April 1972

Eminent Domain: Approaches to Valuation of Real Estate with Emphasis on Mineral Properties

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Eminent Domain: Approaches to Valuation of Real Estate With Emphasis on Mineral Properties

[N]or shall private property be taken for public use, without just compensation. U.S. Const. amend. V. Private property shall not be taken or damaged for public use, without just compensation ... and when private property shall be taken, or damaged, for public use ... the compensation to the owner shall be ascertained in such manner, as may be prescribed by general law .... W. Va. Const. art. 3, § 9 [emphasis added].

INTRODUCTION

Acquisition of private property for public use has increased rapidly in the United States in recent years. Highway construction, low-rent housing, reservoirs, and airports are among the more common government projects which require large segments of privately-owned real estate. Construction of four-lane highways, especially in West Virginia at the present time, is undoubtedly the major cause of increased eminent domain litigation.

Unfortunately, few lawyers are prepared to handle this type of litigation. The small number of lawyers adequately prepared to try condemnation cases are usually specialists employed by the state or federal government. The purpose of the first part of this paper is to narrow the gap between government specialists and practicing trial lawyers by providing an up-to-date compilation of cases dealing with approved approaches to value determination. The second part of this paper will consist of a discussion of the present condemnation law pertaining to mineral properties, and a proposal for a change in that law.

An understanding of condemnation procedure is just as important as an understanding of the different approaches to value; however, a detailed study of condemnation procedure is outside the scope of this note. In any event, it is not too difficult to gain a workable knowledge of procedural law because most states, including West Virginia, have enacted extensive legislation covering condemnation procedure.¹

¹ Basically, condemnation procedure in West Virginia involves the selection of a panel of five commissioners who determine just compensation in
Substantive law pertaining to value determination, on the other hand, is not so accessible. The West Virginia constitution expressly provides that compensation to the owner is determined by general law. Since federal and state constitutions only offer broad guidance, and since statutes relating to value determination are virtually nonexistent, a knowledge of judicially acceptable approaches to value determination can only be gained by a painstaking study of case decisions dealing with the subject.

I. APPROACHES TO VALUE DETERMINATION

Court development of the basic principles of just compensation has centered around the "res" concept and the judicial balancing of loss to the condemnee against public need for limitation in the amount of the awards. In Monongahela Navigation Co. v. United States, the landmark "res" concept case, the Supreme Court said: "[J]ust compensation . . . is for the property, and not to the owner . . . ." Compensation relates to the physical object, not damage to the person in relation to the object.

an informal proceeding, unless the commissioners' hearing is waived by the parties in favor of an immediate jury trial. Even if there is a commissioners' hearing either party can file exceptions to the commissioners' report within ten days and be assured of a jury trial. W. Va. Code ch. 54, art. 2 (Michie 1966).

The commissioners or jury must make one lump sum award for the property taken, irrespective of divided ownership or variance of interests and estates. Charleston & Southside Bridge Co. v. Comstock, 36 W. Va. 263, 15 S.E. 69 (1892). The value of the property cannot be enhanced by any distribution of the title or estate among different persons, or by contract arrangements among the owners of different interests. Any advantage secured to one interest must be taken from another — the sum of all the parts cannot exceed the whole. 4 P. NICHOLS, EMINENT DOMAIN § 12.36(1) (rev. 3d ed. 1971). In West Virginia, when divided ownership or various estates or interests exist, the court may act on its own or appoint a special commissioner to conduct a hearing and ascertain the persons entitled to compensation. W. Va. Code ch. 54, art. 2, § 18 (Michie 1966). After the total award has been ascertained and the money has been paid into court, the condemnor has no further interest in the proceedings. See generally CONTINUING LEGAL EDUCATION PROGRAM OF THE WEST VIRGINIA STATE BAR AND THE WEST VIRGINIA UNIVERSITY COLLEGE OF LAW, EMINENT DOMAIN LAW AND PROCEDURE (1964).

"The process of balancing conflicting interests is commonplace in many areas of the law; in the law of eminent domain it is of primary importance . . . [T]he process of arriving at a decision that is fair both to the public and to private interests involves a careful weighing and balancing of these interests." Kratovil & Harrison, Eminent Domain — Policy and Concept, 42 CALIF. L. REv. 596, 626 (1954).

2 148 U.S. 312 (1893).

In other words, incidental or consequential damages suffered by a person are not compensable [this is true only in complete taking cases — not in partial taking cases]. Loss of business is not recoverable. Losses of future profits are not to be compensated.
STUDENT NOTES

United States v. Chandler-Dunbar Water Power Co., the Supreme Court stated that "[t]he owner must be compensated for what is taken from him, but that is done when he is paid its fair market value for all available uses and purposes." And in United States v. Miller, the Court held the basis of the theory of just compensation to be that an individual property owner should be placed in as good a position financially as he would have been but for the condemnation.

An examination of West Virginia case decisions reveals similar policy considerations. Generally, fair market value at the time of the taking of the property is the compensation to which the owner is entitled. In Wheeling Electric Co. v. Gist, the court defined market value as the price for which the land could be sold in the market by a person desirous of selling to a person wishing to buy, both freely exercising prudence and intelligent judgment as to its value, and unaffected by compulsion of any kind. The landowner is entitled to compensation for the highest and best use of the land. In State Road Commission v. Board of Commissioners, the court declared that the guiding principle of just compensation in a condemnation proceeding is reimbursement to the landowner for the

Business interruption, expenses in substituting other real property, cost of appraisals and surveys, losses because of forced sale by reason of a taking, and losses of rental income (except where capitalization method is used), of good will, of a going concern, and of employment are all considered incidental. S. Searles, A Practical Guide to the Legal and Appraisal Aspects of Condemnation 187 (Joint Committee on Continuing Legal Education of the American Law Institute and the American Bar Association 1969).

6 229 U.S. 53 (1913).
7 Id. at 81. "Market value is value, not to an ordinary buyer or seller, but to a prudent buyer and seller. It is a price arrived at by a willing buyer and seller, obtained in the open market, in the regular course of competition." S. Searles, supra note 5, at 188. See also Guyandotte Valley Ry. v. Buskirk, 57 W. Va. 417, 50 S.E. 521 (1905); 4 P. Nichols, supra note 1, at § 12.2(1) (2). A further refinement of the basic definition of market value was given by the court in Strouds Creek & Muddlely R.R. v. Herold, 131 W. Va. 45, 45 S.E.2d 513 (1947). In that case the court indicated that consideration should be given to every element of value which ordinarily arises in negotiations between private persons with respect to the voluntary sale and purchase of land, the use made of the land at the time a part of it is taken, its suitability for other uses, its adaptability for every useful purpose to which it may be reasonably expected to be immediately devoted, and the most advantageous uses to which it may be applied.
8 317 U.S. 369 (1943).
9 Id. at 373.
land taken. A landowner is entitled to be put in as good a position pecuniarily as if his land had not been taken. In addition, the court said the proper measure of damages is the landowner's loss and not the condemnor's gain.\textsuperscript{14} Ordinarily the cost of a substitute facility is not the proper measure of damages, but the courts have allowed this deviation from the general rule when the condemnee was a government unit and was required by law to provide the substitute facility.\textsuperscript{15}

It is evident from the foregoing decisions that a displaced landowner is entitled to compensation equal to the market value of the real estate he is forced to relinquish to the government. There are three judicially acceptable approaches to market value: (1) comparable sales,\textsuperscript{16} (2) capitalization of income,\textsuperscript{17} and (3) cost.\textsuperscript{18}

A. Comparable Sales

The comparable sales approach is essential in almost every determination of the value of real property. It produces an estimate of the value of a specific tract of property by comparing it with similar properties of the same type and class sold recently in the same or competing areas.\textsuperscript{19} The degree of comparability depends upon many factors, including location, construction, age, condition, layout, and the existence of fixed equipment.\textsuperscript{20} Normally, the sale prices of comparable properties provide a range in which the value of the subject property will fall. Four categories of data are basic to the comparable sales approach and apply regardless of the type of property under consideration: (1) sales or asking prices of comparable properties; (2) conditions influencing each sale; (3) location of each property; and (4) description of land and improvements on each property.\textsuperscript{21}

\textsuperscript{14} Id. at 925.
\textsuperscript{16} The comparable sales approach is often referred to as the market data approach.
\textsuperscript{17} The capitalization of income approach is sometimes referred to as the income approach, or occasionally as the economic approach.
\textsuperscript{18} Rarely used, the cost approach is sometimes referred to as the summation approach.
\textsuperscript{20} Id.
\textsuperscript{21} S. Searles, supra note 5, at 365, 366.
A prior sale of the property involved is admissible, provided the sale was recent, voluntary, and between parties capable and desirous of protecting their interests, and no change in conditions or market fluctuation in values has occurred since the sale. The price paid for the land by the owner is admissible evidence of its value, provided the purchase was not remote in time from the appropriation. Offers made by the condemnor to the condemnee are in the nature of an attempt to compromise and cannot be introduced into evidence. Prior offers of purchasers are generally held inadmissible; however, a West Virginia case permitted the introduction of such evidence. Sales of land similar to the land taken, made voluntarily at or about the time of the taking, are admissible as independent evidence of the value of the land taken. Forced sales are not admissible because they are not voluntary and do not reflect market value. Settlements made between the condemnor and owners of neighboring lands in condemnation proceedings are generally held to be inadmissible; however, this does not appear to be the West Virginia position.

B. Capitalization of Income

The capitalization of income method requires the employment of an expert real estate appraiser. This approach, which is often applied to rental property, involves the mathematical capitalization of income from the property but not income from a business conducted upon the property.

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22 4 P. NICHOLES, supra note 1, at § 12.311(1).
25 4 P. NICHOLES, supra note 1, at § 12.311 (2).
26 Fox v. Baltimore & O. R.R., 34 W. Va. 466, 12 S.E. 757 (1890). The West Virginia Court held: "[T]he court is not improper to hear evidence of its rental value or of an offer to purchase" Id. at 467, 12 S.E. at 757 (emphasis added).
27 4 P. NICHOLES, supra note 1, at § 12.311(3); Virginia Power Co. v. Brotherton, 90 W. Va. 155, 110 S.E. 546 (1922).
28 4 P. NICHOLES, supra note 1, at § 12.3113(1).
29 4 P. NICHOLES, supra note 1, at § 12.3113(2).
30 In United Fuel Gas Co. v. Allen, 137 W. Va. 897, 75 S.E.2d 88 (1953), and Baltimore & O. R.R. v. Bonfield's Heirs, 79 W. Va. 287, 90 S.E. 868 (1916), it was held that the price voluntarily paid by the condemnor to another landowner for land similarly situated was proper evidence to be considered by the jury where damages to the residue were not involved.
31 Evidence of business income or profit is inadmissible. For example, income from a garage, a laundry, a restaurant, etc., would be inadmissible because this is income from a business conducted upon the property. Rental income, on the other hand, is admissible because it is income from the property. 4 P. NICHOLES, supra note 1, at § 12.3121.
In using the capitalization approach, the appraiser is concerned with the present worth of the future income potential of the property, which is generally measured by the net income a fully informed person is warranted in assuming the property will produce during its remaining useful life. This net income is capitalized into a value estimate after comparison with investments of a similar type and class. The controlling factor is the rate at which income is capitalized. A slight variation in the capitalization rate can make a large difference in the capitalized value of the income. For example, the difference between an annual income of $27,500 capitalized at 5 percent and at 5½ percent is $50,000. In contrast, smaller fluctuations result if different gross income estimates are used. An increase of 10 percent in the gross income estimate will only result in an increase of 10 percent in the land-value estimate.

The overall capitalization rate is derived from sales of comparable properties in the open market. By computing the annual net income of comparable properties and dividing by their sale prices, an overall rate is obtained. This overall rate is applied to the annual net income of the subject property to arrive at a value determination, i.e., the value of the property equals its annual net income divided by the overall capitalization rate. The lower the capitalization rate the higher the value; and conversely, the higher the capitalization rate the lower the value. Naturally, the condemnor seeks a high capitalization rate, while the landowner wants a low capitalization rate.

When using the capitalization approach to ascertain the value of rental property the appraiser's work may be classified into four broad categories:

1. Obtaining the rent schedules and the percentage of occupancy for the subject property and comparable properties for the current year and for several years in the past. This information provides gross rental data and the trend in rentals and occupancy. This data is then related and

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32 S. Searles, supra note 5, at 366.
33 Bishop, Condemnation Trial Techniques On Behalf of Condemnor and Condemnee, in CONDEMNATION 314 (Joint Committee on Continuing Legal Education of the American Law Institute and the American Bar Association 1971).
34 Cf. id.
35 Id. at 316.
36 Id.
adjusted by the comparative method to ascertain the estimate of gross income which the subject property should produce to attract investors in the market.

2. Obtaining expense data such as taxes, insurance, and operating costs being paid by the subject property and by comparable properties. The trend in these expenses is also necessary.

3. Estimating the remaining useful economic life of the building to establish the probable duration of its income.

4. Selecting the appropriate capitalization rate and the applicable technique and method for processing the net income.  

Capitalization of hypothetical income is generally rejected by the courts because of uncertainty and speculation. Likewise, past profits derived from the business conducted on the property are inadmissible because of uncertainty. Where property is rented for the use to which it is best adapted, the actual rent reserved (annual net income) is capitalized at the rate which local custom adopts for the purpose; this provides one of the best tests of value and such evidence should be admitted. Evidence of actual rental value is admissible.

C. Cost

When using cost analysis appraisers combine two estimates to arrive at a final value determination: (1) an estimate of the land's value, and (2) an estimate of the depreciated reproduction cost of buildings and other improvements located upon the land. Depreciation, an extremely controversial issue, consists of physical deterioration as well as functional and economic obsolescence. The cost approach requires compliance with four steps: (1) the estimate of the land's value as if vacant (use comparable sales data);

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37 S. Searles, supra note 6, at 366.
38 4 P. Nichols, supra Note 1, at § 12.3121(3).
40 4 P. Nichols, supra note 1, at § 12.3122.
42 In a condemnation proceeding in which land improved with a building was taken evidence of the reproduction cost of the building, less proper deductions for depreciation, was admissible as an element of the market value of the land. Chesapeake & O. Ry. v. Johnson, 134 W. Va. 619, 60 S.E.2d 203 (1950); accord, State Rd. Comm'n v. Milam, 146 W. Va. 368, 120 S.E.2d 254 (1961).
(2) the estimate of the current cost of reproducing the existing improvements; (3) the estimate and deduction of depreciation from all causes; and (4) the addition of the land's value and the depreciated reproduction cost of improvements.43

One or more of these three approaches may apply to a particular situation, depending on the nature of the property involved. The comparable sales approach normally applies whereas capitalization and cost approaches apply less frequently. If possible, an appraiser will attempt to apply and correlate all three approaches as an aid to a more precise evaluation of true value. Due to space limitations, examples could not be given in this article; however, reference material is available to anyone interested in acquiring a thorough knowledge of the mechanics of these three approaches to value.44

D. Special Problem Areas

1. Partial Taking: Damages in partial taking cases are measured by the market value of the land actually taken, plus diminution in market value of the residue, less all benefits which will accrue as a result of the public work to be constructed.45 Benefits may be set off against damages to the residue, but not against the value of the part taken.46

And we are unable to say that he suffers deprivation of any fundamental right when a State goes one step further and permits consideration of actual benefits —

43 S. Searles, supra note 6, at 365.
44 Examples of the three approaches appear in S. Searles, supra note 6, at 370, where M.A.I. appraiser Gerald Schmitz applies each approach to one factual situation in a detailed mathematical manner.
enhancement in market value — flowing directly from a public work, although all in the neighborhood receive like advantages. In such case the owner really loses nothing which he had before; and it may be said with reason, there has been no real injury.\textsuperscript{48}

It is proper to award incidental or consequential damages in partial taking cases. Compensation covers past, present and prospective damages to the residue that are the natural, necessary or reasonable incidents of the work to be performed, assuming such damages are capable of ascertainment at the time of the taking.\textsuperscript{49} Hence, it is proper to consider the nature of the improvement, the manner in which it is made, the character of the tract of which a part is taken, the situation of the part with reference to the residue, the general effect of the improvement on the severance of the tract, and the expenses the owner may encounter in preserving the property from further damage (such as the cost to build a fence).\textsuperscript{50}

2. Leasehold Estates: If the entire tract under a lease is taken the tenant's liability to pay rent terminates unless the lease provides otherwise.\textsuperscript{51} Likewise, where only a part of the leased property is taken the tenant's rent must be reduced in the proportion that the value of the land or interest taken bears to the total value of the land, absent a contrary provision in the lease.\textsuperscript{52} A tenant may recover the value of his lease in a condemnation proceeding if that value exceeds the amount of the rent which he is relieved from paying.\textsuperscript{53} Statutory provisions require that the condemnor allege in the petition "any liens upon or conflicting claims to . . ." the land, so far as are known,\textsuperscript{54} and that the condemnor give ten days notice to all "owners, claimants and persons holding liens, whose interests the applicant seeks to condemn. . ."\textsuperscript{55} In the event of a temporary

\textsuperscript{48} \textit{Id.} at 366.
\textsuperscript{50} \textit{Id.}
\textsuperscript{51} W. Va. Code ch. 37, art. 6, § 29 (Michie 1966).
\textsuperscript{52} \textit{Id.}
\textsuperscript{54} W. Va. Code ch. 54, art. 2, § 2 (Michie 1966).
\textsuperscript{55} W. Va. Code ch. 54, art. 2, § 3 (Michie 1966).
taking of a leasehold estate, courts permit moving costs to be recovered by the lessee. 56

3. Easements: The measure of just compensation payable for a flowage easement is the value of the easement to its owner, exclusive of any value attributable to water power or hydroelectric uses of the land. 57 The right of direct access to and from a public highway is a property right of which an abutting landowner cannot be deprived without just compensation. 58 However, damages may not be recovered by owners of property which does not abut upon a highway after relocation of such highway if reasonable access is otherwise provided. 59

When the condemnor acquires an easement across the owner's land the measure of just compensation is the market value of the easement taken, plus the difference in market value of the residue of the owner's land not occupied by the easement immediately before and immediately after the taking, less all benefits accruing to such residue from the improvement to be constructed. 60 When the condemnor has previously acquired an easement over the same tract, the value of the interests previously acquired and paid for must be deducted. 61

4. Moving and Relocation Expenses: As a general rule, a landowner is not entitled to compensation for the cost of moving personal property from the premises. 62 A West Virginia statute enacted in 1963 authorized the state highway department to pay "relocation costs to persons dislocated by highway construction. . ." provided that "[p]ayments shall not exceed two hundred dollars in the case of a family or an individual, or three thousand dollars in the case of a business concern (including the operation of a farm) or nonprofit organization. . ." 63

E. Summary

By studying applicable statutes West Virginia lawyers can gain a working knowledge of condemnation procedure. Value determination, however, is a much more challenging proposition. No two properties are alike and human value judgments change with the passage of time. Appropriately, in *Application of Port Authority Trans-Hudson Corp.*, the Supreme Court of New York noted:

If analogy is found in Newton’s experiment with prisms showing that white light is composed of all the colors of the spectrum, each lending its own characteristics to a degree when passed through a prism, all approaches to valuation entering into the informed mind and sensitive conscience of the court lend to an appropriate degree in the resulting decision.  

II. MINERAL PROPERTIES — THE SEPARATE VALUATION PROBLEM

A. The West Virginia Position

In 1947, Judge Haymond, in *Strouds Creek & Muddlety Railroad Co. v. Herold*, set forth the West Virginia position with respect to the admissibility of evidence of separate valuations of timber and mineral deposits in arriving at the total market value of condemned land. The controlling language of that opinion was as follows:

To establish the value of the land, the presence of crops, trees, shrubs and timber upon it and of coal, oil, gas, stone and other minerals and valuable deposits upon or under the surface may be shown. . . . Consideration, however, should be confined to the land and its contents and elements together and as an entirety when there is no separate ownership with respect to any of them. . . . Compensation for land should be ascertained and determined on the basis of its value at the time it is taken or damaged. All of its components may be considered in arriving at the value of the unit, the land itself, but none of them, when not separately owned, may be given an independent value apart from the land as land.  

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64 48 Misc. 2d 485, 265 N.Y.S.2d 925 (Sup. Ct. 1965).
65 48 Misc. 2d at ___ , 265 N.Y.S.2d at 975.
67 Id. at 60-61, 45 S.E.2d at 523.
It is noteworthy that in Strouds Creek the court implied that it would have allowed evidence of separate valuations if there had been separate ownership of the surface and mineral interests, or if mining operations had been in existence, or if there had been a lease in existence.

B. Jurisdictions in Agreement with West Virginia Position

Judge Haymond relied primarily upon Pennsylvania and Illinois cases in support of the court's decision in Strouds Creek. The courts of those two states have steadfastly maintained that separate values of land and minerals are inadmissible to determine market value. Searle v. Lackawanna and Bloomsburg Railroad Co., decided in Pennsylvania in 1859, was the earliest case dealing with condemnation of mineral properties in the United States. The reasoning of that decision is still followed in Illinois, and in Pennsylvania except as modified by statute. In Searle, where it was held that no recovery could be had for coal under the surface of land taken in eminent domain by showing what income might be obtained from the coal if it were mined, the court stated:

Though we might have the most accurate calculation of the quantity of coal in the land, yet, without knowing exactly the expense of bringing it to the surface and carrying it to market, and the amount likely to be lost in mining and conveying, and the times in which it would be brought out, and the market prices at those times, the quantity would not help us to value the land. The gross estimates of common life are all that courts and juries have skill enough to use as a measure of value. All other measures are necessarily arbitrary and fanciful.

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68 Id. at 61, 45 S.E.2d at 523. This principle of law was recently confirmed in State v. Cooper, 152 W. Va. 309, 315-316, 162 S.E.2d 281, 285 (1968), where the court quoted 29A C.J.S. Eminent Domain § 174 (1965) with approval:

So where the mineral interest and the surface interest are owned by different persons, the mineral interest may be valued separately, but it must be valued as a segregated part of real property and not as a natural warehouse for minerals as personal property.

69 Id. at 62, 45 S.E.2d at 524.

70 Id. at 62, 45 S.E.2d at 524.

71 Id. at 61, 45 S.E.2d at 523.

72 33 Pa. 57 (1859).

73 Id. at 64.
A 1971 Pennsylvania case, *Whitenight v. Commonwealth*, did not deviate from earlier Pennsylvania decisions. In *Whitenight* the court held that the condemnee could establish the quantity and quality of mineral deposits under condemned land. He could not, however, introduce in evidence the number of tons of minerals lost and then multiply that number by some dollar figure such as market price or royalty payment to establish the total loss. In a 1960 Pennsylvania case, *Brown v. Commonwealth*, the court declared that the same rule applied to standing timber. However, the instance of coal land condemned for a right of way for a highway presents a statutory exception to the normal procedure for ascertainment of damages in Pennsylvania. A Pennsylvania statute established the State Mining Commission as the sole arbiter in this situation. The Commission is authorized to require coal, underlying or adjacent to the highway, to be left in place for vertical or lateral support, and to determine the damages due for such coal. Any coal not required for support is not included in the award because it may be removed by the condemnee. But when the absolute right of support is appropriated, the Commission has no jurisdiction and normal procedures are followed.

Illinois courts have followed the Pennsylvania rule, but evidently Illinois does not have a statutory exception to the rule in highway cases. A 1969 Illinois case, *Department of Public Works and Buildings v. Oberlaender*, provided that compensation for land containing mineral deposits had to be estimated for land as land, with all its capabilities, and if there was timber on it, or coal, oil or other minerals under the surface, they were to be considered so far as they affected the value of the land but they could not be valued separately. Illinois has consistently maintained this position throughout the years.

Apparently only Nebraska has given support to the West Virginia, Pennsylvania, and Illinois views by way of court decision.

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75 399 Pa. 156, 159 A.2d 881 (1960).
77 42 Ill. 2d 410, 247 N.E.2d 888 (1969).
in the last ten years. In a 1970 Nebraska case, Iske v. Omaha Public Power District, the court held that evidence of the quantity and quality of mineral deposits could be shown but the award could not be reached by separately valuing the land and the deposits because that would entail too much speculation.

C. Jurisdictions in Opposition to West Virginia Position

Numerous jurisdictions now allow evidence of separate values of minerals and land to go to the jury if certain qualifications and safeguards are recognized and followed. In a recent Texas case, Brazos River Authority v. Gilliam, the court reached a decision that was opposite to the West Virginia decision in Strouds Creek. The Texas court held that it was proper to consider a mathematical formula to determine the value of gravel in place, and to take such value along with value of the land in other respects into consideration to arrive at the ultimate conclusion of correct value. This decision was made despite the fact that no gravel operations had ever been conducted and despite lack of evidence that gravel operations would be conducted within a reasonable time. Although other jurisdictions have allowed evidence of separate valuations of minerals in condemnation proceedings, none are more liberal in admitting such evidence than was the Texas court in Brazos River Authority.

In Consumers Power Co. v. Allegan State Bank, the Michigan court, with the aid of a statute, decided that the property rights to be considered in awarding just compensation for taking interests in land necessary to establish a gas storage field were title to the minerals, all rights to the formations, and rights to the surface; and such rights were to be considered as separate and distinct uses in awarding just compensation. In a similar but distinguishable case, Mackie v. Green, a Michigan court held that where the right to remove minerals was condemned their value in place must be established to fix the damage, and it was not necessary to establish that a market (warranting commercial exploitation of the materials) existed.

83 5 Mich. App. 583, 147 N.W.2d 427 (1967). In addition, see Michigan State Highway Comm'n v. McLaughlin, 16 Mich. App. 22, 167 N.W.2d 468 (1969), in which the court held that the measure of damages was the value of the minerals in place when mineral rights were condemned for use in highway construction.
Federal courts, in general, have allowed separate valuations of minerals in place, especially if a foundation has been laid establishing the existence of a market for the material, the going price on the market, and the foreseeability of the future of that market. In *United States v. 237,500 Acres of Land*, the court held that evidence of the value of minerals in place, less transportation and mining costs — given a proper foundation regarding a market for the minerals — could be considered as a factor in determining the value of the property. The Eighth Circuit used similar reasoning in *Mills v. United States* in holding that the value of minerals in place was a factor to be considered in an eminent domain proceeding, but the court emphasized that there had to be more than mere theoretical future demand and use. There had to be some objective support for the future demand, including volume and duration.

Taking a slightly different approach in *United States v. 180.37 Acres of Land*, a federal district court in Virginia held that a landowner was entitled to the highest and most profitable use to which the land was adaptable, and that where there was no evidence of comparable sales of condemned timberland in which there was coal, a determination of the value of the property on the basis of a minimum royalty per ton of the coal as calculated by a qualified and experienced engineer together with evidence of the surface value was proper. In *United States v. Certain Parcels of Land in Cattaraugus County*, the court decided that the "unit rule" was no legal im-

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84 See United States v. Sowards, 370 F.2d 87 (10th Cir. 1966); United States v. Whitehurst, 337 F.2d 765 (4th Cir. 1964); United States v. 237,500 Acres of Land, 236 F. Supp. 44 (S.D. Cal. 1964). Condemnation of property in federal courts is governed by Rule 71A of the Federal Rules of Civil Procedure. Rule 71A(h) deals with the method of trial in an action involving the federal power of eminent domain; Rule 71A(k) governs when the state power of eminent domain is invoked in a federal court. State substantive law is not applied when the federal power is invoked, but when the state power is invoked in a federal court under Rule 71A(k) the "intent is to follow state law ...." 5 J. Moore, *Federal Practice* §38.12 [5] (2d ed. 1948). Rule 71A(k) has the effect of avoiding any question as to whether the decision in *Erie R.R. v. Tompkins* and later cases have application to condemnation where the state power is invoked in federal courts. When the federal power is invoked the law of evidence in federal courts favors a broad rule of admissibility and is designed to permit the admission of all evidence which is relevant and material to the issues in controversy, unless there is a sound and practical reason for excluding it. FED. R. CIV. P. 43(a); United States v. 60.14 Acres of Land, 362 F.2d 660 (3d Cir. 1966).


86 263 F.2d 78 (8th Cir. 1966). Here, the court did not allow evidence of value based upon the tons in place times the prospective royalty because the landowner had failed to lay a proper foundation.


pediment to a consideration of the value of the timber and soil as proper evidence of the total market value of the property. A similar decision was reached in McLemore v. Alabama Power Co., where it was held that the condemnee had a right to show the value of timber and pulpwood on the land taken.

Recent decisions in Washington and Louisiana also indicate a more liberal trend in admitting evidence of the value of minerals in place. In State v. Hobart, the court found that the condemnee’s value testimony was not inadmissible on the theory that she violated the rule that value cannot be computed by multiplying an assumed number of yards of material by a price per unit, where her entire testimony reflected that her overall valuation was based upon other factors in addition to quantity and unit price, and her estimate of value was less than it would have been had she merely estimated the unit value of rock in place by the number of cubic yards of rock contained in the condemned site. A similar decision was reached in State v. Hart, where evidence of the value of minerals underlying the land was held admissible, but the court stressed that the proper measure of damages was the per acre value of the land considering its mineral content.

In Dow v. State, a 1967 New Hampshire case, the court decided that evidence of the value of mineral deposits in place was proper and admissible as a factor to be considered by the jury in determining damages based on the highest and best use of the condemned property, but only if such evidence was accompanied by proper safeguarding instructions. This was essentially the same position that was taken by the Fourth Circuit in United States v. Wise, a 1942 case in which the court found no error by the trial judge in admitting evidence of the reproduction cost of structural improvements, and the replacement cost of trees, shrubs, etc., where the trial judge had repeatedly instructed the jury that such evidence was admitted solely to aid them in determining the fair market value of the property, but that it would be improper to simply add up the separate values to determine just compensation. The instructions given by the trial judge contained the following language:

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89 285 Ala. 20, 228 So. 2d 780 (1969).
91 249 So. 2d 310 (La. 1971).
93 131 F.2d 851 (4th Cir. 1942).
You are to keep in mind that fair market value is not to be ascertained by saying the buildings on the land are worth so much, the shrubs so much, . . . and all the different elements (the power line and such as that), and then say we will add them all up and that is just compensation. But . . . you are to consider every physical fact and circumstance and everything that is on the land and under the land that has been added to it, for the purpose of arriving at a final figure, which in your opinion, based upon all the evidence, will be just compensation for the single piece of property taken. That is to say, this is not to be viewed as separate takings of the soil, shrubbery, and buildings, but it is to be viewed as the taking of a single piece of property. 94

An analysis of the foregoing decisions discloses a more liberal trend in the courts toward admitting evidence of the separate values of mineral deposits and timber, especially where a foundation is laid establishing a market for the timber or minerals and safeguarding instructions warn the jury against the pitfall of simply adding up the separate values to arrive at just compensation. This trend is especially evident where comparable sales are not available as evidence of the market value of the condemned property.

D. Conclusion and Proposal For Change in West Virginia Law

There are many reasons why courts across the country are discarding the stringent restrictions first laid down in 1859 by the Pennsylvania court in Searle v. Lackawanna and Bloomsburg Railroad Co. 95 A prospective purchaser would want to know precisely the type of information that the Searle rationale holds inadmissible, i.e., an estimate of the quantity of timber or minerals available, the current market price per unit, and the anticipated profits from a given volume of sales: "[T]he brute fact, often in evidence in the valuation of a particular property, is that its income-producing potential is the most important and key element which the buyer and seller take into account in arriving at a fair price to be paid." 96

94 Id. at 852.
95 33 Pa. 57 (1859).
In Strouds Creek & Muddlety Railroad Co. v. Herold, the West Virginia Supreme Court of Appeals found such evidence objectionable because it was based on speculation and conjecture. This may have been a valid position to take in 1947, but its validity is doubtful today. Great technological advances have been made in the timber and mining industries since 1947. The quantity and quality of coal, oil, and gas deposits can be determined through exploratory drillings. Forestry specialists can estimate with great accuracy the number of board feet of lumber available from a given stand of timber. Similar information can be obtained by specialists when the land contains limestone and sand deposits. Economic experts can determine with a high degree of accuracy the available markets and the probable profits of a given operation. And finally, appraisal experts have greatly refined value determination techniques, especially the capitalization of income approach.

The Strouds Creek court, in principle, would have allowed the existence of timber and minerals to be shown, but would not allow separate valuations of the timber and minerals. This position is no longer tenable if scientific advancements since 1947 are taken into consideration. To maintain such a position today would necessarily result in the very evil that the Strouds Creek court sought to avoid, i.e., jury awards based on speculation and conjecture. It would be illogical to allow evidence of the presence of timber and minerals to go to the jury and yet exclude detailed scientific valuation testimony — the very type of information which a prospective buyer would seek and could obtain — from knowledgeable experts in their respective fields. If the jury is simply made aware of the existence of timber and minerals, without more, it seems inevitable that the final jury award will be the result of the most blatant speculation and conjecture imaginable.

It is submitted that neither the old "unit rule" as enunciated by the Searle and Strouds Creek courts, nor the simple addition of separate valuations, sometimes called the "summation rule," is the best method to utilize in arriving at just compensation when mineral properties are condemned. A hybrid of these two methods would provide a more rational rule, i.e., separate valuations of timber, minerals, and the like, should be admissible as evidence provided safeguarding instructions are given informing the jury that such

97 131 W. Va. 45, 45 S.E.2d 513 (1947).
evidence may be considered as a factor in arriving at a final award, along with other evidence, but that it is improper for the jury to simply add the separate value estimates together in ascertaining just compensation. Basically, this was the approach taken in *State Road Commission v. Evans,*98 a 1948 West Virginia decision rendered just one year after *Strouds Creek.* Although this case involved residential property — not mineral property — and *Strouds Creek* was not mentioned in the opinion, it seems that the following language written by Judge Kenna should apply with equal force to condemned mineral properties.

The range of relevant testimony in arriving at market value varies according to the circumstances of each case and, in the final analysis, rests largely within the discretion of the trial judge. In some localities sales may be frequent: in others rare. We believe, however, that in any event it is not error to permit a witness to analyze the figure given by him as the market value and in doing so to state his opinion as to the value of the items going to make up the whole. Consequently the cost of reconstructing the garage, by itself and standing alone, would not have been properly admitted as a distinct item of damages. However, as one of the ingredients going to make up market value of property taken, we believe that it was admissible. As a separate element of recovery it should have been excluded, but if used to sustain and bolster evidence of market value given on behalf of the defendant, as here, we believe that its proper relevance is inescapable. . . .99

It is also submitted that continued adherence to the *Strouds Creek* rule would be unnecessarily frustrating to landowners, trial judges, and trial lawyers who live in a world that demands precise and detailed information to the greatest extent possible.

The present West Virginia rule, although it may have been warranted in the past, is simply unrealistic and unfair because it is unjustifiably couched in general terms. Many centuries ago Aristotle

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98 131 W. Va. 744, 50 S.E.2d 485 (1948).
99 Id. at 747, 50 S.E.2d at 486-87. The *Evans* court also allowed evidence of the separate value of a Colorado blue spruce tree growing upon the residential land. Although the property involved in this case was not timber or mineral property, per se, this case is subsequent in time to *Strouds Creek* and it seems that the same principle should apply to timber and mineral properties.