

SUPPORT GROUNDED IN LITIGATION EXPERIENCE
FOR USING THE FAIR MARKET VALUE MEASURE OF
JUST COMPENSATION IN CASES INVOLVING THE
UNITED STATES

JONATHAN BRIGHTBILL & PETER MCVEIGH*

INTRODUCTION

The Environment and Natural Resources Division of the U.S. Department of Justice (“ENRD”) files condemnation actions on behalf of the United States. It also defends the United States in inverse condemnation cases. The United States Constitution requires the United States to pay “just compensation” when it acquires (or “takes”) real property from its owners.¹ The United States has this obligation, both when exercising the prospective power of eminent domain and when a “taking” is adjudicated to have occurred by an inverse condemnation.

Under Supreme Court precedent, the measure of just compensation is the “fair market value” of the taken property on the date of the taking.² “Fair market value” means the amount that a willing buyer would have paid on the date of taking to purchase the property from a willing seller on the open market.³ In its litigation, ENRD’s attorneys are committed to seeing the United States meet its constitutional obligation to pay just compensation. The Division’s experience is that the fair market value is the most objective of possible measures of just compensation for a number of reasons. Other possible measures would be more difficult, time-consuming, and expensive to apply.⁴ Subjective measures are more susceptible to manipulation and can result in excessive, and thus unjust, compensation. While ENRD is often successful in defeating such claims, even litigation

* From July 2017 to January 2021, Jonathan Brightbill served at the Environment and Natural Resources Division, U.S. Department of Justice, initially as Deputy Assistant Attorney General and then as Acting Assistant Attorney General. Peter McVeigh is an attorney advisor in the Law and Policy Section of the Division.

1. U.S. CONST. amend. V (“[N]or shall private property be taken for public use, without just compensation.”).

2. *Kirby Forest Indus. v. United States*, 467 U.S. 1, 10 (1984).

3. *Id.*

4. See *Kirby Forest Indus.*, 467 U.S. at 10, n.15; *United States v. 564.54 Acres of Land*, 441 U.S. 506, 511–12 (1979).

under the well-established fair market value measure can result in excessive theories and claims of compensation. Some are discussed further below. Departure from the venerable fair market value standard is likely to increase the risk of overcompensation and may result in less overall social welfare.

I. THE ENVIRONMENT DIVISION

ENRD has a broad mission, employing approximately 425 attorneys who handle approximately 6,500 cases and matters.⁵ Two areas of the Division's work are relevant to this Essay. First, ENRD's Land Acquisition Section files condemnation actions in federal district courts to acquire real property for important public needs, such as for military installations.⁶ In the past several years, for example, this work has included acquiring property for the border wall. ENRD's condemnations are governed by Rule 71.1 of the Federal Rules of Civil Procedure and laws enacted by Congress, such as the Declaration of Takings Act, codified at 40 U.S.C. § 3114.

In addition, ENRD's Natural Resources Section defends "takings cases" in which plaintiffs (or "landowners"⁷) allege that the United States has taken real property without providing just compensation.⁸ Landowners file these cases in either the Court of Federal Claims or federal district courts.⁹ The cases may involve, for example, alleged water rights takings, alleged takings related to so-called "rails-to-trails" conversions, alleged overflight-related takings, and hurricane and other flood-related litigation.¹⁰ There can be many disputed issues in these cases, including whether there was a compensable taking

5. See *About the Division*, ENV'T & NAT. RES. DIV., U.S. DEP'T OF JUST. (Jan. 20, 2021), <https://www.justice.gov/enrd/about-division>; *Jonathan D. Brightbill*, WINSTON & STRAWN LLP, <https://www.winston.com/en/who-we-are/professionals/brightbill-jonathan-d.html> (last visited Sept. 20, 2021).

6. *Land Acquisition Section*, ENV'T & NAT. RES. DIV., U.S. DEP'T OF JUST. (Aug. 31, 2021), <https://www.justice.gov/enrd/land-acquisition-section>.

7. For convenience, this Essay refers to the persons who receive, or at least seek, compensation from the United States in ENRD's cases as "landowners," even though that term does not accurately describe all of the individuals and entities involved in the cases.

8. *The World of Inverse Condemnation*, ENV'T & NAT. RES. DIV., U.S. DEP'T OF JUST. (May 12, 2015), <https://www.justice.gov/enrd/world-inverse-condemnation>.

9. *Id.*

10. See *Significant Cases*, ENV'T & NAT. RES. DIV., U.S. DEP'T OF JUST. (May 12, 2015), <https://www.justice.gov/enrd/significant-cases>.

and, if so, what property interest was taken, as well as the measure of just compensation owed for a taking.

II. POLICIES, PRACTICES, AND REQUIREMENTS THAT SERVE TO PROTECT THE INTERESTS OF LANDOWNERS

When discussing the fair market value measure of just compensation, it is appropriate to consider the context in which the measure is applied. Importantly, in ENRD's condemnation actions and takings cases, numerous applicable policies, practices, and requirements serve in part to protect the interests of landowners.

As an initial matter, ENRD does not approach its condemnation actions and takings cases like ordinary litigants. The United States does not "game" its valuations. For example, the United States does not present the lowest plausible valuation arguments for determining the fair market value of the property on the date of taking. Nor does it submit expert reports reflecting half the value of a property—hoping a jury or land commission will split the difference out of empathy for a landowner and still get the ultimate judgment correct. Rather, ENRD's and the federal government's policy is to be open, transparent, objective, and uniform in the approach used to determine fair market value. Attorneys of the Department of Justice take an oath to preserve, protect, and defend the Constitution of the United States. They take seriously all of these responsibilities, including the United States' constitutional responsibility to pay just compensation for taken real property. However, while ENRD attorneys must respect and address the United States' constitutional obligation, they also must be mindful of their obligation to the taxpayer to ensure landowners are not overcompensated.

To this end, in developing appraisals of fair market value and litigating positions in their cases, ENRD's Land Acquisition and Natural Resources Sections adhere to the Uniform Appraisal Standards for Federal Land Acquisitions.¹¹ This is known as the "*Yellow Book*," because the paper copy historically has had a yellow cover. The *Yellow Book*, which is frequently cited in legislation and court rulings, has

11. See INTERAGENCY LAND ACQUISITION CONFERENCE, UNIFORM APPRAISAL STANDARDS FOR FEDERAL LAND ACQUISITIONS (2016), <https://www.justice.gov/file/408306/download> [hereinafter *YELLOW BOOK*].

guided appraisals of land being acquired by the United States since its original publication in 1971. The *Yellow Book* is written by the Interagency Land Acquisition Conference under the leadership of ENRD's Land Acquisition Section. ENRD makes an electronic version available on the Department of Justice's website. ENRD's reliance on the *Yellow Book* is consistent with and furthers ENRD's and the federal government's policy of being open, transparent, objective, and uniform in the approach used to determine fair market value.

There are also laws enacted by Congress that serve in part to ensure fair treatment of landowners. For example, under the federal Uniform Relocation Assistance and Real Property Acquisition Policies Act, federal agencies generally seek to acquire land by direct purchase before ENRD files a condemnation action.¹² Also, under the Equal Access to Justice Act ("EAJA"), when a court awards just compensation to a landowner in a condemnation action, the United States may be obligated to pay attorneys' fees and costs. The award to the landowner must be closer to the landowner's trial testimony on value than the United States' testimony, provided the United States' position cannot be considered "substantially justified."¹³ To be sure, landowners are rarely awarded attorneys' fees and costs under EAJA. ENRD believes that is because its attorneys attempt to get valuations right in the first place.

III. EXCESSIVE CLAIMS FOR COMPENSATION BY LANDOWNERS

The above policies, practices, and requirements serve in part to protect landowners. They do not, however, discourage landowners from challenging government valuations if they question the compensation. In fact, ENRD must defend many cases each year based on speculative and excessive theories of valuation. This is one of the primary reasons why ENRD supports the use of the fair market value measure of just compensation. ENRD attorneys expend considerable resources responding to theories of excessive compensation made against the United States. It is also common that when ENRD's cases are actually litigated, landowners are awarded more than an order of magnitude—and often several orders of magnitude—less

12. See 42 U.S.C. § 4651.

13. See 28 U.S.C. § 2412(d)(2)(H).

compensation than they argued for before the court. Absent new facts or information coming to light during discovery, final judgments tend to be far closer to the United States' initial offers of compensation without litigation than what litigants who pursue claims in court tend to recover.

Described in the remaining sections of this Essay are several examples of approaches ENRD has seen used to attempt recovery of excessive compensation. Two specific cases are described where the approaches and/or similar ones were unsuccessfully deployed. The fact that ENRD must address these kinds of efforts under the fair market value measure of just compensation, which is recognized as limiting the potential for subjectivity and inefficiencies, strongly suggests that other potential measures of just compensation could open the door to more excessive compensation. In other words, these examples raise concern that other possible measures of just compensation may be unjust to the United States and its taxpayers.

A. Landowner Approaches

ENRD regularly addresses varied approaches used by landowners seeking to recover excessive compensation from the United States. One such approach is manipulation of the highest and best use of property. Under federal law, before fair market value can be determined, an appraiser must first evaluate the uses to which the property feasibly, reasonably, and legally can be put.¹⁴ The appraiser then determines fair market value based on the "highest and best use."¹⁵ ENRD frequently is called upon in its cases to address inflated valuations that are based on speculative, impracticable, impossible and/or illegal uses.

Another approach ENRD expends considerable resources addressing is reliance on irrelevant sales of property. The preferred method for determining fair market value involves analysis of open market sales of properties that are comparable to the taken property.¹⁶ ENRD frequently responds to inflated valuations that rely improperly on sales of property that are not at all "comparable" to the

14. YELLOW BOOK, *supra* note 11, §§ 1.4.3–1.4.7.

15. *See id.*

16. *Id.* §§ 1.5, 4.4.

taken property. ENRD also is sometimes forced to address reliance on sales that are not “open market” sales. Such sales are often not representative of what a willing buyer would offer a willing seller in a free and open transaction.

A third approach regularly addressed by ENRD involves the derivation of opinions of value largely or entirely from projections of future income. This attempts to value property based on the profitable cash flow the taken properties purportedly would have generated in the future, rather than on “comparable sales.”¹⁷ ENRD often must respond to such valuation approaches even when there is no such business operating on the property when taken. Contrary to the age-old real estate adage of “location, location, location,” landowners may seek to inflate such valuations, for example, by inappropriately incorporating elements of value from a business located on other property better suited for such commerce. Landowners may use such approaches even where the value of the business located on other property substantially reflects a superior location, as compared with the taken property. If successful, these varied kinds of approaches by landowners would result in inflated awards of compensation and impacts on the taxpayer.

B. Case Examples

ENRD has a strong track record of success in defeating these types of efforts in litigating cases under the fair market value measure of compensation. One example is *United States v. 275.81 Acres of Land* (W.D. Pa.), a condemnation action filed by ENRD to acquire land for the Flight 93 National Memorial.¹⁸ On September 11, 2001, United Airlines Flight 93 was carrying passengers from Newark to San Francisco, when it was hijacked by four al-Qaeda terrorists. The plane crashed into a field in rural Somerset County, Pennsylvania, during an attempt by passengers to regain control of the cockpit. This killed all forty-four people aboard.

At the time of this tragedy, the area where Flight 93 crashed was a vacant field. There were three dilapidated metal panel buildings in

17. *See id.* § 4.4.4.

18. *United States v. 275.81 Acres of Land*, No. 09-233, 2014 WL 1248205, at *1 (W.D. Pa. Mar. 26, 2014).

the area. The landowners nonetheless sought \$30 million for the taken property in the condemnation action based on a claimed potential for future development of a private memorial. The landowners assumed minimal construction and operational costs. Further, in developing estimates of revenue and income, they relied on comparisons to public memorials, such as those at Pearl Harbor, Oklahoma City, and Gettysburg. However, those sites are located in heavily trafficked areas and were otherwise not comparable to the taken property. The landowners' valuation thus relied upon, among other things, inappropriate comparisons to public memorials and unsupported speculation concerning the income the memorial purportedly would have generated. After a weeklong trial, the landowners were awarded \$1.5 million, much less than the \$30 million they had sought.¹⁹

A second example is *United States v. 400 Acres of Land* (D. Nev.). ENRD filed this condemnation action to acquire land located in a remote desert area within the borders of the Nevada Test and Training Range.²⁰ The property is a two-and-a-half-hour drive through the desert from Las Vegas, Nevada. Many years ago, the area had been used for mining. The surrounding training range's operations are often key to developing capabilities of war fighters engaged in current conflicts. Nevertheless, the federal government must cancel all missions when private parties are present on the property to avoid the risk of exposing classified military activity and for safety reasons. This condemnation was important for national security purposes.

The landowners asserted a range of excessive valuations, seeking as much as \$2 billion. The landowners assumed, among other things, that as of the date of the taking, the property's highest and best use would have been conversion of the desert scrub into a "tourism mecca." They hypothesized that alien enthusiasts would be eager to vacation in view of the purported "Area 51" hangers located six to seven miles in the distance.

The landowners' income approach to valuation speculated that—but for the government condemnation of the land, which then merely had several decrepit miners' cabins on it—*tens of thousands* of people per month would have traveled hours through the hot desert

19. *Id.* at *1, *7–8.

20. *United States v. 400 Acres of Land*, No. 15-1743, 2020 WL 5074255, at *1 (D. Nev. Aug. 29, 2019).

from Las Vegas to view these buildings and pay anywhere from \$200 per person to as much as \$1,000 per person for this opportunity. The court excluded most of the landowners' valuations in connection with motion practice, including the aggressive and easily manipulated income-based approach.

The court nevertheless allowed the landowners to advance a \$50 million valuation based on a more traditional comparable sales technique. Because the court still allowed theoretical "tourism" as highest and best use, the valuation nevertheless relied upon five purportedly "comparable" sales of "commercial tourism" land in the Las Vegas metro area. These comparable sales included one just off the Las Vegas Strip, on Tropicana Boulevard next to the MGM Grand.

The landowners pursued this valuation even though the nearest town to the landowners' cabins, the town of Rachel (with a population of fifty-four), is located forty miles away from their desert site—and forty miles closer to Las Vegas. The property is also located fifteen miles from the nearest roadway, and gravel and dirt roads must be traversed to reach it. Further, the landowners had done nothing to pursue the potential use of their property for tourism during their many years of ownership. Nor had any interest been expressed by others in putting the property to such use. Indeed, anyone attempting to do so would have faced a broad range of impediments.

After a lengthy trial, the landowners were awarded \$1.1 million for their non-mineral interests and recovered an additional agreed-to \$100,000 for their mineral interests.²¹ This was close to the amount the United States was prepared to pay without the time, expense, and burden of litigation.

CONCLUSION

ENRD and other Department of Justice attorneys take seriously their oath to preserve, protect, and defend the Constitution of the United States. That includes their recognition of the United States' responsibility to pay just compensation for taken property. Through the application of the *Yellow Book's* standards and hundreds of years of case law, ENRD and the federal government work diligently to satisfy the United States' constitutional responsibility to pay fair

21. *See id.* at *1, *10.

market value in a manner that is open, transparent, objective, and uniform. By doing so, they promote what is “just” to landowners, the taxpayer, and the government. Considerable resources are nevertheless expended addressing certain landowner attempts to recover excessive compensation even under the relatively objective fair market value measure of just compensation. While ENRD has a strong track record of rebuffing such efforts and resolves many cases through mutual resolution, the continuing need for this work suggests that other, potentially more subjective measures of just compensation could open the door to more aggressive claims and potential abuse. While the fair market value standard has its critics, other standards may lead to less consistent, more expensive, and more arbitrary outcomes with less overall societal benefit.