UNITED STATES v. FULLER: JUST COMPENSATION UNDER ATTACK

*By John F. Herlihy**

Introduction

Property owners have reason more than ever before to be apprehensive when confronted with eminent domain proceedings. The source of this increased anxiety is the recent opinion delivered by Justice Rehnquist in *United States v. Fuller*.[1] This opinion rejected the holding of the Ninth Circuit Court of Appeals[2] that compensation for fee land taken by the government should include the value derived by virtue of its location adjoining federally owned Taylor Grazing Land.[3] As a result of this Supreme Court decision, compensation for land taken under eminent domain may in many instances be computed without regard for the land's location value. Writing for the dissent in *Fuller*, Justice Powell observed that this approach allows compensation to be determined after the land has been "artifically denuded of its surroundings."[4]

Can compensation which fails to consider the land's location value be considered just compensation within the spirit of the Fifth Amendment?[5] As early as 1880, Justice Field said:

> [W]hen private property is taken for public use, the owner receives full compensation. The taking differs from a sale by him only in that the transfer of title may be compelled, and the amount

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1. 409 U.S. 488 (1973).

2. United States v. Fuller, 442 F.2d 504 (9th Cir. 1971).

3. This is land which is owned by the government and used by private individuals under the Taylor Grazing Act § 3, 43 U.S.C. § 315(b) (1970), *formerly* ch. 865, § 3, 48 Stat. 1270 (1934). For a discussion of the Taylor Grazing Act as it applies to the *Fuller* decision see, Comment, *United States v. Fuller—Eminent Domain—Taylor Grazing Permits as an Element of Compensation for Condemned Land,* 1973 UTAH L. REV. 75.

4. 409 U.S. at 504 (Powell, J., dissenting).

5. Note that the Fifth Amendment protection ("nor shall private property be taken for public use without just compensation") was provided as a check on the potential abuse of government's power. See text accompanying note 100 *infra*. *See* Stoebuck, *A General Theory of Eminent Domain,* 47 WASH. L. REV. 553 (1972).

> of compensation be determined by a jury of officers of the government appointed for that purpose.[6]

Nearly a century later, *Fuller* has added a new distinction between a governmental taking and a private sale. The addition is that the amount of compensation for private property taken for public use may not include location value in certain cases. The fundamental similarities between a private sale and a governmental taking, which Justice Field believed the Fifth Amendment dictated, have been substantially diminished by the patent disparity in compensation permitted by *Fuller*.

The anxiety created by the *Fuller* decision for landowners and those who represent them is primarily caused by the knowledge that location value could be excluded from compensation; of equal importance is the knowledge that the Court has continued to accept the modified market value theory.[7] This theory, as well as other general theories of compensation, must be considered in order to fully appreciate the alternatives before the Court.

General Theories of Just Compensation

No fewer than three approaches have been devised by courts to arrive at an evaluation of just compensation. These can be referred to as the strict market value rule, the modified market value rule, and the indemnification theory.

The strict market value rule holds that compensation should be equal to the conversion of the asset into its monetary equivalent.[8] This theory is based on the belief that the compensation should be for the property alone, and should not consider the personal status of the owner.[9] Commentators have criticized the strict market value concept for its failure to compensate the condemnee for such incidental costs as business losses and moving expenses.[10] Even with its shortcomings,

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6. County of Mobile v. Kimball, 102 U.S. 691, 703 (1880).

7. See text accompanying notes 12-15 *infra*.

8. United States v. Reynolds, 397 U.S. 14 (1970); Olson v. United States, 292 U.S. 246 (1934).

9. In Monongahela Navigation Co. v. United States, 148 U.S. 312 (1893) the Court construed the Fifth Amendment to be personal except as it applied to just compensation. The Court decided that just compensation was in rem in nature. Compensation could be impossible for incidental losses to the owner because the Fifth Amendment did not recognize his personal rights. The Court held that " 'just compensation' is to be a full equivalent for the property taken." *Id.* at 326 . This is criticized in Kanner, *Condemnation Blight: Just How Just is Just Compensation?* 48 NOTRE DAME LAW 765 (1973) [hereinafter referred to as Kanner].

10. Kanner, *supra* note 9, at 778; *see* Comment, *Eminent Domain Valuations in an Age of Redevelopment: Incidental Losses*, 67 YALE L.J. 61 (1957) [hereinafter cited as Incidental Losses].

adoption of the strict market value rule in *Fuller* would have resulted in compensation for location value, because the market value included location value.[11]

The Court in *Fuller*, however, used the modified market value rule. This differs from the strict market value rule in that the Court eliminates some element which would usually be included in computing fair market value.[12] The Supreme Court in *United States v. Cors*[13] justified this modified market value rule by suggesting that to make a fetish of market value would unnecessarily restrict the Court's ability to consider the equities involved in a given case.[14] Unfortunately the Court seems inclined to put aside its fetish for market value more readily when it is helpful in reaching the desired result.[15]

Dissatisfaction with the first two approaches has given rise to the idemnification theory, which has found more support among commentators than judges.[16] One case in which the Court alluded to this theory stated it concisely: "The owner is to be put in as good position pecuniarily as he would have occupied if his property had not been taken."[17] The indemnification theory is based in part on a liberal construction of the social cost distribution policy.[18] Justice Brennan enunciated this policy in *YMCA v. United States*: "The Just Compensation Clause was 'designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.' "[19]

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11. *See* United States v. Fuller, 409 U.S. 488, 504 & n.8 (1973) (Powell, J., dissenting).

12. *Id.* at 493 (Court eliminated location value of land); United States v. Cors, 337 U.S. 325 (1949) (Court eliminated supply and demand element of market value).

13. 337 U.S. 325 (1949).

14. As stated by Justice Douglas: "The Court in an endeavor to find working rules that will do substantial justice has adopted practical standards, including that of market value. *United States v. Miller*, 317 U.S. 369, 374. But it has refused to make a fetish even of market value, since that may not be the best measure of value in some cases. At times some elements included in the criterion of market value have in fairness been excluded." United States v. Cors, 337 U.S. 325, 332 (1949). *Accord*, United States v. Virginia Elec. & Power Co., 365 U.S. 624 (1961).

15. This is exemplified by the *Fuller* decision and United States v. Cors, 337 U.S. 325 (1949). Judicial disclaimers notwithstanding, the Court does make a fetish of market value in most cases. Kanner, *supra* note 9, at 778. "[T]heir willingness to depart from 'fair market value' as *the* criterion of 'just compensation' is more likely to materialize when such departure inures to the government's benefit." *Id.* at 808.

16. Kanner, *supra* note 9, at 784 n.92; Kanner, *When Is "Property" Not "Property Itself": A Critical Examination of the Bases of Denial of Compensation for Loss of Goodwill in Eminent Domain*, 6 CALIF. W.L. REV. 57 (1969); Incidental Losses, *supra* note 10.

17. United States v. Miller, 317 U.S. 369, 373 (1943).

18. Kanner, *supra* note 9, at 783.

19. YMCA v. United States, 395 U.S. 85, 89 (1969). Both the majority and

The notion that the public should bear the burden need not be limited to the value of the land alone. As the idemnification theory indicates, the actual costs to a condemnee may far exceed the value of the asset,[20] and this burden should also be shared by the public.[21] Had the Court in *Fuller* adopted the indemnification theory, the result certainly would have been more favorable to the landowners, since putting the landowners in as good a position as before the taking would require paying for the location value of their land.

Regardless of which general theory of compensation the Court adopted in *Fuller*, there were two specific rules which had to be considered before deciding the case. First, any increase in value created by the taking itself is not compensable.[22] Second, the condemnor must allow for the single tract theory which provides that when land has been used as a single tract, this factor will be taken into consideration for compensation even when only a part of the tract is taken.[23] These rules will be discussed here both abstractly and more concretely with reference to *Fuller*.

This disregard for any increase in value which might be derived from the taking runs contrary to the traditional concept of fair market value.

> By fair market value is meant the amount of money which a purchaser who is willing but not obligated to buy the property would pay to an owner who is willing but not obligated to sell it, taking into consideration *all uses* to which the property is adapted and might in reason by applied.[24]

By eliminating increase in value caused by the taking, the Court places the government in a substantially more favorable position than other buyers vis-à-vis the seller. Excluding what a willing buyer would pay, one is left with only what a willing seller would ask, and if the seller must ask a price without considering potential usages of the buyer, he is likely to become an unwilling seller. The result is compensation based on neither fair nor market value principles. The legal fiction of fair market value becomes a legal fantasy.

Assuming for the moment that the government should not have to pay for the increased value caused by its own taking, problems arise

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the dissent agreed with this rule of law. The Court, however, held that compensation should not be granted because they refused to accept the petitioners' factual premise.

20. Kanner, *supra* note 9, at 778.

21. For extensive discussions of the purposes of just compensation, see Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967); Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964).

22. Olson v. United States, 292 U.S. 246 (1934).

23. United States v. Miller, 317 U.S. 369, 376 (1943).

24. Arkansas State Highway Comm'n v. DeLaughter, 250 Ark. 990, 1000, 468 S.W.2d 242, 247 (1971).

in the practical application of this reasoning. For example, how can a court distinguish between enhancement due to goverment's need and enhancement due to shortage of supply and increased demand by other buyers? The United States Supreme Court was faced with this problem in *United States v. Cors.*[25]

In *Cors,* the federal government, faced with an increased need for vessels during the Second World War, requisitioned a tugboat which it had sold to Cors seven months earlier. Cors sought to recover the market value of the tugboat, but the United States Supreme Court refused to measure value by that means, observing that, "[i]t is not fair that the government be required to pay the enhanced price which its demand alone has created."[26]

Justice Frankfurter, writing for the dissenters,[27] replied:

> We speak, in referring to the interacting forces of such a period, of the 'inflationary spiral,' and although a requisition by the Government in the midst of this dynamic process undoubtedly has some effect in accelerating it, it is an effect which loses its ascertainable significance by being merged with countless other factors.[28]

Disregarding the simple logic of the dissent, the Court denied recovery of fair market value.[29]

The second rule which should be noted is the single tract theory. As expounded by Justice Roberts, "[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."[30] This rule is compatible with the general theory of indemnifying the loss of the landowner, inasmuch as it recognizes incidental losses in excess of what the landowner would have incurred had the parcel not been used as a part of a larger tract.

A problem involving both of the preceding rules and analogous to that involved in *Fuller* is the extent to which the government must compensate a condemnee for the increased value of land due to its proximity to land previously taken for a government project. Justice Roberts in *United States v. Miller* stated:

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25. 337 U.S. 325 (1949).

26. *Id.* at 333.

27. Only Justices Jackson and Burton joined Justice Frankfurter. Chief Justice Vinson dissented without comment.

28. United States v. Cors, 337 U.S. 325, 344 (1949).

29. Indeed, the Court's holding also disregarded the equities involved. The owner had purchased his tugboat after the government had decided that they did not wish to repair it. Cors spent much of his personal time and money repairing this boat only to have the government requisition it seven months later. There is no indication that Cors was speculating on the possibility of the government's exercising eminent domain over his boat. On the contrary, all indications were that the government was not interested in this boat. *Id.* at 337-340.

> The question then is whether the respondents' lands were probably within the scope of the projects from the time the Government was committed to it. If they were not, but were merely adjacent lands, the subsequent enlargement of the project to include them ought not to deprive the respondents of the value added in the meantime by the proximity of the improvement. If, on the other hand, they were, the Government ought not to pay any increase in value arising from the known fact that the lands probably would be condemned.[31]

In short, *United States v. Miller* leaves open the possibility of compensating for location value created by the government. This was the issue that split the Court five to four in *Fuller*.[32]

United States v. Fuller: The Opinion of the Court and the Dissent

The respondents, Mr. and Mrs. Fuller, operated a ranch on a tract consisting of land which they owned in fee simple, acreage which they used by virtue of a permit issued under the Taylor Grazing Act, and land leased from Arizona not involved in this case.[33] In 1967 the United States instituted an eminent domain proceeding to acquire 920 acres of the fee land[34] to be flooded as part of a dam and reservoir project in Arizona.[35] In the district court, judgment was entered on a jury verdict of $350,000. A two to one vote of the court of appeals affirmed the judgment.[36]

The issue as stated by Justice Rehnquist, writing the majority opinion for the Supreme Court, was "whether the jury might consider value accruing to the fee lands as a result of their actual or potential use in combination with the Taylor Grazing Act 'permit' lands."[37] The respondents stated the issue more precisely:

> '[I]n determining the compensation due an owner of land taken by the United States, the jury may consider the availability and accessibility of public lands, so long as consideration is also given to the possibility that the grazing permits on the public land may be withdrawn.'[38]

Thus, the respondents stressed the location value of their fee land

30. United States v. Miller, 317 U.S. 369, 376 (1943).

31. *Id.* at 377.

32. Justice Rehnquist delivered the opinion of the Court, in which Chief Justice Burger and Justices Stewart, White and Blackmun joined. Justice Powell filed a dissenting opinion, in which Justices Douglas, Brennan, and Marshall joined.

33. 409 U.S. at 488-489.

34. United States v. Fuller, 442 F.2d 504, 505 (9th Cir. 1971).

35. 409 U.S. at 494-495.

36. 442 F.2d at 505.

37. 409 U.S. at 489.

38. *Id.* at 497 n.2.

and made no claim for value to be attached to the permit itself.[39] The Court, however, reasoned that the increase value was created by a revocable government permit,[40] that by statute the permit could not create a compensable interest in the holder thereof,[41] and that the land's proximity to permit land need not be considered for eminent domain purposes. In sum, the Court held "that the Fifth Amendment does not require the Government to pay for that element of value based on the use of respondents' fee lands in combination with Government's permit lands."[42]

Justice Powell wrote the dissenting opinion in which he expressed a preference for the repsondents' point of view:

> [T]he favorable location is the central fact. Even if no permit had been issued to these respondents, their three tracts of land—largely surrounded by the grazing land—were strategically located and logical beneficiaries of the Taylor Grazing Act. In determining the market value of respondents' land, surely this location—whether or not a permit has been issued—would enter into any rational estimate of value.[43]

United States v. Fuller: An Analysis

The holding required that an exception be formulated for the general rule that, "the highest and best use of a parcel may be found to be a use in conjunction with other parcels, and that any increment of value resulting from such combination may be taken into consideration in valuing the parcel taken."[44] The Court determined that an exception should be made "where the parcels to be aggregated with the land taken are themselves owned by the condemnor and used by the condemnee only under revocable permit from the condemnor."[45] Thus, the general rule which would have favored complete compensation for respondents' land including its location value was inapplicable

39. The Taylor Grazing Act specifically provides that the permit "shall not create any right, title, interest, or estate in or to the lands." 43 U.S.C. § 315(b) (1947), *formerly* ch. 865, § 3, 48 Stat. 1270 (1934). As a result, the respondents agreed that the permit itself was not an item which if taken would have entitled them to compensation. 409 U.S. at 489. The dissent indicates that the government had misstated the issue in their brief wherein the government implied that the respondents were claiming value for the permit. *Id.* at 497 n.2. In addition the dissent suggested that the majority based its decision, sub silentio, on the government's statement of the issue, *Id.* at 503, notwithstanding the fact that the majority expressly adopted the respondents' statement of the issue. *Id.* at 489.

40. 409 U.S. at 489-94.

41. See note 39 *supra.*

42. 409 U.S. at 493.

43. *Id.* at 503. (Powell, J., dissenting) (footnote omitted).

44. *Id.* at 490. See also text accompanying notes 26-29 *supra.*

45. *Id.* at 490-91.

because of the exception. To support this exception the Court relied upon two lines of cases. The first consisted of *United States v. Cors,*[46] and *United States v. Miller.*[47] The second was the water rights cases[48] yet to be discussed.[49]

United States v. Cors and United States v. Miller

The opinion cited *Cors*[50] to support the proposition that additional value created by the government itself should not be compensated by the government.[51] As applied by the Court to the facts in *Fuller*, the value created by the permit lands would not be included in just compensation.[52]

The rule in *Cors* conflicted, however, with the rule in *Miller* which granted compensation for "the increment of value resulting from the completed project to neighboring lands originally outside the project limits, but later brought within them."[53] This conflict was resolved by drawing a distinction between the "value added to property by a completed public works project, for which the government must pay, and the value added to fee lands by a revocable permit authorizing the use of neighboring lands that the Government owns."[54] The distinction which the Court drew was founded on the assumption that completed public works are open to the public at large, while in *Fuller* the government land was a privately controlled unit.[55] This rationale failed to consider, however, that since it was agreed that no right, title, interest, or estate in the federal property could be acquired by the permit holder,[56] the permit land retained at least to some degree a similarity to land open to the public at large.

The most plausible explanation for this distinction was offered by Justice Powell: "This is an acceptance of the Government's argument that the added value derives from the permit and not from the favorable location with respect to the grazing land.[57] Thus, the distinction which the Court used to avoid the rule in *Miller* was based

46. 337 U.S. 325 (1949).
47. 317 U.S. 369 (1943).
48. United States v. Rands, 389 U.S. 121 (1967); United States v. Twin City Power Co., 350 U.S. 222 (1956); United States v. Commodore Park, Inc., 324 U.S. 386 (1945).
49. See text accompanying notes 70-88 *infra.*
50. See text accompanying notes 25-29 *supra.*
51. 409 U.S. at 491.
52. *Id.* at 493.
53. *Id.* at 492. See text accompanying note 31 *supra.*
54. *Id.* at 492.
55. *Id.* at 493.
56. See note 39 *supra* and text accompanying.
57. 409 U.S. at 503 (Powell, J., dissenting) (footnote omitted).

on a misunderstanding of the issue,[58] and the rule in *Miller* should have controlled the decision in *Fuller*, affording location value for the respondents' land.

The *Cors* decision presents different problems. The majority interpreted *Cors* as holding that the government should not have to pay for any increase in value which the government created.[59] There are two basic reasons why that interpretation should not be sustained.

First, the rule places the government in an unnecessarily advantageous position vis-à-vis condemnees by isolating the government from the realities of a free market.[60] Consider that when a private party buys a parcel of land it enters the market realizing that it will have to pay location value for the land.[61] Although a private party wishing to purchase the Fullers' ranch would have to pay for its location next to the permit land, the government need not do the same. Placing the government in a much more favorable position than any other buyer cuts severely into the equitable notion of fair market value.[62]

The second problem inherent in the rule arises upon attempting to apply its reasoning. The *Cors* decision illustrates the problems of application. The Court in *Cors* held that the government should not have to pay for the enhanced value of the tugboat, since it was the government's increased demand for ships which created the value.[63] But how could the government separate the effect of its demand on the market from that of other buyers whose demand had also increased?[64] In an economy as complex as that of the United States it could not be attempted without indulging in unwarranted speculation.

Although the rule in *Cors* may often put the condemnee in an unfavorable position and may be impractical to apply, it is well suited for situations in which "the enhanced value reflects speculation as to what the government can be compelled to pay. That is hold-up value,

58. "[T]he favorable location is the central fact . . . . [W]hether or not a permit has been issued, [location value] would enter into any rational estimate of value." *Id.* at 503 (Powell, J., dissenting). See also text accompanying notes 38-39 *supra.*

59. *Id.* at 492; United States v. Cors, 337 U.S. 325, 334 (1949).

60. *See* United States v. Twin City Power Co., 350 U.S. 222, 238 (1956) (Burton, J., dissenting).

61. "The location of land is always a factor, and often a primary factor, in determining its market value. Every public utility exercising the right of eminent *domain* is required to pay it." *Id.*

62. 409 U.S. at 504 (Powell, J., dissenting).

63. 337 U.S. at 334.

64. *Id.* at 344 (Frankfurter, J., dissenting). See text accompanying note 28 *supra.*

not a fair market value."[65] It is conceded that the government should not have to pay for the increased value caused by its taking when the condemnee is one who speculates on the possibility that the property will be taken. Acquiring property immediately preceding the government's exercise of its power of eminent domain might be precipitated more often by insider information than for other reasons. Public policy in such cases dictates that compensation be as small as the Constitution allows in order to discourage and thwart attempts to bilk the public.[66]

The legitimate investor in property, however, should be distinguished from and not be treated in a manner similar to the speculator. If the facts show that his ownership was not instigated with a view toward "selling" it to the government under condemnation proceedings, he should be afforded liberal compensation so as to assure the social distribution of the cost.[67] In *Fuller* there was no evidence or allegation of speculation.

Addressing himself to *Miller* and *Cors*, Justice Powell stated that these cases only support the "'modest generalization that compensation need not be afforded for an increase in market value stemming from the very Government undertaking which led to the condemnation."[68] Such an interpretation would have led to a quite different result. In *Fuller* the value existed before and after the condemnation, as it was derived from the land's location next to Taylor Grazing Land which remained undisturbed by the dam and reservoir project. Thus, the value did not arise from the "very Government undertaking which led to the condemnation."[69]

The Water Rights Cases[70]

In addition to *Miller* and *Cors*, the Court in *Fuller* relied on the water rights cases to support the exception to the rule[71] that the government must compensate for the highest and best use of a parcel in conjunction with other parcels.[72] The water rights cases eliminated from consideration any element of value contributed to land by navi-

65. *Id.* at 334.

66. "[T]he Government ought not to pay any increase in value arising from the known fact that the lands probably would be condemned." United States v. Miller, 317 U.S. 369, 377 (1943).

67. See notes 18-19 *supra* and text accompanying for a discussion of the social distribution of the cost policy.

68. 409 U.S. at 499 (Powell, J., dissenting).

69. *Id.*

70. See note 48 *supra.*

71. See text accompanying notes 46-48 *supra.*

72. 409 U.S. at 491.

73. United States v. Rands, 389 U.S. 121, 126 (1967); United States v. Twin City

gable waters.[73] The reasoning was stated by Justice Lurton: "Ownership of a private stream wholly upon the lands of an individual is conceivable; but that the running water in a great navigable stream is capable of private ownership is inconceivable."[74] This position seems axiomatic. The government owns navigable waterways, but private parties may not. If the private parties do not own the waterways then they need not be compensated when the government uses those waterways. Yet, although no compensation need be given for the stream itself, the location value of the land next to a navigable waterway should be a factor in just compensation. Similarly, in *Fuller* the Court should have allowed compensation for the location value, which would not require compensation for the permit itself.

These issues have not been adequately distinguished in the past. In *United States v. Twin City Power Co.*[75] the confusion was illustrated by Justice Douglas' opinion:

> Location of the lands might under some circumstances give them special value, as our cases have illustrated. But to attach a value of water power of the Savannah River due to location and to enforce that value against the United States would go *contra* to the teaching of *Chandler-Dunbar*—'that the running water in a great navigable stream is capable of private ownership is inconceivable.'[76]

While Justice Douglas' statement left open the possibility for increased compensation due to the land's favorable location, he did not reach that conclusion because he reasoned that the result would mean attaching a value to the water power, which is incapable of private ownership. The problem could have been resolved by the realization that the value was to be attached to the land and not to the water power. Applying this rationale to *Fuller*, the respondents had a right to have a value attributed to their fee land, and not to the government permit land.

Writing for the four dissenters in *United States v. Twin City Power Co.* Justice Burton made the distinction quite clear:

> It is because of that land's location near, but apart from, the flow of the stream that an additional fair market value, long recognized in this land, was recommended and approved below. The location of land is always a factor, and often a primary factor, in determining its market value. Every public utility exercising the right of eminent domain is required to pay it.[77]

The water rights decisions culminated in the recent case of

Power Co., 350 U.S. 222, 228 (1956).

74. United States v. Chandler-Dunbar Water Power Co., 229 U.S. 53, 69 (1913).

75. 350 U.S. 222 (1956).

76. *Id.* at 227-28.

77. *Id.* at 238.

United States v. Rands,[78] where the Court conceded that navigable waters may enhance the market value of riparian property. The Court still maintained, however, that any rights and value which the landowner may have acquired were "not property within the meaning of the Fifth Amendment, and need not be paid for when appropriated by the United States."[79]

Justice Powell pointed out in *Fuller* that the teachings of the water rights cases are subject to various interpretations.[80] First, as interpreted by Justice Rehnquist:

> [T]he Government as condemnor may not be required to compensate a condemnee 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.[81]

This interpretation can lead to harsh results, as is evidenced by the outcome of *Fuller*.

Second, according to Justice Powell, the water rights cases can be limited to "the Government's 'unique position' with respect to 'navigable waters.' "[82] In an attempt to explain the reasoning in the water rights cases and to separate it from the problem posed in *Fuller*, Justice Powell drew a distinction between the government as condemnor and as property owner.[83] The government need not compensate adjoining landowners for decreased value in their land due to a change in the use of government owned property any more than would a private property owner.[84] As condemnor, however, its general obligation to compensate is not open to question[85]—only the quantum of recovery and its means of computation may be disputed. A clear understanding of this distinction leads to the following conclusion: the broadest rule which can be formulated from these cases is that "the Government need not compensate for location value attributable to the proximity of Government property utilized in the same project."[86] Since the permit land was not used in the dam and reservoir project,[87] the rule has no application to *Fuller*.

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78. 389 U.S. 121 (1967).
79. *Id.* at 126.
80. 409 U.S. at 500.
81. *Id.* at 492.
82. *Id.* at 500.
83. *Id.*
84. *Id.* at 500. This statement is obviously limited by general property and tort law concepts of nuisance. *See, e.g.*, McFarlane v. City of Niagara Falls, 247 N.Y. 340, 160 N.E. 391 (1928).
85. *See* United States v. Fuller, 409 U.S. 488, 497-500 (Powell, J., dissenting).
86. *Id.* at 500.
87. *Id.* at 495.

The third view suggested by Justice Powell was the most far reaching. The dissent hinted that the water rights cases might have been wrongly decided.

> [I]t is important to remember when interpreting them [the water rights cases] that they cut sharply against the grain of the fundamental notion of just compensation, that a person from whom the Government takes land is entitled to the market value, including location value, of the land.[88]

Given these numerous alternative interpretations of *Miller, Cors*, and the water rights cases, the decision in *Fuller* is questionable.[89]

Summary

Several points warrant reiteration in reviewing this opinion. First, separation of the value of the government asset the permit land, from the value created by location next to it is essential for a clear understanding of this case. The issue was clearly enunciated in the district court's instructions to the jury:

> '[I]n determining the *value of the fee land* and in awarding compensation to the owners, you should *consider the availability and accessibility of the permit and leased land* and *its use in conjunction with the fee land taken* and give to the fee land such value as, in your judgment, according to the evidence, should be given on account of such *availability and accessibility* of the permit and leased land, if any.'[90]

The judge cautioned the jury not to give any value to the permit itself and to remember that the permit could be revoked at any time without necessitating compensation by the government.[91]

The second point is that the government asset remained substantially unchanged both before and after the condemnation proceeding. The land still was available as permit land under the Taylor Grazing Act.[92]

The third point is that even though the permit did not "create any right, title, interest or estate in or to the lands,"[93] the permits were of "considerable value to ranchers and served a corresponding public interest in assuring the 'most beneficial use' of range lands."[94] Hence, land value on the open market included its proximity to federal permit land. Calculation of land's value "artificially denuded of

88. *Id.* at 500.

89. As Justice Powell phrased this for the dissent: "Neither of the lines of cases on which the Court relies seems apposite." *Id.* at 498.

90. *Id.* at 496 (emphasis added).

91. *Id.* at 497.

92. *Id.* at 495.

93. *Id.* at 489.

94. *Id.* at 495.

its surroundings"[95] was contrary to principles of the market place and of fairness.

The significance of these points is that the Fullers' land should have been afforded location value, for location is an inextricable part of a land's market value. Whether a parcel of land is situated near as school, a church, a bus stop, a shopping center, a vacant lot, or federal grazing land is relevant in deciding how much it is worth in the market place. Whether or not the owner utilizes that school, is a member of that church, rides the bus, shops at those stores, plays baseball in the vacant lot, or has a permit to use the federal land should be irrelevant. The price the buyer is willing to pay has nothing to do with the other rights possessed by the present owner, such as a permit to graze cattle, unless they are covenants running with the land. The price will be affected, however, by the current and potential use of the property in light of its location.

In discussing the issues in *Fuller*, Justice Rehnquist said: "The constitutional requirement of just compensation derives as much content from the basic equitable principles of fairness as it does from technical concepts of property law."[96] It is difficult to see how denial of location value to a property owner would serve either of these principles.

Conclusion

The underlying significance of just compensation cases like *United States v. Fuller* may not be readily apparent until an accounting is made. In *United States v. Twin City Power Co.*, the appraised value of the land was between 1.2 and 1.6 million dollars, yet the value resulting from the majority's ruling was $150,841.45.[97] In *United States v. Fuller* the difference was equally staggering. "Respondents' witnesses valued the land at figures up to nearly a million dollars, while the government's expert witness assigned it a value of $136,500. In what was manifestly a compromise, the jury awarded $350,000."[98] Clearly, the monetary impact can be considerable.

The views expressed in *Fuller* pose a continuing threat to landowners in that they may not be reimbursed for their property's location value if it is taken under eminent domain. *Fuller* not only dampened hope that the Court would adopt the indemnity theory but also marked a retreat from the strict market value concepts in favor of the modified market value rule.[99] This slow but continuous erosion of the just com-

95. *Id.* at 504.
96. *Id.* at 490.
97. United States v. Twin City Power Co., 350 U.S. at 236-37 nn. 8, 9 (1956).
98. 409 U.S. at 504 n.8 (1973).
99. See text accompanying notes 8-20 *supra.*

pensation concept is contrary to the philosophy upon which the Fifth Amendment was based. Just compensation was placed in historical perspective when Justice Brewer wrote for the Court in *Monongahela Navigation Co. v. United States*:

> The first ten amendments to the Constitution, adopted as they were soon after the adoption of the Constitution, are in the nature of a bill of rights, and were adopted in order to quiet the apprehension of many, that without some such declaration of rights the government would assume, and might be held to possess, the power to trespass upon those rights of persons and property which by the Declaration of Independence were affirmed to be unalienable rights . . . .
>
> And in this there is a natural equity which commends it to every one. It in no wise detracts from the power of the public to take whatever may be necessary for its uses; while, on the other hand, it prevents the public from loading upon one individual more than his share of the burdens of government, and says that when he surrenders to the public something more and different from that which is exacted from other members of the public, a full and just equivalent shall be returned to him.[100]

The apprehensions were real at the time of the adoption of the Bill of Rights, and they are renewed today.

100. Monongahela Navigation Co. v. United States, 148 U.S. 312, 324-25 (1893).