federal law, rule, or regulation that requires it. USPAP and these Standards require full and prominent disclosure to avoid misleading intended users (or even casual readers) of the appraisal report.

While these Standards are not *law* in and of themselves, they are based on, and describe, federal law (including case law, legislation, administrative rules, and regulations). These Standards have also been specifically incorporated by reference into a number of statutes and regulations, including the regulations that implement the Uniform Act.²⁶ It is clear that the deviations between the requirements of these Standards and USPAP noted below fall under

²⁴ For purposes of this discussion, the 2016-2017 edition of USPAP has been used. Appraisers are cautioned that USPAP changes frequently and, thus, additional jurisdictional exceptions to USPAP may be required.

²⁵ USPAP, Jurisdictional Exception Rule, 16.

²⁶ 49 C.F.R. § 24.103; *see, e.g.*, 113 Stat. 1693 § 4(b), (Pub. L. No. 106-138); 112 Stat. 879 § 1(c), (Pub. L. No. 105-208); 112 Stat. 2681 § 357(1), § 605(a)(3), (Pub. L. No. 105-277); 110 Stat. 4093 § 304(c)(4)(A) (Pub. L. No. 104-333); 106 Stat. 2112 § 7(b) (Pub. L. No. 102-415); 106 Stat. 2258 § 2(d)(2)(A) (Pub. L. No. 102-453); 105 Stat. 1150 § 8126(a) (Pub. L. No. 102-172); 102 Stat. 1086 § 3(a) (Pub. L. No. 100-409), amending 43 U.S.C. § 1716; 100 Stat. 4274 § 8(o) (Pub. L. No. 99-663); 36 C.F.R. § 254.9; 43 C.F.R. § 2201.3.

USPAP's Jurisdictional Exception Rule; the legal authority justifying these exceptions consists of these Standards and the federal case law, legislation, and federal regulations upon which these Standards are based.

Linking Estimate of Value to Specific Exposure Time. Section 1.2.4 provides that the appraiser shall not *link* an opinion of market value for federal acquisition purposes to a specific exposure time. The legal basis for this jurisdictional exception to USPAP Standards Rule 1-2(c) and may be found in Section 4.2 of these Standards.

Consideration of Land Use Regulations and Anticipated Public Projects. Section 1.2.7.3.3 of these Standards provides that the appraiser disregard any changes in a property's neighborhood brought about by the government's project. Section 1.4.3 further instructs appraisers to disregard recent rezoning (or the probability of rezoning) of the subject property if such action was the result of the government's project. Section 4.3.2.4.1 (Exceptions, under Zoning and Permits) explains the legal basis for these instructions. These instructions are contrary to USPAP Standards Rule 1-3(a), which requires appraisers to identify and analyze the effect on use and value of existing land use regulations and probable modifications thereof, and to USPAP Standards Rule 1-4(f), which requires appraisers to analyze the effect on value of anticipated public improvements located on or off site. Therefore, the instructions to appraisers in these Standards in this regard are considered jurisdictional exceptions.

Specific Legislation and Regulations. Each land acquisition agency has its own rules and regulations relating to its land acquisition activities. While all of these rules and regulations work from a base of the Uniform Act and its implementing regulations, specific agency program activities sometimes make it necessary to adopt rules and regulations that are, or may be construed to be, contrary to USPAP.

Also, it is not uncommon for Congress to enact specific legislation relating to the acquisition of a specific property or properties to be acquired for a specific public project. In some instances, adherence to the provisions of that specific legislation may require the appraiser to invoke USPAP's Jurisdictional Exception Rule and/or prepare an appraisal under a hypothetical condition or extraordinary assumption. In such instances, it is the agency's responsibility to advise the appraiser of the special conditions under which the appraisal is to be conducted, of the specific law requiring the invocation of USPAP's Jurisdictional Exception Rule, and, if applicable, of the hypothetical condition or extraordinary assumption.

Any time appraisers confront a potential conflict between USPAP and these Standards or the client's instructions, they should always analyze the apparent conflict and avoid invocation of USPAP's Jurisdictional Exception Rule whenever possible. Often, these Standards and the agency's special appraisal instructions do not require a jurisdictional exception, but rather merely that the appraiser conduct an appraisal under a hypothetical condition or by adopting an extraordinary assumption.

1.2.7.3. Special Rules and Methods. An important aspect of assignment conditions under these Standards is compliance with the special rules and methods that apply to the development of

appraisals of market value for federal acquisition purposes. These special rules and methods are summarized briefly below, and explained in greater detail throughout these Standards. The legal foundations for these rules are found in the appropriate sections of Section 4 (Legal Foundations).

1.2.7.3.1. Larger Parcel. Essential to the appraiser’s conclusion of highest and best use is the determination of the larger parcel.²⁷ The appraiser must make a larger parcel determination in every appraisal conducted under these Standards, even in minor partial acquisitions in which the appraiser is instructed not to do a complete before and after appraisal.

1.2.7.3.2. Unit Rule. There are several aspects of the unit rule that are important for appraisers to understand in developing appraisals under these Standards. The unit rule requires valuing property as a whole rather than by the sum of the values of the various interests into which it has been carved—such as lessor and lessee, or life tenant and the holder of the remainder. This requirement holds true in circumstances where the physical components of the property are held under different ownership such as the surface estate, mineral rights, water rights, or timber. Even when the physical components of a property are under the same ownership, it is improper to separately value the various components (improvements, minerals, standing timber, crops, and land) and then add them up. This procedure results in an improper summation or cumulative appraisal, which is inconsistent with both federal appraisal standards and USPAP.²⁸

1.2.7.3.3. Government Project Influence and the “Scope of the Project” Rule. Any increase or decrease in the market value of real property prior to the date of valuation caused by the government project for which the property is being acquired must be disregarded in developing the appraisal. Under federal law, valuations for just compensation purposes must disregard any government project influence on a property’s market value once it is within the scope of the government’s project. The resulting scope of the project rule, when properly applied, ensures fair results for both landowners and the public, as discussed in Section 4.5.

Proper application of the scope of the project rule is complex, and virtually always requires a legal instruction.

Simply directing appraisers to follow these Standards is not a sufficient legal instruction for purposes of the scope of the project rule. See Section 4.5.

The scope of the project rule applies only to changes in value *attributable to the government’s project*; it does not allow an appraiser to disregard changes in value attributable to other factors. For this reason, changes in value prior to the date of valuation due to physical deterioration within the landowner’s reasonable control must be considered.

In partial acquisitions, the scope of the project rule typically excludes consideration of government project influence on the value of the larger parcel before the acquisition, and includes consideration of government project influence on the value of the remainder after the acquisition.²⁹

²⁷ As discussed in Section 4.3.3, the larger parcel, for purposes of these Standards, is defined as that tract or those tracts of land that possess a unity of ownership and have the same, or an integrated, highest and best use. Elements of consideration by the appraiser in making a determination in this regard are contiguity, or proximity, as it bears on the highest and best use of the property, unity of ownership, and unity of highest and best use.

²⁸ USPAP, Standards Rule 1-4(e).

²⁹ See Sections 4.5 and 4.6 (especially 4.6.1, 4.6.2, and 4.6.3).

Because the scope of the project rule involves interrelated factual and legal questions, the appraiser must request appropriate **legal instruction** if there is evidence the government's project affected the market value of the property being appraised.³⁰ The appraiser may be asked to gather and/or analyze data to inform the legal analysis. Counsel (or the Court) will instruct the appraiser as to (1) *whether* the scope of the project rule applies; (2) *how* the rule must be applied to the specific property under appraisal; and, if applicable (3) *when* the scope of the project rule applies, i.e., the date as of which the rule is triggered. As discussed in Section 4.5, these legal instructions are the criteria the appraiser must follow in determining the fair market value of the property. As with other complex legal questions, counsel may direct the appraiser to perform a dual-premise appraisal if the legal outcome is uncertain.³¹

1.2.7.3.4. Before and After Rule. In partial acquisitions, these Standards require application of the before and after rule, also known as the federal rule, in which the appraiser estimates both the market value of the larger parcel before the government's acquisition and the market value of the remainder property after the government's acquisition.³² Requiring this method of valuation allows acquiring agencies, the Department of Justice, and the courts to calculate a reasonable measure of compensation by deducting the appraiser's estimated remainder or after value from the appraiser's estimate of the larger parcel's before value. The result of this procedure is a figure that includes the value of the property acquired as well as any compensable damages and/or special benefits to the remainder property.

Appraisers should note that these are two separate appraisals within the same assignment and require the appraiser to perform a new analysis and valuation of the remainder after the acquisition.

1.2.7.3.5. Damages. Because damage to the remainder is automatically included in the before and after valuation, damages are not separately appraised in federal acquisitions. However, to properly estimate the value of the remainder after the acquisition, appraisers must understand the concept of damages for federal acquisition purposes. The legal terminology associated with damages is confusing, perhaps because the same terms have been applied to different concepts under federal and state laws. Under federal law, damage to a property's market value is either compensable and must be considered, or non-compensable and must be disregarded.³³ The term *severance damages* has been used to describe those damages for which the United States must pay compensation. The term *consequential damages* has been used to describe damages for which the United States is not obligated to pay compensation. For the purposes of these Standards and to reduce confusion, appraisers should use the term compensable rather than *severance* and non-compensable instead of *consequential*. Further discussion regarding the proper development of appraisals concerning partial acquisitions is found in Section 1.7.

³⁰ See Section 4.5. If there is no evidence the government's project affected the market value, the scope of the project rule does not apply. *See id.*

³¹ See Section 1.2.7.

³² See Section 4.6.1.

³³ As discussed in Section 4.6.2, the United States reimburses landowners for many types of non-compensable damage through administrative payments under the Uniform Act. These statutory benefits to persons and businesses affected by federal acquisitions are separate from, and in addition to, just compensation paid for the property acquired.

1.2.7.3.6. Benefits. Broadly, benefits are positive effects on market value that result from the public project for which the property was acquired. There are two categories of benefits for federal acquisition purposes: direct (special) benefits, which must be offset against total compensation, and general (indirect) benefits, which must be ignored. As with damages, whether a benefit is general or direct is a mixed fact/law question that requires a **legal instruction**.

1.2.8. Scope of Work. A full understanding of the critical assignment elements discussed above is essential to a proper scope of work that will enable appraisers to solve the appraisal problem they have been hired to solve. It is ultimately the appraisers' responsibility to discuss these critical elements with the client at the time they are engaged to perform the assignment to ensure the resulting appraisal is credible, reliable, and accurate. The scope of work should reflect the complexity of the property and the market. The intended use and intended users are also critical factors that will impact scope of work decisions.

It is recognized that federal agencies may use (or are directed by statute or other authority to use) these Standards outside the realm of acquisitions/exchanges (for sales or conveyances of federal land, leases, and fee determinations). In these situations, the scope of work may be modified. For example, some of the special rules and methods, including the larger parcel analysis and the before and after methodology, may not apply in these appraisal assignments. Additional hypothetical conditions related to highest and best use and ownership may be required as well. The protection of the public trust remains paramount and must be the foundation that appraisers and client agencies operate from when making these determinations.

1.3. Data Collection. As discussed in Section 1.2 (Problem Identification), the starting point for developing an appraisal under these Standards is the legal description of the property to be acquired and the property rights to be appraised. All of the information concerning the characteristics of the land and improvements that influence the value of the subject property must be collected by the appraiser during the process of property inspection and market research.

1.3.1. Property Data.

1.3.1.1. Land. In the development of the appraisal, the appraiser must collect and properly analyze data about the subject property. The appraiser must identify all characteristics that impact value, which may include access and road frontage, topography, soils, vegetation (including timber and crops), views, land area and shape, utilities, mineral deposits, water rights, and easements or other encumbrances. The presence of hazardous substances should be considered by appraisers in accordance with the assignment conditions.

1.3.1.2. Improvements. The appraiser must collect and properly analyze data about all improvements located on the subject property. This includes building dimensions; square foot measurements; chronological and effective ages; type and quality of construction; present use and occupancy; interior finishes; type and condition of the roof; type and condition of mechanical, electrical, and plumbing systems; and dates of any significant remodeling or renovations. The appraiser must identify and properly calculate the appropriate method of

measurement used in determining rentable areas. In addition, the appraiser must identify the type, quality, and condition of all site improvements, including fencing, landscaping, paving (both roadways and parking areas), irrigation systems, and domestic and private water systems.

Questions regarding whether an item is a fixture (real estate) or equipment (personal property) must be referred to legal counsel for clarification. In making this referral, appraisers should bear in mind that the determination of whether an item is a fixture or equipment, for federal acquisition purposes, may not always be consistent with laws of the state in which the property is located.³⁴ In those instances where specialty fixtures are encountered or when the fixtures will represent a substantial portion of the property's value, consideration should be given to the retention of a fixture valuation specialist.³⁵

1.3.1.3. Zoning and Land Use Controls. Zoning is a factor to be considered in evaluating property. Accordingly, if the property to be appraised is subject to zoning, the appraiser must identify the applicable restrictions and interpret the impact of such restrictions on the utility and value of the subject property. If zoning is uncertain, **legal instruction** may be required. In selecting comparable sales for use in the appraisal, the appraiser should select those sales that have the same or similar zoning as the property being appraised.³⁶

The appraiser must consider not only the use restrictions of the zoning ordinance, but also other provisions of the zoning ordinance that may affect value. Examples include lot area requirements, building setback requirements, floor/area ratios, lot coverage ratios, off-street parking, landscaping requirements, height limitations, treatment of preexisting nonconforming uses, and treatment of uses that became nonconforming after adoption of the zoning ordinance. If the appraisal involves a partial acquisition, the appraiser must consider the effect of the zoning provisions on both the larger parcel and the remainder property.

Special care must be taken to determine the effect of a zoning ordinance on a remainder property that has been converted to a nonconforming use by the government's partial acquisition. Some ordinances have specific provisions to reclassify or "grandfather in" properties that have become nonconforming by reason of a partial acquisition by a governmental agency. Other ordinances contain no mechanism for converting a property that has become nonconforming after adoption of the zoning ordinance into a conforming property or classifying it as a preexisting nonconforming use. Penalties for nonconformity can be severe under such circumstances.

The appraiser must consider not only the effect of existing land use regulations, but also the effect of reasonably probable modifications of such land use regulations,³⁷ such as what impact on value any probability of a rezoning of the subject property might have. Although an appraiser might conclude that a property could be put to a more profitable highest and best use if it were zoned differently, this does not in itself suggest that a probability of rezoning exists.

³⁴ See Section 4.1.

³⁵ See Section 1.13.

³⁶ See Sections 4.3.2.4 (Zoning and Permits), 4.4.2.1 (Comparability), and 4.4.2.4.5 (Contingency Sales).

³⁷ See Section 4.3.2.4; see also USPAP, Standards Rule 1-3(a).

An investigation of the probability of rezoning should include:

- interviews of zoning administrators and members of the legislative body that make final zoning determinations;
- reviews of all rezoning activity of nearby property (both approvals and denials), land use patterns in the neighborhood (and any recent changes), physical characteristics of the subject and nearby properties, neighborhood growth patterns, and land use planning document provisions;
- investigation of neighborhood attitudes concerning rezones;
- determination of the age of the zoning ordinance; and
- analysis of sales of similar property to determine whether the sale prices reflect anticipated rezoning.

If the probability of a rezoning is impacted, either positively or negatively, by the government project for which the subject property is being acquired, such impact must be disregarded under the scope of the project rule.³⁸ In partial acquisitions, the probability of rezoning must be separately analyzed in regard to the larger parcel before acquisition, and the remainder property after acquisition. If the remainder property has a greater probability of rezoning, there may be a direct benefit to the property that must be offset against the total;³⁹ if such probability has been diminished, a compensable damage may have occurred.⁴⁰

In addition to zoning, the appraiser must consider the impact of other land use regulations on the utility and value of the subject property. These land use regulations may be of local, state, regional, or national origin. Many common land use regulations that may have an impact on property value are listed in the sidebar. The client agency should advise the appraiser of any special or unique land use regulations it has identified that may affect the value of the property.

Common land use regulations that can affect market value:

- building codes
- health code regulations
- subdivision regulations
- development moratoria
- other development restrictions
- environmental impact statements
- shorelines management requirements
- coastal zone management
- flood plain management regulations
- comprehensive land use plans
- mining regulations
- timber harvesting regulations
- wetland regulations
- open space requirements
- endangered species protections
- noise, air, or water pollution controls
- hazardous or toxic waste controls

1.3.1.4. Use History. In developing the appraisal, the appraiser must identify the purpose for which the improvements were designed and the dates of original construction and major renovations, additions, and/or conversions. This is particularly important for properties located in transitional areas (such as a residential neighborhood being converted to higher density residential and commercial uses) or special-use properties (such as church buildings converted to a commercial or residential use). The appraiser should identify a 10-year history of the use and occupancy of the property, if available. Past uses of the property may suggest historical contamination by hazardous substances.

³⁸ See Section 4.5.

³⁹ See Section 4.3.3.

⁴⁰ See Section 4.3.4.

1.3.1.5. Sales History. Since any recent, unforced sale of the subject property can be the best evidence of its value, it is important to collect data on all sales of the property for the 10 years prior to the effective date of value.⁴¹ Any offers to buy or sell the subject property should also be identified and evaluated if available. If no sale of the property has occurred in the past 10 years, the appraiser shall identify the most recent sale of the property, whenever it occurred.

These Standards require a 10-year sales history—longer than that required in appraisals for many other purposes—for the reasons discussed in Section 4.4.2.

Information to be identified and reported under Section 2 shall include name of the seller, name of the buyer, date of sale, price, terms, and conditions of sale.⁴² As part of this process, the appraiser should verify the information with a party to the transaction and determine whether the transaction met the conditions required for a comparable sale under Section 1.5.2.1.

1.3.1.6. Rental History. The appraiser must collect historical rental or lease history of the property for at least the past three years, if this information can be ascertained. All current leases should be identified and information collected, including: the date of the lease, name of the tenant, rental amount, term of the lease, parties responsible for property expenses, and other lease provisions that impact whether the lease reflects market rent.

1.3.1.7. Assessed Value and Annual Tax Load. The appraiser must collect all information related to the current assessment and dollar amount of real estate taxes. If assessed value is statutorily a percentage of market value, determine the percentage. If the property is not assessed or taxed, the appraiser should collect all necessary information to support an estimate of the assessment and the tax rate to support an estimate of the dollar amount of tax. In some jurisdictions, certain types of property may be assessed based on *current use* rather than *highest and best use*. These programs often relate to farmlands, timberlands, and open space; to be eligible, owners may have to agree to leave the property in its existing use for a certain period of time.⁴³ In such situations, the appraiser should collect the data necessary to support both the current assessed value and taxes for the property's existing use and the estimated assessed value and tax load for the property at its highest and best use.

1.4. Data Analysis. A well-supported market analysis is a critical element in every appraisal prepared under these Standards. The data and analysis developed in this process are fundamental to the highest and best use and the larger parcel analyses that follow. The area and neighborhood analysis leads directly to a more detailed marketability study focused on the market characteristics of the subject property.

Market decides the use. Use determines value.

⁴¹ In comparison, USPAP requires a three-year sales history, while the Uniform Act requires at least a five-year sales history.

⁴² Terms and conditions of sale cannot, of course, conclusively be determined from the public record. Therefore, appraisers should confirm the sales of the subject property with one of the parties to the transaction.

⁴³ Many of these programs require owners to pay back taxes and a substantial penalty if land is converted from its existing use before the agreed time period. These back taxes and penalties become an encumbrance on the land when it is converted to an alternate use. However, since appraisers should estimate the market value of property as if free and clear, the indebtedness, or potential indebtedness, imposed under these programs is not to be considered by the appraiser in estimating the property's market value.

1.4.1. Area and Neighborhood Analysis. In developing an area and neighborhood analysis, the appraiser must identify the characteristics of the area or neighborhood that directly influence the subject property. These data (demographic and economic) should include only the information that directly affects the appraised property, together with the appraiser's conclusions as to significant trends. The use of "boilerplate" or general demographic and economic data is unnecessary and should not be included unless the specific data directly impacts the current market value of the subject property. As discussed in Section 4.6 and Section 1.2.7.3.3, the appraiser must disregard changes in the neighborhood brought about by the government's project for which the subject property is being acquired. This specific standard regarding government *project influence* requires a jurisdictional exception to USPAP Standards Rule 1-4(f).

1.4.2. Marketability Studies. In complex or unusual appraisal problems, a marketability study may be required as part of the scope of work. Marketability studies are often required for appraisals of properties located in transitional areas, properties that contain special-use improvements, or properties for which the highest and best use is unclear without in-depth study. In acquisitions referred to the U.S. Department of Justice, a marketability study will be required.

A marketability study should include a detailed analysis of the subject property and its economic environment. This should include an analysis of the potential physically possible and legally permissible uses of the subject property and its competitive position within the market. A detailed supply and demand analysis should be developed for the various uses possible for the subject property. In appraisals of properties with income producing improvements, the marketability study should identify the quality class of the improvements and the existing and future competitive supply of similar improvements. Vacancy levels in the market, rental rates, and operating expenses should also be addressed.

1.4.3. Highest and Best Use. The appraiser's determination of highest and best use is one of the most important elements of the entire appraisal process.⁴⁴ Therefore, appraisers must apply their skill with great care and provide market support for the highest and best use conclusion(s) developed in the appraisal.

1.4.4. Definition. For just compensation purposes, market value must be determined with reference to the property's highest and best use, that is,⁴⁵

The highest and most profitable use for which the property is adaptable and needed or likely to be needed in the reasonably near future.

1.4.5. Four Tests. First, the appraiser should form an opinion of the highest and best use of the land, as if vacant. If the land is improved, the appraiser forms an opinion of the highest and best use of the property, as improved. The highest and best use of some property cannot be reliably estimated without extensive marketability and/or feasibility studies, which may

⁴⁴ See Section 4.3.

⁴⁵ See Section 4.3 for the legal basis for this definition.

require the assistance of special consultants in particularly complex assignments.⁴⁶ To be a property's highest and best use, the use must be (1) physically possible; (2) legally permissible; (3) financially feasible; and (4) must result in the highest value. Each of these four tests must be fully analyzed in the appraisal development process. A property's highest and best use will ordinarily be its existing use, as an owner will normally put property to its maximum (highest-value) use. A determination that the property has a different highest and best use than its existing use requires evidence that the property is physically and legally adaptable for that use and there is market demand for that use in the reasonably near future.

In assignments involving improved properties, it is important to fully develop both analyses of highest and best use (as if vacant and as improved). Land can be influenced by the size, shape, function, and remaining life of the improvements. For example, there may be surplus or excess land when considered in light of the existing pattern of development. For this reason, all four tests of highest and best use must be addressed in the analysis of highest and best use as improved.

For any highest and best use that will require a property to be rezoned, the probability of that rezoning must be thoroughly investigated and analyzed. Likewise, the probability of obtaining any other forms of government approvals necessary for a proposed highest and best use must be investigated and analyzed. The extent of the investigation and analysis required to meet this requirement can be found in Section 1.3.1.3.

Generally, the government's intended use of the property after acquisition is an improper highest and best use and cannot be considered. It is the property's *market value* that is to be estimated, not the property's value to the government. If it is solely the government's need that creates a market for the property, this special need must be excluded from consideration by the appraiser. The government's intended use of the property can only be considered as a potential highest and best use if there is *competitive demand for that use in the private market*, separate and apart from the government project for which the property is being acquired. Section 4.3 discusses the legal bases for these requirements.

1.4.5.1. Economic Use. For purposes of just compensation, opinions of market value must be based on an economic highest and best use. Therefore, appraisals in federal acquisitions cannot be based on noneconomic or nonmarket uses. To be an economic use, the use must contribute to the property's actual market value, and there must be competitive supply and demand for that use in the private market. Whether or not a particular use is economic and therefore appropriate to consider depends on the relevant market, not the use itself. This topic is discussed in depth in Section 4.3.2.3.

1.4.6. Larger Parcel Analysis. Essential to the appraiser's analysis of highest and best use is the determination of the larger parcel. These Standards define the larger parcel as that tract, or those tracts, of land that possess a unity of ownership and have the same, or an integrated, highest and best use.

The larger parcel is that tract of land which possesses a unity of ownership and has the same, or an integrated, highest and best use.

Determining unity of ownership may require legal instruction.

⁴⁶ See Section 1.13.

Elements to be considered in determining the larger parcel are contiguity (or proximity) as it bears on the highest and best use of the property, unity of ownership, and unity of highest and best use.

The appraiser must make a larger parcel determination in every appraisal developed under these Standards.⁴⁷ It is not uncommon for an appraiser's conclusion regarding the larger parcel to be different from the specific parcel the client agency identified to be appraised, as the appraiser cannot determine highest and best use without considerable investigation and analysis. In such instances, the appraiser shall inform the client agency of the determination of the larger parcel and the agency shall amend the appraisal assignment accordingly.

The appraiser must make a larger parcel determination regardless of whether the agency designated an acquisition as a total acquisition or a partial acquisition. This is so because whether an acquisition is a total or partial acquisition cannot be determined until the appraiser has determined the highest and best use and the larger parcel. Under the rules for larger parcel determination, as described in Section 4.3.4, two physically separate tracts may constitute a single larger parcel, or a single contiguous physical tract may constitute multiple larger parcels. This can be important not only in consideration of damages and benefits, but also in the selection and analysis of comparable sales.⁴⁸

In light of the discussion in Section 4.3.4 regarding the larger parcel, it is recommended that the appraiser begin an analysis of the unity of ownership test with the premise that, in making a larger parcel determination, it is allowable to consider all lands that are under the beneficial control of a single individual or entity even though title is not identical in all areas of the tract(s). If the appraiser then concludes that the larger parcel constitutes lands that are under the beneficial control of a single entity (but title is not identical), the appraiser's larger parcel determination, together with the facts upon which it is based, should be submitted to the client agency's legal counsel for review before the appraiser proceeds. Based on applicable case law and the facts of the case, legal counsel can then determine whether, as a matter of law, the unity of ownership test of the larger parcel is present, and provide written **legal instructions** to the appraiser accordingly.

Larger parcel determinations in appraisals for federal land exchanges, or in connection with inverse condemnation claims, may require different considerations than those described above. For a discussion of those potential differences, appraisers should refer to Section 1.12 regarding federal land exchange appraisals and to Section 1.11 regarding inverse condemnation appraisals.

1.4.7. Highest and Best Use Conclusion. In reaching a conclusion regarding a property's highest and best use and regarding the larger parcel, the appraiser must identify the *most probable buyer* and/or the *most probable user* of the subject property under that highest and best use. The appraiser must also reach a conclusion concerning the *timing* of any highest and best use that is different than the current use.

⁴⁷ The appraiser must make a larger parcel determination even for minor partial acquisitions in which the appraiser is instructed not to perform a complete before and after appraisal. See Section 4.6.4.1.

⁴⁸ For instance, if an appraiser determined that the larger parcel was a 10-acre tract out of a total ownership of 200 acres, the unit (e.g., per square foot or per acre) value may well be different for the smaller tract and the appraiser would utilize comparable sales similar in size to the 10-acre larger parcel rather than sales similar in size to the entire 200-acre ownership.

1.5. Application of Approaches to Value. The following sections outline the standards for the application of the three approaches to value. The approaches to be used to value land as if vacant are presented first. The application of the sales comparison approach, the income capitalization approach, and the cost approach for the valuation of the property as improved follows.

1.5.1. Land Valuation. When the subject property is unimproved or the cost approach is being used, the primary method of land valuation is the sales comparison approach as described below. The subdivision development method and the capitalization of ground leases are to be used only in rare cases when the property has a highest and best use for subdivision development or the property is subject to a long-term ground lease. Even when those situations exist, the latter two methods are better used as additional support for the sales comparison approach.

1.5.1.1. Sales Comparison Approach. The appraiser shall develop an opinion of the value of the land for its highest and best use, as if vacant and available for such use. In doing so, the appraiser's opinion of value shall be supported by confirmed sales of comparable or nearly comparable lands⁴⁹ having like optimum uses. Differences shall be weighed and considered to determine how they indicate the value of the subject land. Items of comparison shall include property rights conveyed, financing terms, conditions of sale, market conditions, location, and physical characteristics. The appraiser shall obtain adequate information concerning each comparable sale used and perform a comparative analysis to form a supported opinion of the market value of the subject property as if vacant. See Section 1.5.2 for a full discussion of the Sales Comparison Approach.

1.5.1.2. Subdivision Development Method. When the highest and best use of a property is for subdivision purposes and comparable sales do not exist, resorting to the subdivision development method⁵⁰ to land value may be appropriate if adequate market and/or technical data are available to reliably estimate the property value. This method of estimating land value can also be used to test the appraiser's highest and best use conclusion and to check against the indicated value of the land developed by the use of comparable sales when the sales data is limited. However, this approach to value is complex, often requires the assistance of other experts,⁵¹ and always requires substantial amounts of research, analysis, and supporting documentation.

In applying this technique, appraisers must bear in mind that a property must be valued in its *as-is* condition. Therefore, consideration must be given to the time lag that is typically necessary between the date of value and the projected date when developed lots would become marketable. This time lag must provide for the time necessary to procure all land use permits and approvals, as well as the time necessary for the physical construction of the infrastructure that will be required to convert the land into marketable lots. One of the most critical factors in the application of this technique is, of course, selection of the appropriate discount rate to be applied to the income streams generated by the development. This discount rate should be derived from and supported by direct market data whenever possible.

⁴⁹ For a discussion of what legally constitutes a comparable sale and the admissibility of comparable sales information, see Section 4.4.2.

⁵⁰ For a discussion of the courts' view of this valuation technique, see Section 4.4.5.

⁵¹ Such as marketing and feasibility consultants, land use planners, civil engineers, and contractors. See Section 4.12 (Appraisers' Use of Supporting Experts' Opinions); USPAP Competency Rule (acquiring competency).

1.5.1.3. Ground Leases. In those rare circumstances when the property being appraised is under a long-term ground lease, the appraiser must analyze the lease and determine whether it is appropriate to use a direct capitalization of the ground lease to develop an opinion of the market value of the land. The appraiser must be able to identify comparable properties in the area that are subject to similar ground leases in order to ensure that the ground lease is a market rent, as well as adequate market data to support the selection of a capitalization rate. This procedure should be used to support a conclusion of land value developed by the sales comparison approach rather than as the only method used to develop an opinion of market value.

1.5.2. Sales Comparison Approach. The sales comparison approach is normally the preferred method of valuation for property being acquired under these Standards. The sales comparison approach is a systematic procedure in which appraisers study the market for sales of properties with the same highest and best use as the subject property that are as close in proximity and time as possible. Each sale is verified with parties to the transaction to ensure that information is accurate and the sale is a market transaction. Each sale is adjusted for elements that are different from the subject property and the resulting array of sales data is reconciled to a final opinion of market value. Analysis of sales shall be made using a market derived unit of comparison such as price per acre, price per square foot, or animal unit month. In some markets, more than one unit of comparison may be used by market participants and care should be used to maintain consistency.

1.5.2.1. Prior Sales of Subject Property. Since any recent and unforced sale of the subject property can be the best evidence of its value,⁵² any such sale is treated as a comparable sale in this approach to value. It must be analyzed like any other comparable sale and given appropriate weight by the appraiser in forming a final opinion of the market value of the subject property. As noted in Section 1.3.1.5, the appraiser must verify the most recent sale of the subject property with the parties to the transaction to ensure that the sale provides an indication of market value.

1.5.2.2. Selection and Verification of Sales. In selecting the comparable sales to be used in valuing a given property, it is fundamental that all sales have the same economic highest and best use as the subject property and that the greatest weight be given to the properties most comparable to the subject property. In this regard, appraisers must recognize that when valuing a property with a highest and best use that will require rezoning or extensive permitting, sales of similar properties may require extensive analysis and adjustment before they can be deemed economically comparable. The analysis and adjustment of such sales is discussed below.

All comparable sales used must be confirmed by the buyer, seller, broker, or other person having knowledge of the price, terms, and conditions of sale.⁵³ When a comparable sale is of questionable nature and/or admissibility (e.g., sales to a government entity), special care must be

⁵² See Section 4.4.2.4.1.

⁵³ These Standards require that sales verification be conducted by competent and reliable personnel, and if the case goes into condemnation, the sale must be personally verified by the appraiser who will testify. However, appraisers should recognize that some agencies may require in their appraisal contracts that initial verification be made by the appraiser who will sign the appraisal report.

taken in the verification of the circumstances of the sale.⁵⁴ The appraiser must collect adequate information about each sales transaction to support a detailed analysis in the adjustment process. In most cases this would include a physical inspection of each property selected as a comparable sale. If the appraisal is being prepared for the Department of Justice, a physical inspection of each sale selected as a comparable is required.

The appraiser should collect and analyze the recent sales history of properties selected as comparable sales. This information can be useful in analyzing trends in the market and evaluating the impact of the government project on market value after acquisition.

1.5.2.3. Adjustment Process. Comparison of sales transactions to the subject property is the essence of the sales comparison approach to value. The basic elements of comparison to be considered are recognized as:

- Property rights conveyed
- Financing terms
- Conditions of sale
- Expenditures made immediately after purchase
- Market conditions (historically referred to as a *time* or *date of sale* adjustment)
- Location
- Physical characteristics
- Economic characteristics
- Legal characteristics (land use, zoning)
- Non-realty components of value included in the sale property⁵⁵

The comparable sales should be adjusted through quantitative and/or qualitative analysis, depending on the market data available, to derive an indication of the market value of the subject property.⁵⁶ Quantitative adjustments should be made whenever adequate market data exist to support dollar or percentage amount adjustments. Qualitative adjustments (i.e., inferior, superior) can be made when market data is not sufficient to support reliable quantitative adjustments.⁵⁷ Quantitative and qualitative adjustments are not mutually exclusive methodologies: because one factor of adjustment cannot be quantified by market data does not mean that all adjustments to a sale property must be qualitative. All factors that can be reliably quantified should be adjusted accordingly. When using quantitative adjustments, appraisers must recognize that not all factors are suitable for percentage adjustments. Percentage and dollar adjustments may, and often should, be combined.⁵⁸ Each item of adjustment must be carefully analyzed to determine

54 For a description of the verification process required by these Standards for such sales, see Section 1.5.2.4. See Section 4.4.2.4 for the legal bases for these requirements.

55 See generally APPRAISAL INSTITUTE, THE APPRAISAL OF REAL ESTATE 403-37 (14th ed. 2013) (discussing elements of comparison).

56 See Section 4.4.2.2.

57 Both quantitative and qualitative adjustments have strengths and weaknesses—and both can be misleading and unreliable without careful support. Without adequate market data, the apparent precision of quantitative adjustments can convey a false sense of accuracy. Similarly, without careful explanation of each element of comparison for each sale, qualitative adjustments can improperly obscure key aspects of the appraiser's analysis.

58 For instance, a percentage adjustment for market conditions (time) may be appropriate, but an adjustment for the fact that the property under appraisal is 300 feet from a sewer connection and all of the comparable sales are connected to sewer should often be made in a lump sum dollar amount to reflect the cost to cure the subject property's comparative deficiency. If a percentage adjustment were applied to the price per unit (e.g., per acre, per square foot) of each comparable, the adjustment to each of the comparables would vary, depending on the price per unit of the comparable, and might have no relationship to the cost to cure the subject property's deficiency.

whether a percentage or dollar adjustment is appropriate. When both quantitative and qualitative adjustments are used, all quantitative adjustments should be made first.⁵⁹

When appraisers must resort to qualitative adjustments, more extensive discussion of the appraiser's reasoning is generally required. This methodology may also require the presentation of a greater number of comparable sales to develop a reliable opinion of value. It is essential that the appraiser specifically state whether each comparable sale is generally either overall superior or inferior to the property under appraisal. The comparable sales utilized should include both sales that are overall superior and overall inferior to the property being appraised, rather than merely demonstrating the property is worth more (if all sales are inferior to the subject property) or less than a certain amount (if all sales are superior to the subject property).

The definition of market value used in these Standards requires that the opinion of value be made in terms of cash or its equivalent, as discussed in Section 4.2. Therefore, the appraiser must make a diligent investigation to determine the financial terms of each comparable sale. When comparing the sale to the property being appraised, the appraiser shall analyze and make appropriate adjustments to any comparable sale that included favorable or unfavorable financing terms as of the date of sale. Such adjustment must reflect the difference between what the comparable sold for with the favorable or unfavorable financing and the price at which it would have sold for cash or its equivalent.

While cash equivalency of favorable or unfavorable financing can be estimated by discounting the contractual terms at current market or yield rates for the same type of property and loan term over the expected holding period of the property, the preferred method of estimating a proper cash equivalency adjustment is by the analysis of actual market data, if such data is available.

In developing a final opinion of market value by the sales comparison approach, the appraiser shall consider the comparative weight given to each comparable sale, regardless of whether quantitative or qualitative adjustments or a combination thereof are used.

1.5.2.4. Sales Requiring Extraordinary Verification. Certain types of sales can be used only under certain circumstances or for limited purposes in appraisals for federal acquisitions. As a result, these sales require extraordinary verification to ensure the appraiser's opinion does not reflect any legally improper considerations. Section 4.4.2.4 addresses several types of sales that require this extraordinary treatment and the legal reasons for this requirement. This Section explains the verification process required for sales to government entities, sales to environmental organizations, and contingency sales.⁶⁰

⁵⁹ THE APPRAISAL OF REAL ESTATE, *supra* note 55, at 433-36.

⁶⁰ See Sections 4.4.2.4.2., Item (5) (Sales Involving the Government or Other Condemnation Authority), 4.4.2.4.2., Item (6) (Sales Involving Environmental or Other Public Interest Organizations), and 4.4.2.4.5 (Contingency Sales); see generally Section 4.4.2.4 (Transactions Requiring Extraordinary Care).

Sales to Government Entities. Because sales to government entities routinely involve nonmarket considerations, sales to the government should be immediately viewed by appraisers as *suspect* in appraisals for federal acquisitions.⁶¹ Sales to the government should not be used as comparable sales unless there is such a paucity of private market data as to make a reliable estimate of market value impossible without the use of government purchases. The types of transactions conducted and lands acquired by governments are often unique. For instance, lands acquired for conservation or preservation are often of extraordinary size, have little economic utility or value, and are located in remote areas with little market activity. To develop a reliable and supported estimate of market value in these situations, appraisers may be forced to consider sales to the government in the sales comparison approach to value.

If the appraiser determines, after careful analysis and verification required under these Standards, that a sale to the government was a true open-market transaction, the sale may be appropriate to consider as a potential comparable sale. There are certain steps that the appraiser must take before a sale to the government can be qualified as a valid comparable sale. Comprehensive and documented verification of government transactions is essential.

The type and amount of sales documentation and other information available to an appraiser about a sale to the government that is potentially comparable to the subject property will vary, depending on the land acquisition documentation requirements of the entity that acquired the potentially comparable property. Small governmental entities, such as local service districts, may acquire property without written appraisals, appraisal reviews, or written records of negotiations. On the other hand, state and federal government acquisitions are usually subject to the Uniform Act (or comparable state statutes) and require extensive documentation of land acquisitions, including formal documented appraisals, written appraisal reviews, and written records of the negotiating process.

First, the appraiser should review the legislation that authorized and/or mandated the government's acquisition of the potentially comparable property to determine whether the legislation provided that such property would be acquired at market value. Legislation that mandates acquisition at a price other than market value or provides for acquisition at a price unaffected by particular market forces (e.g., disregard of the influence of the Endangered Species Act) may not result in a valid comparable sale representative of market value. Likewise, legislation that allows the acquiring agency to deviate from the market value measure if it finds it in the public interest to do so will often not result in a price representative of market value.

The availability of sales documentation for inspection and analysis may vary by agency.

The appraisal report must note any sales documentation that was not available for inspection, and explain the impact on the reliability of the transaction as a comparable sale.

The appraiser should next contact the acquiring agency and ask to inspect the appraisal upon which the acquisition was based, the agency review of that appraisal, the negotiator's report (or file) in conjunction with the acquisition, and the agency's acquisition file.

61 See Section 4.4.2.4.2, Item (5) (Sales Involving the Government or Other Condemnation Authority).

Examination and analysis of the agency's appraisal should include:

- Determination of whether the sale was a total acquisition of the landowner's property indicating the value of the property acquired or a partial acquisition that reflects not only the value of the part acquired but also damage to the remainder.
- Determination of whether the sale was for the fee simple interest in the property or a total interest similar to the interest being appraised (e.g., leasehold of the entire property). Sales of something less than the fee simple interest in an entire property (e.g., easement acquisitions) may not be valid comparable sales.
- A review of the highest and best use determination. The highest and best use upon which the value opinion was based must be an *economic* use, and must be the *same* as, or *highly similar* to, the highest and best use of the property under appraisal before the transaction can be considered a reliable comparable sale. A highest and best use of *sale to the government*, conservation, or any use that contemplates noneconomic considerations is not a valid highest and best use upon which to estimate market value.
- A review of the appraiser's final opinion of value. Determine whether the price paid for the property was equivalent to its appraised value. If not, determine whether the price paid was within the range of values indicated by the appraiser's comparable sales in the sales comparison approach and/or by the different approaches to value developed by the appraiser.
- A review of the sales used by the appraiser in developing an opinion of value. If the sales relied on by the appraiser were influenced by nonmarket factors (e.g., political pressure), they would be invalid indicators of market value; thus, any value conclusion reached based on such sales may, likewise, be invalid.
- A review of any value allocation or breakdown included in the appraisal report, such as different unit values for different land types included in the sale property or the contributory value of improvements.

Next, the appraiser must examine the agency's appraisal review, and make particular note of any technical or factual errors reported by the review appraiser. The requirements for appraisal reviews for federal acquisition purposes can be found in Section 3.

The appraiser must also review the negotiator's report and the agency's acquisition file regarding the process of negotiation between the agency and the property owner. Any suggestion that the property would be condemned if agreement could not be reached should be noted. Likewise, any indication that the property owner accepted the price paid with the understanding that the agency would support (or not oppose) the property owner's attempt to take a tax write-off for a donation for some amount in excess of the actual price paid should be noted. Either of these circumstances may suggest a price below market value. Any suggestion that a property owner may have threatened to damage the property for the government's intended use (e.g., cutting the timber from land slated for acquisition as a park) if the owner's asking price was not paid can result in a price in excess of market value. Sales involving the exchange of property are generally unreliable for use as comparable sales.⁶²

62 See Section 4.4.2.4.3.

A determination should be made whether the property owner or the owner's representative submitted an appraisal or any meaningful market data to the agency that may have supported a value higher than the government's appraisal and the agency's subsequent determination to pay more than its appraisal. If so, the submitted material should be analyzed.

The appraiser should read any correspondence from the property owner's political representatives, and the agency's response thereto, to determine whether there may have been nonmarket pressure to consummate a sale at something other than market value. The appraiser should also review any media coverage concerning the property and the government project to determine whether there was an undue amount of public pressure on the agency or the property owner to consummate a quick sale. Such public pressure can result in a price that is above or below the market value of the property.

Conveyance and closing documents will reveal the exact estate conveyed to the government. It should be confirmed that the estate that was conveyed is the same estate that was appraised. In negotiations, some agencies may allow the property owner to retain some rights in the property after acquisition not contemplated by the government's appraiser (for example, a life estate in the property or an estate for years, at zero or nominal rent, or the right to continue to grow crops on the land or use it for grazing or a physical reduction in the land area acquired).

If the estate acquired was only an easement, the sale is not a valid comparable either as an indication of fee simple value or of the value of the easement. If only an easement is being acquired from the subject property, the measure of value should not be based on the price paid for similar easements but rather upon the federal before and after method.⁶³

There are a number of legitimate reasons why a government agency would pay a price in excess of its approved appraisal for a specific acquisition. A reading and analysis should be undertaken of any documents produced by the agency or others in an attempt to justify payment in excess of the approved appraisal. An agency's appraisal does not represent the only reasonable estimate of market value. But if the government paid more for the property than its approved appraisal, the appraiser must determine the government's justification for doing so and whether it was based on market considerations.

A price in excess of an agency's approved appraisal may still represent a *valid indication of market value* if:

- The appraisal is outdated in a rapidly appreciating market.
- The price remains within the range of values indicated by the comparable sales developed by the appraiser.
- The price remains within the range of values indicated by the different approaches to value developed by the appraiser.
- Factual information about the property, the appraisal, or the comparable sales used came to light after the appraisal and review that revealed errors in the appraisal that could be mechanically corrected.

63 See Section 4.6.1.

On the other hand, a price in excess of an agency's approved appraisal would *not* be a valid indication of market value, and therefore would not be a valid comparable sale (at least without adjustment) if:

- The price in excess of market value was warranted due to costs and risks inherent in a condemnation trial.
- The threat of imminent destruction of the property for the government's intended use existed.
- The cost of project delay caused by the failure to acquire the property offsets the price paid in excess of its market value.
- The administrator of the public agency found it to be in the public interest to pay in excess of market value.
- The tract acquired was a key tract, or the last tract to be acquired, for the government's project.
- The economy of land management of a consolidated ownership by the government outweighed the price in excess of market value paid for the tract.

Once the foregoing investigation and analysis have been completed, the appraiser should personally verify the sale with the purchaser *and* the seller or their representatives. In conducting this verification, the appraiser should clear up any questions that may have arisen as a result of earlier research.

Sales to Environmental or Other Public Interest Organizations. Sales to environmental or other public interest organizations are also prone to reflecting nonmarket considerations, as discussed in Section 4.4.2.4.2., Item (6). As a result, these transactions are subject to the same extraordinary verification measures as sales to government entities. When public interest organizations work closely with government agencies that administer conservation or similar projects, extensive sale documentation may be available. Before using such a transaction as a comparable sale, the appraiser must determine whether the sale was based on a competent appraisal of market value of the property for its *economic* highest and best use, whether any tax write-offs were taken, and whether the transaction was impacted by the pendency of the government's project.⁶⁴ If the purchase price was not based on the market value of the property for an economic highest and best use, the sale will normally have to be discarded as a comparable sale. The same is true if tax write-offs were involved or if project influence was present, although it is sometimes possible to make adjustments to the sale for these factors. If, subsequent to the sale, the property has been transferred by the environmental group to the government, the facts and circumstances of the transfer must be reported.

Contingency Sales. Potentially comparable sales for a property with a highest and best use that requires procurement of rezoning or a land use permit must also be verified and treated with great care. Sales of such property in the private market generally take the form of initial options or contingency sales, with the contingency being the purchaser's ability to procure the necessary rezoning or permitting to develop the property to its highest and best use. If the rezoning or

⁶⁴ Such transactions may well reflect project influence, as discussed in Section 4.5.

permitting is denied, the contingency is not met and the sale does not close (or the option is not exercised). Therefore, when consummated, such sales reflect the price of property already rezoned or permitted for development to its highest and best use. All of the risks, time delays, and costs associated with a rezoning or permitting have been removed from the transaction.

Such sales are typically not comparable to the property being appraised for federal acquisition purposes. Generally, properties under appraisal for government acquisition purposes that have a highest and best use that requires a rezone and/or permits to be developed to their highest and best use do not have the zoning or permitting in place. Thus, on the theoretical date of the sale's closing (i.e., the effective date of valuation), the purchaser must assume the risks, time delay, and costs of procuring the rezone and/or permitting. Properties seldom sell in such a condition in the private market; thus, there are few truly comparable sales available for the appraiser's use in developing a value for the property under appraisal by the sales comparison approach.

Accordingly, appraisers must often resort to using sales that already have, on the date of consummation, their needed zoning/permitting in place. Under these circumstances, it is essential that the appraiser adjust the sales to reflect the differences in the regulatory environments of both the sales at the time of closing and the subject property as of the effective date of the appraisal. Such adjustments must account for the risks inherent in the procurement of a rezoning or permitting, including the possibility that the regulatory agency may deny such a request or place conditions on it.⁶⁵ The time delays encountered in procurement of the rezoning and/or permitting and the costs associated with their procurement must also be considered. In certain circumstances, a purchaser may require an entrepreneurial profit in addition to an adjustment for risk.

Appraisers cannot merely assume that such a rezoning/permit is in place for the subject property, or assume that such a rezone/permit will be granted. They must appraise the property only in light of the probability of obtaining the rezone/permit. If appraisers use sales of properties with zoning/permitting in place at the time of sale, they must clearly and specifically explain how they accounted for the regulatory environmental differences between these sales and the subject property and how they quantified the adjustment(s) for this factor, based on market evidence whenever possible.

- 1.5.3. Cost Approach.** In the cost approach, the market value of the vacant land is added to the depreciated reproduction or replacement cost (contribution) of the improvements to arrive at an indication of the value of the property. The value of the land, vacant and subject to improvement, is generally developed by the sales comparison approach for land (see Section 1.5.1.1.). The estimate of the reproduction or replacement cost of the improvements is based on current local market cost of labor and materials for construction of improvements. All forms of depreciation are deducted from the cost new estimate, as discussed below. This approach to value is most useful in developing the value of a property in which the improvements are new (and actual costs are known) and there is no evidence of depreciation. The cost approach is also used

⁶⁵ See Section 4.3.2.4 regarding the consideration of the possibility of rezoning or permitting.

as a check on the opinion of market value indicated by the sales comparison approach and for appraising highly improved properties with no known comparable sales.

In the case of special-purpose properties⁶⁶ that are not generally bought and sold, it is sometimes necessary to resort to reproduction cost new less depreciation for want of any more reliable method of determining market value. If it is necessary to resort to the cost approach, all forms of depreciation—physical deterioration, functional obsolescence, and external (or economic) obsolescence—must be accurately reflected and deducted from the reproduction or replacement cost before the value of the land and the contributory value of the improvements are added together to develop an indication of market value by the cost approach. Whenever the cost approach is utilized and it can be determined at what time and at what cost the improvements were erected, a trending up—or down, as appropriate—of such initial costs becomes an important part of the analysis.

1.5.3.1. Critical Elements. In developing an opinion of market value by the cost approach, the appraiser must recognize the critical elements that must be well supported by market evidence: reproduction and replacement costs, depreciation, and entrepreneurial profit.

1.5.3.1.1. Reproduction and Replacement Costs. The appraiser must recognize the distinction between reproduction cost and replacement cost.⁶⁷ Reproduction cost is the present cost of reproducing the improvement with an exact replica; replacement cost is the present cost of replacing the improvement with one having equal utility. If the cost approach is applicable, the appraiser may use either the reproduction or replacement cost method, but must account for all forms of depreciation appropriate under the particular method chosen. In developing the cost estimate, the appraiser must account for all *direct* and *indirect* costs associated with constructing the improvements. Direct (hard) costs include the labor and materials required to construct the improvements. Indirect (soft) costs include such items as architectural and engineering design fees, legal fees, costs of permits and other similar expenses associated with obtaining approvals, and designing and overseeing the construction of the improvements.

If a national cost-estimating service is used, the appraiser should ensure that the most similar improvement type is selected and that all adjustment factors such as locality adjustments developed for the service are properly accounted for. If the appraiser may place considerable weight on the cost approach to value in reaching a final opinion of value, a contractor or professional cost estimator should be retained to assist in developing the reproduction or replacement cost estimate.

1.5.3.1.2. Depreciation. The depreciation from all causes—including physical deterioration, functional obsolescence, and economic or external obsolescence—must be properly identified and analyzed. The estimated dollar amounts associated with each form of depreciation must be supported by market data using the breakdown method or the market extraction method. Depreciation should not be estimated by the use of published tables or age-life computations.

⁶⁶ Also referred to as special-use properties or limited-market properties.

⁶⁷ See Section 4.4.3.3.

- 1.5.3.1.3. Entrepreneurial Profit.** The estimate of the contribution of entrepreneurial profit should be supported by market data developed from properties similar to the subject improvements.
- 1.5.3.1.4. Unit Rule.** In developing the cost approach, appraisers must distinguish between calculating an improvement's replacement cost and estimating market value. It is the contribution of the improvements (and all of its components) to the market value of the whole that is being measured.⁶⁸
- 1.5.4. Income Capitalization Approach.** In appraising property that generates income, it may be appropriate to develop an opinion of market value using the income capitalization approach. This approach should generally be used in addition to the sales comparison approach and can serve as additional support for the final opinion of market value. In developing the income capitalization approach, it is critical that the appraiser have market support for every component such as income, expenses, capitalization, and/or discount rates.
- 1.5.4.1. Market Rent.** The income that is to be capitalized in the income approach is the market or economic rent for the subject property. These Standards use the following definition of market rental value:⁶⁹

Definition of Market Rental Value

Market rental value is the rental price in cash or its equivalent that the leasehold would have brought on the date of value on the open market, at or near the location of the property acquired, assuming reasonable time to find a tenant.

The appraiser should not consider the fact that a property may be under lease to a third party, except to the extent that the rent specified in the lease may be indicative of the property's market rental value. The value to be appraised is the market value of the property as a whole, not the value of the various interests into which it may have been carved.⁷⁰

- 1.5.4.2. Comparable Leases.** The opinion of market rent should be based on an analysis of comparable leases extracted from the market. As with the sales comparison approach, the comparable leases selected in this analysis should have the same or similar highest and best use as the subject property and reflect leases as close as possible to the effective date of value. The lease data shall be verified with a party to the transaction. It is important to identify the operating expenses paid by each party (landlord and tenant), the basis for the calculation of the leased area, and any concessions (free rent and/or tenant improvements) offered by the landlord. A physical inspection of each rent comparable is necessary to identify the quality of tenant finishes, overall building condition, and quality and location difference with the subject. As with the sales comparison approach, the appraiser must collect market data to support adjustments (quantitative and/or qualitative) to the comparable leases for differences between them and the subject property.
- 1.5.4.3. Expense Analysis.** In developing the estimate of net operating income that will be capitalized to develop an opinion of the market value of the subject property, the appraiser must collect market

⁶⁸ See Section 4.4.3.1.

⁶⁹ See Section 4.7 for the legal basis for this definition.

⁷⁰ See Section 4.2.2 concerning the Unit Rule.

data to support the estimated vacancy and credit loss, as well as operating expenses and any set asides for reserves for replacement. If available, the operating history of the subject property provides an important basis for these estimates, but data collected from other similar competitive buildings in the market area is also important to provide market support for these determinations.

1.5.4.4. Direct Capitalization. Capitalization of the net operating income shall be at a rate prevailing for the type of property and location. The preferred source of an applicable capitalization rate is from actual capitalization rates reflected by comparable sales. The selection of the capitalization rate is one of the most critical factors to be applied in the income capitalization approach to value. Accordingly, developing capitalization rates from the improved sales used in the sales comparison approach provides the best market support for the rate selected for the subject property. Capitalization rates identified in national publications can be used as support for the estimated capitalization rate selected for the subject but should not be the only source for this determination.

1.5.4.5. Yield Capitalization (Discounted Cash-Flow [DCF] Analysis). A second method of valuation used in the income capitalization approach is known as the yield capitalization method. This method is also often referred to as the discounted cash-flow (DCF) analysis and has been an accepted valuation method within the appraisal profession for several decades. This method is often used in the valuation of investment grade properties such as multi-tenant office buildings, retail centers, apartment complexes, and industrial warehouse facilities and reflects the way sophisticated buyers and sellers consider the potential income generated by a property to arrive at a purchase or sale price.

The yield capitalization method has limited use in an eminent domain setting because it requires the appraiser to forecast a number of different factors into the future such as income change, holding period, property value at the end of the holding period, and the yield rate or discount rate to be applied to the future stream of income in order to arrive at the present value of the property. Because of this, valuations based on this method can be complicated, confusing, and speculative. If this method is to be used in developing an appraisal under these Standards, it is critical that the appraiser develop market support for each of the many factors that must be forecasted in order to show that the analysis reflects what buyers and sellers for that property type are considering on the effective date of value. If appraisers are considering the use of this method, they should discuss it with their client as part of the scope of work conversation.

The yield capitalization method can be a useful tool in testing feasibility in highest and best analysis and as support for the other approaches to value. This method can be very useful in appraisals of leasehold acquisition involving potential damages to a remainder after the taking. It is useful as a means of determining the value of the property before and after the leasehold taking in order to identify the difference.⁷¹

1.6. The Reconciliation Process and Final Opinion of Value. A critical part of developing an appraisal under these Standards and forming a final opinion of market value is the reconciliation process. This process requires a careful examination of the factual data about the subject property

⁷¹ EATON, *supra* note 16, at 414.

and the market. The highest and best use and larger parcel analyses are considered in light of the factual data to ensure consistency and accuracy. All of the supporting data for each of the approaches to value is examined for consistency and accuracy with the subject property and market data as well as the highest and best use and larger parcel analyses. For example, if both the sales comparison and income capitalization approaches were developed, the appraiser should examine the adjustment processes in both approaches to ensure that adjustments for location and other physical characteristics of the subject property were consistently applied in both.

Each of the approaches to value developed in the analysis are examined for the quality and extent of the supporting data. In the sales comparison approach, the appraiser should consider the proximity in time and location of the sales to the subject property. The level of market support for the adjustment process and the number and size of the adjustments should also be considered. A similar analysis should be followed in the income capitalization approach. The appraiser should also evaluate the market support for estimates of vacancy, credit loss, and expenses as well as capitalization and discount rates. If the cost approach has been developed, the appraiser should consider the level of support for all of the elements of cost new, depreciation, and entrepreneurial profit. Every calculation in each approach should be double-checked for accuracy.

The final opinion of market value should not be derived by applying a formulaic approach such as averaging the values from the various approaches developed in the appraisal. The goal is to provide the client agency and intended users with a clear, logical analysis of the results of each approach to value developed in the appraisal and the reasons for the weight given to each approach in forming a final opinion of market value.

1.7. Partial Acquisitions. There are many situations in which a client agency is only acquiring a part of a larger parcel. This can occur when the client agency is acquiring an interest less than the fee simple, such as an easement, water rights, subsurface rights, or air rights. This can also occur when the agency is acquiring the fee interest in only a portion of a larger parcel. This section of the Standards addresses the appraisal requirements under these circumstances.

1.7.1. Before and After Rule (Federal Rule). The federal rule—also known as the before and after rule—applies in all appraisals involving partial acquisitions. Under this procedure, the appraiser develops opinions of both the market value before the acquisition and the market value after the acquisition. Requiring this valuation procedure allows acquiring agencies, the Department of Justice, and the courts to calculate a reasonable measure of compensation by deducting the remainder or after value from the larger parcel's before value. The result is a figure that includes the value of the property acquired as well as any compensable damages and/or direct (special) benefits to the remainder property. It should be noted that these are two separate appraisals within the same assignment requiring the appraiser to perform a new analysis and valuation of the remainder after the taking. It should also be noted that it is improper for an appraiser to develop an opinion of the market value of the larger parcel in the before situation and then deduct the opinion of value of the property acquired together with separately calculated damages to arrive at the value of the remainder.

If the appraisal is prepared for the Department of Justice, the scope of work will typically not include allocation of the difference between the before and after values into the components of the contributory value of the property acquired and compensable damages to the remainder. However, in assignments for other client agencies the scope of work may include such an allocation in order to assist the agency in meeting their obligations under the Uniform Act.

- 1.7.1.1. Damages.** When considering damages to remainder properties, appraisers must understand that state and federal rules may differ on which items of damage may be compensable (severance) and which items may be non-compensable (consequential). It is recommended that appraisers seek guidance from agency legal counsel if there is any question about whether an element of damage is compensable.

The fundamental basis for a claim of compensable damages is a diminution in the market value of the remainder. The extent to which the utility of a property has been impacted by the acquisition must be established by factual information and analysis and must never be assumed or based on speculation. Evidence that the highest and best use of the remainder property has changed as a result of the taking provides support for the existence of damages. Factual evidence of a change in the intensity of the highest and best use, such as from a balanced farm to an unbalanced farm, may also provide support for the conclusion.

In certain circumstances, damage to the remainder may be cured by remedial action. This is generally called the cost to cure and is a proper measure of damage only when it is no greater in amount than the decrease in the market value of the remainder if left as it stood. When the cost to cure is less than the compensable damages if the cure were undertaken, the cost to cure is the proper measure of damage and the United States is not obligated to pay in excess of that amount. Developing the cost to cure requires that the appraiser develop a well-supported cost estimate in the same manner as described in Section 1.5.3, which describes the critical elements in developing a cost approach.

If a consultant's services are used to assist an appraiser in estimating a cost to cure damage amount in a partial acquisition, the appraiser must review and analyze the cost estimate with great care. Even though a cost to cure method of estimating the diminution of value may be appropriate, it must be remembered that the remainder property is still to be valued in its uncured condition. Therefore, it is important that any cost to cure estimate of damage include not only the direct costs of the cure, but also the indirect cost, any effects of delay, and if appropriate, an entrepreneurial profit factor.

- 1.7.1.2. Benefits.** As with damages, appraisers must be aware that the legal rules regarding what constitutes indirect (general) benefits and what constitutes direct (special) benefits may differ between state and federal rules. The extent of a benefit to a remainder parcel is a fact question that must be well supported by the appraiser. Whether the benefit is general or direct (special) is a mixed fact/law question and client agency counsel should be consulted to resolve any question about this classification.

Appraisers should give the same consideration to benefits as they do to damages in developing an opinion of the market value of remainder properties. Benefits can take many forms, such as when the project has caused the remainder to have lake frontage, frontage on a better road, more convenient access, improved drainage, irrigated land, and an improved view. An upward shift in highest and best use of the remainder property is often an indication of direct (special) benefits, and direct benefits must be considered when appraisers develop an opinion of the value of remainder properties, even though other lands may have the same benefits from the project.

- 1.7.1.3. Offsetting of Benefits.** Direct (special) benefits may offset the contributory value of the part taken and any damages to the remainder caused by the government's project. To take into account any direct benefits from the project, appraisers must apply the before and after rule by forming an opinion of the market value of the larger parcel at the time of acquisition (excluding any enhancement or diminution resulting from the project) and deducting the market value of the remainder property (including any direct benefit or diminution from the project).

Appraisers should note that the federal rule in this regard may be different from state rules and they should consult client agency counsel if there is a question.

- 1.7.1.4. Takings Plus Damages Procedure (State Rule).** There may be rare circumstances in federal acquisitions when strict adherence to the before and after rule will create costly and/or difficult burdens on the appraiser. Examples of such situations are minor fee or easement acquisitions (for flowage, wetland or habitat protection, roads, pipelines) from large parcels, where the cost of performing a full before and after appraisal is unwarranted in view of the minor nature of the acquisition and there are clearly minor or no damages to the remainder. In those rare situations, the client agency may alter the scope of work to allow a takings plus damages procedure, sometimes called the state rule. Under this procedure, the appraiser must still determine the larger parcel and develop an opinion of the value of the part taken as it contributes to the larger parcel. Minor damages are added to the opinion of value of the part taken to provide an estimate of the compensation to be paid by the client agency.

- 1.8. Leasehold Acquisitions.** The government will sometimes acquire only a leasehold estate in all or a portion of a property, thus acquiring the right of use and occupancy of the property for an identified period of time. This section of the Standards will address the requirements for developing an appraisal for this purpose.

- 1.8.1. Market Rent and Highest and Best Use.** As discussed in the income capitalization approach section of these Standards, in developing an appraisal for a leasehold acquisition, the appraiser must use the definition of market rental value found in Section 1.5.4.1.

As part of the development of an appraisal for a leasehold acquisition, the appraiser must determine the highest and best use of the property (as improved) that is the subject of the leasehold. This requirement is critical to the selection of comparable rents used in the valuation process. Where necessary, the appraiser may need to perform a marketability study to aid in this analysis.

1.8.2. Leasehold Estate Acquired. It is critical that the client agency provide the appraiser with a description of the leasehold estate it plans to acquire. In turn, the appraiser must fully understand the estate to be appraised and the impact on the market value of the property.

It is important for the appraiser to recognize the characteristics of the rental or income streams being evaluated. Most often rent is paid periodically (e.g., monthly) in advance. However, when the government acquires a leasehold interest or right of use and occupancy in a property, it will usually pay rent in a manner that is inconsistent with the market. If the leasehold interest is acquired by condemnation, all of the rent due for the entire term of its occupancy is usually paid in a lump sum at the beginning of the occupancy (or on the date of acquisition). Therefore, an appraiser must convert any opinion of periodic market rent into a single lump sum present value or payment to be paid in advance. If the leasehold is acquired by negotiation, the rent may be paid in arrears or at different frequencies than is typical in the market, and the appraiser must account for this difference.

If rent is paid by the government in a single lump sum, adjustment for this factor is typically accomplished by applying an ordinary annuity factor (present worth of 1 per period factor) to the periodic market rent (if the opinion of rent is projected to remain constant over the government's occupancy). If the appraiser concludes that the market rent will not be constant throughout the government's occupancy, the periodic rent is typically converted into a lump sum present worth by the use of present worth of 1 factors or by discounted cash-flow (DCF) analysis.

The discount rate to be applied to the periodic rent should reflect the rates of return typical for the type of property involved. The selected discount rate should be supported by market data whenever possible.

Appraisers must bear in mind that the leasehold estate acquired by the government may vary substantially from the terms of a typical lease in the private market. For instance, the term of the lease may be longer or shorter than typical for the type of space under appraisal. Expenses paid by the government may differ from those paid by the typical lessee, and there may be no provisions for expense stops and rental escalations during the lease term. The parking ratio for the space occupied by the government may vary from the market standard and there will be no provisions for rent concessions or lessor buildout of the occupied space. The appraiser must consider all of these factors when estimating the market or economic rent for the acquired space, and comparable rentals must be adjusted to account for these differences. Table 1 summarizes the most commonly encountered differences between private and government leases which must be accounted for in the adjustment process.

Table 1. Common Differences Between Private and Government Leases

Adjustment Factors	Private Leases	Federal Leases
Measurements	Typical for market—often BOMA based	Generally inconsistent with local market and/or standards such as BOMA or IPMS
Term (duration)	Typical for market (e.g., five years)	Shorter or longer terms—often unusual (e.g., 33 months)
Base rent	Dollar per square foot monthly in advance	Lump sum in advance, or monthly in arrears
Rent adjustments	Index leases, graduated leases, percentage leases	Level payment over term (no adjustments) or adjustments built into lump sum
Expenses	Full service, gross, modified gross, net	Expense stops not included. May include excess janitorial, security services
Parking	x spaces per x square feet	More or less spaces than market norm
Tenant improvements (TIs)	Landlord provides dollar amount for tenant improvements (TIs)	No tenant improvements (TIs)
Rent concessions	Landlord provides free rent dependent on size and length of lease	No rent concessions
Renewal options	Established in lease	May condemn another term if needed
At lease end	Lessor retains TIs	May allow the government to destructively remove specialized equipment
At lease extension/renewal	Market rent for finished out space	Government won't pay twice for TIs already paid for

1.8.3. Larger Parcel Concerns. There are occasions when the government acquires the leasehold interest in only a portion of a larger property. In those instances, the appraiser must consider the possibility of damages to the remainder property (i.e., that portion not to be occupied by the government). In those instances where severance damages may be significant, appraisers should consult with their client agency and/or its legal counsel before proceeding with the appraisal assignment to ensure that the appraisal will be prepared in accordance with current applicable law.

1.9. Temporary Acquisitions. In addition to leasehold acquisitions, there are generally two situations in which the acquisition by the government may be temporary: temporary construction easements (TCEs), and temporary acquisitions by inverse condemnations. TCEs and temporary inverse condemnation acquisitions will be discussed separately below because of their uniquely different characteristics.

1.9.1. Temporary Construction Easements (TCEs). A temporary construction easement (TCE) is generally acquired in conjunction with a permanent acquisition and often abuts the boundaries of the permanent acquisition. The permanent acquisition area is used for permanent placement of the public improvement, whereas the TCE is used in addition to the permanent acquisition area for initial construction of the public improvement. After initial construction of the public improvement is completed, the construction easement expires and the unencumbered fee interest in the land reverts back to the owner. Similar to TCEs but shorter in nature is an easement for a right of entry onto the land for purposes of surveying, inspection, and/or testing for contamination. These rights of entry are generally very short term in nature and are treated in the same manner as TCEs.⁷²

Damages that result from TCEs are usually based on the economic or market rent of the affected area for the term of the temporary easement. Usually, the land area affected is so small and the term of the easement so short that compensation for the TCE is nominal. As a result, many agencies and appraisers have adopted a shortcut for its estimation. A reasonable return rate, rather than the economic or market rent based on comparable rentals, is estimated and applied to the encumbered land's fee value for the term of the easement. The rent loss or appropriate return is often not converted to a present value through the application of a discount rate because of the short term of the easement and the nominal nature of the indicated rent loss.

Even though technically incorrect, as discussed below, this shortcut is generally acceptable to agencies because of the nominal nature of the TCE acquisition and the cost/time savings associated with the shortcut. However, appraisers must recognize that the shortcut methodology will be found unacceptable under these Standards if the indicated compensation is more than nominal. When the indicated compensation for the acquisition of a TCE is more than nominal, the appraiser must use proper appraisal methodology to develop the present value of the rent loss. This will entail the use and presentation of properly documented comparable rentals, and the discounting of the lost rental income stream into a present value.

The appraiser must also consider whether the existence of a TCE will restrict the property owner from using the unencumbered portion of the land for its highest and best use during the easement's term. Often an appropriate method to estimate the proper adjustment to reflect the diminution in the land's value by reason of the temporary easement is to apply the rent loss to all lands so affected. (If the property can be rented for a lesser use during the term of the TCE, the measure of damage is usually measured by the rent differential between the before and after situations.)

Appraisers must remember that the loss in value caused by a TCE acquisition is not an independent acquisition, and the compensation for it cannot be added to the indicated diminution in value by reason of the associated permanent acquisition. The rent loss associated with a TCE should be used as the basis for an adjustment to the remainder property's after value, not as something to be added to the difference between the before and after value of the property.

⁷² These rights of entry are often so short term in nature (sometimes as short as 24 hours) and their purpose so restricted that agencies do not have an appraisal conducted of such properties, but rather they make an administrative determination of a nominal compensation for the acquisition.

1.9.2. Temporary Inverse Takings. Temporary acquisitions by inverse condemnation may be by either a physical invasion of the property by the government (or an agent of the government)⁷³ or by regulation.⁷⁴ The measure of value in a temporary inverse case is the same as in the acquisition of a TCE, that is, the rental value of the land taken for the term of the taking. The substitution of a return on the fee value of the land for an opinion of the rental value of the land is not generally an accepted alternative.⁷⁵

What generally makes temporary acquisitions by inverse condemnation uniquely different from the acquisition of a TCE is the amount of indicated compensation. An inverse condemnation acquisition usually involves whole ownerships rather than a small geographical portion of the ownership, and the term of the alleged inverse taking is generally of a substantially longer period of time than the duration of a TCE. For that reason, greater care must be employed by the appraiser in developing an opinion of the value of such properties. Department of Justice legal counsel will generally provide the appraiser with the effective date of the appraisal and the duration and extent of the alleged taking.

In a regulatory taking situation, it is possible that the regulation temporarily precludes the use of the land for its highest and best use, but secondary uses of the property remain available to the property owner. In such a case, opinions of the before and after market rent are developed to determine the difference in the rent that could have been commanded by the property during the inverse taking period. The *before* rent is the market or economic rent of the property for its highest and best use for the duration of the taking, and the *after* rent is the market or economic rent of the property for its secondary, but allowable, use during the taking period. In estimating the potential use of the subject property during the taking period, appraisers must take into account the limited duration of the period of use.⁷⁶

Because inverse condemnation cases (either permanent or temporary) are very fact-specific, it is essential that the appraiser work very closely with the Department of Justice attorney assigned to the case. Both appraiser and attorney must understand the precise question that must be addressed by the appraiser and the acceptable methodology to be used to answer it. This will often involve substantial legal research by the attorney, concluding with written **legal instructions** to the appraiser.⁷⁷

1.10. Acquisitions Involving Natural Resources. The appraisal of properties containing valuable natural resources such as minerals, timber, and water is a complex subject requiring specialized training and experience (see USPAP Competency Rule). A critical first step in developing an appraisal of properties containing resource assets is identifying the property

⁷³ See, e.g., *767 Third Ave. Assocs. v. United States*, 30 Fed. Cl. 216 (1993), *aff'd* 48 F.3d 1575 (Fed. Cir. 1995).

⁷⁴ See, e.g., *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987).

⁷⁵ *United States v. 883.89 Acres of Land in Sebastian Cty.*, 442 F.2d 262, 264, 265 (8th Cir. 1971), *aff'g* 314 F. Supp. 238 (W.D. Ark. 1970); *United States v. Michoud Indus. Facilities*, 322 F.2d 698, 707 (5th Cir. 1963); *United States v. 117,763 Acres of Land in Imperial Cty.*, 410 F. Supp. 628 (S.D. Cal. 1976), *aff'd sub nom. United States v. Shewfelt Inv. Co.*, 570 F.2d 290 (9th Cir. 1977).

⁷⁶ For instance, if the denial of a permit for a period of three years precluded the use of a property for commercial purposes, a secondary use of industrial warehousing during the taking period would not be appropriate because the short-term life of the secondary use would not be economically feasible. However, a secondary use as an industrial equipment storage yard might be a suitable secondary use because such a use would not involve the construction of substantial improvements or a commitment to a long-term use.

⁷⁷ See Section 1.9 for additional discussion of inverse condemnations.

rights to be acquired and the ownership interests into which they may be divided. The appraiser and the client agency must work together to obtain title information and legal descriptions to ensure that the appraisal properly addresses these components and their contribution to the value of the larger parcel.

While the valuation of these diverse resource assets requires different considerations, there are common elements that apply in all appraisals of these properties: the unit rule, highest and best use, and larger parcel analyses.

1.10.1. The Unit Rule. In the development of an appraisal concerning properties containing resource assets, it is particularly important to understand the unit rule.⁷⁸ Property must be valued as a whole for federal acquisition purposes, with due consideration of all of the components that make up its value. Its constituent parts are considered only in light of how they enhance or diminish the value of the whole, with care being exercised to avoid so-called cumulative or summation appraisals.⁷⁹

Accordingly, it is improper to estimate the value of the surface of the property, add to it a valuation of the minerals or other resource such as water or timber (as estimated by a separate expert), and thereby conclude an opinion of total market value for the property. Not only would this result in an improper summation appraisal, as a practical matter it would also mean that no one individual could testify to the market value of the property as a whole should the matter go to litigation. For these reasons, when consultants' reports are used in the valuation of mineral property, appraisers must strictly adhere to the requirements of Section 1.13 of these Standards relating to the use of consultants' reports.

1.10.2. Highest and Best Use Considerations. Highest and best use analysis is a critical element in the development of a reliable appraisal of property containing valuable natural resources. As a first step, a market analysis should be performed to identify the market supply and demand for the resource located on the property. If no market exists for the resource, then the quantity and quality of the commodity need not be determined. The market analysis provides the foundation for the appraiser's conclusions regarding the marketability, price, and competition for the commodity found on the property.

If a market exists for a mineral or other resource, then a supported determination must be made concerning both the *legal permissibility* of extracting the mineral (or harvesting the timber) and the *physical characteristics* of the minerals or timber located on the property. These determinations often require special expertise, including:

- Interpretation of permitting and other environmental requirements that may necessitate the assistance of a consultant with specialized knowledge and experience in the relevant market.
- Studies regarding the physical characteristics of the minerals that are usually conducted by specialists (usually geologists and/or engineers) who make determinations concerning such

⁷⁸ See Section 4.2.2 for a discussion of the legal basis for the unit rule.

⁷⁹ See Section 4.2.2.

important factors as the location, quantity, quality of the mineral deposit, and any variations in the quality that might be found on the property.

- Additional determinations regarding such factors as accessibility (due to topographical constraints or distance to road or rail line, for example) and problems and costs of extraction or harvest.
- A cruise plan, timber cruise, and check cruise for land containing valuable timber.

This information provides the basis for developing an opinion of the value of the property using the sales comparison and income capitalization approaches to value. However, before the adoption of these interpretations, studies, or determinations, it is the professional responsibility⁸⁰ of the appraiser to thoroughly analyze and understand the reports prepared by other experts and adopt them only if the analysis and conclusions were prepared according to appropriate standards, are sound, and are adequately supported.

As with all other appraisals prepared under these Standards, the appraiser must identify the most likely purchaser and user of the subject property as well as the timing of the use (for example, mineral extraction or timber harvesting). In addition, a larger parcel analysis must be completed. For property containing valuable natural resources, this analysis may require an examination of minerals or timber holdings beyond the land being acquired by the government that meet the three tests of the larger parcel.⁸¹

1.10.3. Special Considerations for Minerals Properties.

Property Rights and Interests. It is fundamental that the property rights and interests in minerals properties are identified as part of the problem identification process. The client agency must identify the property rights and interests that are to be acquired and valued. A comprehensive understanding of the rights and interests to be appraised is critical to the proper development of both the sales comparison and income capitalization approaches to value.

In the oil and gas industry there is a distinction between the working interest and the royalty interest. For example, in a federal lease sale the successful bidder acquires a working interest through payment of a bonus bid while the United States retains the royalty interest. In hard rock mining, these two interests are sometimes referred to as the contributing and noncontributing interests. The contributing interest is controlled by the mining company, which contributes the capital required for exploration, ore definition, and mining of a property. The noncontributing interest is a passive interest in the land and is essentially a nonparticipating royalty interest. Both contributing and noncontributing interests can be present in leased fee and fee simple estates. In the case of fee ownership, the contributing and noncontributing interests may be held by the same party.

The selection and evaluation of comparable sales in the sales comparison approach and the methodology selected for the income capitalization approach are both driven by the interests being acquired and valued. For example, when valuing a noncontributing interest, the sales selected for analysis should be transfers of property with the same interest. The income analyzed would be the present worth of the anticipated future royalty income.

⁸⁰ See Section 1.13 for further discussion of an appraiser's reliance on the work of other experts.

⁸¹ See Section 4.3.3 for further discussion of the legal requirements for a larger parcel analysis.

Appraisers valuing mineral properties impacted by the 1872 Mining Law are advised to coordinate with client agency staff to clarify the approaches to valuing those interests.

Sales Comparison Approach to Value. Despite the common use of the income capitalization approach for industry purposes, in federal acquisitions the sales comparison approach is normally considered the most reliable approach for minerals as for other property types.⁸² As a result, the appraiser cannot default to using an income approach or other valuation method that may be acceptable for typical industry or other purposes. It is unacceptable for an appraiser to simply state that there are no comparable sales transactions without providing adequate support for the conclusion.

To properly develop a sales comparison approach to value for a mineral-bearing property, the appraiser must understand the level of information available concerning the mineralization found on the subject property. It is then important to identify comparable sales that had similar levels of information about mineralization available at the time of sale. Significant variables typically include rights conveyed, conditions of sale, the presence of multiple ores on the same property, access for extraction purposes, topography and cover (stripping ratios), transportation availability and cost, and distance to smelters or refineries. All of these factors may require adjustment.⁸³

In analyzing a sale of a mining property as a comparable sale, the sale may include the mine, mill, extraction plant, offices, and various other support facilities. These capital improvements are part of the real property and are also components of the business of mining and selling the mineral. The appraiser must understand the complex interplay of the real property components and identify where the real property ends and the business interests begin.

The verification of comparable sales data is a critical component of this analysis, and the assistance of experts in identifying all necessary areas of inquiry during the verification process may be required. The appraiser may need to consult geologists, engineers, and other experts for producing or nonproducing oil and gas, fissionable and hard rock, or other locatable minerals.

Also important in the sales comparison approach is the selection of the appropriate unit of comparison. Such selection should generally mirror that unit of comparison used by participants in the market and, as such, will generally result in the tightest bracket of value for the subject property.⁸⁴

In valuing mineral properties using the income capitalization approach, “[g]reat care must be taken, or such valuations can reach wonderland proportions.”

— *United States v. 47.14 Acres of Land in Polk Cty.*, 674 F.2d 722, 726 (8th Cir. 1982).

Income Capitalization Approach to Value. The income capitalization approach to value is also a valid means for developing an opinion of the market value of mineral properties, but should never be used exclusively if comparable sales are available for use in the sales comparison approach. The income capitalization approach can be especially applicable when the subject

⁸² See Section 4.8.

⁸³ For a general discussion of the application of the sales comparison approach, see Sections 1.5.2 and 4.4.2.

⁸⁴ See Section 4.8.

property is already being mined, and thus the historical income stream from the property is available for analysis. In applying the income capitalization approach, appraisers must take care to consider only the income that the property itself will produce—not income produced from the business enterprise conducted on the property (i.e., the business of mining).⁸⁵ An appraiser who is not thoroughly experienced in the appraisal of mineral properties should not attempt to employ the income capitalization approach. Even when used by an appraiser experienced in this field, this appraisal approach can be highly speculative, and great care must be exercised in its use.

In developing an opinion of value by the income capitalization approach for a mineral property, it is generally recognized that the most appropriate method of capitalization is yield capitalization, most notably discounted cash flow (DCF) analysis. The income that may be capitalized is the royalty income, and not the income or profit generated by the business of mining and selling the mineral. For this reason, the income capitalization approach, when applied to mineral properties, is sometimes referred to as the royalty income approach.

In conducting a DCF analysis, the appraiser must avoid estimating a property-specific investment value to a particular owner instead of developing an opinion of the market value of the property if it were placed for sale on the open market. Like application of the subdivision development method to value, DCF analysis in the valuation of mineral properties can be highly complex.⁸⁶ Creation of a detailed mining plan for the property is often required. The essential components of this approach are: (1) the royalty rate; (2) the unit sale price of the mineral to which the royalty rate is applied (e.g., \$20 per ton); (3) the projected annual amount of mineral production (e.g., 100,000 tons per year)—with the product of this ingredient and the prior two ingredients yielding the annual income; (4) the projected number of years of production and the year when the production will begin; and (5) the proper capitalization or discount rate.

In developing an estimated income stream, the proper royalty rate can be derived from comparable mineral lease transactions, and the mineral unit price to which the royalty rate is applied may be derived from appropriate market transactions. The annual amount of production and the number of years of production are more difficult (and speculative) to estimate, and at a minimum require not only physical tests of the property to determine the quantity and quality of the mineral present, but also market studies to determine the volume and duration of the demand for the mineral in the subject property. Production level estimates should be supported by documentation regarding production levels achieved in similar operations. Production levels should also be consistent with the mining plan's labor and equipment estimates. Numerous other factors may have to be considered, such as the amount of overburden, the method of mining (e.g., surface or deep mining), the requirements of permitting and applicable reclamation laws, the hauling distance to market, competition from other sites, the size and timing of the investment needed to construct any necessary access or processing plant, and so on.

When the interest to be acquired and appraised includes the working or contributing interest, the income analysis should also consider the size and timing of the investment needed. Capital costs will include expenditures for services, construction, and equipment related to mine development,

⁸⁵ See Sections 4.4.4 and 4.8.

⁸⁶ See Sections 1.5.1.2 for discussion of the subdivision development method.

preproduction, and production. Among the factors to be considered in this portion of the analysis are preliminary studies such as exploration and environmental and engineering studies required to define the location and nature of the resource sufficiently to support the mining plan and ensure compliance with all applicable governmental permitting and land use regulations. The engineering costs related to the mining operation design must include contractors' fees and management. Other elements to be considered include the costs of site preparation, facilities and improvements (including off-site improvements, such as rail or road facilities), mining equipment, and preproduction (including all of the costs required to bring the extraction process to full production, including the costs of time lag and permitting).⁸⁷

Operating costs are the expenditures incurred during the ongoing extraction process. These cost elements include labor, materials, supplies, utility costs, payroll overhead, management, indirect costs, and contingencies. Also, appropriate deductions for all relevant taxes associated with the operation must be made. As in the subdivision development approach, the estimation of an appropriate level of entrepreneurial profit is a critical element in the DCF analysis of any mineral property and is a factor that should be supported by direct market data whenever possible.

One of the most critical factors in the application of DCF analysis is the selection of the discount rate. Attempts have been made to apply various statistical techniques (such as probability weighted scenarios, Monte Carlo analysis, marketing uncertainty analysis, and timing of development analysis) to mineral valuations to account for the extraordinary high risks associated with such operations. However, the application of various statistical techniques is not a substitute for discount rate selection derived from and supported by direct market data,⁸⁸ which is the preferred and most widely accepted approach.⁸⁹

1.10.4. Special Considerations for Forested Properties. In developing an appraisal of forested properties, the appraiser must determine whether any merchantable timber is located on the property and whether the tree products located on the property are marketable and saleable. There must be sufficient volumes for profitable harvesting under existing state forest practice rules (or other applicable jurisdiction if appropriate). Merchantable timber may contribute value to the property. Pre-merchantable timber may or may not contribute value to the property and in some cases is included in the land value.

A critical part of the valuation of forested property is a timber cruise. A cruise plan should be developed that establishes the cruise procedures to be used in accordance with current market practices for the area and type of timber. The objective is to establish cruise standards and sampling errors based on private market expectations in the local market when timber is sold with the land.

⁸⁷ This factor can have a significant impact on the value of mineral property because the time lag between the effective date of an appraisal and the projected date upon which all studies have been completed, all permits issued, all construction completed, and an actual income stream can be generated may be extended.

⁸⁸ For a discussion of market extraction of discount rates, see the American Society of Farm Managers and Rural Appraisers' 2012 course, "Appraising Natural Resources," 18-19.

⁸⁹ See Section 1.5.1.2.

The sales comparison and income capitalization approaches are both appropriate for use in valuing properties with a highest and best use for timber production. In developing the sales comparison approach, the selection of the unit of comparison should be based on common local market practices. In developing the income capitalization approach, the appraiser must consider all factors including lumber selling price and absorption period (based on supply and demand analysis in the market), all harvesting and transportation costs, costs of sales, and profit. The discount rate used to estimate present value must be market supported and should reflect timber investment rates and risk associated with the subject property.

1.10.5. Water Rights. In appraising properties in which water rights contribute to the overall value of the property, the appraiser must recognize that water rights are established under state law. Appraisers should research sales in the same district or drainage basin and take into account water-rights seniority, past demand, drought, past depletion type of use, historic place of use, conversion, and statutory limitations on transferring place of use. There may be many other market factors that should be considered, such as costs of hydrologic and engineering studies as well as legal fees that must be addressed. The appraiser should consult with the client agency and agency counsel to ensure that the characteristics of the water rights that contribute value to the larger parcel are properly accounted for.

1.11. Special Considerations in Appraisals for Inverse Condemnations. Unlike direct condemnations and other intentional acquisitions, inverse taking or inverse condemnation claims involve a threshold question of government liability. In filing a direct condemnation, the United States expressly acknowledges the actual or proposed acquisition and its obligation to pay compensation. In the inverse taking claim, on the other hand, the United States may contest the landowner's claim that a taking occurred for which just compensation must be paid under the Fifth Amendment. Accordingly, in an inverse taking claim, the court must first determine whether a taking of property occurred for which just compensation must be paid. Appraisers may be retained to develop opinions in connection with the liability phase, the compensation phase, or both. If the government's action resulted in the government's permanent physical occupation of the land in question, the liability issue is a rather straightforward one.⁹⁰ However, in the context of a taking by regulation, the federal courts have developed various *tests* to determine whether a taking has occurred: the character of the government action; the extent to which the regulation interferes with distinct, investment-backed expectations; and the economic impact of the regulation.⁹¹

The economic impact test above involves the valuation of the property in question before and after the government's action.⁹² When conducting such an analysis, the appraiser's application of the larger parcel tests may vary from those applied in the direct acquisition or condemnation⁹³ because of the investment-backed expectations test noted above. Investment-backed expectations

90 "[A] permanent physical occupation is a government action of such a unique character that it is a taking without regard to other factors that a court might ordinarily examine." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 432 (1982).

91 *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978).

92 Such action generally relates to the denial of a government permit, such as a permit to fill wetlands.

93 In the context of inverse condemnation cases the courts have sometimes referred to the larger parcel determination as the issue of the denominator. See, e.g., *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 497 (1987). For a discussion of the larger parcel tests in direct acquisitions, see Sections 1.2.7.3.1 and 4.3.

are typically considered as of the date upon which the owner acquired the property and in the regulatory environment that existed at that time. But, on the date of the alleged taking, the owner may have sold portions of the property previously acquired. For the court to accurately assess the *economic impact of the regulation*, it must know how the regulation impacted the owner's reasonable investment-backed expectations.⁹⁴ For that reason, it may be necessary for the appraiser to disregard the unity of title test of the larger parcel and to value the entirety of the tract that was originally acquired. Because the tests applied by the courts to determine the question of liability (i.e., whether a compensable taking has occurred) are quite complex, it is essential for the appraiser to confirm with legal counsel the appropriateness of the larger parcel determination before proceeding with the appraisal assignment.

In providing appraisal services to the government in connection with the liability phase of an inverse condemnation action, it is imperative for both the appraiser and the trial attorney to completely understand what the appraiser's valuations are intended to measure. For that reason, continual contact and conferencing between the appraiser and trial counsel throughout the development of the appraisal is essential. Government's trial counsel must determine *what* is to be measured, while the appraiser determines *how* to measure it.

If the court finds that a compensable taking has occurred, the appraiser's function generally is to develop an opinion of the market value of the affected property before and after the taking, as of the date of the taking, which should be provided to the appraiser by legal counsel. In this valuation phase of the inverse condemnation litigation, the appraiser will generally utilize the same larger parcel tests that are applied in direct acquisitions or condemnations. In other words, the larger parcel used in the liability phase of the trial may be different than the larger parcel used in the valuation phase of the trial. Inverse condemnation actions relating to temporary takings are discussed in Section 1.9.2.

- 1.12. Special Considerations in Appraisals for Federal Land Exchanges.** Federal land exchanges differ from other federal land acquisitions in that an exchange must always be voluntary and the parties must reach agreement on the value of the properties. In direct acquisitions, the government has the authority to force owners to transfer their land by the exercise of its power of eminent domain as long as the government's use of the land will be for a public purpose and the government pays the owner just compensation for the land. However, the government does not have the authority to force individuals to convey their lands and accept federal lands as compensation. Likewise, the government "is not required to exchange any Federal lands. Land exchanges are discretionary, voluntary real estate transactions between the Federal and non-Federal parties."⁹⁵ This does not mean that such transactions are exempt from litigation relating to the valuation of the property involved and/or the adequacy of the appraisal report upon which the transaction was based.⁹⁶

94 For example, the owner may have acquired 100 acres, but as of the date of the alleged taking may have sold 75 acres of the tract, leaving an ownership on the date of valuation of only 25 acres.

95 36 C.F.R. § 254.3(a). See also 43 C.F.R. § 2200.0-6(a).

96 See, e.g., *Desert Citizens Against Pollution v. Bisson*, 231 F.3d 1172 (9th Cir. 2000).

Most federal land exchanges are accomplished pursuant to the Federal Land Policy and Management Act of 1976 (FLPMA), as amended (43 U.S.C. § 1701 *et seq.*). There are a number of specific statutes authorizing land trades that may not be entirely consistent with the provisions of FLPMA, as for example, certain National Wildlife Refuge System and National Park System exchange acts; the Alaska Native Claims Settlement Act, as amended (43 U.S.C. § 1621); and the Alaska National Interest Lands Conservation Act (16 U.S.C. 3192). Appraisers must therefore confer with the agency to ensure complete understanding of the appraisal development and appraisal report requirements applicable to the specific appraisal assignment.

The two agencies most actively involved in federal land exchanges are the U.S. Forest Service and the Bureau of Land Management (BLM). Both the Forest Service and BLM have adopted regulations that implement FLPMA and control their land exchange activities.⁹⁷ Forest Service and BLM regulations are similar and both require some modifications of these Standards. These regulations define appraisal, highest and best use, and market value,⁹⁸ and appraisers must use these definitions when conducting appraisals for federal land exchanges.

Exchanges can be proposed by the Forest Service, BLM, or any person, state, or local government. To assess the feasibility of an exchange proposal, the agency may complete a feasibility analysis of the lands involved in the proposal. Valuation input into the feasibility analysis may or may not include an appraisal, but shall always be prepared by a qualified agency appraiser in compliance with the requirements of USPAP.⁹⁹

If the feasibility analysis does not provide an opinion of value, it may not fall under these Standards but would still be considered part of appraisal practice under USPAP.¹⁰⁰ The requirements for classification as a qualified appraiser under these exchange regulations are essentially the same as those for a contract appraiser under 49 C.F.R. § 24.103(d)(2) and these Standards.¹⁰¹

One of the initial steps in an exchange involving federal lands is the formulation of an Agreement to Initiate an Exchange (ATI).¹⁰² This nonbinding agreement outlines the exchange process, identifies the proposed lands or interests in lands to exchange, and memorializes the responsibilities of each party (including the appraisal costs and other costs associated with processing the exchange). The ATI also documents whether the proposed land exchange will be processed as an assembled or non-assembled land exchange.

A qualified appraiser shall be an individual acceptable to all parties and approved by the authorized officer. The appraiser shall be competent, reputable, impartial, and have training and experience in appraising property similar to the property involved in the appraisal assignment pursuant to these Standards. The appraisal report must reference and be prepared according to the applicable regulations and, to the extent appropriate, these Standards.¹⁰³ All appraisal reports

97 Forest Service regulations may be found in 36 C.F.R. § 254 *et seq.*, and BLM regulations may be found in 43 C.F.R. § 2200 *et seq.*

98 36 C.F.R. § 254.2; 43 C.F.R. § 2200.0-5.

99 43 C.F.R. § 2201.1(b); *see also* 36 C.F.R. § 254.4(b).

100 If the feasibility analysis provides a value opinion, it would fall under these Standards and must comply with USPAP's Standard 1 and Standard 2.

101 *See* 36 C.F.R. § 254.9(a)(2); 43 C.F.R. § 2201.3-1(b).

102 43 C.F.R. § 2201.1; 36 C.F.R. § 254.4.

103 36 C.F.R. § 254.9; 43 C.F.R. § 2201.3.

prepared for federal exchanges are subject to review by federal agency review appraisers.¹⁰⁴ Therefore, appraisers conducting appraisals for federal exchange purposes have a professional responsibility to recognize the federal agency as the client and the private landowners as *intended users* of the appraisal report and to identify them as such in the appraisal report.¹⁰⁵

If any party issues an instruction to the appraiser to make an extraordinary assumption or to employ a hypothetical condition in the conduct of the appraisal that would conflict with the exchange regulations, the ATI, or these Standards, the appraiser must advise the client of the conflict. If the client provides written instructions to the appraiser to make the assumption or employ the condition in conducting the appraisal, the appraiser may make the appraisal but must clearly identify the assumption and/or condition in the appraisal report and also report that the opinion of value has not been prepared in accordance with the exchange regulations, the ATI, and/or these Standards, so as to ensure that the *intended users* of the report are not misled.

The major technical difference between appraisals prepared for federal land exchange purposes and those typically prepared under these Standards relates to the appraisal of multiple tracts and the appraiser's determination of the larger parcel.¹⁰⁶ For a non-assembled land exchange appraisal (similar to the typical acquisition appraisal, although the estate to be appraised has been identified in the ATI), the appraiser will apply the tests of unity of ownership, of unity of highest and best use, and of contiguity or proximity as it bears on unity of use in determining the larger parcel. However, for purposes of an assembled exchange appraisal, the tracts to be appraised are defined in the property description contained in the ATI. The nonfederal ownerships being assembled for exchange shall be appraised based on the sum of the value of the separate ownerships in the manner they were acquired and conveyed as individual transactions.

If an appraiser concludes that the property described in the ATI constitutes two or more separate larger parcels, the method of valuation is generally fact dependent and, in most cases, will be controlled by the provisions of the ATI. In some instances, the appraiser may be instructed to value the different larger parcels as separate entities, while under other circumstances the appraiser may be instructed to value the larger parcels only as they contribute to the whole, as if the property described in the ATI would be sold from one seller to one buyer in one transaction.¹⁰⁷ If appraiser instructions are contrary to the appraiser's highest and best use or larger parcel conclusion, the appraiser must advise the client that it may be necessary to identify the instruction as an extraordinary assumption or hypothetical condition under USPAP. It is important, however, for the appraiser to recognize that the same method of valuation must be utilized for both the federal and nonfederal lands.¹⁰⁸

104 36 C.F.R. § 254.9(d); 43 C.F.R. § 2201.3-4.

105 USPAP, Standards Rule 2-2(a)(i) and 2-2(b)(i), 23, 25.

106 For discussion of the larger parcel, see Sections 1.4.6 and 4.3.3.

107 In other words, the value of the whole property cannot be estimated by simply adding together the independently appraised values of the larger parcels, unless market evidence demonstrates that the larger parcels would contribute their full value to the value of the whole property as defined in the ATI.

108 36 C.F.R. § 254.9(b)(v); 43 C.F.R. § 2201.3-2(a)(5).

The regulations provide for special treatment of the larger parcel issue in assembled land exchanges.¹⁰⁹ This term is defined differently in Forest Service and BLM regulations¹¹⁰ and, for that reason, assembled land exchanges may be administered differently by these agencies. Again, depending on the provisions of the ATI, the value of the various parcels may be estimated as independent parcels, or as a single tract to be sold in a single transaction.

When appraising the federal land portion of the exchange, the regulations require that the appraiser “estimate the value of the lands and interests as if in private ownership and available for sale in the open market.”¹¹¹ This is an assignment condition that requires a **legal instruction** and creates a hypothetical condition. Because the federal land is appraised as if in private ownership, to its highest and best use, any other surrounding federal land cannot be part of a larger parcel because (due to the hypothetical condition) it is under different ownership and has a different highest and best use.

Because of the complexity of appraising multiple tracts of land for exchange purposes and the fact that their treatment is often fact specific, it is essential that agencies provide clear written instructions to the appraiser in this regard and that the appraiser insist upon such instructions at the initiation of the appraisal assignment.

- 1.13. Supporting Experts Opinions and Reports.** Real estate appraisal is becoming increasingly sophisticated. Preparation of an adequately supported opinion of market value often requires the assistance of consultants with special expertise. Before issuing an appraisal assignment, agencies should attempt to identify the need for such special consultants and make arrangements for such services, either by contracting with the consultant directly or by providing for the appraiser’s retention of the consultant in the appraisal contract. If an agency retains the consultant directly, it should select the consultant in cooperation with the appraiser, who will ultimately have to rely on the consultant’s analysis and conclusions. The agency and the appraiser should jointly determine the scope of work and establish qualification criteria for any consultant retained. Regardless of whether the consultant is retained by the agency or the appraiser, selection of the consultant must be by concurrence of both the appraiser and the agency.

If the appraiser finds that an appraisal cannot be completed without a consultant’s assistance, the appraiser should notify the agency involved immediately. The appraiser may not adopt unauthorized, unreasonable, or unsupported assumptions in making an appraisal in lieu of obtaining specialized consultant assistance.

Types of special consultants often needed include:

- Fixture appraisers
- Environmental engineers and auditors

¹⁰⁹ 36 C.F.R. § 254.5; 43 C.F.R. § 2201.1-1.

¹¹⁰ An “[a]ssembled land exchange means an exchange of Federal land for a package of multiple ownership parcels of non-Federal land consolidated for purposes of one land exchange transaction.” 36 C.F.R. § 254.2; An “[a]ssembled land exchange means the consolidation of multiple parcels of Federal and/or non-Federal lands for purposes of one or more exchange transactions over a period of time.” 43 C.F.R. § 2200.0-5(f).

¹¹¹ 43 C.F.R. § 2201.3-2(2); 36 C.F.R. § 254.9(b)(ii).

- Civil engineers
- Cost estimators and contractors
- Market experts
- Feasibility and planning experts
- Statisticians
- Geologists/mining engineers/mineral specialists
- Hydrologists
- Timber cruisers/foresters/forestry engineers
- Communications experts

In using these opinions and reports, the appraiser cannot merely accept such consultant reports as accurate, but rather must analyze such reports and adopt them only if reasonable and adequately documented and supported. The results of secondary valuation reports (minerals, fixtures, or timber valuations) cannot simply be added to the value of the land to arrive at a value of the property as a whole without proper analysis by the appraiser. To do so would violate the unit rule and professional standards. The appraiser must consider these components of the property in light of how they contribute to the market value of the property as a whole.

- 1.14. Appraisers as Expert Witnesses.** When contracting for appraisals, it is important to require the individual appraiser with whom the contract is made to actually prepare or be principally responsible for developing the appraisal and the appraisal report, and to be prepared to testify in court if it becomes necessary. There are additional reporting requirements for appraisals prepared for trial purposes (refer to Section 2.2.3 for additional requirements).

The appraiser's role as an expert witness in litigation carries with it a heavy responsibility that should not be taken lightly no matter how many times the appraiser has testified before. In addition, federal eminent domain cases are generally complex matters involving discovery, depositions, and testimony that require the appraiser to be well prepared and thorough. Unlike other forms of litigation such as bankruptcy cases, attorneys involved in eminent domain cases are often as knowledgeable about appraisal standards, methodology, and theory as the appraisers appearing as expert witnesses. Section 4.13.1 of these Standards is required reading for any appraiser who has been identified as an expert witness by the U.S. Department of Justice.

- 1.15. Confidentiality.** Appraisers' valuations and supporting appraisal reports are confidential information and appraisers shall strictly abide by the following confidentiality of USPAP's Ethics Rule:

- (1) An appraiser must protect the confidential nature of the appraiser-client relationship.
- (2) An appraiser must act in good faith with regard to the legitimate interests of the client in the use of confidential information and in the communication of assignment results.
- (3) An appraiser must not disclose confidential information or assignment results prepared for a client to anyone other than: a) the client and persons specifically authorized by the client; b) state appraiser enforcement agencies and such third parties as may be authorized by due process of law; and c) a duly authorized professional peer review committee.

Under item (1) above, appraisers must obtain written authorization from the client agency (or the Department of Justice if a case has been filed) before disclosure. The passage of time in and of itself does not extinguish either the appraiser's responsibility for confidentiality or the appraiser/client relationship. The appraiser/client relationship is extinguished only upon written release from the client agency or upon the consummation of the government's acquisition of the property appraised. Even though the appraiser/client relationship may terminate, the appraiser remains subject to the confidentiality provisions of USPAP.

Appraisers have an extraordinary duty to maintain confidentiality when the acquisition of the property appraised may have to be accomplished by condemnation, and any appraisal report prepared for the purposes of government acquisition should be considered the subject of potential litigation until such time as the government has consummated its acquisition.

If an appraiser receives a request or order, under items (2) or (3) above, to provide confidential information relating to an appraisal conducted for the government to a state appraiser enforcement agency or professional peer review committee, the appraiser must provide the government with written notice of the request or order *prior* to providing the confidential information to the state appraiser enforcement agency or professional peer review committee. If litigation is pending, the Department of Justice may elect to intercede if it determines such intercession would be in the best interest of the government.

Appraisers must use extreme caution in choosing what information to cite in developing their opinions of value. While it is common practice for appraisers in non-litigation appraisals to report that they have relied upon confidential information (such as information learned in the conduct of other appraisals, or information provided to the appraiser by market participants on the condition that it not be disclosed) in addition to the supporting data reported, in developing their opinion of value such a reference in a litigation report may subject the information to discovery. Appraisers should not reference such information in litigation reports unless they are prepared to reveal the information, which occurs often by order of the court.

2. APPRAISAL REPORTING

- 2.1. Introduction.** These Standards address the content and level of information and analysis required to communicate the results of an appraisal prepared for federal property acquisitions. These Standards are intended to establish requirements for appraisal report *content* and *documentation*. These Standards are not, however, intended to establish an absolute requirement for appraisal report *formatting*. The report formats described in Section 2.3, consisting of a four-part appraisal report for total acquisition appraisals and a seven-part appraisal report for partial acquisition appraisals, are recommended guides that agencies can modify as appropriate for agency needs. Appraisers are cautioned to closely examine their appraisal contract or assignment letter for report formatting requirements, as many agencies mandate report formatting in accordance with the recommendations herein. For ease of reference, the recommended formatting for appraisal reports is shown in the addenda of these Standards, marked as Appendix B and Appendix C.

These Standards also address the additional content and documentation requirements for appraisal reports to be used by appraisers who will testify as expert witnesses in federal court under Rule 26(a)(2)(B) of the Federal Rules of Civil Procedure. Finally, the reporting requirements for leasehold acquisitions and project appraisal reports are addressed under Sections 2.4 and 2.5 respectively.

- 2.2. Appraisal Reports.** There are two written reporting options established under USPAP: an *appraisal report* and a *restricted appraisal report*. In addition, USPAP permits an appraiser to provide an *oral report*. For the reasons discussed under Sections 2.2.1 and 2.2.2 below, oral reports and restricted appraisal reports are not permitted under these Standards. The reporting formats set forth under Sections 2.3, 2.4, and 2.5 below are consistent with and/or exceed the requirements for an appraisal report under Standard 2 of USPAP.
- 2.2.1. Oral Appraisal Reports.** Oral appraisal reports are not permitted under these Standards. An oral report is inconsistent with the intended use and intended users of an appraisal prepared for federal acquisitions. Even with the appraiser's workfile available, an oral report does not satisfy agency record-keeping requirements, and cannot be reliably reviewed. The number of intended users of appraisals in federal acquisitions also makes such a practice impossible.
- 2.2.2. Restricted Appraisal Reports.** For most acquisitions and all litigation matters, restricted appraisal reports are not permitted.¹¹² These reports cannot be reviewed to the level of detail required for federal acquisition appraisals; the intended user of the report is restricted to the client only,¹¹³ a condition that cannot be met for federal acquisition appraisals because it should

¹¹² This does not prevent agencies from using restricted appraisal reports performed by internal agency appraisal staff for low value noncomplex acquisitions (in general accordance with the waiver valuation procedures established under the URA) or for internal portfolio valuation purposes.

¹¹³ USPAP, Standards Rule 2-2 and Advisory Opinion 12, *Use of the Appraisal Report Options of Standards Rules 2-2, 8-2, and 10-2, 22 and 103*.

be anticipated that others such as landowners, legislators, or the courts will be asked to use and rely on the appraisal report.

- 2.2.3. Compliance with Rule 26 of the Federal Rules of Civil Procedure.** If an appraiser may testify as an expert witness in a federal trial or deposition, the appraiser's report must satisfy not only these appraisal Standards, but also the content requirements of Rule 26(a)(2)(B) of the Federal Rules of Civil Procedure.

Rule 26(a)(2)(B) requires a written report, prepared and signed by the expert, that contains:

- i. a complete statement of all opinions the witness will express and the basis and reasons for them;
- ii. the facts or data considered by the witness in forming them;
- iii. any exhibits that will be used to summarize or support them;
- iv. the witness's qualifications, including a list of all publications authored in the previous 10 years;
- v. a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and
- vi. a statement of the compensation to be paid for the study and testimony in the case.¹¹⁴

Appraisal reports prepared in accordance with these appraisal Standards will normally satisfy parts (i), (ii) and (iii) of Rule 26(a)(2)(B).¹¹⁵ However, many appraisers' qualification resumes or curriculum vitae typically do not include the information required in parts (iv), (v), and (vi). Appraisers must therefore supplement their customary qualification resumes to list (iv) all publications authored in the previous 10 years; all trial or deposition testimony within the previous four years; and (vi) the appraiser's fees for the appraisal assignment and for potential testimony. The appraiser must comply with Rule 26 if an appraisal report may be used for litigation purposes. In addition, because litigation may arise even when testimony is not anticipated, appraisers may wish to include such information in any report being prepared for federal acquisition purposes.

- 2.2.4. Electronic Transmission of Appraisal Reports.** It is common for appraisers to deliver appraisal reports electronically. The appraiser is responsible for the security of the report when it is submitted in this manner.

- 2.2.5. Draft Reports.** Agencies may request that the appraiser provide a draft of all or a portion of the appraisal report prior to delivery of a final report. This requirement should be addressed as part of the scope of work with the agency before initiating the assignment. A draft should not be signed and must be clearly marked as a draft or a work in progress.

2.3. Content of Appraisal Report.

¹¹⁴ FED. R. CIV. P. 26(a)(2)(B) (through amendments effective Dec. 1, 2015).

¹¹⁵ See, e.g., *United States v. 12.94 Acres of Land in Solano Cty.*, No. CIV. S-07-2172, 2009 WL 4828749, at *4, *7, 2009 U.S. Dist. LEXIS 114581, at *11, *20-*21 (E.D. Cal. Dec. 9, 2009).

2.3.1. Introduction.

2.3.1.1. Title Page. This should include (1) the name, street address, and agency assigned tract or parcel number (if any) of the property appraised; (2) the name and address of the individual(s) making the report; and (3) the effective date of the appraisal.

2.3.1.2. Letter of Transmittal. This should include the date of the letter; identification of the property and property rights appraised; a reference that the letter is accompanied by an appraisal report; a statement of the effective date of the appraisal; identification of any hypothetical conditions, extraordinary assumptions, limiting conditions, or legal instructions; the value opinion (or, in a partial acquisition, opinions of the value of the larger parcel before the acquisition and the remainder property after the acquisition, the difference); and the appraiser's signature.

2.3.1.3. Table of Contents. The major parts of the appraisal report and their subheadings should be listed. Items in the addenda of any report shall be listed individually in the table of contents.

2.3.1.4. Appraiser's Certification. The appraisal report shall include an appraiser's signed certification statement that is consistent with the certification requirements of USPAP Standard 2. In addition, the following statements related to these Standards must be included:

- the appraisal was developed and the appraisal report was prepared in conformity with the *Uniform Appraisal Standards for Federal Land Acquisitions*;
- the appraisal was developed and the appraisal report prepared in conformance with the Appraisal Standards Board's *Uniform Standards of Professional Appraisal Practice* and complies with USPAP's Jurisdictional Exception Rule when invoked by Section 1.2.7.2 of the *Uniform Appraisal Standards for Federal Land Acquisitions*; and
- the appraiser has made a physical inspection of the property appraised and that the property owner, or [his][her] designated representative, was given the opportunity to accompany the appraiser on the property inspection.

The appraiser's certification shall also include the appraiser's opinion of the market value of the subject property as of the effective date of the appraisal. If the government's acquisition comprises only a portion of the whole property or property rights appraised, the certification shall include both the appraiser's opinion of the market value of the whole property as of the effective date of the appraisal and the appraiser's opinion of the remainder property's market value after the government's acquisition and the difference between them as of the effective date of the appraisal.

Appraisers may also add to their certifications certain items that may be required by law and the appraiser's professional organization(s). However, appraisers should avoid adding certifications that are not pertinent to the specific appraisal (e.g., that the report was prepared in accordance with the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 [FIRREA]) or that are beyond the scope of the appraisers' assignment (e.g., certifying an opinion of just compensation).

2.3.1.5. Executive Summary. The appraiser shall report the major facts and conclusions that led to the final opinion(s) of value. This summary should include an identification of the property appraised; the highest and best use of the property (both before and after the acquisition if a partial acquisition); brief description of improvements (both before and after the acquisition if a partial acquisition); the indicated value of the property by each approach to value employed (both before and after the acquisition if a partial acquisition); the final opinion of value (both before and after the acquisition if a partial acquisition); any hypothetical conditions, extraordinary assumptions, limiting conditions, or instructions; and the effective date of the appraisal.

2.3.1.6. Photographs. Photographs shall show the front elevation of the major improvements, any unusual features, views of the abutting properties on either side, views of the property directly opposite, and interior photographs of any unique features. When a large number of buildings are involved, including duplicates, one photograph may be used for each type. Except for an overall view, photographs may be incorporated in the body of the report as appropriate, or may be placed in the addenda of the report.

Each photograph should be numbered and show the identification of the property, the date taken, and the name of the person taking the photograph. The location from which each photograph was taken and the direction the camera lens was facing should be shown on the plot plan of the property in the report's addenda.

In selecting photographs for inclusion in their reports, appraisers should bear in mind that some government appraisal reviewers and other readers of the report may never have an opportunity to personally view the property. Therefore, they must rely on the photographs and the narrative description of the property provided by the appraiser to gain an adequate understanding of the physical characteristics of the property to judge the accuracy and reasonableness of the appraiser's analyses and value estimate(s). Thus, the appraiser may need to include aerial photographs in the report to ensure that readers can accurately visualize the property.

In taking photographs, appraisers should also be guided by the knowledge that the government may be unable to acquire the property voluntarily and may take possession of the property well before the question of value is settled; thus, the land may be substantially altered and improvements demolished prior to a final decision in a condemnation trial.

2.3.1.7. Statement of Assumptions and Limiting Conditions. Any assumptions and limiting conditions that are necessary to the background of the appraisal shall be stated. Any agency or special **legal instructions** provided to the appraiser shall be referenced and a copy of such instructions shall be included in the addenda of the appraisal report.¹¹⁶

If the appraisal has been made subject to any encumbrances against the property, such as easements, these shall be stated. In this regard, it is unacceptable to state that the property has

¹¹⁶ Appraisers must bear in mind that if a client or legal instruction has not been provided to them in writing, it is not considered a binding instruction. Therefore, if the appraiser accepts an oral instruction from the client or legal counsel, the appraiser becomes wholly responsible for it. Reference to a client or legal instruction, a copy of which is not in the addenda of the appraisal report, will not be acceptable justification for acceptance or adoption of the instruction and may result in disapproval of the appraisal report.

been appraised as if free and clear of all encumbrances, *except as stated in the body of the report*; the encumbrances *must* be identified in this portion of the report.

The appraiser must avoid including “boilerplate” assumptions and limiting conditions. For instance, an assumption that improvements are free from termite infestations is inappropriate in the appraisal of vacant land. Also, assumptions and limiting conditions cannot be used by an appraiser to alter an appraisal contract, assignment letter, or the appraiser’s scope of work. Unauthorized hypothetical conditions, assumptions, or limiting conditions may result in disapproval of the appraisal report.

In a partial acquisition, the appraiser should identify those hypothetical conditions, assumptions, and limiting conditions that apply to both the before and after acquisition appraisals, those that apply only to the appraisal of the larger parcel before the acquisition, and those that apply only to the appraisal of the remainder. Appraiser assumptions and limiting conditions, as well as client and **legal instructions**, are discussed in greater detail in Section 1.2 of these Standards.

2.3.1.8. Description of Scope of Work. The appraiser shall use this section of the report to identify the seven critical elements that defined the appraisal problem to be solved:

- Client
- Intended users
- Intended use
- Definition of market value
- Effective date
- Property characteristics
- Assignment conditions

This section shall include an explanation of the intended use for the appraisal, and a description of the property rights appraised, which should be provided to the appraiser by the client agency. In most instances the intended use of the appraisal will be to provide an opinion of the market value as of a specific date.¹¹⁷ In an appraisal assignment involving a partial acquisition, the intended use of the appraisal will be to provide an opinion of the market value of the larger parcel before the acquisition and an opinion of the market value of the remaining property after the acquisition.

It is imperative that the appraiser utilize the correct definition of market value. For appraisals prepared under these Standards, appraisers shall use the definition of market value found in Section 1.2.4 of these Standards.

This definition must be placed in this portion of the appraisal report. No other definition of market value for purposes of appraisals made under these Standards is acceptable,¹¹⁸ unless otherwise required by a specific and cited federal law or regulation.

¹¹⁷ For a discussion of the legal requirements regarding the effective date of value, see Section 4.2.1.1.

¹¹⁸ For a discussion of the legal basis for this definition of market value and this specific requirement, see Section 4.2.

The appraiser should describe the investigation and analysis that was undertaken in developing the appraisal. The geographical area and time span searched for market data should be included, as should a description of the type of market data researched and the extent of market data confirmation. The appraiser should state the references and data sources relied upon in developing the appraisal.

The applicability of all approaches to value shall be discussed and the exclusion of any approach to value shall be explained.

The appraiser has the burden of clearly identifying and explaining the implications of any hypothetical condition or extraordinary assumption adopted. The required explanation and discussion of the implications of such hypothetical conditions or extraordinary assumptions must be included in this portion of the appraisal report. Each hypothetical condition and extraordinary assumption must be labeled as such and any legal instructions must be included in the addenda of the report.

2.3.2. Factual Data—Before Acquisition.¹¹⁹

2.3.2.1. Legal Description. This description must be sufficiently detailed to properly identify the property appraised. If lengthy, it should be referenced and included in the addenda of the report. If the client agency has assigned a parcel or tract number to the property, that information should also be referenced. A more detailed standard concerning the legal description of the property to be appraised appears in Section 1.1.1 of these Standards.

2.3.2.2. Area, City, and Neighborhood Data. This data (mostly demographic and economic) must be kept to an absolute minimum and should only include information that directly affects the subject property, together with the appraiser's conclusions as to significant trends. The use of "boilerplate" demographic and economic data is unnecessary and, unless the appraiser demonstrates that the specific data directly impacts the current market value of the subject property, it should be excluded.

Changes in the neighborhood brought about by the government's project for which the property under appraisal is being acquired shall be disregarded. This specific Standard is contrary to USPAP Standards Rule 1-4(f) and is considered a jurisdictional exception. See Section 4.5 (Project Influence) for a discussion of the legal basis for this specific Standard.

2.3.2.3. Property Data.

2.3.2.3.1. Site. Describe the present use, accessibility and road frontage, land contours and elevations, soils, vegetation (including timber), views, land area, land shape, utilities, mineral deposits, water rights associated with the property, and relevant easements, etc. A statement must be made concerning the existence or nonexistence of commercially valuable mineral deposits.

¹¹⁹ If the government's acquisition is a partial acquisition, it is imperative that the sections of the appraisal report in Section 2.3.2 relate only to the before situation. The appraiser must not attempt to combine the discussion of the factual data after acquisition with the factual data relating to the before situation.

Also discuss the beneficial and detrimental factors inherent in the location of the property.¹²⁰ The presence of hazardous substances should be addressed in accordance with Sections 1.3.1.1 of these Standards. An affirmative statement is required if the property is located within a flood hazard area.¹²¹

2.3.2.3.2. Improvements. Describe the following: all improvements including their dimensions; square foot measurements, chronological and effective age, and dates of any significant remodeling/renovation; condition; type and quality of construction; and present use and occupancy. This description may be in narrative or schedule form. Where appropriate, a statement of the method of measurement used in determining gross building area and net rentable areas should be included. All site improvements, including fencing, landscaping, paving, irrigation systems, and domestic and private water systems require description. The appraiser should coordinate such description with the photographs of the property included in the report and with the plot plan (and floor plan, if included). If the appraiser will rely on the cost approach to value, or if the acquisition is a partial acquisition that will structurally impact the improvements, a more comprehensive improvement description is required. These items are described in more detail in Section 2.3.7.

2.3.2.3.3. Fixtures. All fixtures are to be described in narrative or schedule report form with a statement of the type and purpose of each. The current physical condition, relative utility, and obsolescence should be stated for each item or group included in the appraisal, and whenever applicable the repair or replacement requirements to bring the fixture to a usable condition.¹²²

2.3.2.3.4. Use History. State briefly the history of the use of the property as vacant and as improved. If improved, state the purpose for which the improvements were designed and the dates of original construction and major renovations, additions, and/or conversions. Include a 10-year history of the use and occupancy of the property.¹²³ If any of the foregoing information is indeterminable, the appraiser must report that fact.

2.3.2.3.5. Sales History. Include a 10-year record of all sales and, if the information is available, any offers to buy or sell the subject property. If no sale of the property has occurred in the past 10 years, the appraiser must report the last sale of the property, irrespective of date.

Information to be reported must include the name of the seller, name of the buyer, date of sale,¹²⁴ price, terms and conditions of sale, and the appraiser's verification of the sale and whether the transaction met the conditions required for a comparable sale under Section 1.5.2.2.

¹²⁰ Beneficial factors may include such items as desirable views, proximity to desirable public or cultural facilities, or proximity to dedicated open space or greenbelts. Detrimental factors may include such items as offensive odors, undesirable land uses, contamination, and noxious weeds. Farm properties can be especially impacted by environmental factors such as noxious weeds, frost, incidence of hail, floods and droughts, and variations in crop yields. Appraisers should list and describe those beneficial and detrimental factors that may impact the utility and value of the land.

¹²¹ For this purpose, appraisers should refer to Federal Emergency Management Agency (FEMA) flood hazard maps.

¹²² See Section 1.3.1.2.

¹²³ Past uses of the property may suggest its historical contamination by hazardous substances.

¹²⁴ Terms and conditions of sale cannot, of course, be conclusively determined from the public record. Therefore, appraisers should confirm the sales of the subject property with one of the parties to the transaction.

2.3.2.3.6. Rental History. Report the historical rental or lease history of the property for at least the past three years, if this information can be ascertained. All current leases should be reported, including the date of the lease, name of the tenant, rental amount, term of the lease, parties responsible for property expenses, and other pertinent lease provisions. The appraiser must describe the verification process and whether the lease(s) meets the conditions required for a comparable lease.

2.3.2.3.7. Assessed Value and Annual Tax Load. Include the current assessment and dollar amount of real estate taxes. If assessed value is statutorily a percentage of market value, state the percentage.

Some jurisdictions have developed programs wherein property will be assessed based on its current use rather than its highest and best use. These programs often relate to farmlands, timberlands, and open space; for purposes of eligibility, owners may have to agree to leave the property in its existing use for a certain period of time.¹²⁵ In such a case, the appraiser should report both the current assessed value and taxes for the property's existing use and the estimated assessed value and tax load for the property at its highest and best use.

2.3.2.3.8. Zoning and Other Land Use Regulations. Identify the zoning for the subject property. This must be reported in descriptive terms (e.g., multifamily residential, 5000 sq. ft. of land per unit) rather than by zoning code (e.g., MF-2). Other local land use regulations that have an impact on the highest and best use and value of the property, including setback requirements, off-street parking requirements, and open space requirements must be reported. The appraiser should also note any master or comprehensive land use plan in existence that may affect the utility or value of the property.

If the property was recently rezoned, that must be reported. The appraiser must determine whether such rezoning was a result of the government's project for which the subject property is being acquired. If so, the appraiser must justify this conclusion and disregard the rezoning.¹²⁶ If the rezoning of the property is imminent or probable, discuss in detail the investigation and analysis that led to that conclusion under Section 2.3.3.1 (Highest and Best Use).¹²⁷ The mere assertion by an appraiser that a property could be rezoned is insufficient.¹²⁸ In addition to zoning, the appraiser must identify all other land use and environmental regulations that have an impact on the highest and best use and value of the property.¹²⁹ The impact of the regulations must also be discussed in the highest and best use analysis. The appraiser must also discuss the impact of any private restrictions on the property, such as deed and/or plat restrictions.

2.3.3. Data Analysis and Conclusions – Before Acquisition.

2.3.3.1. Highest and Best Use. The appraiser's determination of highest and best use is one of the most important elements of the entire appraisal process. Therefore, appraisers must apply their skill with great care and clearly support the highest and best use conclusion in the appraisal report.

¹²⁵ See Section 1.3.1.7.

¹²⁶ For the legal basis for this standard, see Section 4.5.3. Under USPAP, invocation of this standard would result in an appraisal prepared under a hypothetical condition.

¹²⁷ For a discussion of the extent of the required investigation that must be taken by the appraiser in this regard, see Section 1.3.1.3.

¹²⁸ See Section 1.3.1.3.

¹²⁹ See Section 1.3.1.3.

The highest and best use of the land, as if vacant, is addressed first. If the land is improved, the highest and best use of the property, as improved, is then addressed. In some cases, the highest and best use of property cannot be reliably determined without extensive marketability and/or feasibility studies, which in complex cases may require the assistance of special consultants.

2.3.3.1.1. Four Tests. The four tests of highest and best use are physically possible, legally permissible, financially feasible, and highest value. Each of these four criteria must be addressed in the appraisal report. The level of supporting data and analysis presented in the report for each criteria will depend in part on the complexity of the appraisal problem.

In all assignments, the appraiser must describe the analysis developed under Section 1.4 concerning the highest and best use of the property as if vacant. The physical characteristics of the property that impact value must be addressed. Property size, shape, topography, access, road frontage, and utilities are all examples of physical characteristics of a property that may influence use and value and should be described in adequate detail for the client and intended users to understand how they may influence the determination of highest and best use.

The appraiser must describe the legal constraints on the property that were identified and analyzed under Sections 1.3.1.3 and 1.4.5. Zoning requirements, height restrictions, setback and open space requirements, and all other legal constraints on the property should be described and their impact discussed. If the appraiser concludes a highest and best use that will require rezoning of the property, the investigations and analyses developed under Section 1.3.1.3 concerning the probability of obtaining that zoning change should be reported here in sufficient detail for the client and intended users to understand the reasons for the conclusion. If the appraiser concludes that the highest and best use requires some other form of government approval, the investigations and analyses developed under Sections 1.3.1.3 and 1.4.5 concerning the probability of obtaining those approvals must be described in sufficient detail for the client and intended users to understand the reasons for the conclusion.

The financial feasibility of those uses, which are both physically possible and legally permitted, should be addressed. All feasibility or comparative studies developed under Section 1 should be described here, so the client and intended users can understand those uses that may have been eliminated in that analysis. Finally, the appraiser should discuss the use of the property as if vacant, which results in the highest value, and the analysis that supports that conclusion. The appraiser should identify the timing of the use and the likely purchaser and user.

If the property contains improvements, the appraiser must address the highest and best use as improved. The same process described above should be followed. This analysis is focused on the contribution of the improvements to the property overall, taking into account the highest and best use of the property as if vacant. After addressing each of the four tests and making a determination of the highest and best use as improved, the appraiser should identify the timing of the use and the likely purchaser and user.

2.3.3.1.2. Larger Parcel. In every appraisal report prepared under these Standards, the appraiser must describe the factual basis and analysis underlying the conclusion of the larger parcel analysis. The three tests developed under the larger parcel analysis—unity of highest and best use, unity of title, and contiguity—should be addressed here.¹³⁰ Each of the three tests (with emphasis on the unity of highest and best use) must be reported in sufficient detail for the client and intended users to fully understand the factual and analytical basis for the conclusion.

Application of the Approaches to Value

2.3.3.2. Land Valuation. The appraiser shall report the opinion of value of the land for its highest and best as if vacant and available for such use. See Sections 1.5.1 and 4.4.2 for a detailed discussion concerning the approaches to value and the legal foundation for these Standards. In all assignments, the sales comparison approach is the preferred valuation approach for forming an opinion of the market value of the land as if vacant. However, in some assignments the subdivision development method may be appropriate. The following sections describe the reporting requirements for the land valuation process.

2.3.3.2.1. Sales Comparison Approach. In reporting the results of the sales comparison approach for land valuation, the appraiser shall provide detailed descriptions of confirmed sales of lands that have the same or similar highest and best use as the subject property. The description of each sale transaction used as a comparable sale should at a minimum include the date of the transaction, the price paid, the name of the seller, the name of the buyer, the size of the property, the location of the property, the zoning or other legal constraints on the property, and a description of the physical characteristics of the property. The person with whom the transaction was verified should also be identified.

Differences between the comparable sales and the subject property shall be considered and adjustments made to the sales to address these differences. Items of comparison shall include property rights conveyed, financing terms, conditions of sale, market conditions, location, physical characteristics, economic characteristics, legal characteristics, and non-realty components of value. The adjustments must be summarized in an adjustment grid and each adjustment (whether qualitative or quantitative) should be supported with market data. The data and analysis must provide sufficient detail for the client and intended users to understand the data, the analysis, and the logic of the appraiser's opinion of market value for the subject land as if vacant.

2.3.3.2.2. Subdivision Development Method. In those circumstances where the property has a highest and best use for subdivision purposes and the appraiser has developed the subdivision development method, the report must address all of the factors and assumptions used in sufficient detail for the client and intended users to understand the outcome of this method. The market support for each factor (lot sale price, absorption rate, development costs, expenses, time lag, and discount rate) used in this analysis must be clearly presented in the report. The discounted cash flow analysis prepared as part of this analysis must be included in the report.

¹³⁰ See Sections 1.5.3, 4.3.3, and 4.3.4 for an in-depth discussion of the analysis required and the legal basis for the larger parcel analysis.

2.3.3.3. Cost Approach. This portion of the report should be in the form of computational data, arranged in sequence, beginning with reproduction or replacement cost. The report should state the source (book and page—including last date of page revision—if a national service) of all figures used. Entrepreneur's profit, as an element of reproduction or replacement cost, must be considered and discussed and if applicable, should be derived from market data whenever possible. If the appraiser retained the services of a contractor or professional cost estimator to assist in developing the reproduction or replacement cost estimate, this data should be referenced and the estimator's report included in the addenda of the appraisal report.

The dollar amount of depreciation from all causes, including physical deterioration, functional obsolescence, and economic or external obsolescence shall be explained and deducted from reproduction or replacement cost. See Section 1.5.3 for a discussion concerning the preferred methods of estimating depreciation under these Standards.

2.3.3.4. Sales Comparison Approach. Each appraisal report must contain a sufficient description of the comparable sales¹³¹ used so that it is possible for the reader to understand the conclusions drawn by the appraiser from the comparable sales data. Photographs of the comparable sales are valuable visual aids that indicate the comparability of the property recently sold with the subject property. Such photographs must accompany each appraisal report not only to aid the review appraiser but also for the agency's records and for later use in possible condemnation litigation. In addition to the identification of the property, every photograph should show the date taken and the name of the person taking the photograph.

Documentation of each comparable sale shall include the name of the buyer and seller, date of sale, legal description,¹³² type of sale instrument, document recording information, price, terms of sale, location, zoning, present use, highest and best use, and a brief physical description of the property. A plot plan or sketch of each comparable property should be included, not only to facilitate the reader's understanding of the relationship between the sale property and the subject property, but also to locate the sale property in the field. This information may be summarized for each sale on a comparable sales form and included in this section or in the addenda of the report. As noted, a photograph of each comparable sale shall also be included. A comparable sales map showing the relative location of the comparable sales to the subject property¹³³ shall be included, either in this section or in the addenda of the report. Inclusion of a copy of the transfer document (e.g., deed, contract) in the report is neither required nor desirable, unless there is something in the document that is unusual or particularly revealing.

As discussed in Section 1.5.2.3, the preferred method of adjusting comparable sales is through the use of quantitative adjustments (whenever adequate market data exists to support them). Only when adequate market data does not exist to support quantitative adjustments should the appraiser resort to qualitative adjustments (i.e., inferior, superior). Appraisers must bear in mind that quantitative and qualitative adjustments are not mutually exclusive methodologies. Because

¹³¹ See Section 1.5.2 for discussion of Selection and Verification of Comparable Sales, The Adjustment Process, and Sales Requiring Extraordinary Verification.

¹³² This may be abbreviated if lengthy, or reference may be made to a tax parcel number.

¹³³ It is important that the locations of the comparable sales and the subject property are shown on the same map so that a reader of the report who may not be familiar with the area can understand the relative proximity of the properties and locate them in the field.

one factor of adjustment cannot be quantified by market data does not mean that all adjustments to a sale property must be qualitative. All factors that can be quantified should be adjusted accordingly. When quantitative and qualitative adjustments are both used in the adjustment process, all quantitative adjustments should be made first. When using quantitative adjustments, appraisers must recognize that not all factors are suitable for percentage adjustments. Percentage and dollar adjustments may and often should be combined.¹³⁴ Each item of adjustment must be carefully analyzed to determine whether a percentage or dollar adjustment is appropriate.

When appraisers must resort to qualitative adjustments, they must recognize that this form of comparative analysis will often require more extensive discussion of the appraiser's reasoning. This methodology may also require the presentation of a greater number of comparable sales. It is essential, of course, that the appraiser specifically state whether each comparable sale is generally either overall superior or inferior to the property under appraisal. To develop a valid indication of value of the property under appraisal by the use of qualitative analysis, it is essential that the comparable sales utilized include both sales that are overall superior and overall inferior to the subject property. If this is not done, the appraiser will have merely demonstrated that the property is worth more than a certain amount (if all of the sales are inferior to the subject property) or less than a certain amount (if all of the sales are superior to the subject property).

In developing a final opinion of value by the sales comparison approach, the appraiser shall explain the comparative weight given to each comparable sale, no matter whether quantitative or qualitative adjustments or a combination thereof are used. A comparative adjustment chart or graph is required and may assist appraisers in explaining their analysis in this regard.

2.3.3.5. Income Capitalization Approach. The appraisal report shall include adequate factual data to support each figure and factor used and should be arranged in detailed form to show at least (1) estimated gross economic (or market) rent, or income; (2) allowance for vacancy and credit losses; (3) an itemized estimate of total expenses; and (4) an itemized estimate of the reserves for replacements, if applicable. Section 1.5.4 discusses the income capitalization approach in detail.

Capitalization of net income shall be at the rate prevailing for this type of property and location. The capitalization technique, method, and rate used should be explained in narrative form and supported by a statement of the sources of rates and factors. The preferred source of an applicable capitalization rate is from actual capitalization rates reflected by comparable sales.¹³⁵

As with a recent and unforced sale of the subject property (see Section 2.3.3.4), if the property is actually rented, its current rent is often the best evidence of its economic (or market) rent and should be given appropriate consideration by the appraiser in developing an opinion of the gross economic rent of the property. Likewise, the appraiser should attempt to obtain at least the last three years' historical income and expense statements for the property. These

¹³⁴ For instance, a percentage adjustment for market conditions (time) may be appropriate, but an adjustment for the fact that the subject property is 300 feet from a sewer connection and all of the comparable sales are connected to sewer should often be made in a lump sum dollar amount to reflect the cost to cure the subject property's comparative deficiency. If a percentage adjustment were applied to the price-per-unit (e.g., per acre, per square foot) of each comparable, the adjustment to each of the comparable sales would vary depending on the price-per-unit of the comparable and might have no relationship to the cost to cure the subject's deficiency.

¹³⁵ See Section 4.4.4.

can generally be developed into a reliable reconstructed operating statement. If this historical income and expense information is available, it should be included in this portion of the appraisal report or in the addenda.

- 2.3.3.6. Reconciliation and Final Opinion of Market Value.** The appraiser must explain the reasoning applied to arrive at the final opinion of value and how the results of each approach to value were weighed in that opinion, and the reliability of each approach to value for solving the particular appraisal problem. See Section 1.6.

The appraiser shall also state the final opinion of value of all of the property under appraisal as a single amount, including the contributory value of fixtures, timber, minerals, and water rights, if any. The appraiser must avoid making a summation appraisal.¹³⁶ The appraiser is solely responsible for the final opinion of value. If that value opinion includes elements of value that were based on estimates developed by others (e.g., timber cruisers, mineral appraisers), the appraiser cannot merely assume their accuracy. The reasonableness of the subsidiary estimates must be confirmed in accordance with Section 1.13.

2.3.4. Factual Data—After Acquisition (Partial Acquisitions Only).

- 2.3.4.1. Legal Description.** The legal description of the remainder property shall be included. If a legal description of the remainder property is not available, appraisers may develop their own by utilizing the before acquisition legal description and excluding from it the legal description of the real estate acquired by the government.

If the *estate acquired* is less than a fee interest (e.g., an easement), the legal description under Section 2.3.2.1 may be referenced and the legal description of the property encumbered by the estate acquired should be included. If lengthy, the legal description should be briefly referenced and the full legal description should be included in the report's addenda.

- 2.3.4.2. Neighborhood Factors.** The appraiser shall describe the government project for which the property is being acquired and its impact, if any, on the neighborhood and the remainder property. The degree of detail regarding the government's project included in this section should relate directly to the complexity of the government's project and its impact on the remainder property.¹³⁷ The aspects of the government's project that will result in damages to the remainder property should be described in specific detail.

¹³⁶ See Section 4.2.2.

¹³⁷ For example, in a fee acquisition of a portion of the property for inclusion in a wildlife refuge without any substantial construction, the description of the government's project could probably be brief. If, on the other hand, the government's acquisition was a permanent easement through the parcel for construction of a flood control levee with associated temporary construction easements, a detailed description of the government's project may be necessary. Such a description might include such things as height of the levee; width at the base and at the top of the levee; degree of side slopes of the levee; finish material (e.g., riprap, seeded soil) of the slopes; any provisions for access over the levee; any provisions for drainage; duration of temporary construction easements and the use to which the government will put the easement areas during construction; anticipated condition of the temporary construction easement areas at termination; and anticipated impact on future flooding, as compared to historical flooding.

2.3.4.3. **Property Data.**

2.3.4.3.1. Site. The appraiser must describe the remainder site, paying particular attention to the shape, size, available utilities, and available access to the remainder site, addressing all requirements listed in Section 2.3.2.3.1.

2.3.4.3.2. Improvements. The appraiser must describe those improvements remaining in whole or in part, addressing all requirements listed in Section 2.3.2.3.2.

2.3.4.3.3. Fixtures. The appraiser must describe those fixtures remaining, addressing all requirements listed in Section 2.3.2.3.3.

2.3.4.3.4. History. If the appraisal is prepared after the date of acquisition, the appraiser must report the utilization of the remainder property since the date of acquisition as well as any sales or rentals of the remainder property, addressing all requirements listed in Sections 2.3.2.3.4 (Use History), 2.3.2.3.5 (Sales History), and 2.3.2.3.6 (Rental History).

2.3.4.3.5. Assessed Value and Tax Load. The appraiser must estimate what the assessed value and annual tax load will be on the remainder property. This estimate is particularly critical if the income capitalization approach is to be utilized in developing an opinion of the value of the remainder property. In this connection, discussions with local assessing authorities are often helpful in making these estimates. All requirements listed in Section 2.3.2.3.7 must be addressed.

2.3.4.3.6. Zoning and Other Land Use Regulations. The appraiser must report the influence of zoning and other land use regulations on the remainder property.¹³⁸ Specific attention should be given to the probability of a rezone, either up or down, of the property caused by the government's project and the possibility that because of the acquisition, the remainder property has become nonconforming to land use regulations in areas such as lot area requirements, setbacks, and off-street parking. All requirements in Section 2.3.2.3.8 must be addressed.

2.3.5. **Data Analysis and Conclusions—After Acquisition (Partial Acquisitions Only).**

Introductory Note: These analyses and valuation sections relating to the remainder property constitute a new appraisal. In cases of an insignificant taking, the remainder may be so similar to the larger parcel before the acquisition that the same highest and best use analysis and the same cost, market, and income data and analysis will remain applicable and can therefore be referenced and employed in reporting the opinion of the market value of the remainder property. However, a change in the basic physical or economic character of the remainder may result in a change in the remainder's highest and best use or the intensity of that use and may result in damages or benefits, which will require different market data and/or analysis than that which was used in the larger parcel valuation.¹³⁹

¹³⁸ See Sections 2.3.2.3.4 to 2.3.2.3.6 and Section 2.3.2.3.8.

¹³⁹ See Section 4.3.4.5.

2.3.5.1. Analysis of Highest and Best Use. The appraiser shall state and explain the highest and best use of both the remainder land (as if vacant) and the remainder property (as improved). Impacts of the acquisition on the property's highest and best use or the intensity of that use shall be specifically addressed and described. If restoration or rehabilitation of the remainder property will be required before it can be put to its highest and best use, the physical and economic feasibility of such restoration or rehabilitation shall be explained and justified. Major restoration or rehabilitation may require the services of an expert in the field, such as an architect, engineer, and/or contractor.¹⁴⁰ If the acquisition includes a temporary construction easement, or other temporary property interest, the effect of such temporary acquisition on the remainder property's highest and best use must be discussed.¹⁴¹

2.3.5.2. Land Valuation. The appraiser will develop an opinion of the market value of the remainder land for its highest and best use as if vacant and available for such use.¹⁴²

If the acquisition includes one or more temporary construction easements, the impact of those easements on the value of the remainder property must be accounted for in the valuation of the land after acquisition. Any diminution in the remainder land value by reason of the temporary easements must be measured in accordance with Section 1.9.1, and then be used as the basis for an adjustment to the remainder's land value in this section of the report. The diminution in the remainder's land value by reason of temporary easements should not be treated as an additive to be added to the difference between the before and after value of the property.

2.3.5.3. Cost Approach – See Section 2.3.3.3.

2.3.5.4. Sales Comparison Approach – See Section 2.3.3.4.

2.3.5.5. Income Capitalization Approach – See Section 2.3.3.5.

2.3.5.6. Reconciliation and Final Opinion of Market Value. The appraiser must describe the reasoning applied to arrive at the final opinion of value of the remainder property, addressing all the requirements in Section 2.3.3.6.

2.3.6. Acquisition Analysis (Partial Acquisitions Only). This part of these Standards is applicable only in partial acquisition appraisals. The requirements in Sections 2.3.6.2 and 2.3.6.3 are identified to assist agencies in meeting their obligations under the Uniform Act. If the appraisal report is being prepared for condemnation trial purposes, trial counsel for the United States may instruct the appraiser to omit these sections.

2.3.6.1. Recapitulation. The appraiser must report the difference between the value of the larger parcel and the value of the remainder by deducting the property's after value from its before value.

¹⁴⁰ See Section 1.13.

¹⁴¹ See Section 1.9.1.

¹⁴² For requirements of land valuation, see Section 2.3.3.2.

- 2.3.6.2. Allocation and Damages.** Damages, as such, are not appraised. However, the appraiser shall briefly explain any damages to the remainder property and allocate the difference in the value of the property before and after the acquisition between the value of the acquisition and damages to the remainder. The appraiser should note that such allocation is an accounting tabulation and not necessarily indicative of the appraisal method employed.

If damages have been measured by a cost to cure, the appraiser must justify the cost to cure¹⁴³ and demonstrate that the cost to cure is less than the damage would be if the cure was not undertaken.

- 2.3.6.3. Special Benefits.** The appraiser shall identify any special or direct benefits accruing to the remainder property and explain how and why those benefits have occurred.

- 2.3.7. Exhibits and Addenda.**

Legal Instructions. Any legal instructions must be presented.

Location Map. This exhibit should display the location of the subject property within the city or area in which the property is located. All maps should include a north arrow and the identification of the subject property.

Comparable Data Maps. These maps might include, among other items, a comparable land sales map, a comparable improved sales map, and a comparable rentals map. The maps should include a north arrow and show the locations of both the comparable sales and/or rentals and the subject property. If this requires the use of a map that is not of a readable scale, secondary maps showing the specific location of each comparable should be included.

Details of Comparable Sales and Rental Data. This data may be included in the body of the report. Photographs of each comparable property must be included.

Plot Plan. A plot plan should help the reader to visualize the property and the scope of the appraisal considerations. The plot plan should depict the entire subject property, including dimensions and street frontages. Structural improvements should be shown in their approximate locations; significant on-site improvements and easements should also be shown. The dimensions of improvements should be noted. The plot plan should include a directional north arrow. The location from which each of the subject photographs was taken should be identified on the plot plan, as well as the photograph identification number and the direction in which the photo was taken.

In a partial acquisition, the plot plan should identify the remainder area and its dimensions. Any significant construction features of the government project for which the property is being acquired should be shown. If the subject property or area acquired is complex, a separate plot plan of the remainder property may be desirable.

¹⁴³ This may require the services of a consultant. See Section 1.13.

Floor Plan. Floor plans are required only for reports related to leasehold acquisitions or when they are necessary to describe a unique property feature.

Title Evidence Report. If the agency provided a title evidence report to the appraiser it should be included, but if it is lengthy it may be referenced.

Other Pertinent Reports and Exhibits. These would include, for example, any written instructions given to the appraiser by the agency or its legal counsel, any specialist reports (such as timber appraisals, environmental studies, mineral or water-rights studies or appraisals, reproduction cost estimates, cost to cure estimates, fixture valuations), any pertinent title documents (such as leases or easements), and any charts or illustrations that may have been referenced in the body of the report.

Qualifications of the Appraiser. Include the qualifications of all appraisers or technicians who made significant contributions to the completion of the appraisal assignment. If appraisal reports are being prepared for trial purposes, appraisers must ensure that the content of their qualifications conform with Rule 26(a)(2)(B) of the Federal Rules of Civil Procedure.

- 2.4. Reporting Requirements for Leasehold Acquisitions.** The reporting Standards presented above provide the framework for reporting the results of an appraisal developed for a leasehold acquisition. The following are additional reporting requirements that apply to these special assignments.
- 2.4.1. Property Rights Appraised.** The terms of the leasehold estate acquired must be clearly discussed in the appraisal. Any differences between the government's lease and typical leases in the market must be described and analyzed. The analysis should address all of the differences identified in Section 1.8.
- 2.4.2. Improvements Description.** The description of the improvements must address all exterior and interior features of the building improvements in which the leasehold will be located. The physical location of the government's leasehold space within the building must be described in sufficient detail to allow the client and intended users to understand the impact (if any) of the government's leasehold on the rest of the building.
- 2.4.3. Highest and Best Use and Larger Parcel.** The appraiser must describe the factual basis and analysis concerning the highest and best use of the building in which the government's leasehold is located, including those situations in which the leasehold is the entire building. This analysis is critical in determining the position of the building within the market. This analysis is critical in situations where the property is located in a market in transition. The appraiser must also present the larger parcel analysis developed under Section 1.8. The result of this analysis will dictate whether a before and after valuation must be performed.
- 2.5. Project Appraisal Reports.** Some government projects require the acquisition of many parcels of real property, and individual appraisers are assigned to appraise a number of these

properties at the same time. On occasion, it is logical to include the appraisal of more than one parcel in a single report. Such project appraisal reports (or multiple-parcel appraisal reports) are not appraisal shortcuts; they are clerical shortcuts. A separate opinion of market value must still be *developed* for each acquisition; but the results of each valuation can be *reported* in a more efficient form. Project appraisal reports that meet the criteria set forth here may be acceptable for agency negotiation purposes under the Uniform Act and for initial review purposes by the Department of Justice.

Project appraisal reports are rarely conducive to litigation purposes, as they typically contain opinions of value of properties owned by persons not parties to the lawsuit and introduce a myriad of collateral issues.¹⁴⁴ But they can be a useful tool to assist in fair and efficient acquisitions for agencies engaged in large projects in which the vast majority of acquisitions can be completed voluntarily without condemnation litigation.

A project appraisal report may be appropriate if:

- (1) All parcels are total acquisitions OR all are partial acquisitions of a nominal and/or consistent nature;
- (2) All parcels are vacant OR all have similar improvements;
- (3) All parcels are located within a geographic area with a relatively similar land use pattern;
- (4) All parcels have the same or similar highest and best use;
- (5) The most relevant approach to value is the same for all parcels; and
- (6) The same array of market data can be relied on in the valuation of each parcel.

The project appraisal report consists of three major parts: **Part I** contains an introduction, factual data, and analysis relating to all properties included in the report; **Part II** includes the individual parcel reports; and **Part III** provides addenda and exhibits relating to all properties included in the report.

Part I—Introduction, General Factual Data, and Analysis

- (1) **Title Page.** This should include the government project title, the number of individual parcels included in the report, the name and address of the individual(s) making the report, and the date on which the appraisals were prepared.
- (2) **Letter of Transmittal.** This should include the date of the letter; identification of the government project; the number of parcels included in the appraisal report; statement of the range of effective dates of the appraisals; identification of any hypothetical conditions, extraordinary assumptions, limiting conditions or **legal instructions** relating to all parcels included in the report; and the appraiser's signature.
- (3) **Table of Contents.** The major parts of the appraisal report and their subheadings shall be listed. The location of each individual parcel report shall be specifically identified and items in the addenda of the report shall be individually listed in the table of contents.
- (4) **Executive Summary.** The appraiser should report the value findings for each parcel

¹⁴⁴ For the same reasons, project appraisal reports generally should not be used for acquisitions in which an agency will need to release the underlying appraisals to comply with specific statutory or other requirements, unless the agency and the appraiser are prepared to significantly revise the appraisal scope of work. See Section 1.2.6.

appraised. These findings should include the agency-assigned parcel number, the owner of the property, the effective date of the value estimate(s), and the value conclusion(s). In partial acquisitions, the before value, after value, and difference should be shown. If the project appraisal encompasses a larger number of parcels, it is desirable to include a second summary listed alphabetically, by owners' names.

- (5) **Statement of Assumptions and Limiting Conditions.** The requirements of Section 2.3.1.7 must be addressed. All assumptions and limiting conditions that universally apply to the appraisal of all parcels in the project appraisal report must be listed. Assumptions and limiting conditions that are not applicable to all parcels included in the project appraisal report should not be included in this section, but rather should be noted in the individual parcel reports.
- (6) **Scope of Work.** The requirements of Section 2.3.1.8 must be addressed.
- (7) **Area, City, and Neighborhood Data.** The requirements of Section 2.3.2.3.2 must be addressed. In partial acquisitions, this discussion should be clearly broken down into two subsections: before the acquisitions and after the acquisitions.
- (8) **Zoning and Other Land Use Regulations.** Include a general discussion of the zoning and other land use regulations that affect all parcels in the report. General trends in land use regulations in the area and recent zoning activity should be discussed. In partial acquisitions, this discussion should be clearly broken down into two subsections: before the acquisitions and after the acquisitions.
- (9) **Analysis of Highest and Best Use.** The general content requirements of Section 2.3.3 must be addressed. Inasmuch as all parcels in the report will have the same or similar highest and best use, the appraiser should discuss and develop the highest and best use of the parcels in this section. If, after in-depth analysis an appraiser determines that the highest and best use of a parcel is not the same as or similar to that of the other parcels to be included in the report, the unique parcel should be excluded from the project report and a separate narrative appraisal report should be prepared for this unique parcel in accordance with Section 2.3 of these Standards. In partial acquisitions, this discussion should be clearly divided into two subsections: before the acquisitions and after the acquisitions.
- (10) **Discussion of Approaches to Value.** The appraiser should discuss the standard approaches to value and their applicability or non-applicability to the subject parcels in the project appraisal report. If any modification to the typical application of the approaches to value is required, such modification should be discussed. In partial acquisitions, this discussion should be clearly broken down into two subsections: before the acquisitions and after the acquisitions.
- (11) **Land Valuation.** The appraiser should identify, describe, and discuss all comparable land sales that will be used in the individual parcel reports. A discussion of how the

comparable sales will be used in the individual reports can be included in this section of the report. Reference should be made to comparable sales data sheets, photos, and a comparable sales map, which shall be included in the addenda of the report.

Universal adjustments to the comparable sales should be discussed and developed in this section of the report. Adjustments classified as universal would include such adjustments as time (or market conditions), cash equivalency, and those adjustments that are not subject property dependent. Also, the general results of any study relating to land value (e.g., a size adjustment study) developed under item (15) (Special Studies) should be discussed. In partial acquisitions, this discussion should be clearly divided into two subsections: before the acquisitions and after the acquisitions.

If a parcel requires land valuation by means other than comparable sales, as a general rule that parcel is not appropriate for inclusion in a project report.

- (12) **Cost Approach.** The appraiser should describe the methodology used to develop reproduction or replacement cost and depreciation estimates. If a national cost service has been used in estimating reproduction or replacement costs, that publication should be specifically identified. If entrepreneur's profit has been included in reproduction or replacement cost, its derivation should be explained.

If depreciation studies using the market extraction or sales comparison method have been developed, their content and development should be discussed and the general conclusions reached should be reported. Discussion of partial acquisitions should be clearly divided into two subsections: before the acquisitions and after the acquisitions.

- (13) **Sales Comparison Approach.** The appraiser should identify, describe, and discuss all improved property comparable sales that will be used in the individual parcel reports. A discussion of how the comparable sales will be used in the individual reports can be included in this section of the report. Reference should be made to comparable sales data sheets, photos, and a comparable sales map, which shall be included in the addenda of the report. Universal adjustments to the comparable sales should be discussed and developed in this section of the report. Adjustments classified as universal would include time, market conditions, cash equivalency adjustments; i.e., those adjustments that are not subject property dependent. The discussion of partial acquisitions should be clearly divided into two subsections: before the acquisitions and after the acquisitions.

- (14) **Income Capitalization Approach.** The appraiser should identify, describe, and discuss all comparable rental properties to be used in the individual parcel reports. A discussion of how the comparable rentals will be used in the individual reports can be included in this section of the report. Reference should be made to comparable rental data sheets, photos, and a comparable rentals map, which shall be included in the addenda of the report.

Because a high degree of similarity exists between all individual parcels included in the project report, capitalization rates applicable to each should be the same or fit into a relatively narrow bracket. Therefore, the development of applicable capitalization rates should be presented in this section of the report. Discussion of partial acquisitions should be clearly broken down into two subsections: before the acquisitions and after the acquisitions.

- (15) **Special Studies.** Present any special studies that are appropriate and apply to all, or most, of the individual parcels included in the project appraisal report. Such studies might include easement studies (the impact of easements on encumbered areas and abutting unencumbered areas), size adjustment studies, proximity studies (impact on remainder property values due to proximity to various public improvements), land lock studies, special benefit studies, and project influence studies. These studies may relate to the before situation, the after situation, or both, and are in addition to the capitalization rate, time or market conditions, entrepreneurial profit, depreciation, and cash equivalency studies previously mentioned.

Part II—Individual Parcel Report

Each individual parcel report should contain the following information. In partial acquisitions, item (26) through (34) should be repeated in the after situation, which is further discussed in Section 2.3.4.

- (16) **Title Page.** See Section 2.3.1.1 for content requirements.
- (17) **Table of Contents.** See Section 2.3.1.3 for content requirements.
- (18) **Appraiser's Certification.** See Section 2.3.1.4 for content requirements.
- (19) **Summary of Salient Facts and Conclusions.** See Section 2.3.1.7 for content requirements.
- (20) **Photographs of Subject Property.** See Section 2.3.1.6 for content requirements.
- (21) **Statement of Assumptions and Limiting Conditions.** The appraiser should state that the assumptions and limiting conditions stated in item (5) of Part I of the project report are applicable to this parcel. If any additions, modifications, or deletions to the general assumptions and limiting conditions are necessary, they shall be noted.
- (22) **Scope of Work.** The appraiser should state that the scope of work for this appraisal stated in item (6) of Part I of the project report is applicable to this parcel. If any additions, modifications, or deletions to the general discussion are necessary, they shall be noted.
- (23) **Executive Summary.** The appraiser should discuss any specific appraisal problem unique to the individual subject parcel and briefly describe its treatment.

- (24) **Legal Description.** See Section 2.3.2.1 for content requirements.
- (25) **Area, City, and Neighborhood Data.** The appraiser should reference the area, city, and neighborhood data in item (7) of Part I of the project report, discuss the parcel's location within the neighborhood, and note any specific neighborhood factors uniquely affecting the subject parcel.
- (26) **Property Data.**
- a. Site. See Sections 2.3.2.3.1 and 2.3.4.3.1 for content requirements.
 - b. Improvements. See Sections 2.3.2.3.2 and 2.3.4.3.2 for content requirements.
 - c. Fixtures. See Sections 2.3.2.3.3 and 2.3.4.3.3 for content requirements .
 - d. Use History. See Sections 2.3.2.3.4 and 2.3.4.3.4 for content requirements.
 - e. Sales History. See Sections 2.3.2.3.5 and 2.3.4.3.4 for content requirements.
 - f. Rental History. See Sections 2.3.2.3.6 and 2.3.4.3.4 for content requirements.
 - g. Assessed Value and Annual Tax Load. See Sections 2.3.2.3.7 and 2.3.4.3.5 for content requirements.
 - h. Zoning and Other Land Use Regulations. The appraiser should reference the discussion of zoning and other land use regulations in Part I, item (8) of the project report. If additions, modifications, or deletions from that general discussion are required as they relate to the specific parcel, this should be noted.
- (27) **Analysis of Highest and Best Use.** The appraiser should reference the discussion of highest and best use in item (9) of Part I of the project appraisal report and relate that discussion specifically to the subject parcel. The appraiser shall specifically state the highest and best use of the property, both in the before and after situations if a partial acquisition, and thoroughly explain the reasoning that led to the conclusion.
- (28) **Land Valuation.** For content requirements, see Section 2.3.3.2. The appraiser should reference the data and discussion of land sales in item (11) of Part I of the project appraisal report and shall specifically identify which of those sales are most comparable to the parcel under appraisal and have been relied upon in developing an opinion of the parcel's value. A comparative analysis between each of the selected comparable sales and the subject property shall be included.
- If adjustments are based on universal adjustments and/or studies discussed and developed in Part I of the appraisal, the discussion or study should be specifically referenced and related to the subject property.
- (29) **Value Indication by the Cost Approach.** For content requirements, see Section 2.3.3.3. The appraiser should reference the general discussion of the cost approach in item (12) of Part I of the project report. If computations or estimates are based on studies discussed and developed in Part I of the project appraisal report, the studies should be specifically referenced and related to the subject parcel.

- (30) **Value Indication by the Sales Comparison Approach.** For content requirements, see Section 2.3.3.4. The appraiser should reference the data and discussion of the whole property sales in item (13) of Part I of the project appraisal report and shall specifically identify which of these sales are most comparable to the subject parcel and have been relied upon in developing an opinion of the parcel's value. A comparative analysis between each of the selected comparable sales and the subject property shall be included.

If adjustments are based on universal adjustments and/or studies discussed and developed in Part I of the project appraisal report, the discussion or study should be specifically referenced and related to the subject property.

- (31) **Value Indication by the Income Capitalization Approach.** For content requirements, see Section 2.3.3.5. The appraiser should reference the data and discussion of whole property rentals in item (14) of Part I of the project appraisal report and shall specifically identify which of those rentals are most comparable to the subject parcel and have been relied upon in developing an opinion of the parcel's economic (or market) rent. A comparative analysis between each of the selected comparable rentals and the subject property shall be included.

If the capitalization rate selected for the subject property is based on studies discussed and developed in Part I of the project appraisal report, the study should be specially referenced and related to the subject property.

- (32) **Reconciliation and Final Opinion of Value.** For content requirements, see Section 2.3.3.6.

- (33) **Acquisition Analysis.** In a partial acquisition, the appraisal report shall include an analysis of the government's acquisition in accordance with the requirements of Section 2.3.6 of these Standards.

- (34) **Exhibits and Addenda.** For content requirements, see Section 2.3.7 of these Standards.

- a. Location Map
- b. Comparable Data Maps. If the comparable data maps included in Part III of the project report are not clear enough to ensure complete understanding of the relationship between the subject property and the comparable data relied on in the individual parcel report, comparable data maps should be included in the addenda of the individual parcel reports.
- c. Details of Comparable Sales and Rental Data. Detailed comparable data sheets must be included in Part III of the project report. Those comparable data sheets relating to the specific comparable sales and/or rentals relied on in estimating the value of the individual parcel may also be included here for ease of reference.

- d. Plot Plan
- e. Floor Plan
- f. Title Evidence Report
- g. Other Pertinent Reports and Exhibits

Part III—General Exhibits and Addenda

Exhibits and addenda items should relate to all or most of the parcels included in the project appraisal report. Exhibits and addenda items relating only to one or a small portion of the parcels appraised should be included in the addenda of the individual parcel reports.

- (35) **Location Map.** (Within the city or area.) All maps should include a north arrow and the identification of the subject parcels.
- (36) **Comparable Data Maps.** These maps might include, among others things, a comparable land sales map, a comparable improved sales map, and a comparable rentals map. The maps should include a north arrow that shows the locations of the comparable sales and/or rentals, and shows the parcels appraised. If this requires use of a map that is not of a readable scale, secondary maps showing the specific location of each comparable relied on in making the individual parcel appraisals should be included in the addenda of the individual parcel reports.
- (37) **Detail of Comparable Sales and Rental Data.** See Section 2.3.7.
- (38) **Other Pertinent Exhibits.** These would include, for example, any written instructions given the appraiser by the agency or its legal counsel relating to all parcels in the project report, such as environmental studies relating to all parcels; fixture, timber, and/or mineral appraisals relating to multiple parcels; and any charts or illustrations that may have been referenced in the body of the report and relate to all or most of the parcels in the project report.
- (39) **Qualifications of Appraiser.**

3. APPRAISAL REVIEW

3.1. Introduction. The appraisal review process in federal acquisitions should be developed and reported in conformity with these Standards, which are compatible with standards and practices of the appraisal profession and with the current edition of USPAP. This Section of the Standards addresses the types of reviews completed by government appraisers (technical reviews and administrative reviews) as well scope of work considerations.

3.1.1. Government Review Appraisers. Government review appraisers are often assigned administrative duties in addition to the technical review of individual appraisal reports. Those administrative duties vary from agency to agency and may range from contract administration or counseling management for general valuation issues to assisting the agency to meet both its non-appraisal and appraisal obligations under the Uniform Act. Some of these duties may fall outside the scope of valuation services as defined in USPAP.¹⁴⁵ These administrative duties are also considered to fall outside the scope of these Standards and are therefore not covered in the following discussion.

The review of appraisal reports by a qualified reviewing appraiser is required. The federal regulations implementing the Uniform Act require agencies to have an appraisal review process that at a minimum requires the following:

- (a) *A qualified review appraiser* shall examine the presentation and analysis of market information in all appraisals to ensure that they meet all applicable appraisal requirements and support the appraiser's opinion of value. The level of review analysis depends on the complexity of the appraisal problem. As needed, the review appraiser shall, prior to acceptance, seek necessary corrections or revisions.

The review appraiser shall identify each appraisal report as *recommended* (as the basis for the establishment of the amount believed to be just compensation), *accepted* (meets all requirements, but not selected as recommended or approved), or *not accepted*.

If authorized by the agency to do so, the staff review appraiser shall also *approve* the appraisal (as the basis for the establishment of the amount believed to be just compensation), and if also authorized to do so, develop and report the amount believed to be just compensation.

- (b) If the review appraiser is unable to recommend (or approve) an appraisal as an adequate basis for the establishment of the offer of just compensation and it is determined by the acquiring agency that it is not practical to obtain an additional appraisal, the review appraiser may, as part of the review, present and analyze market information in conformance with § 24.103 to support a recommended (or approved) value.

¹⁴⁵ USPAP, Definitions, 4.

- (c) The review appraiser shall prepare a written report that identifies the appraisal reports reviewed and documents the findings and conclusions arrived at during the review of the appraisal(s). Any damages or benefits to any remaining property shall be identified in the review appraiser's report. The review appraiser shall also prepare a signed certification that states the parameters of the review. The certification shall state the approved value, and if the review appraiser is authorized to do so, the amount believed to be just compensation for the acquisition.¹⁴⁶

Federal agencies have adopted various policies and rules to implement these regulations.¹⁴⁷ Therefore, review appraisers should refer to the agency-specific review standards for a detailed discussion of appraisal review requirements. Agency appraisal review standards generally set appraisal review requirements from USPAP as minimum appraisal review standards.

In accordance with agency requirements, prior to approving an appraisal of property having more than nominal value, the review appraiser for each agency should prepare a written review report indicating the scope of work for the review and the reviewer's analysis and support for the action recommended. It is the review appraiser's responsibility to determine whether the appraisal is adequately supported, complies with recognized appraisal principles and practices, complies with the appraiser's contract (or assignment letter) and these Standards, and conforms to all governing legal premises prescribed by written **legal instruction**.

Appraisals provided by an agency to the U.S. Department of Justice in support of a request to initiate condemnation proceedings shall be reviewed by the Appraisal Unit of the Department. It is the responsibility of the Appraisal Unit to ensure that credible, reliable, and accurate appraisals are available for litigation purposes, including settlement negotiations and trial. In this regard, the Appraisal Unit shall confirm both technical conformance with these Standards and the reasonableness of the appraiser's opinion of value. In addition, the Appraisal Unit shall determine the suitability of the appraisal report for trial purposes: it will identify weaknesses and strengths of the report under review and recommend actions that the government's appraiser and/or trial counsel can take prior to trial to improve the appraisal report and provide better support for its conclusions. Appraisal reports may be found to be unsuitable for trial purposes even if they are in technical conformance with these Standards and the appraiser's opinion(s) of value are reasonable.¹⁴⁸ Due to the intended use and intended user of these appraisal reviews, review appraisers within the Appraisal Unit shall not develop their own independent opinions of value.

3.1.2. Contract Review Appraisers. Some agencies may have the authority to engage a qualified non-agency review appraiser to review an appraisal report. In most instances the contract review appraiser will be bound by the requirements discussed in Section 3.1.1 above and Section 3.2 below. But different requirements may apply in some instances (e.g., review

¹⁴⁶ 49 C.F.R. § 24.104(a)-(c); *see also* 49 C.F.R. § 24.103(d)(1) (requiring agencies to establish qualifications for review appraisers) and app. A, § 24.104 (review of appraisals).

¹⁴⁷ *E.g.*, U.S. DEPT OF AGRIC., FOREST SERVICE MANUAL FSM § 5400 (2005) and FOREST SERVICE HANDBOOK FSH 5409.12 (2006); U.S. ARMY CORPS OF ENG'RS, REAL ESTATE ENGINEER REGULATIONS, EC 405-1-04 (2016).

¹⁴⁸ For instance, a prior appraisal of the same property by the appraiser, which may have been provided to the property owner by the agency during the negotiating process or may be subject to discovery, may have contained inconsistent or erroneous conclusions and if brought to light during trial, could undermine the credibility of the appraiser and the ultimate opinion(s) of value and testimony.

appraisers engaged as rebuttal experts). Not all agencies have authority to engage non-agency review appraisers. Refer to specific agency regulations, guidelines, and authorities.

3.1.3. Rebuttal Experts. Contract review appraisers may be engaged as rebuttal experts in litigation. *Rebuttal* is a legal term meaning evidence introduced by a party to meet new facts brought out in the opponent's case in chief.¹⁴⁹ Its function is to "explain, repel, counteract or disprove evidence of the adverse party."¹⁵⁰

Rebuttal experts are typically engaged by the Department of Justice in condemnation trial proceedings to contradict or rebut the analysis and conclusions of another appraiser. As a rebuttal expert, a review appraiser may be asked to review an entire appraisal report or to focus on a specific element of an appraisal (for example, the quality and reasonableness of the highest and best use conclusion or a specific approach to value employed).

Review appraisers who prepare rebuttal reports for federal litigation purposes must comply with USPAP and the Federal Rules of Civil Procedure, particularly Rule 26(a)(2) regarding expert reports.¹⁵¹ As with all assignments, review appraisers must never allow the assignment conditions or a client's objectives to cause the results of a rebuttal assignment to be biased or not credible.¹⁵²

3.2. Types of Appraisal Reviews. Federal acquisitions generally involve two types of agency appraisal reviews: a technical review, which can only be developed and reported by an appraiser, and an administrative (or compliance) review, which may be performed by a non-appraiser.¹⁵³

A technical review is developed and reported by an appraiser in accordance with these Standards, which require conformity with USPAP and with agency policies, rules, and regulations. In completing a technical review, the review appraiser renders opinions on the quality of an appraisal report and whether the opinion(s) of value are adequately supported and in compliance with all appropriate standards, laws, and regulations relating to the appraisal of property for federal acquisition purposes. In addition, as a part of a technical review, the review appraiser may reach a conclusion regarding whether to approve (or recommend approval of), modify, or not accept or modify the conclusions presented in the appraisal report under review. If appropriate to the assignment, the agency review appraiser performing a technical review may render a separate opinion of value. However, if the review appraiser renders a separate opinion of value, the value opinion must be developed and reported in accordance with the appraisal development and content requirements for these Standards. The development of such opinions and further review

In federal condemnation cases, proper rebuttal of an appraisal report typically addresses flaws in the appraiser's data and basic assumptions, but does not itself contain an independent opinion of value. *E.g. United States v. 4.0 Acres of Land*, 175 F.3d 1133, 1141 (9th Cir. 1999).

149 *Morgan v. Commercial Union Assurance Cos.*, 606 F.2d 554, 555 (5th Cir. 1979).

150 *United States v. Finis P. Ernest, Inc.*, 509 F.2d 1256, 1263 (7th Cir. 1975), *cert. denied*, 423 U.S. 893.

151 See Standard 2.2.3 for an explanation of the requirements under Rule 26 of the Federal Rules of Civil Procedure.

152 USPAP, Scope of Work Rule, 14-15.

153 USPAP formerly included guidance discussing both types of review in Advisory Opinion 6 (AO-6), which was retired in 2004. While USPAP no longer addresses administrative reviews, they continue to be a useful tool for many agencies to ensure quality control and inform agency decisions, among other purposes.

of the initial reviewer's opinion of value and the support therefore may also be subject to the pertinent agency's policies, rules, and/or regulations.

An administrative review may be performed by an appraiser or a non-appraiser and is sometimes referred to as a compliance review. The content and scope of an administrative review will vary with the intended use and intended user of the administrative review. Some federal agencies have specific policies regarding the development and use of administrative reviews. An administrative review may include confirmation that the appraisal report conforms to contract/assignment letter requirements and to applicable federal law for federal land acquisition appraisals, and/or that the report includes a signed certification stating that the report has been prepared in compliance with these Standards. The administrative reviewer may also verify if the correct subject property has been appraised, if photographs of the subject property and comparable market data are included, if the analyses reflect the government's most recent project plans, and if the factual data and the mathematics presented in the appraisal report are correct. The administrative reviewer shall not, however, form an opinion regarding the quality of the analysis, judgment, or opinion(s) of value contained within the appraisal report under review.¹⁵⁴ As such, administrative reviews do not meet the requirements of 49 C.F.R. § 24.104. Administrative reviewers often use a checklist as a guide in making their determinations; a model checklist is provided in the Appendix of these Standards for convenience.¹⁵⁵

3.3. Problem Identification. The research and analyses necessary to develop credible assignment results will vary depending on the scope of work for an appraisal review assignment. For example, technical reviews may be conducted as either desk reviews or field reviews. In addition to confirmation that the report was prepared in accordance with these Standards, a desk review involves a thorough review and analysis of the information and analysis contained in the appraisal report under review and a careful examination of the internal logic and consistency. In a desk review, the review appraiser limits the examination to the information and analysis presented within the appraisal report. The data contained within the appraisal report may or may not be confirmed and the review appraiser may or may not identify additional comparative market data.

The most significant difference between a desk review and a field review is the level of evaluation accorded the factual data presented in the appraisal report. A field review always requires at least an exterior field inspection of the subject property and often of the properties used as comparable data in the appraisal report. In addition, the data contained within the appraisal report is usually independently confirmed during the review process. A field review may be used to obtain additional market data beyond that provided by the appraiser or to resolve factual differences between two appraisals with divergent market value estimates. The field review represents the highest level of due diligence within the appraisal review practice.

154 If the administrative reviewer is an appraiser and forms an opinion regarding the analysis, judgment, or opinion(s) of value contained in the appraisal report, the review becomes a technical review and falls under the requirements of Standard 3 of USPAP. If appraisers complete a compliance review they must still comply with the portions of USPAP related to appraisal practice such as the Definitions, Preamble, Ethics Rule, Competency Rule, and Jurisdictional Exception Rule.

155 This checklist is not intended to be used as part of a technical appraisal review and is included merely for easy reference by appraisers and reviewers.

The appropriate scope of work to be performed within the review process may be based on the dollar value of the property and/or the complexity of the valuation problem, as dictated by the regulatory and policy requirements of the acquiring agency. The degree of controversy surrounding a particular acquisition (or the agency's project generally) may also play a role in determining the scope of work.

It is critical that the review appraiser clearly identify the precise scope of work and extent of the review process for each appraisal review assignment. Terms such as administrative or technical review, desk review and field review may not be understood by all users or readers of the review, and require precise definition if used. This can be done while disclosing the mandatory assignment elements for a scope of work¹⁵⁶ that are outlined in sections 3.3.1 through 3.3.7 below.

If an appraisal review results in a request for corrective action by the appraiser, the review appraiser should maintain a complete file memorandum of the results of the preliminary review and the requested corrective action. The practice of maintaining only the final corrected appraisal report and the final review thereof should be avoided.

- 3.3.1. Client.** The review appraiser must identify who engaged the review appraiser to perform the appraisal review assignment together with all relevant contact information for the client(s).
- 3.3.2. Intended Users.** The review appraiser must disclose the review appraiser's understanding of who intends to use the appraisal review assignment results.
- 3.3.3. Intended Use.** The review appraiser must disclose the review appraiser's understanding of the intended use of the appraisal review assignment results by both the client and intended users.
- 3.3.4. Type of Opinion.** The review appraiser must disclose the type of opinion being rendered, which in an appraisal review assignment is generally an opinion about the quality of the appraisal work under review. If applicable, the review appraiser should discuss the actions to be taken in accordance with the implementing regulations of the Uniform Act (e.g., accept, approve, or not accept the appraisal, etc.).
- 3.3.5. Effective Date.** The date of the review appraiser's report will normally reflect the effective date of the review appraiser's opinions and conclusions. The appraisal review report must clearly disclose the date of the report and the effective date of the appraisal under review.
- 3.3.6. Subject of the Assignment.** An appraisal review must identify what is being reviewed by the review appraiser. Typically, this will be an appraisal report so the review appraiser must provide identifying details relating to the report under review, its author(s), the subject of the report, etc. However, review appraisers should also recognize that a specific scope of work may call for a review to include the workfile for the appraisal assignment, just a portion of the appraisal report, or any combination of these items.

¹⁵⁶ USPAP, Scope of Work Rule, Problem Identification section, 14.

3.3.7. Assignment Conditions. The type and extent of research and analyses undertaken as part of the appraisal review process must be clearly identified. If the review appraiser required significant assistance in arriving at conclusions, then the extent of that assistance should be summarized in the scope of work together with the names of those providing assistance (which must also be stated in the certification). Other assignment conditions to be discussed can include assumptions, extraordinary assumptions, hypothetical conditions, laws and regulations, or other conditions that affect the scope of work. Care should be taken to focus on assignment conditions applied to the appraisal review assignment itself and not just those adopted in the report that has been reviewed.

3.4. Responsibilities of the Review Appraiser. Like the appraiser, review appraisers must remain objective in their appraisal review activities. They cannot let agency goals or adversarial pressure influence their opinions of an appraisal report's appropriateness or of the value opinion(s) it reports, nor can they let their personal opinions regarding an agency's proposed acquisition enter into the review process. Also, review appraisers should not attempt to substitute their judgment for that of the appraiser unless they are willing and able to develop their own opinions of value and become the appraiser of record.

Review appraisers must recognize that technical deficiencies can be found in nearly every appraisal report. However, minor technical nonconformance with these Standards or USPAP Standards should not be the reason to not accept an appraisal report, unless the deficiency affects the credibility of the opinion of value, or the opinion of value itself. Minor technical nonconformance with these Standards should never be used as an excuse to not accept a report if the underlying reason for not accepting it is the review appraiser's differing opinion of the market value of the property appraised.

In conducting an appraisal review the review appraiser must:

- Identify the scope of work performed in the review consistent with the seven elements described above under problem identification.
- Develop an opinion as to the completeness of the appraisal report under review within the scope of work applicable to the appraisal assignment, which shall include these Standards.
- Develop an opinion as to the adequacy and relevance of the data and the adequacy of market support for any adjustments to the data.
- Develop an opinion as to the appropriateness of the appraisal methods and techniques used and describe the reasons for any disagreements.
- Develop an opinion as to whether the analyses, opinions, and conclusions in the appraisal report under review are appropriate, reasonable, and adequately supported by market data and describe the reasons for any disagreement.

- Prepare an appraisal review report in compliance with agency policies, rules, and regulations and in accordance with these Standards, which include USPAP.

3.5. Review Appraiser Expressing an Opinion of Value. If a review appraiser cannot accept or recommend approval of an appraisal report reviewed for Uniform Act purposes and it is determined that it is not practical to obtain an additional appraisal, the review appraiser may be authorized to develop an independent opinion of value.¹⁵⁷ Various federal agencies have adopted policies, rules, and procedures that regulate the circumstances in which a reviewing appraiser may develop an independent opinion of value and become the agency's appraiser of record.¹⁵⁸

The review appraiser may recommend, accept, or not accept an appraisal report based upon compliance with these Standards and the appropriateness of the methods and analyses employed in the appraisal report. Such actions do not constitute an opinion of value on the part of the review appraiser, nor do they infer that the reviewing appraiser has taken ownership of, or is responsible for, the value opinion expressed in the appraisal report under review.

When it is appropriate for a review appraiser to develop an opinion of value and become the appraiser of record, that value opinion must be supported and documented in accordance with these Standards. This does not require the review appraiser to replicate the steps completed by the original appraiser. The data and analysis that the reviewer determined to be credible and in compliance with these Standards can be incorporated by reference into the review appraiser's review report using an extraordinary assumption.¹⁵⁹ Those portions of the appraiser's report that the reviewer determined not credible or inconsistent with these Standards must be replaced in the review report with additional data and analysis by the review appraiser.¹⁶⁰ The reviewer may use additional information that was not available to the original appraiser, but under such circumstances the effective date of the reviewer's opinion of value will generally be later in time than the effective date of the original appraiser's opinion of value. Therefore, in most cases, the original appraiser's opinion of value generally cannot be compared directly to the reviewer's later opinion of value for any legitimate purpose.

3.6. Review Appraiser's Use of Information Not Available to Appraiser. The scope of work for an appraisal review assignment involving a federal acquisition typically exceeds that of the usual appraisal review because Uniform Act regulations require the reviewer to determine whether the appraisal report under review can be the basis for the establishment of an offer of just compensation.¹⁶¹ In making that determination, the review appraiser may need to consider information that was not available to the appraiser who prepared the

¹⁵⁷ Under 49 C.F.R. § 24.104, the independent opinion of value must be developed and reported in accordance with the appraisal criteria set forth in 49 C.F.R. § 24.103.

¹⁵⁸ Some of those policies, rules, and procedures may require invocation of USPAP's Jurisdictional Exception Rule. If so, reviewers must specifically identify the jurisdictional exception and the section(s) of USPAP to which it applies and include that information in the appraisal review report.

¹⁵⁹ The extraordinary assumption would be to assume that the facts relied upon and reported by the original appraiser that are incorporated into the reviewer's report are accurate.

¹⁶⁰ While this procedure may produce a report suitable for the establishment of an offer of just compensation under 49 C.F.R. § 24.104, it would not, of course, produce a report suitable for litigation purposes.

¹⁶¹ See 49 C.F.R. § 24.104(a)-(c).

appraisal report under review.¹⁶² In light of the intended use (i.e., establishing a basis for offer of just compensation) and intended user (i.e., agency management), the reviewer is required to consider all available information in making a recommendation. A recommendation based on outdated or incomplete information would fail to meet the agency's obligation to determine a *current* offer of just compensation, and would not conform to the intent of the Uniform Act and its implementing regulations.

Consideration of information not available to the original appraiser is also consistent with USPAP requirements.¹⁶³ The current USPAP document expressly contemplates that review appraisers may need to consider such information to produce credible assignment results:

Information that should have been considered by the original appraiser can be used by the reviewer in developing an opinion as to the quality of the work under review.

Information that was not available to the original appraiser in the normal course of business may also be used by the reviewer; however, the reviewer must not use such information in the reviewer's development of an opinion as to the quality of the work under review.¹⁶⁴

Accordingly, a review appraiser's use of subsequent information necessary to produce credible assignment results for the scope of work does not require a jurisdictional exception to USPAP. Of course, an appraisal reviewer may find that an appraisal report under review was prepared in accordance with these Standards and that the opinion of value reported was reasonable and reliable as of the effective date of the appraisal, and yet still find that the opinion of value is unreliable as the basis for an offer to purchase by the government because of changed circumstances or new information that has become available. In such an instance, the review appraiser must clearly explain all pertinent findings in the review report to avoid any impression that the appraisal report under review was not accepted because of its quality or the reasonableness of the opinion of value as of the effective date of the appraisal. In these circumstances, some agency reviewers *accept* but do not *approve* the appraisal report.

- 3.7. Review Reporting Requirements.** Oral appraisal review reports are contrary to Uniform Act regulations and these Standards. Therefore, oral appraisal review reports as the end-result or final conclusion of an appraisal review assignment are not permitted. However, an oral appraisal review may be reported if the scope of work for an appraisal review assignment requires an oral review to be conducted in advance of a final written appraisal review report and there is adequate support for the oral review in the review appraiser's workfile for the assignment.

These Standards do not require a specific review report format or structure. A number of federal agencies have required or recommended formats for review reports to provide consistency and

162 Information not available until after completion of the original appraisal report might include additional market activity that occurred after the effective date of the appraisal, a change in the estate to be acquired by the government, information from other appraisals of different properties by different appraisers for the same project, or information that became available as a result of negotiations or through the discovery process in litigation.

163 Previously, USPAP was more restrictive of review appraisers' consideration of information not available to the appraiser. Compare USPAP Standards Rule 3-1(c) (2000 ed.) with USPAP Standards Rule 3-2(g) (2016-2017 ed.). But USPAP has since been updated to allow reviewers "broad flexibility and significant responsibility in determining the appropriate scope of work in an appraisal review assignment."

164 USPAP, Comment to Standards Rule 3-2(g), 31.

efficiency in the review reporting process. Review appraisers for these agencies should, of course, be familiar with and follow these agency-required or recommended formats. Irrespective of the review report format, all appraisal review reports must be in writing and contain, at a minimum, the following:

- Identification of the client and intended users of the review report, the intended use of the review, and the purpose of the review assignment;
- Identification of the appraisal report under review, the date of the review report, the property and ownership interest appraised in the report under review, the date of the report under review and the effective date of the value opinion(s) reported, and the names of the appraisers that completed the report under review; and
- Description of the scope of work performed in the review;
- Statement of opinions, reasons, and conclusions reached concerning the appraisal report under review; and
- Review appraiser's signed certification, in accordance with these Standards and USPAP.

The scope of work undertaken in the review assignment must be adequately described so that the intended user of the review report will understand the type and level of review completed.

3.8. Certification. The technical appraisal review report shall include the reviewing appraiser's signed certification statement consistent with the certification requirements in Standard 3 of the current edition of USPAP and the following statements related to these Standards:

- The appraisal review was developed and the review report prepared in conformity with the *Uniform Appraisal Standards for Federal Land Acquisitions*.
- My analyses, opinions, and conclusions were developed and this review report was prepared in conformity with the *Uniform Standards of Professional Appraisal Practice*, and complies with those areas of the *Uniform Appraisal Standards for Federal Land Acquisitions* that might require invocation of USPAP's Jurisdictional Exception Rule (see scope of work for details).
- Review appraisers should also include any additional certification statements required by professional organizations in which they are members.

4. LEGAL FOUNDATIONS FOR APPRAISAL STANDARDS

4.1. Introduction to Legal Foundations. This Section explains the legal foundations for Sections 1, 2, and 3. It is written for both lawyers and non-lawyers—including appraisers, who must correctly apply federal law in the development, reporting, and review of market value appraisals in federal acquisitions. This Section discusses the legal standards that govern many recurring valuation problems, and provides guidance on specialized appraisal issues that are unique to federal acquisitions. The legal foundations discussed here hold significance even for those who are not bound to follow these Standards but must adhere to the federal law these Standards summarize and explain.

4.1.1. Requirement of Just Compensation. Federal acquisitions entail different appraisal standards than other types of valuation problems because they involve payment of just compensation, and the meaning of just compensation is a question of substantive right “grounded upon the Constitution of the United States.”¹⁶⁵ Because only the United States Supreme Court can make binding interpretations of the Constitution,¹⁶⁶ questions with respect to just compensation must be resolved under federal common law—that is, case law.¹⁶⁷ These questions most frequently arise in federal condemnation cases. As the Supreme Court observed: “Our jurisprudence involving condemnations...is as old as the Republic and, for the most part, involves the straightforward application of *per se* rules.”¹⁶⁸ Those rules form the basis of these Standards. While most of the case law cited in these Standards stems from the federal exercise of eminent domain, just compensation must be paid in many other types of federal acquisitions, whether or not condemnation may be involved.¹⁶⁹

“... nor shall private property be taken for public use, without just compensation.”

– U.S. Constitution, amendment v

These Standards explain the valuation requirements that apply to all federal acquisitions involving “the measure of compensation...grounded upon the Constitution of the United States.”¹⁷⁰

The underlying principles of just compensation remain in force even if special legislation or other considerations may require exceptions to certain aspects of these Standards. Where just compensation is concerned, a reliable process is necessary to ensure a just result,¹⁷¹ “and it is the duty of the state, in the conduct of the inquest by which the compensation is ascertained, to see

¹⁶⁵ *United States v. Miller*, 317 U.S. 369, 380 (1943); U.S. CONST. amend. v.

¹⁶⁶ *Marbury v. Madison*, 5 U.S. 137 (1803).

¹⁶⁷ *Miller*, 317 U.S. at 380; *Norfolk Redevel. & Hous. Auth. v. Chesapeake & Potomac Tel. Co.*, 464 U.S. 30, 36 (1983); see *United States v. New River Collieries Co.*, 262 U.S. 341, 343-44 (1923); *Kohl v. United States*, 91 U.S. 367, 376-77 (1875).

¹⁶⁸ *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 322 (2002); cf. 1 LEWIS ORGEL, VALUATION UNDER THE LAW OF EMINENT DOMAIN v (2d ed. 1953) [hereinafter ORGEL] (“eminent domain furnishes perhaps the richest case law on the valuation of real property[, giving the] subject a significance even for [those] who may never be faced with a condemnation case”).

¹⁶⁹ See ORGEL, *supra* note 191, at v; see, e.g., Uniform Act, § 301, 42 U.S.C. § 4651.

¹⁷⁰ *Miller*, 317 U.S. at 380.

¹⁷¹ *Rasmuson v. United States*, 807 F.3d 1343, 1346 (Fed. Cir. 2015) (vacating compensation award based on valuation that applied incorrect methodology under federal law).

that it is just, not merely to the individual whose property is taken, but to the public which is to pay for it.”¹⁷²

4.1.2. Market Value: The Measure of Just Compensation. To ensure a fair, objective and practical standard, federal courts have long held that market value is normally the measure of just compensation.¹⁷³ The market value measure “has an external validity which makes it a fair measure of public obligation to compensate the loss incurred by an owner as a result of the taking of his property for public use.”¹⁷⁴ The “appraiser’s function is to assist...in [the] determination of just compensation by furnishing an opinion of market value.”¹⁷⁵ Opinions of market value for federal acquisition purposes must follow federal law to provide a fair measure of just compensation. Otherwise, “a finding on the value of a [property interest] that ‘is derived from the application of an improper legal standard to the facts’ must be remanded for new factual findings for application of the correct legal standard.”¹⁷⁶

4.1.3. Federal Law Controls. Just compensation is determined in accordance with federal rather than state law.¹⁷⁷ Both appraisers and attorneys must correctly apply federal law as it affects the appraisal process in the estimations of market value, recognizing that federal and state laws differ in important respects. Appraisals for federal acquisitions must follow the appropriate legal standards.¹⁷⁸ Most appraisals for federal acquisitions involve straightforward application of established legal standards to the facts.¹⁷⁹ But some valuation problems require nuanced legal instructions to address complicated or undecided questions of law.¹⁸⁰ If the correct legal standard is unclear, agencies may find it prudent to procure a dual-premise appraisal.¹⁸¹

Federal courts have jurisdiction to determine title (ownership) questions in federal condemnation proceedings, but sometimes refer to state law in resolving the nature of property rights acquired.¹⁸² The United States Supreme Court has stated that “[t]hough the meaning of ‘property’...in the Fifth Amendment is a federal question, it will normally obtain its content by

172 *Bauman v. Ross*, 167 U.S. 548, 574 (1897); *Searl v. Sch. Dist. in Lake Cty.*, 133 U.S. 553, 562 (1890); cf. *Kelo v. City of New London*, 545 U.S. 469, 489 n.21 (2005) (noting importance of “questions about the fairness of the measure of just compensation”).

173 E.g., *Horne v. Dep’t of Agric.*, 135 S. Ct. 2419, 2432 (2015); *United States v. 50 Acres of Land (Duncanville)*, 469 U.S. 24, 29 (1984); *Miller*, 317 U.S. at 374; *Olson v. United States*, 292 U.S. 246, 255 (1934); *Miss. & Rum River Boom Co. v. Patterson*, 98 U.S. 403, 407-08 (1878).

174 *Kimball Laundry Co. v. United States*, 338 U.S. 1, 5 (1949).

175 EATON, *supra* note 16, at 19-22 (“[A]ppraisers are experts in estimating value, not just compensation.”).

176 *Rasmuson*, 807 F.3d at 1345 (quoting *Walther v. Sec’y of Health & Human Servs.*, 485 F.3d 1146, 1152 (Fed. Cir. 2007)); cf. *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 149-50 (1997) (Breyer, J., concurring) (observing that subjecting expert opinions to appropriate legal standards “will help secure the basic objectives of . . . the ascertainment of truth and the just determination of proceedings” (citing FED. R. EVID. 102)); *Olson*, 292 U.S. at 257 (“[T]o allow mere speculation and conjecture to become a guide for the ascertainment of value [is] a thing to be condemned in business transactions as well as in judicial ascertainment of truth.”).

177 *United States v. Miller*, 317 U.S. 369, 379-80 (1943) (“We need not even determine what is the local law . . . [on] the measure of compensation,—grounded upon the Constitution of the United States.”).

178 Cf. *Rasmuson*, 807 F.3d at 1345.

179 *Kimball Laundry*, 338 U.S. at 4; cf. *Horne v. Dep’t of Agric.*, 135 S. Ct. 2419, 2432 (2015); *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 322 (2002).

180 See *Kimball Laundry*, 338 U.S. at 4 (“novel and serious questions in determining what is ‘just compensation’ are not resolved by the familiar formulas available for the conventional situations which gave occasion for their adoption”).

181 See, e.g., *United States v. Eastman (Eastman III)*, 714 F.2d 76, 77 (9th Cir. 1983), adopting 528 F. Supp. 1177 (D. Or. 1981), and aff’g 528 F. Supp. 1184, 1184 (D. Or. 1981) (“dual set of findings” of market value so that “if the Court of Appeals reverses my preliminary [legal] ruling, it may then evaluate the correctness of the alternative finding”); see *United States v. Reynolds*, 397 U.S. 14, 15 (1970) (“There being a conflict between the circuits on this question, we granted certiorari to consider a recurring problem of importance in federal condemnation proceedings.”).

182 See *United States v. Causby*, 328 U.S. 256, 266 (1946); *United States ex rel. Tenn. Valley Auth. v. Powellson*, 319 U.S. 266, 279 (1943); *United States v. 0.073 Acres of Land (Mariner’s Cove)*, 705 F.3d 540, 544 (5th Cir. 2013); *United States v. 79.31 Acres of Land*, 717 F.2d 646, 647-48 (1st Cir. 1983); *United States v. 1,629.6 Acres of Land in Sussex Cty. (Island Farm III)*, 503 F.2d 764, 766-67 & n.3 (3d Cir. 1974).

reference to local law.”¹⁸³ It is also established that the United States can acquire any property interest it deems necessary, whether or not the interest is recognized under state laws.¹⁸⁴ Federal law is “wholly applicable” to condemnations by federal agencies,¹⁸⁵ controlling procedural as well as substantive matters under Rule 71.1 of the Federal Rules of Civil Procedure.¹⁸⁶

4.1.4. Defining Property Interests. An appraiser cannot develop an opinion of market value for just compensation purposes without knowing what, exactly, the United States will acquire.¹⁸⁷ A legal description identifies a property’s precise physical or geographic location. The property interest or interests to be acquired must be described with equal precision. The nature and extent of any property interest being acquired is determined by the acquiring agency, as delegated by Congress—not the appraiser, the landowner, or the courts.¹⁸⁸ Under federal title regulations, the property interest must be sufficient for the government’s purpose in acquiring it,¹⁸⁹ balanced against “the Government’s natural desire and duty to deplete the public purse no further than necessary in carrying out its projects”¹⁹⁰ and other considerations that may be imposed by specific statutes and regulations. “Of course, payment need only be made for what is taken, but for all that the Government takes it must pay.”¹⁹¹ It is therefore critical for the agency to carefully and precisely define the property interest(s) being acquired and expressly state what interest(s), if any, will remain with the landowner.¹⁹²

An interest is a legal share in property, such as a right to possess, use or convey it to another. An estate is the amount, degree, nature, and quality of a person’s interest in property. The broadest possible estate is fee simple absolute (often shortened to fee simple or fee).

Agencies are well advised to follow the maxim “measure twice, cut once” in defining the property interests to be acquired. An opinion of market value can only be used for just compensation

183 *Powelson*, 319 U.S. at 279; cf. *Rogers v. United States*, 814 F.3d 1299, 1307-08 (Fed. Cir. 2015) and *Rogers v. United States*, 184 So.3d 1087, 1090 (Fla. 2015) (Federal Circuit’s certification of property law question to Florida Supreme Court). But this does not mean “that every local idiosyncrasy . . . will be accepted.” *Nebraska v. United States*, 164 F.2d 866, 868 (8th Cir. 1947).

184 *United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 604 (1973); *United States v. Certain Interests in Prop. in Champaign Cty.*, 271 F.2d 379, 384 (7th Cir. 1959); see *United States v. 32.42 Acres of Land in San Diego Cty.*, 683 F.3d 1030, 1039 (9th Cir. 2012) (“Having paid just compensation, the United States is entitled to the interest it sought.”).

185 *United States v. 93.970 Acres of Land (Illinois Aircraft)*, 360 U.S. 328, 332-33 & n.7 (1959).

186 Rule 71.1 (formerly Rule 71A) ended the use of state procedures in federal condemnations in 1951, establishing “a uniform set of procedures governing federal condemnation actions.” *Kirby Forest Indus., Inc. v. United States*, 467 U.S. 1, 3-4 & n.2 (1984) (discussing Rule 71A); FED. R. CIV. P. 71.1. However, condemnations by pipeline companies under the Natural Gas Act are governed by state law in some circuits. E.g., *Rockies Express Pipeline LLC v. 4.895 Acres of Land*, 734 F.3d 424, 429-30 (6th Cir. 2013); but see, e.g., *S. Nat. Gas Co. v. Land, Cullman Cty.*, 197 F.3d 1368 (11th Cir. 1999) (applying federal procedural law); see also *Portland Nat. Gas Transmission Sys. v. 19.2 Acres of Land*, 318 F.3d 279, 282 n.1 (1st Cir. 2003) (“Perhaps surprisingly, several circuits [apply] state substantive law as well as formal practice [in Natural Gas Act condemnations].”). Cases decided on state law grounds are not applicable to federal acquisitions, in which compensation must be determined under federal law. *United States v. Miller*, 317 U.S. 369, 379-80 (1943).

187 See *United States v. Causby*, 328 U.S. 256, 268 (1946) (“Since [the terms of the property interests acquired are] not clear . . . , it would be premature for us to consider whether the amount of the award . . . was proper.”); *United States v. 21.54 Acres of Land in Marshall Cty.*, 491 F.2d 301, 305 (4th Cir. 1973) (discrepancies in legal description of easement boundaries required determination “whether the government has, in fact, accurately described the land in which it intends to take easements”).

188 See *Berman v. Parker*, 348 U.S. 26, 35-36 (1954); *Shoemaker v. United States*, 147 U.S. 282, 298 (1893); *United States v. Gettysburg Elec. Ry. Co.*, 160 U.S. 668, 685 (1896); *United States v. 3,218.9 Acres of Land in Warren Cty.*, 619 F.2d 288, 291 (3d Cir. 1980); cf. *United States v. Meyer*, 113 F.2d 387, 392 (7th Cir. 1940) (citing cases); *United States ex rel. Tenn. Valley Auth. v. Russell*, 87 F. Supp. 386, 389 (E.D. Tenn. 1948) (citing cases).

189 Regulations of the Attorney General Governing the Review and Approval of Title for Federal Land Acquisitions (2016); cf. *United States v. City of Tacoma*, 330 F.2d 153, 155, n.6 (9th Cir. 1964) (noting Attorney General could not “render . . . a written opinion as to the validity of the Government’s title, without noticing the very serious impediment on that title left undecided by the judgment” of the lower court).

190 See *United States v. 62.17 Acres of Land in Jasper Cty.*, 538 F.2d 670, 676 (5th Cir. 1976); cf. *United States ex rel. Tenn. Valley Auth. v. Welch*, 327 U.S. 546, 554 (1946) (“The cost of public projects is a relevant element in all of them, and the government, just like anyone else, is not required to proceed oblivious to elements of cost.”).

191 *United States v. Dickinson*, 331 U.S. 745, 750 (1947).

192 See *Causby*, 328 U.S. at 268; see also Sections 4.6, 4.7, and 4.8.

purposes if it reflects the market value of the precise property interest being acquired.¹⁹³ If an appraiser is provided an incorrect or outdated property interest, the resulting opinion of market value—no matter how well supported—will be of little or no use for purposes of just compensation.¹⁹⁴ Moreover, in condemnation, agencies must stand by and pay compensation for the stated terms of the property interest taken.¹⁹⁵ If those terms are not carefully defined, a condemning authority may well “‘discover[] that the judgment it won gave it more of a title than it wanted to pay for,’ but it must pay for what it won nonetheless.”¹⁹⁶

- 4.1.5. About the Sixth Edition.** As noted, this is the sixth edition of the *Uniform Appraisal Standards for Federal Land Acquisitions*. With the passage of 16 years since publication of the previous edition, some topics of great importance in past decades have become less significant, and some issues that were controversial or unsettled have been resolved by the courts.

Of course, some valuation problems remain as vital today as in years past. And while the underlying legal principles are unchanged, recent court rulings contain practical examples of how to apply the underlying law to actual valuation problems. Therefore, this Section includes case studies and citations to instructive court opinions. Most of these citations are eminent domain cases, which are often difficult to distinguish by case name.¹⁹⁷ To assist the reader, frequently cited cases include common names or reference a distinctive property location, landowner name, or public project for which property was acquired.¹⁹⁸ A table of all cases and other authorities cited in these Standards is included in the Appendix.

- 4.2. Market Value Standard.** Under established law, the measure of just compensation is the market value of the property acquired. As stated by the United States Supreme Court, just compensation “means in most cases the fair market value of the property on the date it is appropriated. Under this standard, the owner is entitled to receive what a willing buyer would pay in cash to a willing seller at the time of the taking.”¹⁹⁹ The Supreme Court has often repeated this “clear and administrable rule for just compensation: ‘The court has repeatedly

Measure Twice, Cut Once

An opinion of market value can be useful for just compensation purposes only if it reflects the market value of the precise property interest to be acquired.

Agencies must carefully define the interest(s) to be acquired and expressly state what interests (if any) will remain with the landowner.

Appraisers must ensure they understand the precise property interest(s) involved and request **legal instruction** to clarify any uncertainty.

193 See *Causby*, 328 U.S. at 268; *Benecke v. United States*, 356 F.2d 439, 441 (5th Cir. 1966) (remanding for new trial where appraisal witnesses “valued somewhat less than the entire tract” actually taken).

194 As a result, in the appraisal review process under the Uniform Act, an appraisal may be *accepted* as meeting applicable standards but not *recommended* or *approved* as a basis for establishing just compensation, and the agency may need to obtain an additional appraisal. See Section 3.

195 See, e.g., *Transwestern Pipeline Co. v. O’Brien*, 418 F.2d 15, 19-21 (5th Cir. 1969) (proper to measure compensation based on actual easement language in pleadings, not condemnor’s assertions that landowner would be allowed to make more extensive use of remainder).

196 *Vector Pipeline, L.P. v. 68.55 Acres of Land*, 157 F. Supp. 2d 949, 958 (N.D. Ill. 2001); see *United States v. Dickinson*, 331 U.S. 745, 750 (1947).

197 Federal condemnation cases are generally styled (named) as United States v. [#] Acres of Land, rather than United States v. [Landowner], because a condemnation proceeding is an action *in rem*, that is, a taking of a thing itself—the real property. In contrast, a legal proceeding against a person is an action *in personam*, taking the rights of persons in the thing. See *Dunnington*, 146 U.S. at 352-53; *In Personam and In Rem*, BLACK’S LAW DICTIONARY (10th ed. 2014); see also FED. R. CIV. P. 71.1(c)(1) (requiring case caption to name “the property—designated generally by kind, quantity, and location—and at least one owner of some part of or interest in the property”).

198 For example, the Supreme Court case *United States v. 50 Acres of Land (Duncanville)* concerned the United States’ condemnation of 50 acres owned by the City of Duncanville, Texas. 469 U.S. 24 (1984).

199 *Kirby Forest Indus., Inc. v. United States*, 467 U.S. 1, 9-10 (1984) (internal quotations & citations omitted); accord *Miss. & Rum River Boom Co. v. Patterson*, 98 U.S. 403, 407-08 (1878).

held that just compensation normally is to be measured by “the market value of the property taken at the time of the taking.”²⁰⁰ As a result, these Standards require use of the following definition of market value in the appraisal of property for federal acquisitions:

4.2.1. Market Value Definition.

Definition of Market Value

Market value is the amount in cash, or on terms reasonably equivalent to cash, for which in all probability the property would have sold on the effective date of value, after a reasonable exposure time on the open competitive market, from a willing and reasonably knowledgeable seller to a willing and reasonably knowledgeable buyer, with neither compelled to buy or sell, giving due consideration to all available economic uses of the property.

The federal definition of market value is based on Supreme Court cases that establish and explain the market value standard as the measure of just compensation.²⁰¹ It applies to all types of federal acquisitions that involve payment of just compensation, whether or not condemnation may be involved.²⁰² In most situations, the market value measure “achieves a fair ‘balance between the public’s need and the claimant’s loss.’”²⁰³ Thus, while the “Court has never attempted to prescribe a rigid rule for determining what is ‘just compensation’ under all circumstances and in all cases[,] market value has normally been accepted as a just standard.”²⁰⁴ These Standards follow the practical, objective, clear, and administrable rule of market value as the measure of just compensation, established by the Supreme Court nearly 140 years ago.²⁰⁵

4.2.1.1. **Date of Value.** The date of value is generally determined by law (or a **legal instruction**, for the appraiser’s purposes) based on the nature of the acquisition.²⁰⁶

200 *Horne v. Dep’t of Agric.*, 135 S. Ct. 2419, 2432 (2015) (quoting *Duncanville*, 469 U.S. at 29, and *Olson v. United States*, 292 U.S. 246, 255 (1934)).

201 *E.g.*, *Kirby Forest Indus., Inc.*, 467 U.S. at 10; *Almota Farmers Elevator & Warehouse Co. v. United States*, 409 U.S. 470, 471-72, 474 (1973); *United States v. Reynolds*, 397 U.S. 14, 17 (1970); *United States v. Miller*, 317 U.S. 369, 374 (1943); *McCoy v. Union Elevated R.R. Co.*, 247 U.S. 354, 359 (1918); *Kerr v. S. Park Comm’rs*, 117 U.S. 379, 386-87 (1886).

202 As discussed in Section 0.2.4, only the Supreme Court can define just compensation. *See Miller*, 317 U.S. at 380; *United States v. New River Collieries Co.*, 262 U.S. 341, 343-44 (1923); *Marbury v. Madison*, 5 U.S. 137 (1803).

203 *Duncanville*, 469 U.S. at 33. Other measures of just compensation “are employed only ‘when market value [is] too difficult to find, or when its application would result in manifest injustice to owner or public.’” *Kirby Forest Indus., Inc.*, 467 U.S. at 10 n.14 (quoting *United States v. Commodities Trading Corp.*, 339 U.S. 121, 123 (1950)).

204 *Commodities Trading*, 339 U.S. at 123; *see Kimball Laundry Co. v. United States*, 338 U.S. 1, 5 (1949) (“The value of property springs from subjective needs and attitudes, its value to the owner may therefore differ widely from its value to the taker. Most things, however, have a general demand which gives them a value transferable from one owner to another. As opposed to such personal and variant standards as value to the particular owner whose property has been taken, this transferable value has an external validity which makes it a fair measure of public obligation to compensate the loss incurred by an owner as a result of the taking of his property for public use.”).

205 *Horne v. Dep’t of Agric.*, 135 S. Ct. 2419, 2432 (2015) (“clear and administrable rule for just compensation”); *United States v. 564.54 Acres of Land (Lutheran Synod)*, 441 U.S. 506, 511 (1979) (“relatively objective working rule . . . a useful . . . tool”); *Kimball Laundry*, 338 U.S. at 5 (“a fair measure of public obligation to compensate the loss incurred by an owner as a result of the taking of his property for public use”); *Miller*, 317 U.S. at 374 (“practical standard”); *Bauman v. Ross*, 167 U.S. 548, 574 (1897) (“The just compensation required by the constitution to be made to the owner is to be measured by the loss caused to him by the appropriation. He is entitled to receive the value of what he has been deprived of, and no more.”); *Miss. & Rum River Boom Co. v. Patterson*, 98 U.S. 403, 408 (1878) (“The inquiry in such cases must be what is the property worth in the market . . . from its availability for valuable uses.”).

206 *See United States v. Dow*, 357 U.S. 17, 22 (1958) (“that event which gives rise to the claim for compensation and fixes the date as of which the land is to be valued”).

- In most direct acquisitions (such as voluntary purchases), the date of value should be as near as possible to the date of the acquisition—typically the date of the appraiser’s last property inspection.²⁰⁷
- In “quick-take” condemnations involving a declaration of taking, the date of value is the earlier of (1) the date the United States files a declaration of taking and deposits estimated compensation with the court, or (2) the date the government enters into possession of the property.²⁰⁸
- In “complaint-only” straight condemnations in which no declaration of taking is filed, the date of value is the date trial commences.²⁰⁹
- In inverse takings, the date of value is the date of taking, which should be provided by legal counsel.²¹⁰
- For property exchanges, the date of value may be set by the parties or established by statute, and should be provided by legal counsel or the appraiser’s client.²¹¹

In each type of acquisition, a property’s market value is to be ascertained as of the appropriate date of value, considering the property as it existed on that date.²¹² The appraiser must disregard physical changes (such as government construction) as well as changes in market value that occur after the date of value.²¹³ But this does not necessarily prohibit consideration of market data or events that occurred after the date of value: For example, market data after the date of value may be considered for the purpose of corroborating the market expectations or trends that existed on the date of value.²¹⁴ Sales that occurred after the date of value may be appropriate to consider, as discussed in Section 4.4.2.4.7. And in acquisitions under the

207 Cf. 49 C.F.R. § 24.102(g) (updating offer of just compensation under Uniform Act); *United States v. 790.71 Acres of Land in Cotton, Comanche & Stephens Cty.*, 550 F. Supp. 690, 691 (W.D. Okla. 1981) (holding changes in appraisals of same property were due to later appraisal’s inclusion of recently discovered additional comparable sales, not bad faith or unfair treatment).

208 *Dow*, 357 U.S. at 21-22; see Declaration of Taking Act, 40 U.S.C. § 3114 (corresponds to Act of February 26, 1931, 46 Stat. 1421, originally codified at 40 U.S.C. §§ 258a-258b).

209 See *Kirby Forest Indus., Inc.*, 467 U.S. at 16-17; General Condemnation Act, 40 U.S.C. § 3113 (corresponds to Act of August 1, 1888, 25 Stat. 357, originally codified at 40 U.S.C. § 257).

210 See *United States v. Clarke*, 445 U.S. 253, 258 (1980); see generally Section 4.9.

211 E.g., *Greer Coal, Inc. v. U.S. Forest Serv.*, 470 F. App’x 630, 636 (9th Cir. 2012) (unpubl.); *Desert Citizens Against Pollution v. Bisson*, 231 F.3d 1172, 1185-86 & nn.17-18 (9th Cir. 2000); see generally Section 4.10.

212 *Kerr v. S. Park Comm’rs*, 117 U.S. 379, 385-87 (1886); accord *United States v. Reynolds*, 397 U.S. 14, 16 (1970); *United States v. Miller*, 317 U.S. 369, 374 (1943); see, e.g., *United States v. 125.2 Acres of Land in Nantucket*, 732 F.2d 239, 244 (1st Cir. 1984) (“well-settled rule”); *United States v. 161.99 Acres of Land in Collins Cty.*, 512 F.2d 65, 66 (5th Cir. 1975); see also *Rasmuson v. United States*, 807 F.3d 1343, 1346 (Fed. Cir. 2015) (“A proper appraisal methodology has to account for those physical conditions [that existed on the date of value].”).

213 See *Kirby Forest Indus., Inc.*, 467 U.S. at 16-18 & n.29; *United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53, 76 (1913); *Searl v. Sch. Dist. in Lake Cty.*, 133 U.S. 553, 562-65 (1890); *United States v. Certain Land in Lincoln*, 343 F. Supp. 155 (D. Neb. 1972).

214 *Ga.-Pac. Corp. v. United States*, 640 F.2d 328, 337 n.5 (Ct. Cl. 1980) (allowing post-taking data “for purposes of corroborating the reasonableness of the views of a . . . prospective purchaser and seller as to their anticipations” as of the date of taking); e.g., *United States v. Certain Lands in Wappinger*, 67 F. Supp. 905, 907-08, 909-11 (S.D.N.Y. 1946) (considering market trends); see *Hickey v. United States*, 208 F.2d 269, 277-78 (3d Cir. 1953) (“A witness may state that his conclusion on an initial examination was confirmed by later events, when additional information is available.”); *United States v. 765.56 Acres of Land in Southampton (765.56 Acres I)*, 164 F. Supp. 942, 947 (E.D.N.Y. 1958), *aff’d sub nom. United States v. Glanat Realty Corp.*, 276 F.2d 264 (2d Cir. 1960) (noting “zoning regulations [that] had been under consideration . . . for some time” as of date of value “had become a fact” at time of trial); see also USPAP Advisory Opinion 34 (“Data subsequent to the effective date may be considered in developing a retrospective value as a confirmation of trends that would reasonably be considered by a buyer or seller as of that date.”); cf. *Dugan v. Rank*, 372 U.S. 609, 624 (1963) (noting “[p]arenthetically” that federal dam project had indeed been operating in accordance with previously stated plans).

Uniform Act, the assignment may instruct the appraiser to consider changes in value due to physical deterioration within the owner's reasonable control.²¹⁵

- 4.2.1.2. Exposure on the Open, Competitive Market.** The federal definition of market value presumes that the property, prior to the date of value, was on the open market for a reasonable length of time to find a buyer who was ready, willing, and able to consummate a purchase on the date of valuation.²¹⁶ Value is to be determined by what the property “would sell for in the market for cash in the due course of business . . . under ordinary circumstances”²¹⁷

Appraisers should not link an opinion of market value made for federal acquisition purposes to a specific exposure time. This jurisdictional exception to USPAP is required for appraisals applying the federal definition of market value.

In determining just compensation, federal courts have neither defined a “reasonable” length of time nor required that an estimate of market value be linked to a specified exposure time on the open market. For these reasons, appraisers should not link opinions of market value for federal acquisitions to a specific exposure time.²¹⁸ To do so in an appraisal for federal acquisition purposes would needlessly place a limiting condition on the opinion that is irrelevant and could undermine the reliability of the entire appraisal.²¹⁹

- 4.2.1.3. Willing and Reasonably Knowledgeable Buyers and Sellers.** *Willing and reasonably knowledgeable* buyers and sellers are not defined as all-knowing, but rather as having the knowledge possessed by the “typical ‘willing buyer-willing seller’” in the marketplace.²²⁰ An arm's-length transaction cannot be disregarded solely because a buyer or seller lacked “perfect” knowledge.²²¹ For example, the Federal Circuit held that it was appropriate to consider “a relevant market made up of investors who are real but are speculating in whole or major part.”²²² And as the same court held in a later appeal, “uncontroverted evidence of an active real estate market compels the conclusion that the typical ‘willing buyer-willing seller’

215 See Uniform Act, § 301 (3); 42 U.S.C. § 4651(3). This is an express statutory exception to the rule that property must be valued as it existed on the date of value. *E.g., Rasmuson*, 807 F.3d at 1346 (noting that a calculation that does not consider existing conditions “will result in an artificially inflated value and yield a windfall”); *cf. 161.99 Acres in Collins*, 512 F.2d at 66 (holding compensation must be measured as of date of taking, regardless of subsequent changes in property's market value).

216 See, e.g., *Kimball Laundry Co. v. United States*, 338 U.S. 1, 6 (1949) (“the equivalent arrived at by the haggling of the market”); *McCoy v. Union Elevated R.R. Co.*, 247 U.S. 354, 359 (1918).

217 *McCoy*, 247 U.S. at 359; see *Kerr v. S. Park Comm'rs*, 117 U.S. 379, 386-87 (1886) (“what land would have sold for in cash, or on such time and terms as would be equivalent to cash”).

218 This jurisdictional exception to USPAP Standards Rule 1-2(c) is required for appraisals for federal acquisitions—i.e., appraisals applying the federal definition of market value—to ensure the opinion of value can be used as a reliable measure of just compensation under the Fifth Amendment to the U.S. Constitution. See USPAP Advisory Opinion 35, *Reasonable Exposure Time in Real Property and Personal Property Opinions of Value*; USPAP Frequently Asked Question 108. Appraisers may be accustomed to linking opinions of value to specific exposure times in other types of assignments. *Cf. Robinson v. United States*, 305 F.3d 1330, 1332 (Fed. Cir. 2002) (distinguishing “quick sale value” as amount expected if property's market exposure was limited to specific term, and “liquidation value” as amount expected if property “is sold without reasonable market exposure”); *In re Dyevoich*, No. 11–2551 (MLC), 2012 WL 194677 (D.N.J. Jan. 23, 2012) (unpubl.) (distinguishing “reasonable market exposure time” from “restricted market exposure time”).

219 See EATON, *supra* note 16, at 18-19.

220 See *Fla. Rock Indus., Inc. v. United States (Florida Rock III)*, 18 F.3d 1560, 1567 (Fed. Cir. 1994).

221 See *id.* at 1566 n.12 (“The market from which a fair market value may be ascertained need not contain only legally trained (or advised) persons who fully investigate current land use regulations; ignorance of the law is every buyer's right.”); *id.* at 1567 (“When the market provides a well-substantiated value for a property, a court may not substitute its own judgment as to what is a wise investment. . . . Should a landowner wish to pick and choose her buyers, that luxury is not chargeable to the federal fisc.”).

222 *Fla. Rock Indus. v. United States (Florida Rock II)*, 791 F.2d 893, 903 (Fed. Cir. 1986); see *United States v. 69.1 Acres of Land (Sand Mountain)*, 942 F.2d 290, 294 (4th Cir. 1991) (“The buyers in the sand reserve market are limited to those with foresight and patience, but they are nonetheless real buyers in a real market.”).

requirement of fair market value had been met”²²³

As a result, “[w]hile an [appraiser] might be justified in adjusting the fair market value figure by discarding aberrational values based upon sales between related entities or fraudulent sales . . . , an [appraiser] may not discard an entire market as aberrational.”²²⁴

The hypothetical buyer and seller under the federal definition of market value are objective market participants, motivated by typical market considerations: “[T]he same considerations are to be regarded as in the sale of property between private parties[.]”²²⁵ having regard for “the existing business or wants of the community”²²⁶ As the Supreme Court warned, “care must be taken to avoid . . . supposing the hypothetical purchaser to have either the same idiosyncrasies as the owner, or the same opportunities for use of the property as a taker armed with the power of eminent domain.”²²⁷

“Speculation”

While *market participants* may speculate, *appraisers* cannot. The finder of fact “must not, itself, speculate, i.e., guess, about potential end uses or markets when the speculation is so remote or improbable that one would not invest his money in it.” *Fla. Rock Indus., Inc. v. United States* (*Florida Rock II*), 791 F.2d 893, 903 (Fed. Cir. 1986); see Section 4.3.

4.2.1.4. All Available Economic Uses. Compensation “is to be arrived at upon just consideration of all the uses for which [a property] is suitable.”²²⁸ As the Supreme Court stated in *Olson v. United States*, “[t]he highest and most profitable use for which the property is adaptable and needed or likely to be needed in the reasonably near future is to be considered”²²⁹ That use must be considered “to the full extent that the prospect of demand for such use affects the market value while the property is privately held.”²³⁰ As discussed in Section 4.3, in valuations for just compensation purposes, only profitable—i.e., economic—uses can be considered.²³¹ Nonmarket considerations such as *value to the public* “afford[] no just criterion for estimating what the owner should receive” and must be disregarded.²³²

223 *Florida Rock III*, 18 F.3d at 1567; accord *Sand Mountain*, 942 F.2d at 294 (4th Cir. 1991) (“The existence of six other recent sales of properties in the area to sand producers lends further support . . . that a market exists for minable reserves . . .”).

224 *Florida Rock III*, 18 F.3d at 1567; cf. *United States v. 381.76 Acres of Land (Montego Group)*, No. 96-1813-CV, 2010 WL 3734003, at *7 (S.D. Fla. Aug. 3, 2010) (qualitative analysis of comparable sales was the “superior” approach “to determine the value of peculiar properties in a peculiar market while taking complex factors into account”), adopted sub nom. *United States v. 10.00 Acres of Land*, No. 99-0672-CIV, 2010 WL 3733994 (S.D. Fla. Sept. 22, 2010), aff’d sub nom. *United States v. Gonzalez*, 466 F. App’x 858 (11th Cir. 2012) (per curiam).

225 *Miss. & Rum River Boom Co. v. Patterson*, 98 U.S. 403, 407-08 (1878); see *United States v. 6.24 Acres of Land (Weber)*, 99 F.3d 1140, 1996 WL 607162, at *5 (6th Cir. 1996) (per curiam) (unpubl.) (“We assume that buyers and sellers of ordinary prudence are knowledgeable and that they are not motivated by speculation or conjecture.”); accord *United States v. 760.807 Acres of Land in Honolulu*, 731 F.2d 1443, 1446 (9th Cir. 1984).

226 *United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53, 77-78 (1913); *Kimball Laundry Co. v. United States*, 338 U.S. 1, 5-6 (1949); see *Olson v. United States*, 292 U.S. 246, 257 (1934) (In estimating market value, “there should be taken into account all considerations that fairly might be brought forward and reasonably be given substantial weight” in “fair negotiations between an owner willing to sell and a purchaser desiring to buy.”).

227 *Kimball Laundry*, 338 U.S. at 6 n.3; *Chandler-Dunbar*, 229 U.S. at 79-81; see *United States v. 564.54 Acres of Land (Lutheran Synod)*, 441 U.S. 506, 514 (1979) (“[N]ontransferable values arising from the owner’s unique need for the property are not compensable”); see also *Boom Co.*, 98 U.S. at 408 (“Others may be able to use [the property], and make it subserve the necessities or conveniences of life. Its capability of being made thus available gives it a market value which can be readily estimated.”); *Florida Rock III*, 18 F.3d at 1567 (“Dollars are fungible Should a landowner wish to pick and choose her buyers, that luxury is not chargeable to the federal fisc.”).

228 *Olson v. United States*, 292 U.S. 246, 255 (1934).

229 *Id.*; see Section 4.3 (Highest and Best Use).

230 *Olson*, 292 U.S. at 255.

231 See *id.*; see also *Monongahela Nav. Co. v. United States*, 148 U.S. 312, 328 (1893).

232 *Chandler-Dunbar*, 229 U.S. at 80.

4.2.2. The Unit Rule. The market value concept in federal acquisitions generally requires application of the so-called unit rule, a principle developed by the federal courts that dictates what is to be valued for just compensation purposes.²³³ Under the unit rule, the property being appraised must be valued as a unitary whole and held in single ownership.²³⁴ The value of the whole cannot be derived by adding together the separate values of various interests or components.²³⁵ As a result, summation or cumulative appraisals are improper under federal law.²³⁶ The unit rule relates to *ownership* interests (estates) in real estate—such as landlord and tenant, or mortgagor and mortgagee—and to various *physical* components of real estate—such as timber, mineral deposits, farmland, and buildings.²³⁷ As discussed in Section 4.6, the unit rule can raise particularly challenging valuation issues in appraisals for partial acquisitions, especially if easements are involved.

4.2.2.1. Ownership Interests (the Undivided Fee). A property with multiple ownership interests or estates—such as lessor and lessee, life tenant and the holder of the remainder, or mortgagor and mortgagee—must be valued as a whole, embracing all of the rights, estates, and interests of all who may claim, and as if in one ownership.²³⁸ For example, in an acquisition of property in fee simple absolute, the property must be appraised as an undivided fee.²³⁹ Similarly, in acquisitions of less-than-fee interests, the interests being appraised must be valued as if under single ownership.²⁴⁰ The market value of the whole is later apportioned among “the respective interest holders . . . either by contract or judicial intervention.”²⁴¹ This is because just compensation is for the property itself, not the various ownership interests; thus, “the appraised value of the property represents the whole fee.”²⁴² This aspect of the unit rule ensures the public is not charged twice in federal acquisitions.²⁴³

4.2.2.2. Physical Components. Buildings and improvements, timber, crops, sand, gravel, minerals, oil, and so forth, in or upon the property are to be considered *to the extent they contribute to the market value of the property as a whole*. “[I]t is firmly settled that one does not value the []land as one factor and then value the improvements as another factor and then add the two values to determine market

233 See *United States v. 6.45 Acres of Land (Gettysburg Tower)*, 409 F.3d 139, 146 & n.13 (3d Cir. 2005) (“[W]e have applied the unit rule as the legal procedure by which just compensation is to be determined and apportioned.”); *United States v. 1.377 Acres of Land (Hotel San Diego)*, 352 F.3d 1259, 1269 (9th Cir. 2003) (government provides just compensation, then respective interest holders apportion award).

234 *United States v. Dunnington*, 146 U.S. 338, 351 (1892); *United States v. 25.936 Acres of Land in Edgewater*, 153 F.2d 277, 279 (3d Cir. 1946).

235 E.g., *Dunnington*, 146 U.S. at 351; *Bogart v. United States*, 169 F.2d 210, 213 (10th Cir. 1948); *Nebraska v. United States*, 164 F.2d 866, 868 (8th Cir. 1947); *25.936 Acres in Edgewater*, 153 F.2d at 279; *Meadows v. United States*, 144 F.2d 751, 753 (4th Cir. 1944).

236 See, e.g., *United States v. Gonzalez*, 466 F. App’x 858 (11th Cir. 2012) (per curiam).

237 *United States v. 91.90 Acres of Land in Monroe Cty. (Cannon Dam)*, 586 F.2d 79, 87 (8th Cir. 1978).

238 E.g., *Dunnington*, 146 U.S. at 351; *Bogart*, 169 F.2d at 213; *Nebraska*, 164 F.2d at 868; *25.936 Acres in Edgewater*, 153 F.2d at 279; *Meadows*, 144 F.2d at 753; cf. *United States v. 499.472 Acres of Land in Brazoria Cty.*, 701 F.2d 545, 552 (5th Cir. 1983) (emphasizing “importance of presenting in a single trial to a single jury all interests of all parties in the condemned property.”).

239 *Gettysburg Tower*, 409 F.3d at 145-47 & nn.12-13; *United States v. 1.377 Acres of Land (Hotel San Diego)*, 352 F.3d 1259, 1269 (9th Cir. 2003); *Nebraska*, 164 F.2d at 868-69.

240 E.g., *United States v. 237,500 Acres of Land*, 236 F. Supp. 44, 55 (S.D. Cal. 1964) (valuing placer mining claims as a whole, then apportioning locators’, lease and option interests). Applying the unit rule can be particularly complex in acquisitions of less-than-fee estates such as easement (Section 4.6.5) or leasehold (Section 4.7) interests, or in acquisitions involving minerals, timber or other natural resources (Section 4.8).

241 *Hotel San Diego*, 352 F.3d at 1269. This apportionment is generally beyond the scope of the appraiser’s assignment.

242 *Dunnington*, 146 U.S. at 351; see *Gettysburg Tower*, 409 F.3d at 146.

243 *Dunnington*, 146 U.S. at 353-54.

value.”²⁴⁴ Rather, the measure of just compensation is the market value of the entire property—not the total of the money values of the separate items. As a result, in developing an opinion of value for federal acquisitions, the appraiser must consider all the elements that “contribute to make the property valuable, all . . . that detract from it, and finally, weighing all those elements, determine [the market value of] the single piece of property . . .” acquired.²⁴⁵

The unit rule is often misapplied in valuations involving natural resources such as minerals, oil, and gas.²⁴⁶ As with any other component, the possible or actual existence of such resources can only be considered to the extent it would contribute to the market value of the whole property. Section 4.8 discusses valuation issues that commonly arise in appraising natural resource properties.

4.2.2.2.1. Existing Government Improvements. The presence of *government-constructed* buildings and improvements on the property on the date of value may significantly affect the analysis of market value. Proper treatment of improvements often turns on the legal effects of a lease, if one exists, as “any valuation should take into account the lease terms covering improvements” of significance to a reasonable buyer.²⁴⁷ But regardless of a contractual agreement, “the equitable principle which condemns unjust enrichment [may] prevent[] the value of [government-built] premises becoming a windfall to the owner of the land in the guise of fair compensation.”²⁴⁸ Depending on the facts of the acquisition, the appraiser may need to determine a buyer’s cost to remove such improvements, estimate any contributory value, or exclude them from consideration entirely, among other courses.²⁴⁹ Therefore, appraisers should request **legal instructions** on how to treat government-constructed improvements that predate the date of value.²⁵⁰

4.2.2.3. Allocations and Administrative Payments Under the Uniform Act. Valuations for federal acquisitions must follow the unit rule. But some appraisal assignments may require the appraiser to subsequently allocate the market value of the whole property, once properly determined under the unit rule, for administrative or other purposes. Thus, the appraiser may be directed to apportion the whole property’s value among separate estates or interests

244 *United States v. 91.90 Acres of Land in Monroe Cty. (Cannon Dam)*, 586 F.2d 79, 87 (8th Cir. 1978) (“[T]he value of the improved property may be greater than, equal to, or even less than the property in its unimproved state.”); accord *United States v. 6.24 Acres of Land (Weber)*, 99 F.3d 1140, 1996 WL 607162 (6th Cir. 1996) (per curiam) (unpubl.); *United States v. Lewis*, 308 F.2d 453, 457-59 (9th Cir. 1962); *United States v. 158.76 Acres of Land in Townshend*, 298 F.2d 559, 561 (2d Cir. 1962); *United States v. Certain Parcels of Land in Rapides Par.*, 149 F.2d 81, 82 (5th Cir. 1945); *United States v. Meyer*, 113 F.2d 387, 397 (7th Cir. 1940); *United States v. 33.92356 Acres of Land (Piza-Blondet Trial Op.)*, No. 98-1664, 2008 WL 2550586, at *10-*11 (D.P.R. June 13, 2008), aff’d, 585 F.3d 1, 11 (1st Cir. 2009); *United States ex rel. Tenn. Valley Auth. v. Harralson*, 43 F.R.D. 318, 321 (W.D. Ky. 1966) (mem.); see *Morton Butler Timber Co. v. United States*, 91 F.2d 884, 888 (6th Cir. 1937); *United States v. Wise*, 131 F.2d 851, 852-53 (4th Cir. 1942); cf. *United States v. Sowards*, 370 F.2d 87, 90-91 (10th Cir. 1966) (improper to value property by multiplying amount of coal *in situ* by price per ton).

245 *Wise*, 131 F.2d at 852-53 (“[When a] shrewd, able purchaser who was interested in that property . . . finally came to determine what he would pay, it would be a single figure.”).

246 See, e.g., *Cannon Dam*, 586 F.2d at 88-89 (“serious error” to permit aggregation of estimated surface value and estimated value of underlying clay).

247 *United States v. 32.42 Acres of Land (Fleet ASW)*, No. 05cv1137 DMS, 2009 WL 2424303, at *6 (S.D. Cal. Aug. 6, 2009) (citing *Kimball Laundry Co. v. United States*, 338 U.S. 1, 16 (1949)); *United States v. Certain Space in Rand McNally Bldg.*, 295 F.2d 381, 383-84 (7th Cir. 1961).

248 *Bibb Cty. v. United States*, 249 F.2d 228, 230 (5th Cir. 1957); see also *Searl v. Sch. Dist. in Lake Cty.*, 133 U.S. 553, 562-65 (1890); *United States v. Del., Lackawana & W.R.R. Co.*, 264 F.2d 112, 116-17 (3d Cir. 1959).

249 See *Fleet ASW*, 2009 WL 2424303, at *6; cf. *United States v. City of Columbus*, 180 F. Supp. 775, 775 (S.D. Ohio 1959) (lease provision allowed tenant United States reasonable time to remove improvements); *San Nicolas v. United States*, 617 F.2d 246 (Ct. Cl. 1980) (lease provision obligated tenant United States to restore property to condition at lease onset).

250 See, e.g., *Old Dominion Land Co. v. United States*, 269 U.S. 55, 65 (1925); *Searl*, 133 U.S. at 562-65; *Wash. Metro. Area Transit Auth. v. One Parcel of Land*, 780 F.2d 467, 471 (4th Cir. 1986); *Del., Lackawana*, 264 F.2d at 116-17; *Bibb Cty.*, 249 F.2d at 230; but see *Rand McNally Bldg.*, 295 F.2d at 383-84.

for negotiating purposes and/or to comply with agency obligations under the Uniform Act. Such an allocation should be reported in a separate, supplemental report, rather than in the appraisal report of the market value of the whole property.²⁵¹ Similarly, some assignments may require a determination of the contributory value of buildings, structures, or other improvements that will be removed or adversely affected due to the government project.²⁵² If applicable, the appraiser should clearly state that any such allocations do not indicate the appraisal method(s) employed.²⁵³

4.2.2.4. Departure from the Unit Rule. Federal courts have repeatedly emphasized that the unit rule is “a ‘carefully guarded’ one and that only in rare and exceptional types of situations [should] departures from it be[] permitted.”²⁵⁴ Thus, while the courts recognize the unit rule “manifestly is not without hardships in practical operation,”²⁵⁵ under federal law departure from the unit rule is permitted only in “extraordinary,” “unique,” “rare and compelling” circumstances.²⁵⁶ Any departure from the unit rule requires a **legal instruction**, as “the determination as to [the unit rule’s] applicability is one made by a court as a matter of law rather than by an appraiser.”²⁵⁷

Any departure from the unit rule requires a legal instruction, because the applicability of the rule is a matter of law that cannot be determined by an appraiser.

4.2.3. Objective Market Evidence; Conjectural and Speculative Evidence. For compensation to be “just, not merely to the individual whose property is taken, but to the public which is to pay for it[,]” its measure must be objective.²⁵⁸ The determination of market value must therefore take into account all considerations that might fairly be brought forward

“[I]t is the owner’s loss, not the taker’s gain, which is the measure of compensation”

—*United States ex rel. Tenn. Valley Auth. v. Powelson*, 319 U.S. 266, 281 (1943)

251 Unless specifically instructed, apportionment (allocation) of the market value of the whole property is generally beyond the scope of the appraiser’s assignment. See *United States v. Dunnington*, 146 U.S. 338, 351 (1892); *United States v. 6.45 Acres of Land (Gettysburg Tower)*, 409 F.3d 139, 146-47 & n.13 (3d Cir. 2005); *United States v. 1.377 Acres of Land (Hotel San Diego)*, 352 F.3d 1259, 1269 (9th Cir. 2003).

252 Section 302 of the Uniform Act directs agencies to acquire proportional interest in such structures. 42 U.S.C. § 4652; see *United States v. 158.00 Acres in Clay Cty.*, 562 F.2d 11, 13 (8th Cir. 1977) (noting “contributory value of improvements may be only a subsidiary fact supporting the ultimate finding of just compensation” but “has independent significance” under the Act). Administrative benefits under the Act or other statutes are separate from compensation under the Fifth Amendment. See *United States v. Gen. Motors*, 323 U.S. 373, 379-80 (1945); *United States v. Willow River Power Co.*, 324 U.S. 499, 510 (1945); *Ackerley Commc’ns of Fla. v. Henderson*, 881 F.2d 990, 992-93 & n.2 (11th Cir. 1989) (“[S]uch benefits should be viewed as administrative payments to displaced persons.” (quoting H.R. REP. NO. 91-1656, at 5-6 (1970), as reprinted in 1970 U.S.C.C.A.N. 5854)).

For a thorough analysis of the legislative history and intent of the Uniform Act, see *Barnhart v. Brinegar*, 362 F. Supp. 464 (W.D. Mo. 1973) (adopted by *Ackerley Commc’ns*, 881 F.2d at 992); *United States v. 320 Acres of Land*, 605 F.2d 762, 823 (5th Cir. 1979); *Roth v. U.S. Dep’t of Transp.*, 572 F.2d 183, 184 (8th Cir. 1978); *Rhodes v. City of Chi. for Use of Sch.*, 516 F.2d 1373, 1378 (7th Cir. 1975); cf. *Clear Sky Car Wash, LLC v. City of Chesapeake*, 910 F. Supp. 2d 861, 878 n.13 (E.D. Va. 2012).

253 See *United States v. 91.90 Acres of Land in Monroe Cty. (Cannon Dam)*, 586 F.2d 79, 87 (8th Cir. 1978) (“[I]t is firmly settled that one does not value the []land as one factor and then value the improvements as another factor and then add the two values to determine market value. That is true because the value of the improved property may be greater than, equal to, or even less than the property in its unimproved state.”).

254 *United States v. 6.45 Acres of Land (Gettysburg Tower)*, 409 F.3d 139, 148 (3d Cir. 2005) (quoting *Nebraska v. United States*, 164 F.2d 866, 869 (8th Cir. 1947)).

255 *Nebraska*, 164 F.2d at 868.

256 *Gettysburg Tower*, 409 F.3d at 147-48 (citing, inter alia, *United States v. Welch*, 217 U.S. 333, 338 (1910); *Bos. Chamber of Commerce v. City of Boston*, 217 U.S. 189, 195 (1910); *United States v. 499.472 Acres of Land in Brazoria Cty.*, 701 F.2d 545, 549 (5th Cir. 1983); *United States v. Corbin*, 423 F.2d 821, 828 (10th Cir. 1970)).

257 *Gettysburg Tower*, 409 F.3d at 142 n.5.

258 *Bauman v. Ross*, 167 U.S. 548, 574 (1897); see *United States v. 564.54 Acres of Land (Lutheran Synod)*, 441 U.S. 506, 511 (1979) (“we have recognized the need for a relatively objective working rule”); *United States v. Miller*, 317 U.S. 369, 375 (1943); cf. *City of New York v. Sage*, 239 U.S. 57, 61 (1915) (“[I]t is to be considered only so far as the public would have considered it if the land had been offered for sale”).

and reasonably be given substantial weight in bargaining between buyer and seller.²⁵⁹ But the appraiser must disregard any *special value to the owner* “who may not want to part with his land because of its special adaptability to his own use” as well as any *special value to the government* because of the government’s needs or the property’s “peculiar fitness” for the government’s purposes.²⁶⁰ Only “value transferable from one owner to another . . . has an external validity which makes it a fair measure of public obligation to compensate the loss incurred by an owner as a result of the taking of his property for public use.”²⁶¹ As a result, “loss to the owner of nontransferable values deriving from his unique need for property or idiosyncratic attachment to it, like loss due to an exercise of the police power, is properly treated as part of the burden of common citizenship.”²⁶² Similarly, “the Fifth Amendment allows the owner only the fair market value of his property; it does not guarantee him a return of his investment.”²⁶³

Moreover, just compensation cannot be based on mere speculation or conjecture. As the Supreme Court stated in *Olson v. United States*:

Elements affecting value that depend upon events or combinations of occurrences which, while within the realm of possibility, are not fairly shown to be reasonably probable, should be excluded from consideration, for that would be to allow mere speculation and conjecture to become a guide for the ascertainment of value—a thing to be condemned in business transactions as well as in judicial ascertainment of truth.²⁶⁴

4.2.4. Refinements of Market Value Standard. The Fifth Amendment requirement of just compensation “derives as much content from the basic equitable principles of fairness as it does from technical concepts of property law.”²⁶⁵ With this in mind, the Supreme Court has honed the basic foundation of market value “with certain refinements developed over the years in the interest of effectuating the constitutional guarantee” of just compensation.²⁶⁶ Valuations for federal acquisitions must comply with these refinements, which reflect the Supreme Court’s recognition that “strict adherence to the criterion of market value may involve . . . elements which, though they affect such value, must in fairness be eliminated.”²⁶⁷ These refinements reflect the practical applications of the principles of fairness underlying

Appraisers estimate market value, not just compensation. Departure from the market value standard is rarely justified in federal acquisitions, and inevitably requires appropriate legal instruction.

²⁵⁹ *Olson v. United States*, 292 U.S. 246, 257 (1934); *Rasmuson v. United States*, 807 F.3d 1343, 1346 (Fed. Cir. 2015).

²⁶⁰ *Miller*, 317 U.S. at 375; see Section 4.4.2.4.2.5 (Sales to a Party with Condemnation Authority); see also *United States v. Fuller*, 409 U.S. 488, 491 (1973). In developing the market value standard as the measure of just compensation, the federal courts have used terms such as *value*, *market value*, *fair market value*, and *market value fairly determined* interchangeably without altering the meaning of *market value* for federal acquisition purposes. See *Miller*, 317 U.S. at 374 & nn.10-14 (citing cases).

²⁶¹ *United States v. 50 Acres of Land (Duncanville)*, 469 U.S. 24, 36 (1984) (quoting *Kimball Laundry Co. v. United States*, 338 U.S. 1, 5 (1949)).

²⁶² *Duncanville*, 469 U.S. at 36.

²⁶³ *United States ex rel. Tenn. Valley Auth. v. Powelson*, 319 U.S. 266, 285 (1943); see *Olson*, 292 U.S. at 255 (“The public may not by any means confiscate the benefits, or be required to bear the burden, of the owner’s bargain.”); see, e.g., *United States v. 15,478 Square Feet of Land (Balaji Sai)*, No. 2:10-cv-00322, 2011 WL 2471586, at *6 (E.D. Va. June 20, 2011).

²⁶⁴ *Olson*, 292 U.S. at 257.

²⁶⁵ *Fuller*, 409 U.S. at 490.

²⁶⁶ *United States v. Reynolds*, 397 U.S. 14, 16 (1970).

²⁶⁷ *United States v. Miller*, 317 U.S. 369, 375 (1943); see also *Fuller*, 409 U.S. at 491. In developing the market value standard as the measure of just compensation, the federal courts have employed terms such as *value*, *market value*, *fair market value*, and *market value fairly determined* interchangeably; the adding of adjectives such as *fair* or *cash* to the term *market value* does not alter its meaning for federal acquisition purposes. See *Miller*, 317 U.S. at 374 & nn.10-14 (citing cases).

the Fifth Amendment.²⁶⁸ They include the analysis of highest and best use (Section 4.3) and determination of the larger parcel (Section 4.3.3); acceptable approaches to value (Section 4.4); the treatment of government project influence on market value (Section 4.5); partial acquisitions and the before and after valuation method (Section 4.6.1), compensable damages (4.6.2), offsetting benefits (4.6.3), and easement valuation issues (4.6.5); and the market rental value standard for leasehold and other temporary acquisitions (Section 4.7). These refinements can lead to particularly complex valuation problems in acquisitions involving natural resources (Section 4.8), inverse takings (Section 4.9), and land exchanges (Section 4.10).

4.2.5. Special Rules. Certain types of federal acquisitions raise unique compensation questions that have led the courts to craft special valuation rules with limited applicability, which is discussed in Section 4.11. The general principle that just compensation does not include value created by the United States has specific implications in the appraisal of riparian lands involving the United States' navigational servitude (Section 4.11.1) and of ranch lands involving federal grazing permits (Section 4.11.2). Similarly, the valuation of public roads, infrastructure, and facilities sometimes requires special treatment to ensure that compensation will reflect the owner's loss, not the government's gain (Section 4.11.3).

4.2.6. Exceptions to Market Value Standard. These Standards direct appraisers to estimate a property's market value—not the just compensation due for a government acquisition²⁶⁹—because appraisers do not have the authority to determine just compensation under the Fifth Amendment.²⁷⁰ Rarely, deviation from market value as the measure of just compensation may be required in federal acquisitions, but “only ‘when market value has been too difficult to find, or when its application would result in manifest injustice to owner or public.’”²⁷¹ Such situations are highly unusual,²⁷² and moreover, inevitably require appropriate **legal instruction**.²⁷³ Whether departure from the established market value standard is appropriate in a given set of facts is a legal question beyond the scope of an appraiser to determine.²⁷⁴

4.3. Highest and Best Use. Market value must be determined by considering a property's highest and best use, a term of art defined by the Supreme Court in 1934 as the “highest and most profitable use for which the property is adaptable and needed or likely to be needed in the reasonably near future.”²⁷⁵ The Court went on to explain that a property's highest and best use must be considered “not necessarily as the measure of value, but to the full extent

268 See *Powelson*, 319 U.S. at 285; *Bauman v. Ross*, 167 U.S. 548, 574 (1897); *Shoemaker v. United States*, 147 U.S. 282 (1893); *Kerr v. S. Park Comm'rs*, 117 U.S. 379 (1886).

269 See *United States v. New River Collieries Co.*, 262 U.S. 341, 343-44 (1923); cf. *United States v. 33.92356 Acres of Land (Piza-Blondet Trial Op.)*, No. 98-1664, 2008 WL 2550586, at *1-*2, *6 (D.P.R. June 13, 2008) (distinguishing valuation evidence from determination of just compensation), *aff'd*, 585 F.3d 1 (1st Cir. 2009); cf. *United States v. Foster*, 131 F.2d 3, 6-7 (8th Cir. 1942).

270 See *Monongahela Nav. Co. v. United States*, 148 U.S. 312, 327-28 (1893).

271 *United States v. 50 Acres of Land (Duncanville)*, 469 U.S. 24, 29 (1984) (quoting *United States v. Commodities Trading Corp.*, 339 U.S. 121, 123 (1950), and *Kirby Forest Indus., Inc. v. United States*, 467 U.S. 1, 10 n.14 (1984)).

272 See *Duncanville*, 469 U.S. at 30 (“This case is not one in which an exception to the normal measure of just compensation is required because fair market value is not ascertainable. Such cases, for the most part, involve properties that are seldom, if ever, sold in the open market.”).

273 See *Monongahela*, 148 U.S. at 327 (“what shall be the measure of compensation . . . is a judicial . . . question”); see *Rasmuson v. United States*, 807 F.3d 1343, 1345 (Fed. Cir. 2015); *United States v. 4.105 Acres of Land in Pleasanton*, 68 F. Supp. 279, 292-93 (N.D. Cal. 1946).

274 See *Kimball Laundry Co. v. United States*, 338 U.S. 1, 4 (1949) (granting certiorari in case “rais[ing] novel and serious questions in determining what is ‘just compensation’ under the Fifth Amendment” that “are not resolved by the familiar formulas available for the conventional situations which gave occasion for their adoption”).

275 *Olson v. United States*, 292 U.S. 246, 255 (1934); see *United States ex rel. Tenn. Valley Auth. v. 1.72 Acres of Land*, 821 F.3d 742, 752 (6th Cir. 2016) (“a term of art” (citing *Olson*)).

that the prospect of demand for such use affects the market value while the property is privately held.”²⁷⁶

4.3.1. Highest and Best Use Definition.

Definition of Highest and Best Use

The highest and most profitable use for which the property is adaptable and needed or likely to be needed in the reasonably near future.

A highest and best use must be reasonably probable. The determination of market value must take into account all considerations that might fairly be brought forward and reasonably be given substantial weight in bargaining between buyer and seller.²⁷⁷ But the Supreme Court has stated: “Elements affecting value that depend upon events or combinations of occurrences which, while within the realm of possibility, are not fairly shown to be reasonably probable, should be excluded from consideration.”²⁷⁸

A significant practical implication of this legal rule is that a specific highest and best use can only be considered “if the use is likely to be reasonably probable ‘in the reasonably near future.’”²⁷⁹

Accordingly, there must be proof of “present or future demand, the connecting link from

adaptability to value.”²⁸⁰ Similarly, if a property could not legally be used for residential development without rezoning or some variance or permit, that use cannot be considered in determining value unless there is “a reasonable probability that the property would be rezoned or that a variance could have been obtained in the near future.”²⁸¹ This requirement “ensures that the landowner is put in as good a position as he would have occupied if his property had not been taken, but that he does not profit” from a government acquisition for public purposes.²⁸²

Criteria for Analysis

Each potential highest and best use must be analyzed using four criteria as stated in Section 1.5.2:

- (1) Physical possibility,
- (2) Legal permissibility,
- (3) Financial feasibility, and
- (4) Degree of profitability.

The fact that a parcel’s highest and most profitable use “can be made only in combination with other lands does not necessarily exclude that use from consideration if the possibility of combination is reasonably sufficient to affect market value.”²⁸³ But “there must be a reasonable probability of the lands in question being combined with other tracts for that purpose in the reasonably near future.”²⁸⁴

4.3.2. Criteria for Analysis. As discussed in Section 1.5.2, in determining a property’s highest and best use, each potential use must be analyzed using four criteria: (1) physical possibility, (2) legal

276 *Olson*, 292 U.S. at 255; cf. *Kerr v. S. Park Comm’rs*, 117 U.S. 379, 386 (1886) (“What would any one needing lands for residence, business, or any other purpose have paid for them in cash?”).

277 *Olson*, 292 U.S. at 257; *Rasmuson*, 807 F.3d at 1346.

278 *Olson*, 292 U.S. at 257; see also *United States v. 320 Acres of Land*, 605 F.2d 762, 814-20 (5th Cir. 1979).

279 *United States v. 33.92356 Acres of Land (Piza-Blondet)*, 585 F.3d 1, 7-8 (1st Cir. 2009) (quoting *Olson*, 292 U.S. at 255-56); accord *TVA v. 1.72 Acres*, 821 F.3d at 752-53.

280 *St. Joe Paper Co. v. United States*, 155 F.2d 93, 97 (5th Cir. 1946); accord *TVA v. 1.72 Acres*, 821 F.3d at 755-56; see Section 4.3.2.2 (Market Demand).

281 *Piza-Blondet*, 585 F.3d at 7-8; see Section 4.3.2.4 (Zoning and Permits).

282 *TVA v. 1.72 Acres*, 821 F.3d at 752-53 (citing *Olson*, 292 U.S. at 255, 257).

283 *Olson*, 292 U.S. at 256.

284 *United States ex rel. Tenn. Valley Auth. v. Powelson*, 319 U.S. 266, 275-76 (1943) (citing *Olson*, 292 U.S. at 255).

permissibility, (3) financial feasibility and (4) degree of profitability. Because most property is adaptable to several uses, the highest and best use is the physically possible, legally permissible, and financially feasible use that results in the highest value.²⁸⁵

4.3.2.1. All Possible Uses. As “economic demands normally result in an owner’s putting his land to the most advantageous use[,]”²⁸⁶ a property’s highest and best use is ordinarily its existing use on the date of value.²⁸⁷ Many courts describe this precept as a *presumption* in favor of a property’s existing use;²⁸⁸ others simply regard an existing use as “compelling evidence” of highest and best use when a different proposed use is asserted.²⁸⁹ Either rationale has the same result: to assert a highest and best use other than a property’s existing use, there must be evidence “that this [different] use is ‘reasonably probable’ and that the probability has a real market value.”²⁹⁰ Similarly, in litigation (such as condemnation proceedings), the party claiming a property’s highest and best use is not the existing use bears the burden of proof.²⁹¹

Any presumption favoring the existing use does not preclude consideration of other uses in the highest and best use analysis. In fact, any reasonably probable use should be considered to the extent a property’s potential for such use affects its market value.²⁹² As the Fifth Circuit stated:

owners of property [may seek] to prove, if they can, that the actual use to which they are putting it is not the highest and best use for the property as viewed by a potential purchaser. [But where] there has been no such proof[, t]here is nothing more than speculation that...a purchaser could be interested in buying the land [for another use].²⁹³

Moreover, a potential future use, even if profitable, is not necessarily the measure of the property’s value: “Instead, it is to be considered to the extent the prospect of demand for the use affects market value.”²⁹⁴

285 See *United States v. 69.1 Acres of Land (Sand Mountain)*, 942 F.2d 290, 292 (4th Cir. 1991); Section 1.6.

286 *United States v. Buhler*, 305 F.2d 319, 328 (5th Cir. 1962).

287 *United States v. L.E. Cooke Co.*, 991 F.2d 336, 341 (6th Cir. 1993); *United States v. 62.50 Acres of Land in Jefferson Par.*, 953 F.2d 886, 890 (5th Cir. 1992); *Sand Mountain*, 942 F.2d at 292.

288 E.g., *United States ex rel. Tenn. Valley Auth. v. 1.72 Acres of Land*, 821 F.3d 742, 753 (6th Cir. 2016); *L.E. Cooke*, 991 F.2d at 341 (“In the absence of proof to the contrary, the current use is presumed to be the best use.”); *62.50 Acres in Jefferson*, 953 F.2d at 890 (“A landowner can overcome this presumption only by showing a reasonable probability that the land is adaptable and needed for the potential use in the near future.”); *Sand Mountain*, 942 F.2d at 292; *United States v. 158.24 Acres of Land in Bee Cty.*, 515 F.2d 230, 233 (5th Cir. 1975).

289 E.g., *Buhler*, 305 F.2d at 328-29; see *United States v. 25.202 Acres of Land (Amexx I)*, 860 F. Supp. 2d 165, 177-79 (N.D.N.Y. 2010) (“A potential use should be considered only to the extent that the prospect of demand for such use would have affected the price that a willing buyer would have offered for the property just prior to the taking.”), *aff’d*, 502 F. App’x 43, 45 (2d Cir. 2012).

290 *United States v. 1.604 Acres of Land (Granby I)*, 844 F. Supp. 2d 668, 679-81 (E.D. Va. 2011); accord *62.50 Acres in Jefferson*, 953 F.2d at 890; *United States v. 27.93 Acres of Land in Cumberland Cty.*, 924 F.2d 506, 512-14 (3d Cir. 1991).

291 E.g., *TVA v. 1.72 Acres*, 821 F.3d at 753-54, 756; *United States v. 100.00 Acres of Land in Livingston Cty.*, 369 F. Supp. 195, 200 (W.D. Ky. 1973); *United States v. 429.59 Acres of Land (Imperial Beach)*, 612 F.2d 459, 460, 461-62 (9th Cir. 1980); *62.50 Acres in Jefferson*, 953 F.2d at 890; see *United States v. 33.92356 Acres of Land (Piza-Blondet)*, 585 F.3d 1, 7-8 (1st Cir. 2009) (“If a claimed use is prohibited by zoning, the property owner must show that it is reasonably probable that the relevant restrictions will be removed in the reasonably near future.”), *aff’d*, 2008 WL 2550586, at *7 (D.P.R. June 13, 2008) (“[E]vidence of a proposed use must be excluded if the landowner fails to demonstrate reasonable probability that a permit would be issued for the proposed use.”).

292 *Olson v. United States*, 292 U.S. 246, 255 (1934); *Sand Mountain*, 942 F.2d at 292; *United States v. 8.41 Acres of Land in Orange Cty.*, 680 F.2d 388, 394 (5th Cir. 1982).

293 *Buhler*, 305 F.2d at 329; see *TVA v. 1.72 Acres*, 821 F.3d at 754 (“[T]here must be demonstrated an actual profitable use or a market demand for the prospective use.”).

294 *62.50 Acres in Jefferson*, 953 F.2d at 890; accord *Olson*, 292 U.S. at 255.

4.3.2.2. Market Demand. Any highest and best use requires a showing of market demand. As the Supreme Court observed, “most things...have a general demand which gives them a value transferable from one owner to another...[T]his transferable value has an external validity which makes it a fair measure” of just compensation.²⁹⁵

Government demand cannot support a highest and best use.

Accordingly, “it is generally accepted that there must be demonstrated an actual profitable use or a market demand for the prospective use.”²⁹⁶ To meet this standard, “objective evidence substantiating [the appraiser’s] market demand analysis” is required.²⁹⁷ “Value implies demand and a buyer”—and each must be proven, never assumed.²⁹⁸

Highest and best use cannot be predicated on demand created solely by the government project for which the property is acquired; as the Supreme Court held, “[i]t is not fair that the government be required to pay the enhanced price which its demand alone has created.”²⁹⁹ To illustrate, a property’s highest and best use cannot be commercial rock quarrying if there is no likely market demand for gravel except in connection with the public highway project for which the property is acquired.³⁰⁰

Similarly, the government’s intended use of the property—such as a military bombing range, national monument, or habitat conservation—cannot be considered unless there is competitive demand for that use in the private market.³⁰¹ As the Ninth Circuit reasoned:

[V]alues resulting from the urgency or uniqueness of the government’s need for the property or from the uniqueness of the use to which the property will be put do not reflect what a willing buyer would pay to a willing seller [G]overnment projects may render property valuable for a unique purpose. Value for such a purpose, if considered, would cause “the market to be an unfair indication of value,” because there is no market apart from the government’s demand.³⁰²

The Sixth Circuit recently explored what must be shown “to prove the existence of a market demand for something.”³⁰³ To show market demand for a proposed use of hotel development, examples of “objective evidence substantiating [a] market demand analysis” would include proof of preliminary discussions with a prospective hotel chain, market studies showing sufficient

295 *Kimball Laundry Co. v. United States*, 338 U.S. 1, 5 (1949) (rejecting “such personal and variant standards as value to the particular owner whose property has been taken” or “gain to the taker [which] may be wholly unrelated to the deprivation imposed upon the owner”).

296 *TVA v. 1.72 Acres*, 821 F.3d at 754 (quoting *United States ex rel. Tenn. Valley Auth. v. An Easement & Right-of-Way (Hadley)*, 447 F.2d 1317, 1319 (6th Cir. 1971)).

297 *TVA v. 1.72 Acres*, 821 F.3d at 755; accord *United States v. 341.45 Acres of Land in St. Louis Cty.*, 633 F.2d 108, 113 (8th Cir. 1980).

298 *341.45 Acres in St. Louis*, 633 F.2d at 113 (quoted in *TVA v. 1.72 Acres*, 821 F.3d at 755); see *Olson*, 292 U.S. at 256 (highest and most profitable use is to be considered “to the full extent that the prospect of demand for such use affects the market value while the property is privately held”).

299 *United States v. Cors*, 337 U.S. 325, 333 (1949); accord *United States v. 320 Acres of Land*, 605 F.2d 762, 811 n.107 (5th Cir. 1979); *United States v. 46,672.96 Acres of Land in Doña Ana Cty.*, 521 F.2d 13, 15, 16 (10th Cir. 1975); *J.A. Tobin Constr. Co. v. United States*, 343 F.2d 422, 423 (10th Cir. 1965); *United States v. 158.76 Acres of Land in Townshend*, 298 F.2d 559, 560 (2d Cir. 1962).

300 *J.A. Tobin*, 343 F.2d 422.

301 *United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53, 80-81 (1913); *320 Acres*, 605 F.2d at 783 n.26, 811 n.107; *46,672.96 Acres in Doña Ana*, 521 F.2d at 15-16; *United States v. 275.81 Acres of Land (Flight 93 Memorial)*, No. 09-233, 2014 WL 1248205, at *4 (W.D. Pa. March 26, 2014) (compensation cannot reflect change in value due to United States’ development of public Flight 93 National Memorial).

302 *United States v. Weyerhaeuser Co.*, 538 F.2d 1363, 1366, 1367 (9th Cir. 1976) (internal citations omitted); accord *46,672.96 Acres in Doña Ana*, 521 F.2d at 15-17; *United States v. Whitehurst*, 337 F.2d 765 (4th Cir. 1964).

303 *TVA v. 1.72 Acres*, 821 F.3d at 755 (citing *341.45 Acres in St. Louis*, 633 F.2d 108).

demand for a hotel, or market sales of land for hotel development purposes.³⁰⁴ With no such evidence presented, hotel development was correctly excluded from consideration as the property's highest and best use.³⁰⁵

4.3.2.3. Economic Use. For just compensation purposes, market value must be based on a property's highest and *most profitable use*—that is, an *economic use*.³⁰⁶ The inquiry must be “what is the property worth in the market . . . from its availability for valuable uses.”³⁰⁷ And *valuable uses* are those which “the prospect of demand for such use affects the market value while the property is privately held.”³⁰⁸ Because “[c]onsiderations that may not reasonably be held to affect *market value* are excluded[.]”³⁰⁹ *noneconomic* uses cannot be considered in determining market value for federal acquisitions.³¹⁰ Federal courts have also rejected valuations that improperly fail to consider an economic use.³¹¹

“The federal concept of market value is intimately related to selling price on the market” in federal case law.³¹² Indeed, the Supreme Court has recognized that “the ‘market price’ becomes so important a standard of reference” because it reflects the value “arrived at by the haggling of the market”³¹³ Accordingly, in determining market value for just compensation purposes, a use cannot be considered unless there is competitive demand for that use in the private market.³¹⁴ This means that a use can be considered as a highest and best use only if that use contributes to the property's actual market value—that is, to the amount for

Market Value and Economic Use

“Value is a word of many meanings”—but “the *value* compensable under the Fifth Amendment . . . is only that which is capable of transfer from owner to owner and thus of exchange for some equivalent.” *Kimball Laundry Co. v. United States*, 338 U.S. 1, 4-5 (1949). Thus market value, as the measure of just compensation, cannot reflect nonmarket or noneconomic considerations.

The federal concept of market value is fundamentally different from the real estate appraisal concept of public interest value, which links highest and best use to noneconomic uses and public policy benefits rather than market considerations. Because noneconomic uses reflect something other than market value, **appraisals for federal acquisitions cannot consider public interest value or related concepts** (such as habitat value or preservation value).

304 *TVA v. 1.72 Acres*, 821 F.3d at 755.

305 *Id.* at 755-56.

306 *See Olson v. United States*, 292 U.S. 246, 255-56 (1934) (“highest and most profitable use”); *Monongahela Nav. Co. v. United States*, 148 U.S. 312, 328 (1893) (“The value of property, generally speaking, is determined by its productiveness,—the profits which its use brings to the owner.”).

307 *Miss. & Rum River Boom Co. v. Patterson*, 98 U.S. 403, 407-08 (1878) (“[C]ompensation to the owner is to be estimated by reference to the uses for which the property is suitable, having regard to the existing business or wants of the community, or such as may be reasonable expected in the immediate future.”); *see Olson*, 292 U.S. at 255-57 (“The highest and most profitable use . . . is to be considered, not necessarily as the measure of value, but to the full extent that the prospect of demand for such use affects the market value while the property is privately held.”).

308 *Olson*, 292 U.S. at 255 (citing *Boom Co.*, 98 U.S. at 408 (“In determining the value of land appropriated for public purposes, the same considerations are to be regarded as in a sale of property between private parties.”)).

309 *Olson*, 292 U.S. at 256 (emphasis added), quoted in *United States v. 50 Acres of Land (Duncanville)*, 469 U.S. 24, 29 (1984).

310 *See, e.g., United States v. 46,672.96 Acres of Land in Doña Ana Cty.*, 521 F.2d 13, 17 (10th Cir. 1975); *United States v. 1.57 Acres of Land in San Diego Cty.*, No. 12cv3055, 2015 WL 5254558 (S.D. Cal. Sept. 9, 2015) (excluding from consideration all evidence not “relating to market value” in valuation of conservation easement); *see also United States v. 275.81 Acres of Land (Flight 93 Memorial)*, No. 09-233, 2014 WL 1248205, at *4 (W.D. Pa. March 26, 2014); *United States v. 1.604 Acres of Land (Granby I)*, 844 F. Supp. 2d 668, 679-81 (E.D. Va. 2011) (excluding all evidence of proposed highest and best use not shown to be financially feasible).

311 *See, e.g., Desert Citizens Against Pollution v. Bisson*, 231 F.3d 1172, 1185 (9th Cir. 2000).

312 *United States v. Sowards*, 370 F.2d 87, 89 (10th Cir. 1966).

313 *Kimball Laundry Co. v. United States*, 338 U.S. 1, 6 (1949).

314 *United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53, 80-81 (1913); *United States v. 320 Acres of Land*, 605 F.2d 762, 783 n.26, 811 n.107 (5th Cir. 1979); *United States v. Weyerhaeuser Co.*, 538 F.2d 1363, 1366, 1367 (9th Cir. 1976); *46,672.96 Acres in Doña Ana*, 521 F.2d at 15-16; *United States v. Whitehurst*, 337 F.2d 765 (4th Cir. 1964); *Flight 93 Memorial*, 2014 WL 1248205, at *4; *see, e.g., 1.57 Acres in San Diego*, 2015 WL 5254558, at *3 (evidence unrelated to market value cannot be considered in determining whether conservation easement had “significant private market value”).

which the property would sell in the open competitive market.³¹⁵ As to what constitutes an open competitive market, the Supreme Court held that where prices are “controlled by the supply and demand[, t]hese facts indicate a free market.”³¹⁶

Federal courts consistently reject alternative measures of compensation that reflect something other than market value based on an economic use indicated by supply and demand in the open, competitive market.³¹⁷ Uses based on *preservation, conservation* or *open space*, among other priorities, typically lack the competitive supply and demand necessary to indicate a free market and therefore cannot be considered in determining market value for federal acquisitions.³¹⁸ As the Supreme Court has held for over a century: “That [a] property may have to the public a greater value than its fair market value affords no just criterion for estimating what the owner should receive.”³¹⁹

The Supreme Court bluntly rejected the addition of nonmarket, noneconomic considerations to market value in *City of New York v. Sage*, in which land commissioners improperly awarded compensation “over and above the market value” of the property acquired due to “what they thought a fair proportion of the increase” for its availability and adaptability for a public reservoir.³²⁰

Upon that point . . . they were wrong [W]hat the owner is entitled to is the value of the property taken, and that means what it fairly may be believed that a purchaser in fair market conditions would have given for it in fact,—not what a tribunal at a later date may think a purchaser would have been wise to give Any rise in value before the taking, not caused by the expectation of that event, is to be allowed, but we repeat, it must be a rise in what a purchaser might be expected to give.³²¹

315 See, e.g., *46,672.96 Acres in Doña Ana*, 521 F.2d at 17 (“[T]he land had little, if any, market value. . . . The fact that [the property] has very little value cannot justify . . . using an inapplicable measure, namely, its highest and best use being a missile range.”). A related issue is that sales to government entities and certain other transactions frequently involve noneconomic or nonmarket considerations. As discussed in Section 4.4.2.4, such sales cannot be used without “great caution” because they are “an inaccurate indicator of market value.” *Id.* at 17. See Section 1.5.2.4 and the appendix regarding the extraordinary verification and treatment necessary to rely on such sales.

316 *United States v. New River Collieries Co.*, 262 U.S. 341, 345 (1923); see also *L. Vogelstein & Co. v. United States*, 262 U.S. 337, 338 (1923) (“market price as fixed by supply and demand and other elements in normal trading”) (decided the same day as *New River*); *Desert Citizens*, 231 F.3d at 1185 (“A regional market and the presence of competitors sponsoring similar projects made reasonably probable . . . that use of the lands for landfill purposes was financially feasible [and should have been considered as a potential highest and best use].”).

317 See, e.g., *New River*, 262 U.S. at 345 (refusing to depart from market value standard where prices “were controlled by the supply and demand. These facts indicate a free market”).

318 Cf. *United States v. 15.00 Acres of Land in Miss. Cty.*, 468 F. Supp. 310, 314-16 & n.9 (E.D. Ark. 1979) (“The court is not unmindful of the special significance of this land to the [landowners], their families, friends and associates. And, while the court is sympathetic to the unique problems posed by the increasing demand for the limited natural resources involved in this case, the court must resolve the issues herein on the same basis as a jury, without regard to sympathy or prejudice or like or dislike of any party to this suit. . . . [W]hile the value of the . . . tract for duck hunting purposes is conceded, it does not follow that the [landowners] are to be compensated on the basis of that particular value”); APPRAISAL INSTITUTE, *THE APPRAISAL OF REAL ESTATE* 331 (14th ed. 2013) (“[H]ighest and best use . . . is an economic concept”); *id.* 334 (“[C]onservation and preservation are not uses of land. Rather, they are the motivations of individuals or groups for acquiring certain properties.”).

As discussed in Section 4.4.2.4, sales of properties for conservation or similar purposes may also reflect project influence from the government project, which must be disregarded. As a result, such sales cannot be relied on as comparable sales without great caution.

319 *Chandler-Dunbar*, 229 U.S. at 80.

320 239 U.S. 57, 61 (1915).

321 *Id.* at 61; accord *Five Tracts of Land in Cumberland Twp. v. United States*, 101 F.661, 664-65 (3d Cir. 1900) (“There is no doubt that historic association may enter into the market value of the land, but you are not to give, as separate items- First, market value; and, second, historic value.”).

Whether a specific use is economic and therefore appropriate to consider depends on the market, not the use itself.³²² For example, in a market in which real estate developers are required to acquire and set aside suitable land to mitigate the impacts of and obtain approvals for real estate development projects, competitive demand in the private market could make mitigation an economic use.³²³ But in a market lacking private competitive demand—due to insufficient development activity, absence of mitigation requirements, excess supply of suitable mitigation land, or other reasons—mitigation would not be an economic use.³²⁴ A recent example can be found in a condemnation involving an existing conservation easement.³²⁵ Recognizing “private market value” as the measure of compensation for the easement, the district court excluded all evidence not “relating to market value” from consideration, as “[c]onsiderations that may not reasonably be held to affect market value are excluded.”³²⁶ Thus, under federal law, whether mitigation or a similar use is economic (and therefore appropriate to consider) in a given valuation assignment cannot be assumed, but rather must be demonstrated on the specific facts of the property being appraised and the relevant market.³²⁷

4.3.2.4. Zoning and Permits. A proposed highest and best use cannot be considered reasonably probable unless it is *legally permissible*.³²⁸ Zoning regulations, permits, and other land use restrictions are therefore of critical importance in analyzing highest and best use because they restrict the uses to which property can lawfully be devoted.³²⁹ Indeed, “regulatory restrictions may preclude an otherwise possible use even more decisively than the inherent physical characteristics of a property.”³³⁰ And “it is clear that just compensation must be determined in

322 Compare *United States v. Whitehurst*, 337 F.2d 765, 775 (4th Cir. 1964) (rejecting valuation based on use of gravel quarrying because “under the facts of this case, . . . extensive use to supply . . . sand and gravel demand is merely a figment of the imagination”), with *United States v. 237,500 Acres of Land*, 236 F. Supp. 44, 53 (S.D. Cal. 1964), *aff’d sub nom. United States v. Am. Pumice Co.*, 404 F.2d 336 (9th Cir. 1968) (allowing valuation based on use of pumice mining because “in this case, there was not only a prior market, but an existing and rising one on the date of taking, and the [landowners] were in active operation of the pumice mines”).

323 E.g., *Otay Mesa Property, L.P. v. United States*, 110 Fed. Cl. 732, 734 n.1 (2013) (*Otay Mesa II*), *aff’d in relevant part*, 779 F.3d 1315 (Fed. Cir. 2015) (*Otay Mesa III*); see *Olson v. United States*, 292 U.S. 246, 256 (1934) (“[P]ublic service corporations and others having that power [of eminent domain] frequently are actual or potential competitors [for property]. And, to the extent that probable demand by prospective purchasers or condemnors affects market value, it is to be taken into account.”); see also *Sage*, 239 U.S. at 61 (“Any rise in value before the taking, not caused by the expectation of that event, is to be allowed, but we repeat, it must be a rise in what a purchaser might be expected to give.”).

324 See *United States v. 15.00 Acres of Land in Miss. Cty.*, 468 F. Supp. 310, 315 n.9, 316 (E.D. Ark. 1979) (Despite “special significance of this land to the [landowners and others, and] increasing demand for the limited natural resources[. . .] it does not follow that the [landowners] are to be compensated on the basis of that particular value[.]” rather, “all factors should be considered which would influence a person of ordinary prudence desiring to purchase the property involved.”); see also *United States v. 46,572.96 Acres of Land in Doña Ana Cty.*, 521 F.2d 13, 16 (10th Cir. 1975) (“In our case there is absolutely no evidence that anyone other than the government could or would use the land for a missile range.”); *Olson v. United States*, 67 F.2d 24, 30 (8th Cir. 1933), *aff’d*, 292 U.S. 246 (1934) (“In using this defined standard [of market value] no account is given to values or necessities peculiar to the seller, or the buyer, but only such matters as would affect the ordinary seller and buyer in negotiating a fair price.”); cf. *Chandler-Dunbar*, 229 U.S. at 80 (“no just criterion for estimating what the owner should receive”); *Sage*, 239 U.S. at 62 (rejecting compensation award reflecting not only market value but also “additional value gained by the [government’s acquisition that a commission felt] should be taken into account and shared between the [government] and the owner of the land,—a proposition to which we cannot assent”).

325 *United States v. 1.57 Acres of Land in San Diego Cty.*, No. 12-cv-3055, 2015 WL 5254558 (S.D. Cal. Sept. 9, 2015).

326 *Id.* at *2-3 (quoting *United States v. 50 Acres of Land (Duncanville)*, 469 U.S. 24, 29 (1984). Similarly, in a condemnation of land being used as a park, the Eighth Circuit found no “justification for a departure from the concept of market value as the standard of just compensation” and ordered a new trial in which “market value is not [to be] abandoned as the ultimate test . . .” *United States v. S.D. Game, Fish & Parks Dep’t*, 329 F.2d 665, 666-69 (8th Cir. 1964) (citing, *inter alia*, *Kimball Laundry Co. v. United States*, 338 U.S. 1, 5 (1949); *Olson*, 292 U.S. at 254; *Miss. & Rum River Boom Co. v. Patterson*, 98 U.S. 403, 408 (1878); and *L. Vogelstein & Co. v. United States*, 262 U.S. 337, 340 (1923)).

327 *1.57 Acres in San Diego*, 2015 WL 5254558. Note that even if mitigation is an economic use appropriate for consideration in a given assignment, the *price of mitigation credits* does not equate to the value of property suitable for mitigation use.

328 See *United States v. 480.00 Acres of Land (Fornatora)*, 557 F.3d 1297, 1312 (11th Cir. 2009); *United States v. 429.59 Acres of Land (Imperial Beach)*, 329 F.2d 459, 462 (9th Cir. 1980); *United States v. 320 Acres of Land*, 605 F.2d 762, 818 & n.128 (5th Cir. 1979); see also *Olson*, 292 U.S. at 256-57 (“physical adaptability alone cannot be deemed to affect market value”).

329 See, e.g., *United States ex rel. Tenn. Valley Auth. v. 1.72 Acres of Land*, 821 F.3d 742, 753-54 (6th Cir. 2016); *United States v. 33.92356 Acres of Land (Piza-Blondet)*, 585 F.3d 1, 7-9 (1st Cir. 2009); *Fornatora*, 557 F.3d 1297, 1313; *Imperial Beach*, 612 F.2d at 462; *320 Acres*, 605 F.2d at 818.

330 *320 Acres*, 605 F.2d at 818.

light of such regulatory restrictions.”³³¹ As a result, any zoning or other use restrictions that are applied to the property and its proposed use on the date of valuation must be considered.³³²

Under federal law, a “use is not possible and probable if it is prohibited by a zoning regulation that is not likely to change.”³³³ For any use that requires a permit, license, or rezoning, “it must be shown that there is a reasonable probability that such permit or license will be issued or that a re-zoning will occur to make the use legal.”³³⁴

Of course, zoning regulations may change, and prospective purchasers may well consider the potential for a zoning change or variance when determining the price they would pay for the property.³³⁵ Thus, if there was “a reasonable probability that the property would be rezoned or that a variance could have been obtained in the near future[,]” this probability should be considered in arriving at the value estimate³³⁶—but only to the extent that this probability would have *affected the price* a willing buyer would have paid for the property at the time of the government’s acquisition.³³⁷ It is legally improper to assume that a permit, license, or rezoning would be obtained.³³⁸ Rather, the appraiser’s opinion as to whether there is a reasonable probability of a zoning change must have a factual foundation; an unsupported statement that a zoning change is reasonably probable is insufficient.³³⁹ To demonstrate a reasonable probability of rezoning or obtaining a variance requires concrete factual support; examples of such support might include, as the First Circuit recently suggested, instances of similar properties receiving similar variances, permits being granted to develop the subject property for the proposed use (not merely pending applications), or actual development of the proposed use on similarly zoned properties.³⁴⁰ The test is not the probability (or possibility) of rezoning in absolute terms, but rather the market value of the property “in the light of the chances as they would appear to the hypothetical willing buyer and seller.”³⁴¹

- 331 *Id.* at 818 & n.128 (citing *United States v. Commodities Trading Corp.*, 339 U.S. 121 (1950)); *United States v. 765.56 Acres of Land in Southampton (765.56 Acres I)*, 164 F. Supp. 942, 947 (E.D.N.Y. 1958) (“of course it is necessary . . . to consider the possibility and probability of the future use of this land . . . and the appropriate zoning for such use”), *aff’d sub nom. United States v. Glanat Realty Corp.*, 276 F.2d 264 (2d Cir. 1960).
- 332 *TVA v. 1.72 Acres*, 821 F.3d at 753-54; *Piza-Blondet*, 585 F.3d at 7-9; *United States v. 27.93 Acres of Land in Cumberland Cty.*, 924 F.2d 506, 512-14 (3d Cir. 1991); *United States v. 174.12 Acres of Land in Pierce Cty.*, 671 F.2d 313, 315-16 (9th Cir. 1982); *320 Acres*, 605 F.2d 762, 818; *United States v. Eden Mem’l Park Ass’n*, 350 F.2d 933, 936 (9th Cir. 1965); *H & R Corp. v. District of Columbia*, 351 F.2d 740, 742-43 (D.C. Cir. 1965); *Rapid Transit Co. v. United States*, 295 F.2d 465, 466-67 (10th Cir. 1961); *United States v. Meadow Brook Club*, 259 F.2d 41, 45 (2d Cir. 1958); *see, e.g., Wash. Metro. Area Transit Auth. v. One Parcel of Land (Old Georgetown)*, 691 F.2d 702, 703-04 (4th Cir. 1982).
- 333 *Fornatora*, 557 F.3d at 1312; *see Piza-Blondet*, 585 F.3d at 7-8 (use can only be considered if it is “likely to be reasonably probable ‘in the reasonably near future,’” quoting *Olson*, 292 U.S. at 255-56); *320 Acres*, 605 F.2d at 818 & n.129 (“if existing zoning restrictions preclude a more profitable use, ordinarily such use should not be considered in the evaluation”); *Meadow Brook*, 259 F.2d at 45.
- 334 *Fornatora*, 557 F.3d at 1300.
- 335 *E.g., 320 Acres*, 605 F.2d at 818-19 & nn.128-29; *see Piza-Blondet*, 585 F.3d at 7-8.
- 336 *Piza-Blondet*, 585 F.3d at 7-8; *see 320 Acres*, 605 F.2d at 818-19.
- 337 *Olson*, 292 U.S. at 255, 256; *Virgin Islands v. 2.7420 Acres of Land*, 411 F.2d 785, 786 (3d Cir. 1969); *Wolff v. Puerto Rico*, 341 F.2d 945, 946 n.3 (1st Cir. 1965); *Meadow Brook*, 259 F.2d at 45; *H & R Corp.*, 351 F.2d at 743.
- 338 *E.g., United States ex rel. Tenn. Valley Auth. v. 1.72 Acres of Land*, 821 F.3d 742, 753-54 (6th Cir. 2016); *Piza-Blondet*, 585 F.3d at 8; *see United States v. 62.50 Acres of Land in Jefferson Par.*, 953 F.2d 886, 888-93 (5th Cir. 1992); *see also H & R Corp.*, 351 F.2d at 742-43 (“[A] witness’ bare assertion that zoning change was probable [does not allow the probability of a change in zoning to be considered]. His opinion must have some foundation in fact.”).
- 339 *320 Acres*, 605 F.2d at 819 & n.130; *H & R Corp.*, 351 F.2d at 742-43.
- 340 *See Piza-Blondet*, 585 F.3d at 8 (excluding appraiser’s opinion that “failed to document a single instance in which the Board has ever, or is likely to, approve residential housing developments” on land with same zoning as the subject property); *accord United States ex rel. Tenn. Valley Auth. v. 1.72 Acres of Land*, 821 F.3d 742, 754 (6th Cir. 2016).
- 341 *Wolff*, 341 F.2d at 946 n.3; *see United States v. 62.50 Acres of Land in Jefferson Par.*, 953 F.2d 886, 890 (5th Cir. 1992) (“If regulatory contingencies mean that a buyer would consider the use insignificant in deciding how much to pay for the property, the use does not contribute to the property’s market value.”); *United States v. 8,968.06 Acres of Land in Chambers & Liberty Cty.s.*, 326 F. Supp. 546, 548 (S.D. Tex. 1971) (requiring proponent of prospective use requiring permit to “demonstrate that a willing buyer and seller would have regarded the issuance of the permit as reasonably probable”).

These principles apply with equal force to regulations that preclude a particular use unless permits are issued by regulating authorities.³⁴² As held in a case recently affirmed by the Eleventh Circuit, the issue is whether there is a reasonable probability that permits for the proposed use would have been granted: if so, the market value “would be based on the property value as if it had obtained the necessary permits”—while if not, the value “would be based on conditions at the time” of the acquisition.³⁴³ As with the possibility of rezoning, a reasonable possibility of obtaining necessary permits must be demonstrated with concrete factual support. The fact that the parcels under appraisal “are adjacent and proximate to established and permitted [uses] is not, without more, determinative.”³⁴⁴ Permitting issues often arise in connection with a proposed use of wetlands, which require permits to discharge dredged or fill material under the Clean Water Act as administered by the U.S. Army Corps of Engineers.³⁴⁵ Such uses of wetlands may require not only federal but also state and/or municipal permits.³⁴⁶ Other frequently encountered permits are discussed in Section 1.3.1.3.

4.3.2.4.1. Exceptions. A narrow exception to the general rule that zoning and other land use regulations must be considered in determining a property’s highest and best use may arise under the scope of the project rule.³⁴⁷ As discussed in Section 4.5, the scope of the project rule ensures that compensation does not reflect changes in market value due to the influence of the government project prompting the acquisition. In most valuation assignments, zoning and other land use restrictions are not a form of *project influence*—they are simply “the legal framework of land use restrictions to which virtually all private real estate is subject,” and so they must be considered regardless of whether the scope of the project rule applies.³⁴⁸

Whether the scope of the project rule applies and if so, how to apply it, are complex questions that require legal instruction. See Section 4.5.

However, in limited circumstances—and only with appropriate **legal instructions**—application of the scope of the project rule may allow or require the appraiser to disregard the impact of a zoning restriction on a piece of property.³⁴⁹ The Eleventh Circuit recently stated this narrow exception as follows:

[I]n order to have a zoning restriction excluded from a calculation of a property’s value, a landowner must show that the primary purpose of the regulation was to depress the property

342 See, e.g., *United States v. 381.76 Acres of Land (Montego Group)*, No. 96-1813-CV, 2010 WL 3734003, at *3-5 (S.D. Fla. Aug. 3, 2010), *adopted sub nom. United States v. 10.00 Acres of Land*, No. 99-0672-CIV, 2010 WL 3733994 (S.D. Fla. Sept. 22, 2010), *aff’d sub nom. United States v. Gonzalez*, 466 F. App’x 858 (11th Cir. 2012) (per curiam); *62.50 Acres in Jefferson*, 953 F.2d at 890-93; *8,968.06 Acres in Chambers*, 326 F. Supp. at 548.

343 *Montego Group*, 2010 WL 3734003, at *4.

344 *Id.*; see also *320 Acres*, 605 F.2d at 819 n.130 (“[A] party obviously cannot . . . simply . . . assert[] that a particular use is reasonably practicable and reasonably probable, or that there is a reasonable possibility of obtaining a permit; . . . there must be some foundation in fact.”).

345 Section 301(a) of the Clean Water Act prohibits the discharge of pollutants into the nation’s water, except for discharges made in compliance with other sections of the Act, including Section 404. Pursuant to Section 404, the U.S. Army Corps of Engineers administers a permit program for the discharge of dredged or fill material (“pollutants” under the Act) into navigable waters, including wetlands. The Clean Water Act is codified at 33 U.S.C. § 1251 *et seq.* See 33 C.F.R. § 323.2 (implementing regulations).

346 See generally *Montego Group*, 2010 WL 3734003.

347 *United States v. 480.00 Acres of Land (Fornatora)*, 557 F.3d 1297, 1307 (11th Cir. 2009).

348 *320 Acres*, 605 F.2d at 818 (“[I]t is clear that just compensation must be determined in light of such regulatory restrictions.”); see *id.* at 818 n.128 (citing cases, including *United States v. Commodities Trading Corp.*, 339 U.S. 121 (1950) (wartime price controls); *United States v. Eden Mem’l Park Ass’n*, 350 F.2d 933, 936 (9th Cir. 1965); *Fairfield Gardens, Inc. v. United States*, 306 F.2d 167, 170 (9th Cir. 1962); *United States v. Delano Park Homes, Inc.*, 146 F.2d 473, 474 (2d Cir. 1944)); see also *Fornatora*, 557 F.3d at 1311.

349 *Fornatora*, 557 F.3d at 1307; *320 Acres*, 605 F.2d at 820 n.131.

value of land or that the ordinance was enacted with the *specific intent* of depressing property value for the purpose of later condemnation.³⁵⁰

Federal case law makes clear that this narrow test is not satisfied simply because the government advocated for or against a local zoning decision. Thus, the Second Circuit held it was improper to consider an improbable prospective rezoning (and therefore a more profitable use) even though the government's opposition was the primary obstacle to rezoning: "Clearly the United States, like any adjoining landowner, was a proper party to resist zoning."³⁵¹ The Second Circuit's reasoning has been widely adopted by federal courts, most recently by the Eleventh Circuit.³⁵²

4.3.3. Larger Parcel. In adopting "working rules in order to do substantial justice[,]” the Supreme Court established that “a parcel of land which has been used and treated as an entity shall be so considered in assessing compensation for the taking of part or all of it.”³⁵³ That “parcel of land,” reflecting the whole property to be considered for compensation purposes, is called the larger parcel. It is the economic unit to be valued.³⁵⁴ Under federal law, the larger parcel is the tract or tracts of land that possess a unity of ownership and have the same, or an integrated, highest and best use.³⁵⁵

Definition of Larger Parcel

The tract or tracts of land that possess a unity of ownership and have the same, or an integrated, highest and best use.

The larger parcel may or may not have the same boundaries as the government's acquisition.³⁵⁶ As a result, the appraiser must determine the larger parcel in every appraisal for federal acquisition purposes. This determination will distinguish whether a total or partial acquisition is involved, and therefore will dictate the valuation method to be used.³⁵⁷ In a total acquisition, the United States acquires an entire larger parcel, and compensation is measured by the market value of the

A total acquisition is an acquisition of an entire larger parcel. A partial acquisition is an acquisition of only part of a larger parcel.

350 *Fornatora*, 557 F.3d at 1311 (emphases added); accord *United States v. Land & Cris Realms Inc.*, 213 F.3d 830, 834-36 (5th Cir. 2000); *United States v. 27.93 Acres of Land in Cumberland Cty.*, 924 F.2d 506 (3d Cir. 1991); *United States v. Meadow Brook Club*, 259 F.2d 41 (2d Cir. 1958); see also *320 Acres*, 605 F.2d at 820 n.131.

351 *Meadow Brook*, 259 F.2d at 45; accord *Fornatora*, 557 F.3d at 1311; see also *Cris Realms*, 213 F.3d at 836.

352 See, e.g., *Fornatora*, 557 F.3d at 1311; *Cris Realms*, 213 F.3d at 834-36; *27.93 Acres in Cumberland*, 924 F.2d at 511.

353 *United States v. Miller*, 317 U.S. 369, 375-76 (1943); see *Sharp v. United States*, 191 U.S. 341, 354-55 (1903), *aff'g Sharpe v. United States*, 112 F. 893 (3d Cir. 1902).

354 See *United States v. 6.45 Acres of Land (Gettysburg Tower)*, 409 F.3d 139, 147-48 & n.15 (3d Cir. 2005); *United States v. 0.21 Acres of Land*, 803 F.2d 620, 623-24 (11th Cir. 1986); *United States v. 429.59 Acres of Land (Imperial Beach)*, 612 F.2d 459, 461 (9th Cir. 1980); *United States v. Buhler*, 254 F.2d 876, 882 & n.10 (5th Cir. 1958); *United States v. Waymire*, 202 F.2d 550, 554-55 (10th Cir. 1953).

355 See *Miller*, 317 U.S. at 375-76; *Sharp*, 191 U.S. at 351-56; *United States v. 33.92356 Acres of Land (Piza-Blondet)*, 585 F.3d 1, 10 (1st Cir. 2009); *United States v. 8.41 Acres of Land in Orange Cty.*, 680 F.2d 388, 392-93 & n.6 (5th Cir. 1982); *Imperial Beach*, 612 F.2d at 464-65; *Bank of Edenton v. United States*, 152 F.2d 251, 253 (4th Cir. 1945); *United States v. 25.202 Acres of Land (Amexx I)*, 860 F. Supp. 2d 165, 179-81 (N.D.N.Y. 2010), *aff'd*, 502 F. App'x 43, 45-46 (2d Cir. 2012); cf. *Gettysburg Tower*, 409 F.3d at 148 & n.15, and on remand, No. 1:CV-99-2128, 2006 WL 839375 (M.D. Pa. March 27, 2006).

356 See *United States v. Grizzard*, 219 U.S. 180, 181-85 (1911). As discussed in Section 1.4.6, if the appraiser determines the boundaries of the larger parcel are different than those of the specific parcel initially identified for appraisal, the appraisal assignment may need to be modified. Cf. EATON, *supra* note 16, at 89-90 ("Appraisers, whether they are retained by the condemnor or the condemnee, have a tendency to estimate the value of the parcel shown on the condemnor's right-of-way map, often without adequately analyzing the larger parcel." (emphasis added)).

357 See *Miller*, 317 U.S. at 375-76; *Piza-Blondet*, 585 F.3d at 10; see, e.g., *Winn v. United States*, 272 F.2d 282 (9th Cir. 1959); see generally EATON, *supra* note 16, at 88-92 (stating "appraisers must make a determination of the larger parcel in all cases" and rejecting "myth that the larger parcel determination is only important in damage and/or benefit cases").

property acquired. In a partial acquisition, the United States acquires only part of a larger parcel, and compensation is measured by the difference between the market value of the larger parcel before the government's acquisition and the market value of the remainder after the government's acquisition.³⁵⁸ A single acquisition for government purposes may involve more than one larger parcel (or parts of more than one larger parcel) for compensation and valuation purposes.³⁵⁹

The larger parcel determination is integral to the analysis of highest and best use.³⁶⁰ It is fact-specific and rarely simple, but it is necessary for purposes of just compensation. As the Supreme Court explained:

It is often difficult . . . to determine what is a distinct and independent tract; but the character of the holding, and the distinction between the residue of a tract whose integrity is destroyed by the taking, and what are merely other parcels or holdings of the same owner, must be kept in mind in the practical application of the requirement to render just compensation for property taken for public uses. How it is applied must largely depend upon the facts of the particular case³⁶¹

4.3.4. Criteria for Analysis. In determining the larger parcel, federal courts consider unity of use, unity of ownership (title), and physical unity (proximity or contiguity) as it relates to highest and best use—factors historically called the three unities.³⁶²

Because this analysis typically involves questions of law as well as fact, appropriate **legal instructions** are often required.³⁶³

4.3.4.1. Unity of Use. The key question in determining the larger parcel is whether parcels have an integrated use.³⁶⁴ To meet the unity of use test in federal acquisitions, the lands in question must have the same or an integrated highest and best use.³⁶⁵ Lands with dissimilar uses are not part of the same larger parcel, and must be considered as separate and distinct tracts for compensation and valuation purposes.³⁶⁶

Determination of the larger parcel is necessary in both total and partial acquisitions.

Partial acquisitions (Section 4.6) require two larger parcel determinations. The larger parcel before acquisition is also called the parent tract, and the larger parcel after acquisition is the remainder.

358 The before and after method of valuation and other issues specific to partial acquisitions are discussed in depth in Section 4.6.

359 See, e.g., *Gettysburg Tower*, 409 F.3d at 148 & n.15; *United States v. 6.24 Acres of Land (Weber)*, 99 F.3d 1140, 1996 WL 607162 (6th Cir. 1996) (*per curiam*) (unpubl.). The unit rule (Section 4.2.2) would not prohibit a well-supported determination that an acquisition encompasses more than one larger parcel. As reasoned in *Weber*, considering a property's distinct features and then arriving at a value for the land as a whole does "not violate the spirit nor the application of the unit rule as employed by the courts." *Weber*, 1996 WL 607162 at *4.

360 See, e.g., *Piza-Blondet*, 585 F.3d at 3-4, 10; *8.41 Acres in Orange*, 680 F.2d at 390-91 & n.1 ("[Y]ou must first determine the fair cash market value, immediately before the taking, of the entire tract of land of which the portion taken was a part, in the light of the highest and best use at the time of the entire tract as a single unit. You must next determine the fair cash market value, immediately after the taking, of the remainder of the tract not taken, bearing in mind that the highest and best use of the remainder after the taking may not be the same as the highest and best use of the entire tract before the taking.").

361 *Sharp v. United States*, 191 U.S. 341, 354 (1903) (quoting and affirming *Sharpe v. United States*, 112 F. 893, 896 (1902)).

362 See, e.g., *8.41 Acres in Orange*, 680 F.2d at 390-91, 394-95.

363 See, e.g., *Sharp*, 191 U.S. at 354; *Gettysburg Tower*, 409 F.3d at 148 & n.15; *United States v. 429.59 Acres of Land (Imperial Beach)*, 612 F.2d 459, 463-64 (9th Cir. 1980) (approving instruction "to value the property as a unit" because "it was 'reasonably probable that the properties would be used in combination'"); *8.41 Acres in Orange*, 680 F.2d at 393.

364 *Piza-Blondet*, 585 F.3d at 10 (quoting *Baetjer v. United States*, 143 F.2d 391, 394-95 (1st Cir. 1944)); *8.41 Acres in Orange*, 680 F.2d at 393; *United States v. 25.202 Acres of Land (Amexx I)*, 860 F. Supp. 2d 165, 179 (N.D.N.Y. 2010), *aff'd*, 502 F. App'x 43, 45 (2d Cir. 2012); see *Wash. Metro. Area Transit Auth. v. One Parcel of Land (Old Georgetown)*, 691 F.2d 702, 704-05 (4th Cir. 1982); *Imperial Beach*, 612 F.2d at 463-64; cf. *United States v. 105.40 Acres of Land in Porter Cty.*, 471 F.2d 207, 211-12 (7th Cir. 1972); *United States v. Evans*, 380 F.2d 761, 763-64 (10th Cir. 1967).

365 *Old Georgetown*, 691 F.2d 702, 704-05 (4th Cir. 1982); *United States v. 158.24 Acres of Land in Bee Cty.*, 515 F.2d 230, 232 (5th Cir. 1975); *United States v. Wateree Power Co.*, 220 F.2d 226, 231-32 (4th Cir. 1955); *Baetjer*, 143 F.2d 391.

366 See, e.g., *Piza-Blondet*, 585 F.3d at 4-5, 9-10; *Winn v. United States*, 272 F.2d 282, 286-87 (9th Cir. 1959).

As with any other aspect of the highest and best use analysis, actual use is compelling evidence of highest and best use.³⁶⁷ An integrated use that is merely planned or hoped for is not sufficient to meet the unity of use test.³⁶⁸ In determining the larger parcel, a potential use “may be weighed only if there is a ‘reasonable probability’ the lands in question will be put to that use in the reasonably near future.”³⁶⁹ Even then, “potential use is only one factor to consider in determination of the ‘unity’ issue, along with unity of ownership, contiguity, and existing use.”³⁷⁰

The federal unity of use test turns on an integrated highest and best use. But some courts have invoked a different unity of use test (rarely applicable in federal acquisitions) to determine whether to allow separate valuations of property taken and of damage to property not taken³⁷¹—loosely, and misleadingly, called severance damage.³⁷² This taking plus damages compensation formula, also known as the State Rule, is generally improper in federal acquisitions regardless of unity of use.³⁷³ Still, based on the State Rule measure of compensation, courts have required proof of *actual unitary use* with the part taken to allow consideration of separately calculated severance damage to a landowner’s other property.³⁷⁴ The actual unitary use test reflects the requirement that compensation cannot be charged for damage to separate and independent parcels belonging to the same owner as the property taken.³⁷⁵ Under the Federal Rule, compensation in partial acquisitions is measured by the difference in the market value of the landowner’s property *before* and *after* the government’s acquisition, as discussed in Section 4.6. Using this federal measure, “there is no occasion for the making of any special award or determination of ‘severance damage,’ because the matter is included in the finding of what the remainder of the land was worth immediately after the taking.”³⁷⁶ For this reason, severance damage “concepts have no application” to acquisitions

367 See, e.g., *United States v. 50.50 Acres of Land*, 931 F.2d 1349, 1359 (9th Cir. 1991); *United States v. 33.92356 Acres (Piza-Blondet Trial Op.)*, No. 98-1664, 2008 WL 2550586 (D.P.R. June 13, 2008), *aff’d*, *Piza-Blondet*, 585 F.3d 1.

368 *8.41 Acres in Orange*, 680 F.2d at 394 n.8 (citing *United States ex rel. Tenn. Valley Auth. v. Powelson*, 319 U.S. 266 (1943)); *United States v. Mattox*, 375 F.2d 461, 463-64 (4th Cir. 1967) (“there must exist a reasonable probability that the separate tracts would have been combined for such integrated use”); *Cole Inv. Co. v. United States*, 258 F.2d 203, 205 (9th Cir. 1958) (finding no unity of use where evidence “would only show a planned unity of use”); cf. *Powelson*, 319 U.S. at 284 (“the possibility or probability of [a future] action, so far as it affects present values, is a proper subject for consideration in valuing property for purposes of a condemnation award” (emphasis added)).

369 E.g., *Piza-Blondet Trial Op.*, 2008 WL 2550586; *8.41 Acres in Orange*, 680 F.2d at 394 n.8 (citing *Powelson*, 319 U.S. 266); *Imperial Beach*, 612 F.2d at 463-64.

370 *8.41 Acres in Orange*, 680 F.2d at 394 n.8.

371 *United States v. Certain Land Situated in Detroit (DIBCO I (for Detroit Int’l Bridge Co.))*, 188 F. Supp. 2d 747, 755 (E.D. Mich. 2002), *aff’d*, 450 F.3d 205 (6th Cir. 2006); *United States v. Honolulu Plantation Co.*, 182 F.2d 172, 179 (9th Cir. 1950); see *United States v. 10.0 Acres of Land*, 533 F.2d 1092, 1095 n.1 (9th Cir. 1976).

372 *United States v. Miller*, 317 U.S. 369, 376 (1943) (“loosely”); *United States v. 9.20 Acres of Land in Polk Cty.*, 638 F.2d 1123, 1125 n.2 & 1127 (8th Cir. 1981) (discussing “misleading” nature of term and concept of ‘severance damages’); *United States v. 91.90 Acres of Land in Monroe Cty. (Cannon Dam)*, 586 F.2d 79, 86 (8th Cir. 1978) (“[W]hile the solution to the problem [of measuring compensation in partial takings] is simple, it seems to be frequently missed. And, the difficulty seems to arise out of the concept of ‘severance damage.’”); *Honolulu Plantation*, 182 F.2d at 175 n.1 (“The use of this term is to be criticized because it is apt to lead to loose thinking.”).

373 As discussed in Section 4.6.4.1, the *taking plus damages* or State Rule formula not only is more complicated than the *before and after* or Federal Rule, but also frequently results in something other than just compensation under the Fifth Amendment.

374 See *DIBCO I*, 188 F. Supp. 2d at 749-55 (rejecting “severance damages” for owner’s other property not in actual unitary use with part taken, and rejecting before and after valuation because there was no reasonable probability that owner’s other property would be used in conjunction with part taken in reasonably near future).

375 See *Miller*, 317 U.S. at 376; *8.41 Acres in Orange*, 680 F.2d at 393 & n.6; *Cole Inv. Co. v. United States*, 258 F.2d 203, 205 (9th Cir. 1958) (“The test in severance damage cases [is] that market value is the criterion for severance damages and that ‘strict proof’ of the loss in market value to the remaining parcel is obligatory.” (quoting *Honolulu Plantation*, 182 F.2d at 179)); *United States v. Certain Parcel of Land in Jackson Cty.*, 322 F. Supp. 841, 850 (W.D. Mo. 1971) (“Adaptability to a common use, or an intention on the part of the owner to put the property to a common use, is not enough to admit their being treated as a separate subject of damages.” (quoting 6 A.L.R. 2d 1197, 1202)); see also *United States v. Mattox*, 375 F.2d 461, 463 (4th Cir. 1967) (“[I]t does not follow that the mere proximity or possibility of the integrated use will confer upon the owner a right to severance damages.”).

376 *United States v. 403.14 Acres of Land in St. Clair Cty.*, 553 F.2d 565, 567 n.2 (8th Cir. 1977); accord *United States v. 6.24 Acres of Land (Weber)*, 99 F.3d 1140, 1996 WL 607162, at *4 (6th Cir. 1996) (per curiam) (unpubl.); *United States v. 2.33 Acres of Land in Wake Cty.*, 704 F.2d 728, 730 (4th Cir. 1983); see *United States v. 33.92356 Acres of Land (Piza-Blondet)*, 585 F.3d 1, 9 (1st Cir. 2009) (“The before and after method is particularly advantageous where either it is difficult to value fairly the condemned tract as a separate parcel or one of the parties contends that the remainder was harmed or benefitted by the condemnation.”).

that are subject to “a before-and-after valuation”³⁷⁷ With no separate calculation of severance damage under the Federal Rule, actual unitary use is not determinative, but merely a factor to be considered in determining the larger parcel in federal acquisitions.³⁷⁸ For a full discussion of the Federal Rule, the State Rule, appropriate treatment of damages and benefits, and other issues arising in partial acquisitions, see Section 4.6.

In federal acquisitions, whether under the Federal Rule or (with appropriate **legal instructions**) the State Rule, the ultimate goal is to fairly measure the owner’s actual compensable loss.³⁷⁹ As a result, “strict proof of the loss in market value to the remaining parcel is obligatory.”³⁸⁰ Similarly, the availability of replacement property for the part acquired must be considered, as reasonable buyers and sellers would do.³⁸¹

4.3.4.2. Unity of Ownership (Title). The larger parcel must also have *unity of ownership*—that is, there must be uniform control over the ownership and future of all property making up the larger parcel.³⁸² Principles of fairness underlie the unity of ownership concept and form the basis of the Supreme Court’s reasoning in *Campbell v. United States*:

[I]f the land taken from plaintiff had belonged to another, or if it had not been deemed part and parcel of this estate, he would not have been entitled to anything on account of the diminution in value of his estate. It is only because of the taking of a part of his land that he became entitled to any damages resulting to the rest.³⁸³

Thus, to allow landowners to receive compensation not only for their property but for diminution in value to land owned by another would be a windfall and an unfair enrichment rather than just compensation.³⁸⁴

Historically, unity of ownership (or unity of title) was held to require all property comprising a single larger parcel to be owned to precisely the same extent (e.g., in fee simple) by precisely the

377 *United States v. 10.0 Acres*, 533 F.2d 1092, 1095 n.1 (9th Cir. 1976) (noting “severance-damage cases . . . are not in point” regarding “a before-and-after valuation”); accord *Cannon Dam*, 586 F.2d at 86; *United States v. 765.56 Acres of Land in Southampton (765.56 Acres II)*, 174 F. Supp. 1, 13-14 (E.D.N.Y. 1959), *aff’d sub nom. United States v. Glanet Realty Corp.*, 276 F.2d 264 (2d Cir. 1960).

378 *See 8.41 Acres in Orange*, 680 F.2d at 393-94 & n.8; *United States v. 105.40 Acres of Land in Porter Cty.*, 471 F.2d 207, 210-12 (7th Cir. 1972); *Baetjer v. United States*, 143 F.2d 391, 394 (1st Cir. 1944); *see also 403.14 Acres in St. Clair*, 553 F.2d at 567 n.2; *see also United States v. 429.59 Acres of Land (Imperial Beach)*, 612 F.2d 459, 463 (9th Cir. 1980) (affirming valuation of properties as a unit because it was “reasonably probable that the properties would be used in combination”); *cf. United States v. Grizzard*, 219 U.S. 180, 185-86 (1911) (“The determining factor was that the value of that part of the Grizzard farm not taken was \$1,500, when the value of the entire place before the taking was \$3,000.”).

379 *See, e.g., Bauman v. Ross*, 167 U.S. 548, 574 (1897) (“The just compensation required by the constitution to be made to the owner is to be measured by the loss caused to him by the appropriation. He is entitled to receive the value of what he has been deprived of, and no more. To award him less would be unjust to him; to award him more would be unjust to the public.”).

380 *Cole Inv.*, 258 F.2d at 205 (quoting *Honolulu Plantation*, 182 F.2d at 179)).

381 *See* Section 4.6 and cases cited therein. This federal requirement may differ from state law.

382 *Imperial Beach*, 612 F.2d at 463-64; *United States v. 17.69 Acres of Land in San Diego (Nat’l Enterprises)*, No. 99cv1248 DMS (JMA), slip op. at 8 (S.D. Cal. Aug. 30, 2004) ECF No. 272; *United States v. 14.36 Acres of Land in McMullen Cty.*, 252 F. Supp. 2d 361, 363 (S.D. Tex. 2002).

383 *Campbell v. United States*, 266 U.S. 368, 371 (1924); *see Sharp v. United States*, 191 U.S. 341, 355 (1903) (“It is solely by virtue of his ownership of the tract invaded that the owner is entitled to . . . damages.”).

384 *See Campbell*, 266 U.S. at 371; *United States v. Grizzard*, 219 U.S. 180, 184 (1911) (“The ‘just compensation’ thus guaranteed obviously requires that the recompense to the owner for the loss caused to him by the taking of a part of a parcel, or single tract of land, shall be measured by the loss resulting to him from the appropriation.” (emphases added)); *Sharp*, 191 U.S. at 354; *see also United States ex rel. Tenn. Valley Auth. v. Stewart*, 429 F. Supp. 658, 659-61 (E.D. Tenn. 1976) (“it would be wholly inequitable to allow other parties owning . . . different tracts . . . [to] secure damages to which they are not entitled”).

same owner.³⁸⁵ But modern case law has recognized that at times, the strict traditional rule may ignore market realities that should in fairness be considered.³⁸⁶ As a result, the unity of ownership inquiry focuses on whether a *single decision maker* has *actual legal control* of all property at issue.³⁸⁷ Ultimately, unity of ownership turns on what “is more consistent with the goal of just compensation”³⁸⁸ Because unity of ownership raises not only factual but legal questions, appraisers must obtain **legal instructions** if they conclude that a single larger parcel exists when the ownership interests in all parts of the whole are not identical.³⁸⁹ This is one of many issues on which federal and state law may differ.³⁹⁰

Federal courts have held that fairness compels consideration of market realities in determining unity of ownership. Accordingly, the Ninth Circuit found unity of title was satisfied for properties owned by three corporations because a single person served as the president, chairman of the board, and chief executive officer for all three entities.³⁹¹ As one district court recently reasoned, a person with personal control of Parcel A and actual control of Parcel B as the sole owner of a corporation “would never negotiate against or attempt to undermine himself in a transaction. The relevant ‘economic realities of the marketplace simply do not produce those kind of results.’”³⁹² Moreover, as another district court observed, “the buyer in the marketplace could readily acquire both parcels from the same operative vendors, exercising the same business judgment in the transaction.”³⁹³

But “a group of individuals is significantly different than a single decision maker operating through a variety of corporate forms.”³⁹⁴ Fairness and market realities therefore dictate that unity of ownership does not exist when *multiple* decision makers are involved—that is, as one district court recently stated, “when the wishes of different individuals, and not a single individual wearing multiple hats, must be spanned to achieve unity of title.”³⁹⁵ As a result, unity of ownership has been ruled lacking when one tract was owned by one person and a second tract by a spouse,³⁹⁶ sibling,³⁹⁷ or adult child.³⁹⁸ Similarly, the existence of common or overlapping owners among multiple decision makers is not sufficient for unity of ownership. Thus, a court found unity of ownership was lacking among three tracts: one owned by one person, the second owned by the same person and a sibling, and the third owned by the same person and his spouse.³⁹⁹

385 *United States v. 87.30 Acres of Land*, 430 F.2d 1130, 1133 (9th Cir. 1970); *Stewart*, 429 F. Supp. at 660-61; *United States v. Certain Parcel of Land in Jackson Cty.*, 322 F. Supp. 841, 848-49 (W.D. Mo. 1971).

386 *See Imperial Beach*, 612 F.2d at 464; *14.36 Acres in McMullen*, 252 F. Supp. 2d at 363-64.

387 *E.g., Se. Supply Header, LLC v. 110 Acres in Covington Cty. (SESH)*, No. 2:07-CV-291 KS-MTP, 2008 WL 127490, at *2 (S.D. Miss. Jan. 10, 2008); *Nat'l Enterprises*, slip op. at 4-8, ECF No. 272; *14.36 Acres in McMullen*, 252 F. Supp. 2d at 363-64; *see Imperial Beach*, 612 F.2d at 463-64.

388 *14.36 Acres in McMullen*, 252 F. Supp. 2d at 364; *accord United States v. Miller*, 317 U.S. 369, 375-76 (1943) (larger parcel requirement and subsidiary rules developed “in order to do substantial justice”).

389 *See 14.36 Acres in McMullen*, 252 F. Supp. 2d at 364; *see also Miller*, 317 U.S. at 375-76; *Sharp*, 191 U.S. at 354.

390 *See 14.36 Acres in McMullen*, 252 F. Supp. 2d at 363 (disregarding state law on unity of use because federal law controls in federal condemnation cases); *see also Oncor Elec. Delivery Co. v. Brown*, 451 S.W.3d 128, 132 (Tex. Ct. App. 2014) (citing *14.36 Acres* and noting differences in federal and state law).

391 *Imperial Beach*, 612 F.2d at 463-64.

392 *SESH*, 2008 WL 127490, at *2 (quoting *14.36 Acres in McMullen*, 252 F. Supp. 2d at 364).

393 *14.36 Acres in McMullen*, 252 F. Supp. 2d at 363-64 (quoting JULIUS L. SACKMAN ET AL., NICHOLS ON EMINENT DOMAIN § 1202[1] (rev. 3d ed. 2001)).

394 *SESH*, 2008 WL 127490, at *2.

395 *Id.*

396 *United States ex rel. Tenn. Valley Auth. v. Stewart*, 429 F. Supp. 658, 660-61 (E.D. Tenn. 1976).

397 *Id.*

398 *United States v. 87.30 Acres of Land in Whitman & Garfield Clys.*, 430 F.2d 1130, 1133 (9th Cir. 1970) (cited with approval in *United States v. 50.50 Acres of Land*, 931 F.2d 1349, 1350 (9th Cir. 1991)); *SESH*, 2008 WL 127490, at *2-3; *see Stewart*, 429 F. Supp. at 660 n.3 (“familial relationship to the other owners [is] a consideration not relevant to this analysis” (citing *87.30 Acres in Whitman*, *supra*)).

399 *Stewart*, 429 F. Supp. at 660-61 (“For whatever reason, they have treated the three tracts as independent with regard to the ownership interests held therein.”); *accord SESH*, 2008 WL 127490, at *1-3 (no unity of ownership among two adjacent tracts, one owned in fee by one person and the second owned by the same person and his parents).

Tracts that lack unity of ownership cannot be treated as a single larger parcel for just compensation purposes, regardless of whether they share an integrated or actual use. Accordingly, a district court recently found no unity of ownership among one tract owned by one person in fee, and a second tract owned by the same person and his parents, observing that “[d]espite the present harmony of the . . . family, either [the son] or his parents could prevent a transaction to acquire a present possessory interest in the [combined tracts].”⁴⁰⁰ The court ultimately concluded:

Although both parents and son benefit from the uninterrupted use of the whole, the division of ownership between the . . . parents and their son has legal consequences in an eminent domain proceeding. The potentially conflicting interests between the parents’ use of their life estates and the son’s vested remainder make it impossible . . . to recognize a unity of title consistent with available case law.⁴⁰¹

4.3.4.3. Physical Unity (Contiguity or Proximity). Under federal law, physical unity is considered within the context of integrated use rather than as a stand-alone test. As the First Circuit emphasized:

Physical contiguity is important, however, in that it frequently has great bearing on the question of unity of use. Tracts physically separated from one another frequently, but we cannot say always, are not and cannot be operated as a unit, and the greater the distance between them the less is the possibility of unitary operation⁴⁰²

Accordingly, the physical unity (proximity) or separation of a tract is an important consideration, but not necessarily determinative of the ultimate question of what constitutes a single tract.⁴⁰³

The availability of replacement property for the part acquired must always be considered (as noted above) and can be particularly important in partial acquisitions involving noncontiguous parcels devoted to a unitary use, such as a livestock ranch or a timber and milling operation.⁴⁰⁴ The effect of the existence (or absence) of replacement property on the market value of the remainder property must be shown, as it will vary depending on the property, its use, and the relevant market. For example, in *International Paper Co. v. United States*, the Fifth Circuit found no unitary use between woodland acres and the same landowner’s paper mill in another state, as neither the existing operation nor any reasonable expectation in the foreseeable future showed any difference between the owner’s small woodland tracts and “the tracts of small owners whose products would be available on a competitive basis.”⁴⁰⁵ Moreover, the landowner could “turn right around and

400 *SESH*, 2008 WL 127490, at *2.

401 *Id.* at *3.

402 *Baetjer v. United States*, 143 F.2d 391, 395 (1st Cir. 1944); *cf. Sharpe v. United States*, 112 F. 893, 895-96 (3d Cir. 1902), *aff’d sub nom. Sharpe v. United States*, 191 U.S. 341 (1903) (discussing “22 acres of meadow . . . not adjoining or a part of [the farm tract with which it had been purchased], nor was it used in connection therewith, but was such a considerable distance away, and of so little value, that no attention was paid to it by either [party], either as to value or damages”).

403 *Baetjer*, 143 F.2d at 395.

404 *See, e.g., United States v. Evans*, 380 F.2d 761, 764 (10th Cir. 1967) (livestock ranch); *Int’l Paper Co. v. United States*, 227 F.2d 201, 206-07 (5th Cir. 1955) (paper mill operation); *Baetjer*, 143 F.2d at 396-97 (sugar cane production); *Ga.-Pac. Corp. v. United States*, 640 F.2d 328 (Ct. Cl. 1980) (per curiam) (burden to show that “replacement old-growth timber was not available, or if available, at least, the burden to show persuasively that under existing circumstances it would be economically unfeasible to obtain available replacement timber”); *cf. United States v. 711.57 Acres of Land in Alameda Cty.*, 51 F. Supp. 30, 33 (N.D. Cal. 1943) (awarding compensation reflecting availability of alternative access to severed tract).

405 *Int’l Paper*, 227 F.2d at 206. The Fifth Circuit went on to state that regardless of whether a unitary tract existed (which it called “quite doubtful”), there was “no doubt whatever about the correctness” of the finding that the taking of woodland acreage did not diminish the value of the remainder property (the paper mill). *Id.* at 206-07.

make its acreage whole by buying [similarly located timber property to replace that taken] with the proceeds of the condemnation award.”⁴⁰⁶ Meanwhile in *United States v. Evans*, different facts led the Tenth Circuit to uphold a finding that pastureland was part of a single economic unit with noncontiguous but “integrated” and “interdependent” croplands, feeding yards, and ranch headquarters with silage land within economical hauling distance.⁴⁰⁷ In *Evans*, there was evidence that such physical separation of integrated tracts was not only common for ranching in the area but considered desirable to take advantage of variations in rainfall, soil types, and other factors, and that “pasture land sold separately would bring a lower price than if sold as part of a ranch—a balanced unit.”⁴⁰⁸ Even so, the Tenth Circuit cautioned, the *Evans* case “must be considered to be an extreme one, as to the noncontiguous tract problem; however, the record shows unusually clear evidence on the point. The damages have been well limited to the integrated lands.”⁴⁰⁹ Critically, both *Evans* and *International Paper* “restricted damages to the realities of the situation . . .”⁴¹⁰ Of course, depending on “the realities of the situation,” even a demonstrated lack of available replacement property may not diminish the value of remainder property.⁴¹¹

4.3.4.4. Legal Instructions. While the larger parcel must ultimately be determined by the appraiser, **legal instructions** are often required to address questions of law that arise within the appraiser’s analysis. For example, whether unity of ownership exists based on the quality of the property interests held in different tracts raises not only factual but legal questions.⁴¹² Thus, an appraiser must obtain **legal instructions** if the ownership interests in all parts of the whole are not identical in a potential larger parcel. Similarly, whether there is sufficient evidence to support a finding of an integrated use involves legal as well as factual analysis.⁴¹³ In addition, in federal condemnation litigation, the appraiser’s larger parcel analysis and conclusions will be evaluated by the court and/or the finder of fact (jury, land commission, or judge).⁴¹⁴

4.3.4.5. Special Considerations in Partial Acquisitions. In partial acquisitions, the appraiser must make two separate determinations of highest and best use: once for the larger parcel

406 *Id.* at 207 (noting that the landowner in fact “actually purchased [such replacement property] subsequent to the taking here involved”).

407 *Evans*, 380 F.2d at 764.

408 *Id.* at 764; cf. APPRAISAL INST. & AM. SOC’Y OF FARM MANAGERS, *THE APPRAISAL OF RURAL PROPERTY* 343, 323-60 (2d ed. 2000) (“[T]he highest and best use of a ranch property is directly related to ranch balance.” (Chapter 19: The Valuation of Livestock Ranches)).

409 *Evans*, 380 F.2d at 764.

410 *Id.* (analyzing *Int’l Paper*, 227 F.2d 201).

411 *Id.*; e.g., *Baetjer*, 143 F.2d at 396, and on remand, *United States v. 7936.6 Acres of Land*, 69 F. Supp. 328, 332 (D.P.R. 1947) (“[W]hile there has been a severance in the legal sense such severance has caused no compensable damage to the market value of the properties not taken.”); see also *Int’l Paper*, 227 F.2d at 207 n.7 (discussing *Baetjer* and result on remand).

412 See, e.g., *United States v. 429.59 Acres of Land (Imperial Beach)*, 612 F.2d 459, 463-64 (9th Cir. 1980); *United States v. 14.26 Acres of Land in McMullen Cty.*, 252 F. Supp. 2d 361, 363-64 (S.D. Tex. 2002); *United States v. 17.69 Acres of Land in San Diego (Nat’l Enterprises)*, No. 99cv1248 DMS (JMA) (S.D. Cal. Aug. 30, 2004), ECF No. 272; *Se. Supply Header, LLC v. 110 Acres in Covington Cty. (SESH)*, No. 2:07-CV-291 KS-MTP, 2008 WL 127490, at *2 (S.D. Miss. Jan. 10, 2008).

413 See, e.g., *United States v. 33.92356 Acres of Land (Piza-Blondet)*, 585 F.3d 1, 10 (1st Cir. 2009); *United States v. 8.41 Acres of Land in Orange Cty.*, 680 F.2d 388, 393 (5th Cir. 1982); *United States v. 25.202 Acres of Land (Amexx I)*, 860 F. Supp. 2d 165, 179-81 (N.D.N.Y. 2010), *aff’d*, 502 F. App’x 43, 45-46 (2d Cir. 2012); *SESH*, 2008 WL 127490, at *3; *United States v. Certain Land Situated in Detroit (DIBCO I)* (for *Detroit Int’l Bridge Co.*), 188 F. Supp. 2d 747, 755 (E.D. Mich. 2002), *aff’d*, 450 F.3d 205 (6th Cir. 2006).

414 There is a split of authority among federal courts on this issue, although it does not affect the appraiser’s role of determining the larger parcel in keeping with appropriate **legal instructions**. The Supreme Court has held that in a federal condemnation case, “except for the single issue of just compensation, the trial judge is to decide all issues, legal and factual, that may be represented.” *United States v. Reynolds*, 397 U.S. 14, 19 (1970); see *FED. R. CIV. P.* 71.1(h). Many federal circuits hold based on *Reynolds* that “[u]nity of use is an issue for the court to decide.” *Amexx I*, 860 F. Supp. 2d at 179; *accord DIBCO*, 450 F.3d at 208-11; *Imperial Beach*, 612 F.2d at 463-64; *United States v. 105.40 Acres of Land in Porter Cty.*, 471 F.2d 207, 212 (7th Cir. 1972); see *Piza-Blondet*, 585 F.3d at 10 (“While unity of use is an issue for the court to decide, unless some party objects, there is no ground for overturning a decision by the trial judge to submit the question to the jury in an advisory capacity.”). But some federal courts hold that “the issue of unity or separateness of tracts is a question of fact to be presented to the trier of fact.” *8.41 Acres in Orange*, 680 F.2d at 393; see also *Nat’l Enterprises*, slip op. at 2 n.1 (S.D. Cal. Aug. 30, 2004), ECF No. 271 (“The Court also questions Defendants’ assertion that the issue of unity or separateness of tracts is a matter of law to be decided by the Court.”). Even under the latter rule, however, the court will reject the fact-finder’s identification of the unitary parcel if it is unsupported, speculative, or otherwise legally erroneous. *E.g.*, *8.41 Acres in Orange*, 680 F.2d at 393-94 & n.8 (rejecting commission’s “clearly erroneous . . . finding that the strips of condemned land were ‘severed’ from their parent tracts”).

before acquisition, and once for the remainder after acquisition. As J.D. Eaton cautioned: “If the appraiser does not estimate the property’s highest and best use correctly in both the before and after situations, it will be impossible to estimate the property’s value correctly.”⁴¹⁵

The existence and extent of any change in highest and best use due to the government’s acquisition requires careful analysis.⁴¹⁶ The highest and best use of the remainder may reflect a complete change, a change in intensity, or no change from the highest and best use of the larger parcel before acquisition.⁴¹⁷ A change in a property’s highest and best use may have a positive, negative, or negligible impact on its market value. For example, if what was farmland before acquisition becomes lakefront property with a highest and best use for recreational home sites, offsetting special or direct benefits may apply, as discussed in Section 4.5.5.⁴¹⁸ On the other hand, if a remainder property has a less valuable highest and best use after acquisition, the difference in the values before and after acquisition will reflect any compensable diminution in the value of the remainder resulting from acquisition, as discussed in in Section 4.5.2.

4.3.4.6. Special Considerations in Riparian Land Acquisitions. When developing an opinion of the highest and best use of land riparian to navigable water, there are special considerations that must be taken into account, as discussed in Section 4.11.1.

4.3.4.7. Special Considerations in Land Exchanges. Different considerations may be required in determining the larger parcel in appraisals for federal land exchanges (see Section 1.12). In such situations, **legal instructions** for the appraiser to assume a specific larger parcel determination may be necessary to comply with statutes or other federal requirements, as discussed in Section 4.10.

Determining the larger parcel in inverse takings claims raises complex legal issues. Close consultation between appraisers and legal counsel is essential.

4.3.4.8. Special Considerations in Inverse Takings. Determining the larger parcel in connection with inverse taking claims for liability purposes requires different considerations than in eminent domain-based valuations because of the distinct—and complex—legal issues involved.⁴¹⁹ As the Ninth Circuit explained, in eminent domain cases the issue is *how much* is due the landowner as just compensation: “[But i]n inverse condemnation the issue is liability: Has the government’s action effected a taking of the landowner’s property? [T]he boundaries of the property allegedly taken must be determined by taking jurisprudence rather than the laws of eminent domain.”⁴²⁰

415 EATON, *supra* note 16, at 104; see *Olson v. United States*, 292 U.S. 246, 255 (1934).

416 See, e.g., *Rousseaux v. United States*, 394 F.2d 123, 124 (5th Cir. 1968) (per curiam) (“The parties did not dispute that the highest and best use of the land after the easement was imposed was for growing timber. However, the highest and best use of the land before the taking was sharply contested, as was the issue of value.”).

417 E.g., *E. Tenn. Nat. Gas Co. v. 7.74 Acres of Land*, 228 F. App’x 323 (4th Cir. 2007) (unpubl.) (highest and best use changed from commercial development before taking to agricultural or residential use after taking); *Wash. Metro. Area Transit Auth. v. One Parcel of Land (Old Georgetown)*, 691 F.2d 702, 703 (4th Cir. 1982) (change in intensity from low-density to high-density residential development in new mass-transit “impact zone”); *United States v. Werner*, 36 F.3d 1095 (4th Cir. 1994) (no change in highest and best use of large-lot residential development); *8.41 Acres in Orange*, 680 F.2d at 394-95 (no change in highest and best use for industrial plant sites).

418 E.g., *United States v. Trout*, 386 F.2d 216 (5th Cir. 1967).

419 See *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 322 (2002) (“Our regulatory takings jurisprudence . . . is characterized by ‘essentially ad hoc, factual inquiries,’ designed to allow ‘careful examination and weighing of all relevant circumstances.’” (quoting *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978), and *Palazzolo v. Rhode Island*, 533 U.S. 606, 636 (2001) (O’Connor, J., concurring))).

420 *Am. Savings & Loan Ass’n v. County of Marin*, 653 F.2d 364, 369 (9th Cir. 1981).

In the context of regulatory inverse takings claims, the larger parcel is commonly referred to as the parcel as a whole or the denominator.⁴²¹ It is the relevant parcel against which to measure the economic impact of the regulation being challenged.⁴²² As a result, determination of the parcel as a whole plays a critical role in regulatory takings cases in determining liability—i.e., whether a compensable taking occurred.⁴²³ This complex legal determination requires careful consideration of all relevant facts, making close consultation between the appraiser and legal counsel essential.⁴²⁴

The typical starting point is “the metes and bounds that describe [the] geographic dimensions” of contiguous acres held under common ownership,⁴²⁵ with a focus on the property owned by the plaintiff at the time of the government action giving rise to the taking. As a result, the unity-of-ownership test may need to be disregarded, or applied on an earlier date, so that the parcel as a whole will include properties originally (but no longer) held in common ownership on the date of valuation.⁴²⁶ The owner’s actual and projected use of the property must also be considered. Other relevant factors include the timing of an owner’s acquisition of property interests, the timing of the imposition of the regulations being challenged, the owner’s demonstrated expectations for the property, whether the extent to which property is linked through a common development scheme, and the extent to which regulated portions are integrated with and enhance the value of unregulated portions of the property.

The Supreme Court has consistently rejected the “circular” approach of “defining the [relevant parcel] in terms of the very regulation being challenged.”⁴²⁷ But lower federal courts’ rulings weighing the various factors listed above have resulted in contradictory opinions, with some facing Supreme Court review as these Standards went to publication.⁴²⁸

4.4. Valuation Process.

4.4.1. The Three Approaches to Value. For purposes of just compensation, market value must be determined “with an approach which seeks with the aid of all relevant data to find an amount representing value to any normally situated owner or purchaser of the interests taken”⁴²⁹

Three approaches to value are recognized in federal acquisitions: (1) the sales comparison approach, (2) the cost approach, and (3) the income capitalization approach.⁴³⁰

421 *E.g., Palazzolo*, 533 U.S. at 631 (“the difficult, persisting question of what is the proper denominator in the takings fraction”); *Penn Cent.*, 438 U.S. at 130-31 (“In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole”).

422 *See Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 497 (1987) (“Because our test for regulatory taking requires us to compare the value that has been taken from the property with the value that remains in the property, one of the critical questions is determining how to define the unit of property ‘whose value is to furnish the denominator of the fraction.’”).

423 *See, e.g., Tahoe-Sierra*, 535 U.S. at 330-31; *Penn Cent.*, 438 U.S. at 130-31.

424 *Cf. Tahoe-Sierra*, 535 U.S. at 322; *Palazzolo*, 533 U.S. at 636 (O’Connor, J., concurring); *Penn Cent.*, 438 U.S. at 124.

425 *See Tahoe-Sierra*, 535 U.S. at 331.

426 *E.g., Norman v. United States*, 429 F.3d 1081, 1087, 1091 (Fed. Cir. 2005) (including previously sold property in parcel as a whole).

427 *Tahoe-Sierra*, 535 U.S. at 331.

428 *See, e.g., Lost Tree Village Corp. v. United States*, 787 F.3d 1111 (Fed. Cir. 2015), *petition for cert. docketed*, No. 15-1192 (March 23, 2016); *Murr v. Wisconsin*, 359 Wis. 2d 675 (Wis. Ct. App. 2014), *review denied*, 366 Wis. 2d 59 (2015), *cert. granted*, 136 S. Ct. 890 (2016).

429 *Kimball Laundry v. United States*, 338 U.S. 1, 20 (1949).

430 *See generally United States v. 25.202 Acres of Land (Amexx I)*, 860 F. Supp. 2d 165, 174-75 (N.D.N.Y. 2009), *adopted by* 860 F. Supp. 2d 165 (N.D.N.Y. 2010), *aff’d*, 502 F. App’x 43, 45 (2d Cir. 2012). As discussed in Section 4.4.5, it may be appropriate to incorporate aspects of all three approaches to value in the *development method*, a technique for appraising undeveloped acreage with a highest and best use for subdivision into lots. *E.g., United States v. 99.66 Acres of Land (Sunburst Invs.)*, 970 F.2d 651, 655-56 (9th Cir. 1992).

Because the “federal conception of market value . . . is intimately related to selling prices in the market,”⁴³¹ the sales comparison approach is normally preferred as the best evidence of market value in federal acquisitions, but not to the exclusion of other relevant evidence of value based on market data.⁴³² One or more approaches to value may be appropriate—even necessary—to derive a reliable estimate of market value in a given appraisal problem.⁴³³ As the Supreme Court recognized:

Valuation is not a matter of mathematics Rather, the calculation of true market value is an applied science, even a craft. Most appraisers estimate market value by employing not one methodology but a combination. These various methods generate a range of possible market values which the appraiser uses to derive what he considers to be an accurate estimate of market value, based on careful scrutiny of all the data available.⁴³⁴

Of course, not every approach to value is appropriate for every valuation assignment: in determining market value in federal acquisitions, appraisers must not use an approach that “though perhaps making it easier to reach some solution, only ma[kes] the proper solution more difficult.”⁴³⁵ Federal courts have repeatedly prohibited the use of an approach to value that is unreliable in light of the facts and circumstances of a given valuation problem.⁴³⁶ Where just compensation is concerned, a reliable valuation process is necessary to ensure a just result, “and it is the duty of the state, *in the conduct of the inquest by which the compensation is ascertained*, to see that it is just, not merely to the individual whose property is taken, but to the public which is to pay for it.”⁴³⁷

4.4.2. **Sales Comparison Approach.** Under federal law, unforced, arm’s-length transactions of properties in the vicinity of and comparable to the property being appraised, reasonably near the

431 *United States v. 60.14 Acres of Land*, 362 F.2d 660, 665 (3d Cir. 1966).

432 See *United States v. Toronto, Hamilton & Buffalo Nav. Co.*, 338 U.S. 396, 402-404 (1949); *United States v. Miller*, 317 U.S. 369, 374-75 (1943); *United States v. 320 Acres of Land*, 605 F.2d 762, 798-99 & n. 61 (5th Cir. 1979) (citing cases).

433 *Toronto, Hamilton*, 338 U.S. at 402-405 (“Were market conditions normal, we could hardly call an award ‘just compensation’ unless relevant . . . sales, in available markets, were considered. . . . The question is of course one of degree, and we do not mean to foreclose the consideration of each case upon its facts.”); see *CSX Transp., Inc. v. Ga. State Bd. of Equalization*, 552 U.S. 9, 17 (2007) (“Appraisers typically employ a combination of methods because no one approach is entirely accurate, at least in the absence of an established market for the type of property at issue. The individual methods yield sometimes more, sometimes less reliable results depending on the peculiar features of the property evaluated.”); *Seravalli v. United States*, 845 F.2d 1571, 1575 (Fed. Cir. 1988) (“The method of valuation that is most appropriate in the light of the facts of the particular case . . . may be a single method or some combination of different methods.”); *Sill Corp. v. United States*, 343 F.2d 411, 416 (10th Cir. 1965).

434 *CSX Transp.*, 552 U.S. at 16-17.

435 *United States v. Benning Hous. Corp.*, 276 F.2d 248, 253 (5th Cir. 1960); cf. *CSX Transp.*, 552 U.S. at 18 (rejecting contention that it is “as likely to get an accurate result by [one valuation method] as it is by employing another method altogether” because “some approximations [a]re better than others”).

436 See, e.g., *United States v. 25.202 Acres of Land (Amexx I)*, 860 F. Supp. 2d 165, 174-179 (N.D.N.Y. 2009), *adopted* by 860 F. Supp. 2d 165 (N.D.N.Y. 2010), *aff’d*, 502 F. App’x 43, 45 (2d Cir. 2012); *United States v. 33.92356 Acres of Land (Piza-Blondet)*, 585 F.3d 1, 7-8 (1st Cir. 2009); see *United States v. Wise*, 131 F.2d 851, 851-52 (4th Cir. 1942); cf. *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146-47 (1997) (expert opinions are to be rejected when “there is simply too great an analytical gap between the data and the opinion proffered”); *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 589 (1993) (expert opinions must be “not only relevant, but reliable”).

437 *Bauman v. Ross*, 167 U.S. 548, 574 (1897) (emphasis added) quoting *Searl v. Sch. Dist. in Lake Cty.*, 133 U.S. 553, 562 (1890); cf. *Gen. Elec.*, 522 U.S. at 149-50 (Breyer, J., concurring) (observing that subjecting expert opinions to appropriate legal standards “will help secure the basic objectives of . . . the ascertainment of truth and the just determination of proceedings” and citing FED. R. EVID. 102); *Olson v. United States*, 292 U.S. 246, 257 (1934) (“to allow mere speculation and conjecture to become a guide for the ascertainment of value [is] a thing to be condemned in business transactions as well as in judicial ascertainment of truth”).

time of acquisition, are normally the best evidence of market value.⁴³⁸ The process of forming an opinion of a property's market value through comparison with such comparable sales is known as the sales comparison approach to value.⁴³⁹ The sales comparison approach is normally preferred in federal acquisitions as the best evidence of value, but not to the exclusion of other relevant evidence of value based on market data.⁴⁴⁰ The essence of the sales comparison approach to value is the comparison of sales transactions to the property being appraised.⁴⁴¹ “Generally, the more comparable a sale is, the more probative it will be of the fair market value” of the property being appraised.⁴⁴² The converse is also true, as one court observed:

Significant differences as to location, size, topography, market area, and recreational potential existed between most comparable sales and the subject property. This makes comparison extremely shaky because of the necessity of substantial adjustments required between the comparable and the subject.⁴⁴³

As a result, the most recent sale of the property being appraised may well be the most comparable of all the comparable sales, as discussed further in Section 4.4.2.4.1.⁴⁴⁴

4.4.2.1. Comparability. A sale's comparability “is largely a function of three variables: characteristics of the properties, their geographic proximity to one another, and the time differential.”⁴⁴⁵ The significance of different elements of comparison will vary with the type of property being appraised and the relevant market. For example, as the Sixth Circuit explained:

⁴³⁸ *E.g.*, *El Paso Nat. Gas Co. v. Fed. Energy Regulatory Comm'n*, 96 F.3d 1460, 1464 (D.C. Cir. 1996); *United States v. 819.98 Acres of Land*, 78 F.3d 1468, 1471 (10th Cir. 1996); *United States v. 24.48 Acres of Land*, 812 F.2d 216, 218 (5th Cir. 1987); *United States v. 47.14 Acres of Land in Polk Cty.*, 674 F.2d 722, 725 (8th Cir. 1982); *United States v. 103.38 Acres of Land in Morgan Cty. (Oldfield)*, 660 F.2d 208, 211 (6th Cir. 1981); *United States v. 320 Acres of Land*, 605 F.2d 762, 798 & n.61 (5th Cir. 1979) (citing cases); *United States v. 100 Acres of Land*, 468 F.2d 1261, 1265 (9th Cir. 1972); *United States v. Upper Potomac Props. Corp.*, 448 F.2d 913, 918 (4th Cir. 1971); *United States v. 344.85 Acres of Land*, 384 F.2d 789, 791-92 (7th Cir. 1967); *United States v. 60.14 Acres of Land*, 362 F.2d 660, 665 (3d Cir. 1966).

⁴³⁹ The sales comparison approach was formerly called the market data approach, a problematic term because “[i]n essence, all approaches to value (particularly when the purpose of the appraisal is to establish market value) are market data approaches since the data inputs are presumably market derived.” BYRL N. BOYCE, *REAL ESTATE APPRAISAL TERMINOLOGY* 136 (1st ed. 1975) (defining “market data approach”); compare *THE APPRAISAL OF REAL ESTATE* 273-314 (7th ed. 2d prtg. 1979) (“market data approach”) and *United States v. Eden Mem'l Park Ass'n*, 350 F.2d 933, 935 (9th Cir. 1965) (“market data approach or consideration of comparable sales”) with *THE APPRAISAL OF REAL ESTATE* (8th ed. 1983) 309-31 (“sales comparison approach”) and *Amexx I*, 860 F. Supp. 2d at 174 (“market approach (also known as the sales comparison approach)”).

⁴⁴⁰ *El Paso Nat. Gas*, 96 F.3d at 1464; *819.98 Acres of Land*, 78 F.3d at 1471; *Seravalli v. United States*, 845 F.2d 1571, 1575 (Fed. Cir. 1988); *United States v. 421.89 Acres of Land*, 465 F.2d 336, 338-39 (8th Cir. 1972); *Upper Potomac*, 448 F.2d at 917; 344.85 Acres, 384 F.2d at 792.

⁴⁴¹ *Cf. United States v. New River Collieries Co.*, 262 U.S. 341, 344 (1923) (“Where private property is taken for public use, and there is a market price prevailing at the time and place of the taking, that price is just compensation.”).

⁴⁴² *320 Acres*, 605 F.2d at 798.

⁴⁴³ *United States v. Eastman (Eastman II)*, 528 F. Supp. 1184, 1186 (D. Or. 1981), *aff'd*, 714 F.2d 76, 77 (9th Cir. 1983).

⁴⁴⁴ *Cf. Hickey v. United States*, 208 F.2d 269, 273 (3d Cir. 1953).

⁴⁴⁵ *320 Acres*, 605 F.2d at 798 & n.61 (citing cases). In appraisal terminology, typical elements of comparison include property rights conveyed, financing terms, conditions of sale (i.e., buyer and seller motivations), expenditures made immediately after purchase, market conditions (i.e., time- or date-of-sale adjustment), location, physical characteristics, economic characteristics, legal characteristics (i.e., zoning and permits) and non-realty components of value included in sale. See Section 1.5.2.3; APPRAISAL INST., *THE APPRAISAL OF REAL ESTATE* 390-92, 404-25 (14th ed. 2013); see, e.g., *United States v. 480.00 Acres of Land (Fornatora)*, 557 F.3d 1297, 1304-05, 1312 (11th Cir. 2009) (applicable zoning restrictions, buyer motivations, conditions of sale); *United States v. 124.84 Acres of Land in Warrick Cty.*, 387 F.2d 912, 915 (7th Cir. 1968) (physical characteristics including soil type and susceptibility to flooding); *Knollman v. United States*, 214 F.2d 106 (6th Cir. 1954) (character and location); *United States v. 68.94 Acres of Land in Kent Cty.*, 736 F. Supp. 541, 549-550 (D. Del. 1990) (time, size, tillable soil percentage, effects of easements on property rights conveyed, buyer motivations); *Eastman II*, 528 F. Supp. at 1185-86 (time, size, location, topography); cf. *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 537-40 (1994) (noting “‘fair market value’ presumes market conditions that, by definition, simply do not obtain in the context of a forced sale”); *United States v. 564.54 Acres of Land (Lutheran Synod)*, 441 U.S. 506, 513-14 (1979) (noting new facilities would bear financial burdens imposed by regulations that did not apply to comparable existing facilities).

On the point of similarity in character and locality, obviously if part of an allotment is condemned, sales, in order to be evidence of market value, should be of lots either within the immediate vicinity or very close. But when large areas of open country are involved, similarity of character and locality depends not upon mere propinquity. The character of such land situated several miles from land condemned may well be more comparable than that within a few hundred feet.⁴⁴⁶

4.4.2.2. Adjustments. Depending on the property involved and the relevant market, the appraiser may need to adjust each comparable sale through quantitative and/or qualitative analysis to derive an indication of the market value of the subject property. Adjustments are made “up or down, depending upon such factors as time of sale, size of parcel, location, topography, and other such variables.”⁴⁴⁷ Quantitative adjustment, qualitative analysis, or both may be appropriate depending on the specific facts of the valuation problem.⁴⁴⁸

Quantitative adjustment is appropriate when there are adequate market data to reliably quantify the effect of a sale characteristic in terms of a percentage or dollar amount:

For example, if the comparable sale occurred one year before the taking of the subject property and during a period of rising prices, the appraiser will adjust upward, that is, he will derive a value (either on a per-acre or per-parcel basis) for the comparable. This will be adjusted in accord with the percent by which sales of that kind of property increased over the period of time between the two relevant dates.⁴⁴⁹

Some characteristics may require quantitative rather than qualitative adjustment, such as market conditions (time) as described above, or expenditures made immediately after purchase.⁴⁵⁰ But quantitative adjustment is not appropriate for characteristics for which reliable numerical adjustments cannot be derived from market data.⁴⁵¹ Indeed, without adequate market support, the apparent precision of quantitative adjustments would convey a false sense of accuracy.⁴⁵²

Qualitative adjustment may also be appropriate—and necessary—where market data does not support a quantitative adjustment. As another court recognized:

[The appraiser’s] decision to make qualitative rather than quantitative adjustments to his identified comparable sales . . . is reasonable in light of the multiple factors involved in each of the sales and the complex market in which the subject tracts are located. Further, . . . [the

446 *Knollman v. United States*, 214 F.2d 106, 109 (6th Cir. 1954) (citation omitted).

447 *Eastman II*, 528 F. Supp. at 1186.

448 *E.g., Childers v. United States*, 116 Fed. Cl. 486, 498-99 (Fed. Cl. 2013); *United States v. 381.76 Acres of Land (Montego Group)*, No. 96-1813-CV, 2010 WL 3734003, at *7 (S.D. Fla. Aug. 3, 2010), *adopted sub nom. United States v. 10.00 Acres of Land*, No. 99-0672-CIV, 2010 WL 3733994 (S.D. Fla. Sept. 22, 2010), *aff’d sub nom. United States v. Gonzalez*, 466 F. App’x 858 (11th Cir. 2012) (per curiam).

449 *Eastman II*, 528 F. Supp. at 1186; *see also McCann Holdings, Ltd. v. United States*, 111 Fed. Cl. 608, 619-22 (Fed. Cl. 2013).

450 *See Eastman II*, 528 F. Supp. at 1186; Section 1.5.2.3; Section 4.4.2.1.

451 *McCann Holdings*, 111 Fed. Cl. at 622-23 (“This Court is not persuaded that [the appraiser’s] numbers were derived from sufficient market data. While [the] expert applied various percentage-based adjustments, it is not clear what market data supported a particular adjustment or why a given numerical adjustment was chosen.”).

452 *Cf. Borman v. Raymark Indus., Inc.*, 960 F.2d 327, 334 n.12 (3d Cir. 1992) (“Requiring the experts to speak in terms of numerical percentages introduces a false precision into the evidence. . . . Honest, but more flexible, words such as ‘substantial factor,’ ‘major contribution’ or ‘significant cause’ are more suitable to the . . . function of justly and fairly resolving uncertainties.”); *In re Gulf Oil/Cities Serv. Tender Offer Litig.*, 142 F.R.D. 588, 596 (S.D.N.Y. 1992).

appraiser] initially attempted to use a quantitative approach to appraise one of the [tracts] but found that method to be problematic While [qualitative analysis] is not without flaws, it appears to this Court that it is the superior approach, especially considering the . . . market and . . . the parcels at issue.⁴⁵³

Qualitative analysis can be particularly useful in evaluating considerations such as development restrictions, particular land use restrictions, allowable density, the presence of environmental lands, and the impact of easements or encumbrances.⁴⁵⁴

- 4.4.2.3. Sales Verification.** In developing an opinion of market value for the purpose of determining just compensation, the appraiser must verify sales amounts and ascertain whether terms and conditions of a sale were conventional and under open competitive market conditions.⁴⁵⁵ Verification typically requires interviews and discussions with the seller, the buyer, the closing agency, and/or the broker handling the transaction in addition to confirming recordation.⁴⁵⁶ As federal courts recognize, prices reported in public records may not tell the whole story:

[C]ertainly most transactions are likely to be influenced by the motives of the parties thereto, such as the special needs or the strong desires of the buyer, the financial or other exigencies of the seller, and the whims, follies, fancies or ignorance of local values on the part of one or both of them [T]hese are all matters of which persons . . . such as a party to the sale itself or the broker or agent who affected it, can be expected to know at least something More often than not the true consideration paid is not stated in a deed And . . . accurate knowledge of the price paid cannot be calculated from revenue stamps without accurate knowledge of liens and encumbrances on the land at the time of the sale which might or might not appear in the records⁴⁵⁷

Verification must be accomplished by competent and reliable personnel, and if the case goes into condemnation, the appraiser who will testify must personally verify the sale. As the Third Circuit explained, the appraiser's function is "to express his opinion of the value of real estate which he has personally examined and studied"⁴⁵⁸ A real estate appraiser, "no matter how well qualified he may be in general, . . . is not an expert on the value of property which is unknown to him or is situated in an area which is unfamiliar to him."⁴⁵⁹

- 4.4.2.4. Transactions Requiring Extraordinary Care.** Not all property transactions can be used as potential comparable sales in valuations for federal acquisitions. While few types of

⁴⁵³ *Montego Group*, 2010 WL 3734003, at *7 (citations omitted) (accepting valuation opinions derived from qualitative analysis as "honest attempts to determine the value of peculiar properties in a peculiar market while taking complex factors into account").

⁴⁵⁴ *Childers*, 116 Fed. Cl. at 498-99.

⁴⁵⁵ *Accord United States v. 5,139.5 Acres of Land*, 200 F.2d 659, 662 (4th Cir. 1952); see *United States v. 429.59 Acres of Land (Imperial Beach)*, 612 F.2d 459, 462 (9th Cir. 1980) ("[T]he proper inquiry is whether the expert has made careful inquiry into the facts of the other sales, and whether his opinion is founded upon such careful inquiry").

⁴⁵⁶ See *United States v. Katz*, 213 F.2d 799, 800 (1st Cir. 1954).

⁴⁵⁷ *Id.*

⁴⁵⁸ *United States v. 60.14 Acres of Land*, 362 F.2d 660, 668 (3d Cir. 1966).

⁴⁵⁹ *Id.* ("Instead the essential elements of the real estate expert's competency include his knowledge of the property and of the real estate market in which it is situated, as well as his evaluating skill and experience as an appraiser.").

transactions are categorically excluded from consideration under modern jurisprudence,⁴⁶⁰ as a matter of law several types of sales can be considered only under certain circumstances or for limited purposes. Accordingly, careful verification and analysis of each sale is required to ensure the appraiser's opinion of value does not reflect any legally improper considerations.⁴⁶¹ Of course, extraordinary verification alone would not allow an appraiser to rely on a sale that cannot be considered for other reasons, such as a sale involving a different property interest than the property under appraisal,⁴⁶² or a sale excluded from consideration under a **legal instruction** applying the scope of the project rule.⁴⁶³

Some transactions require special attention, verification, and analysis, including:

- **Prior sales of the same property**
- **Transactions with potential nonmarket motivations**
- **Exchanges of property**
- **Sales that include personal property**
- **Contingency sales**
- **Offers, listings, contracts, and options**
- **Sales after the date of valuation**

4.4.2.4.1. Prior Sales of the Same Property. Prior sales of the same property, if unforced, arm's-length, for cash or its equivalent, and reasonably recent to the date of valuation, are extremely probative evidence of market value.⁴⁶⁴ Accordingly, the appraiser must determine what the owner paid for the property being appraised.⁴⁶⁵ In analyzing prior sales, adjustments may be necessary to account for changes in market conditions, transaction conditions, or other factors.⁴⁶⁶ Prior sales of the same property are not categorically entitled to more weight than sales of other comparable properties: the relative importance of each must be analyzed under the particular facts of the appraisal assignment.⁴⁶⁷

Each appraisal report must state and support the consideration accorded to the immediate past sale of the property under appraisal, even if the appraiser concludes the circumstances of the prior sale may have rendered it irrelevant to the determination of the market value as of the date of valuation.⁴⁶⁸ An unsupported statement that the sale did not represent market value, or was not an arm's-length transaction is not sufficient: as the Eighth Circuit admonished, disregarding

⁴⁶⁰ *United States v. 320 Acres of Land*, 605 F.2d 762, 798-99 & nn.65-66 (5th Cir. 1979) (citing cases); see, e.g., *United States v. 4.85 Acres of Land in Lincoln Cty.*, 546 F.3d 613, 618-19 (9th Cir. 2008) (post-acquisition sales) (citing cases).

⁴⁶¹ See *Olson v. United States*, 292 U.S. 246, 256 (1934) ("Considerations that may not reasonably be held to affect market value are excluded."); see, e.g., *4.85 Acres*, 546 F.3d at 619 (requiring "... separate findings of the comparability of each of the proffered comparable properties to the [subject] property" (quoting *United States v. 68.94 Acres of Land*, 918 F.2d 389, 399 (3d Cir. 1990))).

⁴⁶² *United States v. 46,672.96 Acres of Land in Doña Ana Cty.*, 521 F.2d 13, 17 (10th Cir. 1975).

⁴⁶³ See Section 4.5; see generally *320 Acres*, 605 F.2d at 798-803 & nn.61-81.

⁴⁶⁴ *United States v. 100.01 Acres of Land*, 102 F. App'x 295, 298 (4th Cir. 2004) (unpubl.); *United States v. 428.02 Acres of Land*, 687 F.2d 266, 271 (8th Cir. 1982); *Surfside of Brevard, Inc. v. United States*, 414 F.2d 915, 917 (5th Cir. 1969); *United States v. Leavell & Ponder, Inc.*, 286 F.2d 398, 403-04 (5th Cir. 1961); *Simmonds v. United States*, 199 F.2d 305, 307-08 (9th Cir. 1952); *Baetjer v. United States*, 143 F.2d 391, 397 (1st Cir. 1944); *United States ex rel. Tenn. Valley Auth. v. Harralson*, 43 F.R.D. 318, 323-24 (W.D. Ky. 1966) (mem.).

⁴⁶⁵ During litigation, the appraiser should consult with the attorney on how to obtain this information, as communications with landowners may need to go through counsel.

⁴⁶⁶ See, e.g., *United States v. 633.07 Acres of Land*, 362 F. Supp. 451, 453 (M.D. Pa. 1973) (upholding admission of prior sale, reflecting payment of preexisting debt, because it was a "bona fide and voluntary transaction" and circumstances were fully explained and went to weight, not admissibility; court warned that if the prior sale had been admitted "without explanation as to the circumstances surrounding the transaction, . . . reversible error would have been committed"); cf. *United States v. Certain Land Situated in Detroit (DIBCO III)* (for *Detroit Int'l Bridge Co.*), 600 F. Supp. 2d 880, 897 (E.D. Mich. 2009), *aff'd*, 633 F.3d 418 (6th Cir. 2011) (reasonable for appraiser to discount prior sale of property "due to evidence that it was not an arms length transaction").

⁴⁶⁷ *Hickey v. United States*, 208 F.2d 269, 273 (3d Cir. 1953) ("While it is true that prior sales of the condemned property eliminate any question as to whether another sale was of a comparable piece of property, nevertheless the comparison of sales of other properties have their advantages too. For example, the sale of another property may be closer in time to the date of the taking, and therefore would reflect more accurately the condition of the market at the time of the taking.").

⁴⁶⁸ See Section 1.3.1.5. Appraisals subject to the Uniform Act must include "at least a 5-year sales history of the property." 49 C.F.R. § 24.103(a)(2)(i).

a prior transaction without first contacting the participants “to ascertain their motives” would be based on “nothing but speculation[.]”⁴⁶⁹

These requirements reflect the federal courts’ recognition that considering a property’s sale and use history is simply good practice in “forming an intelligent opinion” of its value.⁴⁷⁰ Because a prior sale of the property being acquired is extremely pertinent, such evidence has been allowed even when a considerable period of time has elapsed between the sale and the date of valuation.⁴⁷¹ The sales history should also include prior transactions involving a portion of the property under appraisal, such as sales of individual parcels that were subsequently assembled to form the single property under appraisal.⁴⁷²

4.4.2.4.2. Transactions with Potential Nonmarket Motivations.

Not all property transactions can be used as potential comparable sales in valuations for federal acquisitions. While few types of transactions are categorically excluded from consideration under modern jurisprudence,⁴⁷³ as a matter of law several types of sales can be considered only under certain circumstances or for limited purposes. Accordingly, careful verification and analysis of each sale is required to ensure the appraiser’s opinion of value does not reflect any legally improper considerations.⁴⁷⁴ Transactions that involve potential nonmarket motivations include: (1) forced sales, (2) distress sales, (3) settlement negotiations, (4) sales between related parties or entities, (5) sales to government or other entities with condemnation authority, (6) sales to environmental or other public interest organizations, and (7) project-influenced sales.

(1) **Forced Sales.** Forced sales are transactions that occur under a form of legal compulsion such as foreclosure or condemnation, are nonmarket transactions as a matter of law, and therefore cannot be considered as comparable sales.⁴⁷⁵ Forced sales include sales “at foreclosure, under deed of trust securing indebtedness, at execution of attachment, at auction, under the pressure of the exercise of the power of eminent domain, or other coercion *sui generis*—types of legal

Under these Standards, appraisal reports must include:

- **a 10-year sales history of the subject property (including the whole property or portions);**
- **the most recent sale of the subject property (regardless of when it occurred); and**
- **an analysis of the most recent sale’s relevance (or lack of relevance) to the property’s market value on the date of valuation.**

469 *428.02 Acres*, 687 F.2d at 270-72, 271 n.5; see *Olson v. United States*, 292 U.S. 246, 257 (1934) (prohibiting “mere speculation and conjecture” as basis for determining value).

470 See *Int’l Paper Co. v. United States*, 227 F.2d 201, 208 (5th Cir. 1955).

471 E.g. *Carlstrom v. United States*, 275 F.2d 802, 809 (9th Cir. 1960) (sale six or seven years prior to valuation date); *Dickinson v. United States*, 154 F.2d 642, 43 (4th Cir. 1946) (six years); *United States v. Bechtold Co.*, 129 F.2d 473, 479 (8th Cir. 1942) (passage of 14 years “went to the weight of the evidence, rather than to its admissibility.”).

472 See *United States v. 1.604 Acres of Land (Granby III)*, 844 F. Supp. 2d 685, 688-89 (E.D. Va. 2011) (finding more facts were needed to determine admissibility of prior sales of individual parcels in valuation of ensuing assembled property; prior sales of parcels were ultimately admitted for purpose of comparison with concurrent comparable sales, but not as evidence of value of the property as assembled).

473 *United States v. 320 Acres of Land*, 605 F.2d 762, 798-99 & nn.65-66 (5th Cir. 1979) (citing cases); see, e.g., *United States v. 4.85 Acres of Land in Lincoln Cty.*, 546 F.3d 613, 618-19 (9th Cir. 2008) (refusing to categorically exclude post-acquisition sales) (citing cases).

474 See *Olson*, 292 U.S. at 256 (“Considerations that may not reasonably be held to affect market value are excluded.”); see, e.g., *4.85 Acres*, 546 F.3d at 619 (requiring “separate findings of the comparability of each of the proffered comparable properties to the [subject] property”), quoting *United States v. 68.94 Acres of Land*, 918 F.2d 389, 399 (3d Cir. 1990).

475 *United States v. Certain Land in Fort Worth*, 414 F.2d 1029, 1031-32 (5th Cir. 1969); *D.C. Redev. Land Agency v. 61 Parcels of Land*, 235 F.2d 864, 865-66 (D.C. Cir. 1956); *Hickey v. United States*, 208 F.2d 269, 275 (3d Cir. 1953) (“A forced sale is one which has no probative value whatever and therefore must be excluded from evidence.”); *United States v. 5139.5 Acres of Land*, 200 F.2d 659, 661 (4th Cir. 1952); *Baetjer v. United States*, 143 F.2d 391, 397 (1st Cir. 1944); see *United States v. 79.95 Acres of Land*, 459 F.2d 185, 187 (10th Cir. 1972); cf. *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 538 (1994) (“[F]air market value’ presumes market conditions that, by definition, simply do not obtain in the context of a forced sale.”).

compulsion generally disclosed by public records.”⁴⁷⁶ Appraisers must carefully investigate the circumstances of a potential forced sale to ensure they do not consider a transaction in which “elements of compulsion so affected the seller that the sale could not be said to be fairly representative of market value at the time made.”⁴⁷⁷

(2) Distress Sales. Similarly, distress sales and sales with atypical financing terms are questionable indicators of value and can be used only with great care.⁴⁷⁸ If limited market data necessitates reference to such a sale or sales, the appraiser must carefully analyze the circumstances of each transaction⁴⁷⁹ and make proper adjustments to account for any nonmarket motivations.⁴⁸⁰

(3) Settlement Negotiations. It is generally recognized that offers of settlement are not reliable indicators of market value because such offers are often in the nature of compromise to avoid the expense and uncertainty of litigation.⁴⁸¹ As a result, appraisers cannot rely on settlement negotiations or completed settlements as evidence of market value. As early as its October 1876 term, the Supreme Court noted that well-recognized principles made an offer of compromise inadmissible.⁴⁸² The prohibition against the admissibility of offers to compromise and completed compromises is also codified in Rule 408 of the Federal Rules of Evidence.⁴⁸³ As with any sale, the appraiser should not simply assume that a transaction was a settlement to avoid or resolve litigation, but rather should contact the participants to ascertain their motives.⁴⁸⁴

(4) Sales Between Related Parties or Entities. Sales between members of a family or closely related business entities are not arm’s-length transactions, and since they may involve other factors than market value considerations, such sales generally cannot be considered.⁴⁸⁵

(5) Sales Involving the Government or Other Condemnation Authority. Sales to government entities are inherently problematic for federal appraisal purposes because they routinely

476 *Fort Worth*, 414 F.2d at 1031-32 (quoting *61 Parcels*, 235 F.2d at 865-66); see *79.95 Acres*, 459 F.2d at 187 (“[A] foreclosure sale is not an arms length transaction involving a willing buyer and a willing seller. The amount of money one has ‘invested’, i.e., paid, in the acquisition of property by foreclosure is not relevant It is not evidence of fair market value.”); cf. *BFP*, 511 U.S. at 537 (“Market value . . . is the very antithesis of forced-sale value.”).

477 *Hickey*, 208 F.2d at 275; *Baefjer*, 143 F.2d at 397 (“Only sales on foreclosure and similar forced transactions not on the open market are without probative force as a matter of law. The motivation behind other transactions can be shown”); accord *5139.5 Acres*, 200 F.2d at 661.

478 *United States v. 480.00 Acres of Land (Fornatora)*, 557 F.3d 1297, 1305 (11th Cir. 2009) (“distress sales . . . offer[] little insight”); *Hickey*, 208 F.2d at 275 (“[C]ompulsion may also be that created by business circumstances. For example, a property taken in discharge of a debt may be considered a forced sale, where the creditor had little choice in the matter.”); cf. *United States v. Deist*, 442 F.2d 1325, 1327 (9th Cir. 1971) (“a ‘forced’ or ‘distress’ sale wherein the seller was shown to have been in financial difficulty and in need of making a sale”).

479 See, e.g., *Hickey*, 208 F.2d at 275-76.

480 See, e.g., *Fornatora*, 557 F.3d at 1305; *Deist*, 442 F.2d at 1327 (finders of fact “recognized the [forced or distress] sales for what they were and gave little weight to either”).

481 *United States v. 10.48 Acres of Land*, 621 F.2d 338, 339-40 (9th Cir. 1980); *Slattery Co. v. United States*, 231 F.2d 37, 41 (5th Cir. 1956); *United States v. 46,672.96 Acres of Land in Doña Ana Clys.*, 521 F.2d 13 (10th Cir. 1975); *Evans v. United States*, 326 F.2d 827 (8th Cir. 1964); *United States v. Foster*, 131 F.2d 3 (8th Cir. 1942).

482 *Home Ins. Co. v. Balt. Warehouse Co.*, 93 U.S. 527, 548 (1876); *United States v. Playa De Flor Land & Improvement Co.*, 160 F.2d 131, 136 (5th Cir. 1947); cf. *Barnes v. S.C. Pub. Serv. Auth.*, 120 F.2d 439, 440 (4th Cir. 1941).

483 Rule 408 is designed “to encourage settlements which would be discouraged if such evidence were admissible.” FED. R. EVID. 408, notes of Committee on the Judiciary, Senate Report No. 93-1277.

484 See *United States v. 428.02 Acres of Land*, 687 F.2d 266, 270-72, 272 n.5 (8th Cir. 1982).

485 See *Deist*, 442 F.2d at 1327 (“purported sale was shown to have been an ‘intra-family’ transaction”); see *United States v. 47.14 Acres of Land*, 674 F.2d 722, 726 (8th Cir. 1982) (“[C]omparable sales are the best evidence of the value . . . , which sales on the whole reflect the principle of a willing seller and a willing buyer concluding arms-length negotiations.”); *Welch v. Tenn. Valley Auth.*, 108 F.2d 95, 101 (6th Cir. 1939) (“Sales at arms length of similar property are the best evidence of market value.”); cf. *United States v. Leavell & Ponder, Inc.*, 286 F.2d 398, 405-06 (5th Cir. 1961) (describing transaction in which the parties “‘reach(ed) up in mid-air and pull(ed) down a figure—any figure they wanted to,’ and that is what they reported for income tax purposes”).

involve nonmarket considerations, making them inaccurate indicators of market value and therefore improper to consider as comparable sales.⁴⁸⁶ For example, as recognized by the federal courts, such transactions tend to reflect payments “in the nature of compromise to avoid the expense and uncertainty of litigation and are not fair indications of market value.”⁴⁸⁷ Courts also exclude such evidence in litigation because it “complicates the record, confuses the issue, is misleading, and especially in condemnation cases, raises collateral issues as to the conditions under which such sales were made”⁴⁸⁸

Sales to government entities are inherently suspect and cannot be relied on as comparable sales without a determination that they are true open-market transactions.

Sales to government entities must therefore be viewed as *suspect* from the outset, but they cannot, and should not, be rejected by appraisers as categorically invalid comparable sales.⁴⁸⁹ If the appraiser determines, after careful analysis and verification, that a sale to a government entity was a true open-market transaction, the sale may be appropriate to consider,⁴⁹⁰ particularly if there is a paucity of private sales available for use in the sales comparison approach to value.⁴⁹¹ But such a determination requires extraordinary verification due to the nonmarket considerations inherent in most government acquisitions.⁴⁹² Mere conclusory statements that a transaction was voluntary or did not involve the threat of condemnation are not sufficient.⁴⁹³ For example, the Tenth Circuit barred consideration of the government transactions at issue despite one witness’s testimony that the transactions were “voluntary,” pointing out that the same witness “also admitted that the government was eager to obtain the [properties] without using the condemnation process.”⁴⁹⁴

While some cases allude to a split of legal authority on the admissibility of prices paid by entities with the power of eminent domain,⁴⁹⁵ the federal courts uniformly hold that such sales *cannot*

486 See *United States v. 0.59 Acres of Land*, 109 F.3d 1493, 1498 (9th Cir. 1997); *10.48 Acres*, 621 F.2d at 339; *United States v. 25.02 Acres of Land*, 495 F.2d 1398, 1403 (10th Cir. 1974); *Transwestern Pipeline Co. v. O’Brien*, 418 F.2d 15, 17-18 (5th Cir. 1969); *Evans*, 326 F.2d at 831; *Slattery*, 231 F.2d at 40-41.

487 *10.48 Acres*, 621 F.2d at 339 (quoting *Slattery*, 231 F.2d at 41).

488 *United States ex rel. Tenn. Valley Auth. v. Bailey*, 115 F.2d 433, 434 (5th Cir. 1940); see also *Duk Hea Oh v. Nat’l Capital Revitalization Corp.*, 7 A.3d 997, 1010-11 (D.C. Cir. 2010) (barring evidence of other government acquisitions that would “bias the [government] by requiring it to explain its compromise decision and ‘what’s going on with the government’ and would occasion a ‘frolic and detour’ that would ‘bias’ the [government]”).

489 See *10.48 Acres*, 621 F.2d at 339-40; cf. *Olson v. United States*, 292 U.S. 246, 256 (1934) (“[T]o the extent that probable demand by prospective purchasers or condemnors affects market value, it is to be taken into account. But . . . [v]alue to the taker of a piece of land combined with other parcels for public use is not the measure of or a guide to the compensation to which the owner is entitled.”) (citation omitted).

490 *Transwestern*, 418 F.2d at 18 (Sales to condemnors can be considered “only when it is certain that those sales truly represent the market value of the land in question.”); *25.02 Acres*, 495 F.2d at 1403 (Such sales “often involve compulsion, coercion or compromise [A] condemning party might be willing to give more than the property is worth, and the owner might be willing to take less than it is worth rather than undergo a lawsuit.”).

491 E.g., *United States v. 264.80 Acres of Land in Ramsey Cty.*, 360 F. Supp. 1381, 1383 (D. N.D. 1973) (“[T]his purchase of land in the area by [a government agency] was not an isolated transaction. The [agency] had made several other purchases in the area, and . . . taken together, all of these purchases had a significant impact on the general market value of land in that community.”); see *Olson*, 292 U.S. at 257.

492 E.g., *United States v. 46,672.96 Acres in Doña Ana Cty.*, 521 F.2d 13, 17 (10th Cir. 1975) (“[G]reat caution should be used . . . since [the price paid by a condemnor] is an inaccurate indicator of market value.”); see also *United States v. 2.739 Acres of Land in Santa Cruz Cty.*, 609 F. App’x 436, 437-38 (9th Cir. 2015) (unpubl.) (upholding use of sale to government entity given “evidence that the sale had been voluntary”); cf. *Olson*, 292 U.S. at 256 (“Considerations that may not reasonably be held to affect market value are excluded. Value to the taker of a piece of land combined with other parcels for public use is not the measure of or a guide to . . . compensation . . .”).

493 *Transwestern*, 418 F.2d at 19; see, e.g., *264.80 Acres in Ramsey*, 360 F. Supp. at 1383.

494 *46,672.96 Acres in Doña Ana*, 521 F.2d at 17.

495 See *Duk Hea Oh v. Nat’l Capital Revitalization Corp.*, 7 A.3d 997, 1010-11 (D.C. Cir. 2010) (noting D.C. Circuit’s conflicting holdings in *Nash*, 395 F.2d at 573, 575-76, and *Hannan v. United States*, 131 F.2d 441, 442-43 (D.C. Cir. 1942)). Compare *Transwestern*, 418 F.2d at 18-19 (“generally prevailing rule” excludes sales to buyers with the power of eminent domain, subject to “sensible exception” if party “show[s] that the sales in question were made willingly, without coercion, compulsion, or compromise”) with *Nash v. D.C. Redev. Land Agency*, 395 F.2d 571, 575 (D.C. Cir. 1967) (McGowan, J., explaining why petition for rehearing en banc should be denied) (“minority rule . . . [admits] such evidence . . . provided the purchase by the condemnor was made without compulsion”).

be considered if they are compelled by nonmarket considerations, but *may* be considered if they are *true open-market transactions free of compulsion*.⁴⁹⁶ Indeed, the federal courts have recognized a multitude of motivations that may compel a government entity (or other entity with the power of eminent domain⁴⁹⁷) to acquire lands at a price other than market value. For example, “the necessity of the purchaser, the disposition of the vendor, and peculiar circumstances and conditions may be such as to oblige a purchaser to submit to severe exactions in order to consummate a purchase without delay.”⁴⁹⁸ Or, “in an accumulation for a project such as a large airplane plant, the last parcels are undoubtedly more difficult to obtain, at their fair value, since the purpose of the acquisition is then usually known[,]” and due to “the exigencies which necessitated speed[, the] . . . parcels were urgently wanted and they were bought without regard to the real value”⁴⁹⁹ Moreover, “a condemning party might be willing to give more than the property is worth, and the owner might be willing to take less than it is worth rather than undergo a lawsuit.”⁵⁰⁰ Because of the likelihood of such nonmarket motivations, appraisers can consider sales to buyers with the power of eminent domain as “evidence of market value only when it is certain that those sales *truly* represent the market value of the land in question.”⁵⁰¹

To ensure compliance with federal case law, the appraiser must identify, analyze, and rule out or appropriately adjust for all potential nonmarket motivations before relying on a sale to a government entity as a comparable sale.⁵⁰² Appraisers must carefully verify the circumstances surrounding a sale to a government entity to ensure that it meets the criteria of market value or can be accurately adjusted to reflect market value.⁵⁰³ See Section 1.5.2.4 and Appendix E.

(6) Sales Involving Environmental or Other Public Interest Organizations. Sales to environmental or other public interest organizations may be similarly suspect. For example, acquisitions may be authorized for a government conservation or preservation project before adequate funds are appropriated to acquire the entire project area.⁵⁰⁴ Conservation or other environmental organizations may then voluntarily acquire lands within the project area for the sole purpose of transferring them to the government once funding becomes available.⁵⁰⁵ Sales made

496 *United States v. 0.59 Acres of Land*, 109 F.3d 1493, 1498 (9th Cir. 1997); *46,672.96 Acres in Doña Ana*, 521 F.2d at 17; *Transwestern*, 418 F.2d at 18-19; *Evans v. United States*, 326 F.2d 827, 831 (8th Cir. 1964); *Slattery Co. v. United States*, 231 F.2d 37, 40-41 (5th Cir. 1956).

497 For example, Congress can delegate a limited right of eminent domain to private entities “to be exercised by them in the execution of works in which the public is interested.” *Miss. & Rum R. Boom Co. v. Patterson*, 98 U.S. 403, 406 (1878); e.g., Natural Gas Act, 15 U.S.C. § 717f(h) (giving gas companies power of eminent domain for construction of natural gas pipelines).

498 *United States v. Freeman*, 113 F.370, 371 (D. Wash. 1902) (excluding “the price of adjoining lands, which was fixed by agreement, and was paid by the government” from consideration); see *Justice v. United States*, 145 F.2d 110, 111 (9th Cir. 1944) (rejecting consideration of “the sum paid by the Government for comparable lands” (citing *Freeman*, 113 F. at 371)).

499 *Phillips v. United States*, 148 F.2d 714, 716 (2d Cir. 1945); see *Olson*, 292 U.S. at 257.

500 *25.02 Acres*, 495 F.2d at 1403; see *46,672.96 Acres in Doña Ana*, 521 F.2d at 17.

501 *Transwestern*, 418 F.2d at 19.

502 As J.D. Eaton observed, “unlike most private purchases, a government purchase and the decision-making process that led to it are usually well documented. The appraiser can take advantage of that documentation in the sales verification process. In fact, the appraiser *must* take advantage of it.” EATON, *supra* note 16, at 222.

503 Sales to a *buyer* with condemnation authority are inherently suspect, and cannot be relied on as comparable sales without a determination that they are true open-market transactions. But sales involving a *seller* with condemnation authority are a different matter.

504 For example, Congress authorized an expansion of the boundaries of Everglades National Park in 1989, but did not provide funding for the private land acquisition necessary for expansion until 1992, and the expansion was not fully funded until 1999. See 16 U.S.C. §§ 410r-5 *et seq.*; *United States v. 480.00 Acres of Land (Fornatora)*, 557 F.3d 1297, 1300 (11th Cir. 2009) (discussing East Everglades Acquisition Project); see also Section 4.5 (Project Influence).

505 See, e.g., 16 U.S.C. § 410r-9(2)(B) (authorizing acquisition “from willing sellers by donation, purchase with donated or appropriated funds, or exchange” of property interests “within the area . . . to be added to Everglades National Park”).

under such circumstances may well reflect project influence, which cannot be considered.⁵⁰⁶ And of course, where “a market for a particular use is created solely as a result of the project for which the land is condemned, value based on that use must be excluded.”⁵⁰⁷ Moreover, such sales, like direct sales to the government, typically involve nonmarket motivations and considerations beyond the property’s market value for its “highest and most profitable use....”⁵⁰⁸ But “[c]onsiderations that may not reasonably be held to affect market value are excluded.”⁵⁰⁹ Thus, as with sales to government entities, sales to public interest organizations cannot be used as comparable sales without careful analysis to identify and rule out or adjust for potential nonmarket motivations.⁵¹⁰

(7) Project-Influenced Sales. As discussed in depth in Section 4.5, valuations must disregard any value attributable to the government project prompting the acquisition.⁵¹¹ Consideration of project influence on market value is prohibited under the scope of the project rule. Whether the rule applies and how to apply it in a particular valuation assignment will require legal instructions.

4.4.2.4.3. Exchanges of Property. Sales involving an exchange of property generally introduce too many collateral issues to be reliable indicators of market value. As the Fifth Circuit explained, if evidence of an exchange “is to be considered as proof of present valuation, the values of such exchanged lands obviously must be proved by the same standards as attends proof of value of the property being condemned.”⁵¹²

4.4.2.4.4. Sales that Include Personal Property. Sales that include personal property cannot be considered unless they can be adjusted to reliably reflect only the real property transaction.⁵¹³ For example, in considering the sale of a farm in which the price included personal property, the Second Circuit held it was legal error to exclude reliable evidence of “the actual consideration received for [the] realty.”⁵¹⁴ In the sale of a farm, the purchase price often includes equipment, livestock, and other items of consideration.⁵¹⁵

506 See Section 4.5; cf. *United States v. Miller*, 317 U.S. 369, 376-77 (1943) (“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.”).

507 *United States v. 46,672.96 Acres of Land in Doña Ana Cty.*, 521 F.2d 13, 15-16 (10th Cir. 1975); cf. *Miss. & Rum River Boom Co. v. Patterson*, 98 U.S. 403, 410 (1878) (“[T]he proper inquiry was, ‘What is the value of the property for the most advantageous uses to which it may be applied?’” (quoting *In re Furman Street*, 17 Wend. 649 (N.Y. Sup. Ct. 1836))).

508 *Olson v. United States*, 292 U.S. 246, 255 (1934); see Section 4.3. This may be true of not only the buyer’s but also the seller’s motivations (e.g., sellers may claim such sales as a tax write-off). Cf. *United States v. Leavell & Ponder, Inc.*, 286 F.2d 398, 405-06 (5th Cir. 1961).

509 *Olson*, 292 U.S. at 256; cf. *Boom Co.*, 98 U.S. at 407-08 (“In determining the value of land appropriated for public purposes, the same considerations are to be regarded as in a sale of property between private parties. . . . [The amount] is to be estimated by reference to the uses for which the property is suitable, having regard to the existing business or wants of the community . . .”).

510 Where public interest organizations work closely with the government agency administering conservation or similar projects, extensive sale documentation may be available. In such sales, the government agency commonly approves an organization’s selection of appraisers, provides or assists in the development of appraiser instructions, and reviews the appraisal before the organization makes an offer to purchase the property. See note 528, *supra*, quoting *Eaton*, *supra* note 16, at 221-23.

511 *United States v. Reynolds*, 397 U.S. 14, 16-17 (1970); *Miller*, 317 U.S. at 376-77; *United States v. 320 Acres of Land*, 605 F.2d 762, 781-90 (5th Cir. 1979).

512 *Leavell & Ponder*, 286 F.2d at 406.

513 Cf. *Stephenson Brick Co. v. United States ex rel. Tenn. Valley Auth.*, 110 F.2d 360, 361 (5th Cir. 1940) (“the fair value . . . , excluding personal property, ought to be ascertained”).

514 *United States v. 18.46 Acres of Land in Swanton*, 312 F.2d 287, 289 (2d Cir. 1963).

515 See APPRAISAL INST. & AM. SOC’Y OF FARM MANAGERS, *THE APPRAISAL OF RURAL PROPERTY* 234-35 (2d ed. 2000).

4.4.2.4.5. Contingency Sales. Sales of property with a highest and best use for some form of development that requires rezoning or land use permits generally take the form of *contingency sales* or initial options.⁵¹⁶ Such sales are *contingent* on the would-be purchaser's ability to procure the rezoning or permitting necessary to develop the property to its highest and best use; if the rezoning or permitting is denied, the contingency is not met and the sale does not close (or the option is not exercised). Therefore, when such sales are actually consummated, they reflect the price of property *already rezoned or permitted for development to its highest and best use*. If, on the date of value, the property being appraised would require rezoning or permits to be developed to its highest and best use, completed contingency sales cannot be considered as comparable sales without appropriate adjustments to account for the risks, time delays, and costs associated with rezoning or permitting.⁵¹⁷ As discussed in Section 4.3.2.4, appraisers cannot merely assume that such a rezoning/permit is in place for the property under appraisal or assume that such a rezoning/permit will be granted.⁵¹⁸

4.4.2.4.6. Offers, Listings, Contracts, and Options. Unconsummated transactions are generally not reliable indicators of value and therefore cannot be used as comparable sales. Appraisers should still carefully analyze such data, which may be appropriate to consider for certain limited purposes.⁵¹⁹ “An opinion, however, largely based on owners’ asking prices ought to be rejected, for the courts have decided that even offers by buyers are too unreliable to be considered.”⁵²⁰

A *binding and unconditional* contract of sale can generally be considered as evidence of value, even if title has yet to be conveyed.⁵²¹ By contrast, mere nonbinding offers or unexercised options are not permissible evidence of value, and therefore the appraiser should give little or no weight to such options except to the extent that they may set limits of value.⁵²²

Listings and other nonbinding offers to buy or sell real estate generally cannot be relied on as comparable sales.⁵²³ As the Supreme Court explained:

It is frequently very difficult to show precisely the situation under which these offers were

⁵¹⁶ See, e.g., *United States v. 429.59 Acres of Land (Imperial Beach)*, 612 F.2d 459 (9th Cir. 1980); *United States v. Meadow Brook Club*, 259 F.2d 41, 46 (2d Cir. 1958), *aff’d* *United States v. 50.8 Acres of Land in Hempstead*, 149 F. Supp. 749 (E.D.N.Y. 1957).

⁵¹⁷ *Meadow Brook Club*, 259 F.2d at 46; see *Imperial Beach*, 612 F.2d at 462-63; *Foster v. United States*, 2 Cl. Ct. 426, 447-48 & n.19 (1983) (Sale was “of questionable comparability” because “it was unlikely that a conditional use permit could be obtained.”).

⁵¹⁸ See *Olson v. United States*, 292 U.S. 246, 257 (1934); *United States v. 33.92356 Acres of Land (Piza-Blondet)*, 585 F.3d 1, 4-5, 7-9 (2009); *United States v. 320 Acres of Land*, 605 F.2d 762, 818 & n.128 (5th Cir. 1979) (citing cases); *Meadow Brook Club*, 259 F.2d at 45.

⁵¹⁹ See note 498, *infra*; cf. USPAP, Standards Rule 1-5 (appraisers must analyze “all agreements of sale, options, and listings of the subject property current as of the effective date of the appraisal” in developing opinion of market value).

⁵²⁰ *United States v. Dillman*, 146 F.2d 572, 575 (5th Cir. 1944) (quoting *Atlantic Coast Line R. Co. v. United States*, 132 F.2d 959, 963 (5th Cir. 1943)); *United States v. 0.59 Acres of Land in Pima Cty.*, 109 F.3d 1493, 1496 (9th Cir. 1997) (“[a] letter containing a mere offer to buy ‘comparable’ property [was] plainly inadmissible.”); accord *United States v. 10,031.98 Acres of Land*, 850 F.2d 634, 637 (10th Cir. 1988) (Where witness “used the offering price of replacement property as the basis for figuring the value of his own property . . . , his opinion of the value . . . cannot be separated from the basis on which he arrived at that opinion even though [he] factored in the difference” between the subject property and those on which the offers were received.).

⁵²¹ *United States v. 312.50 Acres of Land*, 812 F.2d 156, 157 (4th Cir. 1987); *United States v. 428.02 Acres of Land*, 687 F.2d 266, 270-71 (8th Cir. 1982); *United States v. 114.64 Acres of Land*, 504 F.2d 1098, 1100 (9th Cir. 1974); *United States v. Smith*, 355 F.2d 807, 811-12 (5th Cir. 1966).

⁵²² *0.59 Acres in Pima*, 109 F.3d at 1495-96; *10,031.98 Acres*, 850 F.2d at 637; *United States v. 158.24 Acres of Land*, 696 F.2d 559, 565 (8th Cir. 1982); *United States v. Certain Land in Fort Worth*, 414 F.2d 1029, 1032 (5th Cir. 1969).

⁵²³ *10,031.98 Acres*, 850 F.2d at 637 (“It has long been held in condemnation suits that the offering price of replacement properties cannot be used to show the fair market value of the condemned land.”); *158.24 Acres*, 696 F.2d at 565 (landowner demand/offer to sell); *Smith*, 355 F.2d at 811-13 (“transactions which were in fact mere offers and not sales and which were, therefore, of no probative value on the question of market value”); *Bank of Edenton v. United States*, 152 F.2d 251, 253 (4th Cir. 1945).

made. In our judgment they do not tend to show value, and they are unsatisfactory, easy of fabrication and even dangerous in their character as evidence upon this subject.⁵²⁴

These risks are still greater “when the offers are proved only by the party to whom they are alleged to have been made, and not by the party making them.”⁵²⁵

An option to purchase is a form of an offer; it is an offer that is irrevocable for the period stipulated. Unexercised options “represent only what a willing seller would take for his land but not, unless and until exercised by the holder of the option, what a willing buyer would give for it.”⁵²⁶ As a result, even if consideration has been paid for it, an unexercised option—like an unaccepted offer—is inadmissible to establish market value. As the Fifth Circuit reasoned:

We cannot agree that paying a consideration for the granting of an option to purchase property at a stipulated price changes its basic character or increases its reliability as an indicia of value. The payment of consideration makes the landowner’s offer irrevocable for the period of time stipulated in the option, . . . and thus assures the holder that amount of time in which to consider all the facts which he deems relevant and to decide at his leisure whether or not to buy. The payment thus merely binds the landowner and indicates the bona fides of his asking price. It does not in any way bind the holder to buy at that price or indicate that he regards that price as a fair one from a purchaser’s standpoint. An option, even though paid for, may well have been acquired for purely speculative reasons.⁵²⁷

Exercised options, on the other hand, “when they result in a binding agreement between buyer and seller, do not differ, from a probative standpoint, from completed transactions.”⁵²⁸

4.4.2.4.7. Sales After the Date of Valuation. Sales that occurred after the date of valuation may be considered if they are not otherwise incompetent as evidence of value.⁵²⁹ In the words of the Eleventh Circuit: “While post-taking sales are not automatically appropriate evidence of comparable value, neither are they automatically inappropriate.”⁵³⁰ But post-acquisition sales may be tainted by government project influence and reflect elements of value that cannot be considered under the scope of the project

Sales after the date of valuation may be considered if they are reliable indicators of value. Post-acquisition sales may be particularly useful in valuing the remainder property in partial acquisitions.

⁵²⁴ *Sharp v. United States*, 191 U.S. 341, 349 (1903).

⁵²⁵ *Id.* In condemnation proceedings, evidence of owners’ offers to sell their own property may be permitted as admissions of value. *Albert Hanson Lumber Co. v. United States*, 261 U.S. 581, 589 (1923) (“the specified price was fixed with perfect freedom; they show a completed agreement of purchase and sale; and there is no reason why they should not be considered as the owner’s admission of the then value of the property”); *cf. United States v. Hart*, 312 F.2d 127, 130 (6th Cir. 1963) (“The testimony was that of the offerors themselves under oath, and not that of the offerees. [It] was not tendered primarily for valuation purposes, negating any apparent motive for fabrication.” citing *Erceg v. Fairbanks Expl. Co.*, 95 F.2d 850, 853-54 (9th Cir. 1938)).

⁵²⁶ *Smith*, 355 F.2d at 811.

⁵²⁷ *Id.* at 812 (quoting *Sharp*, 191 U.S. at 348 (“Pure speculation may have induced it . . .”).

⁵²⁸ *Smith*, 355 F.2d at 812 (citing, *inter alia*, *United States v. Certain Parcels of Land in Phila.*, 144 F.2d 626, 629-30 (3d Cir. 1944)).

⁵²⁹ *United States v. 4.85 Acres of Land in Lincoln Cty.*, 546 F.3d 613, 618-19 (9th Cir. 2008); *United States v. 68.94 Acres of Land in Kent Cty.*, 918 F.2d 389, 398-99 & n.6 (3d Cir. 1990); *United States v. 0.161 Acres of Land in Birmingham*, 837 F.2d 1036, 1044 (11th Cir. 1988); *United States v. 312.50 Acres of Land in Prince William Cty.*, 812 F.2d 156, 157 n.3 (4th Cir. 1987); *United States v. 428.02 Acres of Land in Newton & Searcy Cty.s.*, 687 F.2d 266, 270 (8th Cir. 1982); *United States v. 320 Acres of Land*, 605 F.2d 762, 799-803 (5th Cir. 1979); *United States v. 691.81 Acres of Land in Clark Cty.*, 443 F.2d 461, 462 (6th Cir. 1971); *United States v. 63.04 Acres of Land at Lido Beach*, 245 F.2d 140, 144 (2d Cir. 1957).

⁵³⁰ *0.161 Acres in Birmingham*, 837 F.2d at 1044.

rule.⁵³¹ As a result, before considering such sales, the appraiser must analyze “whether the sales are tainted and how much the taint distorts true market value”⁵³²

In partial acquisitions, post-acquisition sales that reflect the influence of the government project can be highly comparable in valuing the remainder property after acquisition.⁵³³ For example, “[s]uch sales should be particularly useful when the measure of [compensation] . . . is the difference between the market value before and after imposition of an easement.”⁵³⁴

4.4.3. Cost Approach. Where appropriate, appraisers can employ the cost approach in valuing property with existing physical improvements.⁵³⁵ In this approach, the reproduction or replacement cost of the improvements, less appropriate depreciation, is added to the estimated market value of the *land as if vacant* to derive an indication of the market value of the property as a whole.⁵³⁶ It bears noting that the cost approach can yield *an indication* of market value, but “cost is not synonymous with market value. *A fortiori*, cost of land and cost of improvements taken separately and added are not to be equalized with fair market value.”⁵³⁷ Rather, the elements are considered under the cost approach in developing an opinion of the market value of the property as a whole.⁵³⁸

Cost of improvements (incl. entrepreneurial profit)

- depreciation

+ land value

= indication of market value of whole property

While not inherently flawed, the cost approach has often been misused, leading a number of courts to identify the cost approach as “one of the least reliable indicia of market value” for the purpose of measuring just compensation.⁵³⁹ Indeed, as the Fifth Circuit observed, when improperly applied, “reproduction cost evidence, though perhaps making it easier to reach some solution, only ma[kes] the proper solution more difficult.”⁵⁴⁰ As a result, the cost approach is rarely

531 See *4.85 Acres in Lincoln*, 546 F.3d at 618; *68.94 Acres in Kent*, 918 F.2d at 398-99; *320 Acres*, 605 F.2d at 799; Section 4.5.

532 *320 Acres*, 605 F.2d at 802. In some cases, post-acquisition sales may be so distorted by project influence that they must be categorically excluded, particularly if sufficient untainted sales are available for a fair comparison – but this would be a legal determination beyond the scope of the appraiser. See *id.* at 802-03; *68.94 Acres in Kent*, 918 F.2d at 398-99; see also *United States v. Reynolds*, 397 U.S. 14, 20-21 (1970); *4.85 Acres in Lincoln*, 546 F.3d at 618-19 (noting “necessity of a case-by-case approach”); *Lido Beach*, 245 F.2d at 144 (“In every case it is a question of judgment . . .”).

533 Project influence on market value normally must be disregarded, as discussed in Section 4.5. But partial acquisitions present a special situation, as explained in Section 4.6: the measure of compensation for a partial acquisition is the difference in the market value of the landowner’s property before and after the government’s acquisition. As a result, the impact of the government project would normally be disregarded for the “before” value but considered for the “after” value.

534 *United States v. 1129.75 Acres of Land in Cross & Pointsett Clys.*, 473 F.2d 996, 999 (8th Cir. 1973).

535 Compare *United States v. 1.604 Acres of Land (Granby I)*, 844 F. Supp. 2d 668, 682 (E.D.Va. 2011) (allowing cost approach in valuation of partially improved property), with *United States v. 15,478 Square Feet of Land (Balaji Sai)*, No. 2:10-cv-00322, 2011 WL 2471586 at *5 (E.D.Va. June 20, 2011) (rejecting cost approach in valuation of vacant property).

536 *Granby I*, 844 F. Supp. 2d at 682; see *United States v. 100 Acres of Land*, 468 F.2d 1261, 1265 (9th Cir. 1972) (citing *United States v. Toronto, Hamilton & Buffalo Nav. Co.*, 338 U.S. 396, 402, 403 (1949)). While replacement cost and reproduction cost are distinct appraisal concepts as discussed below, the terms sometimes appear interchangeably in case law.

537 *Kinter v. United States*, 156 F.2d 5, 7 (3d Cir. 1946).

538 See, e.g., *United States v. Bechtold Co.*, 129 F.2d 473, 478-79 (8th Cir. 1942) (question is “the value of the land as enhanced by the buildings thereon” (citations omitted)); *United States v. Wise*, 131 F.2d 851, 853 (4th Cir. 1942) (whether existence of improvements “contributes anything to the fair market value of the whole”).

539 *United States v. Certain Interests in Prop. in Champaign Cty.*, 271 F.2d 379, 382 (7th Cir. 1959); accord *United States v. 55.22 Acres of Land in Yakima Cty.*, 411 F.2d 432, 435 (9th Cir. 1969); *United States v. 49,375 Square Feet of Land in Manhattan (252 Seventh Ave.)*, 92 F. Supp. 384, 387-88 (S.D.N.Y. 1950), *aff’d sub nom. United States v. Tishman Realty & Constr. Co.*, 193 F.2d 180 (2d Cir. 1952) (per curiam) (affirming on opinion of trial court) (“[The cost approach] is in itself absurd in the ordinary case, because even in ordinary times it is ridiculous to suppose that anyone would think of reproducing this or any like property, and that same thing would be true in the vast majority of cases, I should think.”); see EATON, *supra* note 16, at 159 (noting “flagrant misuse of the approach by appraisers [who err] from lack of knowledge [or] use the cost approach to intentionally exaggerate the market value of property”).

540 *United States v. Benning Hous. Corp.*, 276 F.2d 248, 253 (5th Cir. 1960).

acceptable as a stand-alone indication of value for federal acquisitions;⁵⁴¹ instead, it is typically employed either to test the financial feasibility of a potential highest and best use⁵⁴² or to “check” or test the reasonableness of estimates of value indicated by other approaches.⁵⁴³ Use of the cost approach may be appropriate in the valuation of properties with highly specialized improvements that have no known comparable sales in the area.⁵⁴⁴ Proper application of the cost approach for any purpose under these Standards requires an understanding of its underlying foundations in the context of determining just compensation, as well as the specific elements involved.⁵⁴⁵

4.4.3.1. Foundations of the Cost Approach. Like the sales comparison and income capitalization approaches to value, the cost approach is based on the principle of substitution: a prudent buyer will pay no more for one property than for a similarly desirable property.⁵⁴⁶ Likewise, when several similar properties are available, the one with the lowest price will attract the greatest demand.⁵⁴⁷ The cost approach specifically “reflects the notion that one will not pay more for an existing property than it would cost to construct one’s own replacement for the property.”⁵⁴⁸ But as the Supreme Court recognized, “the value of property may be greater or less than its cost It is the property and not the cost of it that is protected by the Fifth Amendment.”⁵⁴⁹ Thus, the cost approach as a means of measuring value “may have relevance—but only, of course, as bearing on what a prospective purchaser would have paid.”⁵⁵⁰ Its relevance to market value therefore cannot be merely assumed in federal acquisitions; rather, the appraiser must demonstrate that application of the cost approach to a specific property would be relevant to market participants.⁵⁵¹ The Ninth Circuit suggested possible ways to make the necessary showing in *United States v. 55.22 Acres of Land*, such

541 *E.g.*, *55.22 Acres in Yakima*, 411 F.2d at 435 & n.2 (rejecting reproduction cost as direct evidence of value (citing *Toronto, Hamilton*, 338 U.S. at 403)).

542 *See also United States v. 0.59 Acres*, 109 F.3d 1493, 1497 (9th Cir. 1997) (holding it is improper to “artificially increase or decrease the value of the condemnees’ land by ignoring a condition that the Government did not create”); *cf.* *252 Seventh Ave.*, 92 F. Supp. at 389 (“it is obvious that to make [the building] suitable for the particular industry would mean . . . a very large expense and a considerable diminution of income . . .”). Of course, “the determination of a highest and best use does not obviate the need to determine the fair market value in light of the physical condition of the property.” *Rasmuson v. United States*, 807 F.3d 1343, 1346 n.1 (Fed. Cir. 2015) (citing *Olson*, 292 U.S. at 255).

543 *See United States v. Certain Interests in Prop. in Brooklyn*, 326 F.2d 109, 114-15 (2d Cir. 1964); *Fairfield Gardens, Inc. v. United States*, 306 F.2d 167, 173-74 (9th Cir. 1962); *cf.* *252 Seventh Ave.*, 92 F. Supp. at 396 (award of compensation “is not based upon any one abstraction or method of valuation, nor on any one isolated circumstance or even set of circumstances[.]” rather it “take[s] into consideration the physical characteristics of the property, the peculiarities of the area in which it is located, the teachings of the history of property in that area and adjacent areas, [an] inspection of the building and of comparable properties, sales which were brought forward on the theory that they involved equivalent buildings, and every bit of information that seemed relevant”). *See generally* USPAP Standards Rule 1-4(b) (specifying appraisers’ professional obligations “[w]hen a cost approach is necessary for credible assignment results”), Section 1.6 (The Approaches to Value); Section 1.6.5 (Reconciliation Process and Final Opinion of Value).

544 *E.g.*, *United States v. Bechtold Co.*, 129 F.2d 473 (8th Cir. 1942) (allowing cost approach in valuation of book bindery plant with large, heavy machinery bolted in place, where no bindery sales had occurred in 20 years and no other sales upon which to base valuation had occurred in vicinity; and under state law, machinery was part of realty (see Section 4.1.3)); *see 55.22 Acres in Yakima*, 411 F.2d at 435-36 (prohibiting cost approach as direct evidence of value where improvements were not “of an unusual nature, such as a church, for which comparable sales or other indicia of market value would probably be unavailable”).

545 *Cf. Standard Oil Co. of N.J. v. S. Pac. Co.*, 268 U.S. 146, 155-56 (1925) (“It is to be borne in mind that value is the thing to be found and that neither cost of reproduction new, nor that less depreciation, is the measure or sole guide.” (citing *Minnesota Rate Cases*, 230 U.S. 352, 434 (1913)).

546 *See United States v. 1.604 Acres of Land (Granby I)*, 844 F. Supp. 2d 668, 682 (E.D.Va. 2011); *cf. Int’l Paper Co. v. United States*, 227 F.2d 201, 207 (5th Cir. 1955).

547 *Cf. United States v. 25.202 Acres of Land (Amexx I)*, 860 F. Supp. 2d 165, 178 (N.D.N.Y. 2009), *adopted by* 860 F. Supp. 2d 165 (N.D.N.Y. 2010), *aff’d*, 502 F. App’x 43 (2d Cir. 2012).

548 *Granby I*, 844 F. Supp. 2d at 682.

549 *Brooks-Scanlon Corp. v. United States*, 265 U.S. 106, 123 (1924).

550 *United States v. Toronto, Hamilton & Buffalo Nav. Co.*, 338 U.S. 396, 402-03 (1949) (naming reproduction cost a “false standard of the past” . . . when no one would think of reproducing the property”).

551 *United States v. 55.22 Acres of Land in Yakima Cty.*, 411 F.2d 432, 435-36 (9th Cir. 1969); *United States v. Certain Interests in Prop. in Cumberland Cty.*, 296 F.2d 264, 269-70 (4th Cir. 1961) (“It seems plain that a showing . . . that a reasonable investor would reproduce the project for the amount given as reproduction or replacement cost would be required before a willing vendee would consider such a figure relevant in his negotiations with a willing vendor.”); *see Toronto, Hamilton*, 338 U.S. at 402-03.

as with evidence that “a prudent investor would reproduce the improvements at the reproduction cost figure [stated],” or that “willing vendees and vendors would deem reproduction cost less depreciation relevant in negotiating a purchase and sale of the property.”⁵⁵² The court further suggested that limited use of the cost approach as but “one guide” considered by the appraiser in arriving at a fair market value might have been acceptable.⁵⁵³

Federal courts agree that reliance on the cost approach is improper “when no one would think of reproducing the property,” or when no prudent investor would reproduce it for the figure or amount estimated as replacement or reproduction cost.⁵⁵⁴ Thus courts reject the cost approach without “unequivocal evidence that the [improvements] involved would be reproduced by private investors at the risk of private capital.”⁵⁵⁵

The cost approach is generally inapplicable to vacant land, as any value contributed by bringing a property to its vacant state are reflected in the comparison of the parcel to the prices paid on the market for other vacant parcels.

Because the cost approach is designed to inform the valuation of properties with existing physical improvements, it is generally inapplicable to vacant lands, regardless of costs the landowner may have incurred to remove prior improvements. As a district court recently explained in rejecting any use of the cost approach to value a vacant site:

Efforts and expenditures made by the landowner to bring the property to its present, vacant state, and to maintain it as such, are reflected in the comparison of the parcel to the prices paid on the market for other vacant parcels. Costs to demolish buildings extant on the property and the associated site work, and property maintenance costs such as real estate taxes capitalized, do not inure to the benefit of a prospective buyer over and above any increase in value from the property’s status as vacant land.⁵⁵⁶

Moreover, the mere existence of improvements does not automatically justify application of the cost approach; its use is inappropriate where the improvements would be of no value to a prudent buyer due to the nature or condition of the improvements or of the market or other factors,⁵⁵⁷ or simply because “the original builder guessed wrong.”⁵⁵⁸ Again, “cost is not synonymous with market value.”⁵⁵⁹ Thus the Fourth Circuit emphasized the distinction

552 *55.22 Acres in Yakima*, 411 F.2d at 435-36 (citations omitted).

553 *Id.* at 435-36; see 2 ORGEL, *supra* note 191, at 57 (“The really important problem is that of the use to be made of the evidence [of value derived from the cost approach] rather than the technical question as to its admissibility.”).

554 *Toronto, Hamilton*, 338 U.S. at 403; *55.22 Acres in Yakima*, 411 F.2d at 435-36; *Interests in Cumberland*, 296 F.2d at 269-70; *United States v. Benning Hous. Corp.*, 276 F.2d 248, 253 (5th Cir. 1960); *Buena Vista Homes, Inc. v. United States*, 281 F.2d 476, 478 (10th Cir. 1960).

555 *Benning Hous. Corp.*, 276 F.2d at 253.

556 *United States v. 15,478 Square Feet of Land (Balaji Sai)*, No. 2:10-CV-00322, 2011 WL 2471586, at *6 (E.D. Va. June 20, 2011) (citing *United States ex rel. Tenn. Valley Auth. v. Powelson*, 319 U.S. 266, 285 (1943)).

557 *E.g., United States v. 25.202 Acres of Land (Amexx I)*, 860 F. Supp. 2d 165, 178 (N.D.N.Y. 2009), *adopted by* 860 F. Supp. 2d 165 (N.D.N.Y. 2010), *aff’d*, 502 F. App’x 43 (2d Cir. 2012) (cost approach did not apply in acquisition where “only structure was an old building that had not been used in years and whose demolition was necessary in any event”); *55.22 Acres in Yakima*, 411 F.2d at 436 (“No doubt, having regard for [the landowner’s] personal circumstances, these improvements were satisfactory for his purposes, but they were not shown to be of such a character that, if not on the land, one purchasing the acreage would have wished to construct generally similar improvements.”).

558 *United States v. 49,375 Square Feet of Land in Manhattan (252 Seventh Ave.)*, 92 F. Supp. 384, 387-88 (S.D.N.Y. 1950), *aff’d sub nom. United States v. Tishman Realty & Constr. Co.*, 193 F.2d 180 (2d Cir. 1952) (per curiam) (affirming on opinion of trial court); Balaji Sai, 2011 WL 2471586, at *6 (“To the extent the inclusion of [demolition and other] costs in the valuation is an attempt to collect reimbursement for [the landowner’s] prior investment in the property, the costs are impermissible, as the Fifth Amendment does not guarantee the landowner a return on his investment.” (citing *Powelson*, 319 U.S. at 285)).

559 *Kinter v. United States*, 156 F.2d 5, 7 (3d Cir. 1946).

between merely calculating a building's replacement cost and actually determining a property's market value:

[T]he purpose behind determining replacement cost, or original cost, or any of those things[,] is to aid you in determining whether or not the existence of those buildings on the land contributes anything to the fair market value of the whole, and, if it does contribute to it, how much does it contribute? That applies to each and every structure that was on or in the property.⁵⁶⁰

To ensure a reliable indication of market value, every element of the cost approach methodology and its underlying assumptions must be carefully scrutinized, supported by market research, and directly linked to the property's highest and best use.⁵⁶¹

4.4.3.2. Value of the Land (Site) as if Vacant. The value of the site as if vacant and available for its highest and best use is generally estimated by analysis of comparable sales (i.e., by application of the sales comparison approach).⁵⁶² Of course, this does not allow an appraiser to disregard actual physical conditions that a reasonably prudent buyer would consider: "A proper appraisal methodology has to account for those physical conditions."⁵⁶³

4.4.3.3. Reproduction Cost and Replacement Cost. The appraiser must distinguish between reproduction cost and replacement cost, despite the fact that many courts have used the terms interchangeably.⁵⁶⁴ Reproduction cost is the present cost of reproducing the improvement with an exact replica using the same physical materials; replacement cost is the present cost of replacing the improvement with one of equal utility.⁵⁶⁵ The appraiser may typically use either measure, but must demonstrate the relevance of the selected measure to the market value of the specific property being appraised and account for all forms of depreciation appropriate to the selected method.⁵⁶⁶

The estimate of the reproduction or replacement cost of the improvements must be based on current local market cost of labor and materials for construction of improvements; to be considered, such improvements and any associated cost data must be relevant to the property's highest and best use.⁵⁶⁷

⁵⁶⁰ *United States v. Wise*, 131 F.2d 851, 853 (4th Cir. 1942) (quoting trial court's instructions to jury); see *55.22 Acres in Yakima*, 411 F.2d at 435-36 (accepting valuation of improved property derived from analysis of comparable sales and incremental value of improvements).

⁵⁶¹ See *United States v. 1.604 Acres of Land (Granby I)*, 844 F. Supp. 2d 668, 683-84 (E.D. Va. 2011); USPAP SR 1-4(b) ("When a cost approach is necessary for credible assignment results, an appraiser must: (i) develop an opinion of site value by an appropriate appraisal method or technique; (ii) analyze such comparable cost data as are available to estimate the cost new of the improvements (if any); and (iii) analyze such comparable data as are available to estimate the difference between the cost new and the present worth of the improvements (accrued depreciation)."); see also *Olson v. United States*, 292 U.S. 246, 257 (1934) ("Elements affecting value that depend upon events or combinations of occurrences which . . . are not fairly shown to be reasonably probable should be excluded from consideration . . .").

⁵⁶² E.g., *55.22 Acres in Yakima*, 411 F.2d at 436; cf. *Morris v. Comm'n*, 761 F.2d 1195, 1196 (6th Cir. 1985) (tax case).

⁵⁶³ *Rasmuson v. United States*, 807 F.3d 1343, 1346 (Fed. Cir. 2015) (holding valuation of agricultural property that "does not take into account the costs of removing [existing] physical remnants of [a] railway will result in an artificially inflated value and yield a windfall to the landowner").

⁵⁶⁴ E.g., *Winston v. United States*, 342 F.2d 715, 724 (9th Cir. 1965). In particular, the phrases "reproduction cost new less depreciation" and "replacement cost new less depreciation" often appear with little precision or explanation. Nonetheless, "[i]n appraisal the distinction between reproduction cost and replacement cost is quite clear." EATON, *supra* note 16, at 161.

⁵⁶⁵ EATON, *supra* note 16, at 161.

⁵⁶⁶ See *In re U.S. Comm'n to Appraise Wash. Mkt. Co. Prop.*, 295 F.950, 957-58 (D.C. Cir. 1924) (discussing forms of depreciation to be considered in reproduction cost method);

⁵⁶⁷ *United States v. 1.604 Acres (Granby I)*, 844 F. Supp. 2d 668, 684 (E.D. Va. 2011); see *United States v. Wise*, 131 F.2d 851, 853 (4th Cir. 1942); see also *Olson v. United States*, 292 U.S. 246, 255 (1934).

- 4.4.3.4. Depreciation.** All appropriate forms of depreciation, including physical deterioration, functional obsolescence, and economic obsolescence, must be derived from market data and deducted from the estimated reproduction or replacement cost.⁵⁶⁸ Depreciation may vary depending on the locality, purpose, and type of improvements, among other factors.⁵⁶⁹ “The sales comparison or abstraction method of estimating depreciation is particularly reliable.”⁵⁷⁰
- 4.4.3.5. Entrepreneurial Incentive and Entrepreneurial Profit.** Current appraisal methodology recognizes entrepreneurial incentive—the amount an entrepreneur expects to receive from developing a real estate project—as an element of the cost approach to valuation.⁵⁷¹ Similarly, entrepreneurial profit (also developer’s profit) is the amount actually received, reflecting the difference between the total cost of development and its market value after completion.⁵⁷² Of course, not all developments live up to expectations: “It must be remembered that an entrepreneur is not guaranteed a profit.”⁵⁷³

The Supreme Court has yet to address the propriety of entrepreneurial incentive or entrepreneurial profit in the cost approach to valuation in federal acquisitions.⁵⁷⁴ Still, rulings from one of the only federal courts to consider this issue are instructive:

Because the [amount] due an entrepreneur or developer for assuming the risk of a development project and coordinating and managing the development is a real cost to constructing a replacement for the existing property, inclusion of entrepreneurial incentive may be necessary to ensure the accuracy of the cost approach valuation methodology. The goal of the cost approach is to estimate the market value of the property. Thus, consideration of entrepreneurial incentive comports with current law.⁵⁷⁵

If considered as a potential element of reproduction or replacement cost, entrepreneurial profit or entrepreneurial incentive must be “based on market research and data” and reflect the subject property’s highest and best use,⁵⁷⁶ and will “be scrutinized to ensure that [estimates] do not take

568 *Wash. Mkt. Co. Prop.*, 295 F.2d 957-58; see *United States v. Certain Interests in Prop. in Cumberland Cty.*, 296 F.2d 264, 266 n.1 (4th Cir. 1961) (“replacement cost, or reproduction costs, may be considered only when proper deductions are made for physical and economic depreciation and obsolescence”); cf. *United States v. 3,727.91 Acres of Land in Pike Cty. (Elsberry Drainage Dist.)*, 563 F.2d 357, 360 n.4 (8th Cir. 1977) (noting challenged finding on depreciation was “supported by substantial evidence”).

569 See, e.g., *United States v. Bechtold Co.*, 129 F.2d 473, 479 (8th Cir. 1942).

570 EATON, *supra* note 16, at 169; cf. *Bechtold*, 129 F.2d at 479-80.

571 *United States v. 15,478 Square Feet of Land (Balaji Sai)*, No. 2:10-cv-00322, 2011 WL 2471586, at *6 (E.D. Va. June 20, 2011); see *United States v. 1,604 Acres of Land (Granby I)*, 844 F. Supp. 2d 668, 682-84 (E.D. Va. 2011); EATON, *supra* note 16, at 168-170.

572 See *Entrepreneurial Profit*, THE DICTIONARY OF REAL ESTATE APPRAISAL (6th ed. 2015).

573 EATON, *supra* note 16, at 168; cf. *United States ex rel. Tenn. Valley Auth. v. Powelson*, 319 U.S. 266, 285 (1943) (“[T]he Fifth Amendment allows the owner only the fair market value of this property; it does not guarantee him a return of his investment.”).

574 *Granby I*, 844 F. Supp. 2d at 683; see *United States v. 8.34 Acres of Land in Ascension Par.*, No. 04-5-D-MI, 2006 WL 6860387, at *5 (M.D. La. June 12, 2006) (describing “entrepreneur’s profit” as “a controversial legal-economic issue”); EATON, *supra* note 16, at 168 (“Entrepreneurial profit is a relatively new concept, at least as a separate item of cost in the cost approach.”); cf. 2 ORGEL, *supra* note 191, at 57 (“The failure of the courts to keep abreast of current appraisal theory is not to be explained entirely on the ground that the law lags behind the times. It is partly due to the peculiar problem of finding satisfactory judicial proof.”).

575 *Granby I*, 844 F. Supp. 2d at 683; see *United States v. 1,604 Acres of Land (Granby III)*, 844 F. Supp. 2d 685, 690 (E.D. Va. 2011); *Balaji Sai*, 2011 WL 2471586, at *4-7; see also *United States v. 1,604 Acres of Land (Granby II)*, No. 2:10-cv-00320, 2011 WL 1810594, at *3 (E.D. Va. May 11, 2011). The *Granby* and *Balaji* cases, involving concurrent acquisitions of adjacent properties, were decided by the same district judge.

576 *Granby I*, 844 F. Supp. 2d at 683-84; see *Granby III*, 844 F. Supp. 2d at 690; *Granby II*, 2011 WL 1810594, at *1, *3 (barring consideration of costs premised on unsupported highest and best use); see also *Olson*, 292 U.S. at 255.

into account any improper considerations.”⁵⁷⁷ It is impermissible to calculate entrepreneurial incentive (in whole or in part) as a percentage of land value or land cost because “the fair market value of the land already encapsulates the incentive necessary to entice an entrepreneur or developer to [acquire] the property.”⁵⁷⁸

4.4.3.6. Unit Rule and the Cost Approach. Valuations derived from the cost approach and any other approach to value must follow the unit rule, which requires property to be valued as a whole, as discussed in Section 4.2.2. Indeed, “it is firmly settled that one does not value the [] land as one factor and then value the improvements as another factor and then add the two values to determine market value.”⁵⁷⁹ In using the cost approach, it is therefore critical to distinguish between calculating the cost of improvements and estimating the market value of the property as a whole, considering the contributory value of improvements.⁵⁸⁰

As discussed in Section 4.2.2.3, some assignments may require separate allocation of the contributory value of improvements that will be removed or adversely affected due to the government project (if applicable, the appraiser should clearly state that any such allocations do not indicate the appraisal method(s) employed).⁵⁸¹

4.4.4. Income Capitalization Approach. The third recognized approach to value in federal acquisitions is the income capitalization approach, which involves capitalizing⁵⁸² a property’s anticipated net income to derive an indication of its present market value.⁵⁸³ When properly applied, the income approach can indicate what a buyer would pay at the present time for the anticipated future benefits, discounted for risk and other variables, of owning a property.⁵⁸⁴ The income capitalization approach is relevant only in certain circumstances—namely, in the

577 *Granby I*, 844 F. Supp. 2d at 683-84; cf. *Kimball Laundry Co. v. United States*, 338 U.S. 1, 5-6 (1949) (“The value compensable under the Fifth Amendment, therefore, is only that value which is capable of transfer from owner to owner and thus of exchange for some equivalent.”); *Olson*, 292 U.S. at 257 (“Elements affecting value that . . . are not fairly shown to be reasonably probable, should be excluded from consideration . . .”).

578 *Granby III*, 844 F. Supp. 2d at 690; see *Powelson*, 319 U.S. at 285 (“[T]he Fifth Amendment . . . does not guarantee [a landowner] a return of his investment.”); *Olson*, 292 U.S. at 255 (“It is the property and not the cost of it that is safeguarded by [the Fifth Amendment].”); *Granby I*, 844 F. Supp. 2d at 684; cf. *United States v. Gen. Motors Corp.*, 323 U.S. 373, 379 (1945) (“compensation . . . does not include future loss of profits”).

579 *United States v. 91.90 Acres of Land in Monroe Cty. (Cannon Dam)*, 586 F.2d 79, 87 (8th Cir. 1978); accord *Kinter v. United States*, 156 F.2d 5, 7 (3d Cir. 1946) (“[C]ost is not synonymous with market value. *A fortiori*, cost of land and cost of improvements taken separately and added are not to be equalized with fair market value.”).

580 See *United States v. Wise*, 131 F.2d 851, 853 (4th Cir. 1942); *United States v. Bechtold Co.*, 129 F.2d 473, 478 (8th Cir. 1942) (noting it may be proper to consider evidence “as to the value of the building separate from the land, and all the land separate from the building, where from such evidence the [factfinder] can reach . . . the market value of the land including the building” (quoting *Devou v. City of Cincinnati*, 162 F. 633, 636 (6th Cir. 1908))); cf. *United States v. 158.00 Acres of Land in Clay Cty.*, 562 F.2d 11, 13 (8th Cir. 1977) (“As just compensation is determined by valuing a parcel as a whole, not mechanically adding together its separate components, the contributory value of improvements may be only a subsidiary fact supporting the ultimate finding of just compensation.”).

581 See *158.00 Acres in Clay*, 562 F.2d at 13 (“the contributory value of the [improvements] has independent significance in the comprehensive statutory scheme [of the Uniform Act]”).

582 Capitalization is the conversion of income into value. *Capitalization*, THE DICTIONARY OF REAL ESTATE APPRAISAL (6th ed. 2015).

583 *United States v. 25.202 Acres of Land (Amexx I)*, 860 F. Supp. 2d 165, 174-75 (N.D.N.Y. 2009), adopted by 860 F. Supp. 2d 165 (N.D.N.Y. 2010), *aff’d* 502 F. App’x 43 (2d Cir. 2012); *United States v. 6.45 Acres of Land (Gettysburg Tower)*, 409 F.3d 139, 143 n.6 (3d Cir. 2005); *Foster v. United States*, 2 Cl. Ct. 426, 447 (1983), *aff’d*, 746 F.2d 1491 (Fed. Cir. 1984); EATON, *supra* note 16, 173-96; see *United States v. 47.14 Acres of Land in Polk Cty.*, 674 F.2d 722, 725-26 (8th Cir. 1982); *Income Capitalization Approach*, THE DICTIONARY OF REAL ESTATE APPRAISAL (5th ed. 2010); cf. APPRAISAL INST. & AM. SOC’Y OF FARM MANAGERS, THE APPRAISAL OF RURAL PROPERTY 506-11 (2d ed. 2000).

584 See *United States v. 25.202 Acres of Land (Amexx II)*, No. 5:06-CV-428, 2011 WL 4595009, at *2 n.4 (N.D.N.Y. Sept. 30, 2011), *aff’d*, 502 F. App’x 43 (2d Cir. 2012) (“evidence of income-producing potential of the property is relevant only to the extent that it would affect how much a willing buyer would be willing to pay.”); see *Gettysburg Tower*, 409 F.3d at 143 n.6.

valuation of income-producing property with no available comparable sales.⁵⁸⁵ Even then, “[g]reat care must be taken, or such valuations can reach wonderland proportions.”⁵⁸⁶

For this reason, federal courts have often found iterations of the income capitalization approach to value “ill-suited to the purposes” of just compensation.⁵⁸⁷

These valuations almost always achieve chimerical magnitude, because, in the mythical business world of income capitalization, nothing ever goes wrong. There is always a demand; prices always go up; no competing material displaces the market.⁵⁸⁸

As the Fourth Circuit warned, “to allow value to be proved in such a suspect manner, impeccably objective and convincing evidence is required.”⁵⁸⁹ Accordingly, every factor to be considered in the income capitalization approach in federal acquisitions must be properly supported.⁵⁹⁰ In valuations for just compensation purposes, the goal is “to duplicate marketplace calculations to the greatest possible extent.”⁵⁹¹ Courts have therefore rejected income capitalization without evidence that “rates are in fact fixed in the marketplace by a process which parallels [the expert’s] calculations.”⁵⁹²

Proper application of the income capitalization approach requires a distinction between income generated by *the property itself* (such as rental or royalty income), which can be considered, and income generated by *a business conducted on the property*, which must be disregarded.⁵⁹³

4.4.4.1. Applications. While federal courts recognize the income capitalization may be a valid and reliable approach to value in certain cases, they uniformly hold that it should be used only

585 *Amexx I*, 860 F. Supp. 2d at 176-77; *United States v. 33.92356 Acres of Land (Piza-Blondet Trial Op.)*, No. 98-1664, 2008 WL 2550586, at *11-12 (D.P.R. June 13, 2008), *aff’d*, 585 F.3d 1, 11 (1st Cir. 2009); *United States v. 100.80 Acres of Land (Parrish)*, 657 F. Supp. 269, 274 (M.D.N.C. 1987); see *United States v. Toronto, Hamilton & Buffalo Nav. Co.*, 338 U.S. 396, 403 (1949) (“past earnings are significant only when they tend to reflect future returns”).

586 *47.14 Acres in Polk*, 674 F.2d at 726; see *United States v. 69.1 Acres of Land (Sand Mountain)*, 942 F.2d 290, 293-94 (4th Cir. 1991) (“These valuations almost always achieve chimerical magnitude, because, in the mythical business world of income capitalization, nothing ever goes wrong.”); cf. *United States v. Whitehurst*, 337 F.2d 765, 772 (4th Cir. 1964) (“[A] change of even a fraction of one per cent will produce a surprisingly material change in the result.”); EATON, *supra* note 16, at 174 (“To address the increasing complexity of real estate investment and financing, and the inflationary and recessionary trends of the 1970s and 1980s, more sophisticated investment analysis was developed. New techniques of analysis probably contributed in some degree to the financial woes of the banking industry, not because these techniques are flawed, but because they can easily be misused and manipulated.”).

587 *United States v. 103.38 Acres of Land in Morgan Cty. (Oldfield)*, 660 F.2d 208, 214 (6th Cir. 1981); accord *Sand Mountain*, 942 F.2d at 294 (“As the seminal case on the subject stated, ‘it would require the enumeration of every cause of business disaster to point out the fallacy of using this method of arriving at just compensation.’” (quoting *United States ex rel. Tenn. Valley Auth. v. Indian Creek Marble Co.*, 40 F. Supp. 811, 822 (E.D. Tenn. 1941))); see *Parrish*, 657 F. Supp. at 274 (“[D]angers present in the discounted royalty method [include] the dangers of speculation about future market demand and the vagaries of operating a business.”).

588 *Sand Mountain*, 942 F.2d at 293.

589 *Id.* at 294; see, e.g., *Oldfield*, 660 F.2d at 214-15 (requiring strict evidence of basis in market for use of income capitalization approach); *Parrish*, 657 F. Supp. at 275 (accepting well-supported income capitalization approach that is “substantial, rational, nonspeculative, credible, and based upon the realities of the market place”).

590 *47.14 Acres in Polk*, 674 F.2d at 726; *Oldfield*, 660 F.2d at 214-15 (requiring “evidence derived from or demonstrably related to the actual market” as “essential characteristics”); *Whitehurst*, 337 F.2d at 771-74; *United States v. 158.76 Acres of Land in Townshend*, 298 F.2d 559, 561 (2d Cir. 1962); *Parrish*, 657 F. Supp. at 275-77 (approving analysis that “relied on market and economic realities”); see, e.g., *Amexx I*, 860 F. Supp. 2d at 176-78, *aff’d*, 502 F. App’x at 45 (noting lower court’s “thorough report exposing the unreliability of the expert’s methods”); see also *United States v. Sowards*, 370 F.2d 87, 90-92 (10th Cir. 1966); *Likins-Foster Monterey Corp. v. United States*, 308 F.2d 595, 597-99 (9th Cir. 1962), *aff’g United States v. Certain Interests in Prop. in Monterey Cty.*, 186 F. Supp. 167 (N.D. Cal. 1960); *United States v. Leavell & Ponder, Inc.*, 286 F.2d 398, 406-08 (5th Cir. 1961).

591 *Oldfield*, 660 F.2d at 212; see *Cementerio Buxeda, Inc. v. Puerto Rico*, 196 F.2d 177, 181 (1st Cir. 1952) (allowing consideration of income and expense figures that “are factors which would be considered by a prospective buyer”).

592 *Oldfield*, 660 F.2d at 214 (“The fatal flaw in the owners’ . . . method is its lack of demonstrable relationship with this ‘real’ market”); see *Parrish*, 657 F. Supp. 275-77 (accepting analysis of expert who “relied on market and economic realities to derive his opinion on a royalty”).

593 *Parrish*, 657 F. Supp. at 274, 277; see *United States v. Toronto, Hamilton & Buffalo Nav. Co.*, 338 U.S. 396, 403 n.6 (1949) (citing *Kimball Laundry Co. v. United States*, 338 U.S. 1 (1949)); *Cementerio Buxeda*, 196 F.2d at 180-81; Section 4.6.2.

“when there are *no* comparable sales and market value must be estimated.”⁵⁹⁴ Accordingly, the fact that a property produces (or could potentially produce) income will not, on its own, justify use of the income capitalization approach. Rather, its relevance to what a willing buyer would pay to a willing seller must be demonstrated.⁵⁹⁵

The income capitalization approach may refer to either direct capitalization or yield capitalization techniques:

- Direct capitalization techniques are used to derive an indication of the market value of a stabilized income-producing property by applying an overall capitalization rate to a property’s single-year net income.⁵⁹⁶
- Yield capitalization techniques are used to derive an indication of the market value of an income-producing property with varying forecasted income or expenses, typically using discounted cash-flow (DCF) analysis. Forecasts of net income, expenses, cash flow and other factors over a holding or projection period are required.⁵⁹⁷

Due to the relatively recent development of these techniques in the appraisal of real estate, some specific iterations have faced little or no scrutiny in federal courts.⁵⁹⁸ But existing case law makes clear that regardless of the technique used, there must be sufficient market data to ensure a reliable indication of value for the specific property being appraised.⁵⁹⁹

Use of the income capitalization approach is improper when the future use or demand for that use is speculative.⁶⁰⁰ As stated in an opinion affirmed by the Second Circuit:

594 *United States v. 25.202 Acres of Land (Amexx I)*, 860 F. Supp. 2d 165, 176-77 (N.D.N.Y. 2009), *adopted by* 860 F. Supp. 2d 165 (N.D.N.Y. 2010), *aff’d*, 502 F. App’x 43 (2d Cir. 2012); *accord Oldfield*, 660 F.2d at 211-13; *Sowards*, 370 F.2d at 89; *United States v. 33.92356 Acres of Land (Piza-Blondet Trial Op.)*, No. 98-1664, 2008 WL 2550586 (D.P.R. June 13, 2008), *aff’d*, 585 F.3d 1, 11 (1st Cir. 2009); *Parrish*, 657 F. Supp. at 274; *see United States v. Whitehurst*, 337 F.2d 765, 775 (4th Cir. 1964).

595 *Oldfield*, 660 F.2d at 212-15 (“[T]o validate [this] approach in our eyes, the owners would have to establish that royalty rates are in fact fixed in the marketplace by a process which parallels [the expert’s] calculations.”); *see Foster v. United States*, 2 Cl. Ct. 426, 448 (1983), *aff’d*, 746 F.2d 1491 (Fed. Cir. 1984) (“situations where income producing potential is a key element for both buyer and seller . . . in arriving at a fair price”); *Whitehurst*, 337 F.2d at 775; *Cementerio Buxeda*, 196 F.2d at 180; *see also Sowards*, 370 F.2d at 90 (“whatever method is employed, the evidence offered must have a bearing upon what a willing buyer would pay a willing seller for the property on the date of the taking”); *cf. Kimball Laundry*, 338 U.S. at 5-6.

596 *See Amexx I*, 860 F. Supp. 2d at 174-75; *United States v. 15.00 Acres of Land in Miss. Cty.*, 468 F. Supp. 310, 315 (E.D. Ark. 1979) (discussing direct capitalization); *Direct Capitalization*, THE DICTIONARY OF REAL ESTATE APPRAISAL (6th ed. 2015).

597 *See Amexx I*, 860 F. Supp. 2d at 174-75; *Yield Capitalization*, THE DICTIONARY OF REAL ESTATE APPRAISAL (6th ed. 2015); *cf. United States v. 6.45 Acres of Land (Gettysburg Tower)*, 409 F.3d 139 (3d Cir. 2005), *and on remand*, No. 1:CV-99-2128, 2006 WL 839375 (M.D. Pa. March 27, 2006) (yield capitalization technique).

598 *See EATON*, *supra* note 16, at 173 (“In the past 25 years, the income capitalization approach has been modified and expanded more dramatically than any other procedure in real estate appraisal.”).

599 *See Whitehurst*, 337 F.2d at 776 (“[I]f all of the factors which must necessarily be taken into account are established by proper evidence, there would appear to be no valid reason to judicially condemn, prohibit or outlaw the use of [the income capitalization approach]. We do hold, however, in the instant case that the determination of the several elements or factors which were here relied upon was based upon pure speculation and was without objective evidential support.”); *accord United States v. 69.1 Acres of Land (Sand Mountain)*, 942 F.2d 290, 293-94 (4th Cir. 1991) (discussing *Whitehurst*, 337 F.2d at 771); *United States v. 47.14 Acres of Land in Polk Cty.*, 674 F.2d 722, 726 (8th Cir. 1982) (“[W]here such method is used all of the factors that must necessarily be taken into account should be established by proper evidence. . . . [W]ithout objective evidential support, that method is faulty and can obviously lead to unfounded and enhanced valuations.”); *Oldfield*, 660 F.2d at 214-15 (holding royalties in cash flow analysis must be “derived from or demonstrably related to the actual market in mineral royalties”); *Sowards*, 370 F.2d at 90-92 (“[T]o have probative value, that opinion or estimate [of value] must be founded upon substantial data, not mere conjecture, speculation or unwarranted assumption. It must have a rational foundation.”); *Parrish*, 657 F. Supp. at 274-75.

600 *Amexx I*, 860 F. Supp. 2d at 176-77; *accord United States v. 75.13 Acres in Polk Cty.*, 693 F.2d 813, 816 (8th Cir. 1982).

The mere physical adaptability to a given use is insufficient to invoke the capitalization method, and the landowner must show that “an income producing market existed at the date of the taking or will exist in the reasonably near future.”⁶⁰¹

Of course, the highest and best use of a property may increase the value of vacant land because a buyer may pay more for property that is capable of being developed into a profitable operation.⁶⁰² But “if there is no currently operating business, it would be ‘improper to value the property as if it were *actually being used* for the more valuable purpose.’”⁶⁰³

Direct capitalization techniques cannot be used to value property that is not generating income as of the date of value:

[D]irect capitalization of net income is an appropriate method of valuation only when the landowner can establish actual income, application of the capitalization approach is thus necessarily limited to those situations where eminent domain proceedings impinge an established, on-going business’ opportunity for *continued* as opposed to *prospective* profit. There can be no capitalization of income unless the fact of income is itself first established. Any other rule would permit a valuation, speculative *ab initio*, to be seriously compounded.⁶⁰⁴

Yield capitalization techniques may be appropriate to value property with a highest and best use of development into a profitable operation that is not yet generating income on the date of value.⁶⁰⁵ But such property “may not be valued on the basis of conjectural future demand for [the proposed use]. There must be some objective support for the future demand, including volume and duration.”⁶⁰⁶ Accordingly, the Sixth Circuit rejected a valuation based on costs fixed on the date of value because it did not reflect the fact that the property interest being valued—the right to remove sand—“extended over a period of years: the value of the deposit might be affected by prospects of future increase or decrease in the cost of similar sand.”⁶⁰⁷

Well-documented market support is critical because “[t]his method is highly susceptible to overvaluation, because of the tendency to overestimate the [annual income] and the tendency to employ a capitalization rate that is too low to reflect the hazards of the industry.”⁶⁰⁸ Market support for yield capitalization techniques should include investigation and analysis of potentially relevant sales. Even if there are insufficient sales to support a reliable sales comparison approach,

601 *Amexx I*, 860 F. Supp. 2d at 176-77 (quoting *75.13 Acres in Polk*, 693 F.2d at 816); accord *United States v. 1,291.83 Acres of Land in Adair & Taylor Cty.*, 411 F.2d 1081, 1084-85 (6th Cir. 1969); see also *Hembree v. United States*, 347 F.2d 109, 111-14 (8th Cir. 1965).

602 See *Olson v. United States*, 292 U.S. 246, 255 (1934); *Amexx I*, 860 F. Supp. 2d at 176-77.

603 *Amexx I*, 860 F. Supp. 2d at 177 (quoting *United States v. Meadow Brook Club*, 259 F.2d 41, 45 (2d Cir. 1958), and *Olson*, 292 U.S. at 255); see *1,291.83 Acres*, 411 F.2d at 1084-85.

604 *United States v. 15.00 Acres of Land in Miss. Cty.*, 468 F. Supp. 310, 315 (D. Ark. 1979); (citation omitted); accord *Amexx I*, 860 F. Supp. 2d at 175-81 & n.20; *Foster v. United States*, 2 Cl. Ct. 426, 448 (1983), *aff’d*, 746 F.2d 1491 (Fed. Cir. 1984) (“Direct capitalization of net income is an appropriate method only when actual income from the property can be established in a continuing ongoing business.”).

605 See *Olson*, 292 U.S. at 255; *Amexx I*, 860 F. Supp. 2d at 176-77.

606 *United States v. Whitehurst*, 337 F.2d 765, 771-72 (4th Cir. 1964); accord *Mills v. United States*, 363 F.2d 78, 81 (8th Cir. 1966); see *United States v. 237,500 Acres of Land*, 236 F. Supp. 44, 49-51 (S.D. Cal.1964), *aff’d with qualifications sub nom. United States v. Am. Pumice Co.*, 404 F.2d 336 (9th Cir. 1968).

607 *United States v. Pa.-Dixie Cement Corp.*, 178 F.2d 195, 200 (6th Cir. 1949).

608 *Whitehurst*, 337 F.2d at 773; *United States v. 69.1 Acres of Land (Sand Mountain)*, 942 F.2d 290, 293-94 (4th Cir. 1991) (“[I]n the mythical business world of income capitalization, nothing ever goes wrong. There is always a demand; prices always go up; no competing material displaces the market.”).

“that does not put out of hand the bearing which the scattered sales may have on what an ordinary purchaser would have paid for the claimant’s property.”⁶⁰⁹ This holds true for all types of properties, including mineral properties: “There may be cases where quite distant properties can be shown to be comparable in an economic or market sense, due allowance being made for variables” such as (for a mineral property) “quantity, quality, mining costs and access to market . . .”⁶¹⁰ And sales prices may support a “bonus value” due to a property’s potential for development⁶¹¹—or “demonstrate[] that there [i]s no such enhanced value in the market.”⁶¹²

4.4.4.2. Income to Be Considered. The Supreme Court has instructed that “separation . . . must be made, in any case, between the value of the property and the value of the claimant’s own business skill . . .”⁶¹³ As a result, in determining the market value of the property, only income generated by the *real estate* itself—typically rental or royalty income—can be considered and capitalized.⁶¹⁴ In contrast, income generated by a *business* conducted on the property (such as a farming operation) is not considered.⁶¹⁵ As the First Circuit stated: “It is the value of the real estate, not the business that we are concerned with in this case. To allow evidence of past and future business profits would only confuse the value of the business with the value of the real estate.”⁶¹⁶ The Supreme Court has recognized a single exception to this rule, allowing consideration of *business* income, rather than *real estate* income, only in those rare instances where the United States has condemned a business or franchise itself, and not merely a property on which business is conducted.⁶¹⁷

4.4.4.3. Capitalization Rate or Discount Rate. Determination of the capitalization or discount rate in an income capitalization approach is critical. This rate “reflects the degree of risk in the undertaking involved. It is an extremely important figure in the computation because a change of even a fraction of one percent will produce a surprisingly material change in the result.”⁶¹⁸ As a result, federal courts have rejected use of the income capitalization approach if the discount rate is not supported by appropriate market evidence.⁶¹⁹

609 *United States v. Toronto, Hamilton & Buffalo Nav. Co.*, 338 U.S. 396, 402 (1949); *Mills*, 363 F.2d at 80-81; *Whitehurst*, 337 F.2d at 775.

610 *Am. Pumice Co.*, 404 F.2d at 336-37.

611 *Mills*, 363 F.2d at 80-81.

612 *Whitehurst*, 337 F.2d at 775.

613 *Toronto, Hamilton*, 338 U.S. at 403 n. 6 (citing *Kimball Laundry Co. v. United States*, 338 U.S. 1 (1949)); *Cementerio Buxeda, Inc. v. Puerto Rico*, 196 F.2d 177, 180-81 (1st Cir. 1952).

614 See *Toronto, Hamilton*, 338 U.S. at 403 & n.6 (citing *Kimball Laundry*, 338 U.S. 1); *A.G. Davis Ice Co. v. United States*, 362 F.2d 934, 936-37 (1st Cir. 1966); *United States v. 100.80 Acres of Land (Parrish)*, 657 F. Supp. 269, 274 (M.D.N.C. 1987).

615 *United States v. 33.92356 Acres of Land (Piza-Blondet Trial Op.)*, No. 98-1664, 2008 WL 2550586, at *11-12 (D.P.R. June 13, 2008), *aff’d*, 585 F.3d 1, 11 (1st Cir. 2009); *Stipe v. United States*, 337 F.2d 818, 820-21 & nn.3-4 (10th Cir. 1964); see also *In re Cool*, 81 B.R. 614, 616 (D. Mont. 1987) (discussing “the failings made by appraisers in cases where the appraiser attempts to capitalize the profits of the particular farm operation as opposed to fixing the intrinsic value of the land based on production or reasonable rental value”).

616 *A.G. Davis Ice*, 362 F.2d at 936-37; see, e.g., *Parrish*, 657 F. Supp. at 274 (accepting opinion of value by expert who “was careful to rely on the income generable by the mineral itself (a royalty)—which is correctly attributable to the value of the land—and did not rely on an estimate of an operator’s profit—which would not be attributable to the land”).

617 See *Kimball Laundry*, 338 U.S. at 15 (“It is a difference in degree wide enough to require a difference in result.”); *United States ex rel. Tenn. Valley Auth. v. Powelson*, 319 U.S. 266, 281-85 (1943); *Monongahela Nav. Co. v. United States*, 148 U.S. 312, 326-29, 343-44 (1893); *Stipe*, 337 F.2d 818 (rejecting valuation based on business income where owner’s loss was “due to the destruction or frustration of his business, and not the taking of the property” because “[s]uch losses are not compensable”).

618 *United States v. Whitehurst*, 337 F.2d 765, 771-72 (4th Cir. 1964).

619 E.g., *Whitehurst*, 337 F.2d at 771-72; *United States v. 158.76 Acres of Land in Townshend*, 298 F.2d 559, 561 (2d Cir. 1962); *United States v. Leavell & Ponder, Inc.*, 286 F.2d 398, 407 (5th Cir. 1961); see *Parrish*, 657 F. Supp. at 274 (noting discount rate was “supported” unlike in *Whitehurst*, *supra*).

The capitalization or discount rate must be derived from actual market data, through comparison if possible:

[A] capitalization rate...should be ascertained by reference to the best evidence—the most similar property—as well as dissimilar investments if that proves necessary. “The selection of a capitalization rate by comparison is perhaps the most widely accepted approach. It recognizes the behavioristic nature of economics, because by comparison one gets the reaction of people in the market place.”⁶²⁰

4.4.4.4. Unit Rule Implications. The unit rule, discussed in Section 4.2.2, applies in valuations using the income capitalization approach as in all other approaches to value.⁶²¹ “The subsidiary interests in a fee cannot add to its market value and compensation for these interests must be paid out of the amount awarded for the whole.”⁶²² Accordingly, in federal acquisitions, if using the income capitalization approach to value, appraisers must value the property being acquired as if in single ownership—not by “computing separately the value of the various constituent legal interests” (such as lessor/lessee or operator/owner) in the property.⁶²³

For example, in *United States v. 6.45 Acres of Land (Gettysburg Tower)*, the United States acquired two adjacent tracts in fee simple: Tract 4-203, owned in fee by landowner Enggren and under a 99-year lease to landowner Overview, and Tract 4-204, owned in fee by landowner Overview.⁶²⁴ On the date of value, Overview had built an observation tower on Tract 4-203 overlooking the Gettysburg Battlefield and was operating the tower as a tourist attraction and making payments to Enggren under the lease; Overview also owned and operated a gift shop, restaurant, and parking lot on Tract 4-204. The Third Circuit determined the following appraisal methodology correctly followed the unit rule for this property:

[The appraiser] explained that because he was valuing the *fee* as a whole, lease payments were not considered an expense but merely a transfer of funds between interest holders that would cancel out under a unit valuation. Because [the appraiser’s] task was neither to appraise Overview’s interest nor the Enggrens’ interest, but rather the composite value of all interests, he did not count as an expense what was simply a transfer of value between interest holders that had no bearing on the land’s inherent capacity to generate income.⁶²⁵

620 *United States v. Certain Interests in Prop. in Monterey Cty.*, 186 F. Supp. 167, 170 (N.D. Cal. 1960), *aff’d sub nom. Likins-Foster Monterey Corp. v. United States*, 308 F.2d 595 (9th Cir. 1962); *see 158.76 Acres in Townshend*, 298 F.2d at 561 (“Capitalization of income comprehends the use of a rate of return in comparable investments.”); *Leavell & Ponder*, 286 F.2d at 407.

621 *See, e.g., United States v. 6.45 Acres of Land (Gettysburg Tower)*, 409 F.3d 139 (3d Cir. 2005).

622 *A.G. Davis Co. v. United States*, 362 F.2d 934, 936-37 (1st Cir. 1966); *see Eagle Lake Improvement Co. v. United States (Eagle Lake II)*, 160 F.2d 182, 184 n.1 (5th Cir. 1947) (“For example, . . . the owner of the surface . . . claimed a value of \$350 to \$400 per acre on the theory that the best use of the tract was for subdivision purposes. The owners of the mineral interests on that same parcel claimed values of \$350 to \$700 per acre for the leasehold and \$175 to \$300 per acre for the royalty interest. Certainly, the surface could not be used for a residential subdivision if oil wells were drilled and producing. These are inconsistent uses.”).

623 *Gettysburg Tower*, 409 F.3d at 148.

624 *Id.* at 148. The acquisition also included easements and other interests and other tracts not relevant to this issue. *See id.* at 142-43.

625 *Id.* at 149. The court noted that it also would be acceptable under the unit rule to value Tracts 4-203 and 4-204 separately—i.e., valuing each unit (each tract) as if it was held in fee simple ownership. *Id.* at 148 n.15. “What the [fact-finder] could not do, consistent with the unit rule, was... [to] comput[e] separately the value of the various constituent legal interests in the Condemned Properties.” *Id.* at 148.

The Third Circuit therefore reversed the district court’s ruling, which had improperly added to the valuation just described above a separate valuation of the Enggrens’ interest in the lease payments—thereby “double-count[ing] the substantial value of the lease.”⁶²⁶

As discussed in Section 4.8.1, the unit rule is frequently misapplied in valuations of properties containing minerals or other natural resources.

4.4.4.5. Further Guidance. The income capitalization approach to value in the appraisal of real estate generally—not only in the context of federal acquisitions—has evolved significantly in recent decades.⁶²⁷ The basic parameters for its use for just compensation purposes can be found in Supreme Court cases such as *United States v. Toronto, Hamilton & Buffalo Navigation Co.*,⁶²⁸ and several recent circuit court cases cited in this Section provide more concrete analysis.⁶²⁹ The district court rulings affirmed by or on remand from three recent circuit court opinions are also instructive—see the *Gettysburg Tower* litigation in the Third Circuit, the *Amexx* litigation in the Second Circuit, and the *Piza-Blondet* litigation in the First Circuit.⁶³⁰ The *Parrish* case, an older district court ruling from the Middle District of North Carolina, provides a sound analysis of the appropriate determination and use of royalty rates in estimating market value.⁶³¹ Also informative are *In re Cool*, a bankruptcy case discussing the income approach based on legal principles derived from eminent domain case law,⁶³² and *Denver v. Quick*, a state law case—cited with approval by a number of federal circuit courts—analyzing the consideration of income derived from the land itself.⁶³³

4.4.5. Subdivision Valuation and the Development Method. When appropriate, aspects of the sales comparison, income capitalization, and cost approaches to valuation can be incorporated into a technique for appraising undeveloped acreage having a highest and best use for subdivision into lots. A federal court recently explained this development method⁶³⁴ as follows:

626 *Id.* at 150 & n.17 (aggregated award “includes ‘\$2.7 million worth of prejudice’”).

627 See EATON, *supra* note 16, at 173-75.

628 *Toronto, Hamilton*, 338 U.S. 396, 403 & n.6 (1949) (“[P]ast earnings are significant only when they tend to reflect future returns. We see no relevance in the [property’s] earnings between 1916 and 1932 on the issue of capacity to earn after 1942 On this record they are entirely too remote to bear on [its] value when taken.”); see *Mitchell v. United States*, 267 U.S. 341 (1925); *Joslin Co. v. Providence*, 262 U.S. 668, 675 (1923) (“Injury to a business carried on upon lands taken for public use, it is generally held, does not constitute an element of just compensation, in the absence of a statute expressly allowing it.”) (citations omitted) (applying state law).

629 E.g., *United States v. 6.45 Acres of Land (Gettysburg Tower)*, 409 F.3d 139 (3d Cir. 2005); *United States v. 25.202 Acres of Land (Amexx I)*, 860 F. Supp. 2d 165 (N.D.N.Y. 2009), adopted by 860 F. Supp. 2d 165 (N.D.N.Y. 2010), *aff’d*, 502 F. App’x 43 (2d Cir. 2012) (affirming in all respects, “[l]argely for the reasons that the district court articulated in its memorandum-decision and order”).

630 *United States v. 6.45 Acres of Land*, No. 1:CV-99-2128, 2006 WL 839375 (M.D. Pa. Mar. 27, 2006) (on remand from *Gettysburg Tower*, 409 F.3d 139); *United States v. 25.202 Acres of Land (Amexx I)*, 860 F. Supp. 2d 165 (N.D.N.Y. 2009), *new trial denied*, No. 5:06-CV-428, 2011 WL 4595009 (N.D.N.Y. Sept. 30, 2011), *aff’d*, 502 F. App’x 43 (2d Cir. 2012); *United States v. 33.92356 Acres of Land (Piza-Blondet Trial Op.)*, No. 98-1664, 2008 WL 2550586 (D.P.R. June 13, 2008), *aff’d*, 585 F.3d 1, 11 (1st Cir. 2009).

631 *United States v. 100.80 Acres of Land (Parrish)*, 657 F. Supp. 269, 272-80 (M.D.N.C. 1987). Modern technology allows for more sensitive formula to determine the present value of royalty income than the “Morkill formula” adopted by the court in 1987. See *id.* at 278 & n. 15. But the court’s analysis of the concepts underlying proper discounting of future income to value as of the date of taking, the considerations that must be taken into account and those that must be disregarded, the market support necessary for elements of the income capitalization approach, and the flaws in the formula applied by the fact-finder, remains sound. See *id.* at 273-79.

632 *In re Cool*, 81 B.R. 614, 616-18 (D. Mont. 1987).

633 *Denver v. Quick*, 108 Colo. 111 (1941) (cited in *Hicks v. United States ex rel. Tenn. Valley Auth.*, 266 F.2d 515, 519 (6th Cir. 1959); *Cementerio Buxeda, Inc. v. Puerto Rico*, 196 F.2d 177, 180-81 (1st Cir. 1952); *Chapman v. United States*, 169 F.2d 641, 644 (10th Cir. 1948); and *In re Cool*, 81 B.R. at 618).

634 The development method is not an approach to value; it is a valuation method or technique. The development method is also referred to as the *lot method*, *land residual approach*, *developer’s residual approach*, *anticipated use method*, or *subdivision development method*.

[O]ne first determines or projects both how the land would be subdivided and the prices at which those lots would sell. The projected gross sale proceeds for all lots in the tract are then aggregated and a deduction is made for all projected direct and indirect costs of maintenance and sale, including development [i.e., the developer's anticipated profit] and marketing. Finally, the net amount is discounted to present value to reflect that the lots would be sold over time, i.e., an absorption period, considering projected market demand.⁶³⁵

The remaining sum (the *residual*) is said to represent the market value of the raw land on the date of value. This highly sensitive and complex method of valuation “relies upon layers of hypothetical assumptions regarding the prospects, costs, and timing of subdivision, development, and sales of multiple lots in an uncertain future.”⁶³⁶ As a result, under federal law it can be used only in limited circumstances, and then only with rigorous evidentiary support.⁶³⁷

4.4.5.1. Reasonable Probability of Development. Under federal law, the development method cannot be used unless the property was “‘needed or likely to be needed in the reasonably near future’ for residential subdivision.”⁶³⁸ And showing “that a few new homes had been built in the area around the time” of valuation is insufficient: There must be “evidence ‘of...current demand or potential for subdivisions in the neighborhood[.]’”⁶³⁹ To credibly establish demand for such lots, “there must be some evidence that others have developed and sold such lots, so as to establish a trend, at least, toward that type of development of [similar] property.”⁶⁴⁰

Use of the development method requires evidence that on the date of value, there was a reasonable probability that the property could be developed as a residential subdivision and that its lots would be sold within a reasonable time.⁶⁴¹ It cannot be used “if the subdivision is improbable or unrealistic or merely theoretical or speculative or capable of realization only in the remote future”⁶⁴²

As practical guidance, consider these district court instructions in one case regarding the evidence necessary to support the use of the development method:

[I]f you conclude that this property by map was subdivided into individual lots; that the property was adaptable for residential subdivision purposes; that physical changes were made on the land, such as the digging of a well with a sufficient water supply for development

635 *United States ex rel. Tenn. Valley Auth. v. An Easement & Right-of-Way over 6.09 Acres of Land (TVA v. 6.09 Acres)*, 140 F. Supp. 3d 1218, 1247-48 (N.D. Ala. 2015); see generally *id.* at 1247-56; see also *United States v. 99.66 Acres of Land (Sunburst Invs.)*, 970 F.2d 651, 655-56 (9th Cir. 1992); *United States v. 47.3096 Acres of Land*, 583 F.2d 270, 271-72 (6th Cir. 1978).

636 *TVA v. 6.09 Acres*, 140 F. Supp. 3d at 1251; see generally EATON, *supra* note 16, at 245-70.

637 See *TVA v. 6.09 Acres*, 140 F. Supp. 3d at 1247-56; *Sunburst Invs.*, 970 F.2d at 655-56; EATON, *supra* note 16, at 246 (“[I]n many cases the development approach has been applied under the wrong circumstances or in the wrong way. If all of the land that has been appraised by the development approach were actually subdivided, there would be enough subdivision lots on the market to last hundreds of years and little, if any, farmland left in the United States.”).

638 *47.3096 Acres*, 583 F.2d at 272 (quoting *Olson v. United States*, 292 U.S. 246, 255 (1934)); *Sunburst Invs.*, 970 F.2d at 655-56; *United States v. 341.45 Acres of Land*, 633 F.2d 108, 112 (8th Cir. 1980); *United States v. 147.47 Acres of Land (Delagap)*, 352 F. Supp. 1055, 1061-62 & n.7 (M.D. Pa. 1972).

639 *47.3096 Acres*, 583 F.2d at 272 (quoting *United States v. 478.34 Acres*, 578 F.2d 156, 159 (6th Cir. 1978)); *341.45 Acres*, 633 F.2d at 112 (“more than a few sporadic sales of such lots are necessary”); see *Olson*, 292 U.S. at 255.

640 *341.45 Acres*, 633 F.2d 108, 112 (8th Cir. 1980). In fact, “if there is an actual demand for [such] lots we believe the landowners will be able to show such demand.” *Id.*

641 *Delagap*, 352 F. Supp. at 1061-62 & n.7.

642 *Id.*; see *Olson*, 292 U.S. at 255-56.

purposes; constructing a lake; road grading and other physical changes in the condition of the land; that some lot sales had actually taken place; that there was a reasonable probability that this property could be developed as a residential subdivision; that the anticipated expenses of development would be as [estimated]; that there would be a market for the sale of these lots and that these lots would be sold within a reasonable time...then you may accept the opinion based upon [this method].⁶⁴³

4.4.5.2. Application to Undeveloped Land. It is rarely appropriate to apply the development method to undeveloped land.⁶⁴⁴ As a district court recently explained, the development method

effectively values a parcel of land, even if undivided and unimproved, virtually as if it has *already* been subdivided and sold. Such a valuation calculation...requires more than just that a hypothetical purchaser at the time of the taking would consider development potential; it generally requires that landowner demonstrate that subdivision of the unimproved land was reasonably certain in the near future at the time of the taking.⁶⁴⁵

Use of the development method cannot be justified based on a landowner's "inchoate plans, intention, or profit expectations" for a property as assumptions underlying the development method are too speculative when a landowner has "not actually subdivided, improved, or sold any of the land"⁶⁴⁶ As the Supreme Court admonished in *Olson v. United States*, "allow[ing] mere speculation and conjecture to become a guide for the ascertainment of value [is] a thing to be condemned in business transactions as well as in judicial ascertainment of truth."⁶⁴⁷ As a result, "even though the highest and best use of a property is for a residential subdivision, if no meaningful steps have been taken in that direction, viz., construction expenses and actual lot sales, then a '[development] method' appraisal...would be inappropriate."⁶⁴⁸ Rather, in such cases, "the appropriate market [is] for the entire tract as investment property for future subdivision development."⁶⁴⁹

4.4.5.3. Credible Cost Estimate. Even if subdivision was a demonstrably reasonable certainty, federal law requires credible evidence of projected subdivision costs: "In the absence of credible cost evidence, [one should] exclude[] the [development] method valuation altogether."⁶⁵⁰ Mere unsupported assertions are insufficient.⁶⁵¹ Costs that must be reliably estimated and considered

⁶⁴³ *Delagap*, 352 F. Supp. at 1061-62 & n.7.

⁶⁴⁴ See *United States ex rel. Tenn. Valley Auth. v. An Easement & Right-of-Way over 6.09 Acres of Land (TVA v. 6.09 Acres)*, 140 F. Supp. 3d 1218, 1250-51 (N.D. Ala. 2015) (citing cases); compare *United States v. 99.66 Acres of Land (Sunburst Invs.)*, 970 F.2d 651, 655-56 (9th Cir. 1992) (affirming exclusion of method for valuation of "paper subdivision and nothing more") and *United States v. 100 Acres of Land*, 468 F.2d 1261, 1266-67 (9th Cir. 1972) (permitting method for valuation of property which was part of a subdivision that was partially under development on date of value).

⁶⁴⁵ *TVA v. 6.09 Acres*, 140 F. Supp. 3d at 1255; see generally *id.* at 1247-56. Courts express similar concerns outside federal condemnation. *E.g., United States v. Hickey*, 360 F.2d 127, 137 (7th Cir. 1966) ("Whatever its merit to builders and developers might be, the speculative and unrealistic character of 'lot-method' appraisals in assessing the value of vacant land as security for mortgage loans is apparent. 'Lot-method' appraisal is a reflection of a value which may be achieved at some time in the future when the land is subdivided, improved, and ready to be sold in individual residential lots. It does not reflect the present fair market value of the vacant land . . .").

⁶⁴⁶ *TVA v. 6.09 Acres*, 140 F. Supp. 3d at 1252-53.

⁶⁴⁷ *Olson*, 292 U.S. at 257.

⁶⁴⁸ *Delagap*, 352 F. Supp. at 1060.

⁶⁴⁹ *Sunburst Invs.*, 970 F.2d at 655-56; see Section 4.2.2 (Unit Rule).

⁶⁵⁰ *United States v. 47.3096 Acres of Land*, 583 F.2d 270, 272 (6th Cir. 1978).

⁶⁵¹ *Id.*; see *Sunburst Invs.*, 970 F.2d at 655-56; *United States v. 341.45 Acres of Land*, 633 F.2d 108, 112-13 (8th Cir. 1980).

include direct costs of development (such as surveying, design, engineering, permitting, grading, clearing, sewers, street paving, curbs and gutters, water lines, and other utilities); indirect costs (including financing, insurance, real property taxes, sales, advertising, accounting, legal and closing costs, project overhead, and supervision); and the developer's expected profit.⁶⁵²

4.4.5.4. Availability of Comparable Sales. When a property's market value can be reliably estimated using comparable sales, the development approach should not be relied upon as a primary indicator of value, as its underlying assumptions are "largely speculative" and "subjective elements...enhance the risk of error[.]"⁶⁵³ However, the development method can be utilized in such situations to *test* a highest and best use conclusion⁶⁵⁴ or to support a value indicated by the sales comparison approach.⁶⁵⁵ It also bears noting that "[w]hile a lack of sales and/or development activity may indicate an insufficient supply of land suitable for such use, it can also indicate a lack of demand."⁶⁵⁶ And without "credible evidence that there is an actual demand for [subdivision development] or that such demand will occur in the reasonably near future[.]" subdivision cannot be considered as a highest and best use.⁶⁵⁷

4.5. Project Influence. At times, the market value of the property being acquired may be affected, positively or negatively, by the very project prompting the government's acquisition. This project influence on value is potentially problematic in federal acquisitions because "to permit compensation to be either reduced or increased because of an alteration in market value attributable to the project itself would not lead to the 'just compensation' that the Constitution requires."⁶⁵⁸ The Supreme Court has ruled that in fairness, the United States cannot be charged for value it created in constructing the government project for which the property is being acquired. Similarly, an owner cannot be penalized for any diminution in value due to that very government project.⁶⁵⁹ Accordingly, in valuations for just compensation purposes, once a property is "within the scope" of the government project, all project influence on the property's market value must be disregarded.⁶⁶⁰

Change in market value due to the government project—project influence—must be disregarded under the scope of the project rule.

652 See *TVA v. 6.09 Acres*, 140 F. Supp. 3d at 1247-48 ("all projected direct and indirect costs of maintenance and sale, including development and marketing"); *47.3096 Acres*, 583 F.2d at 272 ("expense of clearing and improving the land, surveying and dividing it into lots, advertising and selling, holding it, and paying taxes and interest until all lots are sold"); *United States v. 100 Acres of Land*, 468 F.2d 1261, 1266 (9th Cir. 1972) ("selling and advertising expenses, engineering and development costs, overhead costs, taxes, buyers' anticipated profits, and for acreage loss for streets, etc."); Section 4.4.3.5 (Entrepreneurial Incentive and Entrepreneurial Profit).

653 See *TVA v. 6.09 Acres*, 140 F. Supp. 3d at 1250-52 (quoting *United States v. 50 Acres of Land (Duncanville)*, 469 U.S. 24, 36 & n.23 (1984)); see also *Norman v. United States*, 63 Fed. Cl. 231, 271 (Ct. Cl. 2004) ("approach 'is highly speculative [and] prone to error'", *aff'd*, 429 F.3d 1081 (Fed. Cir. 2005)); cf. *Olson v. United States*, 292 U.S. 246, 257 (1934). Courts have also found the development method unreliable in other contexts. *E.g., Rockies Express Pipeline LLC v. Hopkins*, 131.495 Acres, No. 1:08-cv-00751-RLY-DML, 2012 WL 1622532, at *4 (S.D. Ind. May 9, 2012) (noting "susceptibility to misuse" and "speculative nature" in valuation under state law).

654 See, e.g., *United States v. 125.07 Acres of Land (Pond Road I)*, 667 F.2d 243, 246 (1st Cir. 1981); *United States v. 1,291.83 Acres of Land in Adair & Taylor Clys.*, 411 F.2d 1081, 1087 (6th Cir. 1969).

655 EATON, *supra* note 16, at 247, 268; see, e.g., *United States v. 3.544 Acres of Land*, 147 F.2d 596 (3d Cir. 1945); *United States v. 147.47 Acres of Land (Delagap)*, 352 F. Supp. 1055, 1059 (M.D. Pa. 1972) (using lot values as market data in addition to comparable sales).

656 EATON, *supra* note 16, at 248; e.g., *United States v. 341.45 Acres of Land in St. Louis Cty.*, 633 F.2d 108, 112-13 (8th Cir. 1980) ("[T]here must be some evidence that others have developed and sold such lots [I]f there is an actual demand for [such] lots we believe the landowners will be able to show such demand."); cf. *Delagap*, 352 F. Supp. at 1058 n.4, 1057-61.

657 *341.45 Acres in St. Louis Cty.*, 633 F.2d at 112-14; see *Olson*, 292 U.S. at 255.

658 *United States v. Reynolds*, 397 U.S. 14, 16 (1970).

659 *Shoemaker v. United States*, 147 U.S. 282, 303-05 (1893); *United States v. Miller*, 317 U.S. 369, 376-79 (1943); *United States v. Va. Elec. & Power Co.*, 365 U.S. at 636; *Reynolds*, 397 U.S. at 16-18; see *United States v. 320 Acres*, 605 F.2d 762, 781-82 (5th Cir. 1979).

660 *Reynolds*, 397 U.S. at 16-18; *Miller*, 317 U.S. at 376-77; *320 Acres*, 605 F.2d at 781-84 & nn.24-27; *United States v. Crance*, 341 F.2d 161, 165 (8th Cir. 1965) ("[A] landowner cannot claim a benefit from a proximate improvement when inclusion of his land in the improvement from the outset renders impossible enjoyment of the claimed benefit."). As discussed below, whether a particular property was within the scope of a particular government project on a particular date is one of several legal questions that must be determined by the court (or a legal instruction), not by the appraiser.

The scope of the project rule excluding project influence is “one of the secondary rules refining the concept of market value as the basic measurement of compensation so that injustice does not result”⁶⁶¹ The rule functions to adjust, limit, or exclude certain evidence from consideration to ensure the appraisal does not unfairly reflect any change in market value caused by the government project for which the property is acquired, or by the likelihood the property would be acquired for such public project.⁶⁶² Proper application of the scope of the project rule requires careful legal and factual analysis of the government project and its influence on market value.⁶⁶³ **Legal instruction** is required, as the scope of the project rule raises questions of law “which limit[] the factors necessary to the determination of ‘just compensation’”⁶⁶⁴ and go beyond the appraiser’s function of assessing the government project’s influence, if any, on market value.⁶⁶⁵

The mere existence of a government project does not automatically invoke the scope of the project rule; it merely marks the beginning of a complex legal and factual inquiry to determine whether the evidence warrants application of the rule.⁶⁶⁶ In a scope of the project rule inquiry, legal determinations will be required regarding: (1) the date as of which the property was probably within the scope of the project;⁶⁶⁷ (2) whether application of the scope of the project rule is warranted;⁶⁶⁸ and (3) if so, how to apply the scope of the project rule to ensure a just result.⁶⁶⁹

4.5.1. The Scope of the Project Test. To fairly apply the principle excluding *project influence*, the Supreme Court created the scope of the project test in *United States v. Miller*: “[I]f the ‘lands were probably within the scope of the project from the time the Government was committed to it,’ no [change] in value attributable to the project is to be considered in awarding compensation.”⁶⁷⁰ Accordingly, if the scope of the project rule applies, project influence on market value must be disregarded.⁶⁷¹ Conversely, if properties *not* originally within the scope of the project are later acquired by the government, the United States “must pay their market value as enhanced [or diminished] by this factor of proximity” to the project—so any project influence on value, positive or negative, must in fairness be considered.⁶⁷²

661 *320 Acres*, 605 F.2d at 782; *United States v. 428.02 Acres of Land*, 687 F.2d 266, 269 (8th Cir. 1982); see *Cors*, 337 U.S. at 332 (“Any increase in value due to [the government’s planned project] in fairness should be excluded from the determination of what compensation would be just.”); cf. *United States v. 480.00 Acres of Land (Fornatora)*, 557 F.3d 1297, 1311 (11th Cir. 2009) (“Courts have only applied exceptions to a general takings doctrine when it is necessary to do so in order to protect the rights of both the taking body and the landowner.”).

662 E.g., *320 Acres*, 605 F.2d at 800 (discussing application of rule by exclusion of “evidence of sales possibly tainted by the Government’s condemnation activities”), 798-803 & nn.61-80 (citing cases applying rule); *Kerr v. S. Park Comm’rs*, 117 U.S. 379, 386 (1886) (sales affected by government project were properly excluded); cf. *Fornatora*, 557 F.3d at 1313 (valuation must consider preexisting zoning regulations because regulations’ impact was not “project influence”).

663 See generally *320 Acres*, 605 F.2d 762 (comprehensive analysis of scope of the project rule); see also *Reynolds*, 397 U.S. 14; *Miller*, 317 U.S. 369; *Fornatora*, 557 F.3d at 1311-13.

664 *Reynolds*, 397 U.S. at 20 & n.14 (quoting and adopting *Ward v. United States*, 402 F.2d 762, 763 (5th Cir. 1968)).

665 E.g., *Fornatora*, 557 F.3d at 1312; *United States v. Eastman (Eastman I)*, 528 F. Supp. 1177, 1178 & n.1 (D. Or. 1981), *aff’d*, 714 F.2d 76 (9th Cir. 1983); see *Reynolds*, 397 U.S. at 21.

666 See *United States v. 1.604 Acres of Land (Granby I)*, 844 F. Supp. 2d 674, 675-76 (E.D. Va. 2011).

667 *Reynolds*, 397 U.S. at 20-21; *Miller*, 317 U.S. at 377.

668 *Fornatora*, 557 F.3d at 1313; see *Cors*, 337 U.S. at 332-34 (“a value which the government itself created and hence in fairness should not be required to pay”); *Ward*, 402 F.2d at 763 (scope of the project is “equitable” rule), *adopted by Reynolds*, 397 U.S. at 20.

669 See *320 Acres*, 605 F.2d at 796 (“But what is the ‘just’ application of the rule with respect to [these properties]? . . . [T]he rule is not to be divorced from its objective – compensation awards that are just to both the public and the dispossessed landowner.”).

670 *Reynolds*, 397 U.S. at 21 (quoting *Miller*, 317 U.S. at 377).

671 As the Old Fifth Circuit noted in *320 Acres*, the scope of the project rule “is primarily concerned with awards that are unjust from the perspective of the public footing the bill” – i.e., enhancements in value due to the project. 605 F.2d at 782. But “the scope-of-the-project rule is also applicable to ‘depreciations in value . . . attributable to the Government project for which property is taken.’” *United States v. Land & Cris Realms Inc.*, 213 F.3d 830, 834 (5th Cir. 2000) (alteration in original) (quoting *320 Acres*, 605 F.2d at 787 n.32).

672 *Miller*, 317 U.S. at 376. The scope of the project rule applies to both positive and negative effects on market value. See *supra* note 694.

The *Miller* test concerns “whether the . . . lands were probably within the scope of the project from the time the Government was committed to it.”⁶⁷³ This determination can be particularly complex in connection with acquisitions in later stages of large government projects that span several years or require boundary adjustments, such as flood control and reservoir projects.⁶⁷⁴ In making this determination, courts typically consider the government’s representations to the landowner or the public regarding the property and/or the project boundaries;⁶⁷⁵ how foreseeable it was at the outset of the project that the property would be needed for it;⁶⁷⁶ and the length of time between the original and subsequent acquisitions, if applicable.⁶⁷⁷ The rule does not require that the land ultimately acquired was actually specified in the original project plans. 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 project.⁶⁷⁸

Some courts have framed this inquiry in terms of reasonable expectations, i.e., whether, after announcement of the government project, a reasonable buyer could reasonably anticipate being able to devote the subject property to its highest and best use without serious apprehension that it would soon be condemned for the government project.⁶⁷⁹ For example, the Tenth Circuit held that landowners could not have reasonably believed that their property had been removed from the scope of a reservoir project despite mistakenly being left off some project maps: the property not only was clearly covered by the government’s statements of intent, but also had been partly “covered with water nearly all of the time since the lake filled . . . ; obviously the government intended this property to be part of the project.”⁶⁸⁰ But both frameworks reflect a common aim:

Regardless of how the inquiry is framed, however—whether in terms of the *Miller* test or in terms of reasonable expectations—the object is the same: to distinguish value attributable to Government demand from true fair market value of Government-conferred benefits, and to ensure that the landowner is not awarded a premium for the former but, at the same time, is justly compensated for the latter.⁶⁸¹

The *date* on which the government’s project commences also requires legal determination. In making this determination, courts typically consider three legal requirements of a “project”: a *public purpose* for which property is to be acquired, *identification of the particular properties* to be acquired for that public purpose, and imminent acquisition that is *evident to the public*.⁶⁸² As the former Fifth

673 *Miller*, 317 U.S. at 377; *Reynolds*, 397 U.S. at 21.

674 *E.g.*, *Miller*, 317 U.S. at 370-73; *United States v. Eastman (Eastman III)*, 714 F.2d 76 (9th Cir. 1983); *United States v. 49.01 Acres of Land in Osage Cty.*, 669 F.2d 1364, 1366-69 (10th Cir. 1982); *United States v. 62.17 Acres of Land in Jasper Cty.*, 538 F.2d 670, 678 (5th Cir. 1976) (“We cannot straitjacket the government in defining scope of the project, but on the other hand, we cannot permit global meanderings to enclave areas not reasonably to have been conceived as included at its inception.”); *United States v. 172.80 Acres of Land in Mercer Cty.*, 350 F.2d 957 (3d Cir. 1965); *United States v. Crance*, 341 F.2d 161 (8th Cir. 1965).

675 *62.17 Acres in Jasper*, 538 F.2d at 680-681.

676 *United States v. Eastman (Eastman I)*, 528 F. Supp. 1177, 1182-83 (D. Or. 1981), *aff’d*, *Eastman III*, 714 F.2d at 77; *62.17 Acres in Jasper*, 538 F.2d at 680-81.

677 *62.17 Acres in Jasper*, 538 F.2d at 681 (“time can be a factor in removing the mote of potential acquisition from the eyes of area landowners”); *Eastman I*, 528 F. Supp. at 1183.

678 *Reynolds*, 397 U.S. at 21.

679 *See 320 Acres*, 605 F.2d at 792-93 & nn.44-46; *Eastman III*, 714 F.2d at 77; *49.01 Acres in Osage*, 669 F.2d at 1367-69; *62.17 Acres in Jasper*, 538 F.2d at 678-81.

680 *49.01 Acres in Osage*, 669 F.2d at 1369.

681 *320 Acres*, 605 F.2d at 793 (quoted in *Eastman I*, 528 F. Supp. at 1182).

682 *United States v. 1.604 Acres of Land (Granby I)*, 844 F. Supp. 2d 674, 674-75 (E.D. Va. 2011); *see United States v. Miller*, 317 U.S. 369, 376, 377 (1943); *Reynolds*, 397 U.S. 14, 21 (1970); *320 Acres*, 605 F.2d at 808.

Circuit reasoned:

It is the date as of which the landowners or prospective purchasers no longer could reasonably anticipate being able to devote these properties to their highest and best use in the context of the surrounding governmental project, without serious apprehension that the properties would soon be condemned. In other words, it is the date as of which the prospect of imminent condemnation becomes sufficiently definite that it would be a major factor in the decision of any reasonable person to buy or develop the property.⁶⁸³

Once that date has been legally determined, the appraiser “*must* disregard any . . . alterations in value [due to the project] which it finds to have occurred thereafter.”⁶⁸⁴

The nature of the government project and its alleged influence on value may also require legal analysis. For example, in *United States v. 480.00 Acres of Land (Fornatora)*, the Eleventh Circuit determined that the scope of the project rule did not allow appraisers to disregard preexisting zoning restrictions that affected the market value of property being acquired for the East Everglades expansion of Everglades National Park.⁶⁸⁵ There, county regulations had restricted development of the properties being acquired since 1981, well before the properties were acquired by condemnation starting in 2000.⁶⁸⁶ The landowners argued the county regulations should be disregarded under the scope of the project rule, claiming they reflected the influence of the federal government in an attempt to depress market value in anticipation of future federal acquisitions. To determine this legal question, the lower court correctly conducted an extensive review of evidence surrounding the county’s passage of the 1981 zoning ordinance, ultimately finding that the evidence failed to show that “the primary purpose of the regulation was to depress the property value of land or that the ordinance was enacted with the specific intent of depressing property value for the purpose of later condemnation.”⁶⁸⁷ As a result, the 1981 county ordinance “was not within ‘the scope’ of [the federal government’s] decision seven years later to expand Everglades National Park or its decision nineteen years later to begin condemning properties.”⁶⁸⁸ The Eleventh Circuit affirmed, holding that the district court “acted correctly in ruling on [the landowners] objection regarding the zoning restrictions as a matter of law and in then excluding evidence regarding this objection from the fact-finding Commission.”⁶⁸⁹

683 320 Acres, 605 F.2d at 807; cf. *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981) (en banc) (adopting as binding precedent all decisions rendered by the former Fifth Circuit prior to October 1, 1981); Fifth Circuit Court of Appeals Reorganization Act of 1980, Pub. L. No. 96-452, 94 Stat. 1994 (1980) (codified as amended in scattered sections of 28 U.S.C.).

684 *Id.* at 807 n.90 (emphasis added).

685 *United States v. 480.00 Acres (Fornatora)*, 557 F.3d 1297 (11th Cir. 2009); see 16 U.S.C. §§ 410r-5 *et seq.* (authorizing expansion).

686 *Fornatora*, 557 F.3d at 1300; see *id.* (discussing Dade County’s 1981 East Everglades Zoning Overlay restricting development to one dwelling per 40 acres with no agricultural use allowed); cf. Code of Miami-Dade Cty., Fla., Municipal Code §1-4.2 (renaming Dade County).

687 *Fornatora*, 557 F.3d at 1299; see *id.* at 1304 (“The evidence instead shows that the purpose and intent of the regulations was for the ecological reasons set out in the Ordinance Additionally, . . . there is clearly insufficient evidence to show that the United States acted in concert or agreement to depress the property values. All the evidence . . . shows is that the federal government shared the concerns expressed by the state and local governments in ensuring the continued vitality of the natural resources of South Florida.” (quoting magistrate judge’s findings adopted by district court)).

688 *Id.* at 1313. Congress authorized the East Everglades expansion project in 1989, but did not provide any funding for acquisitions until 1992, and the expansion was not fully funded until 1999. Once “[a]rmed with sufficient funding,” the United States began acquiring properties by condemnation in 2000. *Id.* at 1300.

689 *Id.* at 1313.

4.5.2. Application of the Scope of the Project Rule. Application of the scope of the project test to any set of facts “requires discriminating judgment.”⁶⁹⁰ Thus, even if a property is unquestionably within the scope of the government project, a “mechanical application of the . . . rule” is insufficient.⁶⁹¹ Rather, “the rule is not to be divorced from its objective—compensation awards that are just to both the public and the dispossessed landowner.”⁶⁹² A nuanced factual and legal inquiry is necessary to determine what must be considered and what must be disregarded to ensure the appraiser’s opinion of market value does not unfairly reflect project influence. Depending on the specific facts of each acquisition, it may be appropriate or necessary to carefully scrutinize, adjust, or even entirely disregard potentially comparable sales that may have been tainted by the government’s acquisition activities, as indicated by date, location, applicable zoning or other factors.⁶⁹³

4.5.3. Legal Instructions. Because the scope of the project rule involves interrelated factual and legal questions, the appraiser must request appropriate **legal instruction** if there is evidence the government’s project affected the market value of the property being appraised.⁶⁹⁴ The appraiser may be asked to gather and/or analyze data to inform the legal analysis. Counsel (or the Court) will instruct the appraiser as to (1) whether the scope of the project rule applies, and, if so, (2) how the rule must be applied to the specific property under appraisal, and, if applicable (3) when the scope of the project rule applies, (i.e., the date as of which the rule is triggered).⁶⁹⁵ These legal instructions are “the criteria [the appraiser] must follow in determining” the fair market value of the property.⁶⁹⁶ As with other complex legal questions, counsel may direct the appraiser to perform a dual-premise appraisal if the legal outcome is uncertain.⁶⁹⁷

Proper application of the scope of the project rule requires careful legal and factual analysis. The appraiser should request legal instructions from counsel.

If the legal outcome is uncertain, the agency/client may find it prudent to direct the appraiser to perform a dual-premise appraisal.

4.5.4. Impact on Market Value. The scope of the project rule only arises if there is evidence the government’s project affected the market value of the property being appraised. If there is no evidence the government project influenced the property’s market value, no determination of the scope of the project is required because there is no project influence to disregard.⁶⁹⁸ And while possible project influence on market value can prompt an analysis of the scope of

690 *United States v. Reynolds*, 397 U.S. 14, 21 (1970).

691 *United States v. 320 Acres*, 605 F.2d 762, 796, 782 (5th Cir. 1979); see also *United States v. 49.01 Acres of Land in Osage Cty.*, 669 F.2d 1364, 1369 (10th Cir. 1982) (refusing to apply scope of the project rule where landowners could not have reasonably believed their submerged property was no longer within the scope of a government reservoir project).

692 *320 Acres*, 605 F.2d at 796.

693 See, e.g., *Kerr v. S. Park Comm’rs*, 117 U.S. 379, 386 (1886); *Fornatora*, 557 F.3d at 1311-13; see generally *320 Acres*, 605 F.2d at 798-803 & nn.61-80 (citing cases).

694 See *320 Acres*, 605 F.2d at 789-90; *Reynolds*, 397 U.S. at 21 (“application to any particular set of facts requires discriminating judgment”); *United States v. 1.604 Acres of Land (Granby I)*, 844 F. Supp. 2d 668, 674 (E.D. Va. 2011). If there is no evidence the government’s project affected the market value, the scope of the project rule does not apply. *Granby I*, 844 F. Supp. 2d at 675.

695 See *320 Acres*, 605 F.2d at 806 & nn.87-88, 808-09.

696 *Reynolds*, 397 U.S. at 20; accord *320 Acres*, 605 F.2d at 809; *Granby I*, 844 F. Supp. 2d at 674.

697 Note that simply directing an appraiser to follow these Standards is not a sufficient legal instruction for purposes of the scope of the project rule.

698 *Granby I*, 844 F. Supp. 2d at 675-76 (“[The Court] need not resolve whether imminent acquisition of the property was evident to the public [before the date of valuation] because there is scant evidence that the government’s actions actually affected the market value of the property.”).

the project, project influence on a property's *marketability* cannot: Even a substantial decrease in marketability, decreasing the number of potential buyers, must be disregarded if the *price* at which the property would be sold is not affected.⁶⁹⁹ This is because the federal definition of market value assumes the property has already had reasonable exposure time on the open market on the effective date of value.⁷⁰⁰ Similarly, a substantial decrease in the *number of market sales* within an announced project boundary would not be considered unless the project has affected the price at which the property could be sold.

4.5.5. Limits of the Scope of the Project Rule. The scope of the project rule “is designed to ensure that the landowner is neither hurt nor helped in a takings valuation by any action done by the Government within the scope of the project leading to the taking.”⁷⁰¹ The scope of the project rule applies only to changes in value attributable to the government's project: the rule does not allow an appraiser to disregard changes in value attributable to other factors.⁷⁰² For this reason, changes in value prior to the date of valuation due to physical deterioration within the landowner's reasonable control must be considered.⁷⁰³ Similarly, the scope of the project rule does not permit the appraiser to ignore market realities beyond the government project.⁷⁰⁴ It also bears noting that the requirement to consider the government project's *direct and special benefits* to remainder property in partial acquisitions (discussed in Section 4.6) does not conflict with the scope of the project rule.⁷⁰⁵ Rather, as the Fifth Circuit explored at length in *320 Acres*, these requirements stem from the same underlying principles.⁷⁰⁶

4.5.6. Further Guidance. As often observed, the scope of the project rule may “be stated easily enough” but “is not so easily understood or applied.”⁷⁰⁷ For further guidance, the two major Supreme Court decisions on the scope of the project rule are *United States v. Miller* and *United States v. Reynolds*.⁷⁰⁸ The Fifth Circuit's influential opinion in *United States v. 320 Acres* analyzes

699 See *Marketability*, THE DICTIONARY OF REAL ESTATE APPRAISAL (6th ed. 2015) (“The relative desirability of a property (for sale or lease) in comparison with similar or competing properties in the area.”); *United States v. 881.39 Acres of Land*, 254 F. Supp. 294, 297 (E.D. Okla. 1966) (discussing marketability); *United States v. 48.10 Acres of Land in New Windsor*, 144 F. Supp. 258, 264-265 (S.D.N.Y. 1956) (allowing compensation for taking of easements where not only marketability, but market value was affected); see also *United States v. 58.1 Acres of Land in Hempstead*, 151 F. Supp. 631, 634 (E.D.N.Y. 1957) (discussing market value impacts in *48.10 Acres in New Windsor*); Section 1.4.2 (marketability studies); cf. *United States v. 6.24 Acres of Land (Weber)*, 99 F.3d 1140, 1996 WL 607162, at *6 (6th Cir. 1996) (per curiam) (unpubl.) (“diminution in value caused by fear may be recoverable when such fear affects the price a knowledgeable and prudent buyer would pay to a similarly well-informed seller”); accord *United States v. 760.807 Acres of Land*, 731 F.2d 1443, 1446-1447 (9th Cir. 1984).

700 See Section 4.2.1.2.

701 *United States v. 480.00 Acres (Fornatora)*, 557 F.3d 1297, 1312 (11th Cir. 2009).

702 *320 Acres*, 605 F.2d at 803 (“The [scope of the project] rule refines the concept of fair market value only with respect to alterations in value attributable to the [specific government project at issue]. It has no bearing whatsoever upon alterations in value attributable to other events or market forces.”); *Granby I*, 844 F. Supp. 2d at 674, 675-79 (finding scope of the project rule did not apply, “given the multitude of other plausible—and more likely—explanations for the financial difficulties” of landowner's proposed development besides alleged project influence); see *City of New York v. Sage*, 239 U.S. 57, 60-62 (1915) (“The [government] is not to be made to pay for any part of what it has added to the land by thus uniting it with other lots, if that union would not have been practicable or have been attempted except by the intervention of eminent domain. Any rise in value before the taking, not caused by the expectation of that event, is to be allowed, but we repeat, it must be a rise in what a purchaser might be expected to give.”).

703 Uniform Act, § 301(3), 42 U.S.C. § 4651(3) (2012); *Granby I*, 844 F. Supp. 2d at 674; cf. *Rasmuson v. United States*, 807 F.3d 1343, 1346 (Fed. Cir. 2015) (“proper appraisal methodology has to account for those physical conditions . . . a reasonably prudent buyer would consider . . . when formulating an offer”).

704 *320 Acres*, 605 F.2d at 803; *Granby I*, 844 F. Supp. 2d at 674, 675-79.

705 See *United States v. Fuller*, 409 U.S. 488, 492 (1973)

706 *320 Acres*, 605 F.2d at 781-89.

707 *Id.* at 781-82; see *United States v. Reynolds*, 397 U.S. 14, 21 (1970) (“application to any particular set of facts requires discriminating judgment”); *United States v. Eastman (Eastman I)*, 528 F. Supp. 1177, 1179 n.2 (D. Or. 1981), *aff'd*, 528 F. Supp. 1177 (9th Cir. 1983).

708 *United States v. Miller*, 317 U.S. 369 (1943); *Reynolds*, 397 U.S. 14 (1970).

applications of the rule as well as its historical and legal origins.⁷⁰⁹ Two more recent cases on the applicability of the scope of the project rule are also instructive: *United States v. 480.00 Acres (Fornatora)*, from the Eleventh Circuit, and *United States v. 1.604 Acres (Granby I)*, from the Eastern District of Virginia.⁷¹⁰

4.6. **Partial Acquisitions.** Just compensation must put a landowner

“in the same position monetarily as he would have occupied if his property had not been taken.”⁷¹¹ The landowner “must be made whole but is not entitled to more.”⁷¹² Under this principle, compensation for a partial acquisition—when the United States acquires only part of a unitary holding—must reflect not only the property interest acquired, but also any change in the value of the remainder directly caused by the government’s acquisition or planned use of the part acquired.⁷¹³ As a result, the federal measure of compensation in partial acquisitions is the difference between the value of the landowner’s property before and after the government’s acquisition.⁷¹⁴ Accordingly, appraisers must apply the *before and after* method of valuation in partial acquisitions under federal law, developing opinions of both (1) the market value of the whole property before the acquisition, and (2) the market value of the remainder property after the acquisition.⁷¹⁵ Valuations must analyze and reflect all compensable damages and direct (special) benefits to the value of the remainder property due to the government’s acquisition and disregard all non-compensable damages and indirect (general) benefits.⁷¹⁶

In partial acquisitions the measure of compensation is the difference between the market value of the landowner’s property before and after the government’s acquisition.

There are important differences between federal and many state laws governing the valuation of partial acquisitions for just compensation purposes.⁷¹⁷ Valuations in federal acquisitions must apply the correct valuation method, analyze and consider compensable damages and benefits, and disregard non-compensable damages and benefits in accordance with federal law.⁷¹⁸ As discussed below, these critical distinctions are often complex and always require careful analysis. Of course, the overarching goal is to ensure that compensation reflects “the value of what [the landowner] has been deprived of, and no more. To award him less would be unjust to him; to award him more would be unjust to the public.”⁷¹⁹

709 320 Acres, 605 F.2d 762 (5th Cir. 1979); see generally *id.* at 781-85 (historical and legal foundations of rule), 785-90 (analysis of *Miller* and *Reynolds*), 790-98 (applicability of rule), 798-803 (implementation of rule) & 803-811 (case-specific analysis). The opinion is widely cited across the federal courts. See, e.g., *United States v. 480.00 Acres (Fornatora)*, 557 F.3d 1297, 1306-07, 1311-13 (11th Cir. 2009); *Eastman I*, 528 F. Supp. at 1179 n.2; *United States v. 428.02 Acres of Land*, 687 F.2d 266, 270 (8th Cir. 1982); *United States v. 49.01 Acres of Land in Osage Cty.*, 669 F.2d 1364 (10th Cir. 1982); *United States v. 125.07 Acres of Land (Pond Road I)*, 667 F.2d 243, 248-49 (1st Cir. 1981); *Granby I*, 844 F. Supp. 2d at 674-75.

710 *Fornatora*, 557 F.3d at 1307, 1311; *Granby I*, 844 F. Supp. 2d at 674-75.

711 *United States v. Reynolds*, 397 U.S. 14, 16 (1970); accord *United States v. Va. Elec. & Power Co.*, 365 U.S. 624, 633 (1961); *Olson v. United States*, 292 U.S. 246, 255 (1934); *United States v. New River Collieries Co.*, 262 U.S. 341, 343 (1923); *Seaboard Air Line Ry. Co. v. United States*, 261 U.S. 299, 304 (1923).

712 *Va. Elec.*, 365 U.S. at 633 (quoting *Olson*, 292 U.S. at 255).

713 *United States v. Miller*, 317 U.S. 369, 376 (1943); *United States v. Grizzard*, 219 U.S. 180, 183 (1911); *Bauman v. Ross*, 167 U.S. 548, 574-75 (1897).

714 *Va. Elec.*, 365 U.S. at 632. Partial acquisitions are distinct from temporary acquisitions. See *United States v. Banisadr Bldg. Joint Venture*, 65 F.3d 374, 378 (4th Cir. 1995); Section 4.7.

715 *Va. Elec.*, 365 U.S. at 632; *United States v. 68.94 Acres of Land*, 918 F.2d 389, 393 n.3 (3d Cir. 1990); *United States v. 91.90 Acres of Land in Monroe Cty. (Cannon Dam)*, 586 F.2d 79, 86 (8th Cir. 1978); *Ga.-Pac. Corp. v. United States*, 640 F.2d 328, 336 (Ct. Cl. 1980) (per curiam).

716 See *Bauman*, 167 U.S. at 574.

717 See *Mitchell v. United States*, 267 U.S. 341, 345-46 & n.1 (1925); *Ga.-Pac.*, 640 F.2d at 361 & n.43.

718 See *Miller*, 317 U.S. at 376 & nn.20-21.

719 *Bauman*, 167 U.S. at 574.

While outside the appraiser’s assignment, it bears noting that landowners are reimbursed for many types of non-compensable damage—such as moving expenses and relocation costs—through the Uniform Act or other federal statutes.⁷²⁰ As the Supreme Court explained, “[s]uch losses may be compensated by legislative authority, not by force of the Constitution alone.”⁷²¹ These administrative payments for *people or businesses* affected by federal acquisitions are separate from, and in addition to, just compensation for the *property* acquired.⁷²² Accordingly, an appraisal that improperly includes non-compensable elements not only would be legally incorrect for just compensation purposes, but also could result in double payment.⁷²³

4.6.1. The Federal Rule: Before and After Methodology. The before and after method of valuation for partial acquisitions is accepted in all federal courts.⁷²⁴ It is often called the federal rule, although it also applies in many (but not all) state jurisdictions.⁷²⁵ A before and after valuation requires careful determination of the larger parcel (or parent tract) at issue—which may differ before and after the acquisition—and proper consideration of damages and benefits to the remainder property due to the government acquisition. Each of these issues will be addressed below, along with limited exceptions to the before and after method.

The before and after method is “particularly advantageous” where the remainder may have been damaged and/or benefitted by the government’s acquisition.⁷²⁶ As recognized by the federal courts, proper application of the before and after method will result in a figure that reflects the value of the land actually acquired as well as any compensable damages and direct and special benefits to the remainder property.⁷²⁷ “All of the elements of value entering into just compensation”—i.e., the part acquired, compensable damage to the remainder and compensable

In partial acquisitions, compensable damages and direct (special) benefits to the remainder must be reflected.

Non-compensable damages and indirect (general) benefits must be disregarded.

These federal rules may differ from state law or local practice.

720 State laws governing relocation benefits vary. See generally Nicole Stelle Garnett, *The Neglected Political Economy of Eminent Domain*, 105 MICH. L. REV. 101, 121-26 & nn.111-53 (2006) (discussing federal and state relocation benefits and empirical studies of same).

721 *United States v. Willow River Power Co.*, 324 U.S. 499, 510 (1945); see also *United States v. Gen. Motors Corp.*, 323 U.S. 373, 382 (1945).

722 See *United States v. 3.66 Acres of Land in S.F.*, 426 F. Supp. 533, 537 (N.D. Cal. 1977) (“While Congress has recognized that landowners sometimes deserve more compensation than the fair market value alone would provide, it did not intend such compensation to be recovered . . . in a condemnation action.”). The Uniform Act expressly states that it does not “creat[e] . . . any element of value or of damage” in eminent domain proceedings to determine just compensation. 42 U.S.C. § 4602(b); see generally note 1, *supra*.

723 Cf. *Gen. Motors*, 323 U.S. at 379-80, 382.

724 E.g., *United States v. Va. Elec. & Power Co.*, 365 U.S. 624, 632 (1961); *Rasmuson v. United States*, 807 F.3d 1343, 1345 (Fed. Cir. 2015); *United States v. 33.92356 Acres of Land (Piza-Blondet)*, 585 F.3d 1, 9 (1st Cir. 2009); *United States v. 4.27 Acres of Land*, 271 F. App’x 424, 425 (5th Cir. 2008) (per curiam) (unpubl.); *United States v. 6.24 Acres of Land (Weber)*, 99 F.3d 1140, 1996 WL 607162 (6th Cir. 1996) (per curiam) (unpubl.); *United States v. Banisadr Bldg. Joint Venture*, 65 F.3d 374, 376 (4th Cir. 1995); *United States v. 760.807 Acres of Land in Honolulu*, 731 F.2d 1443, 1445-46 (9th Cir. 1984); *United States v. 68.94 Acres of Land in Kent Cty.*, 918 F.2d 389, 393, n.3 (3d Cir. 1990); *United States v. 91.90 Acres of Land in Monroe Cty. (Cannon Dam)*, 586 F.2d 79, 86 (8th Cir. 1978); *United States v. 105.40 Acres of Land in Porter Cty.*, 471 F.2d 207, 210 (7th Cir. 1972); *United States v. 901.89 Acres of Land in Davidson & Rutherford Cty.* (*Davenport*), 436 F.2d 395 (6th Cir. 1970); *Transwestern Pipeline Co. v. O’Brien*, 418 F.2d 15, 21 (5th Cir. 1969); *United States v. Evans*, 380 F.2d 761, 765 (10th Cir. 1967); *United States v. Glanat Realty Corp.*, 276 F.2d 264, 265 (2d Cir. 1960), *aff’d* *United States v. 765.56 Acres of Land in Southampton (765.56 Acres II)*, 174 F. Supp. 1 (E.D.N.Y. 1959), and *United States v. 765.56 Acres of Land in Southampton (765.56 Acres I)*, 164 F. Supp. 942 (E.D.N.Y. 1958). The before and after method is the only method of valuation allowed for partial acquisitions in the Fifth Circuit. *United States v. 8.41 Acres of Land in Orange Cty.*, 680 F.2d 388, 392, n.5 (5th Cir. 1982).

725 See generally EATON, *supra* note 16, at 23-43; 4A-14 NICHOLS ON EMINENT DOMAIN § 14.02 (Just Compensation for Partial Takings).

726 *Piza-Blondet*, 585 F.3d at 9-10 & n.6 (citing *United States v. Miller*, 317 U.S. 369, 375-76 (1943)).

727 *Piza-Blondet*, 585 F.3d at 9-10 & n.6 (citing *Miller*, 317 U.S. at 375-76).

benefit to the remainder—“are contained in the federal formula.”⁷²⁸

4.6.1.1. Larger Parcel Determination. By definition, a partial acquisition involves property that is some part of a unitary holding (the “whole”),⁷²⁹ commonly called the larger parcel or parent tract.⁷³⁰ In a partial acquisition, “[i]t is often difficult . . . to determine what is a distinct and independent tract”—the whole property, comprising the part acquired and the remainder.⁷³¹ But this determination of the larger parcel is critical for proper consideration of compensable damages and offsetting benefits.⁷³² As discussed in Section 4.3.3, the key factors in determining the larger parcel are (1) unity of use (i.e., highest and best use), (2) unity of ownership, and (3) physical unity (proximity or contiguity).

Certain aspects of the larger parcel determination merit particular emphasis in partial acquisitions. Appraisers must bear in mind “the distinction between a residue of a tract whose integrity is destroyed [or impaired] by the [acquisition] and what are merely other parcels or holdings of the same owner” that are not part of the remainder for compensation or valuation purposes.⁷³³ Also, the availability of replacement property for the parcel acquired must be considered—as reasonable buyers

Availability of Replacement Property

In *Baetjer v. United States*, the United States acquired more than 7,900 acres of land from a large, integrated sugar cane operation spanning 30,000 acres in Puerto Rico and the neighboring island of Vieques. 143 F.2d 391 (1st Cir. 1944). The landowners claimed the sugar cane capacity of the condemned land could not be economically replaced. The court found that a compensable loss could result—if a lack of available replacement property would affect market value for a hypothetical willing buyer. The court therefore remanded the case to determine whether the sugar mills had an uneconomic over-capacity so that they could not be operated by anyone as profitably after the taking, such that market value would be affected. *Id.* at 396.

In contrast, take the case of *International Paper Co. v. United States*, a condemnation of over 9,500 acres of timber property, which the landowner claimed shared an integrated use with a paper mill under the same ownership. 227 F.2d 201 (5th Cir. 1955). Citing an industry “rule of thumb” that a paper mill should have one acre of woodland for every ton of paper it produced annually, the landowner claimed that falling below this acreage threshold because of the taking had significantly decreased the value of its paper mill. The court rejected this claim because the landowners’ experts failed to consider the availability of replacement property that would in all respects make up the deficiency in acreage due to the taking. Without proof that similar land was unavailable, the court held, damage to the paper mill could not be considered, as the landowner could simply buy replacement acreage to effectively restore the value of the paper mill. *Id.* at 207.

728 *United States ex rel. Tenn. Valley Auth. v. Indian Creek Marble Co.*, 40 F. Supp. 811, 820 (E.D. Tenn. 1941), cited with approval by *City of Van Buren v. United States*, 697 F.2d 1058, 1062 (Fed. Cir. 1983), and *United States v. 2,847.58 Acres of Land in Bath Cty.*, 529 F.2d 682, 686 (6th Cir. 1976); see *United States v. 760.807 Acres of Land in Honolulu*, 731 F.2d 1443, 1445 (9th Cir. 1984) (“Using [the before and after] method, any diminution in value of the remainder resulting from the taking and use of part of the original parcel, sometimes termed ‘severance damages,’ would be included in the award.”).

729 See *Sharp v. United States*, 191 U.S. 341, 353-55 (1903), *aff’d* *Sharp v. United States*, 112 F.893, 896 (3d Cir. 1902).

730 See *United States v. 14.38 Acres of Land*, 80 F.3d 1074, 1077 (5th Cir. 1996). Otherwise, the property under appraisal would be a total acquisition, leaving no remainder.

731 *Sharpe*, 112 F. at 896.

732 See *id.*

733 See *id.*; see also *United States v. 8.41 Acres of Land in Orange Cty.*, 680 F.2d 388, 393 (5th Cir. 1982).

and sellers would do.⁷³⁴ This may be contrary to some state law and practice.⁷³⁵ But in federal acquisitions, failing to consider the availability of replacement property may result, in the words of the Fifth Circuit, in a valuation that “offends any rules relating to the awarding of just compensation for property taken for public use.”⁷³⁶

The availability of replacement property to restore the usability of the remainder must be considered in federal partial acquisitions.

- 4.6.2. Damage.** Just compensation is measured by the owner’s loss, not the government’s gain.⁷³⁷ In partial acquisitions when only part of a larger parcel is acquired, the value of the part acquired is not the sole measure of compensation; the “injury or benefit to the part not taken is also to be considered.”⁷³⁸ If the part not acquired, the landowner’s *remainder*, is “left in such shape or condition as to be in itself of less value than before, the owner is entitled to additional damages on that account.”⁷³⁹ In legal terms, decreases in the market value of the remainder property for which compensation must be paid are compensable damage and must be considered in valuations for federal acquisitions. Compensable diminution in value is also loosely, and misleadingly, referred to as severance damages.⁷⁴⁰ Compensable damages are not a distinct item to be added to compensation; rather, they are already reflected and automatically included in a before and after method of valuation.⁷⁴¹

But “not all losses suffered by the owner are compensable under the Fifth Amendment.”⁷⁴² Non-compensable damages cannot be considered in valuations for federal just compensation purposes.⁷⁴³ The distinction between compensable and non-compensable losses is rooted in the market value standard as the measure of just compensation: under the Fifth Amendment, the Supreme Court held, just compensation does not include “indirect or remote injuries” beyond market value “which would ensue the sale of the property to someone other than the sovereign.”⁷⁴⁴ Such losses are not compensable because they fluctuate with the

Damage to a property’s market value is compensable or non-compensable for federal acquisition purposes.

The confusing terms *severance damage* and *consequential damage* can generally be avoided.

734 *Baetjer v. United States*, 143 F.2d 391 at 396-97 (1st Cir. 1944); accord *Int’l Paper Co. v. United States*, 227 F.2d 201 (5th Cir. 1955); *Porrata v. United States*, 158 F.2d 788, 790 (1st Cir. 1947) (“Certainly one of the elements which would be considered by the mythical ‘willing buyer’ of the [remainder property] would be the availability of a suitable substitute . . . to take the place of the one formerly on [the part taken].”); see *Ga.-Pac. Corp. v. United States*, 640 F.2d 328, 359 (Ct. Cl. 1980) (per curiam) (burden to show that “replacement old-growth timber was not available, or if available, at least, the burden to show persuasively that under existing circumstances it would be economically unfeasible to obtain available replacement timber”); see also *United States v. 711.57 Acres of Land in Alameda Cty.*, 51 F. Supp. 30, 33 (N.D. Cal. 1943) (awarding compensation reflecting availability of alternative access to severed tract).

735 See *Miller v. United States*, 620 F.2d 812, 831-32 & n.17 (1980). (noting that while some state law cases hold otherwise, “the better rule” applied in federal court holds that “the future availability of other land should be considered as the hypothetical ‘willing buyer’ of the [remainder] would consider such a factor”) (citing *Porrata*, 158 F.2d 788).

736 *Int’l Paper*, 227 F.2d at 207 (case study).

737 *Bos. Chamber of Commerce v. City of Boston*, 217 U.S. 189, 195 (1910); *United States ex rel. Tenn. Valley Auth. v. Powelson*, 319 U.S. 266, 281 (1943).

738 *Bauman v. Ross*, 167 U.S. 548, 574 (1897).

739 *Id.*

740 See, e.g., *United States v. Miller*, 317 U.S. 369, 376 (1943) (“loosely”); *United States v. 9.20 Acres of Land in Polk Cty.*, 638 F.2d 1123, 1127 (8th Cir. 1981) (discussing “misleading nature of the term ‘severance damages’ as used in partial taking cases”); see *United States v. Honolulu Plantation Co.*, 182 F.2d 172, 175 & n.1 (9th Cir. 1950) (“The use of this term is to be criticized because it is apt to lead to loose thinking.” (citing *Miller*, 317 U.S. at 376)); *United States v. 760.807 Acres of Land in Honolulu*, 731 F.2d 1443, 1448 (9th Cir. 1984).

741 *United States v. 33.92356 Acres of Land (Piza-Blondet)*, 585 F.3d 1, 9 & n.6 (1st Cir. 2009); *United States v. 91.90 Acres of Land in Monroe Cty. (Cannon Dam)*, 586 F.2d 79, 86 (8th Cir. 1978); *United States v. 711.57 Acres of Land in Alameda Cty.*, 51 F. Supp. 30, 33 (N.D. Cal. 1943) (“Such . . . damage is a part of the whole damage suffered by the owner upon the taking.”); see *Miller*, 317 U.S. at 375-76.

742 *Powelson*, 319 U.S. at 281.

743 *United States v. Westinghouse Elec. & Mfg. Co.*, 339 U.S. 261, 264 (1950).

744 *United States v. Gen. Motors Corp.*, 323 U.S. 373, 382, 379 (1945).

needs of the owner, not the market; they are “apart from the value of the thing taken.”⁷⁴⁵ Non-compensable damages have often been called consequential damages, but this term has caused confusion in both valuation and legal analyses.⁷⁴⁶

Federal law prohibits consideration of non-compensable damages that may be compensable under many state laws and therefore considered in other contexts.⁷⁴⁷ Under federal law, some types of damage may be compensable if proved. Some other types of damage—such as lost profits—are never compensable, even if proved, because “not all losses are compensable.”⁷⁴⁸ And some types of damage may be compensable (if proved) in specific types of acquisitions, but are never compensable in other types of acquisitions.

4.6.2.1. Compensable (Severance) Damages. In the context of the Fifth Amendment, *damage* is simply “the equivalent for the injury done,” just as *compensation*, “standing by itself, carries the idea of an equivalent.”⁷⁴⁹ Yet the concept of compensable damage is often misunderstood, as the Eighth Circuit explained:

It is incorrect to think of “severance damages” as a separate and distinct item of just compensation apart from the difference between the market value of the entire tract immediately before the taking and the market value of the remainder immediately after the taking. In the case of a partial taking, if the “before and after” measure of compensation is properly [applied], there is no occasion . . . to talk about “severance damages” as such, and indeed it may be confusing to do so. The matter is taken care of automatically in the “before and after” submission.⁷⁵⁰

It is incorrect to think of severance damages as a separate item apart from the difference in the property’s market value before and after the government’s acquisition.

745 *United States v. Petty Motor Co.*, 327 U.S. 372, 377-78 (1946); *United States v. 50 Acres of Land (Duncanville)*, 469 U.S. 24, 33 (1984); see also *United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53, 76 (1913) (“These additional values represent, therefore, no actual loss, and there would be no justice in paying for a loss suffered by no one in fact.”).

746 *See Ga.-Pac. Corp. v. United States*, 640 F.2d 328, 361 n.44 (Ct. Cl. 1980) (per curiam) (“The concept of consequential damages, however, is sometimes troublesome and confusing in severance damage situations.”); see also *EATON*, *supra* note 16, at 289-90 (“[T]he term consequential damages introduces nothing but confusion to what, from a valuation standpoint, would merely appear [to] be a question of compensability.”).

747 *See Mitchell v. United States*, 267 U.S. 341, 345-46 (1925); *Batten v. United States*, 306 F.2d 580, 583-84 (10th Cir. 1962) (citing *Richards v. Wash. Terminal Co.*, 233 U.S. 546, 554 (1914)); cf. *Bauman v. Ross*, 167 U.S. 548, 575-84 (1897) (quoting state constitutional provisions regarding just compensation).

748 *United States ex rel. Tenn. Valley Auth. v. Powellson*, 319 U.S. 266, 281 (1943); cf. *United States v. 101.88 Acres of Land in St. Mary Par. (Avoca Island)*, 616 F.2d 762, 770 (5th Cir. 1980) (noting case law draws “distinction between damages allowable in the condemnation proceeding, and claims for damages that are not allowable . . . in a condemnation proceeding”).

749 *Monongahela Nav. Co. v. United States*, 148 U.S. 312, 326 (1893) (distinguishing “damages by way of compensation . . . from punitive or exemplary damages”).

750 *United States v. 9.20 Acres of Land in Polk Cty.*, 638 F.2d 1123, 1127 (8th Cir. 1981) (quoting *United States v. 91.90 Acres of Land in Monroe Cty. (Cannon Dam)*, 586 F.2d 79, 86 (8th Cir. 1978)); accord *United States v. 25.202 Acres of Land (Amexx I)*, 860 F. Supp. 2d 165 (N.D.N.Y. 2010), *aff’d*, 502 F. App’x 43, 45 (2d Cir. 2012) (unpubl.); *United States v. 6.24 Acres of Land (Weber)*, 99 F.3d 1140, 1996 WL 607162 (6th Cir. 1996) (per curiam) (unpubl.); *United States v. Werner*, 36 F.3d 1095, 1994 WL 507461, *6 (4th Cir. 1994) (per curiam) (unpubl.); *United States v. 50.50 Acres of Land*, 931 F.2d 1349, 1358 (9th Cir. 1991); *United States v. 2,560.00 Acres of Land in Wash. Cty.*, 836 F.2d 498, 502 (10th Cir. 1988); *United States v. 8.41 Acres of Land in Orange Cty.*, 680 F.2d 388, 390-92 & n.1 (5th Cir. 1982); see also *United States v. 33.92356 Acres of Land (Piza-Blondet)*, 585 F.3d 1, 8-10 & n.6 (1st Cir. 2009); *Baetjer v. United States*, 143 F.2d 391, 395-96 (1st Cir. 1944).

Compensable damages may reflect a decrease in the market value of the remainder arising from (1) the government's planned use of the part acquired, and/or (2) the relation of the part acquired to the larger parcel.⁷⁵¹

- 4.6.2.2. Necessary Support.** Of course, the mere fact of a partial acquisition will not necessarily entitle a landowner to damages.⁷⁵² It may well be “that while there has been a severance in the legal sense such severance has caused no compensable damage to the market value of the properties not taken.”⁷⁵³

And legally compensable damages can only be considered if proved: as with any element affecting value, damage to the remainder (i.e., diminution in value) can never be assumed but must always be fully supported by the facts of each situation.⁷⁵⁴ Damage that is “vague and speculative in character” or premised on “possibilities more or less remote” cannot be considered.⁷⁵⁵ As a result, it is improper to use damage as a catchall, simply stating an amount without specifying the basis for the opinion. One court criticized parties who failed to furnish factual data to support claimed diminution in value to the remainder as follows: “Not only were the opinions of their experts based largely on speculation and conjecture, but these witnesses totally disregarded available evidence of comparable sales before and after the taking of the easement.”⁷⁵⁶ In short, damage is “compensable only if the landowner incurs a direct loss reflected in the market place that results from the [acquisition].”⁷⁵⁷ Moreover, not merely damage, but *causation* must be proved: for compensation to reflect diminution in value to the remainder, the “landowner must demonstrate that the taking caused the . . . damage[.]”⁷⁵⁸

Conjecture and Speculation. Of course, even potentially compensable damages must be disregarded if based on mere speculation and conjecture.⁷⁵⁹ Thus, the federal courts have barred

751 *Baetjer*, 143 F.2d at 392 n.2; see, e.g., *Sharpe v. United States*, 112 F.893, 896 (3d Cir. 1902), *aff'd sub nom. Sharp v. United States*, 191 U.S. 341 (1903) (“proper to include the damages in the shape of deterioration in value which will result to the residue of the tract from the occupation of the part so taken”); *United States v. Miller*, 317 U.S. 369, 376 (1943) (“compensation . . . includes any element of value arising out of the relation of the part taken to the entire tract”); cf. *United States v. 105.40 Acres of Land in Porter Cty.*, 471 F.2d 207, 211 n.8 (7th Cir. 1972) (“It might be argued that recovery of damages arising from a) the relation of the ‘remainder tract’ to the whole, and b) the relation of the ‘condemned tract’ to the whole, have both been ‘loosely spoken of’ and treated as severance damages.” (quoting *Miller*, 317 U.S. at 376)); *Ga.-Pac. Corp. v. United States*, 640 F.2d 328, 336 (Ct. Cl. 1980) (per curiam).

752 *United States v. Mattox*, 375 F.2d 461, 463-64 (4th Cir. 1967); *Baetjer*, 143 F.2d at 395-96.

753 *United States v. 7,936.6 Acres of Land*, 69 F. Supp. 328, 332 (D.P.R. 1947), *on remand from Baetjer*, 143 F.2d at 395-96.

754 *Olson v. United States*, 292 U.S. 246, 257 (1934); *Baetjer*, 143 F.2d at 395-96 (remanding for evidence on “whether or not the [landowners] have suffered a compensable loss, and if they have, its extent”); *Sharpe*, 112 F. at 897.

755 *Sharpe*, 112 F. at 897.

756 *United States v. 26.07 Acres of Land in Nassau Cty.*, 126 F. Supp. 374, 377 (E.D.N.Y. 1954). In contrast, “the Government’s expert made a detailed survey of sales of residential and industrial parcels in the immediate vicinity of the defendants’ properties, before and after the appropriation of the easement, which plainly indicated that there was no appreciable depreciation in the market value of similar parcels as a result of the imposition of the easement.” *Id.*

757 *United States v. 760.807 Acres of Land in Honolulu*, 731 F.2d 1443, 1448 (9th Cir. 1984); *United States v. 6.24 Acres of Land (Weber)*, 99 F.3d 1140, 1996 WL 607162, at *5 (6th Cir. 1996) (per curiam) (unpubl.).

758 *760.807 Acres in Honolulu*, 731 F.2d at 1448; *Hendler v. United States*, 175 F.3d 1374, 1384-85 (Fed. Cir. 1999) (affirming finding that diminution in market value of contaminated property was due to preexisting contamination caused by third parties, not government’s subsequent remediation activities). Proof of causation is also required to consider the effects of the government project in total acquisitions. See, e.g., *United States v. 1.604 Acres of Land (Granby I)*, 844 F. Supp. 2d 668, 675-76 (E.D. Va. 2011) (“[The court] need not resolve [project influence issues] because there is scant evidence that the government’s actions actually affected the market value of the property.”).

759 *United States ex rel. Tenn. Valley Auth. v. Powelson*, 319 U.S. 266, 275-76 (1943); *Olson v. United States*, 292 U.S. 246, 257 (1934).

consideration of damages that are not supported by actual market evidence.⁷⁶⁰ These items must be disregarded in determining market value for federal acquisitions because consideration of such elements would “add to just compensation something that the law does not allow.”⁷⁶¹ Elements that have been excluded from consideration because they were not shown to be reasonably probable run the gamut from an assertion that “buyers would suddenly become fearful of explosive hazards” due to a safety buffer zone “created to ease public fear of explosive hazards”⁷⁶² to claimed damage due to the threat that “marauding bears” would “specifically foray from [a] newly created park” to attack young-growth trees on remainder property.⁷⁶³

Anticipated Physical Invasion of the Remainder. Damage due to anticipated physical invasion of the remainder resulting from the intended use of the land acquired is not compensable in federal acquisitions.⁷⁶⁴ For example, in the federal acquisition of a flowage easement for construction of a reservoir, an opinion of market value must disregard any damage to the remainder from anticipated wave action above the line of the acquisition during periods of high winds.⁷⁶⁵ To do otherwise would in essence expand the government’s acquisition, which neither appraisers nor landowners—nor the courts—have the power to do.⁷⁶⁶

Use of Others’ Lands. Similarly, diminution in value of a landowner’s remainder caused by the United States’ use of *other* lands is not compensable and cannot be considered in valuations for just compensation purposes.⁷⁶⁷ The Supreme Court created this rule in *Campbell v. United States*, reasoning:

If the former private owners [of adjacent property] had devoted their lands to the identical uses for which they were acquired by the United States . . . , they would not have become liable for the resulting diminution in value of [the remainder] property. The liability of the United States is not greater than would be that of the private users.⁷⁶⁸

- ⁷⁶⁰ *E.g., United States v. Honolulu Plantation Co.*, 182 F.2d 172, 179 (9th Cir. 1950) (“[S]trict proof of the loss in market value to the remaining parcel is obligatory.”); *26.07 Acres in Nassau*, 126 F. Supp. at 377; *see 760.807 Acres in Honolulu*, 731 F.2d at 1448 (finding appraiser’s determination was “insufficient” without “market surveys or other data” that showed damages actually recognized in the market); *United States v. 122.63 Acres of Land in Norfolk Cty.*, 526 F. Supp. 539 (D. Mass. 1981) (declining to award damages for taking of easement where there was no proof of such damage); *see also Weber*, 99 F.3d 1140, 1996 WL 607162, at *4-6 (rejecting one appraiser’s finding of stigma damage where record was “devoid of evidence” showing such damage, and accepting another appraiser’s finding that no stigma damage existed based on comparison of similar properties and interviews of market participants involved with the purchase of similar property); *Sharpe*, 112 F. at 897.
- ⁷⁶¹ *Intertype Corp. v. Clark-Congress Corp.*, 240 F.2d 375, 380 (7th Cir. 1957).
- ⁷⁶² *760.807 Acres in Honolulu*, 731 F.2d at 1448-49 (noting government’s acquisition of safety buffer zone “could very well have increased the value of the remainder” due to public confidence that remainder was safe from explosive hazards).
- ⁷⁶³ *Ga.-Pac. Corp. v. United States*, 640 F.2d 328, 362-63 & n.47 (Ct. Cl. 1980) (per curiam) (finding “no reasonable probability supportive of such a belief in this record” (citing *Olson*, 292 U.S. at 257) and noting it “is questionable, in any event, if such intrusions provide a basis for recovery of severance damages” (citing *United States v. Pope & Talbot, Inc.*, 293 F.2d 822, 826 (9th Cir. 1961))).
- ⁷⁶⁴ Such damage may be compensable in a separate acquisition or inverse taking claim (Section 4.9). *United States v. 38.60 Acres of Land in Henry Cty.*, 625 F.2d 196, 199-200 (8th Cir. 1980); *United States v. 101.88 Acres of Land in St. Mary Par. (Avoca Island)*, 616 F.2d 762, 768 (5th Cir. 1980).
- ⁷⁶⁵ *E.g., 38.60 Acres in Henry*, 625 F.2d at 199-200; *see also Avoca Island*, 616 F.2d at 768 (improper to value as if United States would deposit dredging spoil on remainder land); *United States v. 3,317.39 Acres of Land in Jefferson Cty.*, 443 F.2d 104 (8th Cir. 1971) (error to consider damage for possible flooding of remainder property); *United States v. Brondum*, 272 F.2d 642 (5th Cir. 1959) (error to value taking of easement to cut trees and remove obstructions as if it also included aviation rights to fly aircraft over area).
- ⁷⁶⁶ *38.60 Acres in Henry*, 625 F.2d at 199-200; *Avoca Island*, 616 F.2d at 768; *United States v. 3,317.39 Acres of Land in Jefferson Cty.*, 443 F.2d 104, 105-06 (8th Cir. 1971); *see Berman v. Parker*, 348 U.S. 26, 35-36 (1954); *United States v. 3,218.9 Acres of Land in Warren Cty.*, 619 F.2d 288, 290-93 (3d Cir. 1980); *United States v. 40.60 Acres of Land in Contra Costa Cty.*, 483 F.2d 927, 928 (9th Cir. 1973); *see also United States v. 21.54 Acres of Land in Marshall Cty.*, 491 F.2d 301, 304-06 (4th Cir. 1973).
- ⁷⁶⁷ *Campbell v. United States*, 266 U.S. 368, 371-72 (1924); *760.807 Acres in Honolulu*, 731 F.2d at 1447; *Avoca Island*, 616 F.2d at 769; *United States v. Kooperman*, 263 F.2d 331, 332 (2d Cir. 1959); *Winn v. United States*, 272 F.2d 282, 286-87 (9th Cir. 1959); *Boyd v. United States*, 222 F.2d 493, 494 (8th Cir. 1955).
- ⁷⁶⁸ *Campbell*, 266 U.S. at 371-72 (noting a landowner “ha[d] no right to prevent the taking and use of the lands of others”); *accord United States v. 15.65 Acres of Land in Marin Cty. (Marin Ridgeland Co.)*, 689 F.2d 1329, 1331-32 (9th Cir. 1982).

The Ninth Circuit created a narrow exception to the *Campbell* rule in *United States v. Pope & Talbot, Inc.* to allow compensation for damage resulting from the use of another's property in limited circumstances.⁷⁶⁹ Thus, in the Ninth Circuit, damage to the remainder resulting from the use of others' property may be considered if (1) the part acquired is *indispensable* to the government project; (2) the part acquired contributes *substantially* (not inconsequentially) to the project and the resulting damage; and (3) damage to the remainder due to the use of the part acquired is *inseparable* from damage to the remainder due to the government's use of its adjoining land in the project.⁷⁷⁰ For example, consider a partial taking of a tract for construction of a contaminated soils depository, which would be constructed partly on the property taken and partly on property acquired from others: it might not be practical to separate the diminution in value of the remainder caused by the use of *the property acquired* from that caused by the use of *lands acquired from others*. In such situations, the appraiser should seek **legal guidance**. The Ninth Circuit's exception to the *Campbell* rule has not been adopted by other federal courts,⁷⁷¹ and even in the Ninth Circuit is rarely invoked.⁷⁷² And as the Ninth Circuit made clear in subsequent rulings, regardless of the *Pope & Talbot* exception, damage is "compensable only if the landowner incurs a direct loss reflected in the market place that results from the [acquisition]."⁷⁷³ Moreover, causation must be proved: a "landowner must demonstrate that the taking caused the . . . damage[]."⁷⁷⁴

Stigma, Fear, and Contamination. If stigma or fear of a "hazard would affect the price a knowledgeable and prudent buyer would pay to a similarly well-informed seller, diminution in value caused by that fear may be recoverable as part of just compensation."⁷⁷⁵ The threshold question is not whether the fear or stigma is rational or well-founded, but rather whether and to what extent it affects the market.⁷⁷⁶ There must be evidence "connecting the safety issue to the real estate market."⁷⁷⁷ Moreover, it is improper to simply assume that a hazard, or the fear of a hazard, has an effect on market value. As the Ninth Circuit explained in a condemnation for construction of high-voltage transmission lines and potential fears of electromagnetic fields (EMFs):

In the absence of relevant and probative evidence, a [fact-finder] could only speculate concerning the effect of a particular measurement on public perception. Perhaps the general public, unschooled in the significance of the milligauss, is afraid of actual EMFs in any quantity, so long as they come from a big power line. Or perhaps the levels of EMFs that exist on [the subject property] would even *ease* public fears in the marketplace. There is simply no way for a [fact-finder] to tell. Without any evidence . . . that higher levels of EMF generate higher levels of buyer aversion and lower sale prices, [evidence] about specific EMF levels has little to no probative value.⁷⁷⁸

⁷⁶⁹ *United States v. Pope & Talbot, Inc.*, 293 F.2d 822 (9th Cir. 1961).

⁷⁷⁰ *Marin Ridgeland Co.*, 689 F.2d at 1332; *Pope & Talbot*, 293 F.2d at 825.

⁷⁷¹ See *E. Tenn. Nat. Gas Co. v. 2.93 Acres of Land*, No. 4:02CV00179, 2007 WL 2688414, *2 (W.D. Va. Sept. 13, 2007) (citing cases); cf. *Ga.-Pac. Corp. v. United States*, 640 F.2d 328, 363 (Ct. Cl. 1980) (per curiam) (citing but not applying *Pope & Talbot* analysis).

⁷⁷² See, e.g., *760.807 Acres in Honolulu*, 731 F.2d at 1447-48 (finding *Pope & Talbot* exception did not apply where "alleged severance damage, if resulting from any use, could not be caused by any use of the condemned property"); *St. Regis Paper Co. v. United States*, 313 F.2d 45 (9th Cir. 1962) (finding reduced access to remainder was due to use to which adjoining land owned by others was put, and therefore not compensable under *Campbell*, and *Pope & Talbot* did not apply).

⁷⁷³ *760.807 Acres in Honolulu*, 731 F.2d at 1448.

⁷⁷⁴ *Id.*

⁷⁷⁵ *Id.* at 1447.

⁷⁷⁶ *United States v. 87.98 Acres of Land in Merced Cty.*, 530 F.3d 899, 904-05 (9th Cir. 2008); *Basset, New Mexico LLC v. United States*, 55 Fed. Cl. 63, 75 (2002).

⁷⁷⁷ *87.98 Acres in Merced*, 530 F.3d at 905 (analyzing *760.807 Acres in Honolulu*, 731 F.2d at 1449).

⁷⁷⁸ *87.98 Acres in Merced*, 530 F.3d at 905-06 (internal citations omitted).

Further, fear or stigma associated with anticipated damage may also be recoverable if it would affect the market price a knowledgeable and prudent buyer would pay for the property on the date of value.⁷⁷⁹ Causation between the stigma or fear and the government's acquisition must be shown.⁷⁸⁰ And diminution in value resulting from fear or stigma due to the actions of a third party or to pre-existing conditions cannot be considered.⁷⁸¹ For these reasons, appraisers must obtain clear written instructions regarding appropriate consideration of environmental contamination or other hazards, as discussed in Section 1.2.7.1.⁷⁸²

4.6.2.3. Non-Compensable (Consequential) Damages. Because the compensability of a particular aspect of damage stems from its treatment in the open market between willing buyers and sellers, losses that are not reflected in sales prices in the private market cannot be considered in federal acquisitions. Applying this principle, federal courts have determined that the following losses are not compensable under the Fifth Amendment: loss of business value or going concern value;⁷⁸³ loss of or damage to goodwill;⁷⁸⁴ future loss of profits;⁷⁸⁵ frustration of plans;⁷⁸⁶ frustration of contract or contractual expectations;⁷⁸⁷ loss of opportunity or business prospect;⁷⁸⁸ frustration of an enterprise;⁷⁸⁹ loss of customers;⁷⁹⁰ expenses of moving removable fixtures and personal property;⁷⁹¹ depreciation in value of furniture and removable equipment;⁷⁹² increased production or management costs;⁷⁹³ damage to inventory or equipment;⁷⁹⁴ expense of adjusting or restructuring manufacturing operations;⁷⁹⁵ incurrence of removal or relocation costs;⁷⁹⁶ loss or cancellation of revocable permits or licenses;⁷⁹⁷ loss of ability to collect assessments;⁷⁹⁸ uncertainty premium due to tenant's status as a government entity;⁷⁹⁹ and interference with development

779 *United States v. 33.5 Acres of Land*, 789 F.2d 1396, 1398 (9th Cir. 1986).

780 *760.807 Acres in Honolulu*, 731 F.2d at 1447.

781 *Hendler v. United States*, 175 F.3d 1374, 1384-85 (Fed. Cir. 1999); *760.807 Acres in Honolulu*, 731 F.2d at 1448.

782 *See, e.g., Hendler*, 175 F.3d at 1384-85; *760.807 Acres in Honolulu*, 731 F.2d at 1448.

783 *Mitchell v. United States*, 267 U.S. 341, 345 (1925); *United States v. 1735 N. Lynn St.*, 676 F. Supp. 693, 697-98 (E.D. Va. 1987).

784 *United States v. Gen. Motors Corp.*, 323 U.S. 373, 378 (1945).

785 *Id.*; *United States ex rel. Tenn. Valley Auth. v. Powelson*, 319 U.S. 266, 283 (1943); *Yuba Nat. Res., Inc. v. United States*, 904 F.2d 1577, 1581-82 (Fed. Cir. 1990); *Ga.-Pac. Corp. v. United States*, 640 F.2d 328, 360-61 (Ct. Cl. 1980) (per curiam).

786 *1735 N. Lynn St.*, 676 F. Supp. at 701 (citing *Powelson*, 319 U.S. at 281-82 & n.12, and *Omnia Commercial Co. v. United States*, 261 U.S. 502, 513 (1923)).

787 *Omnia*, 261 U.S. at 513; *United States v. 57.09 Acres of Land in Skamania Cty. (Peterson II)*, 757 F.2d 1025, 1027 (9th Cir. 1985); *United States v. 677.50 Acres of Land*, 420 F.2d 1136, 1138-39 (10th Cir. 1970); *Hooten v. United States*, 405 F.2d 1167, 1168 (5th Cir. 1969); *United States v. 1.604 Acres of Land (Granby I)*, 844 F. Supp. 2d 668, 681-82 (E.D. Va. 2011); *United States v. Gossler*, 60 F. Supp. 971, 976-77 (D. Or. 1945).

788 *Omnia*, 261 U.S. at 513; *United States v. Grand River Dam Auth.*, 363 U.S. 229, 236 (1960); *Powelson*, 319 U.S. at 283.

789 *Omnia*, 261 U.S. at 513; *Grand River*, 363 U.S. at 236.

790 *S. Cty. Gas Co. of Cal. v. United States*, 157 F. Supp. 934, 935-36 (Ct. Cl. 1958), *cert. denied*, 358 U.S. 815 (1958); *R.J. Widen Co. v. United States*, 357 F.2d 988, 990, 993-94 (Ct. Cl. 1966); *see Stipe v. United States*, 337 F.2d 818, 819-21 & n.3 (10th Cir. 1964).

791 *United States v. Gen. Motors Corp.*, 323 U.S. 373, 378 (1945).

792 *Certain Land in City of Washington v. United States*, 355 F.2d 825, 826 (D.C. Cir. 1965); *see County of Ontonagon v. Land in Dickinson Cty.*, 902 F.2d 1568, 1590 WL 66813, *3-*4 (6th Cir. 1990) (unpubl.).

793 *PVM Redwood Co. v. United States*, 686 F.2d 1327, 1328-29 (9th Cir. 1982); *Ga.-Pac. Corp. v. United States*, 640 F.2d 328, 360 n.44, 363-65 (Ct. Cl. 1980) (per curiam).

794 *Klein v. United States*, 375 F.2d 825, 829 (Ct. Cl. 1967).

795 *United States v. 91.90 Acres of Land in Monroe Cty. (Cannon Dam)*, 586 F.2d 79, 87-88 (8th Cir. 1978); *Klein*, 375 F.2d 825 at 829.

796 *United States v. Westinghouse Elec. & Mfg. Co.*, 339 U.S. 261, 264 (1950); *United States v. Petty Motor Co.*, 327 U.S. 372, 377-78 (1946); *Intertype Corp. v. Clark-Congress Corp.*, 240 F.2d 375 (7th Cir. 1957); *Ga.-Pac.*, 640 F.2d at 361 n.44. But see exception discussed below regarding temporary acquisitions that interrupt but do not terminate a longer term.

797 *Acton v. United States*, 401 F.2d 896, 897-900 (9th Cir. 1968); *United States v. Cox*, 190 F.2d 293, 295-96 (10th Cir. 1951); *see also* Section 4.11.2 (Federal Grazing Permits).

798 *United States v. 0.073 Acres of Land (Mariner's Cove)*, 705 F.3d 540, 546-49 (5th Cir. 2013); *but see Adaman Mut. Water Co. v. United States*, 278 F.2d 842 (9th Cir. 1960) (regarding restrictive covenants for collection of assessments for water extracted from burdened properties).

799 *United States v. 131,675 Rentable Square Feet of Space (GS4-VA St. Louis I)*, No. 4:14-cv-1077 (CEJ), 2015 WL 4430134, *4 (E.D. Mo. July 20, 2015); *see United States v. Gen. Motors Corp.*, 323 U.S. 373, 379-80 (1945); *United States ex rel. Tenn. Valley Auth. v. Powelson*, 319 U.S. 266, 276 (1943).

agreements,⁸⁰⁰ among others.⁸⁰¹ Such losses must be disregarded—even if proved—because by law, they are not compensable under the Fifth Amendment.

Acquisitions of Fee or Other Full-Term Interests. Under federal law, compensation for a fee acquisition does not include “future loss of profits, the expense of moving removable fixtures and personal property from the premises, the loss of good-will which inheres in the location of the land, or other like consequential losses which would ensue the sale of the property to someone other than the sovereign.”⁸⁰² The Supreme Court explained the reasons for this rule as follows:

Whatever of property the citizen has the government may take. When it takes the property, that is, the fee, the lease, whatever he may own, terminating altogether his interest, under the established law it must pay him for what is taken, not more; and he must stand whatever indirect or remote injuries are properly comprehended within the meaning of “consequential damage” as that conception has been defined in such cases. Even so the consequences often are harsh. For these whatever remedy may exist lies with Congress.⁸⁰³

While beyond the scope of the appraiser’s assignment, Congress has enacted remedies: people and businesses affected by federal acquisitions receive replacement housing, moving expenses, and relocation services under the Uniform Act.⁸⁰⁴ Similarly, Congress authorized administrative payments for losses due to the cancellation of federal grazing permits for war purposes.⁸⁰⁵ Administrative benefits under the Uniform Act or other statutes are separate from compensation under the Fifth Amendment (and again, beyond the scope of the appraiser’s assignment to develop an opinion of market value for a federal acquisition).⁸⁰⁶

Temporary Acquisitions. The rules above apply with equal force to temporary acquisitions (Section 4.7) that acquire or terminate the full remaining term, because in such situations a “lessee would have to move at the end of his term unless the lease was renewed” regardless of the federal acquisition.⁸⁰⁷ “The compensation for the value of his leasehold covers the loss from the premature termination”⁸⁰⁸ As a result, the Supreme Court held, when there is an acquisition of an entire property interest, “whether that property represents the interest in a leasehold or a fee, the expenses of removal or of relocation are not to be included in valuing what is taken.”⁸⁰⁹

Temporary Acquisitions Interrupting a Longer Term. The valuation of a temporary acquisition that interrupts but does not terminate a longer interest—such as a sublet for less than the outstanding term of an existing leasehold—may involve a nuanced refinement of the

800 *United States v. 1,604 Acres of Land (Granby I)*, 844 F. Supp. 2d 668, 681-82 (E.D. Va. 2011); *Kaiser Dev. Co. v. Honolulu*, 649 F. Supp. 926, 936-37 (D. Haw. 1986), *aff’d for reasons stated by district court*, 898 F.2d 112 (9th Cir. 1990) (mem.).

801 As observed in a leading appraisal text, “[i]t is simply impossible to develop an all-inclusive list of the potential damages that could accrue to property in a partial taking case.” EATON, *supra* note 16, at 309.

802 *Gen. Motors*, 323 U.S. at 379-80 (footnotes omitted).

803 *Id.* at 382.

804 See note 1, *supra*; 49 C.F.R. §§ 24.1 to 24.603 (implementing regulations).

805 43 U.S.C. § 315q; see *United States v. Cox*, 190 F.2d 293, 296 (10th Cir. 1951); Section 4.11.2 (Federal Grazing Permits).

806 See *Gen. Motors*, 323 U.S. at 379-80; *United States v. Willow River Power Co.*, 324 U.S. 499, 510 (1945); *Cox*, 190 F.2d at 296.

807 *United States v. Petty Motor Co.*, 327 U.S. 372, 378-79 (1946); *Intertype Corp. v. Clark-Congress Corp.*, 240 F.2d 375 (7th Cir. 1957).

808 *Petty Motor*, 327 U.S. at 379; *Intertype Corp.*, 240 F.2d 375.

809 *United States v. Westinghouse Elec. & Mfg. Co.*, 339 U.S. 261, 264 (1950) (citing *Gen. Motors*, 323 U.S. at 379; *Intertype Corp.*, 240 F.2d at 380-81 (“the measure of its damages would have been . . . just compensation—which does not include . . . the cost of removal and other such consequential items”).

rule stated above.⁸¹⁰ As a result, the market value of this type of temporary interest may need to reflect reasonable costs for tenant relocation, preparing the space for the new occupant, and storage of goods pending the displaced tenant's return.⁸¹¹ Such items may be considered "not as independent items of damage but to aid in the determination of what would be the usual—the market—price which would be asked and paid for such temporary occupancy of the building then in use under a long term lease."⁸¹²

The Supreme Court has emphasized that consideration of reasonable relocation costs in temporary interrupting acquisitions does not "depart from the settled rule against allowance for 'consequential losses' in federal condemnation proceedings."⁸¹³ Rather, relocation costs may be relevant to the market value of a temporary interrupting acquisition of less than the outstanding term—such as a sublet of an occupied building—and therefore compensable and appropriate to consider in such acquisitions. But relocation costs are merely incidental to the value of an acquisition of the *entire* interest (whether temporary or permanent) and therefore must be disregarded in acquisitions of the entire interest.⁸¹⁴ In short, as the Seventh Circuit stated, "if the Government takes over only a portion of a lease, then the cost of removal may be considered in determination of just compensation" but if it acquires "the entire lease, such consequential losses are not to be considered."⁸¹⁵ The reasons for this distinction can be found in *United States v. Petty Motor Co.*:

There is a fundamental difference between the taking of a part of a lease and the taking of the whole lease. That difference is that the lessee must return to the leasehold at the end of the Government's use or at least the responsibility for the period of the lease, which is not taken, rests upon the lessee. . . . Because of that continuing obligation in all takings of temporary occupancy of leaseholds, the value of the rights of the lessees, which are taken, may be affected by evidence of the cost of temporary removal.⁸¹⁶

Exceptions. Federal courts have recognized rare exceptions to the foregoing rules, allowing normally non-compensable damage to be reflected in unusual circumstances, such as the temporary acquisition of a business property or a partial acquisition with the effect of a total taking.⁸¹⁷ Such exceptions always require **legal instruction**.

810 *Kimball Laundry Co. v. United States*, 338 U.S. 1 (1949); *Gen. Motors*, 323 U.S. 373. These temporary interrupting acquisitions have chiefly occurred in "response to the uncertainties of the Government's needs in wartime." *Ark. Game & Fish Comm'n v. United States*, 133 S. Ct. 511, 519 (2012) (quoting *Westinghouse*, 339 U.S. at 267); see *United States v. 1735 N. Lynn St.*, 676 F. Supp. 693, 696 (E.D. Va. 1987) ("Exigencies of [World War II] moved the government to adopt a policy of acquiring properties for short periods with options to renew.").

811 *Gen. Motors*, 323 U.S. at 383. Unlike benefits under the Uniform Act (see note 828, *supra*), consideration of relocation costs in this specific circumstance would be within the scope of the appraiser's assignment because they bear on market value and just compensation. See *Westinghouse*, 339 U.S. at 263-64 & n.2 ("This holding in the *General Motors* case was the Court's determination, without any congressional action, of what constituted 'just compensation' under the Fifth Amendment."); see also *United States v. Willow River Power Co.*, 324 U.S. 499, 510 (1945) ("Such losses may be compensated by legislative authority, not by force of the Constitution alone.").

812 *Gen. Motors*, 323 U.S. at 383; see *United States v. 131,675 Rentable Square Feet of Space (GSA-VA St. Louis I)*, No. 4:14-cv-1077 (CEJ), 2015 WL 4430134, *4 (E.D. Mo. July 20, 2015); see also *1735 N. Lynn St.*, 676 F. Supp. at 696-99.

813 *Westinghouse*, 339 U.S. at 264; accord *Gen. Motors*, 323 U.S. at 383.

814 *United States v. Petty Motor Co.*, 327 U.S. 372, 379-80 (1946); see *Kimball Laundry*, 338 U.S. at 15 ("The temporary interruption as opposed to the final severance of occupancy so greatly narrows the range of alternatives open to the condemnee that it substantially increases the condemnor's obligation to him. It is a difference in degree wide enough to require a difference in result.").

815 *Intertype Corp. v. Clark-Congress Corp.*, 240 F.2d 375, 380 (7th Cir. 1957).

816 *Petty Motor*, 327 U.S. at 379-80.

817 *Kimball Laundry*, 338 U.S. 1 (allowing compensation for going concern value where government temporarily took business); *United States v. 33,994 Net Usable Square Feet at 910 S. Mich. Ave.*, No. 87 C 8569, 1989 WL 51395 (N.D. Ill. May 11, 1989) (government's holdover and subsequent condemnation of a lease interest in part of an otherwise vacant office building slated for demolition and renovation was effectively temporary taking of entire building; court directed compensation to be measured as difference between property before and after government announced holdover, including in "after" valuation costs buyer would consider such as anticipated carrying costs, etc.).

4.6.3. Benefits. Federal acquisitions and the projects they serve can also enhance properties' market value, often raising complicated valuation questions.⁸¹⁸ Under federal law, compensation for a partial acquisition must reflect any direct and special benefits to the remainder due to the government project.⁸¹⁹ Indirect and general benefits, on the other hand, are not considered because they are enjoyed by the public as a whole rather than arising from an acquisition's particular impact on a specific property.⁸²⁰ Distinctions between these types of benefits are discussed in more detail below.

The same principles guide the analysis of benefits and damages in valuations for federal acquisitions.⁸²¹ Just compensation turns on the question, "What has the owner lost? not, What has the taker gained?"⁸²² In legal terms, direct and special benefits are a form of just compensation, no different than a monetary award or payment.⁸²³ As a result, any direct and special benefits must be *set off* against the total compensation because when a landowner's remainder property "is specially and directly increased in value by the public improvement, the damages to the whole parcel by the appropriation of part of it are lessened."⁸²⁴ One federal court explained the fairness of this principle as follows:

Distinguishing special and direct benefits from general and indirect benefits can raise complicated factual and legal questions, and virtually always requires a legal instruction.

It is not in contemplation of law . . . that after the sovereign has taken from a citizen and paid him for that which it has taken, that the citizen can on the same market sell his residue for an amount which, added to the compensation he has received, aggregates more than the value of the whole from which the part was taken. That cannot be just compensation⁸²⁵

Direct and special benefits commonly include "new access to a waterway or highway, or filling in of swampland."⁸²⁶ An upward shift in the remainder property's highest and best use is often an indication of special and direct benefits. For example, a partial acquisition for the extension of a mass transit system had a special and direct benefit on remainder property that was eligible for special zoning that would allow higher-density residential development due to its location within

818 See *Horne v. Dep't of Agric.*, 135 S. Ct. 2419, 2432 (2015).

819 See *Bauman v. Ross*, 167 U.S. 548, 574 (1897).

820 *Id.* at 581-82.

821 See *id.* at 574-75 ("injury or benefit to the part not taken is also to be considered").

822 *Bos. Chamber of Commerce v. City of Boston*, 217 U.S. 189, 195 (1910) (quoted in *Brown v. Legal Found. of Wash.*, 538 U.S. 216, 236 (2003)); see *Bauman*, 167 U.S. at 574; *Olson v. United States*, 292 U.S. 246, 255 (1934); see also *United States v. Sponenbarger*, 308 U.S. 256, 266-67 (1939).

823 *McCoy v. Union Elevated R.R. Co.*, 247 U.S. 354, 366 (1918) ("[I]n arriving at the amount of damage to property not taken allowance should be made for peculiar and individual benefits conferred upon it; compensation to the owner in that form is permissible."); *United States ex rel. Tenn. Valley Auth. v. Indian Creek Marble Co.*, 40 F. Supp. 811, 819 (E.D. Tenn. 1941) ("compensation shall be paid, whether in cash or in benefits incident to the use to which the property taken is put by the condemnor"); see *Bauman*, 167 U.S. at 581; *Sponenbarger*, 308 U.S. at 265-70 (finding taking without compensation had not occurred as "lands were not damaged, but actually benefited"); *United States v. 901.89 Acres of Land (Davenport)*, 436 F.2d 395, 397-98 (6th Cir. 1970) (discussing historical consideration of benefits in assessing compensation); cf. *Horne*, 135 S. Ct. at 2432 (reiterating that special benefits are deducted from compensation in partial takings while rejecting contention that general regulatory activity can constitute just compensation for a specific physical taking).

824 *Bauman*, 167 U.S. at 574; see *Indian Creek Marble Co.*, 40 F. Supp. at 818 ("compensation is simply that amount of money required to leave the owner with property, including his compensation, of the same market value as that which he had prior to the taking").

825 *Indian Creek Marble Co.*, 40 F. Supp. at 818; accord *Bauman*, 167 U.S. at 581-82 (quoting Justice Brewer's analysis in *Pottawatomie Cty. Comm'rs v. O'Sullivan*, 17 Kan. 58, 59-60 (1876)); *Sponenbarger*, 308 U.S. at 266-67 ("[I]f governmental activities inflict slight damage upon land in one respect and actually confer great benefits when measured in the whole, to compensate the landowner further would be to grant him a special bounty.")

826 *Horne*, 135 S. Ct. at 2432; see, e.g., *Davenport*, 436 F.2d 395 (proximity to and view of lake created by reservoir project was a special and direct benefit). Special valuation rules apply to partial acquisitions affected by the federal navigational servitude. See Section 4.11.1.

a certain distance of a new mass transit station.⁸²⁷ Comparable sales typically provide the best evidence of special and direct benefits.⁸²⁸ The existence or absence of special and direct benefits turns not on the specifications of the government project, but on its impact in the market. For instance, in a partial acquisition for reservoir purposes: “The question is whether the market value of the remainder was increased by its prospective frontage on the [new reservoir created by the government project, which spurred demand for lakeside subdivision]. Market value ‘is . . . a reflection of the state of mind of the public with respect to the property.’”⁸²⁹

General and indirect benefits, in contrast, are those “which result to the public as a whole, and therefore to the individual as one of the public; for he pays in taxation for his share of such general benefits.”⁸³⁰ Thus, compensation would not be offset by the benefit of a “general increase in the value of property in the neighborhood” caused by a government project.⁸³¹ In modern federal acquisitions, appraisers are rarely—if ever—asked to analyze and estimate general and indirect benefits, which relate to taxation, not just compensation.⁸³² But this makes the distinction between the types of benefits no less critical.⁸³³

The *extent* of a special and direct benefit is a fact question to be determined by the appraiser.⁸³⁴ But correctly distinguishing special and direct benefits (to be considered) from general and indirect benefits (to be ignored) “can raise complicated questions” in practice,⁸³⁵ and virtually always requires a **legal instruction**.⁸³⁶ The distinction stems from principles of fairness:

[I]f the proposed road or other improvement inure to the *direct and special benefit* of the individual out of whose property a part is taken, he receives something which none else of the public receive, and it is just that this should be taken into account in determining what is compensation. Otherwise, he is favored above the rest, and,

Benefits: *Bauman v. Ross*

Bauman v. Ross, 167 U.S. 548 (1897), illustrates the distinction between benefit types: in 1893, Congress authorized an expansion of the highway grid system in Washington, D.C., to be funded by an assessment (tax) against area landowners *generally benefited* by the expansion. The expansion also conferred *special benefits* on some remainder properties after partial takings for the project.

As a result, the fact-finder had to (1) determine just compensation for the property taken, offsetting any *special and direct benefits* to the remainder, and (2) quantify the *general and indirect benefits* to all area landowners for assessment purposes to fund the project.

In contemporary federal acquisitions, appraisers are rarely asked to quantify *indirect* and *general benefits* in making valuations for just compensation purposes.

827 See, e.g., *Wash. Metro. Area Transit Auth. v. One Parcel of Land (Old Georgetown)*, 691 F.2d 702 (4th Cir. 1982).

828 *United States v. Trout*, 386 F.2d 216, 222-24 (5th Cir. 1967) (“If the best evidence of market value, i.e., evidence of comparable sales, indicates that there were special benefits to the remainder, it cannot be rejected . . . without an adequate explanation.”).

829 *Id.* at 223 & n.9, 224 (noting that “in demanding evidence pertaining to the structure of the reservoir, the commission misconceived the issue of special benefits”).

830 *Bauman*, 167 U.S. at 581.

831 *Id.* at 580; *United States v. River Rouge Improvement Co.*, 269 U.S. 411 (1926); *Davenport*, 436 F.2d at 397-99; *6,816.5 Acres of Land v. United States*, 411 F.2d 834, 837 (10th Cir. 1969); *United States v. 2,477.79 Acres of Land in Bell Cty.*, 259 F.2d 23, 28-29 (5th Cir. 1958).

832 See *Bauman*, 167 U.S. at 574-75, 587-88 (discussed in sidebar); cf. *Trout*, 386 F.2d at 220 (same amount before and after taking attributed to general benefits of increased property values over county resulting from contemplated government project).

833 See, e.g., *Hendler v. United States*, 175 F.3d 1374 (Fed. Cir. 1999); *Davenport*, 436 F.2d at 397-99.

834 *2,477.79 Acres in Bell*, 259 F.2d at 28.

835 See *Horne v. Dep’t of Agric.*, 135 S. Ct. 2419, 2432 (2015).

836 See, e.g., *Davenport*, 436 F.2d at 400-01 (valuation by appraiser who was correctly “instructed to appraise the ‘after’ value of the subject property considering the reservoir enhancement,” as a direct and special benefit of the government’s acquisition, was “the only [opinion] which has probative value and discloses the proper compensation”); see also *Hendler*, 175 F.3d 1374.

instead of simply being made whole, he profits by the appropriation, and the taxes of the others must be increased for his special advantage.⁸³⁷

Applying these principles, “any special and direct benefits [that are] capable of present estimate and reasonable computation” must be deducted for purposes of just compensation.⁸³⁸

Special and direct benefits can accrue to more than one property, such as a new or widened street benefiting multiple abutting properties. “The benefit is not the less direct and special to the [property at issue], because other estates upon the same street are benefited in a similar manner.”⁸³⁹ The Supreme Court reasoned:

[t]he advantages of more convenient access to a particular lot of land in question, and of having a front upon a more desirable avenue, are direct benefits to that lot, giving it increased value in itself. It may be the same, in greater or less degree, with each and every lot of land upon the same street. But such advantages are direct and special to each lot.⁸⁴⁰

On the other hand, “sharing in the common advantage and convenience of increased public facilities, and the general advance in value of real estate in the vicinity by reason thereof” would be indirect and general benefits.⁸⁴¹

To take into account any special benefits from the project, appraisers apply the before and after rule of valuation, developing opinions of the market value of the larger parcel (the entire tract) *before* acquisition *excluding* any enhancement or diminution from the project, and the market value of the remainder *after* acquisition *including* any special benefit or diminution due to the government project. In a practical example, the Sixth Circuit described the valuation of a partial acquisition for construction of a dam and lake:

An appraiser . . . valued [the landowner’s entire tract before acquisition] at \$80,000, or about \$365 per acre, as of the day of the taking. That was its market value without any enhancement because of its proximity to the already projected development of the [dam and lake]. The [appraiser] buttressed his valuation by referring to comparable sales.

He then valued the [remainder property], title to which would remain in [the landowner after acquisition], at \$30,000 or about \$404 an acre. In valuing this remainder, he gave consideration to the enhancement that would accrue to it from its proximity to the lake and the advantage of an unobstructed view thereof.

837 *Bauman*, 167 U.S. at 581-82 (quoting Justice Brewer’s analysis in *Pottawatomie Cty. Comm’rs v. O’Sullivan*, 17 Kan. 58, 59-60 (1876) (emphasis added)).

838 *Id.* at 584. In a regulatory inverse taking case, the Supreme Court recently rejected the contention that the effects of general regulatory activity—such as higher consumer demand due to government enforcement of quality standards and promotional activities—can offset the total just compensation due for a specific physical taking. *Horne*, 135 S. Ct. at 2432. The Court expressly clarified that this ruling, concerning certain regulatory benefits, does not affect the deduction of special benefits from the amount of compensation paid in partial takings. *Id.* (discussing concerns raised in dissent); *see id.* at 2435-36 (Breyer, J., concurring in part and dissenting in part) (“it is unclear to me what distinguishes this case from . . . other types of partial takings”).

839 *United States v. River Rouge Improvement Co.*, 269 U.S. 411, 416 (1926).

840 *Id.*

841 *Id.*

Deducting this \$30,000 from the \$80,000 value placed on the entire tract, he came up with a figure of \$50,000 representing the fair compensation that should be paid . . . This appraiser's method was correct.⁸⁴²

In this way, the value of any special or direct benefits is offset against the total value.⁸⁴³

Consideration and offset of the government project's direct and special benefits to remainder property does not violate the scope of the project rule, discussed in Section 4.5. Rather, the general principle, as the Supreme Court expressly stated in *United States v. Fuller*, is that the United States "may not be required to compensate a [landowner] for elements of value that the Government has created . . ."⁸⁴⁴ And this general principle does not prevent application of the scope of the project rule to exclude increments in value due to the government's project when necessary "to do substantial justice."⁸⁴⁵ Application of the scope of the project rule turns on the question: "Should the owner have the benefit of any increment of value added to the property taken by the action of the public authority[?]"⁸⁴⁶ As discussed in Section 4.5, the answer to this question depends on the precise facts of each acquisition, and "requires discriminating judgment" and **legal instructions**.⁸⁴⁷

4.6.4. Exceptions to the Federal Rule. The federal courts' universal preference for the before and after method makes clear that departures may be appropriate, if at all, only in "very unique and complex" circumstances.⁸⁴⁸ "[A]ny other method of arriving at compensation could conceivably arrive at something else, either more or less, than compensation."⁸⁴⁹ Nevertheless, some federal courts have accepted valuation methods other than the before and after rule in partial acquisitions where necessary to reach a fair and practical result.⁸⁵⁰ But in those unusual circumstances, as the Court of Claims warned, "[t]he particular evaluation approach utilized by a party in severance damage situations can sometimes serve to increase the burden it must

842 *United States v. 901.89 Acres of Land (Davenport)*, 436 F.2d 395, 396 (6th Cir. 1970).

843 Agencies may need to instruct the appraiser to allocate the result of a before and after valuation between the value of the property being acquired, and damages (and/or benefits) to the remainder – for example, for negotiating purposes and/or to comply with agency obligations under the Uniform Act. See 42 U.S.C. § 4561(3). Such an allocation should be reported in a separate, supplemental report, rather than in the appraisal report of the market value of the property as a whole. Cf. *United States v. Grizzard*, 219 U.S. 180, 185-86 (1911) ("That the [fact-finder allocated] the damages for the land and for the easement of access separately is not controlling. The determining factor was that the value of that part of the Grizzard farm not taken was \$1,500, when the value of the entire place before the taking was \$3,000. . . . Judgment [of \$1,500] affirmed.").

844 *United States v. Fuller*, 409 U.S. 488, 492 (1973).

845 *Id.* (quoting *United States v. Miller*, 317 U.S. 369, 374, 375 (1943); see also *United States v. 320 Acres of Land*, 605 F.2d 762, 781-89 (5th Cir. 1979) (exploring history and underlying principles of scope of the project rule and treatment of benefits due to government project).

846 *Miller*, 317 U.S. at 375.

847 *United States v. Reynolds*, 397 U.S. 14, 21 (1970); *320 Acres*, 605 F.2d at 796; see generally Section 4.5.

848 See *Ga.-Pac. Corp. v. United States*, 640 F.2d 328, 336-37 (1980) (per curiam); cf. *United States v. Va. Elec. & Power Co.*, 365 U.S. 624, 632 (1961) (before and after method is "an acceptable method of appraisal, indeed the conventional method"). As noted, the Fifth Circuit "requires the exclusive use of the before-and-after method of valuation." *United States v. 8.41 Acres of Land in Orange Cty.*, 680 F.2d 388, 392, n.5 (5th Cir. 1982); see *United States v. 4.27 Acres*, 271 F. App'x 424, 425 (5th Cir. 2008).

849 *United States ex rel. Tenn. Valley Auth. v. Indian Creek Marble Co.*, 40 F. Supp. 811, 818 (E.D. Tenn. 1941), cited with approval in *United States v. 2,847.58 Acres of Land in Bath Clys.*, 529 F.2d 682, 686 (6th Cir. 1976).

850 See, e.g., *Ga.-Pac.*, 640 F.2d at 336-37 ("The approaches to severance damages herein represent practical efforts by the parties to reach valuation determinations in a very unique and complex set of circumstances."); but see *United States v. 33.92356 Acres of Land (Piza-Blondet)*, 585 F.3d 1, 9 (1st Cir. 2009) (refusing alternative valuation method when there was "no persuasive reason why the before and after method would be unfair in assessing the value" in a partial taking).

carry in persuading that speculation and conjecture are not the essence of its presentation.”⁸⁵¹

4.6.4.1. Taking Plus Damages (the “State Rule”). Many appraisers may be familiar with an alternative *taking plus damages* (or *taking + damages*) method for valuing partial acquisitions, also referred to as the state rule. Because the taking plus damages method is apt to “arrive at something else, either more or less, than compensation” under the Fifth Amendment,⁸⁵² it is generally improper in valuations for federal acquisition purposes, and cannot be used without **legal instruction** from the acquiring agency or the U.S. Department of Justice.⁸⁵³

The taking plus damages method lacks the “effectiveness of the before and after method in clearly and simply dealing with . . . damages” and benefits in partial acquisitions.⁸⁵⁴ Moreover, as recognized by the federal courts, the taking plus damages method is subject to error and apt to result in improper duplication or *double damage*.⁸⁵⁵ As a result, the taking plus damages method is generally improper in valuations for federal acquisitions: “It is not compensation but more than compensation to twice give the owner severance damage.”⁸⁵⁶ For example, the Fourth Circuit⁸⁵⁷ was forced to vacate a compensation award based on a taking plus damages calculation that was nearly four times greater than

Some assignments may require *allocation* of the difference in the property’s value before and after acquisition, between (1) the part acquired and (2) damage to the remainder, to meet agency obligations under the Uniform Act, 42 U.S.C. § 4561(3).

This accounting exercise is not an exception to the federal rule that partial acquisitions must be valued using the before and after method.

Any allocations must be clearly labeled as accounting tabulations that do not indicate the appraisal method(s) employed.

851 *Ga.-Pac.*, 640 F.2d at 337; see *United States ex rel. Tenn. Valley Auth. v. Robertson*, 354 F.2d 877, 880-81 (5th Cir. 1966) (“[Elements] which make the property less desirable and thus diminish the market value of the property are proper to be considered, though as a separate item of damage might be too speculative and conjectural to be submitted . . .”); see also *United States v. Honolulu Plantation Co.*, 182 F.2d 172, 179 (9th Cir. 1950) (“[S]trict proof of the loss in market value to the remaining parcel is obligatory.”).

852 *Indian Creek Marble Co.*, 40 F. Supp. at 818.

853 See *Piza-Blondet*, 585 F.3d at 9 (refusing alternative valuation method when there was “no persuasive reason why the before and after method would be unfair in assessing the value”); *United States v. 12.94 Acres of Land in Solano Cty.*, No. CIV. S-07-2172, 2009 WL 4828749, at *5-*6, 2009 U.S. Dist. LEXIS 114581, at *15-*21 (E.D. Cal. Dec. 9, 2009) (error to analyze value of the part taken separately from the total); cf. *United States v. Miller*, 317 U.S. 369, 375-76 (1943) (discussing “working rules” that have been “adopt[ed] in order to do substantial justice” in partial takings).

854 *Piza-Blondet*, 585 F.3d at 9 n.6 (citing 4A NICHOLS, THE LAW OF EMINENT DOMAIN § 14.02[4] (rev. 3d ed. 1981)); *United States v. 760.807 Acres of Land in Honolulu*, 731 F.2d 1443, 1445 (9th Cir. 1984) (“Using [the before and after] method, any diminution in value of the remainder resulting from the taking and use of part of the original parcel, sometimes termed ‘severance damages,’ would be included in the award.”); cf. *United States v. 901.89 Acres of Land in Davidson & Rutherford Clys. (Davenport)*, 436 F.2d 395, 399 (6th Cir. 1970) (reversing lower court’s rejection of before and after valuation that reflected direct and special benefits to remainder after taking); *United States v. Werner*, 36 F.3d 1095, 1994 WL 507461, at *5 (4th Cir. 1994) (unpubl.) (“[T]he taking may not affect the value of the remainder in any way [or] it may either damage or benefit the remainder. . . . In any such situation the measure of just compensation is the same, that is, the difference between the fair and reasonable market value of the land immediately before the taking and the fair and reasonable market value of the portion that remains after the taking.” (alterations in original)).

855 *Indian Creek Marble Co.*, 40 F. Supp. at 818-19 (“the inevitable result would be that the land owner would twice receive incidental damages, either in cash compensation or partly in cash and partly in incidental benefits”); see, e.g., EATON, *supra* note 16 at 32-33 (noting a “chronic and dangerous problem—double damage, i.e., the duplication of just compensation” and illustrating “how easy it is to double damage using the taking plus damages (state) rule”).

856 *Indian Creek Marble Co.*, 40 F. Supp. at 818.

857 While the Fourth Circuit previously broke from other federal courts in adopting the taking plus damages method, it subsequently embraced the federal before and after rule, observing “it is well settled that in the event of a ‘partial taking’ . . . the measure of just compensation is the difference between the fair and reasonable market value of the land immediately before the taking and the fair and reasonable market value of the portion that remains after the taking.” *United States v. Banisadr Bldg. Joint Venture*, 65 F.3d 374, 378 (4th Cir. 1995); cf. *United States v. 97.19 Acres of Land*, 582 F.2d 878, 881 (4th Cir. 1978) (“this circuit measures damages as the fair market value of the parcel actually taken plus the severance damages, if any, to the portion of the tract retained by the landowner”), *abrogated by Banisadr*, 65 F.3d at 378, and *United States v. 2.33 Acres of Land in Wake Cty.*, 704 F.2d 728, 730 (4th Cir. 1983), as recognized in *United States v. 0.39 Acres of Land*, No. 2:11-0259, 2013 WL 3874472, at *4 (S.D.W. Va. July 25, 2013).

the landowners' actual loss revealed by applying the before and after method to the same facts.⁸⁵⁸ The court remanded for new proceedings "to the end that duplications in just compensation are eliminated."⁸⁵⁹

The taking plus damages method may be appropriate or even mandated in nonfederal acquisitions, as certain *state* laws offset benefits against "severance damage" to the remainder but not against the value of the part acquired, necessitating separate findings of "severance damage" and the value of the part acquired.⁸⁶⁰ But federal law makes no such distinction,⁸⁶¹ recognizing that under the U.S. Constitution, just compensation turns on the question, "What has the owner lost? not, What has the taker gained?"⁸⁶² Based on this principle, under federal law, compensation must reflect "the effect of the appropriation of a part of a single parcel upon the remaining interest of the owner, by taking into account both the benefits which accrue and the depreciation which results to the remainder in its use and value."⁸⁶³ The taking plus damages method was developed to measure a different question, and thus generally has no place in valuations for federal acquisition purposes.⁸⁶⁴

Still, there may be "persuasive reason[s] why the before and after method would be unfair in assessing the value" of a specific partial acquisition.⁸⁶⁵ Whether the taking plus damages method can be relied on for federal just compensation purposes in a specific valuation assignment is a **legal determination**, not one that can be made by an appraiser.⁸⁶⁶ For example, partial acquisitions affected by the federal navigational servitude may require use of a taking plus damages method due to the unique constitutional and statutory requirements governing compensation for such acquisitions.⁸⁶⁷ The taking plus damages method may also be appropriate in certain minor partial acquisitions, such as acquisitions of easements or other minor interests for flowage or road purposes from large ranches or industrial complexes.⁸⁶⁸ Whether a partial acquisition is sufficiently "minor" to make the taking plus damages method a fair and practical alternative to the before and after rule depends on the acquisition's impact on *the*

Whether the *taking plus damages* method can be used in a specific valuation assignment is a legal determination that cannot be made by an appraiser.

- 858 2.33 *Acres*, 704 F.2d at 729-31. The vacated award valued the larger parcel before the taking at \$296,870 and the remainder after the taking at \$240,663, a difference of approximately \$56,000, yet would have awarded total compensation in excess of \$200,000. *See id.*
- 859 *Id.* at 731 ("Again the conclusion that the landowner was overcompensated . . . ineluctably follows."); *see also Indian Creek Marble Co.*, 40 F. Supp. at 818-19.
- 860 *See McCoy v. Union Elevated R.R. Co.*, 247 U.S. 354, 365 (1918); *Harris v. United States*, 205 F.2d 765, 767 (10th Cir. 1953) (distinguishing between federal and state constitutional provisions for just compensation); *cf. EATON, supra* note 16, at 41-42 & nn.26-31 ("most authorities argue that the complexity of the state rule and its potential for double damages are so great that the before and after rule should be adopted").
- 861 Under federal law, "if the taking has in fact benefitted the remainder, the benefit may be set off against the value of the land taken." *United States v. Miller*, 317 U.S. 369, 376 (1943); *Bauman v. Ross*, 167 U.S. 548, 584 (1897).
- 862 *Bos. Chamber of Commerce v. City of Boston*, 217 U.S. 189, 195 (1910), quoted in *Brown v. Legal Found. of Wash.*, 538 U.S. 216, 236 (2003); *Bauman*, 167 U.S. at 574.
- 863 *United States v. Grizzard*, 219 U.S. 180, 184-85 (1911).
- 864 *See Indian Creek Marble Co.*, 40 F. Supp. at 819 (state rule method of determining "so-called compensation is and must be grounded upon . . . an artificial measure based upon neither justice nor the settled conception of the meaning of the word 'compensation'"); *cf. EATON, supra* note 16, at 40-43 ("The state rule is generally used in jurisdictions that do not allow benefits to be set off against the value of the part taken and/or damages.").
- 865 *See United States v. 33.92356 Acres of Land (Piza-Blondet)*, 585 F.3d 1, 9-10 (1st Cir. 2009); *cf. Miller*, 317 U.S. at 375-76 (recognizing need to "adopt working rules in order to do substantial justice" in measuring compensation for partial takings).
- 866 *Piza-Blondet*, 585 F.3d at 9 (refusing alternative valuation method when there was "no persuasive reason why the before and after method would be unfair in assessing the value"); *Ga.-Pac. Corp. v. United States*, 226 Ct. Cl. 95, 107, 640 F.2d 328, 336-37 (1980) (per curiam); *United States v. 12.94 Acres of Land in Solano Cty.*, No. CIV. S-07-2172, 2009 WL 4828749, at *5-6, 2009 U.S. Dist. LEXIS 114581, at *15-17 (E.D. Cal. Dec. 9, 2009) (error to analyze value of the part taken separately from the total).
- 867 *See* Section 4.11.1.
- 868 *See, e.g., Ga.-Pac. Corp. v. United States*, 640 F.2d 328, 336-37 (1980) (per curiam).

owner's property.⁸⁶⁹ As a result, use of the taking plus damages method is generally limited to acquisitions that cause *no damage to the remainder*. If the “usefulness and value of the remainder” are or may be affected, however,

[t]o say that such an owner would be compensated by paying him only for the narrow strip actually appropriated, and leaving out of consideration the depreciation to the remaining land by the manner in which the part was taken, and the use to which it was put, would be a travesty upon justice.⁸⁷⁰

4.6.5. Easement Valuation Issues. In general terms, an easement is a limited right to use or control land owned by another for specified purposes.⁸⁷¹ An easement is a property interest less than the fee estate, with the owner of the underlying fee (the servient estate) retaining full dominion over the realty, subject only to the easement (the dominant estate); the fee owner may make any use of the realty that does not interfere with the easement holder's reasonable use of the easement and is not specifically excluded by the terms of the easement.

In easement acquisitions, the agency must provide the appraiser with a written description of the precise estate(s) being acquired. There is no “generic” road easement, conservation easement, or any other type of easement.

Easements are either appurtenant or in gross. An appurtenant easement benefits another tract of land, and typically is useful only in conjunction with other property but has no independent utility—for example, a highway access easement for adjacent land. An easement in gross benefits a person or entity, and typically has utility in and of itself or in conjunction with other easements—such as a continuous easement across multiple tracts of land, forming a right of way.

Federal acquisitions involve a wide variety of easements, including road, pipeline, transmission line, levee, flowage, clearance, avigation, scenic, conservation, tunnel, sewer line, construction, access, and safety zone easements, among others.⁸⁷² Easements may be permanent (perpetual) or temporary.⁸⁷³

Easement-related valuation problems typically arise in federal acquisitions in one of three scenarios: (1) direct acquisition of an easement—that is, a dominant easement interest—and its resulting impact on the value of the larger parcel; (2) acquisition of a servient estate encumbered by an existing (dominant) easement; or (3) acquisition that *affects or extinguishes an existing easement benefitting another*

A dual-premise appraisal may be useful to evaluate how acquisitions of various partial interests affect market value.

869 See *United States v. Grizzard*, 219 U.S. 180, 184 (1911) (“‘just compensation’ . . . obviously requires that the recompense to the owner for the loss caused to him by the taking of a part of a parcel, or single tract of land, shall be measured by the loss resulting to him from the appropriation”); *Bos. Chamber of Commerce v. City of Boston*, 217 U.S. 189, 195 (1910) (“What has the owner lost? not, What has the taker gained?”); cf. *Miller*, 317 U.S. at 375 (“Since the owner is to receive no more than indemnity for his loss, his award cannot be enhanced by any gain to the taker.”).

870 *Grizzard*, 219 U.S. at 184, 185-86.

871 Black's Law Dictionary defines an easement as “[a]n interest in land owned by another person, consisting in the right to use or control the land, or an area above or below it, for a specific limited purpose” *Easement*, Black's Law Dictionary (10th ed. 2014).

872 Easements that affect or relate to riparian uses—such as flowage, levee or irrigation easements—may raise special valuation issues due to the United States' dominant navigational servitude. See Section 4.11.1; cf. *Weatherford v. United States*, 606 F.2d 851 (9th Cir. 1979).

873 See Section 4.7; cf. *Ark. Game & Fish Comm'n v. United States*, 133 S. Ct. 511, 517-19 (2012).

parcel (the affected easement may be *appurtenant* or *in gross*). In each scenario addressed below, the effect of the easement must be analyzed to reach a supported opinion of value.

As discussed in Section 4.1.4, the nature and extent of the easement (or any other interest in property) being acquired will be determined by the agency, as delegated by Congress. In easement acquisitions, this means the agency must carefully and precisely define the property interest(s) being acquired and expressly state what interest(s), if any, will remain with the landowner.⁸⁷⁴ As the Supreme Court held, if the terms of the easement being acquired are unclear, “it would be premature for us to consider whether the amount of the award . . . was proper.”⁸⁷⁵

4.6.5.1. Dominant Easement Interests. Compensation for the acquisition of a dominant easement interest is measured by “the difference in the value of the servient land before and after the Government’s easement was imposed.”⁸⁷⁶ Accordingly, federal acquisitions of dominant easement interests must be valued using a before and after methodology, reflecting compensable damage and special (direct) benefits to the remainder, as with all other partial acquisitions.⁸⁷⁷

If an acquisition imposes an easement upon an entire ownership, there is a remainder estate in the land within the easement.⁸⁷⁸ If the easement is impressed upon less than the full area of the larger parcel, the remainder will also include the portion of the parcel outside the easement.⁸⁷⁹ In either setting, it is well established that “[t]he valuation of an easement upon the basis of its destructive impact upon other uses of the servient fee is a universally accepted method of determining worth.”⁸⁸⁰ Accordingly, in a valuation involving acquisition of a dominant easement, the appraiser must clearly understand the specific terms of the easement involved to analyze the burden the easement imposes on the servient estate and the resulting impact on the value of the affected land.⁸⁸¹ As the Sixth Circuit observed, “for the commissioners to determine the ‘before and after’ value of the land, it was necessary that they clearly understood what rights the landowner would retain in the land subject to the easement.”⁸⁸²

874 Compare *United States v. 3,218.9 Acres of Land in Warren Cty.*, 619 F.2d 288, 289-91 (3d Cir. 1980) (noting “explicit” description of “the nature of the estate to be taken” and “clear” language that “third party mineral rights are not intended to be affected”), with *United States v. City of Tacoma*, 330 F.2d 153, 155-56 (9th Cir. 1964) (reversing judgment of compensation that did not resolve “the nature of the easement taken,” as leaving “this critical issue undecided” was detrimental to both the United States and the landowner).

875 *United States v. Causby*, 328 U.S. 256, 268 (1946); see *City of Tacoma*, 330 F.2d at 155-56.

876 *United States v. Va. Elec. & Power Co.*, 365 U.S. 624, 626 n.2, 632 (1961); *Dugan v. Rank*, 372 U.S. 609, 626 (1963).

877 *Va. Elec.*, 365 U.S. at 632; *Rasmuson v. United States*, 807 F.3d 1343, 1345 (Fed. Cir. 2015); *United States v. 8.41 Acres of Land in Orange Cty.*, 680 F.2d 388, 392 (5th Cir. 1982); *United States v. 38.60 Acres of Land in Henry Cty.*, 625 F.2d 196, 198-99 (8th Cir. 1980); *Transwestern Pipeline Co. v. O'Brien*, 418 F.2d 15, 21 (5th Cir. 1969); see *United States v. Banisadr Bldg. Joint Venture*, 65 F.3d 374 (4th Cir. 1995).

878 E.g., *United States v. 68.94 Acres of Land in Kent Cty.*, 918 F.2d 389 (3d Cir. 1990).

879 E.g., *United States v. 38.60 Acres of Land*, 625 F.2d 196 (8th Cir. 1980); *Transwestern Pipeline*, 418 F.2d 15.

880 *Va. Elec.*, 365 U.S. at 630; see *68.94 Acres*, 918 F.2d at 393 n.3; *38.60 Acres*, 625 F.2d at 198 & n.1; *Transwestern Pipeline*, 418 F.2d at 21.

881 *United States v. Causby*, 328 U.S. 256, 268 (1946) (“Since . . . it is not clear whether the easement taken is a permanent or a temporary one, it would be premature for us to consider whether the amount of the award . . . was proper.”).

882 *Evans v. Tenn. Valley Auth.*, 922 F.2d 841, 1991 WL 1113, at *2 (6th Cir. 1991) (unpubl.) (discussing *United States ex rel. Tenn. Valley Auth. v. An Easement & Right-of-Way*, 182 F. Supp. 899 (M.D. Tenn. 1960)); cf. *Monongahela Nav. Co. v. United States*, 148 U.S. 312, 344 (1893) (“doubtless the existence of [a] reserved right to take the property upon certain specified terms may often, and perhaps in the present case, materially affect the question of value”).

For example, consider the acquisition of an easement with the right “to cut and remove any and all trees now or hereafter growing” alongside a right of way.⁸⁸³ To develop an opinion of market value, the appraiser must understand whether or not the tree-cutting privilege is “coupled with liability for future cuttings” under the terms of the easement.⁸⁸⁴

It is conceivable that the market value of [remainder] land would vary as between the alternatives. . . . What difference would the choice make to a prospective purchaser? What difference would it make in the market value of the land? . . . [S]peculative damages need not be considered, except as an estimate of them might affect market value.⁸⁸⁵

A district court explained these considerations as follows:

The question is, how does the easement affect the market price of the property? Here again we have the willing and intelligent buyer and seller, neither acting under compulsion. They agree upon a price before the easement is imposed.

But before the sale is closed the easement is imposed. They meet again, both willing to deal on the basis, of course, of the fair market value. But the situation is changed in one particular—the imposition of the easement or easements. The question is, how does the changed situation affect the market price?

The willing prospective buyer examines the instrument creating the outstanding easement as to its terms, whether it is perpetual; to what extent does it limit the use of the servient estate, and what are the maximum uses granted by the instrument? All in all, how much less valuable do the outstanding easements make the whole property?⁸⁸⁶

Federal courts have rejected other methods for valuing dominant easement interests—even though those methods may be accepted in other settings—because they do not reflect just compensation under the Fifth Amendment.⁸⁸⁷ Thus, where only an easement is acquired, the full fee value of the land within the easement is not a proper measure of damages since the rights remaining in the owners of the servient estate may be substantial.⁸⁸⁸ Moreover, valuing only the area subject to the easement (i.e. “strip valuation”) fails to “compar[e] the fair market value of the entire tract affected by the taking before and after the taking . . . [that is] the correct measure of value in federal court condemnation.”⁸⁸⁹

883 Similar easements are acquired to remove “danger trees” near high-voltage transmission lines, where they can present potentially serious hazards. See, e.g., *Evans*, 1991 WL 1113, at *2 n.2.

884 *United States ex rel. Tenn. Valley Auth. v. Russell*, 87 F. Supp. 386, 389 (E.D. Tenn. 1948).

885 *Id.* (citing *Olson v. United States*, 292 U.S. 246 (1934)); cf. *Monongahela Nav.*, 148 U.S. at 344 (existence of a reserved right in property may often materially affect value).

886 *United States ex rel. Tenn. Valley Auth. v. Indian Creek Marble Co.*, 40 F. Supp. 811, 821 (E.D. Tenn. 1941), cited with approval in *United States v. 2,847.58 Acres of Land*, 529 F.2d 682, 686 (6th Cir. 1976).

887 E.g., *Transwestern Pipeline Co. v. O'Brien*, 418 F.2d 15, 21 (5th Cir. 1969); see *United States v. 33.92356 Acres of Land (Piza-Blondet)*, 585 F.3d 1, 4, 9-10 (1st Cir. 2009); *Calvo v. United States*, 303 F.2d 902, 909 (9th Cir. 1962); *United States v. Glanet Realty Corp.*, 276 F.2d 264, 265 (2d Cir. 1960).

888 E.g., *United States v. An Easement & Right-of-Way Over Two Strips of Land*, 284 F. Supp. 71, 73 (W.D. Ky. 1968), citing *United States v. Cress*, 243 U.S. 316, 328-29 (1917) (“If any substantial enjoyment of the land still remains to the owner . . . less than the whole has been taken and is to be paid for . . .”), discussed in *Ark. Game & Fish Comm’n v. United States*, 133 S. Ct. 511, 518-20 (2012); *United States v. Va. Elec. & Power Co.*, 365 U.S. 624, 633-35 (1961); see *United States v. Grizzard*, 219 U.S. 180, 185-86 (1911).

889 *Transwestern Pipeline Co. v. O'Brien*, 418 F.2d 15, 21 (5th Cir. 1969) (emphasis added); *Grizzard*, 219 U.S. at 185-86.

4.6.5.1.1. “Going Rates” and Nonmarket Considerations. For some types of easements, such as for electric, telephone, fiber optics, cable, transmission line, or pipeline purposes, there may be a customary “going rate” (per pole, per line-mile, or per rod, for example). But while customary rates may offer a convenient pricing system in other settings, going rates cannot be used as a proxy for market value in federal acquisitions requiring payment of just compensation.⁸⁹⁰ Going rates tend to reflect non-compensable considerations above the market value of the property acquired, such as avoiding the cost of condemnation or other litigation, and economic pressures to complete construction and place the planned facility or infrastructure in operation. As the Fifth Circuit recognized, “consideration of the expense and lost motion involved in relocation, additional construction, pipe and material costs and delay—none of which relate to the fair market value—are inevitably involved.”⁸⁹¹ Amid such nonmarket considerations, “[t]here is no basis for translating a dollar per rod settlement figure into a market value per acre figure.”⁸⁹² Moreover, the use of a “going rate” improperly assumes the easement acquired is a separate economic unit to be valued based on the government’s planned use of the property—assumptions the federal courts reject as improper.⁸⁹³ For these reasons, appraisals of easements for federal acquisitions cannot be based upon going rates but rather must be based upon the accepted before and after appraisal method.⁸⁹⁴

4.6.5.1.2. Temporary Easements. For temporary easements, like other temporary acquisitions, compensation is measured by the market rental value for the term of the easement, adjusted as may be appropriate for the rights of use, if any, reserved to the owner.⁸⁹⁵ Federal courts apply this measure even to acquisitions of temporary property interests that are “seldom exchanged.”⁸⁹⁶ “After all, what . . . is required . . . is to determine the figure which would compensate [the landowner] for the loss it suffered by being deprived of this property for this period of time.”⁸⁹⁷

4.6.5.1.3. Sale or Disposal of Easements. Although the before and after method of valuation is required by these Standards when the government *acquires* easements,⁸⁹⁸ use of the before and after method of valuation is not required when the government sells or otherwise *disposes* of an easement interest. In disposing of easement interests, agencies are therefore free to consider the value of the easement to the acquirer, customary “going rates” or other measures, as well as the diminution to the government’s property by reason of the encumbrance.

890 *Cf. Olson v. United States*, 292 U.S. 246, 256-57 (1934); *Miss. & Rum River Boom Co. v. Patterson*, 98 U.S. 403, 408-10 (1878). These Standards do not prohibit consideration of customary going rates in federal *disposals* of easement interests. See Section 4.6.5.1.3.

891 *Transwestern Pipeline*, 418 F.2d at 18; see also *United States v. 10.48 Acres of Land*, 621 F.2d 338, 339 (9th Cir. 1980) (prices paid by entity with condemnation authority to acquire easements “are in the nature of compromise to avoid the expense and uncertainty of litigation and are not fair indications of market value”).

892 *Transwestern Pipeline*, 418 F.2d at 18.

893 *E.g., United States v. 8.41 Acres of Land in Orange Cty.*, 680 F.2d 388, 392 (5th Cir. 1982); see *Etalook v. Exxon Pipeline Co.*, 831 F.2d 1440, 1447 n.4 (9th Cir. 1987) (“improperly attributes to the tract an increase in value caused by the very improvements for which condemnation was sought”), citing *United States v. 320 Acres of Land*, 605 F.2d 762, 811-20 (5th Cir. 1979); *cf. United States v. Va. Elec. & Power Co.*, 365 U.S. 624, 633 (1961) (“no evidence of a market in flowage easements of the type here involved”).

894 *8.41 Acres in Orange*, 680 F.2d at 392.

895 See *Kimball Laundry Co. v. United States*, 338 U.S. 1, 7 (1949) (“[T]he proper measure of compensation [in a temporary taking] is the rental that probably could have been obtained”); Section 4.7; *cf. United States v. 883.89 Acres of Land in Sebastian Cty.*, 442 F.2d 262, 265 (8th Cir. 1971), *aff’d* 314 F. Supp. 238 (W.D. Ark. 1970) (“The comparable sales of other leaseholds in the immediate area were adequate and substantial evidence of the market value of this leasehold.”).

896 *E.g., Yuba Nat. Res., Inc. v. United States*, 904 F.2d 1577, 1582 (Fed. Cir. 1990).

897 See *United States v. Michoud Indus. Facilities*, 322 F.2d 698, 707 (5th Cir. 1963).

898 See *Bos. Chamber of Commerce v. City of Boston*, 217 U.S. 189, 195 (1910) (“[T]he question is, What has the owner lost? not, What has the taker gained?”).

4.6.5.2. Lands Encumbered by Easements. In federal acquisitions of property already encumbered by an easement, the appraiser must value the property in light of the preexisting easement—and not as an unencumbered fee.⁸⁹⁹ As the Supreme Court held:

[T]he Constitution does not require a disregard of the mode of ownership—of the state of the title. It does not require a parcel of land to be valued as an unencumbered whole when it is not held as an unencumbered whole. It merely requires that an owner of property taken should be paid for what is taken from him. It deals with persons, not with tracts of land. And the question is what has the owner lost,⁹⁰⁰ not What has the taker gained?⁹⁰¹

As a result, it is improper to disregard preexisting encumbrances and their impact on the property, as “there is ‘no justice in (requiring the Government to pay) for a loss suffered by no one in fact.’”⁹⁰² In a total acquisition of property encumbered by a preexisting easement, the measure of compensation is the market value of the property as encumbered.⁹⁰³ In a partial acquisition of property encumbered by a preexisting easement, the measure of compensation is the difference between the market value of the property as encumbered before the acquisition, and the market value of the remainder property—subject to the preexisting *and* newly acquired easements—after acquisition.⁹⁰⁴ Regarding an appraiser who misunderstood the nature and extent of the interests being acquired and failed to consider preexisting encumbrances, one court held, “his appraisals and estimates of damage are largely, if not entirely, based upon unwarranted and unjustified theories of law and assumptions of fact and, as such, must be completely rejected”⁹⁰⁵

Appraisals must “take into account all encumbrances on the land” as the question is “the fair market [value] of what the [landowners] had left”⁹⁰⁶ Depending on the nature of the preexisting and newly acquired easements, the difference in market value may be nominal.⁹⁰⁷

4.6.5.3. Appurtenant Easements to the Servient Estate. Slightly different valuation issues arise when the United States’ acquisition of a servient estate also acquires or extinguishes a third party’s appurtenant easement; for example, in a fee acquisition of Owner A’s parcel through which Owner B has an access easement to connect B’s other property to a highway. In such an acquisition, Owner A is entitled to compensation for “what the owner has lost”—i.e., the encumbered fee.⁹⁰⁸ And Owner B, “the owner of a condemned access easement[,] is entitled to

Legal instruction is required for any departure from the unit rule, as the rule’s application is a matter of law that cannot be determined by an appraiser.

899 *United States v. 765.56 Acres of Land in Southampton (765.56 Acres I)*, 164 F. Supp. 942, 946, 948 (E.D.N.Y. 1958), *aff’d sub nom. United States v. Glanat Realty Corp.*, 276 F.2d 264, 267 (2d Cir. 1960); *see also United States v. 765.56 Acres of Land in Southampton (765.56 Acres II)*, 174 F. Supp. 1, 10 (E.D.N.Y. 1959), *aff’d sub nom. Glanat Realty*, 276 F.2d 264.

900 *Bos. Chamber of Commerce*, 217 U.S. at 195.

901 *United States v. Va. Elec. & Power Co.*, 365 U.S. 624, 642 (1961) (Whittaker, J., dissenting) (quoting *United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53, 76 (1913)).

902 *Cf. Nebraska v. United States*, 164 F.2d 866, 869 (8th Cir. 1947), *cert. denied*, 334 U.S. 815 (1948) (no compensation for “a diminution in the market value of the [landowner’s] rights through the creation of a leasehold, easement, or other interest in the land by the [landowner’s] own acts” preceding United States’ acquisition); *United States v. 32.42 Acres of Land*, No. 05cv1137 DMS, 2009 WL 2424303 (S.D. Cal. Aug. 6, 2009) (measure of compensation for acquisition of leased fee excluding existing leasehold is market value of lessor’s reversionary leased-fee interest).

903 *See, e.g., United States v. 3.6 Acres of Land in Spokane Cty.*, 395 F. Supp. 2d 982 (E.D. Wash. 2004); *765.56 Acres I*, 164 F. Supp. at 945-47.

904 *765.56 Acres I*, 164 F. Supp. at 948.

905 *United States v. 79.20 Acres of Land in Stoddard Cty.*, 710 F.2d 1352, 1355 (8th Cir. 1983).

906 *E.g., 3.6 Acres*, 395 F. Supp. 2d at 992 (finding \$1.00 was just compensation for acquisition of easement that did not exceed preexisting easement).

907 *Bos. Chamber of Commerce v. City of Boston*, 217 U.S. 189, 195 (1910); *79.20 Acres in Stoddard*, 710 F.2d at 1354-55.

compensation for the diminution in value of the property which it serves.”⁹⁰⁸ In such instances, departure from the unit rule “may be necessary to avoid grossly unjust results[.]”⁹⁰⁹ as the usual valuation of the property as an undivided fee would not result in just compensation.⁹¹⁰

The federal courts’ solution to this valuation challenge reflects “[t]he guiding principle of just compensation . . . that the *owner* of the condemned property ‘must be made whole but is not entitled to more.’”⁹¹¹ Acquisitions of this sort involve two larger parcels and require two appraisal assignments:

- To measure compensation for Owner A, one appraisal must develop an opinion of the value of the *encumbered fee* (discussed in Section 4.6.5.2), “tak[ing] into account all encumbrances on the land.”⁹¹² This is because “the Constitution does not require a disregard of the mode of ownership,—of the state of the title.”⁹¹³ Just compensation will not result if a parcel of land is “valued as an unencumbered whole when it is not held as an unencumbered whole.”⁹¹⁴ The appraisal of the encumbered fee may require a before and after valuation if the acquisition is only a portion of a *larger parcel*.⁹¹⁵
- To measure compensation for Owner B, another appraisal must develop an opinion of the value of the *appurtenant easement* (discussed in Section 4.6.5.1), which “cannot be ascertained without reference to the dominant estate to which it was attached.”⁹¹⁶ As a partial acquisition, the before and after rule applies, so the appraiser must develop an opinion of the value of the property served by the easement before (with the easement) and after (without the easement) the government’s acquisition.⁹¹⁷ The difference between the before and after values is the measure of compensation.

In neither appraisal will the appraiser develop an opinion of the market value of the property as if unencumbered. The value of the undivided fee is simply not relevant to compensation for such peculiar acquisitions, as the Fourth Circuit reasoned:

908 *United States v. 57.09 Acres of Land in Skamania Cty. (Peterson I)*, 706 F.2d 280, 281 (9th Cir. 1983), citing *United States v. Grizzard*, 219 U.S. 180 (1911), and *United States v. Welch*, 217 U.S. 333, 339 (1910) (“the value of the easement cannot be ascertained without reference to the dominant estate to which it was attached”).

909 *United States v. 6.45 Acres of Land (Gettysburg Tower)*, 409 F.3d 139, 148 (3d Cir. 2005); cf. *United States v. 499.472 Acres of Land in Brazoria Cty.*, 701 F.2d 545, 552 (5th Cir. 1983) (emphasizing that “limited” holding to permit separate valuations in particular condemnation did not “sanction any departure from valuation of condemned property as a unit” and “simply acknowledges that there are rare circumstances where separate trials are justified”).

910 See Section 4.2.2 (The Unit Rule); *Grizzard*, 219 U.S. at 184-85 (“[J]ustice . . . required that regard be had to the effect of the appropriation of a part of a single parcel upon the remaining interest of the owner, by taking into account both the benefits which accrue and the depreciation which results to the remainder in its use and value.”); *Bos. Chamber*, 217 U.S. at 194-95 (The government cannot “be made to pay for a loss of theoretical creation, suffered by no one in fact. . . . [The] Constitution does not require a disregard of the mode of ownership”); see also *Gettysburg Tower*, 409 F.3d at 145-48 & nn.11-15 (analyzing unit rule principle and rare exceptions and citing cases).

911 *United States v. 564.54 Acres of Land (Lutheran Synod)*, 441 U.S. 506, 516 (1979) (quoting *Olson v. United States*, 292 U.S. 246, 255 (1934)); see *Gettysburg Tower*, 409 F.3d at 145-46 & nn.11-12.

912 *79.20 Acres in Stoddard*, 710 F.2d at 1355.

913 *Bos. Chamber of Commerce v. City of Boston*, 217 U.S. 189, 195 (1910).

914 *Id.*

915 See Section 4.5.1; see generally EATON, *supra* note 16, at 365-68.

916 *United States v. Welch*, 217 U.S. 333, 339 (1910).

917 *United States v. Grizzard*, 219 U.S. 180, 184-85 (1911); *United States v. 57.09 Acres of Land in Skamania Cty. (Peterson I)*, 706 F.2d 280, 281 (9th Cir. 1983).

[W]ith property whose use is divided, . . . the compensation to be paid to any one whose interest is taken must be reckoned by the value of the use to which he is entitled and not by the value which the land, if unencumbered, would have.⁹¹⁸

Moreover, as the Fourth Circuit recognized, while the “sum of these values may at times approximate the value of the unencumbered fee[,]” it may be “much less. Indeed, the sum of these values may be only nominal.”⁹¹⁹

4.7. Leaseholds and Other Temporary Acquisitions. When the government acquires a leasehold or other temporary interest in property, the measure of compensation is the market rental value of the premises acquired for the term acquired.⁹²⁰

Definition of Market Rental Value

The rental price in cash or its equivalent that the leasehold would have brought on the date of value on the open competitive market, at or near the location of the property acquired, assuming reasonable time to find a tenant.

As with market value, the federal definition of *market rental value*⁹²¹ requires willing and reasonably knowledgeable market participants, not compelled to buy or sell, giving due consideration to all available economic uses of the property.⁹²² Temporary acquisitions also require a rigorous, well-supported analysis of highest and best use—as in permanent acquisitions.⁹²³ As a district court recently held, “only direct evidence of market rental value, to the exclusion of remote, hypothetical conjecture, should be considered in ascertaining just compensation for a taking.”⁹²⁴ In keeping with the unit rule (Section 4.2.2), market rental value must be determined for the

918 *Mayor & City Council of Baltimore v. United States*, 147 F.2d 786, 789 (4th Cir. 1945).

919 *Id.*

920 *Kimball Laundry Co. v. United States*, 338 U.S. 1, 7 (1949); *United States v. Gen. Motors Corp.*, 323 U.S. 373, 382-83 (1945); *United States v. Petty Motor Co.*, 327 U.S. 372, 378-79 (1946); *United States v. Banisadr Bldg. Joint Venture*, 65 F.3d 374, 378 (4th Cir. 1995); *Yuba Nat. Res., Inc. v. United States*, 904 F.2d 1577, 1580-81 (Fed. Cir. 1990).

921 *Kimball Laundry*, 338 U.S. at 7; *Gen. Motors*, 323 U.S. at 382-383; *Banisadr*, 65 F.3d at 378; *United States v. 46,672.96 Acres in Doña Ana Cty.*, 521 F.2d 13, 17-18 (10th Cir. 1975); *United States v. 1735 N. Lynn St.*, 676 F. Supp. 693, 706 (E.D. Va. 1987); see *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 319 (1987) (“[T]he Just Compensation Clause of the Fifth Amendment requires that the government pay the landowner for the value of the use of the land during this period.”); *Carlock v. United States*, 60 App. D.C. 314, 315-16 (D.C. Cir. 1931) (“The present money value of a leasehold interest is the present market value of the residue of the term yet to run with reference to the most valuable use or uses to which the same may be lawfully put; that is, what would be its present money worth over and above the obligations of the lease, to an assignee or purchaser willing and able to assume and perform the obligation of the lease for the residue of the term after the return of the award.”); cf. *46,672.96 Acres in Doña Ana*, 521 F.2d 13, 17-18 (10th Cir. 1975) (“[T]he evidence offered must have a bearing upon what a willing buyer would pay a willing seller for the property on the date of the taking. . . . [W]e are here concerned with leasehold interests and . . . the amount of the award . . . must bear a realistic relationship to reasonable market value.”).

922 *Kimball Laundry*, 338 U.S. at 7 (“[D]etermination of the value of temporary occupancy can be approached only on the supposition that free bargaining between petitioner and a hypothetical lessee of that temporary interest would have taken place in the usual framework of such negotiations.”); cf. Section 4.2.1 (Market Value Definition).

923 *E.g., Banisadr*, 65 F.3d at 378 (affirming finding that highest and best use of building was for regular office space at low-end rent based on detailed analysis of leases on several comparable buildings, rather than for specialized high-tech use, which lacked any supporting data).

924 *United States v. 131,675 Rentable Square Feet of Space (GSA-VA St. Louis I)*, No. 4:14-cv-1077, slip op. at *9, 2015 WL 4430134 (E.D. Mo. July 20, 2015) (citing *Olson v. United States*, 292 U.S. 246, 257 (1934)).

property as an unencumbered whole, regardless of any sub-leases or other subsidiary interests into which it may have been divided.⁹²⁵

The measure of compensation for temporary acquisitions rarely arose in federal jurisprudence until the World War II era, when war-time exigencies prompted condemnations of leaseholds and other temporary interests.⁹²⁶ As Justice Reed observed in 1951, “[t]he relatively new technique of temporary taking . . . is a most useful administrative device[,]” allowing for properties to be occupied for public uses “for a short time to meet war or emergency needs,” and then “returned to their owners.”⁹²⁷ But temporary acquisitions present “a host of difficult problems . . . in the fixing of just compensation.”⁹²⁸ Of these valuation problems, perhaps the most frequently encountered arise in the context of federal leasehold acquisitions—particularly leaseholds of office space.

- 4.7.1. Leaseholds.** As in appraising a fee estate, the best evidence of the market rental value of a leasehold estate is comparable transactions—for leaseholds, comparable lease transactions.⁹²⁹ As the Eighth Circuit stated, “comparable sales of other leaseholds in the immediate area [a]re adequate and substantial evidence of the market value of this leasehold.”⁹³⁰ Generally, “the more comparable a sale is, the more probative it will be” of the market value of the property being appraised.⁹³¹ Elements of comparability in leasehold valuations include the familiar elements of size, time, location, and so forth (discussed in Section 4.4.2),⁹³² as well as the period (term) of the lease (e.g., six months, one year, five years, etc.),⁹³³ the number and terms

A lease is a contract arrangement in which an owner (landlord or lessor) conveys to another (tenant or lessee) the rights to use and occupy property for a period of time in exchange for payment.

During the lease, the tenant/lessee owns a possessory interest called the leasehold estate, and the landlord/lessor owns the remaining interest, called the leased fee estate.

925 See *Carlock*, 53 F.2d at 927; *A.G. Davis Ice Co. v. United States*, 362 F.2d 934, 937 (1st Cir. 1966); see also *Autozone Dev. Corp. v. District of Columbia*, 484 F. Supp. 2d 24, 31 (D.D.C. 2007) (“Put simply, when all of the interests in a land are condemned, the total amount paid by the condemning authority to everyone with an interest should not be more than the amount it would pay if only one person owned the land.” (discussing *Carlock*)).

If the government’s acquisition will interrupt or extinguish an existing lease of the property, the lessee’s compensation (if any) is a question of distribution, not of valuation, and therefore generally beyond the scope of the appraiser’s assignment. Thus, under these Standards the appraiser should not separately value a third-party leasehold estate unless specifically instructed to do so—for example, if needed for negotiating purposes and/or to comply with agency obligations under the Uniform Act. Similarly, the appraiser should not apportion values of subsidiary interests unless instructed. See Section 4.2.2; cf. *United States v. Rodgers*, 461 U.S. 677, 704-05 & n.33 (1983) (noting challenges of apportioning compensation in eminent domain proceedings involving subsidiary homestead or life-estate interests, and citing cases); *Pa. Ave. Dev. Corp. v. One Parcel of Land in D.C.*, 670 F.2d 289, 292 (D.C. Cir. 1981) (“Under most leases, allocation of the award between lessor and lessee is not problematical because leases generally include a clause which makes them terminate in case of condemnation.”).

926 E.g., *United States v. Westinghouse Elec. & Mfg. Co.*, 339 U.S. 261 (1950); *Kimball Laundry Co. v. United States*, 338 U.S. 1 (1949); *United States v. Petty Motor Co.*, 327 U.S. 372 (1946); *United States v. Gen. Motors Corp.*, 323 U.S. 373 (1945); see *Ark. Game & Fish Comm’n v. United States*, 133 S. Ct. 511, 519-520 (2012); *United States v. 1735 N. Lynn St.*, 676 F. Supp. 696-97 (E.D. Va. 1987); *United States v. Flood Bldg.*, 157 F. Supp. 438, 440-42 (N.D. Cal. 1957).

927 *United States v. Peewee Coal Co.*, 341 U.S. 114, 119 (1951) (Reed, J., concurring).

928 *Id.*

929 *United States v. Banisadr Bldg. Joint Venture*, 65 F.3d 374, 378 (4th Cir. 1995); *United States v. 883.89 Acres of Land in Sebastian Cty.*, 442 F.2d 262, 265 (8th Cir. 1971), *aff’d* 314 F. Supp. 238 (W.D. Ark. 1970).

930 *883.89 Acres in Sebastian*, 442 F.2d at 265. Note that the term *sale* refers to a transaction involving the property interest at issue—here, a leasehold. *Id.*

931 *United States v. 320 Acres of Land*, 605 F.2d 762, 798 (5th Cir. 1979); *United States v. 46,672.96 Acres of Land in Doña Ana Cty.*, 521 F.2d 13, 17 (10th Cir. 1975).

932 See, e.g., *883.89 Acres in Sebastian*, 442 F.2d at 265.

933 See *United States v. Gen. Motors Corp.*, 323 U.S. 373, 382 (1945) (long-term rental value did not reflect market rental value of short-term occupancy of same space); see also *46,672.96 Acres in Doña Ana*, 521 F.2d at 17 (“A further reason for rejecting the [proposed comparable] lease evidence is that these interests are dissimilar to the interest [being valued].”).

of any option(s) to renew,⁹³⁴ tenant build-out,⁹³⁵ and the nature and extent of services provided by the lessor and/or the lessee.⁹³⁶ Section 1.6 notes several terms and services in government leases that often differ from those typically encountered in the market and therefore require careful adjustment. All terms must be evaluated in regard to the market rental value of the space in the open, competitive market.⁹³⁷ In no event can the market rental value reflect the government's special need for the property or the risk that the government may exercise the power of eminent domain at some future point.⁹³⁸

The period of the leasehold being acquired may require careful consideration. For example, as the Supreme Court recognized in *United States v. General Motors Corp.*, if a short-term occupancy is being acquired, its market rental value may not be accurately reflected by the long-term market rental value of the same space.⁹³⁹ Rather, the market rental value of the short-term occupancy “is to be ascertained, not treating what is taken as an empty warehouse to be leased for the long term, but what would be the market rental value of such a building on a lease by the long-term tenant to the temporary occupier.”⁹⁴⁰

It is improper to develop an opinion of the market rental value of a leasehold estate based on the value of the underlying fee—that is, a percentage-of-fee value method.⁹⁴¹ Among other problems, this method (1) does not reflect how rental rates are established in the market;⁹⁴² (2) assumes full utilization of—and payment for—all leasable space, regardless of existing supply and demand in the competitive market;⁹⁴³ and (3) relies on a supposed return on value or a return on an owner's investment, rather than market value.⁹⁴⁴ As a result, use of a percentage-of-fee-value method can lead to “gross over-valuation” of a leasehold interest.⁹⁴⁵ Moreover, federal courts have rejected percentage-of-fee-value methods even if comparable lease transactions are not available.⁹⁴⁶ In

934 See *United States v. 131,675 Rentable Square Feet of Space (GSA-VA St. Louis I)*, No. 4:14-cv-1077, slip op. at *10, 2015 WL 4430134 (E.D. Mo. July 20, 2015) (condemned leasehold interest contained no option to renew, holdover, or terminate early); see also *883.89 Acres in Sebastian*, 442 F.2d at 265 (valuation properly reflected no value for renewal options because “[t]here was no evidence . . . that these options had any value”); *United States v. Right to Use & Occupy 3.38 Acres in Alexandria*, 484 F.2d 1140, 1145 (4th Cir. 1973) (no evidence of any difference in value whether renewal option required 30 or 90 days’ notice to exercise).

935 See *United States v. Bedford Assocs.*, 548 F. Supp. 732, 743-45 (S.D.N.Y. 1982) (considering whether property should be valued in ‘as is’ condition or whether determination of market rental price should include renovations), modified in other respects, 713 F.2d 895 (2d Cir. 1983); *United States v. Flood Bldg.*, 157 F. Supp. 438, 442-44 (N.D. Cal. 1957) (tenant alterations “did not wreak havoc and destruction to the interior” but rather made space “suitable for occupation by commercial type tenants, and owing to the excellent location of the building . . . its continuing utility can readily be perceived”).

936 See *Bedford Assocs.*, 548 F. Supp. at 743-45 (finding operating expenses borne by tenant must be deducted from expected rental income to lessor), modified in other respects, 713 F.2d 895 (2d Cir. 1983).

937 See, e.g., *id.*

938 See, e.g., *GSA-VA St. Louis I*, 2015 WL 4430134, at *10-11 (“The market value of the property taken should be assessed uninfluenced by [the government’s] right to exercise its power of eminent domain in the future. . . . In the event of a future taking, [a landowner] may be assured that the law would require [the government] to provide just compensation again [i.e., in a separate proceeding].”); cf. *United States ex rel. Tenn. Valley Auth. v. Powelson*, 319 U.S. 266, 276 (1943).

939 *United States v. Gen. Motors Corp.*, 323 U.S. 373, 382 (1945).

940 *Id.* at 382; *United States v. 1735 N. Lynn St.*, 676 F. Supp. 693, 696-97 (E.D. Va. 1987).

941 See *United States v. 883.89 Acres of Land in Sebastian Cty.*, 314 F. Supp. 238, 240-42 (W.D. Ark. 1970), *aff’d*, 442 F.2d 262, 264-65 (8th Cir. 1971); *United States v. Michoud Indus. Facilities*, 322 F.2d 698, 707 (5th Cir. 1963); *United States v. 117,763 Acres of Land in Imperial Cty.*, 410 F. Supp. 628, 631 (S.D. Cal. 1976), *aff’d sub nom. United States v. Shewfelt Inv. Co.*, 570 F.2d 290, 291-92 (9th Cir. 1977).

942 See *883.89 Acres in Sebastian*, 314 F. Supp. at 240-42; *Michoud*, 322 F.2d at 706-08.

943 *Michoud*, 322 F.2d at 706-08.

944 *Id.* at 707; see *United States ex rel. Tenn. Valley Auth. v. Powelson*, 319 U.S. 266, 285 (1943) (“[T]he Fifth Amendment allows the owner only the fair market value of this property; it does not guarantee him a return of his investment.”); *Olson v. United States*, 292 U.S. 246, 255 (1934) (“[T]he market value of the property at the time of the [acquisition] . . . may be more or less than the owner’s investment. . . . The public may not by any means confiscate the benefits, or be required to bear the burden, of the owner’s bargain.”).

945 *Michoud*, 322 F.2d at 707; cf. *117,763 Acres in Imperial*, 410 F. Supp. at 631 (“[T]here is no rule that, where what is taken has a minimal value, something more than that value must be allowed.”).

946 *Shewfelt Inv.*, 570 F.2d at 291-92.

temporary acquisitions, as in permanent acquisitions, “lack of comparable [transactions] does not change the measure of compensation[.]”⁹⁴⁷

Temporary acquisitions may be partial or total. At times, the acquisition of a leasehold estate over only a portion of a larger property may cause the diminution in the market rental value of the area not leased by the government that must be considered.⁹⁴⁸ For example, in an acquisition of a leasehold of a portion of a commercial office building, if the rental value of the remainder is diminished unless offered together with the space acquired by the government, then the diminution in rental value of the remainder would be compensable and must be considered.⁹⁴⁹ However, appraisers must take care to disregard non-compensable damage such as frustration of plans or lost opportunities.⁹⁵⁰ As discussed in Section 4.6, specific aspects of diminution in value may be legally compensable, and therefore must be considered in a *partial* leasehold acquisition—but are legally non-compensable, and therefore must be disregarded, in a *complete* leasehold acquisition.⁹⁵¹ “By the same token, a taking may conceivably enhance the value of a residue[.]” meaning such benefits must also be considered in the remainder’s value after acquisition.⁹⁵² Valuation issues in partial acquisitions, including treatment of compensable damages and benefits, are addressed in Section 4.6.

4.7.2. Temporary Inverse Takings. The measure of compensation for temporary inverse takings is the same as for other temporary acquisitions—that is, the market rental value of the property acquired for the term of the acquisition.⁹⁵³ Temporary inverse takings may be *physical* or *regulatory* in nature.⁹⁵⁴ And whether a compensable temporary inverse taking occurred will be determined by the court, using a “more complex balancing process” than in alleged permanent takings.⁹⁵⁵

Whether an inverse taking occurred, and if so whether it is *temporary* or *permanent*, are legal questions that require legal instruction.

Similarly, whether an alleged inverse taking is *temporary* or *permanent* is a legal question requiring **legal instruction**. In deciding this issue, “[t]he essential element of a temporary taking is a finite start and end to the taking.”⁹⁵⁶ This determination can have a significant impact on the

947 *United States v. 46,672.96 Acres in Doña Ana Clys.*, 521 F.2d 13, 18 (10th Cir. 1975) (quoting *United States v. Sowards*, 370 F.2d 87, 90 (10th Cir. 1966)); see *United States v. Toronto, Hamilton & Buffalo Nav. Co.*, 338 U.S. 396, 402-03 (1949).

948 *United States v. 1735 N. Lynn St.*, 676 F. Supp. 693, 698-99 (E.D. Va. 1987).

949 *Id.*

950 *Id.* at 701; *United States v. 131,675 Rentable Square Feet of Space (GSA-VA St. Louis I)*, No. 4:14-cv-1077, slip op. at *8-*11, 2015 WL 4430134 (E.D. Mo. July 20, 2015). Damages are discussed in detail in Section 4.6.

951 See *United States v. Petty Motor Co.*, 327 U.S. 372, 379-80 (1946) (explaining “fundamental difference between the taking of a part of a lease and the taking of the whole lease”); *Intertype Corp. v. Clark-Cong. Corp.*, 240 F.2d 375, 380 (7th Cir. 1957) (analyzing *Petty Motor*, *supra*; *United States v. Gen. Motors Corp.*, 323 U.S. 373 (1945); and *United States v. Westinghouse Elec. & Mfg. Co.*, 339 U.S. 261 (1950)).

952 *1735 N. Lynn St.*, 676 F. Supp. at 698-99 (citing *United States v. Miller*, 317 U.S. 369, 376 (1943)).

953 *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 318 (1987) (citing, *inter alia*, *United States v. Dow*, 357 U.S. 17 (1958); *Kimball Laundry Co. v. United States*, 338 U.S. 1 (1949); *United States v. Causby*, 328 U.S. 256 (1946); *Petty Motor*, 327 U.S. 372; and *Gen. Motors*, 323 U.S. 373); *Tuba Nat. Res., Inc. v. United States*, 904 F.2d 1577, 1580-81 (Fed. Cir. 1990).

954 See, e.g., *767 Third Ave. Assocs. v. United States*, 48 F.3d 1575 (Fed. Cir. 1995) (affirming dismissal of alleged temporary physical and regulatory takings); *First English*, 482 U.S. 304 (alleged regulatory inverse taking).

955 See *Ark. Game & Fish Comm’n v. United States*, 133 S. Ct. 511, 521 (2012) (“temporary limitations are subject to a more complex balancing process [than permanent occupations] to determine whether they are a taking” (quoting *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 n.12 (1982))).

956 *Otay Mesa Property, L.P. v. United States (Otay Mesa I)*, 670 F.3d 1358, 1365 n.5 (Fed. Cir. 2012) (quoting *Wyatt v. United States*, 271 F.3d 1090, 1097 n.6 (Fed. Cir. 2001)).

valuation, and therefore on the amount of compensation awarded.⁹⁵⁷ Indeed, the Supreme Court has held that until it is determined a taking is permanent or temporary, “it would be premature . . . to consider whether the amount of the award . . . was proper.”⁹⁵⁸ Accordingly, the appraiser must receive appropriate **legal instructions** regarding the precise terms of the property interest(s) to be valued in an alleged inverse taking.

The Supreme Court recently held that recurrent floodings, even if of finite duration (i.e., temporary), are not categorically exempt from Takings Clause liability.⁹⁵⁹ Alleged takings of this sort are therefore subject to the same liability and valuation inquiries as other types of inverse takings.⁹⁶⁰

4.8. Natural Resources Acquisitions. Property acquisitions involving natural resources—such as minerals, timber, or water rights—are subject to the same valuation standards as any other type of property acquisition.⁹⁶¹ While such acquisitions may present particularly complex valuation problems for purposes of just compensation, “whatever the difficulties may be in making such appraisals with complete accuracy, it does not defeat the existence of a ‘market value’ . . . and it does not suffice as a reason to depart from the ordinary requirements that the law imposes on such transactions.”⁹⁶² Moreover, “the degree of speculation can and should be minimized.”⁹⁶³ Specialized expertise is typically required, either by the appraiser or through appropriate subsidiary experts, subject to the requirements discussed in Sections 1.11 and 4.12.⁹⁶⁴ Several frequently encountered (and often confused) valuation issues are discussed below.

4.8.1. Unit Rule and Natural Resources. The unit rule, discussed in Section 4.2.2, is often misapplied in the valuation of properties with possible or proven natural resources such as minerals, timber, or oil and gas. For just compensation purposes, property must be valued as a whole—not by summation of its constituent parts.⁹⁶⁵ Thus, the possible or actual existence of a resource in a property can only be considered to the extent its possible or actual existence would contribute to the market value of the whole property.⁹⁶⁶ For example,

957 See, e.g., *Olay Mesa I*, 670 F.3d 1358 (rejecting compensation award of approximately \$3 million based on erroneous finding of temporary taking), and on remand, 110 Fed. Cl. 732 (2013) (*Olay Mesa II*) (awarding \$455,520 based on finding of permanent taking), *aff’d*, 779 F.3d 1315 (Fed. Cir. 2015) (*Olay Mesa III*).

958 *Causby*, 328 U.S. at 268.

959 *Ark. Game*, 133 S. Ct. at 515.

960 *Id.* at 519-23.

961 *Mont. Ry. Co. v. Warren*, 137 U.S. 348, 352-53 (1890) (reiterated in *ASARCO, Inc. v. Kadish*, 490 U.S. 605, 628 n.3 (1989)); *United States v. Consol. Mayflower Mines, Inc.*, 60 F.3d 1470, 1477 (10th Cir. 1995).

962 *ASARCO*, 490 U.S. at 628 n.3 (citing *Mont. Ry.*, 137 U.S. at 352-53); *accord*, *Mayflower Mines*, 60 F.3d at 1476; see *Eagle Lake Improvement Co. v. United States* (*Eagle Lake I*), 141 F.2d 562, 564 (5th Cir. 1944) (“[i]f mineral interests . . . are bought and sold in arms-length transactions for a valuable consideration, they have a market price translatable into a fair market value”).

963 *United States v. 103.38 Acres in Morgan Cty.* (*Oldfield*), 660 F.2d 208, 212 (6th Cir. 1981).

964 See, e.g., *United States v. 100.80 Acres of Land* (*Parrish*), 657 F. Supp. 269, 276 (M.D.N.C. 1987) (rejecting valuation of real estate appraiser whose expertise did not extend to minerals); see also USPAP Competency Rule; *cf.* *United States v. Sowards*, 370 F.2d 87, 92 (10th Cir. 1966) (“owner’s qualification to testify does not change the ‘market value’ concept and permit him . . . to establish a value based entirely upon speculation”).

965 E.g., *United States v. 381.76 Acres of Land* (*Montego Group*), No. 96-1813-CV, 2010 WL 3734003 (S.D. Fla. Aug. 3, 2010), *aff’d*, Doc. No. 239 (S.D. Fla. Sept. 22, 2010), *aff’d sub nom. United States v. Gonzalez*, 466 F. App’x 858 (11th Cir. 2012) (unpubl.) (per curiam).

966 *United States v. 499.472 Acres in Brazoria Cty.*, 701 F.2d 545, 549 (5th Cir. 1983); *Oldfield*, 660 F.2d at 212; *United States v. 91.90 Acres of Land in Monroe Cty.* (*Cannon Dam*), 586 F.2d 79, 87 (8th Cir. 1978); *United States v. 158.76 Acres in Townshend*, 298 F.2d 559, 561 (2d Cir. 1962); *Ga. Kaolin Co. v. United States*, 214 F.2d 284, 286 (5th Cir. 1954); *United States v. Meyer*, 113 F.2d 387, 397 (7th Cir. 1940); *United States v. 33.92536 Acres of Land* (*Piza-Blondet Trial Op.*), No. 98-1664, 2008 WL 2550586, at *11 (D.P.R. June 13, 2008), *aff’d*, 585 F.3d 1 (1st Cir. 2009); *United States ex rel. Tenn. Valley Auth. v. Indian Creek Marble Co.*, 40 F. Supp. 811, 817-18, 822 (E.D. Tenn. 1941); see *Sowards*, 370 F.2d at 91 (“The mere adaptability of the coal deposit to a use does not establish a market.”); *accord* *United States v. Whitehurst*, 337 F.2d 765, 771-72 (4th Cir. 1964); see also *United States v. 22.80 Acres in San Benito Cty.*, 839 F.2d 1362, 1364 n.2 (9th Cir. 1988) (distinguishing taking of “land on which mineral resources are incidentally located” from taking of “the limestone and granite itself, not the overlying parcel of land”).

[for] land that is underlaid with marketable minerals, . . . the existence of those minerals is a factor of value to be considered in determining the market value of the property, but the landowner is not entitled to have the surface value of the land and the value of underlying minerals aggregated to determine market value.⁹⁶⁷

Indeed, in any given acquisition, it is possible that “the whole property is worth more than, the same as, or even less than the mineral [or other resource] it contains.”⁹⁶⁸

4.8.2. Highest and Best Use and Natural Resources. The mere presence of minerals or other resources in a property does not allow the appraiser to forego a careful analysis of highest and best use (discussed in Section 4.3).⁹⁶⁹ “The mere adaptability of [a mineral] deposit to a use does not establish a market.”⁹⁷⁰ Federal courts require “a showing of some sort of market, poor or good, great or small, for the commodity in question before the quantity and price of the commodity or substance may . . . be used as a factor in the expert’s opinion”⁹⁷¹

In valuing property with mineral or other subsurface resources, appraisers must carefully distinguish between a highest and best use of mineral *extraction*⁹⁷² and a highest and best use of mineral *exploration*.⁹⁷³ “Where a proffered highest and best use is extraction of some sort of mineral, the landowner must show not only the presence of the mineral in commercially exploitable amounts, but also that a market exists for the mineral that would justify its extraction in the reasonably foreseeable future.”⁹⁷⁴ For example, a highest and best use of quarrying requires supporting evidence that is

specific as to the suitability and availability of the property for a quarry, considering all factors, such as . . . plant expense, operation expense, transportation, and the presence or reasonable probability of a commercial market, . . . that would have affected the market price of the property on that date.⁹⁷⁵

On the other hand, a highest and best use of mineral exploration requires a reasonable probability that market participants would attempt to explore the property for such a use—and would pay more for property on the date of value with such a prospect than without.⁹⁷⁶ That

967 *Cannon Dam*, 586 F.2d at 87.

968 *Oldfield*, 660 F.2d at 212; *see, e.g., Cameron Dev. Co. v. United States*, 145 F.2d 209, 210 (5th Cir. 1944) (“The mere physical adaptability of the property to use as a source of supply of shell marl, in the absence of a market for its commercial production, did not effect an increase in its market value.”).

969 *Olson v. United States*, 292 U.S. 246, 255, 257 (1934); *see, e.g., United States v. Consol. Mayflower Mines, Inc.*, 60 F.3d 1470, 1476-77 (10th Cir. 1995) (rejecting contention that “the *Olson* standard for considering a use not yet undertaken must be relaxed where the use is the extraction of minerals”).

970 *Sowards*, 370 F.2d at 89-90; *accord Whitehurst*, 337 F.2d at 771-72; *Cameron Dev.*, 145 F.2d at 210.

971 *United States v. Land in Dry Bed of Rosamond Lake*, 143 F. Supp. 314, 322 (S.D. Cal. 1956).

972 *E.g., Oldfield*, 660 F.2d 208; *United States v. 1,629.6 Acres in Sussex Cty. (Island Farm II)*, 360 F. Supp. 147, 151-53 (D. Del. 1973), *aff’d*, 503 F.2d 764, 766 (3d Cir. 1974); *United States v. Upper Potomac Props. Corp.*, 448 F.2d 913, 914-15 (4th Cir. 1971).

973 *E.g., Mont. Ry. Co. v. Warren*, 137 U.S. 348 (1890); *Mayflower Mines*, 60 F.3d at 1477; *Phillips v. United States*, 243 F.2d 1 (9th Cir. 1957); *Eagle Lake I*, 141 F.2d at 564; *see also United States v. 69.1 Acres (Sand Mountain)*, 942 F.2d 290, 292-94 (4th Cir. 1991) (highest and best use of holding sand reserves for future development based on “reasonable probability that the sand will be needed and wanted at a near enough point in the future to affect the current value of the property” (emphasis added)).

974 *Sand Mountain*, 942 F.2d at 292.

975 *United States v. 599.86 Acres of Land in Johnson & Logan Cty.s.*, 240 F. Supp. 563, 570 (W.D. Ark. 1965), *aff’d sub nom. Mills v. United States*, 363 F.2d 78 (8th Cir. 1966).

976 *Phillips v. United States*, 243 F.2d 1, 6 (9th Cir. 1957); *Eagle Lake I*, 141 F.2d at 564 (“[i]f mineral interests . . . are bought and sold in arms-length transactions for a valuable consideration, they have a market price translatable into a fair market value”); *see, e.g., Montana Ry.*, 137 U.S. at 352-53.

reasonable probability can be demonstrated “from the fact that such prospects are the constant subject of barter and sale.”⁹⁷⁷

With a proposed highest and best use of holding for future mineral extraction, the *timing* of future use and its *relation to current market value* (i.e., as of the date of valuation) are critical.⁹⁷⁸ Similarly, extraction of a mineral or other resource cannot be considered as a highest and best use absent “proof that it would be legally permissible to exploit that resource” in the reasonably near future.⁹⁷⁹ Accordingly, the First Circuit recently held that sand extraction could not be considered as a highest and best use because there was no proof of “a reasonable probability that the property would be rezoned or that a variance could have been obtained in the near future” to make sand extraction legally permissible.⁹⁸⁰

Moreover, to prevent confusion, injustice, and improper duplication of value, market value cannot be premised on inconsistent or incompatible uses.⁹⁸¹ Of particular importance in properties with minerals or oil and gas resources, “[t]he fact that the minerals, if any, are located beneath the surface of the parcels condemned cannot be ignored.”⁹⁸² Thus, while a parcel’s surface might be suitable for subdivision purposes and the

same parcel’s subsurface oil and gas resources suitable for extraction, “[c]ertainly, the surface could not be used for a residential subdivision if oil wells were drilled and producing. These are inconsistent uses.”⁹⁸³ This would not prevent a well-supported determination that different parts of a property have different highest and best uses—as long as those uses are compatible and consistent (for example, residential or commercial use along highway frontage and agricultural use for the rear land).⁹⁸⁴ To avoid improper duplication of value, a determination of multiple highest and best uses must not (1) attribute two highest and best uses to the same acres, or (2) accept conflicting and incompatible uses.⁹⁸⁵

Market value cannot be premised on inconsistent or incompatible uses. Disregarding this rule is a common error in mineral property valuations.

4.8.3. Valuation Approaches for Mineral Resources. Under federal law, the sales comparison approach is normally the most reliable approach to value for properties involving minerals.⁹⁸⁶

977 *Montana Ry.*, 137 U.S. at 352-53; *Phillips*, 243 F.2d at 6; *Eagle Lake I*, 141 F.2d at 564.

978 *Sand Mountain*, 942 F.2d at 292-94 & n.3; *United States v. 494.10 Acres in Cowley Cty.*, 592 F.2d 1130, 1131-32 (10th Cir. 1979).

979 *United States v. 33.92536 Acres of Land (Piza-Blondet Trial Op.)*, No. 98-1664, 2008 WL 2550586, at *9 (D.P.R. June 13, 2008), *aff’d*, 585 F.3d 1 (1st Cir. 2009).

980 *United States v. 33.92536 Acres (Piza-Blondet)*, 585 F.3d 1, 7-8 (1st Cir. 2009).

981 *United States v. 320 Acres of Land*, 605 F.2d 762, 817 n.124 (5th Cir. 1979) (“To the extent that potential uses are inconsistent or incompatible uses, whatever value the land possesses because of its suitability for each of these uses cannot be aggregated in determining fair market value and just compensation.”); *United States v. Carroll*, 304 F.2d 300, 306 (4th Cir. 1962); *Eagle Lake Improvement Co. v. United States (Eagle Lake II)*, 160 F.2d 182, 184 & n.1 (5th Cir. 1947) (“It becomes manifest . . . that separate valuation [of surface rights and mineral rights] . . . would bring about confusion and injustice in condemnation cases. . . . [S]eparate awards . . . might include valuation based on inconsistent uses of the property, and consequent duplication of value.”); *see, e.g., United States v. 15.00 Acres in Miss. Cty.*, 468 F. Supp. 310 (E.D. Ark. 1979).

982 *Eagle Lake II*, 160 F.2d at 184 n. 1.

983 *Id.*

984 *E.g., United States v. 179.26 Acres in Douglas Cty.*, 644 F.2d 367, 371 (10th Cir. 1981) (consistent uses of commercial rock quarry and improved livestock and grain farm); *United States v. 1,629.6 Acres in Sussex Cty. (Island Farm II)*, 360 F. Supp. 147, 152-53 (D. Del. 1973), *aff’d*, 503 F.2d 764, 766 (3d Cir. 1974) (“We affirm on the basis of the district court’s fine opinions”).

985 *Island Farm II*, 360 F. Supp. at 153.

986 *United States v. 24.48 Acres of Land*, 812 F.2d 216, 218 (5th Cir. 1987); *Cloverport Sand & Gravel Co. v. United States*, 6 Cl. Ct. 178, 189 (1984); *United States v. 103.38 Acres of Land in Morgan Cty. (Oldfield)*, 660 F.2d 208, 212 (6th Cir. 1981) (“the value of the coal in place would be fully reflected in the sale price of comparable properties”); *United States v. Upper Potomac Props. Corp.*, 448 F.2d 913, 916-18 (4th Cir. 1971); *see United States v. Sowards*, 370 F.2d 87, 89-90 (10th Cir. 1966); *United States v. Whitehurst*, 337 F.2d 765, 775-76 (4th Cir. 1964).

As a result, in federal acquisitions the appraiser cannot default to using an income approach or other valuation method that may be acceptable for typical industry purposes.⁹⁸⁷ Indeed, both federal courts and industry professionals have criticized valuations of mineral property for just compensation purposes that improperly disregard the sales comparison approach.⁹⁸⁸ An unsupported statement that comparable sales do not exist is insufficient.⁹⁸⁹ Moreover, in appraising property involving minerals, “[e]lements of sales of quite distant properties, even those with different mineral content, may be comparable in an economic or market sense when due allowance is made for variables.”⁹⁹⁰ Significant variables or elements for mineral properties may include location (relative to market demand, processing facilities, transportation options, etc.), certainty (e.g., proven or unproven deposits), mineral content or type, mineral quality, mineral quantity, and zoning or permitting status.⁹⁹¹ The sales comparison approach and comparability generally are discussed in Section 4.4.2.

Use of the sales comparison approach requires the appraiser to determine the appropriate unit of comparison (per acre, per square foot, etc.). The unit of comparison should generally reflect that used by market participants. Regardless of what unit of comparison is selected, however, “arriving at a valuation by multiplying an assumed quantity of mineral reserves by a unit price is almost universally disapproved by the courts.”⁹⁹²

Under certain circumstances, it may be appropriate to apply the income capitalization approach to value mineral properties. As discussed in Section 4.4.4, the income approach involves capitalizing a property’s anticipated net income to derive an indication of its present market value. This approach cannot be used as a stand-alone approach to value if comparable sales are available.⁹⁹³ Even if comparable sales are lacking, however, federal courts have repeatedly held that the income approach can be used only with great caution for purposes of just compensation. As the Eighth Circuit warned:

If comparable sales are not available, use of the income capitalization approach may be appropriate in valuing mineral property. When applying this approach to mineral properties, yield capitalization techniques (e.g. discounted cash-flow [DCF] analysis) are typically more appropriate than direct capitalization techniques.

Great care must be taken, or such valuations can reach wonderland proportions. It is necessary to take into consideration manifold and varied factors, like future supply and demand, economic conditions, estimates of mineral recoverability, the value of currency, changes in the

987 *Foster v. United States*, 2 Cl. Ct. 426, 448-455 (1983); *Upper Potomac*, 448 F.2d at 917.

988 See, e.g., *United States v. Am. Pumice Co.*, 404 F.2d 336, 336-37 (9th Cir. 1968) (rejecting assumption that mineral properties could rarely be comparable to one another unless nearly adjacent), *modifying in relevant part United States v. 237,500 Acres in Inyo & Kern Clys.*, 236 F. Supp. 44, 51 (S.D. Cal. 1964); *Whitehurst*, 337 F.2d at 775 (finding valuation that ignored or rejected comparable sales evidence in valuing alleged mineral property was “grossly mistaken”); A.K. Stagg, P.G., A.I.M.A., *Federal Condemnation and Takings – A Journey Down the Yellow Book Road*, to Soc’y of Mining, Metallurgy, & Exploration, Inc. (Denver, Colo., March 1, 2011) (noting “predisposition on the part of many mineral appraisers to believe that the sales comparison approach simply cannot be used” and stating that sales comparison approach “can be used quite adequately in mineral appraisals, albeit, perhaps, with a little extra effort involved”); see generally Trevor R. Ellis, *Sales Comparison Valuation of Development and Operating Stage Mineral Properties*, MINING ENG’G 89 (April 2011).

989 See, e.g., *Whitehurst*, 337 F.2d at 770-72.

990 *Foster*, 2 Cl. Ct. at 448; *accord Am. Pumice*, 404 F.2d at 336-37.

991 *United States v. 100.80 Acres of Land (Parrish)*, 657 F. Supp. 269, 276 n.13 (M.D.N.C. 1987); *Am. Pumice*, 404 F.2d at 336-37; *Foster*, 2 Cl. Ct. at 448-55; see *United States v. 33.92356 Acres (Piza-Blondet)*, 585 F.3d 1 (1st Cir. 2009) (affirming exclusion of highest and best use of sand extraction without evidence of reasonable probability permit could be obtained).

992 *Cloverport*, 6 Cl. Ct. at 188.

993 E.g., *Whitehurst*, 337 F.3d at 770-72; see *United States v. 24.48 Acres of Land*, 812 F.2d 216, 218 (5th Cir. 1987).

marketplace, and technological advances. Many of these factors are impossible to predict with reasonable accuracy.⁹⁹⁴

Similarly, the Fourth Circuit observed, valuations of mineral property based on the income capitalization approach “almost always achieve chimerical magnitude, because, in the mythical business world of income capitalization, nothing ever goes wrong. There is always a demand; prices always go up; no competing material displaces the market.”⁹⁹⁵ As a result, the Fourth Circuit concluded, “to allow value to be proved in such a suspect manner, *impeccably objective and convincing evidence* is required.”⁹⁹⁶ Stated another way, “failure to anchor assumptions to information corroborated by demonstrable facts renders the computations mathematical exercises unrelated to reality.”⁹⁹⁷

As discussed in Section 4.4.4, the income capitalization approach may include direct capitalization or yield capitalization techniques.⁹⁹⁸ When applicable to mineral properties, yield capitalization is generally the more appropriate of these two techniques, and typically involves a discounted cash-flow (DCF) analysis.⁹⁹⁹ The income capitalization approach requires a distinction between income generated by the property itself (the royalty income in producing mining properties), which can be considered, and income generated by a business conducted on the property (i.e., a mining enterprise), which must be disregarded.¹⁰⁰⁰ For this reason, the income capitalization approach is sometimes called the royalty income approach when applied to mineral properties.

Every factor considered in an income capitalization approach must be properly supported.¹⁰⁰¹ In DCF analysis, one of the most critical factors is the selection of the discount rate, which should be derived from and supported by direct market data.¹⁰⁰² Because the market value measure of just compensation is intended “to duplicate marketplace calculations to the greatest possible extent[,]”¹⁰⁰³ courts have rejected income capitalization without evidence that “rates are in fact fixed in the marketplace by a process which parallels [the expert’s] calculations.”¹⁰⁰⁴

994 *United States v. 47.14 Acres of Land*, 674 F.2d 722, 726 (8th Cir. 1982).

995 *United States v. 69.1 Acres of Land (Sand Mountain)*, 942 F.2d 290, 293-94 (4th Cir. 1991).

996 *Id.* at 294; *United States ex rel. Tenn. Valley Auth. v. Indian Creek Marble Co.*, 40 F. Supp. 811, 822 (E.D. Tenn. 1941) (“It would require the enumeration of every cause of business disaster to point out the fallacy of using this method of arriving at just compensation.”).

997 *Foster*, 2 Cl. Ct. at 451 (“Although the calculation may be internally consistent, the capitalization of income approach frequently does not produce reasonably persuasive evidence of value.”).

998 *Direct capitalization* techniques apply an overall capitalization rate to a property’s single-year net income. *Yield capitalization* techniques typically use a discounted cash-flow (DCF) analysis to evaluate varying forecasted income or expenses. See Section 4.4.4 (Income Capitalization Approach).

999 *Whitney Benefits v. United States*, 18 Cl. Ct. 394, 408 (1989); *Foster*, 2 Cl. Ct. at 448-49.

1000 *Cloverport*, 6 Cl. Ct. at 191; see *United States v. Toronto, Hamilton & Buffalo Nav. Co.*, 338 U.S. 396, 403 n.6 (1949); see generally Section 4.4.4 (Income Capitalization Approach).

1001 *47.14 Acres*, 674 F.2d at 726; *United States v. 103.38 Acres of Land in Morgan Cty. (Oldfield)*, 660 F.2d 208, 214-15 (6th Cir. 1981) (requiring “evidence derived from or demonstrably related to the actual market” as “essential characteristics”); *Whitehurst*, 337 F.2d at 771-74; *United States v. 158.76 Acres of Land in Townshend*, 298 F.2d 559, 561 (2d Cir. 1962); see, e.g., *United States v. 25.202 Acres of Land (Amexx I)*, 860 F. Supp. 2d 165, 176-78 (N.D.N.Y. 2010), *aff’d*, 502 F. App’x 43, 45 (2d Cir. 2012) (noting lower court’s “thorough report exposing the unreliability of the expert’s methods”); see also *United States v. Sowards*, 370 F.2d 87, 90-92 (10th Cir. 1966); *Likins-Foster Monterey Corp. v. United States*, 308 F.2d 595, 597-99 (9th Cir. 1962), *aff’g United States v. Certain Interests in Prop. in Monterey Cty.*, 186 F. Supp. 167 (N.D. Cal. 1960); *United States v. Leavell & Ponder, Inc.*, 286 F.2d 398, 406-08 (5th Cir. 1961).

1002 *Prop. in Monterey*, 186 F. Supp. at 170; see also *Leavell & Ponder*, 286 F.2d at 407; *158.76 Acres in Townshend*, 298 F.2d at 561.

1003 *Oldfield*, 660 F.2d at 212; see *Cementerio Buxeda, Inc. v. Puerto Rico*, 196 F.2d 177, 181 (1st Cir. 1952) (allowing consideration of income and expense figures that “are factors which would be considered by a prospective buyer”).

1004 *Oldfield*, 660 F.2d at 214 (“The fatal flaw in the owners’ . . . method is its lack of demonstrable relationship with this ‘real’ market . . .”).

4.8.4. Timber. The sales comparison approach is also typically the most reliable approach to value for properties involving timber.¹⁰⁰⁵ Appraising property with a potential highest and best use for timber production typically requires special expertise and analysis, including a *timber cruise* to inventory the timber involved, evaluation of logging conditions, and investigation of potential timber sales.¹⁰⁰⁶ Such information may be particularly useful as a “check” on the appraiser’s estimate of contributory timber values gleaned from comparable sales and other market data.¹⁰⁰⁷ But it is never appropriate to simply add timber value to land value to determine the market value of the property as a whole.¹⁰⁰⁸

Important considerations in valuing timber properties may include the quantity and quality of merchantable timber, topography, and feasible logging methods.¹⁰⁰⁹ In addition, applicable local, state, and federal laws may significantly affect the value of forested properties and must be considered in valuations for federal acquisitions. For example, the Ninth Circuit held that “in appraising privately owned forest land in California, . . . evaluation witnesses must determine the highest and best use of the land in a manner that is not violative of the Forest Practice Act of the State of California.”¹⁰¹⁰

4.8.5. Water Rights. Water rights may have a substantial impact on the uses to which property can be put and, as a result, on market value.¹⁰¹¹ The laws governing water rights vary significantly by state, county, or other local jurisdiction. Water-rights law may also be an important consideration in determining liability in inverse takings.¹⁰¹² Applicable water laws must be taken into account in determining market value for purposes of just compensation,¹⁰¹³ and appropriate **legal instructions** may be required.

State laws on surface water rights generally follow one of three systems. In most Eastern states, water law is based on the doctrine of riparian rights. Broadly, water rights are allocated to owners of riparian land—that is, land adjacent to a body of water. Various laws in riparian-doctrine states regulate *reasonable use* to protect other riparian owners. In most Western states, where the water supply is more limited, water law is based on a prior appropriation system. Under this “first in time, first in right” concept, water rights are allocated based on when a person puts a quantity of water to actual *beneficial use*, regardless of whether that person owns riparian land. Finally,

1005 *United States v. 2,175.86 Acres in Hardin & Jefferson Chys.*, 687 F. Supp. 1079, 1085-86 (E.D. Tex. 1988), on remand from *Kirby Forest Indus., Inc. v. United States*, 467 U.S. 1 (1984).

1006 E.g., *United States v. 15.00 Acres of Land in Miss. Cty.*, 468 F. Supp. 310, 313 & n.6 (E.D. Ark. 1979); *2,175.86 Acres in Hardin & Jefferson*, 687 F. Supp. at 1085-86.

1007 E.g., *2,175.86 Acres in Hardin & Jefferson*, 687 F. Supp. at 1085-87.

1008 *Id.* at 1086-87; see generally Section 4.2.2.

1009 E.g., *Ga.-Pac. Corp. v. United States*, 640 F.2d 328, 345-46 (Ct. Cl. 1980) (per curiam); *2,175.86 Acres in Hardin & Jefferson*, 687 F. Supp. at 1085-87.

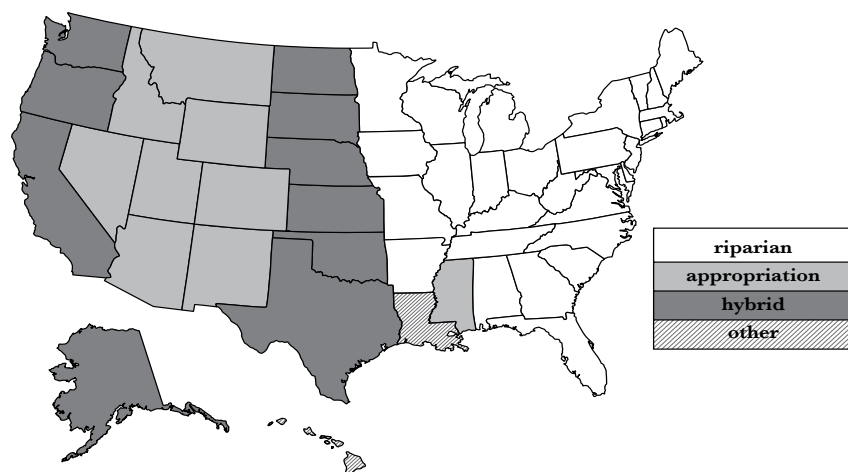
1010 E.g., *Scott Lumber Co. v. United States*, 390 F.2d 388, 395-96 (9th Cir. 1968); see also *United States v. 320 Acres of Land*, 605 F.2d 762, 818-19 & n.128 (5th Cir. 1979) (legal framework affecting uses of property must be taken into account).

1011 E.g., *Wilson v. United States*, 350 F.2d 901, 908 (10th Cir. 1965) (rejecting proposed use of hay production through projected irrigation installations because of “question[able] feasibility of the development of some of the lands for which water rights were pending”) (citing *Olson v. United States*, 292 U.S. 246, 255 (1934)); see *United States v. 46,672.96 Acres in Doña Ana Chys.*, 521 F.2d 13, 14-15 (10th Cir. 1975) (noting evidence that value of properties with potential uses of grazing purposes, rural homesites, recreational sites or roadside businesses “depend[ed] on availability of water and roads”).

1012 *Ark. Game & Fish Comm’n v. United States*, 133 S. Ct. 511, 522 (2012) (noting that bearing of Arkansas water-rights law on whether taking occurred should be addressed on remand).

1013 See, e.g., *United States v. 320 Acres of Land*, 605 F.2d 762, 818-19 & n.128 (5th Cir. 1979) (legal framework affecting uses of property must be taken into account). Note that this is not an exception to the rule that federal, not state, law controls. *Scott Lumber Co.*, 390 F.2d at 395-96 (rejecting valuation based on proposed highest and best use that violated state law); see Section 4.1.

several Western states (including California, Texas, and Oklahoma) originally recognized riparian rights but later incorporated an appropriation system, creating a hybrid system with both riparian and appropriation elements. Beyond these three surface-water-rights systems, unique variations apply in Hawaii and Louisiana, and pueblo water rights affect a few places in the Southwest. Groundwater rights in the United States are generally allocated based on ownership of overlying land, prior appropriation, or state management.¹⁰¹⁴



Special rules regarding riparian lands adjacent to navigable waters and the federal navigational servitude are discussed in Section 4.11.1.

4.9. Inverse Takings. Most valuation assignments under these Standards involve intentional acquisitions, in which the United States purposely seeks to acquire property (by negotiated purchase, exchange, or eminent domain). But actions of the United States may also result in its taking property without intending to do so. In such a situation, called an inverse taking (or inverse condemnation), a landowner can sue the United States for compensation.¹⁰¹⁵ Inverse takings claims involve important legal and practical differences from other types of federal acquisitions.¹⁰¹⁶

The most significant difference between an inverse taking claim and a direct condemnation or other affirmative acquisition is the threshold question of liability: In filing a direct condemnation, the United States expressly acknowledges the actual or proposed property acquisition and its obligation to pay compensation. In an inverse taking claim, on the other hand, the United States may contest the landowner's claim that a taking occurred for which just compensation must be paid under the Fifth Amendment.¹⁰¹⁷ Accordingly, in an inverse taking claim, the court must

¹⁰¹⁴ See generally *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 742-55 (1950) (exploring development of water law systems in the United States generally and California in particular); cf. DAVID H. GETCHES ET AL., *WATER LAW IN A NUTSHELL* (5th ed. 2015).

¹⁰¹⁵ The U.S. Court of Federal Claims has exclusive jurisdiction over inverse takings claims exceeding \$10,000 under the Tucker Act. 28 U.S.C. § 1491. Federal district courts have concurrent jurisdiction for claims for \$10,000 or less. 28 U.S.C. § 1346(a)(2) (the "Little Tucker Act"). These statutes waive sovereign immunity, allowing the United States to be sued, in recognition of the fact that unintended takings may occur despite federal agencies' efforts to avoid them. Cf. Uniform Act, 42 U.S.C. § 4651(8) ("No Federal agency head shall intentionally make it necessary for an owner to institute legal proceedings to prove the fact of the taking of his real property."); 49 C.F.R. § 24.102(f) ("If the Agency intends to acquire any interest in real property by exercise of the power of eminent domain, it shall institute formal condemnation proceedings and not intentionally make it necessary for the owner to institute legal proceedings to prove the fact of the taking of the real property."); see also *Kirby Forest Indus., Inc. v. United States*, 467 U.S. 1, 6 (1984) (noting Uniform Act "enjoins federal agencies . . . to attempt to acquire property by negotiation rather than condemnation, and whenever possible not to take land by physical appropriation").

¹⁰¹⁶ See *United States v. Clarke*, 445 U.S. 253, 255 (1980).

¹⁰¹⁷ The United States can also concede liability as appropriate. E.g., *Otay Mesa Property, L.P. v. United States* (*Otay Mesa III*), 779 F.3d 1315 (Fed. Cir. 2015).

first determine whether a taking occurred for which just compensation must be paid. If so, the case can then proceed to the compensation phase to determine what amount of compensation is due. Appraisers may be retained to develop opinions in connection with the liability phase, the compensation phase, or both.

The liability inquiry will vary depending on the nature of the inverse taking claim. The issue is rather straightforward if the government's action resulted in the government's permanent physical occupation of the land in question.¹⁰¹⁸ But "[i]n view of the nearly infinite variety of ways in which government actions or regulations can affect property interests, the Court has recognized few invariable rules in this area."¹⁰¹⁹ In regulatory takings claims, the federal courts have developed various tests to determine whether a taking has occurred: the character of the government action; the extent to which the regulation interferes with distinct, investment-backed expectations; and the economic impact of the regulation.¹⁰²⁰ These distinct inquiries may alter the appropriate considerations (as well as the terminology) for determining the larger parcel for liability purposes in inverse takings claims, as discussed in Section 4.3.4.8.

If the court finds that a compensable taking occurred, litigation will proceed to the compensation phase, in which the standard valuation rules apply. Generally, the appraiser will be asked to develop opinions of the market value of the affected property before and after the taking. As discussed in Section 4.2.1.1, the date of value is typically the date of taking, which should be provided by legal counsel.

- 4.10. Land Exchanges.** Federal land exchanges are voluntary real estate transactions between the United States and a nonfederal landowner. The parties must agree on the market value of the properties being exchanged, and neither the United States nor a nonfederal landowner is required to participate in an exchange.¹⁰²¹ Nevertheless, federal land exchanges may still result in litigation relating to the valuation of the property involved and/or the adequacy of the appraisal supporting the transaction.¹⁰²² Most federal land exchanges are authorized under the Federal Land Policy and Management Act of 1976 (FLPMA).¹⁰²³ Exchanges can be initiated by any party. By law, for an exchange to occur the public interest must be well served, and the estimated value of the nonfederal land must be within 25 percent of the estimated value of the federal land, among other requirements.¹⁰²⁴ Some land exchanges are specifically legislated by Congress, sometimes with special provisions that differ from the usual federal exchange process.¹⁰²⁵

1018 *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 432 (1982) ("[A] permanent physical occupation is a government action of such a unique character that it is a taking without regard to other factors that a court might ordinarily examine.").

1019 *Ark. Game & Fish Comm'n v. United States*, 133 S. Ct. 511, 518 (2012).

1020 *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978).

1021 In contrast, direct acquisitions, while often voluntary, may involve at least a possibility that the government can exercise the power of eminent domain to take property for a public purpose with payment of just compensation.

1022 *E.g., Greer Coal, Inc. v. U.S. Forest Serv.*, 470 F. App'x 630 (9th Cir. 2012) (unpubl.); *Nat'l Parks & Conservation Ass'n v. Bureau of Land Mgmt. (NPCA v. BLM)*, 606 F.3d 1058 (9th Cir. 2010); *Desert Citizens Against Pollution v. Bisson*, 231 F.3d 1172 (9th Cir. 2000). Litigation also arises over the determination that an exchange is in the public interest, and agency environmental compliance. *E.g., Ctr. for Biological Diversity v. U.S. Dep't of Interior*, 623 F.3d 633 (9th Cir. 2010); *Lodge Tower Condo. Ass'n v. Lodge Props., Inc.*, 85 F.3d 476 (10th Cir. 1996), *aff'd* 880 F. Supp. 1370 (D. Colo. 1995).

1023 43 U.S.C. §§ 1701-1785 (2012).

1024 43 U.S.C. § 1716.

1025 *See, e.g., Mt. St. Helens National Volcanic Monument Act*, Pub. L. No. 97-243, 96 Stat. 301 (1982), 16 U.S.C. § 431 note (1982) (repealed 2014).

Federal land exchanges are subject to the same valuation requirements as other types of federal acquisitions. In fact, federal regulations specifically require appraisals in many federal land exchanges to comply with these Standards.¹⁰²⁶ But special **legal instructions** may be necessary due to statutory or regulatory requirements for land exchanges. Special rules commonly dictate the larger parcel determination, reflecting federal statutes and agency regulations.¹⁰²⁷ The appraiser must also obtain instructions regarding the appropriate date of valuation,¹⁰²⁸ which may be negotiated by the parties involved in the exchange in accordance with agency regulations¹⁰²⁹ or dictated by statute.¹⁰³⁰ For example, following the volcanic eruption at Mount St. Helens in 1980, Congress authorized the acquisition of lands by donation or exchange in what is now the Mount St. Helens National Volcanic Monument.¹⁰³¹ Most of these acquisitions required appraisal of the properties' current market value, but the statute expressly provided for timber acquisitions to be valued as of July 1, 1982, in recognition of rapid deterioration of timber in the area.¹⁰³²

As in other types of acquisitions, analysis of a property's highest and best use is critical in appraising property for federal land exchanges.¹⁰³³ As discussed in Section 4.3.2, a property's existing use is normally its highest and best use on the date of value because "economic demands normally result in an owner's putting his land to the most advantageous use."¹⁰³⁴ But federal lands typically involve other considerations: as the Supreme Court observed over a century ago, "property may have to the public a greater value than its fair market value" ¹⁰³⁵ As a practical matter, then, the federal lands to be exchanged likely are not being put to their highest and best use on the date of value,¹⁰³⁶ while the nonfederal party's proposed use may well be a feasible highest and best use that must be considered.¹⁰³⁷ For this reason, a nonfederal party's proposed use, if reasonably probable, must be analyzed as a part of the highest and best use determination.¹⁰³⁸ As with any possible highest and best use, neither an existing federal use nor a nonfederal party's proposed use can be considered unless there is competitive demand for that use in the private market.¹⁰³⁹ And of course, any proposed use, no matter how probable or

¹⁰²⁶ See, e.g., *NPCA v. BLM*, 606 F.3d at 1066 (citing 43 C.F.R. § 2201.3).

¹⁰²⁷ See Section 4.3.3.

¹⁰²⁸ See *Greer Coal, Inc. v. U.S. Forest Serv.*, 470 F. App'x 630, 636 (9th Cir. 2012) (unpubl.) ("an exchange is concerned with the relative value of two sets of property rather than the absolute value of either"); see generally Section 4.2 (discussing date of valuation).

¹⁰²⁹ See, e.g., *Desert Citizens Against Pollution v. Bisson*, 231 F.3d 1172, 1185 (9th Cir. 2000); cf. 43 U.S.C. § 1716(d).

¹⁰³⁰ See *Mt. St. Helens Mining & Recovery Ltd. P'ship v. United States*, 384 F.3d 721, 729 (9th Cir. 2004) (noting date of valuation for specific acquisitions set by statute).

¹⁰³¹ Mt. St. Helens National Volcanic Monument Act, Pub. L. No. 97-243, 96 Stat. 301 (1982), 16 U.S.C. § 431 note (1982) (repealed 2014).

¹⁰³² *Mt. St. Helens Mining*, 384 F.3d at 729; Pub. L. No. 97-243, § 3(b); 36 C.F.R. § 254.9(b) (2015).

¹⁰³³ See Section 4.3.

¹⁰³⁴ *United States v. Buhler*, 305 F.2d 319, 328 (5th Cir. 1962); see Section 4.3.2.1.

¹⁰³⁵ *United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53, 80 (1913).

¹⁰³⁶ See *United States v. Weyerhaeuser Co.*, 538 F.2d 1363, 1366-67 (9th Cir. 1976) ("[G]overnment projects may render property valuable for a unique purpose."); see, e.g., *United States v. 46,672.96 Acres of Land in Doña Ana Cty.*, 521 F.2d 13, 15-16 (10th Cir. 1975) ("absolutely no evidence that anyone other than the government could or would use the land for a missile range"); cf. *United States v. 320 Acres of Land*, 605 F.2d 762, 783 n.26 (5th Cir. 1979) ("[T]he use which the Government proposes to devote the property to should not be considered unless private owners could also reasonably devote the property to that use.").

¹⁰³⁷ See, e.g., *Nat'l Parks & Conservation Ass'n v. Bureau of Land Mgmt. (NPCA v. BLM)*, 606 F.3d 1058, 1066-69 (9th Cir. 2010); *Desert Citizens Against Pollution v. Bisson*, 231 F.3d 1172, 1181-85 (9th Cir. 2000).

¹⁰³⁸ *Desert Citizens*, 231 F.3d at 1181; accord *NPCA v. BLM*, 606 F.3d at 1067-68; see Section 4.3.

¹⁰³⁹ *Chandler-Dunbar*, 229 U.S. at 80-81; compare *NPCA v. BLM*, 606 F.3d at 1067-68 (noting "obvious and well-known presence of competing . . . proposals" for nonfederal party's proposed use), and *Desert Citizens*, 231 F.3d at 1185 (noting "regional market and the presence of competitors" pursuing similar projects to nonfederal party's proposed use), with *Doña Ana*, 521 F.2d at 16 ("no basis whatsoever for considering that the highest and best use was for a missile range" without "evidence that anyone other than the government could or would use the land for [that purpose]"), and *J.A. Tobin Constr. Co. v. United States*, 343 F.2d 422, 425 (10th Cir. 1965) ("there was no market for an ordinary commercial quarry in the area involved"); see *320 Acres*, 605 F.2d at 811 n.107 ("[T]he use must be one which a private owner might reasonably develop or enjoy." (emphasis added)).

profitable, is to be considered only “to the full extent that the prospect of demand for the use affects market value.”¹⁰⁴⁰

4.11. Special Rules. Federal acquisitions of certain types of property involve special valuation rules to comply with constitutional or specific statutory provisions. The special valuation rules discussed in Section 4.11.1 (Riparian Lands [Navigation Servitude]) and Section 4.11.2 (Federal Grazing Permits) arise from the general principle that the United States is not compelled to compensate “for elements of value that the Government has created, or that it might have destroyed under the exercise of governmental authority other than the power of eminent domain.”¹⁰⁴¹ In the words of Justice Jackson: “Such losses may be compensated by legislative authority, not by force of the Constitution alone.”¹⁰⁴² Specifically, Section 4.11.1 addresses the valuation of property involving the federal navigation servitude over waters of the United States. This section also explains special valuation requirements for partial and total acquisitions under 33 U.S.C. § 595a, which authorizes compensation for certain elements beyond what the Fifth Amendment requires.¹⁰⁴³ Section 4.11.2 discusses the valuation of property involving federal grazing permits, which are administered primarily by the U.S. Forest Service and the Bureau of Land Management.¹⁰⁴⁴ Section 4.11.3, on the other hand, discusses the application of the standard valuation rules to special types of property, guided by the principles of fairness and indemnity underlying the Fifth Amendment.¹⁰⁴⁵ Valuation issues arising in inverse taking claims under the National Trails System Act and Amendments¹⁰⁴⁶ are also addressed, as well as the substitute-facility form of compensation.

4.11.1. Riparian Lands and the Federal Navigational Servitude. Special valuation rules apply in acquisitions affected by the navigational servitude, a dominant federal easement over the nation’s navigable waters.¹⁰⁴⁷ Arising under the U.S. Constitution, the federal navigation servitude is a preexisting limitation on the ownership of the flow of navigable waters and underlying streambeds.¹⁰⁴⁸ This has important ramifications for the compensation due not only for navigable waters, which encompass the entire streambed up to the high-water mark, but also for riparian fast lands (upland) lying above the high-water mark.¹⁰⁴⁹ In addition, by federal

1040 *Olson v. United States*, 292 U.S. 246, 255 (1934).

1041 *United States v. Fuller*, 409 U.S. 488, 492 (1973) (citing *United States v. Rands*, 389 U.S. 121 (1967), *United States v. Twin City Power Co.*, 350 U.S. 222 (1956), and *United States v. Commodore Park, Inc.*, 324 U.S. 386 (1945)).

1042 *United States v. Willow River Power Co.*, 324 U.S. 499, 510 (1945); accord *Fuller*, 409 U.S. at 494 (“Congress may, of course, provide in connection with condemnation proceedings that particular elements of value or particular rights be paid for even though in the absence of such provision the Constitution would not require payment.”); cf. *United States v. Bodcaw Co.*, 440 U.S. 202, 204 (1979) (“such compensation is a matter of legislative grace rather than constitutional command”).

1043 Rivers and Harbors Act of 1970 § 111, 33 U.S.C. § 595a (2012); see *United States v. 30.54 Acres of Land in Greene Cty. (Filiaggi)*, 90 F.3d 790, 793-94, 794 n.3 (3d Cir. 1996).

1044 Taylor Grazing Act of 1934, 43 U.S.C. § 315(b) (2012); Granger-Thye Act of 1950, 16 U.S.C. § 580l (2012).

1045 See *United States v. 50 Acres of Land (Duncanville)*, 469 U.S. 24, 30 (1984); *United States v. 564.54 Acres of Land (Lutheran Synod)*, 441 U.S. 506, 517 (1979); see also *United States ex rel. Tenn. Valley Auth. v. Powelson*, 319 U.S. 266, 281 (1943) (“it is the owner’s loss, not the taker’s gain, which is the measure of just compensation”).

1046 National Trails System Act, 16 U.S.C. §§ 1241-51 (2012); see 1983 Amendments, Pub. L. No. 98-11, 97 Stat. 48 (railbanking provisions).

1047 See *United States v. Rands*, 389 U.S. 121, 122-23 (1967); *Gilman v. City of Philadelphia*, 70 U.S. 713, 724-25 (1865); *Gibbons v. Ogden*, 22 U.S. 1, 189-93 (1824); *United States v. 30.54 Acres of Land in Greene Cty. (Filiaggi)*, 90 F.3d 790, 795 (3d Cir. 1996). A servitude is an easement or other legal right to limited use of property without possession of it. See Section 4.6.5 (Easement Valuation Issues).

1048 *United States v. Twin City Power Co.*, 350 U.S. 222, 227 (1956); see *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1028-29 (1992); *United States v. Cherokee Nation*, 480 U.S. 700, 707 (1987); *Rands*, 389 U.S. at 123; *United States v. Commodore Park Inc.*, 324 U.S. 386, 391 (1945); *United States v. Chi., M., St. P. & P.R. Co.*, 312 U.S. 592, 597 (1941); *Scranton v. Wheeler*, 179 U.S. 141, 163 (1900).

1049 *Rands*, 389 U.S. at 122-26; see *United States v. Willow River Power Co.*, 324 U.S. 499, 509 (1945); see also *United States v. Va. Elec. & Power Co.*, 365 U.S. 624, 628-29 (1961); cf. *Cherokee Nation*, 480 U.S. at 704; *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979) (“fast lands”); *Scranton*, 179 U.S. at 163 (“upland”).

statute, Congress has increased compensation above what the Constitution requires in certain acquisitions of fast lands.¹⁰⁵⁰ These constitutional and statutory requirements establish when market value due to a property's access to or use of navigable waters can be considered, and when it must be disregarded, in appraisals for federal acquisitions relating to navigation.

Origins of the Navigational Servitude. Although the federal navigation servitude affects compensation under the Fifth Amendment, it arises from Congress' power to regulate commerce under Article I of the U.S. Constitution.¹⁰⁵¹ "Commerce includes navigation"¹⁰⁵²—and so the Commerce Clause "confers a unique position upon the Government in connection with navigable waters."¹⁰⁵³ As a result, the great inland waterways have long been deemed national assets rather than the private property of riparian owners: they are "the public property of the nation."¹⁰⁵⁴ And while lands adjacent to or beneath navigable waters may be owned by states or individuals, their ownership "is always subject to the servitude in respect of navigation created in favor of the federal government by the constitution."¹⁰⁵⁵

The Commerce Clause "speaks in terms of power, not of property."¹⁰⁵⁶ The navigational servitude "encompasses the exercise of this federal power with respect to the stream itself and the lands beneath and within its high-water mark."¹⁰⁵⁷ Accordingly, when the United States properly exercises its navigational servitude, no property is taken within the meaning of the Fifth Amendment, and no compensation is due.¹⁰⁵⁸

Navigable Waters. While the term navigable waters is significant in different areas of the law, only its meaning in the context of the navigational servitude is relevant here.¹⁰⁵⁹ The basic

1050 See 33 U.S.C. § 595a (codifying Section 111 of the Rivers and Harbors Act of 1970); see also *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 739-42 (1950); cf. *United States v. Fuller*, 409 U.S. 488, 494 (1973) ("Congress may, of course, provide . . . that particular elements of value or particular rights be paid for even though in the absence of such provision the Constitution would not require payment.").

1051 U.S. Const. art. 1, § 8, cl. 3 ("Congress shall have power . . . [t]o regulate commerce with foreign Nations, and among the several States, and with the Indian Tribes"); see *Twin City Power*, 350 U.S. at 224-25.

1052 *Gilman*, 70 U.S. at 724; accord *Gibbons*, 22 U.S. at 190 ("All America understands, and has uniformly understood, the word 'commerce,' to comprehend navigation. It was so understood, and must have been so understood, when the constitution was framed. The power over commerce, including navigation, was one of the primary objects for which the people of America adopted their government, and must have been contemplated in forming it."); see *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 426-27 (1940).

1053 *Rands*, 389 U.S. at 123; accord *Cherokee Nation*, 480 U.S. at 704.

1054 *Gilman*, 70 U.S. at 725 ("For [navigation] purposes, Congress possesses all the powers which existed in the States before the adoption of the national Constitution, and which have always existed in the Parliament in England."); see *United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53, 69 (1913) ("that the running water in a great navigable stream is capable of private ownership is inconceivable").

1055 *Gibson v. United States*, 166 U.S. 269, 272 (1897); see *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1028-29 (1992) ("a pre-existing limitation upon the land owner's title"); *Rands*, 389 U.S. at 123 ("a power to which the interests of riparian owners have always been subject"); *Scranton v. Wheeler*, 179 U.S. 141, 163 (1900); see also *Lambert Gravel Co. v. J.A. Jones Constr. Co.*, 835 F.2d 1105, 1112 (5th Cir. 1988); cf. Ronald C. Allen, *Federal Evaluation of Riparian Property: Section 111 of the Rivers and Harbors Act of 1970*, 24 ME. L. REV. 175, 197-98 (1972) ("[T]he servitude exemplifies the only clear cut instance when we as a nation have maintained a common property right exclusively for common benefit when needed.").

1056 *Twin City Power*, 350 U.S. 222, 225 (1956); accord *United States v. Certain Parcels in Valdez*, 666 F.2d 1236, 1238 (9th Cir. 1982).

1057 *United States v. Va. Elec. & Power Co.*, 365 U.S. 624, 628 (1961). Federal courts have used the terms high-water mark and ordinary high-water mark interchangeably in describing the boundary of the federal navigational servitude. *Banks v. United States*, 71 Fed. Cl. 501, 506 (2006) (noting both terms "refer to the same boundary" despite "any distinction in nomenclature" and citing cases).

1058 *Cherokee Nation*, 480 U.S. at 704; *Rands*, 389 U.S. at 123; *United States v. Kan. City Life Ins. Co.*, 339 U.S. 799, 804 (1950); see *Lucas*, 505 U.S. at 1028-29; *United States v. 30.54 Acres of Land in Greene Cty. (Filiaggi)*, 90 F.3d 790, 795 (3d Cir. 1996) ("Exercise of the servitude did nothing more than realize a limitation always inherent in the landowners' title. It was not a taking."); *Pub. Util. Dist. No. 1 v. City of Seattle*, 382 F.2d 666, 669 (9th Cir. 1967) ("[T]he navigational servitude, by its nature, does not destroy or exclude all property rights in the beds and banks of navigable streams. Such rights continue to exist but are held subject to the governmental power in the nature of an easement.").

1059 See *Kaiser Aetna v. United States*, 444 U.S. 164, 170-79 (1979); see also *PPL Montana, LLC v. Montana* 132 S. Ct. 1215, 1228-29 (2012); *The Propeller Genesee Chief v. Fitzhugh*, 12 How. 443, 454-57 (1851) (exploring inadequacy of English common-law concept of navigable waters, based on ebb and flow of tide, for American geography); *Kaiser Aetna*, 444 U.S. at 182-83 (Blackmun, J., dissenting) (discussing same); cf. *Rapanos v. United States*, 547 U.S. 715 (2006) (construing "navigable waters" and "waters of the United States" as used in Clean Water Act); *Tundidor v. Miami-Dade Cty.*, 831 F.3d 1328, 1333 (11th Cir. 2016) (citing cases).

standard is navigability in fact.¹⁰⁶⁰ Waterways are “navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce.”¹⁰⁶¹ But this threshold question is not the end of the inquiry: for purposes of compensation under the Fifth Amendment, “the Supreme Court has rejected a mechanical test imposing the [navigational] servitude on all waters navigable in fact.”¹⁰⁶² Thus, whether the navigational servitude applies under federal law to a specific body of water that is navigable in fact must be determined on a case-by-case basis.¹⁰⁶³ Arising mainly (but not only) in inverse takings claims, this determination cannot be made by the appraiser; **legal instructions** are required.¹⁰⁶⁴

Scope of the Navigational Servitude. The navigational servitude extends “to the entire bed of a stream, which includes the lands below ordinary high-water mark.”¹⁰⁶⁵ It “applies to all holders of riparian and riverbed interests.”¹⁰⁶⁶ Accordingly, property within the bed of a navigable stream is always subject to the potential exercise of the navigational servitude.¹⁰⁶⁷ And while the navigational servitude does not extend beyond the high-water mark, it does affect the compensation for fast lands acquired by the United States in connection with navigation.¹⁰⁶⁸

Whether the federal project prompting an acquisition is related to navigation is determined by Congress or the agency officials to whom Congress has delegated this authority—primarily the U.S. Army Corps of Engineers.¹⁰⁶⁹ “If the interests of navigation are served, it is constitutionally irrelevant that other purposes may also be advanced.”¹⁰⁷⁰ Accordingly, “[o]nce Congress determines that an action will improve or protect navigation, the Government may rely on the navigation servitude to accomplish that action.”¹⁰⁷¹ And federal courts have repeatedly held that proper exercise of the navigation servitude stems from the purposes of the federal project as a whole rather than the immediate facts of a specific acquisition.¹⁰⁷² Indeed, the United States may “block navigation at one place to foster it at another.”¹⁰⁷³

Congress may also decide not to assert the navigational servitude in a specific acquisition or project—in other words, Congress may authorize payment of compensation above what the

1060 E.g., *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 406 & n.21 (1940); see *Kaiser Aetna*, 444 U.S. at 175.

1061 *The Daniel Ball*, 77 U.S. 557, 563 (1870); see *Arizona v. California*, 283 U.S. 423, 452 n.2 (1931) (citing cases).

1062 *Boone v. United States*, 944 F.2d 1489, 1495 n.12 (9th Cir. 1991) (citing *Kaiser Aetna*, 444 U.S. at 175).

1063 See, e.g., *United States v. 102,871 Acres of Land in Cameron Par. (La. Jetty)*, No. 2:13 CV 2508, 2015 WL 5794073 (W.D. La. Oct. 2, 2015); see also *Banks v. United States*, 71 Fed. Cl. 501 (2006). In practice, “this important public interest has generally led to the conclusion that the navigational servitude will preclude the payment of compensation in cases involving waters navigable in interstate commerce . . .” *Boone*, 944 F.2d at 1501.

1064 See, e.g., *Owen v. United States*, 851 F.2d 1404 (Fed. Cir. 1988); *Banks*, 71 Fed. Cl. 501; *Alameda Gateway, Ltd. v. United States*, 45 Fed. Cl. 757 (1999). The issue arises less frequently in other types of federal acquisitions. See, e.g., *La. Jetty*, 2015 WL 5794073; see also *United States v. 30.54 Acres of Land in Greene Cty. (Filiaga)*, 90 F.3d 790 (3d Cir. 1996).

1065 *United States v. Chi., M., St. P. & P.R. Co.*, 312 U.S. 592, 596-97 (1941); accord *United States v. Cherokee Nation*, 480 U.S. 700, 704 (1987); *United States v. Rands*, 389 U.S. 121, 123 (1967); *United States v. Va. Elec. & Power Co.*, 365 U.S. 624, 625 (1961).

1066 *Cherokee Nation*, 480 U.S. at 706; see *id.* at 706-07 (citing cases).

1067 *Rands*, 389 U.S. at 123; *Lewis Blue Point Oyster Cultivation Co. v. Briggs*, 229 U.S. 82, 88 (1913); *Alameda Gateway*, 45 Fed. Cl. at 763.

1068 *Va. Elec.*, 365 U.S. at 629; accord *Rands*, 389 U.S. at 123-24; *United States v. Twin City Power Co.*, 350 U.S. 222, 225 (1956); see also *Kaiser Aetna v. United States*, 444 U.S. 164, 175-77 (1979).

1069 *Twin City Power*, 350 U.S. at 224; *United States v. Commodore Park, Inc.*, 324 U.S. 386, 392 (1945); see, e.g., *United States v. Certain Parcels of Land in Valdez*, 666 F.2d 1236, 1239 (9th Cir. 1982) (discussing Ports and Waterways Safety Act of 1972, codified at 33 U.S.C. § 1221).

1070 *Twin City Power*, 350 U.S. at 224.

1071 *Valdez*, 666 F.2d at 1239 (citing *Chi., M., St. P. & P.R. Co.*, 312 U.S. at 597); cf. *United States v. Gerlach Live Stock Co.*, 339 U.S. 725 (1950) (finding Congress had not intended to exercise navigation servitude in acquisitions for specific dam project).

1072 *Commodore Park*, 324 U.S. at 392-93; see, e.g., *Weatherford v. United States*, 606 F.2d 851, 853 (9th Cir. 1979) (holding navigational servitude applied to acquisition for purpose of relocating highway that would be submerged by construction of dam in navigable stream).

1073 *Commodore Park*, 324 U.S. at 393.

Constitution requires.¹⁰⁷⁴ But “[s]uch a waiver of sovereign authority will not be implied . . . [I]t must be ‘surrendered in unmistakable terms.’”¹⁰⁷⁵

Elements of Value Under the Navigational Servitude.

Market value that is “attributable in the end to the flow of the stream—over which the Government has exclusive dominion”—is not compensable under the Fifth Amendment.¹⁰⁷⁶ Similarly, any market value that arises from access to or use of navigable waters is allocable to the public, not to private owners.¹⁰⁷⁷ Paying compensation for such values would permit private owners to receive windfalls to which they are not entitled under the Fifth Amendment.¹⁰⁷⁸ Accordingly, while access to navigable waters may enhance the market value of fast land, any such value must be disregarded in federal acquisitions pursuant to the navigational servitude, except as provided below.¹⁰⁷⁹ Under this established principle of law, “all value attributable to the riparian location of the land” is excluded from consideration under the Fifth Amendment.¹⁰⁸⁰ As a result, when the United States acquires riparian fast lands in an exercise of its power to control commerce, elements of value that are not compensable under the Fifth Amendment include: port site value;¹⁰⁸¹ power site or power development value;¹⁰⁸² value due to riparian rights of access to navigable waters;¹⁰⁸³ irrigation value;¹⁰⁸⁴ and recreational value for boating, fishing, and hunting.¹⁰⁸⁵ Any value arising from a property’s access to or use of navigable

Values Due to Access to or Use of Navigable Water

In federal acquisitions related to navigation, the following elements are not compensable under the Fifth Amendment:

- Port site value
- Power site value
- Riparian rights of access to navigable waters
- Irrigation value
- Recreational value for boating, fishing, and hunting

These values must be disregarded in federal acquisitions of fast land, except as required by federal statute. *See* 33 U.S.C. § 595a.

1074 *Gerlach Live Stock*, 339 U.S. at 739; *Lambert Gravel Co. v. J.A. Jones Constr. Co.*, 835 F.2d 1105, 1110 (5th Cir. 1988); *cf. Turner v. Kings River Conservation Dist.*, 360 F.2d 184, 192-93 (9th Cir. 1966) (analyzing Flood Control Act of 1944 § 8, codified at 33 U.S.C. § 701-1(b) (1996)).

1075 *United States v. Cherokee Nation*, 480 U.S. 700, 707 (1987) (quoting *Bowen v. Pub. Agencies Opposed to Soc. Security Entrapment*, 477 U.S. 41, 52 (1986)); *accord Lambert Gravel*, 835 F.2d at 1109-10.

1076 *United States v. Va. Elec. & Power Co.*, 365 U.S. 624, 629 (1961); *accord United States v. Twin City Power Co.*, 350 U.S. 222, 225-27 (1956) (“a value in the flow of the stream [is] a value that inheres in the Government’s servitude and one that under our decisions the Government can grant or withhold as it chooses”).

1077 *United States v. Rands*, 389 U.S. 121, 124-25 (1967); *accord United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 427 (1940) (“[T]here is no private property in the flow of the stream. This has no assessable value to the riparian owner.”).

1078 *Rands*, 389 U.S. at 126; *see also United States v. 30.54 Acres of Land in Greene Cty. (Filiaggi)*, 90 F.3d 790, 795 (3d Cir. 1996).

1079 *Rands*, 389 U.S. at 126 (“[T]hese rights and values are not assertable against the superior rights of the United States, are not property within the meaning of the Fifth Amendment, and need not be paid for when appropriated by the United States.”); *see Twin City Power*, 350 U.S. at 227 (“it is the water power that creates the special value, whether the lands are above or below ordinary high water”).

1080 *Va. Elec.*, 365 U.S. at 631; *accord Twin City Power*, 350 U.S. at 225-26 (“It is no answer to say that payment is sought only for the location value of the fast lands. That special location value is due to the flow of the stream . . .”).

1081 *Rands*, 389 U.S. at 126; *see also Filiaggi*, 90 F.3d at 796; *United States v. 87.30 Acres of Land*, 430 F.2d 1130, 1133 (9th Cir. 1970).

1082 *E.g., Va. Elec.*, 365 U.S. at 629; *Twin City Power*, 350 U.S. at 228; *United States v. Willow River Power Co.*, 324 U.S. 499, 511 (1945); *see Appalachian Elec.*, 311 U.S. at 424 (describing federal “dominion over flowage and its product, energy”).

1083 *United States v. Commodore Park, Inc.*, 324 U.S. 386, 390-91 (1945); *Scranton v. Wheeler*, 179 U.S. 141, 152-53 (1900); *Gibson v. United States*, 166 U.S. 269, 275-76 (1897); *see South Carolina v. Georgia*, 93 U.S. 4, 10-11 (1876) (no compensation for diverting channel).

1084 *Weatherford v. United States*, 606 F.2d 851, 853 (9th Cir. 1979) (Kennedy, Circuit J.); *United States v. Birnbach*, 400 F.2d 378, 381-82 (8th Cir. 1968) (before Blackmun, Circuit J.).

1085 *Commodore Park*, 324 U.S. at 391 (“no private riparian rights of access to the waters to do such things as ‘fishing and boating and the like’”); *Birnbach*, 400 F.2d at 382 (“boating, fishing and hunting”); *see also Lewis Blue Point Oyster Cultivation Co. v. Briggs*, 229 U.S. 82, 88 (1913) (no compensation for right to use bed for oyster cultivation); *but see* 28 U.S.C. § 1497 (permitting oyster growers to seek damages for destruction of oyster beds cultivated on private lands).

Federal law limits the navigational use of waters in the western United States so as not to “conflict with any beneficial consumptive use, present or future, . . . of such waters for domestic, municipal, stock water, irrigation, mining, or industrial purposes.” 33 U.S.C. § 701-1(b) (2012) (applicable to “waters arising in States lying wholly or partly west of the ninety-eighth meridian”); *see In re Operation of the Mo. River Sys. Litig.*, 363 F. Supp. 2d 1145, 1153-54 (D. Minn. 2004), *aff’d in part and vacated in part*, 421 F.3d 618 (8th Cir. 2005) (discussing statute); *Turner v. Kings River Conservation Dist.*, 360 F.2d 184, 190-98 (9th Cir. 1966) (same). Appraisers should obtain legal guidance on the applicability of this Act.

waters must therefore be disregarded in valuations for federal acquisitions relating to navigation—except as required by 33 U.S.C. § 595a, the federal statute discussed below.¹⁰⁸⁶

Statutory Modification. Congress modified the compensation rule disregarding value due to water access or use from consideration in 1970, with the enactment of 33 U.S.C. § 595a.¹⁰⁸⁷ This statute specifically authorizes compensation for market value due to water uses—that is, for more than what the constitution requires—for lands *above the high-water mark* that are *actually acquired* by the United States.¹⁰⁸⁸ But the statute does not allow compensation for loss of water access from property not acquired by the United States (remainder property),¹⁰⁸⁹ nor for any property below the high-water mark.¹⁰⁹⁰ The statute also made “no change in existing law with respect to the offsetting of special [direct] benefits to remaining real property against the just compensation” to be paid.¹⁰⁹¹ As a result, § 595a has different implications for total and partial acquisitions.¹⁰⁹²

Total Acquisitions Under 33 U.S.C. § 595a. In total acquisitions, in which the United States acquires an entire larger parcel, 33 U.S.C. § 595a creates an exception to the rule to disregard market value due to water access or use for property above the high-water mark.¹⁰⁹³ The statute provides that in connection with any improvement of rivers, harbors, canals, or waterways of the United States:

[T]he compensation to be paid for real property taken by the United States above the normal high water mark of navigable waters of the United States shall be the fair market value of such real property based upon all uses to which such real property may reasonably be put, including its highest and best use, any of which uses may be dependent upon access to or utilization of such navigable waters.¹⁰⁹⁴

As a result, valuations of total acquisitions under § 595a are fairly straightforward: the appraiser must consider water-dependent uses in determining the highest and best use, and the market value of fast land actually acquired should include any value due to its riparian location.¹⁰⁹⁵

1086 As the Supreme Court observed, since its decision in *Rands* (1967), *Va. Electric* (1961), and *Twin City Power* (1956), “the elements of compensation for which the Government must pay when it condemned fast lands riparian to a navigable stream have remained largely settled.” *Kaiser Aetna v. United States*, 444 U.S. 164, 176-77 (1979) (citing *Rands*, 389 U.S. at 123; *Va. Elec.*, 365 U.S. at 628; and *Twin City Power*, 350 U.S. at 226).

1087 Rivers and Harbors Act of 1970, Pub. L. No. 91-611, § 111, 84 Stat. 1818, 1821 (codified at 33 U.S.C. § 595a (2012)). These Standards refer to this statute as § 595a, using the official U.S. Code citation. The same statute has been referred to as Section 111 (an abbreviation of the session laws citation) in prior editions of these Standards and a few early federal cases.

1088 33 U.S.C. § 595a; *United States v. 967,905 Acres of Land in Cook Cty. (Pete)*, 447 F.2d 764, 770-72 (8th Cir. 1971); *United States v. 71.29 Acres of Land in Catahoula Par.*, 376 F. Supp. 1221, 1225-26 (W.D. La. 1974); *United States v. 8,968.06 Acres of Land in Chambers & Liberty Cty.s. (Wallisville)*, 326 F. Supp. 546, 547-48 (S.D. Tex. 1971).

1089 33 U.S.C. § 595a; *United States v. 13.20 Acres of Land in Lincoln Cty.*, 629 F. Supp. 242, 247 (E.D. Wash. 1986); see *United States v. 30.54 Acres of Land in Greene Cty. (Filiaggi)*, 90 F.3d 790, 795-96 (3d Cir. 1996); see also *Weatherford*, 606 F.2d 851 (no compensation for loss of irrigation rights for remainder property).

1090 See, e.g., *United States v. Certain Parcels of Land in Valdez*, 666 F.2d 1236 (9th Cir. 1982) (no compensation for alteration of improvements located in navigable waters); *United States v. 422,978 Square Feet of Land in S.F.*, 445 F.2d 1180 (9th Cir. 1971) (no compensation for use of submerged land beneath navigable waters); see also *United States v. Cherokee Nation*, 480 U.S. 700, 701-05 (1987) (no compensable taking arises from “interference with in-stream interests result[ing] from an exercise of the Government’s power to regulate navigational uses of “the deep streams which penetrate our country in every direction”” (quoting *Gibbons v. Ogden*, 9 Wheat. 1, 195 (1824))).

1091 H.R. REP. NO. 91-1665, at 31 (1970) (quoted in *Filiaggi*, 90 F.3d at 794 n.3).

1092 *Filiaggi*, 90 F.3d at 794 & n.3; *13.20 Acres in Lincoln*, 629 F. Supp. at 247; see *Pete*, 447 F.2d at 771. As discussed in Section 4.3.3, the appraiser must determine the larger parcel to distinguish whether a total or partial acquisition is involved.

1093 See *Filiaggi*, 90 F.3d at 795-96 & nn.4-5 (noting § 595a’s limited nature).

1094 33 U.S.C. § 595a.

1095 *Pete*, 447 F.2d at 771; *United States v. 8,968.06 Acres of Land in Chambers & Liberty Cty.s. (Wallisville)*, 326 F. Supp. 546, 547-48 (S.D. Tex. 1971); see *United States v. 71.29 Acres of Land in Catahoula Par.*, 376 F. Supp. 1221, 1225-26 (W.D. La. 1974).

Section 595a does not alter the rule that no compensation is due for lands *below* the high-water mark.¹⁰⁹⁶ Such lands include property located in the bed of a navigable stream¹⁰⁹⁷ or “spoil islands” and other infilled land created by the United States’ dredging activity.¹⁰⁹⁸ And this rule does not change simply because the legal description of property being acquired may include or contain some land below the high-water mark—for example, if a deed is the source of a legal description, reflecting “a measure of convenience [rather] than a waiver of the navigational servitude.”¹⁰⁹⁹ Note also that § 595a does not alter or replace the scope of the project rule, which bars consideration of changes in market value due to government project influence (see Section 4.5). As a result, application of the scope of the project rule and application of § 595a are separate inquiries.¹¹⁰⁰

Partial Acquisitions Under 33 U.S.C. § 595a. Partial acquisitions under 33 U.S.C. § 595a require a special valuation method because Congress expressly did not authorize compensation for diminution in value of landowners’ remaining property because of lost or reduced access to navigable waters. The statute provides:

In cases of partial takings of real property, no depreciation in the value of any remaining real property shall be recognized and no compensation shall be paid for any damages to such remaining real property which result from loss of or reduction of access from such remaining real property to such navigable waters because of the taking of real property or the purposes for which such real property is taken.¹¹⁰¹

As a result, in partial acquisitions of riparian land under § 595a, access to or use of navigable waters must be considered in valuing the *part acquired*, but cannot be considered in evaluating any damage to the *remainder property*.¹¹⁰² Moreover, because § 595a does not alter “existing law with respect to the offsetting of special benefits to remaining real property,”¹¹⁰³ any direct and special benefit to the remainder property—including benefits resulting from new or enhanced access to navigable waters due to the government’s acquisition—must be considered.¹¹⁰⁴

1096 33 U.S.C. § 595a; *Filiaggi*, 90 F.3d at 795-96; see *United States v. 101.88 Acres of Land in St. Mary Par. (Avoca Island)*, 616 F.2d 762, 768 (5th Cir. 1980) (noting government may use submerged lands subject to navigational servitude “for any purpose in aid of navigation without compensating the owner”).

1097 *Greenleaf-Johnson Lumber Co. v. Garrison*, 237 U.S. 251 (1915) (wharf); *Lewis Blue Point Oyster Cultivation Co. v. Briggs*, 229 U.S. 82 (1913) (oyster cultivation); *W. Chi. St. R.R. v. Ill. ex rel. Chi.*, 201 U.S. 506 (1906) (tunnel); *Alameda Gateway, Ltd. v. United States*, 45 Fed. Cl. 757, 764 (1999) (pier).

1098 E.g., *United States v. 49.79 Acres of Land in New Castle Cty. (Cherry Island)*, 582 F. Supp. 368, 374 (D. Del. 1983); *United States v. 102.871 Acres of Land in Cameron Par. (La. Jetty)*, No. 2:13 CV 2508, 2015 WL 5794073, *7-*8 (W.D. La. Oct. 2, 2015) (holding servitude applied to spoil island created by dredge cast into navigable waters). Lands created by private dredging activity may require compensation, however. See *Kaiser Aetna v. United States*, 444 U.S. 164, 178-80 (1979).

1099 See, e.g., *Lambert Gravel Co. v. J.A. Jones Constr. Co.*, 835 F.2d 1105, 1111 (5th Cir. 1988); see also *Avoca Island*, 616 F.2d at 764-69 (noting government’s original legal description of property relied on disputed ordinary high-water mark, but after amendment to “describe the above water ridges in courses and distances, there was little question about the accuracy of the description”).

1100 E.g., *United States v. 13.20 Acres of Land in Lincoln Cty.*, 629 F. Supp. 242, 243-47 (E.D. Wash. 1986). Similarly, application of the scope of the project rule is also distinct from application of the navigational servitude, regardless of whether § 595a applies. See *United States v. Birnbach*, 400 F.2d 378 (8th Cir. 1968).

1101 33 U.S.C. § 595a; see Section 4.6 (Partial Acquisitions); see also *Palm Beach Isles Assocs. v. United States*, 42 Fed. Cl. 340, 352 (Fed. Cl. 1998) (noting provision “does not abrogate the navigational servitude generally, . . . nor provide compensation for loss or reduction of access to navigable waters”), *vacated on other grounds*, 208 F.3d 1374 (Fed. Cir. 2000).

1102 *United States v. 13.20 Acres in Lincoln Cty.*, 629 F. Supp. 242, 247 (E.D. Wash. 1986); see also *Good v. United States*, 39 Fed. Cl. 81, 97 (1997), *aff’d*, 189 F.3d 1355 (Fed. Cir. 1999).

1103 *United States v. 30.54 Acres of Land in Greene Cty. (Filiaggi)*, 90 F.3d 790, 794 n.3 (3d Cir. 1996) (quoting H.R. REP. NO. 91-1665, at 31 (1970)); see Section 4.6.3 (Benefits).

1104 See *United States v. Rands*, 389 U.S. 121, 125-26 (1967); *Filiaggi*, 90 F.3d at 794 & nn.2-3; *Miller v. United States*, 550 F. Supp. 669, 674 n.3 (Cl. Ct. 1982), *aff’d*, 714 F.2d 160 (Fed. Cir. 1983) (mem.); see also 33 U.S.C. § 595 (2012) (codifying offset of “special and direct benefits to the remainder” for partial takings “in connection with any improvement of rivers, harbors, canals, or waterways of the United States”); cf. *Horne v. Dep’t of Agric.*, 135 S.Ct. 2419, 2432 (2015) (noting regulatory taking ruling does not affect provisions for offset of “special benefits—such as new access to a waterway” in partial takings).

The portion of § 595a prohibiting consideration of damage for remainder property's loss of riparian access has been upheld as constitutional.¹¹⁰⁵ But federal courts have not specifically addressed the appropriate valuation method to measure compensation in partial acquisitions under the statute.¹¹⁰⁶ The usual before and after valuation method for partial acquisitions¹¹⁰⁷ does not readily allow the different treatment of the part acquired and the remainder property that § 595a requires.¹¹⁰⁸ As a result, valuing partial acquisitions under § 595a may require use of a taking plus damages method—but only with appropriate **legal instructions**.¹¹⁰⁹

As explained in Section 4.6.4.1, the taking plus damages method is subject to error and apt to result in improper duplication (double damage), and is therefore generally improper in valuations for federal acquisitions. Its use is recommended here solely to address the unique challenges of valuing partial acquisitions under 33 U.S.C. § 595a. As discussed above, valuations of partial acquisitions under this statute must incorporate the following:

Each of the steps in this rare application of the taking plus damages method requires great care to ensure its results can be used for purposes of just compensation. Note also that the portion being valued at each step must be valued as part of the appropriate larger parcel (Section 4.6.1.1).

- **Estimate the market value of the part acquired, including value due to water access.** The market value of the part acquired must be estimated as a part of the larger parcel. As a result, the appraiser must estimate the market value of the larger parcel based on its highest and best use, *including* uses that depend on access to or utilization of navigable waters, *before* acquisition; then allocate that value to determine the contributory value of the *part being acquired*.¹¹¹⁰

1105 *13.20 Acres of Land in Lincoln*, 629 F. Supp. at 247 (citing *Rands*, 389 U.S. 121).

1106 *E.g.*, *13.20 Acres in Lincoln*, 629 F. Supp. at 247 (“[Section] 595a will apply to the valuation of the remaining parcels, and severance damages regarding those parcels will not include loss of access to Lake Roosevelt.”). Indeed, the only other cases to directly address valuation issues under § 595a involved total, not partial, acquisitions. *Filiaggi*, 90 F.3d 790; *United States v. 967, 905 Acres of Land in Cook Cty. (Pete)*, 447 F.2d 764, 771 (8th Cir. 1971); *United States v. 71.29 Acres of Land in Catahoula Par.*, 376 F. Supp. 1221, 1225-26 (W.D. La. 1974); *United States v. 8,968.06 Acres of Land in Chambers & Liberty Cty.s. (Wallisville)*, 326 F. Supp. 546, 547-50 (S.D. Tex. 1971), *vacating* 318 F. Supp. 698 (S.D. Tex. 1970) *in view of statute*. The legislative history of § 595a is similarly sparse. *See* Ronald C. Allen, *Federal Evaluation of Riparian Property: Section 111 of the Rivers and Harbors Act of 1970*, 24 ME. L. REV. 175 (1972); Kerry R. Brittain, Comment, *Navigation Servitude—The Shifting Rule of No Compensation*, 7 LAND & WATER L. REV. 501 (1972); Charles E. Corker, *Federal-State Relations in Water Rights Adjudication and Administration*, 17 ROCKY MTN. MIN. L. INST. 21 (1972); *see also* Alan T. Ackerman & Noah Eliezer Yanich, *Just and Unjust Compensation: The Future of the Navigational Servitude in Condemnation Cases*, 34 U. MICH. J.L. REFORM 573 (2001).

1107 In partial acquisitions (Section 4.6), the measure of compensation is normally the difference between the market value of the landowner's property before and after the government's acquisition. *E.g.*, *United States v. Birnbach*, 400 F.2d 378, 382 (8th Cir. 1968). Appraisers therefore apply the before and after valuation method (the Federal Rule), estimating the market value of the larger parcel *before* the acquisition, and subtracting the market value of the remainder property *after* acquisition, to determine the difference (diminution) in market value. *See* Section 4.6.1.

1108 *Cf. Birnbach*, 400 F.2d at 382-83 (holding that in determining damage to remainder property in partial taking affected by navigational servitude, an “important distinction must be made so that the enhancement in value ‘flowing’ from a riparian location may not be recognized when the riparian character of the [remainder] land is destroyed”). While *Birnbach* predated § 595a, the statute did not change the compensation for damage to remainder property. *See Pete*, 447 F.2d at 770-71 (discussing *Birnbach* and § 595a).

1109 As discussed in Section 4.6.4.1, the **taking plus damages** valuation method (the State Rule) is generally improper in valuations for federal acquisition purposes. It cannot be used in federal acquisitions (under § 595a or otherwise) without appropriate **legal instructions**. *See* EATON, *supra* note 16, at 30-40 (discussing taking plus damages valuation methods); *see also United States v. 97.19 Acres of Land*, 582 F.2d 878, 880-81 (4th Cir. 1978); *United States v. 344.85 Acres of Land*, 384 F.2d 789, 792 (7th Cir. 1967).

1110 *See* Section 4.3.3; *cf. Olson v. United States*, 292 U.S. 246, 256 (1934) (addressing uses made in combination with other lands); *United States v. 429.59 Acres of Land (Imperial Beach)*, 612 F.2d 459, 463-64 (9th Cir. 1980) (approving instruction to “value the property as a unit” because “it was ‘reasonably probable that the properties would be used in combination’”).

- Estimate damage (diminution in value) to the remainder property resulting from the government's acquisition, disregarding any damage due to lost or impaired water access. That is, what is the difference in value of the *remainder property* before and after the acquisition, based on its highest and best use *excluding* uses that depend on access to or utilization of navigable waters? There may or may not be any diminution in value of the remainder resulting from the government's acquisition that is unrelated to water use or access.¹¹¹¹
- Estimate special and direct benefits to the remainder resulting from the government's project, including those due to new or enhanced riparian access.¹¹¹² For example, such benefits include direct river access from the remainder property from which a landowner can build docks or piers (subject to applicable laws)¹¹¹³ or improved bank stabilization and flood control due to a revetment project that allows remainder property to be converted to a more valuable use.¹¹¹⁴ Any direct and special benefits resulting from the project must be offset against the total compensation to be paid.¹¹¹⁵

Following these steps, the ultimate calculation will reflect the market value of the part acquired (including water access) plus damage to the remainder (disregarding lost water access), offset by direct and special benefits to the remainder (including new or improved water access).

The Navigational Servitude and Inverse Taking Claims. As the Supreme Court has observed, the navigational servitude does not create a blanket exception to the Takings Clause whenever Congress exercises its authority to promote navigation under the Commerce Clause.¹¹¹⁶ In inverse takings claims, courts must consider the factual circumstances of each case regarding the scope of the navigational servitude to determine whether a public action has effected a taking.¹¹¹⁷

1111 See *United States v. Va. Elec. & Power Co.*, 365 U.S. 624, 629-30 (1961) (remanding for determination of “depreciative impact of the [acquisition] upon the nonriparian uses of the property”).

1112 *United States v. Rands*, 389 U.S. 121, 125-26 (1967); *United States v. River Rouge Improvement Co.*, 269 U.S. 411, 417-18 (1926); see 33 U.S.C. § 595 (2012) (mandating that in partial takings in connection with improvement of rivers, harbors, canals or waterways of the United States, award of just compensation “shall take into consideration by way of reducing the amount of compensation or damages any special and direct benefits to the remainder arising from the improvement”); see also *United States v. Eastman* (*Eastman I*), 528 F. Supp. 1177, 1179 n.2 (D. Or. 1981), *adopted* 714 F.2d 76, 77 (9th Cir. 1983) (per curiam) (“Where only part of a tract of land is taken, the government is entitled to deduct from the condemnation award benefits which accrue to the landowner’s remaining land in the same tract.” (citing § 595)).

1113 *River Rouge*, 269 U.S. at 417-18. While the remainder property may be subject to the navigational servitude, it is “fundamental error” to “over-emphasiz[e] the contingent character of the rights of the riparian owners.” *Id.* at 420-21.

1114 E.g., *United States v. Fort Smith River Dev. Corp.*, 349 F.2d 522, 525-26 (8th Cir. 1965) (reversing award that failed to consider special benefits due to United States’ revetment project that “manifestly” protected remainder land “from further reliction or erosion. That fact alone apparently places [the remainder] in a ‘better position’ because of the taking” and must be considered).

1115 H.R. REP. NO. 91-1665, at 31 (1970) (noting § 595a does not change federal law on offsetting special benefit to remainder “against the just compensation that would otherwise be paid for the real property taken and for damages to remaining real property”); *United States v. 30.54 Acres of Land in Greene Cty.*, (*Filiaggi*), 90 F.3d 790, 794 n.3 (3d Cir. 1996) (quoting H.R. REP. NO. 91-1665); see *Rands*, 389 U.S. at 125-26 (“compensation award for the part of the property taken by the Government was reduced by the value of the special and direct benefits to the remainder of the land” (describing *River Rouge*)); see also *Bauman v. Ross*, 167 U.S. 548 (1897); *Hendler v. United States*, 175 F.3d 1374, 1379-80 (Fed. Cir. 1999) (noting differences in federal and state laws regarding offset of benefits).

1116 *Kaiser-Aetna*, 444 U.S. 164, 172 (1979).

1117 E.g., *Owen v. United States*, 851 F.2d 1404 (Fed. Cir. 1988); *Banks v. United States*, 71 Fed. Cl. 501 (2006); *Alameda Gateway Ltd. v. United States*, 45 Fed. Cl. 757 (1999).

4.11.2. Federal Grazing Permits. In federal acquisitions involving ranch lands, appraisers must disregard any value added to those lands as a result of their actual or potential use in combination with adjacent federal lands under revocable grazing permits.¹¹¹⁸ Federal grazing permits are chiefly administered by the Bureau of Land Management (U.S. Department of Interior) under the Taylor Grazing Act¹¹¹⁹ and the Forest Service (U.S. Department of Agriculture) under the Granger-Thye Act.¹¹²⁰ By law, these federal permits to use the public domain for grazing are revocable and create no property rights in the holder.¹¹²¹ Thus, while grazing permits typically remain with a privately owned base property for many years, permits revert to the federal agency when the base property is sold and may or may not be granted to the new owner.¹¹²² As a result, in federal acquisitions, privately owned lands cannot be aggregated with permitted public lands for valuation purposes, as “[t]o require the United States to pay for this . . . value would be to create private claims in the public domain.”¹¹²³ Appraisers must therefore disregard the use or potential use of the subject property in conjunction with federal grazing permit lands—even if “this element of value would be considered by a potential buyer in the open market”—because the government “need not compensate for value which it could remove by revocation of a permit for the use of lands that it owned outright.”¹¹²⁴

Because Congress elected not to create compensable rights out of what are now licensees, landowners “have no compensable right in the land covered by their grazing permits or in the permits themselves.”¹¹²⁵ As a result, federal grazing permits cannot be considered in estimating market value.¹¹²⁶

Whether departure from the market value measure of just compensation is required, and if so, what alternative measure of compensation is appropriate, are legal determinations that cannot be made by the appraiser.

4.11.3. Streets, Rail Corridors, Infrastructure, and Public Facilities. Federal acquisitions may involve property already being used to benefit the public—such as a street, landfill, or other public facility—owned by public or private entities that may be obligated to replace the facility acquired by the United States. But the Supreme Court has unanimously held that none of these facts

1118 *United States v. Fuller*, 409 U.S. 488, 492-93 (1973); see *Bischoff v. Glickman*, 54 F. Supp. 2d 1226, 1230-31 (D. Wyo. 1999); see also *Estate of Hage v. United States*, 687 F.3d 1281, 1291-92 (Fed. Cir. 2012).

1119 Taylor Grazing Act of 1934, 43 U.S.C. § 315(b) (2012) (grazing permits on rangelands in the public domain administered by the Bureau of Land Management, U.S. Department of the Interior); see generally *Public Lands Council v. Babbitt*, 529 U.S. 728, 731-39 (2000) (purpose, history, and administration of Taylor Grazing Act).

1120 Granger-Thye Act of 1950, 16 U.S.C. § 580l (2012) (grazing permits on National Forest System lands, administered by the U.S. Forest Service).

1121 43 U.S.C. § 315b (“issuance of a permit pursuant to [this provision] shall not create any right, title, interest or estate in or to the lands”); *Fuller*, 409 U.S. at 492-93.

1122 APPRAISAL INSTITUTE & AM. SOC’Y OF FARM MANAGERS, *THE APPRAISAL OF RURAL PROPERTY* 325 (2d ed. 2000); see generally *id.* 324-27; *Public Lands Council*, 529 U.S. at 743 (noting “well-established [agency] powers to cancel, modify, or decline to renew individual permits” under Taylor Grazing Act).

1123 *Fuller*, 409 U.S. at 493 (citation omitted).

1124 *Id.* at 491-92; see, e.g., *Estate of Hage*, 687 F.3d at 1291-92.

1125 *Hage v. United States*, 51 Fed. Cl. 570, 587-88 (Fed. Cl. 2002); see *Estate of Hage*, 687 F.3d at 1291-92; see also *Monongahela Nav. Co. v. United States*, 148 U.S. 312, 327 (1893) (“The legislature may determine what . . . property is needed for public purposes[.]” but determining the measure of compensation “is a judicial, and not a legislative, question.”); *Hage v. United States*, 35 Fed. Cl. 147, 170 (Fed. Cl. 1996) (“[B]ased upon the language and history of the Granger-Thye Act and the Taylor Grazing Act, . . . Congress had no legislative intention of creating a property interest in the permit just as Congress had no legislative intention of creating a property interest in the underlying federal lands.”).

1126 *Fuller*, 409 U.S. at 491-92. Congress has provided for *administrative* payments for losses due to cancellation of Taylor grazing permits for war purposes. See 43 U.S.C. § 315q (2012); *United States v. Cox*, 190 F.2d 293, 296 (10th Cir. 1951). But these administrative benefits created by statute are separate from compensation under the Fifth Amendment, and beyond the scope of the appraiser’s assignment to estimate market value. See *United States v. Westinghouse Elec. & Mfg. Co.*, 339 U.S. 261, 263-64, 264 n.2 (1950); *United States v. Gen. Motors Corp.*, 323 U.S. 373, 379-80 (1945); *United States v. Willow River Power Co.*, 324 U.S. 499, 510 (1945).

“require suspension of the normal rules for determining just compensation.”¹¹²⁷ Accordingly, compensation for streets, highways, roads, alleys, other infrastructure, or public facilities is measured by the same market value standard applied to other types of property, whether publicly or privately owned. “Deviation from this measure of just compensation [is] required only ‘when market value [is] too difficult to find, or when its application would result in manifest injustice to owner or public.’”¹¹²⁸ Appraisals for federal acquisitions of streets, infrastructure, or public facilities must therefore follow the same valuation standards as for any other property, whether privately or publicly owned.¹¹²⁹

4.11.3.1. Streets, Highways, Roads, and Alleys. Under federal law, streets, roads, highways, and alleys typically have only nominal market value, and therefore only nominal compensation is due for their acquisition.¹¹³⁰ This is because streets and similar property are normally long narrow strips of land that have been legally dedicated to use as streets or highways, depriving them of value except as thoroughfares.¹¹³¹ As discussed in more detail in Section 4.6.5 (Easement Valuation Issues), it is critical for the appraiser to understand the precise property interest(s) being acquired and the impact of any existing encumbrances.¹¹³² **Legal instructions** are typically required. The Ninth Circuit explained the process for determining just compensation for the taking of state-owned lands dedicated as public thoroughfares in *California v. United States (Naval Shipyard)*:

“Just compensation” is to be measured by what the State lost by the taking, and, [here], this is the value of the lands in question burdened as they were. The *legal effect of the dedication* under the law of the State must first be determined. That question of law resolved, the monetary value, if any, of the loss to the State of the lands so burdened must then be ascertained¹¹³³

Federal courts have repeatedly upheld the payment of only nominal compensation for streets and similar property with only nominal market value.¹¹³⁴ If the owner of a street acquired by the United States is not required to replace it, the owner—typically a city or other municipal

1127 *United States v. 564.54 Acres of Land (Lutheran Synod)*, 441 U.S. 506, 516 (1979) (rejecting demand of owner, a private nonprofit organization, for compensation measured by cost of substitute facility rather than market value); *United States v. 50 Acres of Land (Duncanville)*, 469 U.S. 24, 33-34 (1984) (rejecting municipal owner’s demand for same).

1128 *Duncanville*, 469 U.S. at 29 (quoting *United States v. Commodities Trading Corp.*, 339 U.S. 121, 123 (1950)); accord *Lutheran Synod*, 441 U.S. at 512-13; *Kirby Forest Indus., Inc. v. United States*, 467 U.S. 1, 10 n.14 (1984); see *United States v. Toronto, Hamilton & Buffalo Nav. Co.*, 338 U.S. 396, 402 (1949) (“[When there are insufficient comparable sales to determine market value, we] then say that there is ‘no market’ for the property in question. . . . And it is here that other means of measuring [market] value may have relevance—but only, of course, as bearing on what a prospective purchaser would have paid.”).

1129 See *Duncanville*, 469 U.S. at 26 (holding public condemnees are not entitled to substitute-facilities compensation if market value can be ascertained); *Lutheran Synod*, 441 U.S. at 516-17 (holding private condemnees are not entitled to substitute-facilities compensation).

1130 *United States v. Streets, Alleys & Pub. Ways in Vill. of Stoutsville*, 531 F.2d 882, 887 (8th Cir. 1976).

1131 E.g., *Mayor & City Council of Baltimore v. United States*, 147 F.2d 786, 788-89 (4th Cir. 1945) (“The fact is that the value of the land in the bed of the highway as land has been diminished by its devotion to a limited purpose.”); see *United States v. 3,727.91 Acres of Land (Elsberry Drainage District)*, 563 F.2d 357, 359-60 (8th Cir. 1977) (“[When] the public condemnee has held only a right of way easement in a public street or alley, and, upon condemnation, they retained no interest in the property[. . .] only nominal compensation is held to be proper.”); *California v. United States (Naval Shipyard)*, 395 F.2d 261, 266-68 (9th Cir. 1968) (discussing possible impacts of dedication on lands’ use and market value).

1132 Encumbrances affecting streets could include dedication to highway use, prohibitions on non-road use, or reversionary rights, for example. Such legal encumbrances are a type of easement, that is, a limited right to use or control land owned by another for specified purposes. Federal acquisitions of streets, roads, highways, and alleys may involve dominant easement interests (Section 4.6.5.1), lands encumbered by easements (Section 4.6.5.2), and/or appurtenant easements to the servient estate (Section 4.6.5.3). Section 4.6.5 addresses the valuation issues that commonly arise in acquisitions involving each type of easement.

1133 *Naval Shipyard*, 395 F.2d at 266-67 (emphases added).

1134 See *Caporal v. United States*, 577 F.2d 113, 117-18 (10th Cir. 1978); *Elsberry Drainage District*, 563 F.2d at 359-60; *Vill. of Stoutsville*, 531 F.2d at 887; *United States v. City of New York*, 168 F.2d 387, 389-90 (2d Cir. 1948); *Woodville v. United States*, 152 F.2d 735, 736-37 (10th Cir. 1946), cert. denied, 328 U.S. 842 (1946); *United States v. Des Moines Cty.*, 148 F.2d 448, 449 (8th Cir. 1945).

entity—suffers no *loss*, and therefore no compensation is due.¹¹³⁵ Such federal acquisitions may even *benefit* the owner economically by relieving the owner of the cost of maintaining the land as a highway.¹¹³⁶ Nominal compensation in such circumstances is therefore consistent with the basic Fifth Amendment principles of indemnity and fairness.¹¹³⁷ Alternatively, as discussed below, it is constitutionally permissible for the United States to provide compensation in the form of a *substitute facility* instead of cash.¹¹³⁸

Even strips of land that may have been intended for use as a street, but are not legally encumbered (or “dedicated”) to prohibit non-street use, typically have limited market value. Indeed, it is legally improper to simply assume such strips have the same market value as surrounding lands.¹¹³⁹ As the Federal Circuit explained:

The point is that the property at issue here consists of strips of land, rather than one large, easily developable tract. The question . . . is, what is the fair market value of such odd pieces of land, taking into account their potential uses, current condition and the improvements thereon, and considering the most profitable uses to which the pieces of land can probably be put in the reasonably near future.¹¹⁴⁰

Again, **legal instructions** are typically required regarding the precise property interest(s) to be appraised and the effects of any encumbrances. Existing legal encumbrances must be considered when developing opinions of market value.¹¹⁴¹

Acquisitions of existing roads or rights of way may also involve land with physical impediments or conditions—such as embankments, underground utility lines, rail ties, or poor soil conditions.¹¹⁴² Preexisting physical conditions, like legal encumbrances, must be considered when developing opinions of market value.¹¹⁴³ For example, in an inverse taking of a railway corridor with physical remnants of the abandoned railway that would require removal to put the property

1135 *Vill. of Stoutsville*, 531 F.2d at 886; *Naval Shipyard*, 395 F.2d at 266-67; *Washington v. United States (Hanford)*, 214 F.2d 33, 39 (9th Cir. 1954); see *United States ex rel. Tenn. Valley Auth. v. Powelson*, 319 U.S. 266, 281 (1943) (“it is the owner’s loss, not the taker’s gain, which is the measure of compensation for the property taken”).

1136 *Jefferson Cty. v. Tenn. Valley Auth.*, 146 F.2d 564, 566 (6th Cir. 1945); see *Naval Shipyard*, 395 F.2d at 268 (“The State has lost the profit potential, if any, which these lands may have had as part of the ‘channel.’ On the other hand, the untaken lands have been relieved of the burdens of the dedication. These and other relevant factors must be considered . . . to determine whether the taking resulted in a decrease in the value of the untaken portion of the channel . . .”).

1137 See *United States v. 50 Acres of Land (Duncanville)*, 469 U.S. 24, 30 (1984) (“basic principles of indemnity embodied in the Just Compensation Clause”); *United States v. 564.54 Acres of Land (Lutheran Synod)*, 441 U.S. 506, 517 (1979) (“‘basic equitable principles of fairness’ underlying the Just Compensation Clause” (quoting *United States v. Fuller*, 409 U.S. 488, 490 (1973))); cf. *United States v. 46,672.96 Acres of Land in Doña Ana Chys.*, 521 F.2d 13, 17 (10th Cir. 1975) (“The fact that [property] has very little value cannot justify . . . using an inapplicable measure . . .”).

1138 See *Duncanville*, 469 U.S. at 33 (discussing *Brown v. United States*, 263 U.S. 78 (1923)).

1139 *Bd. of Cty. Supervisors v. United States (Prince William Cty. II)*, 116 F.3d 454, 458 (Fed. Cir. 1997) (holding lower court “erred as a matter of law in reading our decision as foreclosing an inquiry into whether the value of the [strips of land] was different from the value of the surrounding land”).

1140 *Id.*; see *Naval Shipyard*, 395 F.2d at 266-68.

1141 *Bos. Chamber of Commerce v. City of Boston*, 217 U.S. 189, 195 (1910); see *United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53, 76 (1913) (“[T]here would be no justice in paying for a loss suffered by no one in fact.”); cf. *Nebraska v. United States*, 164 F.2d 866, 869 (8th Cir. 1947), *cert. denied*, 334 U.S. 815 (1948) (no compensation for “a diminution in the market value of the [landowner’s] rights through the creation of a leasehold, easement, or other interest in the land by the [landowner’s] own acts” preceding United States’ acquisition).

1142 See, e.g., *Rasmuson v. United States*, 807 F.3d 1343, 1346 (Fed. Cir. 2015) (inverse taking of railway corridor converted to trail use). See Section 4.11.3.2 for discussion of inverse takings claims regarding *rails-to-trails* conversions under the 1983 Amendments to the National Trails System Act.

1143 *Rasmuson*, 807 F.3d at 1346; *United States v. 0.59 Acres of Land*, 109 F.3d 1493, 1497 (9th Cir. 1997) (holding “the condition of condemned land is relevant” and it would be improper to “ignor[e] a condition that the Government did not create” — namely, a preexisting power transmission line within abutting right of way); *United States v. 320 Acres of Land*, 605 F.2d 762, 818 (5th Cir. 1979) (noting “inherent physical characteristics of a property” may “decisively” preclude an otherwise possible use); see *Olson v. United States*, 292 U.S. 246, 256 (1934) (“highest and most profitable use for which the property is adaptable”); Section 4.3 (Highest and Best Use).

to its highest and best use, the Federal Circuit recently held that failing to consider the removal costs “will result in an artificially inflated value and yield a windfall to the landowner.”¹¹⁴⁴ Physical remnants of *improvements made by the United States* may require special treatment, and the appraiser must request appropriate **legal instruction**. This issue is discussed in Section 4.2.2.2.1 and the accompanying case study.

At times, streets or similar facilities may be “so infrequently traded” that their market value may be too difficult to ascertain, at least from comparable sales.¹¹⁴⁵ But a market need not be “an extremely active one” to allow market value to be ascertained.¹¹⁴⁶ And market value can generally be determined even when no comparable sales are available.¹¹⁴⁷ Accordingly, it is legally improper to assume that market value cannot be ascertained, even if no comparable sales are available.¹¹⁴⁸ Whatever valuation method is used, “the equitable principles underlying just compensation require that any profitable uses of the lands which are left open by the dedication must be considered in determining the fact of loss and in calculating its monetary equivalent.”¹¹⁴⁹

4.11.3.2. Corridors and Rights of Way. Acquisitions of strips, corridors, or rights of way via negotiated purchase or affirmative condemnation involve many similar valuation problems to those found in acquisitions of streets. Such acquisitions often involve preexisting encumbrances, such as easements for rail or transmission line use, that may deprive them of value for other uses.¹¹⁵⁰ The appraiser must understand the precise property interest(s) being acquired and the impact of any existing encumbrances.¹¹⁵¹ Typically, **legal instructions** are required.¹¹⁵²

Rails-to-Trails Claims. These issues frequently arise in so-called *rails-to-trails* cases. The

¹¹⁴⁴ *Rasmuson*, 807 F.3d at 1346.

¹¹⁴⁵ See *United States v. 564.54 Acres of Land (Lutheran Synod)*, 441 U.S. 506, 513 (1979) (“This might be the case, for example, with respect to . . . roads or sewers.”); *United States v. Toronto, Hamilton & Buffalo Nav. Co.*, 338 U.S. 396, 402 (1949) (“At times, however, peculiar circumstances may make it impossible to determine a ‘market value.’ There may have been, for example, so few sales of similar property that we cannot predict with any assurance that the prices paid would have been repeated in the sale we postulate of the property taken. We then say that there is ‘no market’ for the property in question. But that does not put out of hand the bearing which the scattered sales may have on what an ordinary purchaser would have paid for the claimant’s property. We simply must be wary that we give these sparse sales less weight than we accord ‘market’ price, and take into consideration those special circumstances in other sales which would not have affected our hypothetical buyer. And it is here that other means of measuring value may have relevance—but only, of course, as bearing on what a prospective purchaser would have paid.”).

¹¹⁴⁶ See *Lutheran Synod*, 441 U.S. at 513.

¹¹⁴⁷ *Toronto, Hamilton*, 338 U.S. at 402; see, e.g., *United States v. 3,727.91 Acres of Land (Elsberry Drainage District)*, 563 F.2d 357, 361-62 (8th Cir. 1977) (error to assume market value of levees and ditches could not be determined without comparable sales evidence and to disregard other evidence of market value).

¹¹⁴⁸ *Elsberry Drainage District*, 563 F.2d at 361-62; *California v. United States (Naval Shipyard)*, 395 F.2d 261, 264-67 (9th Cir. 1968); see *Toronto, Hamilton*, 338 U.S. at 402.

¹¹⁴⁹ *Naval Shipyard*, 395 F.2d at 267 (reversing lower court’s failure to consider evidence of market value of lands dedicated as streets); accord *Elsberry Drainage District*, 563 F.2d at 362 (quoting *Almota Farmers Elevator & Warehouse Co. v. United States*, 409 U.S. 470, 473 (1973)) (“The district court ruled that without the comparable sale as evidence of value the appraisers did not have an adequate basis for their valuation . . . [But i]n light of the underlying policy in condemnation proceedings of providing the ‘full monetary equivalent of the property taken,’ we think [the appraiser’s] testimony [based on other evidence of market value] deserved to be given greater weight.”).

¹¹⁵⁰ See, e.g., Interstate Commerce Act, 49 U.S.C. § 10903 (2012) (generally requiring rail carrier to continue to offer service over its lines to shippers unless it first obtains authority to abandon or discontinue lines from Interstate Commerce Commission); *United States v. Chi., B. & Q. R. Co.*, 82 F.2d 131, 140 (8th Cir. 1936) (discussing similarities between public highways and railways).

¹¹⁵¹ See Section 4.6.5; cf. *Bos. Chamber of Commerce v. City of Boston*, 217 U.S. 189, 195 (1910).

¹¹⁵² Whether or not a rail right of way had been legally abandoned or discontinued as of the date of value is often key. See *Preseault v. Interstate Commerce Comm’n (Preseault I)*, 494 U.S. 1, 5 n.3 (1990) (discussing important distinction between legal “abandonment” of a rail line and “discontinuance” of service under Interstate Commerce Act, 49 U.S.C. § 10903 (1982)); see, e.g., *Terminal Coal Co. v. United States*, 172 F.2d 113, 114-16 (3d Cir. 1949) (finding railroad had not abandoned right of way that was actively used for railroad purposes until taking, therefore owner of reversionary interest in underlying land in event of abandonment was entitled to only nominal compensation); *Woodville v. United States*, 152 F.2d 735, 737-39 (10th Cir. 1946), cert. denied, 328 U.S. 842 (1946) (same result where owner of reversionary interest was municipality).

National Trails System Act Amendments of 1983¹¹⁵³ has prompted numerous inverse takings claims regarding adjacent landowners' potential reversionary interests in rail corridor lands.¹¹⁵⁴ As in any inverse taking claim, the court must first determine liability (i.e., whether a taking occurred for which just compensation must be paid) before the case can proceed to the compensation phase (i.e., what amount of compensation is due) in which appraisers are retained to develop opinions of market value.¹¹⁵⁵ If a taking occurred and the United States is liable for compensation, the standard federal valuation rules apply in the compensation phase of a rails-to-trails case, as in other inverse takings.¹¹⁵⁶ Rails-to-trails takings may be permanent or temporary in nature.¹¹⁵⁷ Rail corridors frequently include preexisting improvements or physical remnants of rail use—such as embankments, rail ties, or poor soil conditions—which must be considered in developing an opinion of market value.¹¹⁵⁸ As the Federal Circuit held, in a rails-to-trails case “the fair market value of the land includes the physical remnants of the railway that would have remained on the landowners' property” but for the conversion of the corridor to trail use.¹¹⁵⁹ Accordingly, failing to consider the removal costs is an improper appraisal methodology that “will result in an artificially inflated value and yield a windfall to the landowner.”¹¹⁶⁰

4.11.3.3. Substitute-Facility Compensation. As noted above, it is constitutionally permissible for the United States to provide compensation in the form of a substitute facility instead of cash.¹¹⁶¹ This form of compensation may be the most practical and equitable means of compensating landowners in certain “peculiar” acquisitions.¹¹⁶² In such circumstances—typically acquisitions of properties that are owned by a public entity, dedicated to public use, and for which a functional substitute is required and payment of market value would deviate significantly from making the owner whole—“compensation by substitution would seem to be the best means of making the parties whole.”¹¹⁶³

But while a substitute facility is a constitutionally acceptable *form* of just compensation instead of cash, the Supreme Court has repeatedly rejected attempts to *measure* just compensation by

1153 16 U.S.C. § 1241-51 (2012) (1983 Amendments, Pub. L. No. 98-11, 97 Stat. 42, 48, amended the National Trails System Act, Pub. L. No. 90-543, 82 Stat. 919 (1968)); see generally *Preseault I*, 494 U.S. at 5-8 (discussing Act and Amendments), 15-16 (distinguishing types of acquisitions).

1154 See, e.g., *Ladd v. United States*, 630 F.3d 1015 (Fed. Cir. 2010); *Ellamae Phillips Co. v. United States*, 564 F.3d 1367 (Fed. Cir. 2009); *Preseault v. United States (Preseault II)*, 100 F.3d 1525, 1533 (Fed. Cir. 1996).

1155 See *Preseault I*, 494 U.S. at 16 (“only some rail-to-trail conversions will amount to takings”); cf. *United States v. Clarke*, 445 U.S. 253, 255-58 (1980) (discussing “important legal and practical differences” between affirmative condemnation proceedings and inverse takings). See generally Section 4.9.

1156 See, e.g., *Rasmuson v. United States*, 807 F.3d 1343, 1345-46 (2015) (citing these Standards).

1157 *Ladd*, 630 F.3d at 1025; *Caldwell v. United States*, 391 F.3d 1226, 1234 (Fed. Cir. 2004).

1158 See, e.g., *Rasmuson*, 807 F.3d at 1345-46.

1159 *Id.* (noting railway companies were not obligated to remove physical railroad construction features and landowners would have regained possession of corridor land with physical structures still on it).

1160 *Id.* at 1346.

1161 *United States v. 50 Acres of Land (Duncanville)*, 469 U.S. 24, 33 (1984) (discussing *Brown v. United States*, 263 U.S. 78 (1923)).

1162 E.g., *Brown*, 263 U.S. at 81 (United States provided new town site and relocated buildings as compensation for flooding of three-quarters of town due to reservoir project); *United States v. Streets, Alleys & Pub. Ways in Vill. of Stoutsville*, 531 F.2d 882 (8th Cir. 1976) (affirming United States' plan to construct substitute road facilities to compensate Village in kind, rather than monetarily, for taking of gravel streets, public alleys and sidewalks); *United States v. 10.56 Acres of Land in Whatcom. Cty. (Peace Arch II)*, No. C07-1261RAJ, 2010 WL 415244, at *2 (W.D. Wash. Jan. 27, 2010) (United States' condemnation of interstate highway conduit to construct elevated roadway and then convey new roadway to state).

1163 *Brown*, 263 U.S. at 81-83; see *Duncanville*, 469 U.S. at 30-34, 30 n.12; *United States v. 564.54 Acres of Land (Lutheran Synod)*, 441 U.S. 506, 513 (1979); see also *Duncanville*, 469 U.S. at 37 (O'Connor, J., concurring) (“When a local governmental entity can prove that the market value of its property deviates significantly from the make-whole remedy intended by the Just Compensation Clause and that a substitute facility must be acquired to continue to provide an essential service, limiting compensation to the fair market value in my view would be manifestly unjust.”).

the cost of a substitute facility instead of the market value standard.¹¹⁶⁴ The Court unanimously criticized the “substitute facility doctrine” as an unfair measure of compensation: among other flaws, it increases the risk of error, prejudice, and windfall awards; adds uncertainty and complexity to the valuation process without any necessary improvement; and departs from the established “principle that just compensation must be measured by an objective standard that disregards subjective values which are only of significance to an individual landowner.”¹¹⁶⁵

If the United States provides compensation in the form of a substitute facility, “the market value of the . . . property is no longer relevant.”¹¹⁶⁶ As a result, appraisals of market value are generally inapplicable in such situations,¹¹⁶⁷ although appraisers or other experts may be retained to estimate costs, perform traffic studies, or conduct other analyses in connection with compensation by substitution.¹¹⁶⁸ But determining whether substitute-facility compensation would be appropriate for a given acquisition is beyond the scope of the appraiser’s task of developing an opinion of market value.¹¹⁶⁹

Congress can specifically authorize substitute-facility compensation, regardless of whether the standard market value measure of just compensation would be adequate.¹¹⁷⁰ Absent a congressional mandate to provide substitute-facility compensation, agencies are to be guided in this determination by the basic principles of just compensation: fairness to both landowners and the public, and making the landowner whole.¹¹⁷¹ With substitute-facilities compensation, as with monetary compensation, “the question is, What has the owner lost? not, What has the taker gained?”¹¹⁷² Accordingly, appropriate compensation will turn on the impact of the government’s

¹¹⁶⁴ *Duncanville*, 469 U.S. at 32-33; *Lutheran Synod*, 441 U.S. at 513-17; see *Peace Arch II*, 2010 WL 415244, at *2 (noting “mistaken[] belie[f] that the substitute facilities doctrine deems the cost of a substitute facility to be ‘the equivalent’ of a property’s market value[.]” as “the cost of a substitute facility is an alternate measure of just compensation, it is not the equivalent of fair market value”).

¹¹⁶⁵ *Duncanville*, 469 U.S. at 33-35; *Lutheran Synod*, 441 U.S. at 511, 514-16; see *id.* at 517-19 (White, J., concurring) (“The substitute-facilities doctrine is unrelated to fair market value and . . . unabashedly demands additional compensation over and above market value in order to allow the replacement of the condemned facility It seems to me that the argument for enhanced compensation . . . is nothing more than a particularized submission that the award should exceed fair market value because of the unique uses to which the property has been put by the condemnee or because of the unique value the property has for it.”).

¹¹⁶⁶ *Peace Arch II*, 2010 WL 415244, at *2; accord *Vill. of Stoutsville*, 531 F.2d at 885 (discussing substitute-facilities compensation “in place of the conventional fair market value concept of determining compensation”); see also *United States v. 10.56 Acres in Whatcom Cty. (Peace Arch I)*, No. C07-1261RAJ, 2008 WL 3977614, at *2 (W.D. Wash. Aug. 22, 2008) (discussing substitute-facility compensation).

¹¹⁶⁷ See *Eaton*, *supra* note 16, at 19-22 (“[A]ppraisers are experts in estimating value, not just compensation.”); Section 4.1.2 (Market Value: The Measure of Just Compensation); Section 4.2.6 (Exceptions to Market Value Standard).

¹¹⁶⁸ See, e.g., *Peace Arch II*, 2010 WL 415244, at *2 (dispute over maintenance and operating costs of substitute highway provided as compensation).

¹¹⁶⁹ See *Duncanville*, 469 U.S. at 32-33 (quoting *Brown v. United States*, 263 U.S. 78, 81 (1923)), 37 (O’Connor, J., concurring); *Lutheran Synod*, 441 U.S. at 513-17 (“we find no circumstances here that require suspension of the normal rules for determining just compensation”); see also *Eaton*, *supra* note 16, at 234 (“The doctrine of substitute facilities is not a valuation or appraisal technique, but a concept that has evolved from court decisions.”).

¹¹⁷⁰ See, e.g., Tenn. Valley Auth. Act, 16 U.S.C. § 831q (2012) (authorizing condemnation of property for purpose of relocating railroad tracks, highways, and other properties, enterprises and projects whose removal may be necessary to carry out purposes of Act); *Berberich v. United States*, 5 Cl. Ct. 652, 655 (1984) (discussing statutory authorization for relocation of North Bonneville, Wash., in connection with construction of new powerhouse at Bonneville Dam); *Brown*, 263 U.S. at 80 (quoting statute authorizing and appropriating funds for condemnation of replacement town site as compensation for flooding of American Falls, Idaho); see also *Lutheran Synod*, 441 U.S. at 519 n.6 (White, J., concurring); cf. *Duncanville*, 469 U.S. at 33 (holding that while substitute-facility compensation may be constitutionally permissible, the United States has no duty to provide anything more than market value (discussing *Brown*, 263 U.S. 78)).

¹¹⁷¹ See *Duncanville*, 469 U.S. at 30 (“basic principles of indemnity embodied in the Just Compensation Clause”); *Lutheran Synod*, 441 U.S. at 517 (“‘basic equitable principles of fairness’ underlying the Just Compensation Clause” (quoting *United States v. Fuller*, 409 U.S. 488, 490)); see also *Town of Clarksville v. United States*, 198 F.2d 238, 242-43 (4th Cir. 1952) (“Of course, the interests of the public, upon which the payment burden rests, are at stake, too, and the award must not be in excess of strict equivalence.”).

¹¹⁷² *Bos. Chamber of Commerce v. City of Boston*, 217 U.S. 189, 195 (1910); see *Brown*, 263 U.S. at 83 (“A method of compensation by substitution would seem to be the best means of making the parties whole” in “peculiar” circumstances presented.); see also *Duncanville*, 469 U.S. at 37 (O’Connor, J., concurring) (“the make-whole remedy intended by the Just Compensation Clause”); *Lutheran Synod*, 441 U.S. at 511 (“compensation required to make the owner whole”), 516 (“The guiding principle of just compensation . . . is that the owner of the condemned property ‘must be made whole but is not entitled to more.’” (quoting *Olson v. United States*, 292 U.S. 246, 255)).

acquisition, not the nature of the acquisition itself. Regardless of the form of compensation, the Fifth Amendment does not require any award for non-compensable (or “consequential”) damages, further discussed in Section 4.6.¹¹⁷³

Reliance on unsupported subsidiary expert opinions can undermine or even invalidate the appraiser’s valuation analysis and conclusions.

In practice, substitute-facility compensation is often extremely complex and arises only in “peculiar” situations.¹¹⁷⁴ As for the specifics of this form of compensation for a given acquisition, the Fourth Circuit’s discussion in *Town of Clarksville v. United States* is instructive:

Of course, the interests of the public, upon which the payment burden rests, are at stake, too, and the award must not be in excess of strict equivalence. Yet we are not here dealing with a rigid, blind measure, that grants compensation only on a pound of flesh basis, but rather with an equitable concept of justice and fairness that accords with the Fifth Amendment’s mandate. Accordingly, the equivalence requirement which must be met with respect to the substitute facility is more that of utility than of mere dollar and cents value.¹¹⁷⁵

As the Supreme Court held in rejecting a substitute-facilities measure of compensation for the taking of a municipal landfill in *Duncanville*, “[i]n this case, as in most, the market measure of compensation achieves a fair ‘balance between the public’s need and the claimant’s loss.’”¹¹⁷⁶ To be just, compensation—whether in the form of cash or substitute facility—must achieve that “fair balance.”¹¹⁷⁷

4.12. Appraisers’ Use of Supporting Experts’ Opinions. Some appraisal assignments may require the appraiser to rely on other experts’ opinions on technical or other specialized issues.¹¹⁷⁸ “An expert cannot be an expert in all fields, and it is reasonable to expect that experts will rely on the opinion of experts in other fields as background material for arriving at an

1173 See *Duncanville*, 469 U.S. at 33. Congress can authorize compensation for otherwise non-compensable damage in connection with substitute-facility compensation. For example, in the relocation of the Town of Bonneville, Washington (population 650), in connection with the construction of a new powerhouse at Bonneville Dam, special legislation authorized the U.S. Army Corps of Engineers to provide not only substitute streets and utilities, but also city planning assistance, cooperation with nonfederal entities, and other elements above and beyond the constitutional requirements of just compensation. See Act of Mar. 7, 1974, Pub. L. No. 93-251, § 83, 88 Stat. 12, 35 (authorizing legislation); cf. *Berberich v. United States*, 5 Cl. Ct. 652, 655 (1984) (discussing specific statutory authorization for relocation of town). This endeavor generated years of litigation. See *Town of N. Bonneville v. Callaway*, 10 F.3d 1505 (9th Cir. 1993); *Town of N. Bonneville v. U.S. Dist. Court*, 732 F.2d 747 (9th Cir. 1984); *Town of N. Bonneville v. United States*, 833 F.2d 1024, 1987 WL 38842 (Fed. Cir. Oct. 28, 1987) (unpubl.); *Town of N. Bonneville v. United States*, 5 Cl. Ct. 312 (1984).

1174 See, e.g., *Brown*, 263 U.S. at 81-83 (providing new town site as compensation for flooding of three-quarters of existing town); *Washington v. United States (Hanford)*, 214 F.2d 33, 38-39, 41-43 (9th Cir. 1954) (providing nominal compensation for taking of part of state highway where existing highways were adequate substitute, as rerouted traffic would “impose no appreciable burden” and state “has suffered no money loss and has been relieved of the burden of maintaining the road taken”); see also *United States v. 10.56 Acres in Whatcom Cty. (Peace Arch II)*, No. C07-1261RAJ, 2010 WL 415244, at *2-*3 (W.D. Wash. Jan. 27, 2010) (providing new highway as compensation with consideration of costs saved by and imposed on state due to substitute; see also *California v. United States (Naval Shipyard)*, 395 F.2d 261 (9th Cir. 1968) (compensation for state road measured by market value).

1175 *Clarksville*, 198 F.2d at 242-43.

1176 *Duncanville*, 469 U.S. at 33 (quoting *United States v. Toronto, Hamilton & Buffalo Navigation Co.*, 338 U.S. 396, 402 (1949)).

1177 See *id.*; *Bauman v. Ross*, 167 U.S. 548 (1897) (Compensation must be “just, not merely to the individual whose property is taken, but to the public which is to pay for it.” (quoting *Searl v. Sch. Dist. in Lake Cty.*, 133 U.S. 553, 562 (1890)).

1178 See USPAP, Competency Rule: Acquiring Competency, comment (“Competency can be acquired in various ways, including, but not limited to, personal study by the appraiser . . . or retention of others who possess the necessary knowledge and/or experience.”). For topics that often require additional expertise in appraisals for federal acquisitions, see Section 1.13.

opinion.”¹¹⁷⁹ But the appraiser cannot merely assume such supporting experts’ reports are accurate and reliable. Rather, the appraiser must review all supporting opinions and can rely on or adopt them only if the appraiser determines, after review, that all supporting opinions are credible, reliable, and factually supported.¹¹⁸⁰ As the Tenth Circuit succinctly stated: “[Any expert] opinion . . . must be founded upon substantial data, not mere conjecture, speculation or unwarranted assumption. It must have a rational foundation.”¹¹⁸¹ An appraiser who fails to ensure the rational foundation of all supporting opinions and other underlying assumptions will be left with an “ultimate opinion of value [that] is virtually devoid of factual moorings, depriving it of virtually any evidentiary value.”¹¹⁸²

The appraiser must carefully analyze subsidiary experts’ reports to ensure a full understanding of the bases for their findings and the impact on the appraisal. The precise steps necessary to ensure the reliability of a particular subsidiary expert’s opinion will of course depend on the subject matter. Broadly, however, important considerations for the appraiser include:

- Are subsidiary experts’ opinions confirmed by market studies or other appropriate analyses?
- Did subsidiary experts credibly reconcile data or other facts that may contradict their conclusions?
- Did subsidiary experts gather relevant data in a methodical manner?
- Are the assumptions underlying subsidiary experts’ opinions reasonable and appropriate?
- Are subsidiary experts’ conclusions substantiated by other evidence?

Appraisers’ reliance on subsidiary expert opinions that failed to adequately address these concerns has resulted in the rejection of all valuation evidence based on such unsupported opinions—including appraisers’ conclusions of highest and best use, methodology, and ultimate opinions of value.¹¹⁸³ However, with appropriate verification of reliability and support (as recognized in a case affirmed by the Eleventh Circuit), “relying on a sub-consultant’s report is a common, respected, and approved occurrence in appraisal practice and[] ‘to hold otherwise would effectively demand an inconceivably broad area of expertise from any appraiser.’”¹¹⁸⁴

Unit Rule Considerations. The results of subsidiary valuation reports, such as mineral, fixture, or timber valuations, cannot simply be added to the value of the land to arrive at a value of the property as a whole without proper analysis by the appraiser. To do so would

1179 *United States v. 1,014.16 Acres of Land in Vernon Cty.*, 558 F. Supp. 1238, 1242 (W.D. Mo. 1983), *aff’d*, 739 F.2d 1371, 1373 (8th Cir. 1984) (“The district court properly noted that in condemnation cases, federal procedural and evidentiary rules apply.”); *see* FED. R. EVID. 703 (bases of an expert opinion).

1180 *See, e.g., United States v. 1.604 Acres of Land (Granby I)*, 844 F. Supp. 2d 668, 678 (E.D. Va. 2011); *United States v. 381.76 Acres of Land (Montego Group)*, No. 96-1813-CV, 2010 WL 3734003, *7 (S.D. Fla. Aug. 3, 2010), *adopted sub nom. United States v. 10.00 Acres of Land*, No. 99-0672-CIV, 2010 WL 3733994 (S.D. Fla. Sept. 22, 2010), *aff’d sub nom. United States v. Gonzalez*, 466 F. App’x 858 (11th Cir. 2012) (per curiam) (unpubl.); *1,014.16 Acres in Vernon*, 558 F. Supp. at 1242.

1181 *United States v. Sowards*, 370 F.2d 87, 92 (10th Cir. 1966).

1182 *Brace v. United States*, 72 Fed. Cl. 337, 352-53 (2006) (“the *ipse dixit* of that reliance does not make those facts, data or opinions true”), *aff’d*, 250 F. App’x 359 (Fed. Cir. 2007) (per curiam) (unpubl.) (“affirmed based upon the well-reasoned opinion of the trial court”); *see, e.g., Granby I*, 844 F. Supp. 2d at 676-81 (excluding all valuation and other evidence based on highest and best use that was premised on unreliable, unsupported opinions of subsidiary experts).

1183 *Granby I*, 844 F. Supp. 2d at 676-81 (detailing failures of subsidiary experts’ opinions, holding such opinions were “without support” and excluding from consideration all valuation and other evidence based on unsupported subsidiary opinions); *see also United States v. 1.604 Acres of Land (Granby III)*, 844 F. Supp. 2d 685, 689 (E.D. Va. 2011) (excluding opinions of five experts based on *Granby I* ruling).

1184 *Montego Group*, 2010 WL 3734003, at *5; *accord 1,014.16 Acres in Vernon*, 558 F. Supp. at 1242.

violate the unit rule (discussed in Section 4.2.2) and professional appraisal standards.¹¹⁸⁵ These components are to be considered, but only in light of how they contribute to the market value of the property as a whole.¹¹⁸⁶

4.13. Common Purpose (Roles and Responsibilities). The importance of sound appraisals in federal acquisitions cannot be overstated. It is the United States' obligation to serve the general public and protect the common welfare by paying just compensation whenever property is needed for public purposes, and reliable, objective valuations are critical to achieving this end.¹¹⁸⁷ Appraisers, landowners, attorneys, and government agency staff all play important roles in the federal acquisition process, whether or not litigation is anticipated.

4.13.1. Appraisers and Other Experts. Appraisers assist in the determination of just compensation by developing an opinion of market value,¹¹⁸⁸ often in consultation with experts in other fields.¹¹⁸⁹ In fact, there is a long history in the United States of objective evaluators appraising property value to assist and inform the determination of just compensation—since well before a distinct real estate appraisal profession began to emerge in the early twentieth century.¹¹⁹⁰

Serving this important function requires expertise, diligence, sound judgment, and objectivity, whether appraisers or other experts are retained by the United States, landowners, or other parties.¹¹⁹¹ The appraiser must be diligent in data collection and competently apply the accepted methods and techniques of the appraisal profession as well as the special rules and requirements set forth in these Standards (e.g., larger parcel, unit rule, before and after method). The following describes an appraiser's job well done:

A comprehensive investigation of [the] parcels was made . . . [The appraiser] thoroughly surveyed each of the parcels and completely catalogued and examined all of the improvements on each parcel; in addition [the appraiser] investigated and checked all sales made in the immediate vicinity for several years prior to the [date of value] and interviewed a number of persons of long experience and familiarity with the property and its uses. Both [t]his investigation and appraisal appear to me to have been thoroughly and conscientiously conducted with a view to a just evaluation. [The appraiser's] conclusions were wholly impersonal and not actuated by any adversary concept.¹¹⁹²

1185 USPAP Standards Rule 1-4(e) ("An appraiser must refrain from valuing the whole solely by adding together the individual values of the various estates or component parts.").

1186 See Sections 4.8 and 4.8.1; see also Sections 4.8.3 and 4.8.4.

1187 See, e.g., *Hoover v. U.S. Dep't of Interior*, 611 F.2d 1132, 1138 (5th Cir. 1980).

1188 See EATON, *supra* note 16, at 19-22; Section 4.1.2.

1189 See Sections 1.11 and 4.12.

1190 For example, in 1878, the Supreme Court described a condemnation involving the "appointment of commissioners to . . . secure a fair appraisement of [a property's] value" followed by a court determination "as to the amount of compensation the owner of the land was entitled to receive[.]" *Miss. & Rum River Boom Co. v. Patterson*, 98 U.S. 403, 404-405 (1878). Similarly, in 1893 the Court noted that "[v]iewers were appointed, who reported the value . . . [and then] the matter was tried before the court . . . as to the question of amount of compensation." *Monongahela Nav. Co. v. United States*, 148 U.S. 312, 314 (1893); cf. James H. Boykin, *Real Property Appraisal in the American Colonial Era*, THE APPRAISAL J. 361, 366-367 (July 1976) (describing property valuation in legal disputes); Norman G. Miller, Jr. & Sergey Markosyan, *The Academic Roots and Evolution of Real Estate Appraisal*, THE APPRAISAL J. 172, 172 (April 2003) (appraisal as a distinct professional field began in about 1902).

1191 See USPAP Ethics Rule ("An appraiser must promote and preserve the public trust inherent in appraisal practice by observing the highest standards of professional ethics.").

1192 *United States v. 711.57 Acres in Alameda Cty.*, 51 F. Supp. 30, 32 (N.D. Cal. 1943); see also USPAP Ethics Rule – Conduct ("[Appraisers] must not advocate the cause or interest of any party or issue . . .").

While this description arose from an appraiser's work as an expert witness in condemnation litigation, the same qualities are necessary for any appraisal for federal acquisition purposes.

Appraisers must exercise sound judgment based on known pertinent facts and circumstances, and it is their responsibility to obtain knowledge of all pertinent facts and circumstances that can be acquired with diligent inquiry and search. They must then weigh and consider the relevant facts, exercise sound judgment, and develop an opinion that is completely unbiased by any consideration favoring either the landowner or the government. For this reason, it is inappropriate for an appraiser to "give the benefit of the doubt" to either a landowner or the United States.

It is inappropriate to "give the benefit of the doubt" to either a landowner or the United States.

While the vast majority of federal acquisitions do not involve litigation, every appraisal and report should be prepared with recognition of the possibility that the question of value may be litigated, since it is not possible to predetermine which tracts will be acquired by voluntary means.¹¹⁹³ The fact that a new appraisal and report may be required prior to trial (to bring the effective date of valuation into conformance with the legally required date of valuation¹¹⁹⁴) does not excuse an ill-prepared initial appraisal. *All* appraisal reports are often subject to discovery, and a poorly prepared initial appraisal may not only embarrass an appraiser, but also weaken a client's case.

Appraisers Retained as Expert Witnesses by the U.S. Department of Justice. Expert witnesses for litigation have additional obligations. It is the responsibility of the appraiser to spend adequate time and effort to thoroughly prepare to testify in depositions and at trial. Prior to undertaking this preparation and any necessary updating of the appraisal report, the appraiser will confer with the trial attorney.

Appraisers must conform their appraisal reports with Rule 26(a)(2)(B) of the Federal Rules of Civil Procedure, as discussed in Section 2.2.3. In addition, the particular court in which a case will be tried may have local rules regarding expert reports. The United States' legal counsel should advise the appraiser of any such local rules. In preparing the initial appraisal report, the appraiser may have had comparable sales verified by personnel from his or her office. In litigation, however, the appraiser must personally verify all comparable sales prior to testifying in deposition or at trial.

The trial attorney will often provide the appraiser with observations and suggestions for strengthening the appraisal report. Both appraisers and attorneys should distinguish between a rigorous exploration of the appraiser's methodologies, analysis, and factual support—and improper pressure that undermines the objectivity and reliability of the appraiser's conclusions. Embracing the former with a clear eye on the appraiser's independence will strengthen the appraisal and reinforce the appraiser's credibility at trial. Any suggestion of the latter, on the other hand, should be immediately addressed and clarified to ensure appraisers' objectivity and the integrity of their opinions.

¹¹⁹³ Moreover, even voluntary acquisitions may generate litigation over valuation matters or the sufficiency of appraisals. See, e.g., *Desert Citizens Against Pollution v. Bisson*, 231 F.3d 1172 (9th Cir. 2000).

¹¹⁹⁴ E.g., *United States v. 8.34 Acres of Land in Ascension Par.*, No. 04-50D-MI, 2006 WL 6860387, at *4 (M.D. La. June 12, 2006); see *Kirby Forest Indus., Inc. v. United States*, 467 U.S. 1, 10 (1984).

In conferring with the attorney, the appraiser should advise the attorney of any information that would be helpful in strengthening the report that was not available to the appraiser.¹¹⁹⁵ The attorney may be able to procure this information from the landowner's legal counsel or through the discovery process, if necessary. The appraiser and the attorney should also discuss the logistics of a site inspection and appropriate communication with the landowner (if the landowner is represented by an attorney, all communications must go through legal counsel).

In condemnation proceedings, appraisers' only function is to testify to their impartial opinion of market value. While it is important that appraisers testify with the conviction that their valuations are correct, appraisers are not advocates for their clients: that role is exclusively reserved to attorneys. Nor do appraisers determine what is *fair* or *just*: that is the responsibility of the fact-finder—a jury, land commission, or judge. The appraiser is employed to develop and express an objective opinion of market value, following federal law, that is supported by factual data to warrant being accorded weight.¹¹⁹⁶

4.13.2. Government Agency Staff. Federal realty acquisitions require the contributions of a variety of government agency staff, including realty specialists, surveyors, engineers, title researchers, negotiators, project managers, contract procurement specialists, executives, appraisers, review appraisers, and attorneys. Critical to the valuation process, agency staff identify property for federal acquisition; work with government and outside appraisers to develop an appropriate scope of work for each valuation assignment; provide necessary information to appraisers, such as property descriptions, title information, maps, surveys and other data; and issue **legal instructions**. Agency staff are also tasked with explaining the United States' offer of just compensation and its basis, which often involves explaining the appraisal process, the data considered by the appraiser, and the reasons improper considerations are disregarded. Agency staff also rely on appraisals to determine just compensation for the purpose of making offers under the Uniform Act, estimate project acquisition costs, and make judicious use of public funds. Finally, while only a small fraction of federal acquisitions involve litigation, it is impossible to predict with certainty which acquisitions—even voluntary acquisitions—will result in litigation.¹¹⁹⁷ Even if a new appraisal may be obtained for litigation (often required in condemnation to reflect the appropriate date of value),¹¹⁹⁸ *every* appraisal should be well prepared, reflecting sound instructions and a scope of work appropriate for its purpose.

1195 Examples might include the property's historical income and expense information that a landowner had not previously provided to the appraiser, or verification of the price, terms, and conditions of a prior sale of the property being appraised.

1196 *See, e.g., Washington v. United States (Hanford)*, 214 F.2d 33, 43 (9th Cir. 1954) (“Opinion evidence is only as good as the facts upon which it is based. . . . Opinion evidence without any support in the demonstrated facts . . . can have no weight . . .”).

1197 *See, e.g., Desert Citizens Against Pollution v. Bisson*, 231 F.3d 1172 (9th Cir. 2000).

1198 *See 8.34 Acres in Ascension*, 2006 WL 6860387, at *4; *cf. Kirby Forest Indus., Inc.*, 467 U.S. at 10.

- 4.13.3. Landowners.** Each and every federal acquisition involves a landowner—usually, but not always, as a willing participant. Landowners are entitled to just compensation if their property is acquired for public purposes, and to receive fair and equitable treatment no matter which agency is acquiring their land. During the appraisal process, landowners must be given an opportunity to accompany the United States’ appraiser on the inspection of their property under the Uniform Act.¹¹⁹⁹ The site visit is a chance for landowners to share information about their property that they believe should be considered in the valuation process (Section 1.2.6.4).
- 4.13.4. Attorneys.** Attorneys play a critical role in appraisals for federal acquisitions, whether or not litigation is involved. **Legal instructions** are necessary on a variety of valuation issues addressed throughout these Standards, such as ownership and title questions affecting the larger parcel determination (Section 4.3.3) or the proper application of the scope of the project rule to exclude government project influence on market value (Section 4.5). To do so, attorneys—whether agency counsel, Department of Justice attorneys, or landowners’ counsel—must often engage in nuanced discussions with appraisers to determine what legal instructions are necessary and appropriate. Agency counsel should consult the U.S. Department of Justice for assistance on novel or complex issues.

¹¹⁹⁹ 42 U.S.C. § 4651(2); see Section 1.2.6.4. Landowners can also designate a representative to attend the property inspection on their behalf.

APPENDIX



APPENDIX A

Appraisal Report Documentation Checklist

INTRODUCTION

Title Page

	Agency name		Appraiser's name(s)
	Agency tract no.		Appraiser's address
	Property address		Effective date of value

Transmittal Letter

	Date of letter		Client and legal instructions
	Property identification		Opinion of value before acquisition
	Property rights appraised		Opinion of value after acquisition
	Effective date of value		Difference
	Extraordinary assumptions		Appraiser signature
	Table of Contents		

Appraiser's Certification

	Conforms to USPAP		Opinion of value after acquisition
	Conforms to Federal Standards		Difference
	Property inspection		Effective date of value
	Offered owner accompaniment		Appraiser signature
	Opinion of value before acquisition		

Executive Summary

	Property identification		Highest and best use – after acquisition
	Effective date of value		Description before
	Highest and best use – before acquisition		Description after
Value before		Value after	
	Cost approach		Cost approach
	Sales comparison approach		Sales comparison approach
	Income capitalization approach		Income capitalization approach
	Final opinion of value		Final opinion of value
	Photos of subject		Assumptions and limiting conditions

Scope of Work Description

	Client		Property characteristics
	Intended users		Assignment conditions
	Intended use		Geographic area and timespan of market data research
	Definition of market value		Type of market data researched
	Definition of market rental value		Extent of market data confirmation
	Effective date		Data sources

FACTUAL DATA AND ANALYSIS – BEFORE ACQUISITION

	Legal description		Area data
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Site Data

	Existing use		Land Shape
	Access		Utilities
	Topography		Minerals
	Soils		Easements
	Vegetation		Hazards
	Land Area		

Improvement Data

	Type		Condition
	Size		Quality
	Actual age		Occupancy
	Effective age		On-site improvements
	Fixtures		Sales history
	Use history		Rental history

Tax/Assessments

	Assessed value		Tax load
	Zoning and land use regulations		

Highest and Best Use

	As vacant		Financial feasibility
	As improved		Degree of profitability
	Physical possibility		Larger parcel
	Legal permissibility		

Land Valuation

	Describe comparables		Analysis of comparables
	Photos of comparables		Final value analysis/opinion of value

Cost Approach

	Included <i>or</i> [] omission explained		Market support
	Reproduction/replacement cost		Final value analysis/opinion of value
	Depreciation		

Sales Comparison Approach

	Included		Analysis of comparables
	Describe comparables		Final value analysis/opinion of value
	Photos of comparables		

Income Capitalization Approach

	Included <i>or</i> [] omission explained		Operating expenses
	Market rental comparables		Market support for capitalization rate
	Gross income estimate		Explain selection of capitalization rate
	Vacancy		Final value analysis/opinion of value
	Fixed expenses		

Reconciliation and Final Opinion of Value

	Provided		Avoid summation appraisal
--	----------	--	---------------------------

FACTUAL DATA AND ANALYSIS – AFTER ACQUISITION**Legal Description/Description of Acquisition**

	Legal description of remainder <i>or</i> [] description of acquisition
--	---

Area Data

	Describe government project		Address project impact
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Site Data

	Shape		Utilities
	Size		Access
	Easements		Relationship to project

Improvement Data

	Describe improvements		
	Fixtures		Rental history after acquisition
	Use after acquisition		

Tax/Assessments

	Est. assessed value		Est. tax load
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Zoning and Land Use Regulations

	Re-zone considered		
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Highest and Best Use

	Change considered		Effects of TCEs <i>or</i> [] n/a
	Intensity considered		Zoning non-conformance addressed
	Restoration considered		

Land Valuation

	Same <i>or</i> different comparables		Analysis of comparables
	Describe comparables		Final value analysis/opinion of value
	Photos of comparables		

Cost Approach

	Included <i>or</i> [] omission explained		Market support
	Reproduction cost		Final value analysis/opinion of value
	Depreciation		

Sales Comparison Approach

	Included		Photos of comparables
	Same <i>or</i> [] different comparables		Analysis of comparables
	Describe comparables		Final value analysis/opinion of value

Income Capitalization Approach

	Included <i>or</i> [] omission explained		Operating expenses
	Gross income estimate		Market support for capitalization rate
	Vacancy		Explain selection of capitalization rate
	Fixed expenses		Final value analysis/opinion of value

Reconciliation and Final Opinion of Value

	Provided		Avoided summation appraisal
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Acquisition Analysis

	Recapitulation		Proper format
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Damage (if applicable)

	Allocate part acquired vs. damage to remainder <i>or</i> [] n/a		Estimate cost to cure damage
	Note allocation is accounting exercise		

Benefits (if applicable)

	Consider direct (special) benefits		Explain benefits analysis
	Disregard indirect (general) benefits		

ADDENDA AND EXHIBITS

	Location map		Comparable sales data maps
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Comparable Sales Data Sheets

	Sales confirmed		Existing use
	Terms reported		Highest and best use
	Buyer and seller		Zoning
	Date of sale		Legal
	Recording information		Physical description
	Location		

Subject Property Plot Plan

	Property boundaries shown		Street frontage after acquisition
	Dimensions before acquisition		Photo locations
	Dimensions after acquisition		Improvement locations
	Street frontage before acquisition		
	Subject property floor plan		Other exhibits
	Title report		Appraiser qualifications

APPENDIX B

Recommended Appraisal Report Format for Total Acquisitions

2.3.1 Introduction

- (2.3.1.1) Title Page
- (2.3.1.2) Transmittal Letter
- (2.3.1.3) Table of Contents
- (2.3.1.4) Appraiser's Certification
- (2.3.1.5) Executive Summary
- (2.3.1.6) Photographs
- (2.3.1.7) Statement of Assumptions and Limiting Conditions
- (2.3.1.8) Description of Scope of Work

2.3.2 Factual Data

- (2.3.2.1) Legal Description
- (2.3.2.2) Area, City, and Neighborhood Data
- (2.3.2.3) Property Data
 - (2.3.2.3.1) Site
 - (2.3.2.3.2) Improvements
 - (2.3.2.3.3) Fixtures
 - (2.3.2.3.4) Use History
 - (2.3.2.3.5) Sales History
 - (2.3.2.3.6) Rental History
 - (2.3.2.3.7) Assessed Value and Annual Tax Load
 - (2.3.2.3.8) Zoning and Other Land Use Regulations

2.3.3 Data Analysis and Conclusions

- (2.3.3.1) Highest and Best Use
 - (2.3.3.1.1) Four Tests
 - (2.3.3.1.2) Larger Parcel
- (2.3.3.2) Land Valuation
 - (2.3.3.2.1) Sales Comparison Approach
 - (2.3.3.2.2) Subdivision Development Method
- (2.3.3.3) Cost Approach
- (2.3.3.4) Sales Comparison Approach
- (2.3.3.5) Income Capitalization Approach
- (2.3.3.6) Reconciliation and Final Opinion of Market Value

2.3.7 Exhibits and Addenda

Location Map

Comparable Data Maps

Detail of Comparable Sales and Rental Data

Plot Plan

Floor Plan

Title Evidence Report

Other Pertinent Exhibits

Qualifications of the Appraiser

APPENDIX C

Recommended Appraisal Report Format for Partial Acquisitions

2.3.1 Introduction

- (2.3.1.1) Title Page
- (2.3.1.2) Transmittal Letter
- (2.3.1.3) Table of Contents
- (2.3.1.4) Appraiser's Certification
- (2.3.1.5) Executive Summary
- (2.3.1.6) Photographs
- (2.3.1.7) Statement of Assumptions and Limiting Conditions
- (2.3.1.8) Description of Scope of Work

2.3.2 Factual Data – Before Acquisition

- (2.3.2.1) Legal Description
- (2.3.2.2) Area, City, and Neighborhood Data
- (2.3.2.3) Property Data
 - (2.3.2.3.1) Site
 - (2.3.2.3.2) Improvements
 - (2.3.2.3.3) Fixtures
 - (2.3.2.3.4) Use History
 - (2.3.2.3.5) Sales History
 - (2.3.2.3.6) Rental History
 - (2.3.2.3.7) Assessed Value and Annual Tax Load
 - (2.3.2.3.8) Zoning and Other Land Use Regulations

2.3.3 Data Analysis and Conclusions – Before Acquisition

- (2.3.3.1) Highest and Best Use
 - (2.3.3.1.1) Four Tests
 - (2.3.3.1.2) Larger Parcel
- (2.3.3.2) Land Valuation
 - (2.3.3.2.1) Sales Comparison Approach
 - (2.3.3.2.2) Subdivision Development Method
- (2.3.3.3) Cost Approach
- (2.3.3.4) Sales Comparison Approach
- (2.3.3.5) Income Capitalization Approach
- (2.3.3.6) Reconciliation and Final Opinion of Market Value – Before Acquisition

2.3.4 Factual Data – After Acquisition

- (2.3.4.1) Legal Description
- (2.3.4.2) Neighborhood Factors
- (2.3.4.3) Property Data
 - (2.3.4.3.1) Site
 - (2.3.4.3.2) Improvements
 - (2.3.4.3.3) Fixtures
 - (2.3.4.3.4) History
 - (2.3.4.3.5) Assessed Value and Tax Load
 - (2.3.4.3.6) Zoning and Other Land Use Regulations

2.3.5 Data Analysis and Conclusions – After Acquisition

- (2.3.5.1) Analysis of Highest and Best Use
- (2.3.5.2) Land Valuation
- (2.3.5.3) Cost Approach
- (2.3.5.4) Sales Comparison Approach
- (2.3.5.5) Income Capitalization Approach
- (2.3.5.6) Reconciliation and Final Opinion of Value – After Acquisition

2.3.6 Acquisition Analysis

- (2.3.6.1) Recapitulation
- (2.3.6.2) Allocation and Damages
- (2.3.6.3) Special Benefits

2.3.7 Exhibits and Addenda

Location Map
Comparable Data Maps
Details of Comparable Sales and Rental Data
Plot Plan
Floor Plan
Title Evidence Report
Other Pertinent Exhibits
Qualifications of the Appraiser

APPENDIX D

(2.5) Recommended Project Appraisal Report Format

Part I – Introduction, General Factual Data and Analysis

Introduction

- (1) Title Page
- (2) Transmittal Letter
- (3) Table of Contents
- (4) Executive Summary
- (5) Statement of Assumptions and Limiting Conditions
- (6) Description of Scope of Work

General Factual Data

- (7) Area, City, and Neighborhood Data
- (8) Zoning and Other Land Use Regulations

Analysis

- (9) Analysis of Highest and Best Use
- (10) Discussion of Approaches to Value
- (11) Land Valuation
- (12) Cost Approach
- (13) Sales Comparison Approach
- (14) Income Capitalization Approach
- (15) Special Studies

Part II – Individual Parcel Report

Introduction

- (16) Title Page
- (17) Table of Contents
- (18) Appraiser's Certification
- (19) Summary of Salient Facts and Conclusions
- (20) Photographs of Subject Property
- (21) Statement of Assumptions and Limiting Conditions
- (22) Description of Scope of Work
- (23) Executive Summary

Factual Data [total acquisitions] or Factual Data – Before Acquisition [partial acquisitions]

- (24) Legal Description

- (25) Area, City, and Neighborhood Data
- (26) Property Data
 - a. Site
 - b. Improvements
 - c. Fixtures
 - d. Use History
 - e. Sales History
 - f. Rental History
 - g. Assessed Value and Annual Tax Load
 - h. Zoning and Other Land Use Regulations

Data Analysis and Conclusions [total acquisitions] or Data Analysis and Conclusions – After Acquisition [partial acquisitions]

- (27) Analysis of Highest and Best Use
- (28) Land Valuation
- (29) Value Estimate by Cost Approach
- (30) Value Estimate by Sales Comparison Approach
- (31) Value Estimate by Income Capitalization Approach
- (32) Reconciliation and Final Opinion of Value

Factual Data – After Acquisition [partial acquisitions only]

Items (24) to (26) in after situation

Data Analysis and Conclusions – After Acquisition [partial acquisitions only]

Items (27) to (32) in after situation

Acquisition Analysis [partial acquisitions only]

- (33) Acquisition Analysis

Exhibits and Addenda

- (34) Exhibits and Addenda
 - a. Neighborhood Map
 - b. Comparable Data Map
 - c. Detail of Comparative Data
 - d. Plot Plan
 - e. Floor Plan
 - f. Title Evidence Report
 - g. Other Pertinent Exhibits

Part III – General Exhibits and Addenda

- (35) Location Map
- (36) Comparable Data Maps
- (37) Details of Comparative Data
- (38) Other Pertinent Exhibits
- (39) Qualifications of Appraiser

APPENDIX E

Extraordinary Verification of Sales - Section 1.5.2.4

1. **Examine Authorizing Legislation**

- Does the legislation require purchase based on market value?
- Does the legislation mandate purchase at other than market value?
- Does the legislation provide for acquisition based on non- market considerations (e.g., unaffected by Endangered Species Act even though an endangered species is found on the property)?

2. **Contact Acquiring Agency**

- Examine the Appraisal
 - Was the appraisal based on a partial or total acquisition?
 - What property interest was valued?
 - Was the highest and best use an economic use?
 - Was the highest and best use the same or similar to the subject property?
 - Were the sales used in the appraisal influenced by non-market factors?
 - Was there an allocation of value in the appraisal addressing the contributions of different land types or improvements?
- Examine the Appraisal Review
 - Did the appraisal review identify any factual or technical errors in the appraisal report?
- Examine the Negotiators Report
 - Was there threat of condemnation if agreement could not be reached?
 - Was the price paid based on agency support for a tax write-off for the seller?
 - Did the owner threaten to damage property if the asking price was not paid?
 - Was the sale part of a land exchange?
 - Did the owner submit an appraisal or other market data to the agency during the negotiation?
- Examine the Correspondence File
 - Was there correspondence between the agency and the owner's political representatives?
 - Was there public pressure on the agency about the purchase?
 - Was there media coverage about the purchase?
- Examine the Conveyance and Closing Documents
 - Was the estate conveyed the same as the estate valued in the appraisal?
 - Was the estate conveyed an easement?
 - Was the price paid for the property equivalent to the appraiser's final opinion of value?
 - Was the price paid within the appraisal's range of value?
 - Did the conveyance allow the seller to remain on the property or continue to use the property for a period of time (e.g., life estate)?

3. **Verify Sale with Buyer and Seller**

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