

Uniform Appraisal
Standards for Federal
Land Acquisitions

The Interagency Land Acquisition Conference has developed, promulgated, and adopted the Uniform Appraisal Standards for Federal Land Acquisitions and is solely responsible for their content. The Appraisal Institute's contribution to the Uniform Standards consisted of editorial and production assistance unrelated to the substance of the Uniform Standards, and the Appraisal Institute assumes no responsibility for the content of the Uniform Standards. The Appraisal Institute has published the Uniform Standards for the Interagency Land Acquisition Conference to help make them available in hard copy form to interested parties.

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INTERAGENCY LAND ACQUISITION CONFERENCE

Uniform Appraisal Standards for Federal Land Acquisitions

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Foreword

This is the fifth edition of the *Uniform Appraisal Standards for Federal Land Acquisitions*. The Standards were originally published in 1971 with the most recent revision published in 1992. The existing Standards have earned a prestigious position. They are frequently cited by Congress in legislation relating to the valuation of federal land acquisitions and have guided the appraisal process in these matters since their original issuance by the Interagency Land Acquisition Conference.

The Interagency Land Acquisition Conference, established on November 27, 1968, by invitation of the Attorney General, is a voluntary organization composed of representatives from the many federal agencies engaged in the acquisition of real estate for public uses. The Conference adopted and continues to adhere to several goals with respect to land acquisition, including the promulgation of uniform appraisal standards and guidelines for appraisal reports. The broad experience of the member representatives of the Interagency Land Acquisition Conference assures that the federal appraisal standards developed for land acquisitions are uniform, fair, and efficient. The Interagency Land Acquisition Conference is chaired by the Assistant Attorney General for the Environment and Natural Resources Division, Department of Justice. Its activities are conducted by *ad hoc* committees composed of member representatives.

The Interagency Land Acquisition Conference Executive is Virginia P. Butler, Chief of the Land Acquisition Section of the Environment and Natural Resources Division, Department of Justice. James D. Eaton, MAI, of the Appraisal Unit, Department of Justice, authored this 2000 revision of the *Uniform Appraisal Standards for Federal Land Acquisitions*. He was assisted in this effort by Appraisal Unit Chief Brian Holly, MAI; trial attorney Marc Gordon; and Ms. Butler. These Standards were submitted to the Appraisal Institute for editorial review and the Department of Justice gratefully acknowledges the editorial assistance of the Appraisal Institute in their preparation. While the vast majority of federal land acquisition is achieved through voluntary means, sometimes litigation is necessary. With this in mind, Mr. Eaton has done an admirable job of updating the case law, expanding the treatment of novel or difficult valuation questions, and recognizing the vast changes that have recently characterized the real estate appraisal profession.

The various departments and agencies of the Interagency Land Acquisition Conference commented upon a draft of these Standards. Their comments and suggestions were taken into account in a modified final revision that the Conference approved.

Under a cooperative agreement between the Appraisal Institute and the Department of Justice, the Appraisal Institute will publish this 2000 edition of the *Uniform Appraisal Standards for Federal Land Acquisitions*. Publication of these Standards will ensure that the “Yellow Book” is available in hard copy to all potential users. The Standards are also available on the Department of Justice’s Internet Web site.

Lois J. Schiffer, Chair
Interagency Land Acquisition Conference
Dated: December 20, 2000



Purpose

These Standards have been prepared for use by appraisers to promote uniformity in the appraisal of real property among the various agencies acquiring property on behalf of the United States. It should make no difference to the landowner, whose property is being acquired, which agency is acquiring the land, or what method of acquisition it uses.

Uniformity and fairness in the treatment of property owners are also the goals of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, P.L. 91-646, as amended, 42 U.S.C §4601, et seq. Portions of this Act deal with the appraisal of real property and are cited and discussed herein in the appropriate sections. These Standards presume full compliance with the pertinent provisions of the Act.

The appraisal of property for purposes of direct voluntary purchase, exchange, or eminent domain by the United States presents unique problems not ordinarily encountered in appraisals for sale, tax, mortgage, rate-making, insurance, and other purposes. This results naturally from the fact that the method of appraisal, the elements and factors to be considered and the weight given them, and the standards of valuation are determined to a great extent by law. Therefore, the judgment or opinion of the individual appraiser should be governed by proper legal standards, whether land is being acquired by voluntary purchase, exchange, or condemnation.

These Standards have been prepared in recognition of the fact that the vast majority of federal land acquisitions are accomplished by voluntary means. However, the utmost objectivity, accuracy, and thoroughness of appraisals, upon which those acquisitions are based, is essential regardless of the government's method of acquisition. The federal appraisal standards are the same for voluntary acquisitions as they are for acquisitions by condemnation. Therefore, the purpose of these Standards is to set forth the general principles applicable to the appraisal of property for federal land acquisitions by both voluntary means and condemnation.

The rules stated herein are subject to modification under the varying circumstances of particular agency programs or cases.¹ Of course, the application of the general rules can reveal wide differences of opinion, some of which must ultimately be resolved in court. Because the amount of compensation to be paid to property owners when their property is acquired by the government for public use is a matter of constitutional law, appraisers are cautioned to confer with counsel for the acquiring agency on legal questions affecting the valuation and, if condemnation is instituted or appears necessary, with the representatives of the Department of Justice who will be charged with the responsibility of preparing the case for trial. In this manner, specific written legal instructions can resolve doubt about the proper method of valuation or the application of particular rules to specific factual situations.

Appraisers and other users should also recognize that these Standards may require modification in certain specific cases prompted by special legislation or court order, by stipulations made between an agency and a property owner in a voluntary acquisition, or by stipulations entered into between litigants in a condemnation action. Such modifications, however, should not be undertaken without specific written instructions from the acquiring agency or its legal counsel.

1. Many of the land acquisition agencies have adopted appraisal and/or review handbooks or manuals which, in some instances, modify these Standards to meet their specific acquisition programs. Examples of such manuals/handbooks include U.S. Fish and Wildlife Service (342 FW 1, *Appraisal Handbook*; 342 FW 2, *Appraisal Review Handbook*); U.S. Forest Service (*Manual* FSM 5410; *Handbook* FSH 5409); U.S. Army Corps of Engineers *Real Estate Engineer Regulations* (ER 405-1-12); *Bureau of Land Management Manual* (9310).

Scope

These Standards will cover the following areas:

- A. Data documentation and appraisal reporting standards
- B. Legal basis for appraisal standards for federal land acquisitions
- C. Standards for the review of appraisals
- D. Standards for unique and miscellaneous appraisal problems

Section A of these Standards derives from generally accepted professional appraisal standards and appraisal reporting standards. However, these have occasionally been modified to meet the overriding standards created by federal law, as described in Section B of these Standards. The standards for appraisal report content and documentation presented in this section must be met. However, the appraisal report formatting presented here is merely recommended rather than mandatory.²

Section B of these Standards is based on federal case law, which is cited throughout the section. The U.S. Constitution provides that private property will not be taken and converted to public use by the government without payment to the landowner of just compensation. The federal courts have adopted the working rule that, in general, the just compensation due for the acquisition of property by the government is equivalent to the property's *market value*. It is, therefore, incumbent upon appraisers who make market value appraisals for federal land acquisitions to understand the federal case law relating to proper application of the appraisal process as applied to federal land acquisitions.

In addition to the case law that supports and, in some instances, dictates the standards set out in Section A, Section B includes a discussion of the legal standards established for treatment of many recurring valuation problems. Therefore, Section B of the Standards is intended for use not only by appraisers, but also by agency and Department of Justice attorneys whose legal practice includes matters relating to real estate valuation.

Section C of the Standards is derived from generally accepted appraisal review standards, as well as from federal regulations requiring such reviews. The purpose of Section C is to insure that appraisals used by the government in its land acquisitions have been

2. Nonetheless, appraisers should review their appraisal contracts or assignment letters in this regard. Some agencies may specify in their contracts/assignment letters that the use of Section A formatting is mandatory.

conducted in an unbiased, accurate, and thorough manner in accordance with these Standards and applicable law.

Section D addresses the proper treatment of specialized or unique but frequently encountered appraisal problems.

While these Standards aim both to encourage uniform approaches to appraisal problems and to prescribe requirements for adequate supporting data and other factual information used to develop market value estimates, the materials are not in any degree presented to limit the scope of appraisal investigations or to bias the independent judgment of value estimates of appraisers employed by federal agencies. Also, to insure maximum flexibility to agencies in accomplishing their program goals, provisions have been made, under certain circumstances, for the modification of the Section A “Data Documentation and Appraisal Reporting Standards.” (See Section A, Introduction.)



Policy

In acquiring real property, or any interest therein, it is United States' policy to impartially protect the interests of all concerned. The Fifth Amendment of the United States Constitution asserts: "nor shall private property be taken for public use, without just compensation." Since "the courts early adopted, and have retained, the concept of market value"³ as the measure of just compensation, the United States, as a matter of general policy, bases its land acquisitions on market value appraisals: "[I]t is the duty of the state, in the conduct of the inquest by which the compensation is ascertained, to see that it is just, not merely to the individual whose property is taken, but to the public which is to pay for it."⁴

3. *United States v. Miller*, 317 U.S. 369, 374 (1943).

4. *Searl v. School District, Lake County*, 133 U.S. 553, 562 (1890); *Bauman v. Ross*, 167 U.S. 548, 574 (1897).



Data Documentation and Appraisal Reporting Standards

Introduction. Appraisal preparation, documentation and reporting shall be in conformity with these Standards, which are compatible with standards and practices of both the appraisal industry and the current edition of the *Uniform Standards of Professional Appraisal Practice* (USPAP).⁵ It has been necessary, however, to invoke USPAP's Jurisdictional Exception Rule in certain instances, so as to conform these Standards with overriding federal law relating to the valuation of real estate for government acquisition purposes.⁶ Appraisals prepared in accordance with these Standards will be considered for the purpose of these Standards to constitute a *complete* appraisal, as defined by USPAP.⁷

It should be recognized that the government's needs for private property for public purposes are quite varied and have a tendency to create unique valuation problems. These Standards do not cover all of the valuation problems that might be encountered in the appraisal of property for government acquisition, and so should not be considered as rigid rules which must be applied in every instance.

The appraiser may sometimes encounter unique appraisal problems that require modification of the appraisal process and the appraisal report to ensure that the specific appraisal problem is adequately addressed and that the appraiser's final conclusion of value is accurate, and has been developed in accordance with controlling federal law. With written agency concurrence, appraisers should feel free to deviate from the Standards in those unique cases that require deviation to properly solve appraisal problems so long as such deviation is in accord with federal law and can be adequately justified. Such justification must be included in the appraisal report.

The Standards set out below have been developed in recognition that government acquisition of private land can create difficult and complex valuation problems, the solutions to which must be developed with the utmost care. Therefore, these standards are especially appropriate when proposed acquisitions are complex, high value, sensitive, or

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5. The Appraisal Foundation, *Uniform Standards of Professional Appraisal Practice* (USPAP), 2000 ed.
 6. Section D-1 of these Standards describes the instances in which the Jurisdictional Exception Rule is invoked. The comparison of these Standards and USPAP utilized, for purposes of comparison, the 2000 edition of USPAP. Appraisers should be aware that future changes in USPAP may require additional jurisdictional exceptions.
 7. **"Complete Appraisal:** the act or process of developing an opinion of value or an opinion of value developed without invoking the DEPARTURE RULE." USPAP, Definitions. USPAP's Departure Rule relates to the acceptance of an appraisal assignment in which the appraiser's scope of work is less than, or different from, the work that would be required by USPAP's specific requirements.

controversial, or when they must be referred to the Department of Justice for litigation. However, economic considerations and unique program requirements may require modification to these Standards. It is recognized that not all government acquisitions result in complex valuation problems, thus not all appraisal reports will require the degree of information, support and documentation cited herein.⁸

Therefore, agencies and valuation managers should modify these Standards as necessary or required to meet their specific agency or program requirements. In making such modifications, the comparative cost of the appraisal services and the anticipated cost of the property to be acquired, as well as the anticipated complexity of the valuation problem, should be considered.

Appraisers should recognize that if these Standards are modified by an agency or program manager for the reasons noted above, the appraiser's assignment may result in a *limited appraisal* as defined by USPAP⁹ and the appraiser should identify the appraisal as such. Under no circumstances, however, may appraisal standards be set at a level below the minimum required under 49 C.F.R. §24.103.

These appraisal Standards are intended to establish a required standard for appraisal report content and documentation, subject to the above exceptions. For easy reference by appraisers and reviewers, a *checklist* of report content and documentation required under these Standards has been included in the addenda of the Standards marked as "Appendix A."¹⁰ In addition, supplemental content and documentation standards for appraisal reports to be used by appraisers who will testify as expert witnesses in federal court are required by Federal Rule of Civil Procedure 26(a)(2)(B). These supplemental standards are explained in Section D-2 of these Standards.

These appraisal Standards are not, however, intended to establish an absolute requirement for appraisal report formatting. The report formatting described in these standards, which consists of a four-part appraisal report for total acquisition appraisals and a seven-part appraisal report for partial acquisition appraisals, should be considered only as a recommended guideline for report format. Appraisers are nonetheless cautioned to closely examine their appraisal contract or assignment letter for report formatting requirements, as some agencies may mandate report formatting in accordance with the recommendations herein. For ease of reference by appraisers, the recommended formatting for appraisal reports is shown in the addenda of these Standards, marked as Appendix B.¹¹

USPAP provides for three types of appraisal reports: self-contained, summary, and restricted use. Appraisers are required by USPAP to specifically identify the *type* of appraisal report prepared.¹² For a number of reasons, the *restricted use report*, as defined by USPAP, is

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8. For instance, the Uniform Relocation and Real Property Acquisition Act of 1970 implementing regulations provide for less than detailed appraisals "for those acquisitions which, by virtue of their low value or simplicity, do not require the in-depth analysis and presentation necessary in a detailed appraisal" 49 C.F.R. §24.103(a). For a discussion of these appraisal requirements, see *The Appraisal Guide* (Washington D.C.: U.S. Department of Transportation, Federal Highway Administration, Pub. No. FHWA-RE-90-006, 1990).
 9. "**Limited Appraisal:** the act or process of developing an opinion of value or an opinion of value developed under and resulting from invoking the DEPARTURE RULE." USPAP, Definitions. USPAP's Departure Rule relates to the acceptance of an appraisal assignment in which the appraiser's scope of work is less than, or different from, the work that would be required by USPAP's specific requirements.
 10. This "checklist" is not an integral part of these Standards, nor is it intended to be used as part of a formal appraisal review, but has been included merely for easy reference by appraisers and reviewers.
 11. This Table is not an integral part of these Standards, but has been included merely for easy reference by appraisers and reviewers.
 12. USPAP, Standards Rule 2-2.

unacceptable for government land acquisition purposes.¹³ Much confusion exists in the appraisal industry regarding what constitutes a *self-contained* report as opposed to a *summary report*, and the terminology used by appraisers varies on a regional basis. However, for the purpose of these Standards any appraisal report, whether identified by the appraiser as a self-contained report or a summary report, will be considered as meeting the USPAP requirements for a self-contained report if it has been prepared in accordance with these Standards.

Part I—Introduction

A-1. Title Page. This should include (a) the name, street address and agency assigned tract, or parcel, number (if any), of the property appraised, (b) the name and address of the individual(s) making the report, and (c) the effective date of the appraisal.

A-2. Letter of Transmittal. This should include the date of the letter; identification of the property and property rights appraised; a reference that the letter is accompanied by a self-contained (or summary) appraisal report; a statement of the effective date of the appraisal; identification of any hypothetical conditions, extraordinary assumptions, limiting conditions, or legal instructions; the value estimate, or estimates, in the case of a partial acquisition, of the value of the whole property before the acquisition and the remainder property after the acquisition; and the appraiser's signature.

A-3. Table of Contents. The major parts of the appraisal report and their subheadings should be listed. Items in the addenda of any report shall be listed individually in the table of contents.

A-4. Appraiser's Certification. The appraisal report shall include an appraiser's signed statement certifying that:

- the statements of fact contained in the report are true and correct;
- the reported analyses, opinions, and conclusions are limited only by the reported assumptions, limiting conditions, and legal instructions, and are the personal, unbiased professional analysis, opinions, and conclusions of the appraiser;
- the appraiser has no present or prospective interest in the property appraised and no personal interest or bias with respect to the parties involved;
- the compensation received by the appraiser for the appraisal is not contingent on the analyses, opinions, or conclusions reached or reported;
- the appraisal was made and the appraisal report prepared in conformity with the *Uniform Appraisal Standards for Federal Land Acquisitions*;
- the appraisal was made and the appraisal report prepared in conformity with the Appraisal Foundation's *Uniform Standards for Professional Appraisal Practice*, except to the extent that the *Uniform Appraisal Standards for Federal Land Acquisitions* required invocation of USPAP's Jurisdictional Exception Rule, as described in Section D-1¹⁴ of the *Uniform Appraisal Standards for Federal Land Acquisitions*;

13. E.g., a restricted use report cannot reliably be reviewed, as is required for government land acquisition appraisals, due to the limited information provided (USPAP Standards Rule 2-2(c)(ix)); the *intended user* of the report is restricted to the client only (USPAP Advisory Opinion 12), a condition that cannot be met for government land acquisition appraisals because it should be anticipated that others, such as a land owner, legislators, or the court, will be asked to use and rely on the appraisal report.

14. Appraisers should recognize that USPAP changes frequently and that future changes may require additional jurisdictional exceptions which are not noted in Section D-1 of these Standards. In such an instance, appraisers will have to identify and report such additional jurisdictional exceptions.

- the appraiser has made a personal inspection of the property appraised and that the property owner, or his/her designated representative, was given the opportunity to accompany the appraiser on the property inspection;
- no one provided significant professional assistance to the appraiser. (If professional assistance was provided the appraiser, the name of the individual(s) providing such assistance must be stated and their professional qualifications should be included in the addenda of the appraisal report. This requirement includes both professional appraisal assistance and providers of subsidiary assistance, e.g., planning and permitting consultants, engineers, cost estimators, marketing consultants.)

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

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

A-5. Summary of Salient Facts and Conclusions. The appraiser shall report the major facts and conclusions that led to the final estimate(s) of value. This summary should include an identification of the property appraised; the highest and best use of the property (both before and after the acquisition if a partial acquisition); brief description of improvements (both before and after the acquisition if a partial acquisition); the indicated value of the property by each approach to value employed (both before and after the acquisition if a partial acquisition); the final estimate of value (both before and after the acquisition if a partial acquisition); and any hypothetical conditions, extraordinary assumptions, limiting conditions or instruction; and the effective date of the appraisal.

A-6. Photographs of Subject Property. Pictures shall show the front elevation of the major improvements, any unusual features, views of the abutting properties on either side and that property directly opposite, and interior photographs of any unique features. When a large number of buildings are involved, including duplicates, one picture may be used for each type. Except for an overall view, photographs may be bound as pages facing the discussion or description of the photographs' content, or may be placed in the addenda of the report.

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

In selecting photographs for inclusion in their reports, appraisers should bear in mind that some government appraisal reviewers and other readers of the report may never have an opportunity to personally view the property. Therefore, they must rely on the photographs and the narrative description of the property provided by the appraiser to gain an adequate understanding of the physical characteristics of the property to judge the accu-

racy and reasonableness of the appraiser's analyses and value estimate(s). Thus, the appraiser may need to include aerial photographs in the report to insure that readers can accurately visualize the property.

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

A-7. Statement of Assumptions and Limiting Conditions. Any assumptions and limiting conditions that are necessary to the background of the appraisal shall be stated. Any client agency or special legal instructions provided the appraiser shall be referenced and a copy of such instructions shall be included in the addenda of the appraisal report.¹⁵

If the appraisal has been made subject to any encumbrances against the property, such as easements these shall be stated. In this regard, it is unacceptable to state that the property has been appraised as if free and clear of all encumbrances, *except as stated in the body of the report*; the encumbrances *must* be identified in this section of the report.

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

The appraiser must also avoid assumptions and limiting conditions that are clearly the appraiser's own conclusions. While it may be appropriate for an appraiser to conclude and report that a probability exists that the property under appraisal could be rezoned, it is not appropriate for an appraiser to make an appraisal under the "assumption" that the property could be rezoned.

The adoption of an uninstructed assumption, or hypothetical condition, that results in a valuation of other than the *as is* market value of the property appraised as of the effective date of the appraisal will, as a general rule, invalidate the appraisal for government acquisition purposes. For instance, the inclusion of the assumption that a property is free of contamination from hazardous substances when it is suspected that the property may, in fact, be contaminated is an unacceptable practice.¹⁶

In the case of a partial acquisition, the appraiser should identify those hypothetical conditions, assumptions and limiting conditions that apply to both the before and after acquisition appraisals, those which apply only to the appraisal of the whole property before the acquisition, and those which apply only to the appraisal of the remainder. Appraiser assumptions and limiting conditions, as well as client and legal instructions, are discussed in greater detail in Section D-3 of these Standards.

A-8. Scope of the Appraisal. The appraiser shall describe the scope of investigation

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

16. See Sections D-3 and D-4 regarding this practice.

and analysis that was undertaken in making the appraisal. The appraisal's scope should conform with its purpose and intended use. In many cases the intended use and purpose of the appraisal places specific demands on the scope of the investigation and analysis presented in the appraisal report. In all cases, the appraisal report should clearly link the appraisal's scope with its purpose and intended use.

The geographical area and time span searched for market data should be included, as should a description of the type of market data researched and the extent of market data confirmation. The appraiser should state the references and data sources relied upon in making the appraisal; if preferred, this information may be shown within the applicable approaches to value.

The applicability of all standard approaches to value shall be discussed and the exclusion of any approach to value shall be explained. Appraisers should recognize that the exclusion of an approach to value because it is not applicable to the specific appraisal problem (e.g., the exclusion of the cost approach in valuing vacant land, or when the improvements do not contribute to the highest and best use of the property under appraisal) does not result in a *limited appraisal* under USPAP.¹⁷ Therefore, the appraiser should not identify an appraisal as a limited appraisal when an inapplicable approach to value has not been utilized.

Likewise, the adoption of a *hypothetical condition*¹⁸ or an *extraordinary assumption*¹⁹ by an appraiser does not result in a *limited appraisal*.²⁰ Rather, the appraisal is merely a *complete appraisal*, made under a specific, and adequately identified, hypothetical condition, or extraordinary assumption. However, the appraiser has the burden of clearly explaining the implications of any hypothetical condition or extraordinary assumption adopted. The required explanation and discussion of the implications of such hypothetical condition or extraordinary assumption must be included in this section of the appraisal report.

A-9. Purpose of the Appraisal. This section shall include an explanation of the reason for the appraisal, and the definition of all value estimates required, and a description of the property rights appraised, which should be provided to the appraiser by the client agency. In most instances the purpose of the appraisal will be to estimate market value as of a specific date.²¹ In an appraisal assignment involving a partial acquisition, the purpose of the appraisal will be to estimate the market value of the whole property before the acquisition and to estimate the market value of the remaining property after the acquisition.

This section should specifically identify the intended use and the intended user of the appraisal report. Generally, the intended user of the appraisal report will be the client agency, and the intended use of the appraisal report will be to assist the client agency in its determination of the amount paid for the property rights acquired or conveyed. Care

17. USPAP, Departure Rule.

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

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

20. Note that hypothetical conditions and extraordinary assumptions fall within USPAP's Standard Rule 1-2, which contains binding requirements from which departure is not permitted.

21. For a discussion of the legal requirements regarding the effective date of value, see footnote 125 in Section B-2 of these Standards.

should be taken to prepare the appraisal report in a manner that clearly meets the intended use of the report by the intended user.

It is imperative that the appraiser utilize the correct definition of market value. For appraisals prepared under these Standards, appraisers shall use the following definition of market value:

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

This definition must be placed in this section of the appraisal report. No other definition of market value for purposes of appraisals made under these Standards is acceptable,²² unless otherwise required by a specific and cited federal law or regulation. Contrary to USPAP Standards Rule 1-2(c), this definition of market value does not call for the estimate of value to be *linked* to a specific *exposure time* estimate, but merely that the property be exposed on the open market for a *reasonable* length of time, given the character of the property and its market. Therefore, the appraiser's estimate of market value shall not be *linked* to a specific exposure time when conducting appraisals for federal land acquisition purposes under these Standards.²³

It is recognized that some appraisers' client groups (e.g., relocation companies, mortgage lenders) may require appraisers to estimate a *marketing time*²⁴ for the property under appraisal. However, such estimates are inappropriate for, and must not be included in, appraisal reports prepared for federal land acquisitions under these Standards. "The request to provide a reasonable marketing time opinion exceeds the normal information required for the conduct of the appraisal process"²⁵ and is, therefore, beyond the scope of the appraisal assignment under these Standards.

A-10. Summary of Appraisal Problems. This section gives the appraiser the opportunity to acquaint the reader of the appraisal report with the specific appraisal problems, if any, which have been encountered by the appraiser and that will be discussed in detail in the body of the appraisal report. Appraisers are encouraged to take advantage of it. If the property under appraisal is a single-family residence, the whole of which is being acquired, in an area of plentiful market data, the appraiser will usually only report that no special appraisal problems were encountered. However, federal land acquisitions are seldom that simple.

In considering subjects to be discussed in this section of the report, appraisers should review the subjects discussed in Section B of these Standards, which cover many of the specialized, sometimes complex, appraisal problems often encountered in preparing appraisal reports for federal land acquisition purposes. The appraiser should briefly describe the principal problems presented in estimating the market value of the property under appraisal and describe the estate to be taken. In the case of a partial acquisition, the

22. For a discussion of the legal basis for this definition of market value and this specific requirement, see Section B-2 of these Standards.

23. For a discussion of the legal basis for this standard, which results in a jurisdictional exception under USPAP, see Section B-2 of these Standards.

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

25. USPAP, Advisory Opinion 7.

appraiser should describe the principal differences in the property between the before and after situations, including a brief description of the government's project and any changes in the highest and best use of the subject property.

If the parcel under appraisal includes water rights, minerals, or suspected mineral values, fixture values, growing crops, or timber values, the treatment of their contributory value should be discussed, including the methodology employed to avoid the forbidden *summation* or *cumulative* appraisal.²⁶ If the valuation of the property required the use of any consulting reports, the appraiser should describe such reports, the method of utilization thereof, and the weight or reliance placed thereon.

Part II—Factual Data—Before Acquisition²⁷

A-11. Legal Description. This description shall be complete as to properly identify the property appraised. If lengthy, it should be referenced and included in the addenda of the report. If the client agency has assigned a parcel, or tract, number to the property, that should also be referenced. A more detailed standard concerning the legal description of the property to be appraised appears in Section D-5 of these Standards.

A-12. Area, City, and Neighborhood Data. This data (mostly social and economic) must be kept to an absolute minimum and should only include such information that directly affects the appraised property, together with the appraiser's conclusions as to significant trends. The use of "boilerplate" or demographic and economic data (often downloaded from the Internet) is unnecessary and, unless the appraiser demonstrates that the specific data directly impacts the current market value of the subject property, it should be excluded.

Changes in the neighborhood, brought about by the government's project for which the property under appraisal is being acquired, shall be disregarded. This specific standard is contrary to USPAP Standards Rule 1-4(f) and is considered a jurisdictional exception. See Section B-10, "Enhancement or Diminution in Value Due to the Project," for a discussion of the legal basis for this specific standard.

A-13. Property Data:

A-13a. Site. Describe the present use, accessibility and road frontage, land contours and elevations, soils, vegetation (including timber), views, land area, land shape, utilities, mineral deposits, water rights associated with the property, easements, etc. A statement must be made concerning the existence or nonexistence of commercially valuable mineral deposits. Also discuss the beneficial and detrimental factors inherent in the location of the property.²⁸ The presence of hazardous substances should be considered by appraisers in accordance with Sections D-3 and D-4 of these Standards. An affirmative statement is required if the property is located within a flood hazard area.²⁹

26. See Section B-13, "The Unit Rule," in these Standards.

27. If the government's acquisition is a *partial acquisition*, it is imperative that the sections of the appraisal report in Part II relate only to the *before situation*. The appraiser should not attempt to combine the discussion of the factual data after the acquisition with the factual data relating to the before situation.

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

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

A-13b. Improvements. Describe the following: all improvements including their dimensions; square foot measurements, chronological and effective age, dates of any significant remodeling/renovation; condition; type and quality of construction; and present use and occupancy. This description may be in narrative or schedule form. Where appropriate, a statement of the method of measurement used in determining rentable areas such as full floor, multi-tenancy, etc. should be included. All site improvements, including fencing, landscaping, paving, irrigation systems, domestic and private water systems, require description. The appraiser should coordinate such description with the photographs of the property included in the report³⁰ and with the plot plan³¹ (and floor plan, if included³²) in the report. In those instances in which the appraiser will rely on the cost approach to value,³³ or in the case of a partial acquisition that will structurally impact the improvements, a more comprehensive improvement description is required.

A-13c. Fixtures. Fixtures are to be described in narrative or schedule report form that includes all fixtures, with a statement of the type and purpose of each. The current physical condition, relative utility, and obsolescence should be stated for each item or group included in the appraisal, and whenever applicable, the repair or replacement requirements to bring the fixture to a usable condition.

Questions regarding whether an item is, as a matter of law, a fixture (real estate) or equipment (personalty) shall be referred to the agency legal counsel for clarification. In making this referral, appraisers should bear in mind that the determination of whether an item is a fixture or equipment, for federal land acquisition purposes, may or may not be consistent with laws of the state in which the property is located.³⁴

In those instances where specialty fixtures are encountered, or when the fixtures will represent a substantial portion of the property's value, consideration should be given to the retention of a fixture valuation specialist.³⁵

A-13d. Use History. State briefly the purpose for which the improvements were designed and the dates of original construction and major renovations, additions, and/or conversions. Include a ten-year history of the use and occupancy of the property.³⁶ If any of the forgoing information is indeterminable, the appraiser must report that fact.

A-13e. Sales History. Include a ten-year record of all sales and, if the information is available, any offers to buy or sell the property under appraisal. If no sale of the property has occurred in the past ten years, the appraiser shall report the last sale of the property, irrespective of date.

Information to be reported shall include name of the seller, name of the buyer, date of sale, price, terms and conditions of sale,³⁷ and the appraiser's opinion as to whether the sale price represented market value at the time, and, if not, the reasons for the appraiser's conclusion. An unsupported statement that the sale did not represent market value, or was not an arms-length transaction, is unacceptable.

30. See Section A-6.

31. See Section A-35.

32. See Section A-36.

33. See Section A-16; B-6.

34. See Section B-1.

35. See Section D-4.

36. Past uses of the property may suggest its historical contamination by hazardous substances. See Section D-3.

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

It is recognized that the ten-year sales history required by this standard is longer than many other appraisal standards require.³⁸ The legal basis and reasoning for this extended sales history is discussed in Section B-5 of these Standards.

A-13f. Rental History. Report the historical rental or lease history of the property for at least the past three years, if this information can be ascertained. All current leases should be reported, including the date of the lease, name of the tenant, rental amount, term of the lease, parties responsible for property expenses, and other pertinent lease provisions. The appraiser shall state his or her opinion as to whether any existing lease of the property represents the property's current market or economic rent, and, if not, the reasons for the appraiser's conclusion. An unsupported statement that the rent does not represent market or economic rent is unacceptable.

A-13g. Assessed Value and Annual Tax Load. Include the current assessment and dollar amount of real estate taxes. If assessed value is statutorily a percentage of market value, state the percentage. If the property is not assessed or taxed, the appraiser should estimate the assessment, state the tax rate, and estimate the dollar amount of tax.

Some jurisdictions have developed programs wherein property will be assessed based on its current use rather than its highest and best use. These programs often relate to farm lands, timber lands, and open space; for purposes of eligibility, owners may have to agree to leave the property in its existing use for a certain period of time.³⁹ In such a case, the appraiser should report both the current assessed value and taxes for the property's existing use and the estimated assessed value and tax load for the property at its highest and best use.

A-13h. Zoning and Other Land Use Regulations. Identify the zoning for the subject property. This must be reported in descriptive terms (e.g., multiple family residential, 5000 sq. ft. of land per unit) rather than by zoning code (e.g., MF-2). Other local land use regulations, such as set-back requirements, off-street parking requirements, and open space requirements, which have an impact on the highest and best use and value of the property are to be reported. The appraiser should also note any master, or comprehensive, land use plan in existence that may affect the utility or value of the property.

If the property was recently rezoned, that must be reported. The appraiser shall determine whether such rezoning was a result of the government's project for which the subject property is being acquired. If so, the appraiser must justify his or her conclusion in this respect and disregard the rezoning.⁴⁰ If the rezoning of the property is imminent or probable, discuss in detail the investigation and analysis that led to that conclusion under Section A-14 (Analysis of Highest and Best Use).⁴¹ The mere assertion by an appraiser that a property could be rezoned is insufficient.⁴²

38. E.g., USPAP requires a one-year sales history for a one to four unit residential property and a three year sales history for other property types; 49 C.F.R. 24.103 requires the reporting of a five year sale history.

39. Many of these programs provide that an owner who converts his or her land from the existing use early must pay back taxes for a certain period of years based on the value of the property for its highest and best use, plus a substantial penalty. These back taxes and penalties become an encumbrance on the land when it is converted to an alternate use. However, since appraisers should estimate the market value of property as if free and clear, the indebtedness, or potential indebtedness, imposed under these programs is not to be considered by the appraiser in estimating the property's market value.

40. For the legal basis for this standard, see Section B-10. Under USPAP, invocation of this standard would result in an appraisal prepared under a *hypothetical condition*.

41. For a discussion of the extent of the required investigation which must be taken by the appraiser in this regard, see Section D-6.

42. See Section D-6; Section B-23.

In addition to zoning, the appraiser should identify all other land use and environmental regulations that have an impact on the highest and best use and value of the property.⁴³ The impact of the regulations must also be discussed under Section A-14. The appraiser should also discuss the impact of any private restrictions on the property, such as deed and/or plat restrictions.

Part III—Data Analysis and Conclusions—Before Acquisition⁴⁴

A-14. Analysis of Highest and Best Use. The appraiser's determination of highest and best use is one of the most important elements of the entire appraisal process.⁴⁵ Therefore, the appraiser must apply his or her skill with great care and clearly justify the highest and best use conclusion in the appraisal report.

The highest and best use of the land, as if vacant, is first estimated. If the land is improved, the highest and best use of the property, as improved, is then estimated. In some cases, the highest and best use of property cannot be reliably estimated without extensive marketability and/or feasibility studies, which in complex cases may call for the assistance of special consultants.⁴⁶ Before it can be concluded that any use for the property is its highest and best use, that use must be physically possible, legally permissible, financially feasible, and must result in the highest value. Each of these four criteria must be addressed in the appraisal report.

If the appraiser concludes a highest and best use that will require a rezoning of the property, the probability of that rezoning must be thoroughly investigated, analyzed and reported. Likewise, if the appraiser's highest and best use conclusions will require other forms of government approval, the probability of obtaining those approvals must be investigated, analyzed, and reported. The extent of the investigation and analysis required by the appraiser to meet the requirements of this standard will be found in Section D-6.

Essential in the appraiser's conclusion of highest and best use is the determination of the *larger parcel*.⁴⁷ The appraiser must make a larger parcel determination in every appraisal conducted under these Standards, even in the case of a minor partial acquisition where the client agency has determined a complete before and after appraisal is not necessary. The appraiser's analysis that led to the larger parcel determination and the determination itself must both be reported.⁴⁸ Because the ultimate determination of highest and best use is the appraiser's to make, and that determination cannot be made until after considerable investigation and analysis has been completed, the appraiser's conclusion as to the larger parcel is sometimes different from the specific parcel he or she was requested to appraise by the agency. In such an instance, the appraiser shall inform the agency of his or her determination of the larger parcel and the agency shall amend the appraisal assignment accordingly.

43. Ibid.

44. If the government's acquisition is a partial acquisition, it is imperative that the sections of the appraisal report in Part III relate only to the before situation. The appraiser should not attempt to combine the analysis and conclusions relating to the after situation with the analysis and conclusions relating to the before situation.

45. See Section B-3.

46. See Section D-4. See also Section D-3.

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

48. The legal basis and reasoning for this specific Standard may be found in Section B-11.

Appraisers must bear in mind that the determination of the larger parcel is required in every appraisal assignment; irrespective of whether the agency has designated an acquisition a *total acquisition* or a *partial acquisition*. This is so because, from a practical standpoint, whether an acquisition is a total or partial acquisition cannot be determined until such time as the appraiser has made a determination of the highest and best use, and the larger parcel. By applying the rules for larger parcel determination, as described in Section B-11, it is possible that two physically separate tracts may constitute a single larger parcel, or conversely, a single physical tract may constitute multiple larger parcels. This can be important not only in consideration of damages and special benefits, but also in the appraiser's selection and comparative analysis of comparable sales.⁴⁹

In light of the discussion in Section B-11 regarding the larger parcel, it is recommended that the appraiser begin an analysis of the *unity of ownership* test with the premise that, in making their larger parcel determination, it is allowable to consider all lands that are under the beneficial control of a single individual or entity, even though title is not identical in all areas of the tract(s). If the appraiser then concludes that the larger parcel constitutes lands that are under the beneficial control of a single entity, but title is not identical, the appraiser's larger parcel determination, together with the facts upon which it is based, should be submitted to agency, or Department of Justice, legal counsel for review before the appraiser proceeds. Based on applicable case law and the facts of the case, legal counsel can then determine whether, as a matter of law, the unity of ownership test of the larger parcel is present, and provide written legal instructions to the appraiser accordingly.

Appraisers conducting appraisals for federal land exchanges, or in connection with inverse condemnation claims, should be aware that the tests applied in larger parcel determination may be different than that suggested above. For a discussion of those potential differences, appraisers should refer to Section D-7 regarding federal land exchange appraisals and to Section D-8 regarding inverse condemnation appraisals.

The use to which the government will put the property after it has been acquired is, as a general rule, an improper highest and best use.⁵⁰ It is the value of the land acquired which is to be estimated, not the value of the land to the government. If it is solely the government's need that creates a market for the land, this special need must be excluded from consideration by the appraiser.⁵¹ Only on the rare occasion that a private demand for the land exists, for the same use for which it is being acquired by the government, is it proper for the appraiser to conclude that the highest and best use of the property is that use for which it is being acquired by the government.

The appraiser's estimate of highest and best use must be an *economic* use. A non-economic highest and best use, such as *conservation, natural lands, preservation*, or any use that requires the property to be withheld from economic production in perpetuity, is not a valid use upon which to estimate market value.⁵² Therefore, any appraisal based on such a non-economic highest and best use will not be approved for federal land acquisition purposes. Similarly, an appraiser's use of any definition of highest and best use that incorporates non-economic considerations (e.g., value to the public, value to the government, or community development goals) will subject the appraiser's report to disapproval for use for federal land acquisition purposes.

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

50. See Section B-3 for the legal basis of this statement.

51. *Ibid.*

52. See Section B-3 for the legal basis and reasoning for this standard.

A-15. Land Valuation. The appraiser shall estimate the value of the land for its highest and best use, as if vacant and available for such use. In doing so, the appraiser's opinion of value shall be supported by confirmed sales of comparable or nearly comparable lands⁵³ having like optimum uses. Differences shall be weighed and explained to show how they indicate the value of the land being appraised. Items of comparison shall include property rights conveyed, financing terms, conditions of sale, market conditions, location, and physical characteristics. The appraiser shall provide adequate information concerning each comparable sale used and the comparative analysis to enable the reader of the report to follow the appraiser's logic.⁵⁴

When the highest and best use of a property is for subdivision purposes and comparable sales do not exist, the appraiser may resort to the *development approach*⁵⁵ to land value, but only if adequate market and/or technical data are available with which to reliably estimate the property value by this approach. This method of estimating land value can also be used to *test* the appraiser's highest and best use conclusion and to check against the indicated value of the land developed by the use of comparable sales when the sales data is limited. However, this approach to value is complex, often requiring the assistance of other experts,⁵⁶ and always requiring substantial amounts of research, analysis and supporting documentation.⁵⁷

In applying this technique, appraisers must bear in mind that a property being appraised must be valued in its *as is* condition. Therefore, consideration must be given to the time-lag that is typically necessary between the effective date of the appraisal and the projected date when developed lots would become marketable. This time-lag must provide for the time necessary to procure all land use permits and approvals, as well as the time necessary for the physical construction of the infrastructure that will be required to convert the land into marketable lots. One of the most critical factors in the application of this technique is, of course, selection of the appropriate discount rate to be applied to the income streams generated by the development. This discount rate should be derived from and supported by direct market data whenever possible.⁵⁸

A-16. Value Estimate by the Cost Approach. This section should be in the form of computational data, arranged in sequence, beginning with reproduction or replacement cost and should state the source (book, page, including last date of page revision, if a national service) of all figures used. Entrepreneur's profit, as an element of reproduction or replacement cost, must be considered and discussed, and if applicable, should be derived

53. For a discussion of what legally constitutes a comparable sale and the admissibility of comparable sales information, see Section B-4 of these Standards.

54. For a discussion of comparable sales documentation and information required and the requirements for comparison, see Section A-17 of these Standards.

55. For a discussion of the courts' view of this technique of valuation, see Section B-8 of these Standards.

56. Such as marketing and feasibility consultants, land use planners, civil engineers and contractors. However, see, Guide Note 6, "Reliance on Reports or Information Prepared by Others," *Guide Notes to the Standards of Professional Appraisal Practice* (Appraisal Institute, 1991, amended 1/16/93).

57. For a discussion of the various methodologies that can be used in applying this valuation technique see, American Institute of Real Estate Appraisers, *Subdivision Analysis* (1978); a copy of this publication may be found in Appendix B of the Appraisal Institute's and American Society of Farm Managers and Rural Appraisers' Seminar Handbook for their seminar "Federal Land Exchanges and Acquisitions: Appraisal Issues and Applications." For a discussion of the market analysis, forecasting techniques, and financial modeling used in this technique of valuation, see Douglas D. Lovell and Robert S. Martin, *Subdivision Analysis* (Chicago: Appraisal Institute, 1993). See also J. D. Eaton, *Real Estate Valuation in Litigation*, 2nd ed. (Chicago: Appraisal Institute, 1995), 245-70.

58. For a discussion and examples of discount rate extraction from sales, see Appendix B of the Appraisal Institute's and American Society of Farm Managers and Rural Appraisers' Handbook for their seminar "Federal Land Exchanges and Acquisitions: Appraisal Issues and Applications."

from market data whenever possible. If the appraiser will place considerable weight on this approach to value in reaching a final value estimate, consideration should be given to retaining the services of a contractor or professional cost estimator to assist in developing the reproduction or replacement cost estimate.

The dollar amount of depreciation from all causes, including physical deterioration, functional obsolescence and economic, or external, obsolescence shall be explained and deducted from reproduction or replacement cost. The preferred methods of estimating depreciation are the breakdown method⁵⁹ and the market extraction method.⁶⁰ The estimating of depreciation by the use of published tables or age-life computation is to be avoided.

Even though the cost approach is often the least reliable approach to value and is often maligned by the courts,⁶¹ it can be a useful analytical tool in allocating the contributory value of various elements of the property in partial acquisition appraisals. Therefore, the indicated value of the property by the cost approach should be developed with care.

The cost approach may be excluded when only a salvage or scrap value is estimated or when it is clear that the improvements would never be reproduced or replaced and application of the cost approach would contribute nothing to the solution of the appraisal problem.

A-17. Value Estimate by the Sales Comparison Approach. Since any recent and unforced sale of the property under appraisal can be the best evidence of its value,⁶² any such sale is treated as a *comparable sale* in this approach to value. It shall be analyzed like any other comparable sale and given appropriate weight by the appraiser in concluding a final estimate of value of the property. As noted in Section A-13e of these Standards, an unsupported claim that a sale of the subject property was a *forced* sale or not indicative of its value is unacceptable.

All comparable sales used shall be confirmed by the buyer, seller, broker or other person having knowledge of the price, terms, and conditions of sale.⁶³ When a comparable sale is of questionable nature and/or admissibility (e.g., sales to a government entity) special care must be taken in the verification of the circumstances of the sale.⁶⁴ A narrative comparative analysis of each comparable sale shall be made explaining how the sale relates to the property under appraisal in respect to those features which have an effect on market value.

In selecting the comparable sales to be used in valuing a given property, it is fundamental that all sales have the same economic highest and best use as the property under appraisal and that the greatest weight be given to the properties most comparable to the property under appraisal. In this regard, appraisers must recognize that, when valuing a property with a highest and best use for some form of development that will require rezoning or extensive permitting, sales of similar properties may require extensive analysis and adjustment before they can be deemed economically comparable. The analysis and adjustment of such sales is discussed in Section D-9 of these Standards.

59. For discussion of this method of estimating depreciation see *The Appraisal of Real Estate*, 11th ed. (Chicago: Appraisal Institute, 1996), 378-94.

60. *Ibid.*, 371-74.

61. See Section B-6 of these Standards.

62. See Section B-5 of these Standards.

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

64. For a description of the verification process required by these Standards for such sales see Section D-9.

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

The preferred method of adjusting comparable sales is through the use of quantitative adjustments whenever adequate market data exists to support them: “[q]uantitative adjustments are developed as either dollar or percentage amounts. Factors that cannot be quantified are dealt with in qualitative analysis.”⁶⁵ Only when adequate market data does not exist with which to support quantitative adjustments should the appraiser resort to qualitative adjustments (i.e., inferior, superior).⁶⁶ Appraisers must bear in mind that quantitative and qualitative adjustments are not mutually exclusive methodologies. Because one factor of adjustment cannot be quantified by market data does not mean that all adjustments to a sale property must be qualitative. All factors that can be quantified should be adjusted accordingly. When quantitative and qualitative adjustments are both used in the adjustment process, all quantitative adjustments should be made first.⁶⁷ When using quantitative adjustments, appraisers must recognize that not all factors are suitable for percentage adjustments. Percentage and dollar adjustments may, and often should, be combined.⁶⁸ Each item of adjustment must carefully be analyzed to determine whether a percentage or dollar adjustment is appropriate.

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

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

65. *The Appraisal of Real Estate*, 11th ed. (Chicago: Appraisal Institute, 1996), 414.

66. The decision whether to use quantitative or qualitative adjustments should be based on the question of availability of data to support quantitative adjustments. Using qualitative adjustments for the purpose of obscuring the appraiser's complete reasoning and analysis from opposing parties in litigation is an unacceptable practice and, in the view of the Department of Justice, is contrary to the intent of Rule 26(a)(2)(B) of the Federal Rules of Civil Procedure.

67. *The Appraisal of Real Estate*, 11th ed. (Chicago: Appraisal Institute, 1996), 440.

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

Documentation of each comparable sale shall include the name of the buyer and seller, date of sale, legal description,⁶⁹ type of sale instrument, document recording information, price, terms of sale, location, zoning, present use, highest and best use, and a brief physical description of the property. A plot plan, or sketch, of each comparable property should be included, not only to facilitate the reader's understanding of the relationship between the sale property and the subject property, but also to locate the sale property in the field. This information may be summarized for each sale on a *comparable sales form* and included in this section or in the addenda of the report. As noted, a photograph of each comparable sale shall also be included. A comparable sales map, showing the relative location of the comparable sales to the property under appraisal⁷⁰ shall be included, either in this section or in the addenda of the report. Inclusion of a copy of the transfer document (e.g., deed, contract) in the report is neither required nor desirable, unless there is something in the document that is unusual or particularly revealing.

The definition of market value used in these Standards requires that the estimate of value be made in terms of cash or its equivalent.⁷¹ Therefore, the appraiser must make a diligent investigation to determine the financial terms of each comparable sale. When comparing the sale to the property being appraised, the appraiser shall analyze and make appropriate adjustments to any comparable sale that included favorable or unfavorable financing terms as of the date of sale. Such adjustment must reflect the difference between what the comparable sold for with the favorable or unfavorable financing and the price at which it would have sold for cash or its equivalent.

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

A-18. Value Estimate by the Income Capitalization Approach. The appraisal report shall include adequate factual data to support each figure and factor used⁷² and should be arranged in detailed form to show at least (a) estimated gross economic, or market, rent or income; (b) allowance for vacancy and credit losses; (c) an itemized estimate of total expenses; and (d) an itemized estimate of the reserves for replacements, if applicable.

Capitalization of net income shall be at the rate prevailing for this type of property and location. The capitalization technique, method, and rate used should be explained in narrative form supported by a statement of sources of rates and factors. The preferred source of an applicable capitalization rate is from actual capitalization rates reflected by comparable sales.⁷³

As with a recent and unforced sale of the property under appraisal,⁷⁴ if the property is actually rented, its current rent is often the best evidence of its economic, or market, rent

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

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

71. See Section B-2 of these Standards.

72. For a discussion of the legal basis for this Standard see Section B-7.

73. See Section B-7 of these Standards. For discussion of derivation of capitalization rates from comparable sales, see, *The Appraisal of Real Estate*, 11th ed. (Chicago: Appraisal Institute, 1996), 514-16. See also, J. D. Eaton, *Real Estate Valuation in Litigation*, 2nd ed. (Chicago: Appraisal Institute, 1995), 184-85.

74. See Section A-17 of these Standards.

and should be given appropriate consideration by the appraiser in estimating the gross economic rent of the property. Likewise, the appraiser should attempt to obtain at least the last three years' historical income and expense statements for the property. These can generally be developed into a reliable reconstructed operating statement. If this historical income and expense information is available, it should be included in this section or in the appraisal report's addenda.

A-19. Correlation and Final Value Estimate. The appraiser shall explain the reasoning applied to arrive at the final opinion of value and how the results of each approach to value were weighed in that opinion, and the reliability of each approach to value for solving the particular appraisal problem.

The appraiser shall also state his or her final estimate of value of all of the property under appraisal as a single amount, including the contributory value of fixtures, timber, minerals, and water rights, if any. The appraiser must avoid making a summation appraisal.⁷⁵ The appraiser is solely responsible for the final estimate of value. If that value estimate includes elements of value which were based on estimates developed by others (e.g., timber cruisers, mineral appraisers), the appraiser cannot merely assume their accuracy. The reasonableness of the subsidiary estimates must be confirmed in accordance with Section D-4 of these Standards.

Part IV—Factual Data—After Acquisition⁷⁶

A-20. Legal Description. The legal description of the remainder property shall be included. If a legal description of the remainder property is not available, appraisers may develop their own by utilizing the before acquisition legal description and excepting from it the legal description of the real estate acquired by the government.

If the *estate acquired* is less than a fee interest (e.g., an easement), the legal description under A-11 may be referenced and the legal description of the property encumbered by the estate acquired should be included. If lengthy, it should be referenced and included in the report's addenda.

A-21. Neighborhood Factors. The appraiser shall describe the government project for which the property is being acquired and its impact, if any, on the neighborhood and the remainder property. The degree of detail regarding the government's project included in this section should relate directly to the complexity of the government's project and its impact on the remainder property.⁷⁷ The aspects of the government's construction that will result in damages to the remainder property should especially be described in detail.

75. See Sections B-13 and D-4 of these Standards.

76. This part of these Standards is applicable only in partial acquisition appraisals. The descriptions included in these sections should specifically relate to the remainder property.

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

A-22. Property Data:

A-22a. Site. The appraiser shall describe the remainder site,⁷⁸ paying particular attention to the shape, size, available utilities, and available access to the remainder site.

A-22b. Improvements. The appraiser shall describe those improvements remaining in whole or in part.⁷⁹

A-22c. Fixtures. The appraiser shall describe those fixtures remaining.⁸⁰

A-22d. History. If the appraisal is prepared after the date of acquisition, the appraiser shall report the utilization of the remainder property since the date of acquisition as well as any sales or rentals of the remainder property.⁸¹

A-22e. Assessed Value and Tax Load. The appraiser should estimate what the assessed value and annual tax load will be on the remainder property. This estimate is particularly critical if the income capitalization approach is to be utilized in estimating the value of the remainder property. In this connection, discussions with local assessing authorities are often helpful in making these estimates.

A-22f. Zoning and Other Land Use Regulations. The appraiser shall report the influence of zoning and other land use regulations on the remainder property.⁸² Specific attention should be given to the probability of a rezone, either up or down, of the property caused by the government's project and the possibility that, because of the acquisition, the remainder property has become non-conforming to land use regulations, in areas such as lot area requirements, setbacks, and off-street parking.

Part V—Data Analysis and Conclusions—After Acquisition⁸³

Introductory note: These analyses and valuation sections relating to the remainder property constitute a new appraisal. In cases of an insignificant taking, the remainder may be so similar to the whole property before the acquisition that the same highest and best use analysis and the same cost, market, and income data and analysis will remain applicable and can therefore be referenced and employed in analyzing and valuing the remainder property. However, a change in the basic physical or economic character of the remainder may result in a change in the remainder's highest and best use or the intensity of that use⁸⁴ and may result in damages⁸⁵ or benefits⁸⁶ to the remainder property which will require different market data and/or analysis than that which was used in the whole property valuation.

78. For the required elements of description, See Section A-13a.

79. *Ibid.*, Section A-13b.

80. *Ibid.*, Section A-13c.

81. For content requirements, See Sections A-13d, e, and f.

82. *Ibid.*, Section A-13h.

83. This part of these Standards is applicable only in partial acquisition appraisals.

84. See Section B-3.

85. See Section B-11.

86. See Section B-12.

A-23. Analysis of Highest and Best Use. The appraiser shall state and explain the highest and best use of both the remainder land, as if vacant, and the remainder property, as improved. Impacts of the acquisition on the property's highest and best use, or the intensity of that use, shall be specifically addressed and described. If restoration or rehabilitation of the remainder property will be required before it can be put to its highest and best use, the physical and economic feasibility of such restoration or rehabilitation shall be explained and justified. Major restoration or rehabilitation may require the services of an expert in the field, such as an architect, engineer, and/or contractor.⁸⁷ If the acquisition includes a temporary construction easement, or other temporary property interest, the effect of such temporary acquisition on the remainder property's highest and best use must be discussed.⁸⁸

A-24. Land Valuation. The appraiser shall estimate the market value of the remainder land for its highest and best use, as if vacant and available for such use.⁸⁹

If the acquisition includes one or more temporary construction easements, the impact of those easements on the value of the remainder property should be accounted for in the valuation of the land, after acquisition. Any diminution in the remainder land value by reason of the temporary easements should be measured in accordance with Section D-10 of these Standards, and then be used as the basis for an adjustment to the remainder's land value in this section of the report. The diminution in the remainder's land value by reason of temporary easements should not be treated as an *additive* to be added to the difference between the before and after value of the property.

A-25. Value Estimate by Cost Approach. For cost approach application and reporting requirements, see Section A-16.

A-26. Value Estimate by Sales Comparison Approach. For sales comparison approach application and reporting requirements, see Section A-17.

A-27. Value Estimate by Income Capitalization Approach. For income capitalization approach application and reporting requirements, see Section A-18.

A-28. Correlation and Final Value Estimate. The appraiser shall describe the reasoning applied to arrive at the final estimate of value of the remainder property. If practical, the appraiser should give the same weight to the indications of value by the various approaches to value that were applied in the valuation of the whole property.

Part VI—Acquisition Analysis⁹⁰

A-29. Recapitulation. The appraiser shall show the difference between the value of the whole property and the value of the remainder by deducting the property's after value from its before value.

87. See Section D-4.

88. See Section D-10.

89. For requirements of land valuation, see Section A-15.

90. This part of these Standards is applicable only in partial acquisition appraisals. It should be noted that the requirements in Part VI are beyond the formal scope of the appraisal. They are required to assist the agency meet its obligations under the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (42 U.S.C. §4601, et seq.). If the appraisal report is specifically being prepared for condemnation trial purposes, appraisers should be aware that government's trial counsel may instruct that Part VI of the appraisal report be omitted.

A-30. Allocation and Explanation of Damages. Damages, as such, are not appraised. However, the appraiser shall briefly explain any damages to the remainder property and allocate the difference in the value of the property before and after the acquisition between the value of the acquisition and damages to the remainder. The appraiser should note that such allocation is an accounting tabulation and not necessarily indicative of the appraisal method employed.

If damages have been measured by a *cost to cure*, the appraiser must justify the cost to cure⁹¹ and demonstrate that the cost to cure is less than the damage would be if the cure was not undertaken.

A-31. Explanation of Special Benefits. The appraiser shall identify any special benefits accruing to the remainder property and explain how and why those benefits have occurred.

Part VII—Exhibits and Addenda

A-32. Location Map.⁹² This exhibit should display the location of the appraised property within the city or area in which the property is located. All maps should include a north arrow and the identification of the subject property.

A-33. Comparable Data Maps. These maps might include, among other items, a comparable land sales map, a comparable improved sales map, and a rental comparables map. The maps should include a north arrow and show the locations of both the comparables and the subject property. If this requires the use of a map that is not of a readable scale, secondary maps showing the specific location of each comparable should be included.

A-34. Detail of Comparative Data.⁹³ This data may be included in the body of the report. Photographs of the comparative properties must be included.

A-35. Plot Plan. A plot plan should help the reader to visualize the property and the scope of the appraisal considerations. The plot plan should depict the entire subject property, including dimensions and street frontages. Structural improvements should be shown in their approximate locations. Significant on-site improvements and easements should also be shown. The dimensions of improvements should be noted. The plot plan should include a directional north arrow. The location from which each of the subject photographs was taken should be identified on the plot plan, as well as the photograph identification number and the direction in which the photo was taken.

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

A-36. Floor Plan. Floor plans are required only when they are necessary to describe a unique property feature or the value estimate.

91. This may require the services of a consultant; see Section D-4.

92. All maps and plans may be bound as facing pages opposite the description, tabulation, or discussions they concern.

93. For description of comparative data required, see Section A-17 of these Standards.

A-37. Title Evidence Report. If the agency provided a title evidence report to the appraiser, it should be included. If such report is lengthy, it may be referenced.

A-38. Other Pertinent Exhibits. These would include, for example, any written instructions given the appraiser by the agency or its legal counsel, any specialist reports (such as timber appraisals, environmental studies, mineral or water rights studies or appraisals, reproduction cost estimates, cost to cure estimates, fixture valuations), any pertinent title documents (such as leases or easements), and any charts or illustrations that may have been referenced in the body of the report.

A-39. Qualifications of Appraiser. Include the qualifications of all appraisers or technicians who made significant contributions to the completion of the appraisal assignment. If appraisal reports are being prepared for trial purposes, appraisers must insure that the content of their qualifications conform with Rule 26(a)(2)(B) of the Federal Rules of Civil Procedure, as described in Section D-2 of these Standards.



Legal Basis for Appraisal Standards for Federal Land Acquisitions

B-1. Federal Law Controls. Since the experience of many appraisers primarily involves non-public acquisition appraisals, or conducting appraisals under various state laws, it is particularly important that appraisers bear in mind that in federal acquisitions, because the meaning of *just compensation* is a matter of fundamental constitutional interpretation, questions with respect to compensation are to be resolved in accordance with federal rather than state law.⁹⁴ Because federal law differs in some important aspects from the law of some states, it is incumbent upon both the attorney and the appraiser to make certain that they understand the applicable federal law as it affects the appraisal process in the estimation of market value, which will generally be the basis for determining just compensation for property acquired by the United States for public purposes. While state law once controlled procedural matters, since the adoption in 1951 of Rule 71A, Federal Rules of Civil Procedure, procedural as well as substantive matters in federal condemnation cases are controlled by federal law.⁹⁵

State law is sometimes referred to, though not necessarily followed, in resolving the nature of property rights acquired. The Supreme Court of the United States has stated that “[t]hrough the meaning of ‘property’ . . . in the Fifth Amendment is a federal question, it will normally obtain its content by reference to local law.”⁹⁶ It has been judicially made clear that “[t]his does not mean, however, that every local idiosyncrasy or artificiality in a state’s concepts, or the incidents thereof, necessarily will be accepted.”⁹⁷ It is also established that the United States may elect to acquire whatever interest it deems necessary whether or not the state recognizes the definition of the interest selected.⁹⁸

B-2. Market Value Criterion. Under established law, the criterion for just compensation is the *market value* of the property taken. As stated by the U.S. Supreme Court:

The United States has the authority to take private property for public use by eminent domain, but is obliged by the Fifth Amendment to provide “just compensation” to the owner thereof. “Just

94. *United States v. 93.970 Acres of Land*, 360 U.S. 328, 332-333 (1959); *United States v. Miller*, 317 U.S. 369, 380 (1943).

95. *Kirby Forest Industries, Inc. v. United States*, 467 U.S. 1, 3-4 (1984); *United States v. 93.970 Acres of Land*, 360 U.S. 328, 333, n.7 (1959).

96. *United States ex rel. T.V.A. v. Powelson*, 319 U.S. 266, 279 (1943).

97. *State of Nebraska v. United States*, 164 F.2d 866, 868 (8th Cir. 1947), cert. denied 334 U.S. 815.

98. *United States v. Little Lake Misere Land Company*, 412 U.S. 580, 604 (1973); *United States v. Certain Interests in Property in Champaign County, Ill.*, 271 F.2d 379, 384 (7th Cir. 1959), cert. denied 362 U.S. 974.

Compensation,” we have held, means in most cases the fair market value of the property on the date it is appropriated. “Under this standard, the owner is entitled to receive ‘what a willing buyer would pay in cash to a willing seller’ at the time of the taking.”⁹⁹

On a number of occasions, the Supreme Court has addressed the issue of market value, as the measure of just compensation, in federal condemnation cases. The following definition of market value has been adopted for use by appraisers in applying these Standards to their appraisals and reports prepared for federal land acquisitions:

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

This definition is based on a compendium of Supreme Court decisions regarding the definition of market value for federal eminent domain purposes.¹⁰⁰ As with most definitions of market value, this one contains various implicit elements, some of which have “been hedged with certain refinements developed over the years in the interest of effectuating the constitutional guarantee” of just compensation.¹⁰¹

In ascertaining market value, consideration should be given to all matters that might be brought forward and reasonably be given substantial bargaining weight by persons of ordinary prudence, but no consideration whatever should be given to matters not affecting market value.¹⁰² In developing the generally applied rule that market value is the measure of just compensation, the federal courts have employed variations of the term *market value*; as explained by the Supreme Court in *United States v. Miller*, 317 U.S. 369, 374 (1943) (internal citations omitted):

The owner has been said to be entitled to the “value,” the “market value,” and the “fair market value” of what is taken. The term “fair” hardly adds anything to the phrase “market value” which denotes what “it fairly may be believed that a purchaser in fair market conditions would have given,” or, more concisely, “market value fairly determined.”

It is clear from these decisions that the adding of adjectives, such as *fair* or *cash* to the term *market value* does not alter its meaning for federal acquisition purposes.

The Supreme Court has cautioned that:

strict adherence to the criterion of market value may involve elements which, though they affect such value, must in fairness be eliminated in a condemnation case, as where the formula is attempted to be applied as between an owner who may not want to part with his land because of its special adaptability to his own use, and a taker who needs the land because of its peculiar fitness for the taker’s purposes. These elements must be disregarded by the fact finding body in arriving at “fair” market value.¹⁰³

99. *Kirby Forest Industries, Inc. v. United States*, 467 U.S. 1, 9-10 (1984) (citations omitted).

100. *Almota Farmers Elevator and Warehouse Co. v. United States*, 409 U.S. 470, 474 (1973); *Kerr v. South Park Commissioners*, 117 U.S. 379, 386-387 (1886); *United States v. Miller*, 317 U.S. 369, 374 (1943); *Kirby Forest Industries, Inc. v. United States*, 467 U.S. 1, 10 (1984); *McCoy v. Union Elevated R.R. Co.*, 247 U.S. 354, 359 (1918); *United States v. Reynolds*, 397 U.S. 14, 17 (1970).

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

102. *United States v. 50 Acres of Land*, 469 U.S. 24, 29 (1984).

103. *United States v. Miller*, 317 U.S. 369, 375, (1943). See also *United States v. Fuller*, 409 U.S. 488, 491 (1973).

Likewise, since market value is the test, no consideration should be given in the appraisal to any special value of the property to the owner not directly reflected in the market value.¹⁰⁴

In this connection, the Supreme Court has noted that “[t]he value compensable under the Fifth Amendment, therefore, is only that value which is capable of transfer from owner to owner and thus of exchange for some equivalent. Its measure is the amount of that equivalent.”¹⁰⁵ The Court goes on to state: “If exchanges of similar property have been frequent, the inference is strong that the equivalent arrived at by the haggling of the market would probably have been offered and accepted, and it is thus that the ‘market price’ becomes so important a standard of reference.”¹⁰⁶ Accordingly, it is the *market price* which arises from the “haggling of the market” which is being sought. When price-controlled property is taken, the controlled price, being the only lawful market price, is the normal measure of just compensation,¹⁰⁷ as “The Fifth Amendment allows the owner only the fair market value of his property; it does not guarantee him a return on his investment.”¹⁰⁸

It is significant that the federal definition of market value is based on the presumption that the property, prior to the effective date of valuation, was on the open market for a reasonable length of time to find a buyer who was ready, willing, and able to consummate a purchase on the effective date of valuation. The federal courts have not attempted to define a *reasonable length of time*, probably in recognition of the fact that such length of time may vary dependent upon a myriad of factors, such as property type, market conditions, property location, and price range of property. Nor have the federal courts required that an estimate of market value be *linked* to a specified exposure time on the open market, only that it be *reasonable* under the circumstances. For that reason, appraisers should not link their estimates of market value made for federal acquisition purposes to a specific exposure time. To do so places a limiting condition on the estimate that is not required for federal land acquisition purposes, and one which may be found to be unacceptable by the federal courts.

The question of what constitutes reasonably knowledgeable buyers and sellers, within the context of market value, has been addressed. It has been found that *reasonably knowledgeable* does not require buyers and sellers to be all-knowing, but rather to have the knowledge possessed by the “typical ‘willing buyer-willing seller’” in the marketplace: “The market from which a fair market value may be ascertained need not contain only legally trained (or advised) persons who fully investigate current land use regulations; ignorance of the law is every buyer’s right.”¹⁰⁹ Consideration should be given to “a relevant market made up of investors who are real but are speculating in whole or major part.”¹¹⁰ As the same court explained in a later appeal:

The uncontroverted evidence of an active real estate market compels the conclusion that the typical ‘willing buyer-willing seller’ requirement of fair market value had been met; it would be inappropriate for a court to substitute its own judgment of value for that of the market. While an [appraiser] might be justified in adjusting the fair market value figure by discarding aberrational values based upon sales between related entities or fraudulent sales to widows and orphans, an [appraiser] may not discard an entire market as aberrational.¹¹¹

104. *United States v. 50 Acres of Land*, 469 U.S. 24, 35 (1984); *United States v. 564.54 Acres of Land*, 441 U.S. 506, 511 (1979); *United States v. Miller*, 317 U.S. 369, 375 (1943).

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

106. *Ibid.*, 6.

107. *United States v. Commodities Trading Corp.*, 339 U.S. 121, 124-125 (1950).

108. *United States ex rel. T.V.A. v. Powelson*, 319 U.S. 266, 285 (1943).

109. *Florida Rock Industries, Inc. v. United States*, 18 F.3d 1560, 1566, n.12 (Fed. Cir. 1994).

110. *Florida Rock Industries, Inc. v. United States*, 791 F.2d 893, 903 (Fed. Cir. 1986).

111. *Florida Rock Industries, Inc. v. United States*, 18 F.3d 1560, 1567 (Fed. Cir. 1994).

The Supreme Court has ruled that any alteration in the market value of the property being acquired that is attributable to the project for which it is being acquired must be disregarded.¹¹² This subject is discussed in detail in Section B-10. The market value which is sought is not merely theoretical or hypothetical; it represents, insofar as it is possible to estimate it, the actual selling price. As has been judicially declared: “where ‘private property is taken for public use, and there is a market price prevailing at the time and place of the taking, that price is just compensation.’”¹¹³

Even though “[t]he Court has repeatedly held that just compensation normally is to be measured by ‘the market value of the property at the time of the taking contemporaneously paid in money,’”¹¹⁴ it has also recognized that deviation from this measure of just compensation has sometimes been required “‘when market value has been too difficult to find, or when its application would result in manifest injustice to owner or public.’”¹¹⁵ As explained by Justice Douglas:

The Court in its construction of the constitutional provision has been careful not to reduce the concept of “just compensation” to a formula. The political ethics reflected in the Fifth Amendment reject confiscation as a measure of justice. But the Amendment does not contain any definite standards of fairness by which the measure of “just compensation” is to be determined. The Court in an endeavor to find working rules that will do substantial justice has adopted practical standards, including that of market value. 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.¹¹⁶

This should not be construed to mean that in all instances in which highly similar comparable sales are unavailable, the courts will disavow the market value measure of compensation. As the Supreme Court explained:

There may have been, for example, so few sales of similar property that we cannot predict with any assurance that the prices paid would have been repeated in the sale we postulate of the property taken. We then say that there is ‘no market’ for the property in question. But that does not put out of hand the bearing which the scattered sales may have on what an ordinary purchaser would have paid for the claimant’s property. We simply must be wary that we give these sparse sales less weight than we accord ‘market’ price, and take into consideration those special circumstances in other sales which would not have affected our hypothetical buyer.¹¹⁷

The Court has also made it clear that “[t]he ascertainment of compensation is a judicial function, and no power exists in any other department of the government to declare what the compensation shall be or to prescribe any binding rule in that regard”¹¹⁸ because the meaning of *just compensation* is a matter of fundamental constitutional interpretation, and the ability to make binding interpretations of the Constitution rests only with the United States Supreme Court.

In short, while the “Court has never attempted to prescribe a rigid rule for determining what is ‘just compensation’ under all circumstances and in all cases . . . market value has normally been accepted as a just standard.”¹¹⁹ Thus, these Standards are based on the premise that the compensation for federal land acquisitions will be measured by the

112. *United States v. Reynolds*, 397 U.S. 14, 16-17 (1970).

113. *United States v. Toronto, Hamilton & Buffalo Navigation Co.*, 338 U.S. 396, 404 (1949), citing *United States v. New River Collieries*, 262 U.S. 341, 344 (1923).

114. *United States v. 50 Acres of Land*, 469 U.S. 24, 29 (1984) (citations omitted).

115. *Ibid.*

116. *United States v. Cors*, 337 U.S. 325, 332 (1949) (citations omitted).

117. *United States v. Toronto, Hamilton & Buffalo Navigation Co.*, 338 U.S. 396, 402 (1949).

118. *United States v. New River Collieries*, 262 U.S. 341, 343-344 (1923).

119. *United States v. Commodities Trading Corp.*, 339 U.S. 121, 123 (1950).

relatively *objective working rule*¹²⁰ of market value as established by the Supreme Court over 100 years ago.¹²¹ It is also for that reason that appraisers are instructed by these Standards to estimate the market value of property being acquired by the government, rather than to estimate the just compensation due for the property acquired. The determination of “just compensation” is beyond the scope of the appraiser’s assignment, expertise, and authority. If the circumstances of a particular case render the market value measure “too difficult to find, or when its application would result in manifest injustice to owner or public,”¹²² that determination will be made by the court in accordance with applicable law.

Buildings and improvements,¹²³ timber, crops, sand, gravel, minerals, oil, and so forth, in or upon the property are to be considered to the extent that they enhance the market value of the property as a whole. The total value of the property shall not be estimated by adding the values of such separate items to the value of the land, and the fact that the various items are in separate ownerships does not alter this rule. It must be remembered that it is the market value of the entire property that is the standard of valuation, and not the total of the money values of the separate items. This subject is discussed in greater detail in Section B-13 of these Standards. The mere possibility of the existence of minerals, oil, or gas is not sufficient to affect market value. Such a possibility can be given consideration only when there is sufficient probability of the presence of mineral, oil, or gas as to affect market value and when that probability would be given weight by a prudent person in bargaining.

Government-constructed buildings and improvements put on the property during the government’s prior occupancy (e.g., when the government begins construction of the public improvement prior to the transfer of title and the effective date of the appraisal, or when the government made improvements as a prior lessee of the property) are often excluded from consideration in estimating market value, depending upon the specific facts of the case. Therefore, appraisers who encounter government-constructed improvements on the property to be appraised as of the effective date of the appraisal should request written instructions from the client agency or legal counsel on how the improvements should be treated.¹²⁴

120. *United States v. 564.54 Acres of Land*, 441 U.S. 506, 511 (1979).

121. E.g., *Boom Company v. Patterson*, 98 U.S. 403, 408 (1878).

122. *United States v. 50 Acres of Land*, 469 U.S. 24, 29 (1984).

123. Section 302(a) of P.L. 91-646, the Uniform Relocation Act (URA), approved January 2, 1971, 84 Stat. 1905, 42 U.S.C. §4652 provides:

[N]otwithstanding any other provision of law, if the head of a federal agency acquires any interest in real property in any State, he shall acquire at least an equal interest in all buildings, structures, or other improvements located upon the real property so acquired and which he requires to be removed from such real property or which he determines will be adversely affected by the use to which such property will be put.

The appraiser should receive from the acquiring agency advice as to the requirements of such agency for the removal of buildings, structures and the identification of these which the head of the agency determines will be adversely affected by the proposed use of the property. However, appraisers should also recognize that such instructions may not be applicable if the case is referred to the Department of Justice for condemnation, because Section 102 of the Act provides:

- (a) The provisions of section 4651 of this title of the Act [relating to real property acquisition policy and practices] create no rights or liabilities and shall not affect the validity of any property acquisitions by purchase or condemnation.
- (b) Nothing in this Act shall be construed as creating in any condemnation proceedings brought under the power of eminent domain, any element of value or of damage not in existence immediately prior to January 2, 1971. 42 U.S.C. §4602.

124. In researching this issue, legal counsel may want to start their research by referring to the following cases: *Old Dominion Co. v. United States*, 269 U.S. 55, 65 (1925); *Searl v. School District, Lake County*, 133 U.S. 553, 562-565 (1890); *Washington Metropolitan Area Transit Authority v. One Parcel of Land*, 780 F.2d 467, 471 (4th Cir. 1986); *United States v. Delaware, Lackawana & Western Railroad Co.*, 264 F.2d 112, 116-117 (3rd Cir. 1959); *Bibb County, Georgia v. United States*, 249 F.2d 228, 230 (5th Cir. 1957), but see *United States v. Certain Space in Rand McNally Building*, 295 F.2d 381, 383-384 (7th Cir. 1961).

As a general rule, the property being acquired should be valued as of the time of acquisition, or as near that time as is possible.¹²⁵ When the appraisal is made after the taking, no consideration whatever should be given to physical changes, particularly improvements made by the condemnor, or changes in value occurring after the taking. Likewise, as discussed in Section B-10, no consideration should be given to or allowance made for enhancement or diminution in value of the property attributable to or resulting from the project or from the government's special need for the property, other than that due to physical deterioration within the reasonable control of the owner, whether such changes in value occur before or after the time of acquisition.

B-3. Highest and Best Use. Market value is to be determined with reference to the property's *highest and best use*, that is:

The highest and most profitable use for which the property is adaptable and needed or likely to be needed in the reasonably near future. . . .¹²⁶

Such use "is to be considered, not necessarily as the measure of value, but to the full extent that the prospect of demand for such use affects the market value while the property is privately held."¹²⁷

"Ordinarily, the highest and best use for property sought to be condemned is the use to which it is subjected at the time of the taking. This is true because economic demands normally result in an owner's putting his land to the most advantageous use."¹²⁸ In the conduct of appraisals for federal land acquisition purposes, there is a presumption that the existing use of land is its highest and best use.¹²⁹ Therefore, when there is a claim that the highest and best use of a property is something other than the property's existing use, the burden of proving that different highest and best use is on the party making the claim.¹³⁰

However, if the property is clearly adaptable to a use other than the existing use, its marketable potential for such use should be considered to the extent that potential affects market value.¹³¹ But, market value cannot be predicated upon potential uses that are speculative and conjectural; as the Supreme Court has said:

Elements affecting value that depend upon events or combinations of occurrences which, while within the realm of possibility, are not fairly shown to be reasonably probable should be excluded from consideration, for that would be to allow mere speculation and conjecture to become a guide for the ascertainment of value—a thing to be condemned in business transactions as well as in judicial ascertainment of truth.¹³²

A proposed highest and best use requires a showing of reasonable probability that the land is both physically adaptable for such use **and** that there is a need or demand for such

125. That will generally be the date of the appraiser's last property inspection in voluntary acquisitions. In a declaration of taking case, the proper time of valuation is the date of filing the declaration of taking or the date of the government's entry into possession, whichever occurs first. *United States v. Dow*, 357 U.S. 17, 21-22 (1958). In a *straight* condemnation (without declaration of taking), the date of commencement of trial is used as the date of valuation. See *Kirby Forest Industries, Inc., v. United States*, 467 U.S. 1, 16-17 (1984), for a full discussion of the date of valuation question in a straight condemnation case.

126. *Olson v. United States*, 292 U.S. 246, 255 (1934). See also *Boom Company v. Patterson*, 98 U.S. 403, 408 (1878).

127. *Ibid.*

128. *United States v. Buhler*, 305 F.2d 319, 328 (5th Cir. 1962).

129. *United States v. L. E. Cooke Company, Inc.*, 991 F.2d 336, 341 (6th Cir. 1993); *United States v. 62.50 Acres of Land*, 953 F.2d 886, 890 (5th Cir. 1992); *United States v. 69.1 Acres of Land.*, 942 F.2d 290, 292 (4th Cir. 1991).

130. *United States v. 62.50 Acres of Land*, 953 F.2d 886, 890 (5th Cir. 1992); *Tennessee Gas Pipeline Co. v. 104 Acres of Land*, 780 F.Supp. 82, 86 (D.R.I. 1991).

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

132. *Ibid.*, 257.

use in the reasonably near future; physical adaptability alone is insufficient.¹³³ “[O]bviously the more profitable operation must be allowed by law to be carried out on the premises.”¹³⁴ (See Sections B-23, “Zoning and Permits” and D-6, “Zoning and Other Land Use Regulations.”)

In no event may an appraisal be made on the basis of one use for the land while the improvements are valued on the basis a different, inconsistent use. (See A-14, “Analysis of Highest and Best Use”). Various parts of a single property may have different highest and best uses as long as these uses are not inconsistent (e.g., residential or commercial along road or highway frontage and agricultural use for the rear land).¹³⁵ These differences, however, may enter into the determination of the larger parcel, which is discussed in Section B-11. In no event is it proper that the different uses be valued independently and merely added together to derive a value for the whole property.¹³⁶

Highest and best use cannot be predicated on a demand created solely by the project for which the property is acquired (e.g., rock quarry, when the only market is the highway project for which property was acquired).¹³⁷ A proposed highest and best use cannot be the use for which the government is acquiring the property (e.g., missile test range, habitat conservation, airfield, park), unless there is a prospect and competitive demand for that use by others than the government.¹³⁸

The Supreme Court has recognized the existence of a ‘principle which excludes enhancement of value resulting from the government’s special or extraordinary demand for the property.’ . . . The focal point of the ‘special or extraordinary’ standard is that values resulting from the urgency or uniqueness of the government’s need for the property or from the uniqueness of the use to which the property will be put do not reflect what a willing buyer would pay to a willing seller. . . . [I]t is clear that government projects may render property valuable for a unique purpose. Value for such a purpose, if considered, would cause ‘the market to be an unfair indication of value,’ because there is no market apart from the government’s demand.¹³⁹

Likewise, “[t]he benefit a real estate development produces for a community or the amenity contribution provided by a planned project (i.e., the public space in a park-like area) is not considered in the appraiser’s analysis of highest and best use. Highest and best use is driven by economic considerations and market forces, not by public interest.”¹⁴⁰ Therefore, “a non-economic highest and best use is not a proper basis for the estimate of market value [thus] a highest and best use of conservation, preservation, or other use that

133. *Ibid.*, 256; *United States v. 27.93 Acres of Land*, 924 F.2d 506, 512 (3rd Cir. 1991); *United States v. 33.90 Acres of Land*, 709 F.2d 1012, 1014-1015 (5th Cir. 1983); *United States v. 158.24 Acres of Land*, 696 F.2d 559, 563 (8th Cir. 1982); *United States v. 77,819.10 Acres of Land*, 647 F.2d 104, 110 (10th Cir. 1981).

134. *United States v. Meadow Brook Club*, 259 F.2d 41, 45 (2nd Cir. 1958), cert. denied, 358 U.S. 921.

135. *United States v. 179.26 Acres of Land*, 644 F.2d 367, 371 (10th Cir. 1981); *United States v. 320.0 Acres of Land*, 605 F.2d 762, 817 n.124 (5th Cir. 1979); *Eagle Lake Improvement Co. v. United States*, 160 F.2d 182, 184 (5th Cir. 1947), cert. denied, 332 U.S. 762; *United States v. Carrol*, 304 F.2d 300, 306 (4th Cir. 1962).

136. *United States v. 91.90 Acres of Land*, 586 F.2d 79, 87 (8th Cir. 1978); cert. denied, 441 U.S. 944 (1979); *Morton Butler Timber Co. v. United States*, 91 F.2d 884, 888 (6th Cir. 1937); *United States v. Jaramillo*, 190 F.2d 300, 302 (10th Cir. 1951); *United States v. Certain Parcels of Land in Rapides Parish, La.*, 149 F.2d 81, 82 (5th Cir. 1945).

137. *United States v. Cors*, 337 U.S. 325, 333 (1949); *United States v. 320.0 Acres of Land*, 605 F.2d 762, 811 n. 107 (5th Cir. 1979); *United States v. 46,672.96 Acres of Land*, 521 F.2d 13, 15, 16 (10th Cir. 1975); *J. A. Tobin Construction Co. v. United States*, 343 F.2d 422, 423 (10th Cir. 1965), cert. denied, 382 U.S. 830; *United States v. 158.76 Acres of Land*, 298 F.2d 559, 560 (2nd Cir. 1962).

138. *United States v. Chandler-Dunbar Co.*, 229 U.S. 53, 80-81 (1913); *United States v. 320.0 Acres of Land*, 605 F.2d 762, 783 n.26, 811 n.107 (5th Cir. 1979); *United States v. 46,672.96 Acres of Land*, 521 F.2d 13, 15-16 (10th Cir. 1975).

139. *United States v. Weyerhaeuser Co.*, 538 F.2d 1363, 1366, 1367 (9th Cir. 1976), cert. denied, 429 U.S. 929 (1976) (internal citations omitted).

140. *The Appraisal of Real Estate*, 11th ed. (Chicago: Appraisal Institute, 1996), 298 n.1.

requires the property to be withheld from economic production in perpetuity, is not a valid use upon which to estimate market value.”¹⁴¹

The Department of Justice’s “view is that an appraisal premised on a highest and best use of ‘preservation,’ ‘conservation,’ ‘natural lands’ and the like is not an appraisal of ‘fair market value’ and is unacceptable for both direct purchase and eminent domain acquisitions. That view is largely based on the principles of eminent domain law from which we conclude that a non-economic use is not a proper basis for assessing fair market value, that a value premised on a highest and best use of ‘preservation’ or the like does not represent a ‘market’ value, and certainly does not represent a ‘fair’ value.”¹⁴² Therefore, the Department of Justice will not approve any appraisal report for federal acquisition purposes wherein the value estimate is based upon an uneconomic highest and best use. Nor will it approve any appraisal report that incorporates a definition of highest and best use that includes the concept of non-economic uses. (See A-14, “Analysis of Highest and Best Use.”)

When determining the highest and best use of land riparian to navigable water, there are special considerations that must be taken into account. See discussion in Section B-14.

Because the highest and best use is a most important consideration in estimating market value, it must be dealt with specifically in appraisal reports. Many things must be considered in determining the highest and best use of property and each potential use must be analyzed in terms of its physical possibility, legal permissibility, financial feasibility, and its degree of profitability. That use which meets the first three tests and is the most profitable use (i.e., results in the highest value) is the property’s highest and best use.

Important practical applications of highest and best use estimates arise in connection with partial acquisitions, such as flowage, conservation, clearance or other types of easements. The value of the remainder, after a partial acquisition, is governed largely by its highest and best use. If, for example, what was essentially farmland before the acquisition has become lakefront property having a highest and best use for recreational home sites, the important principle of offsetting special benefits discussed in Section B-12, might become applicable. However, if the acquisition causes the remainder property to have a less valuable highest and best use, the difference between the values of the property before and after the acquisition will reflect both the diminution in the value of the remainder resulting from the acquisition as well as the value of the land or property interest actually acquired. This is more fully discussed in Section B-11 of these Standards.

Concerning partial acquisitions, the appraiser must consider any material change in the intensity of use within a highest and best use classification: for example, when a balanced farm in the before position becomes an unbalanced farm in the after position because of the partial acquisition by the government.¹⁴³ The highest and best use classification of an agricultural farm would cover both positions. However, the two intensities of that use, a balanced versus an unbalanced farm, would identify the need to carefully re-analyze the comparative ratings of each of the comparable sales in the after position, or even the need to use different comparable sales in the after position than were used before the government’s acquisition.

141. Interagency Land Acquisition Conference, “Position Paper: On the issue whether a noneconomic highest and best use can be a proper basis for the estimate of market value” (Washington D.C., 1995).

142. William J. Kollins, “Presentation on Issues Raised by the ‘Public Interest Value’ Concept: Views of the Department of Justice” (Paper delivered at the Annual Meeting of the American Society of Farm Managers and Rural Appraisers, Reno, NV, November 11, 1994), 4. See also, William J. Kollins, “Public Interest Value,” *United States Attorney’s Bulletin* (February 2000): 47-53.

143. For example, in the before position the farm may have a balanced ratio of supporting outbuildings to service the land area in the farm, whereas in the after position, because of the reduced land area of the farm, the outbuildings may constitute an over-improvement and thus contribute less value, because of the lessened land area to be served.

B-4. Sales Comparison Approach to Value. Arms length transactions in lands in the vicinity of and comparable to the land under appraisal,¹⁴⁴ reasonably near the time of acquisition, are the best evidence of market value,¹⁴⁵ but not to the extent of exclusion of other relevant evidence of value.¹⁴⁶ Such transactions are commonly referred to as comparable sales, and the process of forming an opinion of the property's market value through comparison of such sales transactions with the subject property is known as the sales comparison approach to value. Too often it has been found in appraisal reports that, under the circumstances of the case, the most reliable approach to value has been over-shadowed by the time, attention, and detail given to other less reliable approaches to value.

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

- Property rights conveyed
- Financing terms
- Conditions of sale
- Market conditions (historically referred to as a *time* or *date of sale* adjustment)
- Location
- Physical characteristics
- Economic characteristics
- Use and zoning
- Non-realty components of value included in the sale property¹⁴⁷

Accepting the truism that all three of the usual approaches to value are based on market data interpretation, the federal courts recognize that the sales comparison approach is normally the best evidence. Adjustments made to comparable sales are often developed by the use of techniques from the income capitalization and cost approaches to value and, conversely, factors used in the income capitalization and cost approaches are often derived from comparative market data.

The important role of the sales comparison approach to value in appraisals for federal land acquisitions is illustrated by the Supreme Court's statement that: "Where private property is taken for public use, and there is a market price prevailing at the time and place of the taking, that price is just compensation."¹⁴⁸ Or, as put by the 10th Circuit: "The best evidence of such value is like and comparable sales within a reasonable time preceding the condemnation."¹⁴⁹ The sales comparison approach normally should be stressed and care

144. This would include a prior sale of the land under appraisal, which could very well be the most comparable of all the comparable sales. See Section B-5, "Prior sales of the identical property," for fuller discussion of this point.

145. E.g., *El Paso Natural Gas Co. v. Federal Energy Regulatory Commission*, 96 F.3d 1460, 1464 (D.C. Cir. 1996); *United States v. 819.98 Acres of Land*, 78 F.3d 1468, 1471 (10th Cir. 1996); *United States v. 24.48 Acres of Land*, 812 F.2d 216, 218 (5th Cir. 1987); *Nemmers v. City of Dubuque*, 764 F.2d 502, 505 (8th Cir. 1985); *United States v. 103.38 Acres of Land*, 660 F.2d 208, 211 (6th Cir. 1981); *United States v. 100 Acres of Land, Etc., Marin Cty., Cal.*, 468 F.2d 1261, 1265 (9th Cir. 1972), cert. denied, 414 U.S. 822 (1973); *United States v. Upper Potomac Properties Corp.*, 448 F.2d 913, 918 (4th Cir. 1971); *United States v. 344.85 Acres of Land*, 384 F.2d 789, 791-792 (7th Cir. 1967); *United States v. 60.14 Acres of Land*, 362 F.2d 660, 665 (3rd Cir. 1966).

146. *El Paso Natural Gas Co. v. Federal Energy Regulatory Commission*, 96 F.3d 1460, 1464 (D.C. Cir. 1996); *United States v. 819.98 Acres of Land*, 78 F.3d 1468, 1471 (10th Cir. 1996); *Servalli v. United States*, 845 F.2d 1571, 1575 (Fed. Cir. 1988); *United States v. 421.89 Acres of Land*, 465 F.2d 336, 338-339 (8th Cir. 1972); *United States v. Upper Potomac Properties Corp.*, 448 F.2d 913, 917 (4th Cir. 1971); *United States v. 344.85 Acres of Land*, 384 F.2d 789, 792 (7th Cir. 1967).

147. For a general discussion of these elements of comparison see, *The Appraisal of Real Estate*, 11th ed. (Chicago: Appraisal Institute, 1996), 403-414.

148. *United States v. New River Collieries*, 262 U.S. 341, 344 (1923).

149. *Onego Corporation v. United States*, 295 F.2d 461, 463 (10th Cir. 1961).

should be taken that it does not get lost among other evidence concerning what the courts often view as less reliable approaches to value. Because it is the most easily understood approach to value, it often develops the most acceptable and convincing evidence of the market value of the property to both the courts and the parties to the transaction.

It is imperative to verify sales amounts and to ascertain whether terms and conditions of a sale were conventional and under open competitive market conditions. This requires interviews and discussions with the seller, buyer, the closing agency, or the broker handling the transaction and the verification of recordation, which is the only avenue of verification not based upon statements of persons other than the appraiser. Verification must be accomplished by competent and reliable personnel, and if the case goes into condemnation, the sale must be personally verified by the appraiser who will testify.

The extent of sales verification will vary with the circumstances of each sale, including the specific parties involved in the sale and the importance and weight ultimately given to the sale in the final estimate of value. Sales must be evaluated under two criteria: the weight, if any, to be given them by the appraiser in arriving at an estimate of market value of the property under appraisal, and the admissibility of such sale if the acquisition must be by condemnation. Although the criteria for these evaluations are similar, they are not identical, and the result of one evaluation does not necessarily dictate the result of the other. For instance, a sale that is found to be inadmissible does not necessarily have to be entirely excluded from the appraiser's consideration in deriving an estimate of market value (e.g., see discussion of "offers" in Section B-16 of these Standards). Nor is a sale which the appraiser concluded should be given no weight necessarily inadmissible. The criteria for the evaluation of sales for purposes of admissibility will be discussed below. Sections A-17, and D-9 discuss the criteria and required verification process for various categories of sales to determine the weight, if any, these sales should be given by the appraiser.

However, in determining when to consider, and if so how much weight to give sales in their appraisals, appraisers should recognize that the criteria established for the admissibility of sales by the federal courts were established for legitimate and persuasive reasons. Therefore, one of the factors that should be considered in the selection and weighing of comparables sales is their admissibility.

Forced sales, i.e., sales made under some form of legal (as distinguished from economic) compulsion, are generally not admissible in a condemnation trial.¹⁵⁰ "A forced sale is one which has no probative value whatever and therefore must be excluded from evidence."¹⁵¹ "The phrase 'forced sale' is used in the law of condemnation to describe a sale of property which is inadmissible as evidence of value because elements of compulsion so affected the seller that the sale could not be said to be fairly representative of market value at the time made. This conception of a forced or compulsive sale includes force or compulsion as a result of some kind of legal process."¹⁵² It has been held that a comparable sale was not under compulsion, coercion or compromise, such as to be inadmissible in evidence, if the witness testifies or if it is otherwise shown, that the public records do not disclose that the sale was at foreclosure, under deed of trust securing an indebtedness, at execution or attachment, at auction, under the pressure of the exercise of the power of eminent domain, or under other coercion sui generis – types of legal compulsion generally disclosed by

150. *United States v. Certain Land in Fort Worth, Texas*, 414 F.2d 1029, 1031-32 (5th Cir. 1969); *District of Columbia Redevelopment Land Agency v. 61 Parcels of Land*, 235 F.2d 865, 865-66 (D.C. Cir. 1956); *Hickey v. United States*, 208 F.2d 269, 275 (3rd Cir.1953), cert. denied, 347 U.S. 919(1954); *United States v. 5139.5 Acres of Land*, 200 F.2d 659, 661 (4th Cir. 1952); *Baetjer v. United States*, 143 F.2d 391, 397 (1st Cir.), cert. denied, 323 U.S. 772.

151. *Hickey v. United States*, 208 F.2d 269, 275 (3rd Cir. 1953), cert. denied, 347 U.S. 919 (1954).

152. *Ibid.*

public records.¹⁵³ The motivation behind other transactions can be shown, but only as affecting the weight that should be afforded a sale, not as to its admissibility.¹⁵⁴

Sales to a condemning authority are often inadmissible. (See Section B-18, “Price paid by government entity for similar property.”) The reasons for excluding sales to a condemning authority are not applicable, however, to sales *by* a condemning authority. Sales between members of a family or closely related business entities are not arms-length transactions, and since they may involve other factors than market value considerations, such sales are generally inadmissible. Sales involving the exchange of property are generally not admissible because they are considered unreliable indicators of market value and introduce too many collateral issues. As has been explained:

If evidence of . . . an exchange is to be considered as proof of present valuation, the values of such exchanged lands obviously must be proved by the same standards as attends proof of value of the property being condemned. Then it becomes the task of the trial judge to determine ordinarily whether such collateral issues would be so confusing or so lengthy as to cause him to rule out any effort to prove value of the condemned tract in such a fashion.¹⁵⁵

Sales that include personal property (e.g., the sale of a farm that includes the farm equipment and/or livestock), are likewise considered inadmissible, unless they can accurately be adjusted to reflect only the real property transaction. Distress sales and sales with atypical financing terms are of questionable reliability and should be used only with great care. If want of available market data necessitates reference to such a sale or sales, it is important that proper adjustments be made.

Sales after the date of acquisition are not per se inadmissible (contrary to popular belief) and with appropriate caution and restraint may be utilized by the appraiser if they meet the usual standards of comparability and are not otherwise incompetent as evidence of value.¹⁵⁶ Sales transacted on or before the date of acquisition are the preferred support for an appraisal and if such sales are available and adequate, there is little justification for using post-acquisition sales. Use of post-acquisition sales should be avoided where they reflect artificially inflated or depressed values resulting from the acquisition itself or from the government’s project,¹⁵⁷ or if they significantly post-date the acquisition date.

A binding and unconditional contract of sale, even where title has yet to be conveyed, is generally competent admissible evidence of value and may be utilized by the appraiser as a comparable sale.¹⁵⁸ However, it is essential that the contract be *binding and unconditional*.

153. *United States v. Certain Land in Fort Worth, Texas*, 414 F.2d 1029, 1031-1032 (5th Cir. 1969); *District of Columbia Redevelopment Land Agency v. 61 Parcels of Land*, 235 F.2d 865, 865-866 (D.C. Cir. 1956).

154. *United States v. 6, 162.78 Acres of Land*, 680 F.2d 396, 399 (5th Cir. 1982); *United States v. Certain Land in Fort Worth, Texas*, 414 F.2d 1029, 1032 (5th Cir. 1969); *District of Columbia Redevelopment Land Agency v. 61 Parcels of Land*, 235 F.2d 865, 866 (D.C. Cir. 1956); *United States v. Katz*, 213 F.2d 799, 800 (1st Cir. 1954); *United States v. 5139.5 Acres of Land*, 200 F.2d 659, 661 (4th Cir. 1952).

155. *United States v. Leavell & Ponder, Inc.*, 286 F.2d 398, 406 (5th Cir. 1961), cert. denied, 366 U.S. 944.

156. *United States v. 68.94 Acres of Land*, 918 F.2d 389, 398 (3rd Cir. 1990); *United States v. 0.161 Acres of Land*, 837 F.2d 1036, 1044 (11th Cir. 1988); *United States v. 312.50 Acres of Land*, 812 F.2d 156, 157 n.3 (4th Cir. 1987); *United States v. 428.02 Acres of Land*, 687 F.2d 266, 270 (8th Cir. 1982); *United States v. 320.0 Acres of Land*, 605 F.2d 762, 799-803 (5th Cir. 1979); *United States v. 691.81 Acres of Land*, 443 F.2d 461, 462 (6th Cir. 1971); *United States v. 63.04 Acres of Land*, 245 F.2d 140, 144 (2nd Cir. 1957).

157. *Ibid.* But in the case of a partial acquisition where offsetting of benefits or damages are involved, post-acquisition sales could be particularly relevant in valuing the remainder. For example, they may also be particularly useful when the measure of damages is the difference between the market value before and after imposition of an easement. *United States v. 1129.75 Acres of Land*, 473 F.2d 996, 999 (8th Cir. 1973).

158. *United States v. 312.50 Acres of Land*, 812 F.2d 156, 157 (4th Cir. 1987); *United States v. 428.02 Acres of Land*, 687 F.2d 266, 270-271 (8th Cir. 1982); *United States v. 114.64 Acres of Land*, 504 F.2d 1098, 1100 (9th Cir. 1974); *United States v. Smith*, 355 F.2d 807, 811-812 (5th Cir. 1966).

Mere offers and unexercised options, by contrast, are inadmissible as evidence of value and, therefore, the appraiser should give little or no weight to such options, except to the extent that they may set limits of value.¹⁵⁹ See Section B-16.

The consideration and weight accorded to sales of other lands is determined by the reliability of the data collected and verified and by the application of the three tests of proximity (in time, in location, and in physical and economic similarity). But, the appraiser should thoroughly investigate sales that were considered though not relied upon as direct comparables in reaching a final estimate of market value. Such research material should be retained in the appraiser's file. When the comparability, thus admissibility, of a sale is disputed in the course of a valuation trial, it is a well-recognized principle of law that the determination of admissibility rests within the sound discretion of the presiding judge, whose ruling is subject to review only for abuse of discretion.¹⁶⁰ Retention of all data considered by the appraiser in concluding a value estimate will insure that adequate market data will be available for presentation to a trier of fact if the acquisition has to be accomplished by condemnation.

B-5. Prior Sales of the Identical Property. Prior sales of the same property, reasonably recent and not forced, are extremely probative evidence of market value.¹⁶¹ Accordingly, the appraiser has an obligation to determine what the owner paid for the property. Adjustments for changes in market conditions may have to be made, or the prior sale may have been made under circumstances that render it irrelevant to the determination of the market value as of the date of valuation, but each appraisal report must include a statement with respect to the consideration accorded to the immediate past sale of the property under appraisal.

The admission into evidence of a sale of the property being acquired is extremely pertinent, and thus courts have sustained such admissions even when a considerable period of time has elapsed between the sale and the date of valuation.¹⁶² Not only must the appraisal report include the latest sale of the property (regardless of when it was made) with whatever statement is deemed relevant to the value as of the effective date of appraisal and any adjustments made to reflect current value, but these Standards also require the reporting of all sales of the subject property within 10 years of the date of valuation. (See Section A-13e.)

B-6. Cost Approach. While it is acknowledged that appraisers have a professional obligation to apply the cost approach to value whenever the results of the approach will assist in estimating the value of the property,¹⁶³ appraisers need to recognize that the cost

159. *United States v. 0.59 Acres of Land*, 109 F.3d 1493, 1495-1496 (9th Cir. 1997); *United States v. 10,031.98 Acres of Land*, 850 F.2d 634, 637 (10th Cir. 1988); *United States v. 158.24 Acres of Land*, 696 F.2d 559, 565 (8th Cir. 1982); *United States v. Certain Land in Fort Worth, Texas*, 414 F.2d 1029, 1032 (5th Cir. 1969).

160. E.g., *United States v. 819.98 Acres of Land*, 78 F.3d 1468, 1471 (10th Cir. 1996); *United States v. 1,129.75 Acres of Land*, 473 F.2d 996, 998 (8th Cir. 1973); *United States v. 100 Acres of Land*, 468 F.2d 1261, 1265 (9th Cir. 1972), cert. denied, 414 U.S. 822 (1973); *United States v. Certain Land in Fort Worth, Texas*, 414 F.2d 1029, 1031, (5th Cir. 1969); *United States v. 60.14 Acres of Land*, 362 F.2d 660, 668-669 (3rd Cir. 1966); *Bailey v. United States*, 325 F.2d 571, 572 (1st Cir. 1963).

161. *United States v. 428.02 Acres of Land*, 687 F.2d 266, 271 (8th Cir. 1982); *Surfside of Brevard, Inc. v. United States*, 414 F.2d 915, 917 (5th Cir. 1969); A prior sale of the same property is not, as a matter of law, entitled to greater weight than sales of comparable property; the relative importance of the two being dependent upon the facts in the particular case. *Hickey v. United States*, 208 F.2d 269, 273 (3rd Cir. 1953), cert. denied, 347 U.S. 919 (1954).

162. *United States v. 428.02 Acres of Land*, 687 F.2d 266, 271 (8th Cir. 1982); *Carlstrom v. United States*, 275 F.2d 802, 809 (9th Cir. 1960); *Dickinson v. United States*, 154 F.2d 642,643 (4th Cir. 1946) (sale six years prior to date of valuation held properly admitted); *United States v. Bechtold Co.*, 129 F.2d 473, 479 (8th Cir. 1942) (sale fourteen years prior to date of value properly admitted). In *Bechtold* the court stated (p. 479): "The fact the purchase was made some fourteen years before the date of taking the property went to the weight of the evidence, rather than to its admissibility."

163. J. D. Eaton, *Real Estate Valuation in Litigation*, 2nd ed. (Chicago: Appraisal Institute, 1995), 160.

approach is generally viewed by the courts as the least reliable method of valuation.¹⁶⁴ Orgel summarized the courts' view as follows:

In the first place, reproduction cost should be regarded as setting the upper limit upon a valuation derived by any other method. . . . In the second place, structural cost should be recognized as an inferior measure of value, to be given weight only in those cases where more satisfactory evidence based on actual sales or on earning power is not available. In the third place, whenever reproduction cost is offered as evidence, the court should make every effort to assure a full deduction for those elusive forms of depreciation, obsolescence and inadequacy, that are so often disregarded by all but the most careful appraisers.¹⁶⁵

The courts have made clear that this approach should never be relied upon "when no one would think of reproducing the property,"¹⁶⁶ or when no prudent investor would reproduce it for the figure or amount given as replacement or reproduction cost.¹⁶⁷

In this approach, the market value of the bare land is added to the depreciated reproduction or replacement cost of the improvements to arrive at an indication of the value of the property. The value of the land bare and subject to improvement is generally estimated by a study of comparable sales (i.e., by application of the sales comparison approach). The estimate of the reproduction or replacement cost of the improvements is based on current local-market cost of labor and materials for construction of improvements. All forms of depreciation are deducted from the cost new estimate, as discussed hereinafter. This approach to value is most generally used as a check on the estimate of value indicated by the sales comparison approach and for appraising highly improved properties where there are no known comparable sales in the area.

In the case of special purpose properties¹⁶⁸ that are not generally bought and sold, it is sometimes necessary to resort to reproduction cost new less depreciation for want of any more reliable method of valuation.¹⁶⁹ It is important to remember that if it is necessary to resort to the cost approach, all forms of depreciation—physical deterioration, functional obsolescence, and external (or economic) obsolescence—must be accurately reflected and deducted from the reproduction or replacement cost before the value of the land and improvements are added together to develop an indication of market value by the cost approach. Whenever the cost approach is utilized and it can be determined at what time and at what cost the improvements were erected, a trending up—or down, as appropriate—of such initial costs becomes an important part of the analysis.

It should be noted that many of the reported cases speak in terms of reproduction cost new less depreciation and use the words *reproduction* and *replacement* interchangeably. The appraiser should recognize the distinction between reproduction cost and replacement cost. Reproduction cost has been defined as the present cost of reproducing the improvement with an exact replica, and replacement cost as the present cost of replacing the improve-

164. *United States v. 55.22 Acres of Land*, 411 F.2d 432, 435 (9th Cir. 1969) *United States v. Certain Interests in Property in Champaign County, Ill.*, 271 F.2d 379, 382 (7th Cir. 1959), cert. denied, 362 U.S. 974.

165. Lewis Orgel, *Valuation Under the Law of Eminent Domain*, 2nd ed. (Charlottesville, Va.: The Michie Co., 1953), vol 2, §199, p. 57.

166. *United States v. Toronto, Hamilton & Buffalo Navigation Co.*, 338 U.S. 396, 403 (1949); *See also United States v. Benning Housing Corp.*, 276 F.2d 248, 253 (5th Cir. 1960); *Buena Vista Homes, Inc. v. United States*, 281 F.2d 476, 478 (10th Cir. 1960).

167. *United States v. 55.22 Acres of Land*, 411 F.2d 432, 435-36 (9th Cir. 1969); *United States v. Certain Interests in Property, Etc.*, 296 F.2d 264, 269-70 (4th Cir. 1961).

168. Also referred to as *unique properties*, or *limited market properties*.

169. The courts have made clear that: "Even where there have been no sales of similar property in the vicinity upon which a basis of valuation might be predicated, the quest is still for 'market value.'" *Kintner v. United States*, 156 F.2d 5, 7 (3rd Cir. 1946); *United States v. Toronto, Hamilton & Buffalo Navigation Co.*, 338 U.S. 396, 402 (1949).

ment with one having equal utility.¹⁷⁰ If the cost approach is applicable, the appraiser may use either the reproduction or replacement cost method, but must account for all forms of depreciation appropriate under the particular method chosen: “[T]he cost basis selected for a particular appraisal must be clearly explained in the [appraisal] report to avoid misunderstanding.”¹⁷¹

Caution must be exercised in selecting the cost approach as the primary means of estimating market value because the courts are skeptical about the reliability of this approach, as demonstrated in *United States v. 49,375 Square Feet of Land in Borough of Manhattan*, 92 F. Supp. 384, 378-388 (S.D.N.Y. 1950), affirmed per curiam sub. nom. *United States v. Tishman Realty and Constr. Co.*, 193 F.2d 180 (2nd Cir 1952), cert. denied, 343 U.S. 928, as follows:

A third method of appraisal is somewhat tentatively and timidly put forward by the claimant, namely, the reproduction method. Here an expert is called upon to give his version of the sound value of the building by estimating what it would cost to reproduce it, and then deducting a fair amount for depreciation. This “method” is perhaps the most excellent example conceivable to demonstrate that none of such abstractions ought to have a place in the search for market value, generally speaking.¹⁷² . . . [I]gnoring the fact that on the figures an absurd result is reached, it is apparent that the reproduction method is in itself absurd in the ordinary case, because even in ordinary times it is ridiculous to suppose that anyone would think of reproducing this or any like property, and that same thing would be true in a vast majority of cases.

B-7. Income Capitalization Approach. While the courts generally favor the sales comparison approach to value, there are, of course, some income-producing properties for which the income capitalization approach is particularly relevant.¹⁷³ However, even when valuing that type of property where there are an adequate number of comparable sales available with which to develop an indication of market value, the sales comparison approach to value must also be developed and considered by the appraiser in arriving at a final value opinion. While the degree of reliance placed on the various approaches to value is a matter for the appraiser’s judgment, in making that judgment the appraiser should consider both the courts’ obvious preference for the sales comparison approach and the fact that “[h]istorically, the capitalization of income approach to value has been suspect.”¹⁷⁴ This cautionary note is warranted because the income capitalization approach often requires the appraiser to use a myriad of factors and variables, the accuracy of which cannot clearly and easily be demonstrated by direct market data. This is particularly true when discounted cash flow (DCF) analysis, or other forms of yield capitalization, is employed.

Nevertheless, as the same court quoted above has noted: “The capitalization of income approach has become acceptable in recognition of situations where income producing potential is a key element for both buyer and seller in many negotiations in arriving at a

170. *The Appraisal of Real Estate*, 11th ed. (Chicago: Appraisal Institute, 1996), explains this distinction as follows (p. 345): “Reproduction cost is the estimated cost to construct, at current prices as of the effective appraisal date, an exact duplicate or replica of the building being appraised, using the same materials, construction standards, design, layout, and quality of workmanship, and embodying all the deficiencies, superadequacies, and obsolescence of the subject building.” “Replacement cost is the estimated cost to construct, at current prices as of the effective appraisal date, a building with utility equivalent to the building being appraised, using modern materials and current standards, design, and layout.”

171. *Ibid.*, 345.

172. In a footnote, the court added: “I know well that there are situations in which the courts have been driven into using reproduction cost as a guide to value. I mean to say merely that those situations are certainly unusual.”

173. It must be noted, and emphasized, at the outset that the only *income* properly considered under this approach to market value is the income generated by the real estate—normally rental income, and not the income generated from a business conducted on the property.

174. *Foster v. U.S.*, 2 Cl. Ct. 426, 448 (1983).

fair price.”¹⁷⁵ “The fact . . . that a valuation reached has in it baffling elements of speculation and surmise does not mean that it should not be employed. One guess may be better than another guess, since not all guesses have in them the same element of intelligence. The realization that a considerable amount of conjecture is involved should not paralyze the function of deciding, but it should induce humility. Dogmatism is clearly out of order in a modern valuation case.”¹⁷⁶

That does not mean, however, that the various factors utilized by an appraiser can be used without justification and adequate market support. Another court explains:

[T]he capitalization of income method may be appropriate in certain cases, but where such method is used all of the factors that must necessarily be taken into account should be established by proper evidence. Where several of the elements or factors . . . are without objective evidential support, that method is faulty and can obviously lead to unfounded and enhanced valuations. Again, it appears clear that comparable sales are the best evidence of value of condemned land, which sales on the whole reflect the principle of a willing seller and a willing buyer concluding arms-length negotiations. The income capitalization method is justified mainly when better evidence is not available. Great care must be taken, or such valuations can reach wonderland proportions.

....

After reviewing the entire record, we are left with the definite and firm conviction that a mistake has been made. . . . [A]ppellees’ experts made key assumptions in using the income capitalization which were unsupported by the record evidence and the commission appeared to rely on these assumptions. When a factfinder bases its findings on the opinion of an expert whose reasons are without support in the record, the reviewing court should reject as clearly erroneous the findings based on such testimony.¹⁷⁷

One of the most critical factors applied in the income capitalization approach is, of course, the capitalization or discount rate. “It would seem apparent that if a capitalization rate is to be set, it should be ascertained by reference to the best evidence—the most similar property—as well as dissimilar investments if that proves necessary. ‘The selection of a capitalization rate by comparison is perhaps the most widely accepted approach. It recognizes the behavioristic nature of economics, because by comparison one gets the reaction of people in the market place.’”¹⁷⁸ For these reasons, appraisers utilizing the income capitalization approach in the valuation of property for federal acquisition are encouraged to make rate selections by comparison, as discussed in Section A-18.

In using the income capitalization approach, care should be taken to consider only income that the property itself will produce—not income produced from a business enterprise conducted on the property. When the public requires the land upon which a business is located, the business is not taken and the value estimate developed by the appraiser should include no incremental value for loss of the business or its profits.¹⁷⁹ Accordingly, the rule against admitting evidence of profits or income, either past or future, from a business conducted on the property condemned has been applied to farmlands as well as to other lands.¹⁸⁰ It is not improper, however, to consider the

175. *Ibid.*

176. *Ibid.* at 447.

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

178. *United States v. Certain Interests in Property in Monterey County, Cal.*, 186 F. Supp. 167, 170 (N.D. Cal. 1960) (citations omitted), *aff’d*, 308 F.2d 595 (9th Cir. 1962). See also *United States v. Leavell & Ponder, Inc.*, 286 F.2d 398, 407 (5th Cir. 1961), cert. denied, 366 U.S. 944; *United States v. 158.76 Acres of Land*, 298 F.2d 559, 561 (2nd Cir. 1962).

179. E.g., *United States v. Petty Motor Co.*, 327 U.S. 372, 377-78 (1946); *United States v. General Motors Corp.* 323 U.S. 373, 379-380 (1945); *United States ex rel. T.V.A. v. Powelson*, 319 U.S. 266, 281 (1943); *Mitchell v. United States*, 267 U.S. 341, 344-345 (1925); *Joslin Co. v. Providence*, 262 U.S. 668, 675 (1923); *Bothwell v. United States*, 254 U.S. 231, 233 (1920); *A.G. Davis Ice Co. v. United States*, 362 F.2d 934, 936-937 (1st Cir. 1966).

180. *United States v. Brinker*, 413 F.2d 733, 735 (10th Cir. 1969); *United States v. 26.699 Acres of Land*, 174 F.2d 367, 368-369 (5th Cir. 1949); *United States v. Meyer*, 113 F.2d 387, 397 (7th Cir. 1940), cert. denied, 311 U.S. 706; *Welch v. Tennessee Valley Authority*, 108 F.2d 95, 100 (6th Cir. 1939), cert. denied 309 U.S. 688.

uses to which a property can be put, including the character and extent of the business carried on, as distinguished from the profits from that business, the facilities for doing the business, and location of the property as a point commanding trade from the surrounding area, or otherwise.¹⁸¹ Therefore, when valuing property that typically sells on the basis of income production, it is appropriate to consider the amount of business conducted on the site. For instance, one common unit of comparison in valuing service stations is price per gallon of gasoline pumped; for taverns a unit of comparison is often price per keg of beer sold; and for funeral home the price per case. Also, of course, many commercial properties will be rented based on a percentage of the gross sales of the business located on the property. In these situations, business volumes may be considered but with the sole reference to the market value of the land.¹⁸²

The income to be capitalized in the income capitalization approach is the market or economic rent of the property being appraised. The appraiser should not consider the fact that a property may be under lease to a third party, except to the extent that the rent specified in the lease may be indicative of the property's market rent. The value to be estimated is the market value of the property as a whole, not the value of the various interests into which it may have been carved. This topic is discussed in greater detail in Section B-19.

It is generally recognized that it is improper to appraise the market value of a property, for federal acquisition purposes, by capitalizing the net income from a non-existent, hypothetical improvement proposed as the highest and best use for the subject land, and then deducting for development costs of the hypothetical improvement.¹⁸³

Property having a highest and best use for mineral production may be appraised by an income approach. This is not, however, an approach that should be used by an appraiser who is not thoroughly experienced in appraising mineral properties. Even when used by an appraiser experienced in the field, this can be a highly speculative appraisal method that must be used with great care. Because of the complexity of applying the income capitalization approach to mineral property, it is discussed in greater detail in Section D-11.

B-8. Development Approach. The development approach¹⁸⁴ is a method of appraising undeveloped acreage having a highest and best use for subdivision into lots. This approach consists of estimating a final sale price for the total number of lots into which the property could best be divided and then deducting all costs of development, including the developer's anticipated profit. The remaining sum, the *residual*, is said to represent the market value of the raw land.¹⁸⁵

181. *Lehigh Valley Coal Co. v. Chicago*, 26 F. 415, 417 (C.C. N.D. Ill. 1886).

182. Loss of business profits is, under federal law, noncompensable, as discussed in B-15, "Noncompensability of consequential damages." Congress has provided for recovery of some business losses by adopting the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970. Such recovery is, however, outside of the estimate of market value of the real estate for federal acquisition purposes. Therefore, to avoid double recovery, it is important that appraisers exclude such consequential damages from consideration in developing their estimates of market value.

183. *See United States v. 75.13 Acres of Land*, 693 F.2d 813, 816 (8th Cir. 1982). Because there are few federal cases on this issue, *see also* the following cases in which state courts, employing the same principles with undergird the federal concept of market value, treat speculative evidence: *Fruit Growers Express v. City of Alexandria*, 221 S.E.2d 157, 161-162 (S. Ct. Va. 1976); *Matter of City of New York (Blackwell's Island Bridge)*, 103 N.Y.S. 441, 443-444 (N.Y. 1907); *Levitin v. State of New York*, 207 N.Y.S.2d 798, 799 (N.Y. 1960).

184. It is recognized that the methodology described herein is not technically an *approach* to value, but rather a *method* or *technique* of valuation which incorporates aspects of all of the formal approaches to value (i.e., sales comparison, income capitalization, and cost) into its application. It has also been referred to as a land residual approach, developer's residual approach, subdivision development method, and the lot method.

185. Cases setting out the courts' description of the development approach include *United States v. 99.66 Acres of Land*, 970 F.2d 651, 655-656 (9th Cir. 1992); *United States v. 47.3096 Acres of Land*, 583 F.2d 270, 271-272 (6th Cir. 1978).

This highly sensitive and complex method of valuation involves the creation of a detailed development plan for the property including streets, utilities, lot sizes and locations; a market study to locate comparable finished lots and selling prices; an estimate of the time lag between the effective date of the appraisal and the date when the subdivision would be approved and construction of the subdivision infrastructure completed, making the lots marketable; an absorption analysis to estimate how quickly the lots can be absorbed by the market; an analysis of the direct costs of development, including the costs of surveying, design, engineering, permitting, grading, clearing, sewers, street paving, curbs and gutters, water lines and other utilities; an analysis of indirect costs, including financing, insurance, real property taxes, sales, advertising, accounting, legal and closing costs, and project overhead and supervision; an estimate of developer's expected profit; and the determination of an appropriate discount rate. Finally, all of the income and expenses have to be scheduled over the period of permitting, development, and sellout so that the income stream can be discounted back to a present value.

When comparable sales are available with which to accurately estimate the property's market value, the development approach should not be relied upon as the primary indicator of value, as it is considerably more prone to error. However, even when adequate comparable sales are available, the development approach can be utilized to *test* both the highest and best use conclusion¹⁸⁶ and to support the indicated value of the property by the sales comparison approach to value.

Although “[t]here is some authority for the proposition that valuation evidence based on the lot method of appraisal should never be admitted in condemnation cases involving unimproved raw land,”¹⁸⁷ the federal courts have, as noted above, admitted such evidence in appropriate cases, but only if the proponent also offers credible evidence of the costs of subdivision.¹⁸⁸ There must also be a showing “that the property was ‘needed or likely to be needed in the reasonably near future’ for residential subdivision.”¹⁸⁹ The development approach is particularly applicable in instances wherein the land being appraised has a highest and best use for subdivision purposes and there are no comparable sales available with which to develop an indication of value by the sales comparison approach. Application of the development approach is further discussed in Section A-15.

B-9. Conjectural and Speculative Evidence. In seeking to determine market value, there should be taken into account all considerations that might fairly be brought forward and reasonably be given substantial weight in bargaining between buyer and seller. However, the Supreme Court has stated that: “Elements affecting value that depend upon events or combinations of occurrences which, while within the realm of possibility, are not fairly shown to be reasonably probable, should be excluded from consideration.”¹⁹⁰

B-10. Enhancement or Diminution in Value Due to the Project. “The [Supreme] Court early recognized that the ‘market value’ of property condemned can be affected, adversely or favorably, by the imminence of the very project that makes the condemnation necessary. And it was perceived that to permit compensation to be either reduced or increased because of an alteration in market value attributable to the project

186. *United States v. 125.07 Acres of Land*, 667 F.2d 243, 246 (1st Cir. 1981).

187. *United States v. 47.3096 Acres of Land*, 583 F.2d 270, 271-272 (6th Cir. 1978).

188. *United States v. 99.66 Acres of Land*, 970 F.2d 651, 655-656 (9th Cir. 1992); *United States v. 125.07 Acres of Land*, 667 F.2d 243, 245, 246, 251 (1st Cir. 1981); *United States v. 47.3096 Acres of Land*, 583 F.2d 270, 272 (6th Cir. 1978); *United States v. 100 Acres of Land*, 468 F.2d 1261, 1266-1267 (9th Cir. 1972), cert. denied 414 U.S. 822 (1973).

189. *United States v. 47.3096 Acres of Land*, 583 F.2d 270, 272 (6th Cir. 1978).

190. *Olson v. United States*, 292 U.S. 246, 257 (1934); See also discussion in *United States v. 320.0 Acres of Land*, 605 F.2d 762, 814-820 (5th Cir. 1979).

itself would not lead to the ‘just compensation’ that the Constitution requires.”¹⁹¹ With that recognition came the creation of the *scope of the project rule*, which provides that the United States cannot be charged in federal land acquisitions for values it has created in constructing the project for which the property is being acquired; nor can an owner be penalized for any diminution in value attributable to the project.¹⁹² Accordingly, any increase or decrease in the market value of real property prior to the date of valuation caused by the public improvement for which such property is acquired, or by the likelihood that the property would be acquired for such improvement, other than that due to the physical deterioration within the reasonable control of the owner, must be disregarded in estimating the market value of the property for federal acquisition purposes.¹⁹³

Before the scope of the project rule can be applied, it first must be determined whether a government “project” exists for purposes of the rule. To constitute a project there are three legal requirements that must be met: there must be a public purpose requiring the acquisition of land, the particular lands required for the public purpose must be identified, and finally, such imminent acquisition must be evident to the public.¹⁹⁴ The critical consideration in the application of this rule is whether the “lands were probably within the scope of the project from the time the Government was committed to it.” If they were, no enhancement or diminution in value attributable to the project¹⁹⁵ is to be considered in estimating market value; if they were not, but were merely adjacent lands, the subsequent enlargement of the project to include them (or their acquisition for some other public purpose) cannot deprive [or reward] the owners of the value added [or lost] in the meantime by the proximity of the project.¹⁹⁶

The question of whether the lands were probably within the scope of the project from the time the government was committed to it typically arises in connection with projects that involve boundary adjustments or that have spanned long periods between inception and the acquisition in question. Application of the scope of the project test to any set of facts “requires discriminating judgment.”¹⁹⁷ The rule does not require a showing that the land ultimately taken was actually specified in the original plans for the project. It need only be shown that during the course of the planning or original construction it became evident that land so situated would probably be needed for the public use.¹⁹⁸

If a property’s marketability has been detrimentally impacted by the creation of the government’s project, thereby reducing the number of potential buyers for the property under appraisal, this does not by itself fall under the scope of the project rule, unless the reduced marketability results in an impact on the price at which the property could be sold. Even a substantial reduction of the attractiveness of the property to potential purchasers does not fall under the scope of the project rule because the definition of market value used for federal land acquisition purposes includes the presumption of a reasonable exposure time on the open market and, irrespective of that length of time, it is assumed to have passed on the effective date of value. Therefore, if the number of market sales within

191. *United State v. Reynolds*, 397 U.S. 14, 16 (1970), citing e.g. *Shoemaker v. United States*, 147 U.S. 282 (1893).

192. *Shoemaker v. United States*, 147 U.S. 282, 303-305 (1893); *United States v. Miller*, 317 U.S. 369, 376-379 (1943); *United States v. Virginia Electric Co.*, 365 U.S. 624, 636 (1961); *United States v. Reynolds*, 397 U.S. 14, 16-18 (1970).

193. See 42 U.S.C. §4651(3) of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970.

194. *United States v. 49.01 Acres of Land*, 669 F.2d 1364, 1367-1369 (10th Cir. 1982); *United States v. 62.17 Acres of Land*, 538 F.2d 670, 677-680 (5th Cir. 1976).

195. The enhancement or diminution in value due to the project is often referred to as “project influence.”

196. *United States v. Miller*, 317 U.S. 369, 376, 377 (1943); *United States v. Reynolds*, 397 U.S. 14 (1970); *United States v. 320.0 Acres of Land*, 605 F.2d 762, 786-793 (5th Cir. 1979).

197. *United States v. Reynolds*, 397 U.S. 14, 21 (1970).

198. *Ibid.*

an announced project boundary decreases substantially, this fact is not considered unless the project has impacted the price at which the property could be sold.

Worth noting here is the rule that special benefits to the remainder property resulting from the project for which the land is acquired (a kind of *project enhancement*) are to be offset against the award of compensation in a partial acquisition. This rule, which is not inconsistent with the foregoing no-project-enhancement rule, is discussed in detail in Section B-12.

If there is any real question about whether the government's activities constitute a *project*, for purposes of the scope of the project rule, or whether the property under appraisal falls within the scope of the project, the appraiser should request legal instructions in this regard from legal counsel for the agency or, if litigation has been instituted, the responsible trial attorney. These questions are matters of law and not within the purview of the appraiser's function, which is limited to measuring the impact of the government's project, if any, on the market value of the property under appraisal.

B-11. Partial Acquisitions. When the United States acquires only part of a unitary holding, federal law requires that compensation be made not only for the property interest acquired, but also for the diminution, if any, in the value of the remainder directly caused by the acquisition and/or by the use to which the part acquired will be put.¹⁹⁹ This diminution in the value of the remainder is often and “somewhat loosely” referred to as *severance damage*.²⁰⁰ When the remainder is specially benefited as a result of the government's project, the value of the remainder will reflect that fact, which will result in a lessening of the compensation paid to the landowner.²⁰¹

It is essential to a *partial taking* and to the application of the rules on severance damages and special benefits that the land acquired be part of a *unitary holding* (a “whole”), commonly referred to as the *larger parcel*.²⁰² It is often difficult to determine what constitutes the whole property comprising the part acquired and the remainder, in particular when there are vast acreages or non-contiguous parcels involved.²⁰³ Because of this difficulty, tests have been established to determine the larger parcel. First, there must be a unity of ownership in all parts of the whole.²⁰⁴ Second, there must be a unity of highest and best use for all parts of the whole.²⁰⁵

Historically, to satisfy the requirement of *unity of ownership*, title to all parts of the whole had to be vested to the same extent in the same persons.²⁰⁶ It has been ruled that

199. *Bauman v. Ross*, 167 U.S. 548, 574 (1897); *United States v. Grizzard*, 219 U.S. 180, 183 (1911); *United States v. Miller*, 317 U.S. 369, 376 (1943).

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

201. *Ibid.* For a detailed discussion of this point, see Section B-12, “Offsetting of benefits.”

202. Also referred to as the *parent tract*. See *United States v. 14.38 Acres of Land*, 80 F.3d 1074, 1077 (5th Cir. 1996).

203. Contiguity is not essential to a unitary holding. *Baetjer v. United States*, 143 F.2d 391, 395 (1st Cir. 1944), cert. denied 323 U.S. 772; *United States v. 57.09 Acres of Land*, 706 F.2d 280, 281 (9th Cir. 1983); *United States v. Evans*, 380 F.2d 761, 764 (10th Cir. 1967).

204. *United States v. 87.30 Acres of Land*, 430 F.2d 1130, 1133-1134 (9th Cir. 1970); *United States v. Certain Parcel of Land in Jackson Co. Mo.*, 322 F. Supp. 841, 848-849 (W.D. Mo. 1971).

205. *Washington Metropolitan Area v. One Parcel of Land*, 691 F.2d 702, 704-705 (4th Cir. 1982); *United States v. 158.24 Acres of Land*, 515 F.2d 230, 232 (5th Cir. 1975); *United States v. Wateree Power Co.*, 220 F.2d 226, 231 (4th Cir. 1955); *United States v. Honolulu Plantation Co.*, 182 F.2d 172, 179 (9th Cir. 1950), cert. denied, 340 U.S. 820; *Baetjer v. United States*, 143 F.2d 391 (1st Cir. 1944), cert. denied 323 U.S. 772.

206. *United States v. 87.30 Acres of Land*, 430 F.2d 1130, 1133 (9th Cir. 1970); *United States v. Stewart*, 429 F. Supp. 658, 660-661 (E.D. Tenn. 1976); *United States v. Certain Parcel of Land in Jackson Co. Mo.*, 322 F. Supp. 841, 848-849 (W.D. Mo. (1971)).

unity of ownership was lacking when the owner has different interests in the two or more tracts, as, for example, when one tract is owned in fee simple, a leasehold interest is held in a second tract, and the owner holds all of the stock in a corporation that holds title to a third tract. Likewise, unity of ownership has been ruled lacking when one tract was owned by a husband and the second was owned by his wife, or where one was owned by the father and the other was owned by the son.²⁰⁷

However, in more recent cases some courts have found a single larger parcel even though the quality of the title was not identical. For example, a single larger parcel was found when the interest in one tract was an easement and the interest in the second tract was a leasehold.²⁰⁸ In another case, the court found that three tracts constituted a single larger parcel even though each tract was owned by a different corporation, because ownership of all three corporations was held by the same individuals.²⁰⁹ But even in these more recent cases, legal control over the ownership and future of the lands in question was required to meet the unity of title test.

Whether the quality of the interests held in different tracts is sufficient to meet the unity of title test is, of course, a legal question, and the law on this issue appears somewhat unsettled. Thus, appraisers must seek advice of legal counsel²¹⁰ any time they conclude that a single larger parcel exists when the ownership interests in all parts of the whole are not identical.

While it has been found that, to meet the unity of use test, all parts of the whole must actually be devoted to a unitary use,²¹¹ the weight of the law is that to meet this test the lands in question merely have to have the same, or an integrated, highest and best use.²¹² If the uses are dissimilar, no allowance can be made for severance damages or special benefits. While holding that it is not essential that parcels be contiguous, physical proximity has usually been considered to the extent that it bears on the physical and economic practicalities of a single unitary highest and best use. Appraisers must bear in mind the distinction between a residue of a tract whose integrity is destroyed [or impaired] and what are merely other parcels or holdings of the same owner.²¹³ Practical application of the larger parcel tests and the appraiser's responsibility in conjunction therewith are discussed in Section A-14.

The availability of replacement property for the parcel taken is an important factor to bear in mind, particularly (but not only) when the acquisition involves non-contiguous parcels devoted to a unitary use (e.g., a mill site and one or more parcels providing raw material for the mill); a reasonable buyer and seller would consider the availability of a replacement.²¹⁴ Thus, for example, if a mill site's loss of a parcel of sugar cane land can be remedied by the mill owner's purchase of a replacement parcel, *severance damages* might

207. *Ibid.*

208. *United States v. 57.09 Acres of Land*, 706 F.2d 280, 282 (9th Cir. 1983).

209. *United States v. 429.59 Acres of Land*, 612 F.2d 459, 464 (9th Cir. 1980).

210. This advice should be conveyed in a written legal instruction.

211. *United States v. Honolulu Plantation Co.*, 182 F.2d 172, 179 (9th Cir. 1950), cert. denied, 340 U.S. 820.

212. *Washington Metropolitan Area v. One Parcel of Land*, 691 F.2d 702, 704-705 (4th Cir. 1982); *United States v. 158.24 Acres of Land*, 515 F.2d 230, 232 (5th Cir. 1975); *United States v. Wateree Power Co.*, 220 F.2d 226, 231-232 (4th Cir. 1955); *Baetjer v. United States*, 143 F.2d 391 (1st Cir. 1944), cert. denied 323 U.S. 772.

213. There is a good discussion in this connection in *Sharpe v. United States*, 112 F. 893, 896 (3rd Cir. 1902), aff'd 191 U.S. 341, 354 (1903). See also, *United States v. 8.41 Acres of Land*, 680 F.2d 388, 393 (5th Cir. 1982).

214. *Georgia-Pacific Corp. v. United States*, 640 F.2d 328, 359-360 (Ct. Cl. 1980); *International Paper Company v. United States*, 227 F.2d 201, 207 (5th Cir. 1955); *Porrata v. United States*, 158 F.2d 788, 790 (1st Cir. 1947). In *International Paper Company v. United States*, *supra*, the question of the availability of replacement land was considered so important that the court affirmed the trial judge's withdrawal of the severance damage claim from the jury because the owner's witnesses had not taken that factor into consideration.

be reduced or eliminated. This is essentially a *cost to cure* measure of damages, as discussed later in this section and in Section D-4.

When considering damages to remainder properties, appraisers must recognize that in some states the compensation due a property owner may include items that the federal rules exclude as being consequential, i.e., non-compensable, damages.²¹⁵ It is important that appraisers bear in mind these differences between the various state and federal rules.

Because the fundamental basis of a claim of severance damages is a diminution in the value of the remainder land,²¹⁶ the law is that “strict proof of the loss of market value to the remaining parcel is obligatory.”²¹⁷ And, as has been judicially noted, “the extent to which the utility of a property has been destroyed and its market value diminished must necessarily be established by factual data having a rational foundation in support of such a claim.”²¹⁸ Accordingly, severance damage should never be assumed merely because there has been a partial acquisition, but must always be fully supported by the facts of each situation. Unfortunately, however, appraisers too often use severance damage as a catchall. When an appraisal report has factual data supporting other conclusions, severance damages are simply stated as the appraiser’s opinion without specifying the basis for the opinion. With reference to landowners who had failed to furnish factual data to support claimed diminution in value to the remainder, one court stated: “Not only were the opinions of their experts based largely on speculation and conjecture, but these witnesses totally disregarded available evidence of comparable sales before and after the taking of the easement.”²¹⁹ Clearly, the language here indicates that severance damages, like other factors in estimating market value, must not be based upon speculation.²²⁰ As the cited case shows, evidence in this respect must not be “vague and speculative in character,” nor may testimony dealing with “possibilities more or less remote” be considered.

Allowable severance damages include diminution in the value of the remainder caused by the use to which the United States will put the part of the land acquired;²²¹ however, diminution in value of the remainder caused by the use to which the United States will put the land taken from others or from use of land it owns cannot be considered.²²² In recognition of the practical difficulty in applying this rule in some situations, the 9th Circuit has

215. *Batten v. United States*, 306 F.2d 580, 583-584 (10th Cir. 1962). For a discussion of consequential damages, see Section B-15.

216. *Bauman v. Ross*, 167 U.S. 548, 574 (1897); *United States v. Grizzard*, 219 U.S. 180, 183 (1911); *United States v. Miller*, 317 U.S. 369, 376 (1943); *United States v. 33.5 Acres of Land*, 789 F.2d 1396, 1398 (9th Cir. 1986); *United States v. 101.88 Acres of Land*, 616 F.2d 762, 767 (5th Cir. 1980).

217. *United States v. Honolulu Plantation Co.*, 182 F.2d 172, 179 (9th Cir., 1950), cert. denied 340 U.S. 820; *Miller v. United States*, 620 F.2d 812, 828 (Ct. Cl. 1980).

218. *United States v. 26.07 Acres of Land*, 126 F. Supp. 374, 377 (E.D. N.Y. 1954), citing *Westchester County Park Commission v. United States*, 143 F.2d 688, 692 (2nd Cir., 1954), cert. denied, 323 U.S. 776.

219. *United States v. 26.07 Acres of Land*, 126 F. Supp. 374, 377 (E.D. N.Y. 1954). As the court went on to state: “On the other hand . . . the Government’s expert made a detailed survey of sales of residential and industrial parcels in the immediate vicinity of the defendants’ properties, before and after the appropriation of the easement, which plainly indicated that there was no appreciable depreciation in the market value of similar parcels as a result of the imposition of the easement.”

220. *Sharpe v. United States*, 112 F. 893, 897 (3rd Cir. 1902), aff’d 191 U.S. 341 (1903).

221. *United States v. Grizzard*, 219 U.S. 180, 183 (1911); *Sharp v. United States*, 191 U.S. 341, 354 (1903); *2,953.15 Acres in Russell County, Alabama v. United States*, 350 F.2d 356, 360 (5th Cir. 1965); *West Virginia Pulp & Paper Co. v. United States*, 200 F.2d 100, 103-104 (4th Cir. 1952).

222. *Campbell v. United States*, 266 U.S. 368, 371-372 (1924); *United States v. 760.807 Acres of Land*, 731 F.2d 1443, 1447 (9th Cir. 1984); *United States v. 101.88 Acres of Land*, 616 F.2d 762, 769 (5th Cir. 1980); *United States v. Kooperman*, 263 F.2d 331, 332 (2nd Cir. 1959); *Winn v. United States*, 272 F.2d 282, 286-287 (9th Cir. 1959); *Boyd v. United States*, 222 F.2d 493, 494 (8th Cir. 1955).

allowed severance damages when the damages may be said to flow both from the acquisition and use of only a portion of the owner's property and from the use to which the government puts land acquired from a third party neighbor when the damages are inseparable.²²³ An example of such a situation might be the partial taking of a tract for construction of a contaminated soils depository, a portion of which would be constructed on the property acquired and a portion of which would be constructed on property acquired from others—it might not be practical to separate the diminution in value to the remainder caused by the use of the property acquired from the larger parcel from the diminution caused by the use of lands acquired from others. If confronted with such a situation, it is recommended that appraisers seek guidance from agency or Department of Justice legal counsel.

Also, a distinction must be drawn between diminution in value of the remainder caused by the acquisition itself and the use to which the acquired property will be put, which is compensable as severance damage, and damage to the remainder caused by anticipated physical invasion of the remainder that would result from the intended use of the land acquired, which is not compensable. For instance, if the government acquired a flowage easement for construction of a reservoir, an appraiser could not consider damages to the remainder property above the line of the acquisition from anticipated wave action during periods of high winds.²²⁴

If the United States proposes to put the part of a larger parcel acquired to hazardous use and if fear of the hazard would affect the price, a knowledgeable and prudent buyer would pay to a similarly well-informed seller, diminution in value to the remainder caused by the fear is a proper consideration in estimating the market value of the remainder, even if such fear is not well founded.²²⁵ As one court explained:

[I]n the final analysis, we are concerned only with market value. Although these studies may show objectively the complete safety of these structures, we are not convinced that certain segments of the buying public may not remain apprehensive of these high voltage lines, and therefore might be unwilling to pay as much for the property as they otherwise would. On the record, allowance of incidental damages . . . on each side of the outer boundary of the remainder of the easements appears to us reasonable and proper.²²⁶

In partial acquisitions, these Standards require with the exceptions noted below and in Section B-14, application of the *before and after* method of valuation²²⁷ in which the appraiser estimates both the market value of the whole property before the government's acquisition and the market value of the remainder property after the government's acquisition.²²⁸ Requiring this method of valuation allows acquiring agencies, the Department of Justice, and the courts to calculate a reasonable measure of compensation by deducting the appraiser's estimated remainder or after value from the appraiser's estimate of the larger

223. *United States v. Pope & Talbot, Inc.*, 293 F.2d 822, 825 (9th Cir. 1961); *United States v. 15.65 Acres of Land*, 689 F.2d 1329, 1332 (9th Cir. 1982), cert. denied, 460 U.S. 1041 (1983).

224. Such damage may be compensable in an inverse taking action by the landowner but is not compensable as severance damages in a condemnation action. *United States v. 38.60 Acres of Land*, 625 F.2d 196, 199-200 (8th Cir. 1980); *United States v. 101.88 Acres of Land*, 616 F.2d 762, 768 (5th Cir. 1980).

225. *United States v. 760.807 Acres of Land*, 731 F.2d 1443, 1447 (9th Cir. 1984); *United States v. 6.24 Acres of Land*, 99 F.3d 1140, (6th Cir. 1996).

226. *United States ex rel. T.V.A. v. An Easement & Right of Way*, 405 F.2d 305, 309 (6th Cir. 1968).

227. Often referred to as the *before and after rule*, or the *federal rule*.

228. E.g., *United States v. Virginia Electric Co.*, 365 U.S. 624, 632 (1961) (easement acquisition); *United States v. 68.94 Acres of Land*, 918 F.2d 389, 393, n.3 (3rd Cir. 1990); *United States v. 91.90 Acres of Land*, 586 F.2d 79, 86 (8th Cir. 1978), cert. denied 441 U.S. 944 (1979); *Georgia-Pacific Corp. v. United States*, 640 F.2d 328, 336 (Ct. Cl. 1980). It is the only method of valuation allowed in the Fifth Circuit, *United States v. 8.41 Acres of Land*, 680 F.2d 388, 392, n.5 (5th Cir. 1982).

parcel's before value. The result of this method is a figure that automatically includes the value of the land actually acquired as well as any severance damages and/or special benefits to the remainder property.

Notwithstanding the foregoing, to assist acquiring agencies in meeting their obligations under the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970,²²⁹ appraisals must contain an allocation of the difference between the before and after value estimates between the contributory value of the land acquired and damages to the remainder. (See A-30, "Allocation and Explanation of Damages.")

In another approach, the appraiser estimates the contributory value of the part of the whole property to be acquired and adds to or subtracts from that figure an allowance for damages and/or special benefits in value to the remainder.²³⁰ This method may or may not be more complicated, but it usually is more subject to error and more apt to result in duplication,²³¹ sometimes referred to as *double damages*. When this *taking + damages* method is employed, the value of the part acquired is its value as a part of the whole (i.e., larger parcel), not its value as a separate parcel. Also, if this method of valuation is employed, the appraiser must affirmatively address the issue of possible damages and/or special benefits to the remainder of the larger parcel in the appraisal report. This second taking + damages method should not be utilized by appraisers without the express written authorization from the acquiring agency, or the Department of Justice trial counsel, to employ it.

However, acquiring agencies should bear in mind that there are situations in which insistence upon strict adherence to the before and after rule would impose costly and sometimes nearly impossible burdens upon appraisers. Examples of such situations, in which this second taking + damages method may be applicable, are minor fee or easement acquisitions (for flowage, wetland or habitat protection, roads, pipelines, transmission lines, etc.) from large ranches, industrial complexes, etc., where the cost of valuing the whole unit before and after the acquisition is simply unwarranted in view of the minor nature of the acquisition. Use of this method, however, is generally limited to those instances wherein there are no damages to the remainder property. In short, where its application would be logical, practical, and capable of understanding, the before and after method of valuation in partial acquisitions is preferred. The taking + damages method shall not be utilized without concurrence of the client agency.

In certain circumstances, damage to the remainder may be *cured* by remedial action taken by the owner. The *cost to cure*, however, is a proper measure of damage only when it is no greater in amount than the decrease in the market value of the remainder if left as it stood.²³² When the cost to cure is less than the severance damages if the cure were not undertaken, the cost to cure is the proper measure of damage, and the government is not obligated to pay in excess of that amount.²³³ See additional discussion of the cost to cure measure of damage in Section D-4.

229. 42 U.S.C. §§ 4601-4655; P.L. 91-646, . Section 4651(3) requires the head of the acquiring agency to make a written offer to purchase to the property owner, separately stating the estimated contributory value of the property to be acquired and damages to the remaining property.

230. Often referred to as the *taking + damages rule*, or the *state rule*. See *United States v. 97.19 Acres of Land*, 582 F.2d 878, 880-881 (4th Cir. 1978); *Miller v. United States*, 620 F.2d 812, 829 (Ct. Cl. 1980).

231. For an example of how this *duplication* occurs see, J. D. Eaton, *Real Estate Valuation in Litigation*, 2nd ed. (Chicago: Appraisal Institute, 1995), 32-33. Some states use this second method because they require a separate finding of severance damage since their law permits benefits from the project to be offset against the severance damage, but not against the value of the land acquired. As will be shown in Section B-12, this reason is not applicable in federal acquisitions.

232. *United States v. 2.33 Acres of Land*, 704 F.2d 728, 730 (4th Cir. 1983); *United States v. Dickinson*, 152 F.2d 865, 870 (4th Cir. 1946), *aff'd*, 331 U.S. 745 (1947).

233. *United States v. 2.33 Acres of Land*, 704 F.2d 728, 730 (4th Cir. 1983).

B-12. Offsetting of Benefits. In a partial acquisition, when the market value of the remainder property is being estimated, federal law requires that consideration be given to special benefits that are capable of present estimate and reasonable computation.²³⁴

The law makes a distinction between *general* and *special* benefits, and provides that only special benefits should be considered in estimating the remainder's value.²³⁵ The distinction between the two classes of benefits has been described in a leading case on the subject as follows:²³⁶

General and special benefits have been thus distinguished:

The most satisfactory distinction between general and special benefits is that general benefits are those which arise from the fulfillment of the public object which justified the taking, and special benefits are those which arise from the peculiar relation of the land in question to the public improvement. Ordinarily the foregoing test is a satisfactory one, though sometimes difficult to apply. In other words, the general benefits are those which result from the enjoyment of the facilities provided by the new public work and from the increased general prosperity resulting from such enjoyment. The special benefits are ordinarily merely incidental and must result from physical changes in the land, from proximity to a desirable object, or in various other ways. *Nichols on Eminent Domain*, 3rd ed., 45, §8.6203.

...

We think that special benefits are those which are direct and peculiar to the particular property distinguished from the incidental benefits enjoyed to a greater or lesser extent by the lands in the area of the improvement. A special benefit is nonetheless such because other lands in like situations are similarly benefitted.

In other words, benefits to be special need not be particular to a single parcel, but may accrue to multiple parcels. For instance, lands within all four quadrants of a newly constructed freeway interchange may all be specially benefitted due to their special relationship to the public improvement, whereas general benefits may accrue to all lands in the vicinity due to the reductions in traffic congestion and commuting times. Further illustration in this regard comes from a case involving a river improvement project, in which the Supreme Court opined that an increase in the value of the portion of any parcel of land caused by its frontage on the widened river, carrying a right of immediate access to and use of the improved stream, would constitute a special and direct benefit, as distinguished from a benefit common to all the lands in the vicinity, although the remaining portions of other riparian parcels would be similarly benefitted.²³⁷ In so deciding, the Court approved and followed the law of benefits as it had been applied in reference to lands abutting upon a new or widened street, stating:

The benefit is not the less direct and special to the land of the petitioner, because other estates upon the same street are benefitted (*sic*) in a similar manner. The kind of benefit, which is not allowed to be estimated for the purpose of such deduction, is that which comes from sharing in the common advantage and convenience of increased public facilities, and the general advance in value of real estate in the vicinity by reason thereof. . . . The advantages of more convenient access to a particular lot of land in question, and of having a front upon a more desirable avenue, are

234. E.g., *Bauman v. Ross*, 167 U.S. 548, 570 (1897); *United States v. River Rouge Co.*, 269 U.S. 411, 415-416 (1926); *United States v. Miller*, 317 U.S. 369, 376 (1943); *Washington Metropolitan Area v. One Parcel of Land*, 691 F.2d 702, 704 (4th Cir. 1982); *United States v. 901.89 Acres of Land*, 436 F.2d 395, 397-399 (6th Cir. 1970), cert. denied, 402 U.S. 973 (1971); *United States v. 2,477.79 Acres of Land*, 259 F.2d 23, 28-29 (5th Cir. 1958).

235. *Bauman v. Ross*, 167 U.S. 548, 574-575 (1897); *United States v. River Rouge Co.*, 269 U.S. 411 (1926); *Washington Metropolitan Area v. One Parcel of Land*, 691 F.2d 702, 704 (4th Cir. 1982); *United States v. 901.89 Acres of Land*, 436 F.2d 395, 397-399 (6th Cir. 1970), cert. denied, 402 U.S. 973 (1971); *United States v. 6816.5 Acres of Land*, 411 F.2d 834, 837 (10th Cir. 1969); *United States v. 2,477.79 Acres of Land*, 259 F.2d 23, 28-29 (5th Cir. 1958).

236. *United States v. 2,477.79 Acres of Land*, 259 F.2d 23, 28 (5th Cir. 1958) See also *United States v. 901.89 Acres of Land*, 436 F.2d 395, 397-399 (6th Cir. 1970), cert. denied, 402 U.S. 973 (1971).

237. *United States v. River Rouge Co.*, 269 U.S. 411, 415-416 (1926).

direct benefits to that lot, giving it increased value in itself. It may be the same, in greater or less degree, with each and every lot of land upon the same street. But such advantages are direct and special to each lot. They are in no proper sense common because there are several estates, or many even, that are similarly benefited (*sic*).

To take into account any special benefits from the project, the appraisers apply the before and after rule of valuation, i.e., estimate the market value of the entire tract at the time of acquisition excluding any enhancement or diminution from the project, and the market value of the remainder including any special benefit or diminution from the project.

The extent of the benefit to a tract caused by the project is a fact question and the appraiser should be prepared in this respect.²³⁸ However, whether a benefit is a *general* benefit or a *special* benefit is a mixed fact-law question and, therefore, appraisers should consult with legal counsel to resolve any questions about this classification.²³⁹

Appraisers should give the same consideration to benefits as they do to damages in estimating values of remainder properties. Benefits can take many forms, such as when the project has caused the remainder to have lake frontage, frontage on a better road, more convenient access, a beach firmed up and made more useful, drainage improvement, irrigated land, and an improved view. An upward shift in the highest and best use of the remainder property is often an indication of special benefits, and special benefits *must* be considered when appraisers estimate the value of remainder properties, even though other lands may enjoy the same benefits from the project.

B-13. The Unit Rule. The market value concept adopted by the courts to be applied in federal acquisitions generally requires application of the so-called *unit rule*. This rule has two aspects; one relating to the interests, or estates, into which ownership of real estate may be carved, and the second relating to the various physical components of real estate.

The first aspect of the unit rule requires that property be valued as a whole rather than by the sum of the values of the various interests into which it may have been carved, such as lessor and lessee, life tenant and remainderman, and mortgagor and mortgagee, etc. This is an application of the principle that it is the property, not the various interests, that is being acquired.²⁴⁰ Many cases illustrate the unit rule,²⁴¹ thus, if there are several interests or estates in the property, the property should be valued as a whole, embracing all of the rights, estates, and interests of all who may claim, and as if in one ownership. The market value of the whole property is later apportioned among those who hold various interests in the property, but this apportionment generally falls outside the scope of the government appraiser's assignment.²⁴²

238. *United States v. 2,477.79 Acres of Land in Bell County*, 259 F.2d 23, 28 (5th Cir. 1958).

239. At times, attorneys may not be certain how the court might rule in this regard and need to be prepared to proceed under either premise. They may, therefore, request that the appraiser conduct a *dual premise* appraisal of the remainder: one premise assuming the benefit is special and to be considered, and a second premise assuming the benefit is general and to be disregarded by the appraiser.

240. The term *in rem* is used to designate proceedings or actions instituted against the thing, in contradiction to personal actions, which are said to be *in personam*. It is for this reason that the *style* of federal condemnation cases generally takes the form of *United States v. x Acres of Land*, rather than *United States v. Landowner*.

241. E.g., *United States v. Dunnington*, 146 U.S. 338, 351 (1892); *Bogart v. United States*, 169 F.2d 210, 213 (10th Cir. 1948); *Nebraska v. United States*, 164 F.2d 866, 868 (8th Cir. 1947), cert. denied 334 U.S. 815; *United States v. 25.936 Acres of Land*, 153 F.2d 277, 279 (3rd Cir. 1946); *Meadows v. United States*, 144 F.2d 751, 753 (4th Cir. 1944), cert. denied, 358 U.S. 921.

242. However, the appraiser may be asked by a client agency to allocate the total value of the property among the separate estates or interests for agency negotiating purposes and/or to meet its obligations under the Uniform Relocation Assistance and Real Property Acquisition Policies Act. In such an instance, it is recommended that the appraiser report such an allocation in a supplemental report rather than include it in the appraisal report in which the market value of the property as a whole is reported.

The whole property or unit valuation remains applicable even where the ownership is divided between such inherently diverse interests as surface rights and timber rights²⁴³ or surface and mineral rights.²⁴⁴ That does not necessarily mean, however, that the independent values of the various interests are not admissible in a condemnation trial; but if they are admitted it is for the sole purpose of aiding the trier of fact in fixing the value of the property as a whole.²⁴⁵ Likewise, it is not inappropriate for appraisers to consider the independent values of the interests, but again, only for the purpose of better estimating the market value of the whole property.

Appurtenant easements and similar use restrictions create an exception to this aspect of the unit rule.²⁴⁶ When lands are encumbered by such an appurtenant easement, they are valued as encumbered. The easement estate is valued separately from the balance of the tract it encumbers. The value of such an easement interest is estimated in relationship to the dominant estate to which it is attached.²⁴⁷ Thus, when a tract of land encumbered with an appurtenant easement is acquired, two larger parcels are created for valuation purposes. One parcel is the property acquired, subject to the easement encumbrance, and the second parcel is the appurtenant easement together with the lands to which it is attached.²⁴⁸

A second aspect of the unit rule is that different elements or components of a tract of land are not to be separately valued and added together. For example, the value of timber, as an independent component, cannot be added to the value of minerals in the same property as an independent component, and this sum further added to the value of the land. Such a procedure results in a *summation* or *cumulative* appraisal, which is forbidden in appraisals for federal acquisitions,²⁴⁹ as it is in general real estate appraisal practice.²⁵⁰ The summation appraisal is an invalid procedure because the entire unit is being hypothetically sold in its entirety, not as separate parts individually. If the appraiser is not familiar with all of the types of property involved, he or she should consult with experts in the particular fields to become familiar with all aspects of the property. In discussing the separate elements of the property in their analyses in the appraisal reports, appraisers should always clearly state that these elements were considered with respect to their enhancement of the value of the whole.

There are some stated guidelines on admissibility of evidence with which appraisers should be familiar; these relate to the valuation of components of a real estate parcel:

- (1) that a landowner in dealing with a parcel of land on which there is a mineral, timber or like substance may not introduce expert testimony by which the expert multiplies the gross material present by the market value per unit thereof and thereby arrive at a figure which purports to be fair market value for the parcel;

243. *Meadows v. United States*, 144 F.2d 751, 752-753 (4th Cir. 1944), cert. denied, 358 U.S. 921.

244. *Eagle Lake Improvement Co. v. United States*, 160 F.2d 182, 184 (5th Cir. 1947), cert. denied, 332 U.S. 762.

245. *Meadows v. United States*, 144 F.2d 751, 753 (4th Cir. 1944), cert. denied, 358 U.S. 921.

246. If the estate to be acquired by the government is, for example, fee subject to public road easements and a public road crosses a property to be appraised, then the impact of the easement on the subject property is considered by the appraiser. The encumbered portion of the property generally would have no more than nominal value. This is not an aspect of the unit rule but recognition of the mode of ownership that the owner should be paid for what is taken from him, which the Constitution allows. See *Boston Chamber of Commerce v. Boston*, 217 U.S. 189, 195 (1910).

247. *United States v. Welch*, 217 U.S. 333, 339 (1910).

248. See J. D. Eaton, *Real Estate Valuation in Litigation*, 2nd ed. (Chicago: Appraisal Institute, 1995), 365-368.

249. *United States v. 91.90 Acres of Land*, 586 F.2d 79, 87 (8th Cir. 1978); cert. denied, 441 U.S. 944 (1979); *United States v. 6.24 Acres of Land*, 99 F.3d 1140 (6th Cir. 1996); *Morton Butler Timber Co. v. United States*, 91 F.2d 884, 888 (6th Cir. 1937); *United States v. 25.936 Acres of Land*, 153 F.2d 277, 279 (3rd Cir. 1946); *United States v. W.R. Carroll*, 304 F.2d 300, 306 (4th Cir. 1962); *United States v. Jaramillo*, 190 F.2d 300, 302 (10th Cir. 1951); *United States v. 8.41 Acres of Land*, 680 F.2d 388, 395 (5th Cir. 1982).

250. The Appraisal Foundation, *Uniform Standards of Professional Appraisal Practice* (USPAP), 2000 ed., Standards Rule 1-4(e).

- (2) that the landowner may not by expert testimony capitalize the present or future value of a business enterprise and thereby arrive at fair market value; that rental value may, however, be capitalized;
- (3) that the landowner is entitled to have an expert or lay witness describe the commodity or substance on the land, the quantity thereof, the going price thereof as *factors* only, upon which the expert may in part base his value as to the *fair market value* of the parcel in question; that a landowner is not entitled to present testimony as to the fair market value of the mineral or timber or other substance apart from the value of the land... In other words, a clear distinction must be drawn between what is presented and considered as a *factor* underlying the expert's opinion as contrasted with opinion as to the fair market value of the substance, timber or mineral itself, apart from the land;
- (4) that a landowner must make a showing of some sort of market, poor or good, great or small, for the commodity in question before the quantity and price of the commodity or substance may be presented to the jury to be used as a factor in the expert's opinion testimony;
- (5) that since the inquiry is essentially one as to what would have been the negotiations between the willing buyer and the willing seller, there may be taken into consideration by the expert only those *factors* which would have been reasonably so considered;
- (6) that except in cases where the matter is so clear that it becomes a question of law it is generally a question for the jury to determine whether the proposed *factor* underlying in part the opinion of the expert as to the fair market value, is one which would have reasonably been considered by the willing buyer and the willing seller; . . .²⁵¹

Normally, each parcel should be appraised separately, but appraisers must recognize that agency and/or local taxing authority mapping do not control what constitutes a separate larger parcel. Since unity of use is one of the elements for an integrated unit, it would not necessarily follow that a contiguous body of land in the same ownership constitutes a single unit if the highest and best use for various parts is different. Failure to value the property as an integrated whole, however, must always be explained and supported. In this regard, appraisers must follow the guidelines set out for *larger parcel* determination, as discussed in Sections A-14 and B-11 of these Standards.

B-14. The Commerce, or “Navigational Servitude.” The Federal Government reserves very broad powers over navigation and navigable waters under the Commerce Clause of the Constitution of the United States,²⁵² which appraisers must bear in mind when valuing riparian land acquired by the United States. The navigable waters are United States public property and because of this, the great inland waterways have long been deemed national assets rather than the private property of riparian owners. In this connection, the Supreme Court has stated “. . . that the running water in a great navigable stream is capable of private ownership is inconceivable.”²⁵³ The Supreme Court has also observed that “. . . although the title to the shore and submerged soil [of navigable rivers] is in the various States and individual owners under them, it is always subject to the servitude in respect of navigation created in favor of the Federal government by the Constitution.”²⁵⁴

Since the special values arising from access to navigable streams are allocable to the public, and not to private interests, allowing recovery of those values would permit private owners to receive windfalls to which they are not entitled.²⁵⁵ Accordingly, although land

251. *United States v. Land in Dry Bed of Rosamond Lake*, 143 F. Supp. 314, 321-322 (S.D. Cal. 1956).

252. Art. 1, Sec. 8, Clause 3.

253. *United States v. Chandler-Dunbar Co.*, 229 U.S. 53, 69 (1913).

254. *Gibson v. United States*, 166 U.S. 269, 272 (1897). There the Supreme Court stated the principle in terms that “riparian ownership is subject to the obligation to suffer the consequences of the improvement of navigation in the exercise of the dominant right of the Government in that regard.” (166 U.S. at 276) Later the Court noted that the damage sustained by the riparian owner results not from a taking of property, “but from the lawful exercise of a power to which that property has always been subject.” *United States v. Chicago, M., St. P. and P. R. Co.*, 312 U.S. 592, 597 (1941).

255. *United States v. Rands*, 389 U.S. 121, 126 (1967).

strategically located on navigable bodies of water undeniably enjoys site-specific potentials that may make the property more valuable in transactions between private individuals, the federal government, when acquiring land pursuant to the commerce servitude that is riparian to a navigable stream, is not required to pay for the value of the land attributable to the flow of the stream. Under this established principle of law, the following values have been held to be noncompensable when the riparian upland is acquired by the federal government in exercise of its power to control commerce: port site value;²⁵⁶ power site value;²⁵⁷ and riparian rights of access to navigable waters.²⁵⁸ More recently, the rule has been construed as applicable to other factors relating to riparian location such as irrigation, boating, fishing, and hunting.²⁵⁹

It should be noted that “[i]t is commerce, and not navigation, which is the great object of constitutional care.”²⁶⁰ For this reason the constitutional power of the United States over its waters is not limited to navigation: flood protection, watershed development, recovery of cost of improvements through utilization of power are likewise part of commerce control.²⁶¹ However, with the adoption by Congress of Section 111 of the Rivers and Harbors Act of 1970 (84 Stat. 1818, 1821, codified at 33 U.S.C. § 595a), a special provision regarding government land acquisition was enacted as follows:

In all cases where real property shall be taken by the United States for the public use in connection with any improvement of rivers, harbors, canals, or waterways of the United States, and in all condemnation proceedings by the United States to acquire lands or easements for such improvements, the compensation to be paid for real property taken by the United States above the normal high water mark of navigable waters of the United States shall be the fair market value of such real property based upon all uses to which such real property may reasonably be put, including its highest and best use, any of which uses may be dependent upon access to or utilization of such navigable waters. In cases of partial takings of real property, no depreciation in the value of any remaining real property shall be recognized and no compensation shall be paid for any damages to such remaining real property which result from loss of or reduction of access from such remaining real property to such navigable waters because of the taking of real property or the purposes for which such real property is taken. The compensation defined herein shall apply to all acquisitions of real property after December 31, 1970, and to the determination of just compensation in any condemnation suit pending on December 31, 1970.

The provisions of Section 111 are fairly straightforward and unambiguous. They should present no difficulty in implementation when the appraisal involves acquisition of an entire larger parcel, leaving no remainder. However, when the appraisal involves a partial taking,

256. *United States v. Rands*, 389 U.S. 121, 126 (1967). See also *United States v. 30.54 Acres of Land*, 90 F.3d 790, 796 (3rd Cir. 1996); *United States v. 87.30 Acres of Land*, 430 F.2d 1130, 1133 (9th Cir. 1970). Indeed, in *United States v. Virginia Electric Co.*, 365 U.S. 624, 631 (1961), the Supreme Court stated: “The [lower] court was clearly right in excluding all value attributable to the riparian location of the land.”

257. E.g., *United States v. Virginia Electric Co.*, 365, U.S. 624, 629 (1961); *United States v. Twin City Power Co.*, 350 U.S. 222, 228 (1956).

258. In *United States v. Commodore Park*, 324 U.S. 386, 390-391 (1945), navigable waters were filled in with material dredged from other navigable waters. In *South Carolina v. Georgia*, 93 U.S. 4, 10-11 (1876), the course of a stream was diverted. In *Gibson v. United States*, 166 U.S. 269, 275-276 (1897) and *Scranton v. Wheeler*, 179 U.S. 141, 152-153 (1900), there was impairment or destruction of access to the stream by the placement of a dike or jetty in front of the riparian owner's property. In each of these situations it was held that the riparian owner had no right of recovery as against the United States in exercising its power to control commerce.

259. *United States v. Birnbach*, 400 F.2d 378, 382 (8th Cir. 1968). Under the provisions of the 1944 Flood Control Act, 33 U.S.C. Sec. 701.1(b), with respect to waters lying wholly or partially west of the ninety-eighth meridian, improvements for navigation or flood control are limited to such use “as does not conflict with any beneficial consumptive use, present or future, in States lying wholly or partly west of the ninety-eighth meridian, of such waters for domestic, municipal, stock water, irrigation, mining, or industrial purposes.” When there is doubt concerning the applicability of this Act, the appraiser should consult with agency or Department of Justice, legal counsel.

260. *Scranton v. Wheeler*, 179 U.S. 141, 160 (1900).

261. *United States v. Appalachian Electric Power Co.*, 311 U.S. 377, 426 (1940).

leaving a remainder, their implementation is a problem.²⁶² The use of the usual before and after method of valuation entails too many difficulties to be workable in a Section 111 partial acquisition situation. Instead, it is recommended that when provisions of Section 111 of the Rivers and Harbors Act of 1970 apply, the appraiser employ the taking + damages method of valuation, as described in Section B-11 of these Standards, using the steps set out below.²⁶³

- (a) Estimate the market value of the land to be acquired, as a part of the whole (larger parcel), based upon its highest and best use, including uses that may be dependent upon access to or utilization of navigable waters.
- (b) Estimate the market value of the remainder land, as a part of the whole (larger parcel), based upon its highest and best use, *excluding* uses that would be dependent upon access to or utilization of the navigable waters.
- (c) Estimate the market value of the remainder land after the acquisition by the government, based upon its highest and best use, *excluding* uses that would be dependent upon access to or utilization of the navigable waters.
- (d) Compute compensable damages to the remainder property (b – c).
- (e) Add value of taking (a) + damages (d).²⁶⁴

It should be noted that this procedure takes into account the fact that the law established by the Supreme Court prior to enactment of Section 111, the Rivers and Harbors Act of 1970, remains applicable to remainder properties, both before and after the government's acquisition. The case law provides that the navigational servitude permits the government to reduce the value of riparian lands by denying the riparian owner access to the stream without compensation for the loss and also permits the government to disregard the value arising from the same fact of riparian location in the valuation of fast lands for government acquisition for navigational purposes. It is for that reason that steps (b) and (c) require analysis and valuation of the remainder property *excluding* consideration of uses that would be dependent upon access to or utilization of the navigable waters.

B-15. Noncompensability of Consequential Damages. It is a firmly established principle of federal law that certain damages which may occur by reason of a government acquisition of land are not compensable and, therefore, must be disregarded by appraisers when estimating market value for such acquisitions. Such damages are classified as *consequential* or *incidental* damages. “[T]he Fifth Amendment does not require any award for consequential damages arising from a condemnation.”²⁶⁵

Loss of business and relocation expenses have been determined to be consequential, and therefore noncompensable.²⁶⁶ Other damages classified as consequential include:

262. In the 1973 edition of these Standards the hope was expressed that the provisions of Section 111 would be construed by the courts at an early date. Unfortunately, no circuit or Supreme Court case has been decided that sheds any light on the proper appraisal methodology for such a partial acquisition.

263. This methodology has been tested in court only once, and in an unpublished case was successful. However, as developments subsequent to publication of these Standards may require adoption of a different methodology, it is recommended that the appraiser consult with the client agency (or trial counsel, as appropriate) before undertaking an appraisal of a partial acquisition covered by this Act.

264. For a thorough discussion of the formula applied in the *taking + damages* valuation methodology, see J. D. Eaton, *Real Estate Valuation in Litigation*, 2nd ed. (Chicago: Appraisal Institute, 1995), 30-40. See also *United States v. 97.19 Acres of Land*, 582 F.2d 878, 880-881 (4th Cir. 1978); *United States v. 344.85 Acres of Land*, 384 F.2d 789, 792 (7th Cir. 1967).

265. *United States v. 50 Acres of Land*, 469 U.S. 24, 33 (1984).

266. *United States v. 91.90 Acres of Land*, 586 F.2d 79, 87 (8th Cir. 1978), cert. denied, 441 U.S. 944 (1979), citing, inter alia, *Kimball Laundry Co. v. United States*, 338 U.S. 1, 11-12 (1949); *United States v. Petty Motor Co.*, 327 U.S. 372, 377-378 (1946); *United States ex rel. T.V.A. v. Powelson*, 319 U.S. 266, 281-286 (1943).

damage to business, loss of or damage to goodwill, future loss of profits, expenses of moving removable fixtures and personal property, depreciation in value of furniture and removable equipment, frustration of plans, frustration of contractual expectations, loss of customers, and the expense of having to readjust manufacturing operations.²⁶⁷

The basic federal law in this respect has been stated by the Supreme Court as follows:

The sovereign ordinarily takes the fee. The rule in such a case is that compensation for that interest does not include future loss of profits, the expense of moving removable fixtures and personal property from the premises, the loss of good-will which inheres in the location of the land, or other like consequential losses which would ensue the sale of the property to someone other than the sovereign. No doubt all these elements would be considered by an owner in determining whether, and at what price, to sell. No doubt, therefore, if the owner is to be made whole for the loss consequent on the sovereign's seizure of his property, these elements should properly be considered. But the courts have generally held that they are not to be reckoned as part of the compensation for the fee taken by the government. We are not to be taken as departing from the rule they have laid down, which we think sound. Even where state constitutions command that compensation be made for property "taken or damaged" for public use, as many do, it has generally been held that that which is taken or damaged is the group of rights which the so-called owner exercises in his dominion of the physical thing, and that damage to those rights of ownership does not include losses to his business or other consequential damage. [Footnotes omitted.]²⁶⁸

The Court went on to state, at page 382:

Whatever of property the citizen has the government may take. When it takes the property, that is, the fee, the lease, whatever he may own, terminating altogether his interest, under the established law it must pay him for what is taken, not more; and he must stand whatever indirect or remote injuries are properly comprehended within the meaning of "consequential damage" as that conception has been defined in such cases. Even so the consequences often are harsh. For these, whatever remedy may exist lies with Congress.²⁶⁹

The Supreme Court later gave further guidance with respect to noncompensable consequential damages by stating:

Since "market value" does not fluctuate with the needs of the condemnor or condemnee but with general demand for the property, evidence of loss of profits, damages to good will, the expense of relocation and other consequential losses are refused in condemnation proceedings.²⁷⁰

In the absence of a statutory mandate, the United States must pay only for what it takes, not for opportunities that the owner may lose.²⁷¹ It is critically important that appraisers objectively estimate market value, without attempting to include any consequential damages in those estimates. To do so would not result in an accurate reflection of market value and, in addition, could result in double recovery of damages reimbursable under the Uniform Act.

267. See *Omnia Commercial Co. v. U.S.*, 261 U.S. 502, 509-510 (1923); *Mitchell v. United States*, 267 U.S. 341, 345 (1925); *United States v. 38.60 Acres of Land*, 625 F.2d 196, 200 (8th Cir. 1980); *Georgia-Pacific Corp. v. United States*, 640 F.2d 328, 360-361 (Ct. Cl. 1980); *United States v. 677.50 Acres of Land*, 420 F.2d 1136, 1138-1139 (10th Cir. 1970), cert. denied, 398 U.S. 928; *R.J. Widen Co. v. U.S.*, 357 F.2d 988, 993-994 (Ct. Cl. 1966); *Certain Land in City of Washington, D.C. v. U.S.*, 355 F.2d 825, 826 (D.C. Cir. 1965).

268. *United States v. General Motors Corp.*, 323 U.S. 373, 379-380 (1945).

269. Congress did, in fact, subsequently enact the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, P. L. 91-646, as amended, 42 U.S.C. §4601, et seq, which provides for extensive recovery for replacement housing, moving expenses, and relocation advisory services. However, the reimbursement of these consequential damages fall under the Uniform Act and is outside of the scope of the appraiser's assignment, which is limited to the estimation of market value.

270. *United States v. Petty Motor Co.*, 327 U.S. 372, 377-378 (1946).

271. *United States ex rel. T.V.A. v. Powelson*, 319 U.S. 266, 282 (1943).

B-16. Offers to Purchase or Sell. It is well settled that a mere offer, unaccepted, to buy or sell real estate is inadmissible to establish market value in eminent domain valuation proceedings.²⁷² The Supreme Court has stated the reasons as follows:

It is frequently very difficult to show precisely the situation under which these offers were made. In our judgment they do not tend to show value, and they are unsatisfactory, easy of fabrication and even dangerous in their character as evidence upon this subject.²⁷³

An exception has been recognized in that an offer to sell by the landowner from whom the property is being condemned may be proved **against** the owner as an admission of value when introduced by the condemner.²⁷⁴ An option to purchase is a form of an offer; it is an offer that is irrevocable for the period stipulated. Even though consideration has been paid for it, an unexercised option is inadmissible.²⁷⁵

Appraisers should not confuse inadmissible information with that information they must disregard in forming their opinions of market value. The analysis of offers to buy and sell is clearly recognized in the appraisal profession as a proper procedure. For instance, *The Appraisal of Real Estate*, 11th ed. (Chicago: Appraisal Institute, 1996) contains the following statements:

Listings, which represent the owner's perception of the value of the property, usually reflect the upper limit of value; offers, which represent the buyer's perception, commonly set the lower limit of value. Listings and offers may be analyzed for comparability, but are not generally adjusted (p. 171).

In addition to recorded sales and signed contracts, appraisers should consider offers to sell and offers to purchase. Offers provide less reliable data than signed contracts and recorded sales (p. 325).

To apply the sales comparison approach, an appraiser gathers data on sales, contracts, offers, refusals, options, and listings of properties considered competitive with, and comparable to, the subject property. Data from completed transactions are considered the most reliable value indicators (p. 400).

In addition, in relation to the property being appraised, Standards Rule 1-5 of The Appraisal Foundation's *Uniform Standards of Professional Appraisal Practice* (USPAP), 2000 ed., requires an appraiser to "analyze any current Agreement of Sale, option, or listing of the property, if such information is available to the appraiser in the normal course of business" and the reporting of offers to buy or sell the property under appraisal is required by these Standards. See Section A-13(e).

Therefore, while it is recognized that offers provide less reliable data than do completed transactions and are generally inadmissible, they nonetheless should be considered by appraisers. The degree of weight given to an offer by an appraiser in arriving at a final estimate of market value is, of course, a matter of judgment, but in making that judgment they should remain mindful that, in the words of the Supreme Court, such offers are "easy of fabrication and even dangerous."

B-17. Settlement Negotiations. As early as its October 1876 term, the Supreme Court noted that well-recognized principles made an offer of compromise inadmissible.²⁷⁶

272. E.g., *Sharp v. United States*, 191 U.S. 341, 348-350 (1903); *United States v. 10,031.98 Acres of Land*, 850 F.2d 634, 637 (10th Cir. 1988); *United States v. 158.24 Acres of Land*, 696 F.2d 559, 565 (8th Cir. 1982); *United States v. Smith*, 354 F.2d 807, 811 (5th Cir. 1966); *Bank of Edenton v. United States*, 152 F.2d 251, 253 (4th Cir. 1945).

273. *Sharp v. United States*, 191 U.S. 341, 349 (1903).

274. *Albert Hanson Lumber Co. v. United States*, 261 U.S. 581, 589 (1923); *Erceg v. Fairbanks Exploration Co.*, 95 F.2d 850, 854 (9th Cir. 1938), cert. denied, 305 U.S. 615; *United States v. Hart*, 312 F.2d 127, 130 (6th Cir. 1963).

275. *United States v. Smith*, 355 F.2d 807, 811 (5th Cir. 1966).

276. *Home Ins. Co. v. Balt. Warehouse Co.*, 93 U.S. 527, 548 (1876); *United States v. Playa De Flor Land & Development Co.*, 160 F.2d 131, 136 (5th Cir. 1947); *Barnes v. South Carolina Public Service Authority*, 120 F.2d 43, 440 (4th Cir. 1941).

The prohibition against the admissibility of offers to compromise and completed compromises is now embodied in Rule 408 of the Federal Rules of Evidence.

There is one notable exception to the above rule. Section 4651 of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, P. L. 91-646, as amended, 42 U.S.C. §4601, et seq. provides that:

Before the initiation of negotiations for real property, the head of the Federal agency concerned shall establish an amount which he believes to be just compensation therefor and shall make a prompt offer to acquire the property for the full amount so established. In no event shall such amount be less than the agency's approved appraisal of the fair market value of such property. . . . The head of the Federal agency concerned shall provide the owner of real property to be acquired with a written statement of, and summary of the basis for, the amount he established as just compensation.

The Fifth Circuit found that §4651 statements of just compensation sent to land owners do not fall under Rule 408 of the Federal Rules of Evidence because “[t]echnically, at the time the statements are provided, there is no disputed claim, and hence no settlement negotiations of a disputed claim, to serve as the predicate of Rule 408.”²⁷⁷ In light of that and other findings, the court ruled that §4651 statements of just compensation sent to land owners “are admissible at a subsequent compensation trial as an admission . . .”²⁷⁸ of the government’s prior determination of just compensation. This could be considered a corollary to the rule allowing offers to sell by landowners admitted as admissions, as discussed in Section B-16.

As with offers to purchase or sell, the admissibility of a settlement offer does not control whether an appraiser *considers* a settlement offer in developing an opinion of value. It should be noted that the Fifth Circuit’s ruling does not admit §4651 statements as evidence of market value, but rather as admissions against interest in those cases in which the government’s valuation testimony at trial is less than the §4651 offer. An offer to purchase made under Section 4651 of the Uniform Relocation Act generally represents only the opinion of market value estimated by another appraiser and, as such, would generally not be given serious consideration by appraisers.

It is generally recognized that offers of settlement are not reliable indications of market value because such offers are often in the nature of compromise to avoid the expense and uncertainty of litigation and, therefore, should not be considered by appraisers in developing their opinions of market value.

B-18. Price Paid by a Governmental Entity for Similar Property. Based upon a variety of reasons, e.g., that such payments are in the nature of compromise to avoid the expense and uncertainty of litigation and so are not fair indications of market value, that such evidence complicates the record, confuses the issue, is misleading, and, especially in condemnation cases, raises collateral issues as to the conditions under which such sales were made, the historical view of the various federal courts has been that the sum paid for similar land by an agency having condemnation authority, even if condemnation proceedings have not begun, was inadmissible.²⁷⁹ However, an exception to this rule is recognized in cases of voluntary sales, or where the fact that the parties were condemnor and condemnee

277. *United States v. 320.0 Acres of Land*, 605 F.2d 762, 824-825 (5th Cir. 1979).

278. *Ibid.*, 825.

279. *United States v. 10.48 Acres of Land*, 621 F.2d 338, 339 (9th Cir. 1980); *United States v. 0.59 Acres of Land*, 109 F.3d 1493, 1498 (9th Cir. 1997); *United States v. 46,672.96 Acres of Land*, 521 F.2d 13, 17 (10th Cir. 1975); *Transwestern Pipeline Co. v. O'Brien*, 418 F.2d 15, 17-18 (5th Cir. 1969); *Slattery Co. v. United States*, 231 F.2d 37, 40-41 (5th Cir. 1956); *Evans v. United States*, 326 F.2d 827, 831 (8th Cir. 1964); *Hickey v. United States*, 208 F.2d 269, 275 (3rd Cir. 1953), cert. denied 347 U.S. 919 (1954); *United States v. 13,255.53 Acres of Land*, 158 F.2d 874, 877 (3rd Cir. 1946).

either was not known or had no influence because the sale was not in connection with or in anticipation of condemnation proceedings.²⁸⁰

“[T]he recent trend has been in favor of granting the trial court broad discretion in determining the admissibility of sales . . .”²⁸¹ “The theory of admissibility is that although evidence of a purchase by the condemnor of property similar to that involved in a condemnation proceedings is less persuasive on the issue of market value than evidence of a purchase by a stranger, there is no reason in principle why such evidence should not be admitted provided the purchase by the condemnor was made without compulsion; in short, it is held that objection to this type of evidence goes to its weight, not to its competency.”²⁸² As explained by the Sixth Circuit: “The possibility that the condemnation itself may have influenced the price the Government paid for the [comparable] property may well disclose the presence of artificially inflated values in the sale price of that property. Nevertheless, this is merely a possibility which cannot be determined through use of a general exclusionary rule prior to trial.”²⁸³

While sales to government entities should be viewed as *suspect* from the outset, they cannot, and should not, be rejected by appraisers as invalid comparable sales out of hand, especially in those situations wherein a paucity of private sales are available for use in the sales comparison approach to value. However, because “the person who offers evidence of other transactions must establish preliminarily that the purchase was made ‘without compulsion, coercion, or compromise,’”²⁸⁴ appraisers must use extreme care in their verifications of sales to government entities if they are going to rely upon them as comparable sales. Since there can be a multitude of motivations for a government entity to acquire lands at a price other than market value, Section D-9 of these Standards sets out the verification procedures appraisers must employ in verifying the circumstances surrounding a sale to a government entity to ensure that it meets the criteria of market value, or can be accurately be adjusted to reflect market value.

B-19. Leaseholds. When the government acquires a leasehold estate, whether by voluntary lease or condemnation, the proper measure of value is the market or economic rent of the occupied premises for the term specified.²⁸⁵ (See Section D-12, for detailed discussion of this point). The market rental rate is to be determined as though the property were an unencumbered whole and without regard to any subsidiary interests into which it may have been divided.²⁸⁶

Just as the preferred way of appraising a fee estate is to use comparable sales transactions, the preferred way of appraising a leasehold estate is to use comparable lease transactions. Elements of comparability in leasehold valuations include, in addition to the usual

280. *United States v. 10.48 Acres of Land*, 621 F.2d 338, 339-340 (9th Cir. 1980).

281. *United States v. 264.80 Acres of Land*, 360 F. Supp. 1381, 1382 (D. N.D. 1973).

282. *Nash v. D. C. Redevelopment Land Agency*, 395 F.2d 571, 576 (D.C. Cir. 1967).

283. *United States v. 691.81 Acres of Land*, 443 F.2d 461, 462-463 (6th Cir. 1971).

284. *Nash v. D. C. Redevelopment Land Agency*, 395 F.2d 571, 575 (D.C. Cir. 1967).

285. *Kimball Laundry Co. v. United States*, 338 U.S. 1, 7 (1949); *United States v. General Motors Corp.*, 323 U.S. 373, 382-383 (1945); *United States v. Petty Motor Co.*, 327 U.S. 372, 378-379 (1946); *United States v. Banisadr Building Joint Venture*, 65 F.3d 374, 378 (4th Cir. 1995); *Yuba Natural Resources, Inc. v. United States*, 904 F.2d 1577, 1580-1581 (Fed. Cir. 1990).

286. This is an aspect of the *unit rule*, discussed more fully in Section B-13. See also *Carlock v. United States*, 53 F.2d 926, 927 (D.C. Cir. 1931); *A.G. Davis Ice Co. v. United States*, 362 F.2d 934, 937 (1st Cir. 1966). Should the property in fact be encumbered by an existing leasehold estate in a third party that will be interrupted or extinguished as a consequence of the government's acquisition, the lessee may or may not be entitled to compensation, but that is a question of allocation of the value. Thus, there is no need for the government's appraiser to value that third party leasehold estate, unless requested to do so by the client agency.

elements of size, time, location, and so forth, the basic term of the lease, the number and term of options to renew, if any, tenant build-out, and the extent services are provided by the lessor and/or lessee. Under this approach, the appraiser will attempt to find leases of similar premises, near in location and time, which reflect as near as possible the terms of the lease and conditions of the premises being acquired. The rent paid per square foot (or per acre, or other unit of measure) in these comparables would be used as the basis for estimating the square foot (or other unit of measure) market, or economic, rent of the space to be leased. In this process, appropriate adjustments must be made for differences between the leasehold being appraised and the comparable lease transactions. Particular attention must be paid to adjustments for basic term and services, as the government often acquires leasehold estates of shorter terms than normally encountered in the market and, when the leasehold is being acquired by condemnation, the estate will not call for the furnishing of janitorial and similar type personal services often included in market leases, as the furnishing of such services cannot be compelled.

When the lease involves office space, it is imperative that the appraiser determine the net rentable area in the space being appraised in the same manner in which the net rentable space in the comparable leases is determined. There are several methods of measurement currently used in the private sector across the country, and the General Services Administration (which leases millions of square feet of space throughout the country and is often the government agency acquiring leasehold estates) has its own method that differs from those found in the private sector. Since square feet is usually the basis for comparison in an office space leasehold appraisal, it is of paramount importance to use the same common denominator and method of measurement in relating the comparable leases to the property under appraisal. If the government's standard of measurement varies from that of the local market (as it usually does), appraisers usually find it easiest to convert the government's measurements to that used in the local market for purposes of comparison because the market rent is to be determined in regard to what the owner/lessor could have received for the space on the open market.²⁸⁷

When comparable lease transactions are available, it is not proper to estimate market, or economic, rent of a leasehold estate by use of the *percentage of fee value* method.²⁸⁸ This method, which requires an appraisal of the fee value of the subject property and the application of some percentage factor reflecting an *appropriate return* on the owner's investment is fallacious in at least two respects: (1) it does not reflect the way rental rates are established in the market, and (2) neither the marketplace nor the law guarantees an owner a return on his or her investment.

The acquisition of a leasehold estate can encompass only a portion of a larger property. Under such circumstances, appraisers should not rule out consideration of the possibility of a diminution in the market rental of the area not leased by the government merely because the government's acquisition is of a leasehold estate. Such diminution in rental value can result in a compensable damage.²⁸⁹ A hypothetical example of such a situation was given by the court in a case which involved a leasehold taking of a portion of a commercial office building. The court stated that if the rental of the remainder is diminished unless offered together with the space acquired by the government, then the diminution in rental value of the remainder is a valid

287. *United States v. Bedford Associates*, 548 F. Supp. 732, 743 (S.D. N.Y. 1982), modified in other respects, 713 F.2d 895 (2nd Cir. 1983).

288. *United States v. 883.89 Acres of Land*, 442 F.2d 262, 264-265 (8th Cir. 1971); *United States v. Michoud Industrial Facilities*, 322 F.2d 698, 707 (5th Cir. 1963); *United States v. 117,763 Acres of Land*, 410 F. Supp. 628, 631 (S.D. Cal. 1976), aff'd *sub nom. United States v. Shewfelt Investment Co.*, 570 F.2d 290, 291-292 (9th Cir. 1977).

289. *United States v. 1735 N. Lynn St.*, 676 F. Supp. 693, 698-699 (E.D. Va. 1987).

compensable damage.²⁹⁰ However, appraisers must take care in this regard to avoid consideration of what are merely consequential, or noncompensable, damages.²⁹¹

As noted above, in conducting appraisals for the government, market rent is estimated without regard to any subsidiary interests into which the property may have been divided. However, client agencies may, on occasion, expand the scope of an appraiser's assignment to include consideration of the values of such subsidiary interests, so as to provide the agency with additional information that will facilitate its acquisition/negotiation activities. Compensation due to the owners of such subsidiary interests will vary depending on the nature and extent of the government's acquisition and the specific terms and conditions under which the subsidiary interest is held.

B-20. Easements. An easement can generally be described as an interest in land of another entitling the owner of that interest to a limited use of the land in which it exists, or a right to preclude specified uses in the easement area by others. An easement is an interest less than the fee estate, with the landowner retaining full dominion over the realty subject only to the easement; the landowner may make any use of the realty that does not interfere with the easement holder's reasonable use of the easement and is not specifically excluded by the terms of the easement. Federal acquisitions involve a wide variety of easement types ranging from the traditional to the exotic; they include, for example, road, pipeline, electric transmission line, levee, flowage, clearance, avigation, scenic, conservation, tunnel, sewer line, and safety zone easements.

In making an appraisal in conjunction with an easement acquisition,²⁹² it is imperative that the appraiser have a clear understanding of the specific terms of the easement involved, as the burden on the land upon which the easement is imposed (the servient estate) and the concomitant impact on the value of the affected land will vary according to the character of the easement.²⁹³ (For example, there is no such thing as a generic road easement or a generic scenic easement.²⁹⁴) Also, full consideration should be given to and due allowance made for the rights remaining in the owner.²⁹⁵

Every easement acquisition is a partial acquisition leaving a remainder estate in the owner. This is true even where the entire ownership is impressed with the easement: because an easement is less than the fee, there is a remainder estate in the land within the easement. If the easement is impressed upon less than the full area of the larger parcel, the portion of the parcel outside the easement is also a remainder. Federal courts have long held that the appropriate measure of compensation in a partial acquisition is the difference between the value of the whole parcel before the acquisition and the value of the remainder after the acquisition.²⁹⁶ The courts accordingly have held this to be the proper measure

290. Ibid.

291. Ibid. 701. See also discussion in Section B-15, "Noncompensability of Consequential Damages."

292. The first part of this Section will deal with appraisals made in conjunction with easement acquisitions. Subsequent portions will deal with the appraisal of existing easements taken or extinguished by the government's acquisition of the servient estate, and the appraisal of land encumbered by an easement.

293. "The valuation of an easement upon the basis of its destructive impact upon other uses of the servient fee is a universally accepted method of determining its worth." *United States v. Virginia Electric Co.*, 365 U.S. 624, 630 (1961).

294. For this reason, it is essential that the client agency provide the appraiser with a written description of the *estate to be taken* when an easement is to be acquired.

295. Where only an easement is acquired, the full fee value of the land within the easement is not necessarily a proper measure of diminution in value since the rights remaining in the owners may be very substantial. See *United States v. An Easement and Right-of-Way Over Two Strips of Land*, 284 F. Supp. 71, 73 (W.D. Ky. 1968).

296. See Section B-11. Because easement acquisitions are partial acquisitions, the rules on severance damages and offsetting of benefits apply.

of compensation in easement acquisitions.²⁹⁷ If only the strip subject to the easement is valued, this violates the rule that “comparing the fair market value of the *entire* tract affected by the taking before and after the taking . . . states the correct measure of value in federal court condemnation.”²⁹⁸

For some types of easements, such as those acquired for electric, telephone, fibre optics, cable lines and pipelines, there may be an established going rate per pole, per line-mile, per rod, and the like. In appraising a similar type of easement for government acquisition, the appraisal must not be based upon such going rates but must be based upon the usual before and after appraisal method.²⁹⁹

Although the before and after method of valuation is required by these Standards when the government acquires easements (because it measures what the owner has lost, not what the government has gained), use of the before and after method of valuation is not required when the government sells an easement interest. Agencies are, therefore, free to consider the value of the easement to the acquirer as well as the diminution to the government’s property by reason of the encumbrance.

Easements may be permanent or temporary. An example of the latter is the temporary construction easement. The appropriate measure of value for the acquisition of a temporary easement is the rental value for the term of the easement, adjusted as may be appropriate for the rights of use, if any, reserved to the owner. See Section D-10 of these Standards for a fuller discussion of this point.

The foregoing discussion pertains to appraisals made for easement acquisitions. A quite different though related matter is the proper measure of value for a third party appurtenant easement that is acquired or extinguished as an incident of the government’s acquisition of the servient estate (e.g., fee acquisition of property through which an easement of access connects a third party’s parcel to the highway). The third-party easement owner has a separate estate that must be separately appraised.³⁰⁰ In such cases, the easement owner is not limited to the value of the easement acquired, but is entitled to the value diminution of the property served by the easement.³⁰¹ Accordingly, two appraisal assignments are required; a before and after appraisal of the easement interest and the property it serves (the before appraisal including the easement interest and the land it serves and the after appraisal excluding those interests acquired by the government) and a second appraisal assignment covering the land being acquired, as encumbered by the easement.³⁰² This second appraisal would also require a before and after appraisal if only a portion of this larger parcel is to be acquired.³⁰³

297. *United States v. Virginia Electric Co.*, 365 U.S. 624, 632 (1961); *United States v. 8.41 Acres of Land*, 680 F.2d 388, 392 (5th Cir. 1982); *United States v. 38.60 Acres of Land*, 625 F.2d 196, 198-199 (8th Cir. 1980); *Transwestern Pipeline Co. v. O’Brien*, 418 F.2d 15, 21 (5th Cir. 1969).

298. *Transwestern Pipeline Co. v. O’Brien*, 418 F.2d 15, 21 (5th Cir. 1969) (emphasis added).

299. *United States v. 8.41 Acres of Land*, 680 F.2d 388, 392 (5th Cir. 1982).

300. This is an exception to the *unit rule* discussed in Section B-13, and is reasonable because the owner of the easement has a different larger parcel (the easement together with the land which it serves) than does the owner of the land encumbered with the easement.

301. *United States v. Grizzard*, 219 U.S. 180, 184-185 (1911); *United States v. 57.09 Acres of Land*, 706 F.2d 280, 281 (9th Cir. 1983).

302. *Boston Chamber of Commerce v. Boston*, 217 U.S. 189, 195 (1910); *United States v. 79.20 Acres of Land*, 710 F.2d 1352, 1354-1355 (8th Cir. 1983).

303. For a fuller discussion of this methodology, see J. D. Eaton, *Real Estate Valuation in Litigation*, 2nd ed. (Chicago: Appraisal Institute, 1995), 365-368.

B-21. Streets, Highways, Roads and Alleys. Under established federal law, only nominal compensation is due for streets, highways, roads and alleys acquired by the federal government unless the streets must be replaced.³⁰⁴ This is not to say that the government pays nothing for the land constituting the streets: as has been judicially stated, “[i]t is customary to say that the value of the land in the streets and alleys is ‘reflected’ in the value of the lots, and since this value must be paid for upon condemnation, it cannot be said that the condemnor acquired without cost the lands within the lines of the highway.”³⁰⁵

If the governmental unit from which the street has been acquired needs to replace the street, then the cost of replacing the street with a functionally equivalent substitute becomes the measure of the owner’s loss, rather than market value, the usual standard.³⁰⁶ If acquired streets do not need replacement, they require only nominal compensation. Compensation for streets that require replacement is generally measured by the cost to replace them, and appraisals are seldom used for such acquisitions.

B-22. Public Facilities. Public property owners have sought to extend application of the replacement cost measure of compensation to properties of a more conventional nature than streets, highways, roads and alleys, such as buildings and landfills.³⁰⁷ However, the Supreme Court has ruled that, notwithstanding the need to replace the acquired facility, market value is the proper measure of compensation when the market value of the property is ascertainable.³⁰⁸

From an appraisal perspective, the question that must be addressed is not what measure of compensation should be employed, but rather what is meant by *replacement cost*. For instance, when a street must be replaced, the only means of obtaining a functionally equivalent street is to construct one. Streets are not bought and sold in the open market, and the functionality of a street is tied to its specific location. However, when the property acquired is one that has an ascertainable market, the replacement cost of the property is not the cost to reconstruct it, but rather the price at which a functionally equivalent property can be acquired in the open market, i.e., its market value. In the case cited above, the Court found that there was an active market for the type of property being acquired.³⁰⁹

304. *United States v. Streets, Alleys & Public Ways, Etc.*, 531 F.2d 882, 885-886 (8th Cir. 1976). “The overwhelming weight of modern authority is to the effect that a municipality, a county, a state, or other public entity is entitled to compensation for the taking of a street, road or other public highway **only to the extent that, as a result of such taking, it is compelled to construct a substitute highway.**” (Emphasis by court.) *California v. United States*, 169 F.2d 914, 924 (9th Cir. 1948). See also *Prince William County v. United States*, 27 Fed. Cl. 339, 342-343 (1992), rev’d on other grounds 48 F.3d 520 (Fed. Cir. 1995); *Franklin County, Georgia v. United States*, 341 F.2d 106 (5th Cir. 1965); *Mayor and City Council of Baltimore v. United States*, 147 F.2d 786, 790 (4th Cir. 1945); *United States v. Des Moines County*, 148 F.2d 448, 449 (8th Cir. 1945), cert. denied, 326 U.S. 743; *Woodville v. United States*, 152 F.2d 735, 737 (10th Cir. 1946), cert. denied, 328 U.S. 842; *United States v. City of New York*, 168 F.2d 387, 389-390 (2nd Cir. 1948); *United States v. Certain Lands in Raritan and Woodbridge*, 246 F.2d 823, 824 (3rd Cir. 1957); *Washington v. United States*, 214 F.2d 33, 39, 42-44 (9th Cir. 1954), cert. denied, 348 U.S. 862.

305. *Mayor and City Council of Baltimore v. United States*, 147 F.2d 786, 790 (4th Cir. 1945).

306. *United States v. Streets, Alleys & Public Ways, Etc.*, 531 F.2d 882, 885 (8th Cir. 1976); *County of Sarpy, Nebraska v. United States*, 386 F.2d 453, 457 (Ct. Cl. 1967); *Washington v. United States*, 214 F.2d 33, 39 (9th Cir. 1954), cert. denied, 348 U.S. 862; *City of Fort Worth v. United States*, 188 F.2d 217, 222 (5th Cir. 1951); *United States v. Des Moines County*, 148 F.2d 448, 449 (8th Cir. 1945), cert. denied, 326 U.S. 743.

307. This has become known as the *substitute facilities doctrine* and excludes any consideration of, or deduction for, depreciation in the acquired facility.

308. *United States v. 50 Acres of Land*, 469 U.S. 24, 26 (1984). It should be noted that the Court did not address the question of the appropriate measure of compensation for the taking of public facilities for which there is no ascertainable market value.

309. The property acquired was a landfill site with a remaining holding capacity of 650,000 cubic yards, with an estimated remaining life of 12.8 years. The condemnee had replaced the taken site with a site which had a holding capacity of 2.1 million cubic yards and a life span of 41.6 years. The cost of the new site, which was claimed as compensation by the condemnee, was \$1,276,000, whereas testimony was introduced that the market value of the taken site, based on comparable sales, was from \$160,000 to \$370,000.

In line with current case law, appraisers assigned to value a public facility that has a demonstrable market must estimate its market value. When the public facility being acquired is one without an ascertainable market value, because the property type is not one bought and sold on the open market, appraisers should seek guidance in the form of a written legal instruction from the client agency's legal counsel, or if a condemnation case has been filed, from Department of Justice legal counsel regarding the appropriate valuation methodology to be employed.

B-23. Zoning and Permits. Market value is to be estimated at the time of valuation considering the property in its condition and situation at that time;³¹⁰ if at that time, the property was subject to zoning restrictions, that factor must be considered in evaluating the property.³¹¹ “Thus, if existing zoning restrictions preclude a more profitable use, ordinarily such use should not be considered in the evaluation.”³¹² Because property is to be valued in light of its highest and best use³¹³ zoning regulations are of critical importance because they restrict the uses to which the property may lawfully be devoted.

Of course, zoning regulations may change and a prospective purchaser may well consider the potential for a zoning change when determining the price he or she would pay for the property. Thus, if there is a reasonable probability that the property's zoning classification will be changed, this probability should be considered in arriving at the value estimate; but it should be considered only to the extent that the *probability* would have affected the price a willing buyer would have offered for the property at the time of the government's acquisition.³¹⁴ The appraiser's opinion as to whether there is a reasonable probability of a zoning change must have a factual foundation; it is insufficient to merely assert that there is a reasonable probability of a zoning change.³¹⁵ A discussion of the investigation and analysis required by an appraiser in this regard may be found in Section D-6 of these Standards.

The foregoing principles apply with equal force when the property is subject to regulations that preclude a particular use unless a permit for that use has been issued by the regulating authority.³¹⁶ (Substitute “reasonable probability of obtaining a permit” for “reasonable probability of a zoning change.”) For instance, this issue frequently arises in connection with a proposed use of wetlands subject to the Corps of Engineers' regulatory authority under the Clean Water Act of 1977, 33 U.S.C. 1251 et seq. In Section 301(a) of this Act, Congress enacted an absolute prohibition against the discharge of pollutants into the nation's water, excepting only discharges made in compliance with other sections of the Act, including Section 404. Pursuant to Section 404, the Corps of Engineers administers a permit program for the discharge of dredged or fill material (“pollutants” under the Act) into *navigable waters*, which includes *wetlands*.³¹⁷

310. *United States v. Chandler-Dunbar Co.*, 229 U.S. 53, 76 (1913); *United States v. Miller*, 317 U.S. 369, 374 (1943); *United States v. Reynolds*, 397 U.S. 14, 16 (1970).

311. *United States v. 27.93 Acres of Land*, 924 F.2d 506, 512 (3rd Cir. 1991); *United States v. 174.12 Acres of Land*, 671 F.2d 313, 315-316 (9th Cir. 1982); *United States v. 320.0 Acres of Land*, 605 F.2d 762, 818 (5th Cir. 1979); *United States v. Eden Memorial Park Association*, 350 F.2d 933, 936 (9th Cir. 1965); *H & R Corporation v. District of Columbia*, 351 F.2d 740, 742-743 (D.C. Cir. 1954); *Rapid Transit Co. v. United States*, 295 F.2d 465, 466-467 (10th Cir. 1961), cert. denied, 369 U.S. 819 (1962); *United States v. Meadow Brook Club*, 259 F.2d 41, 45 (2nd Cir. 1958), cert. denied, 358 U.S. 921.

312. *United States v. Meadow Brook Club*, 259 F.2d 41, 45 (2nd Cir. 1958), cert. denied, 358 U.S. 921.

313. *Olson v. United States*, 292 U.S. 246, 255 (1934); *United States ex rel. T.V.A. v. Powelson*, 319 U.S. 266, 275 (1943).

314. *Virgin Islands v. 2. 7420 Acres of Land*, 411 F.2d 785, 786 (3rd Cir. 1969); *United States v. Meadow Brook Club*, 259 F.2d 41, 45 (2nd Cir. 1958), cert. denied 358 U.S. 921; *H & R Corporation v. District of Columbia*, 351 F.2d 740, 743 (D.C. Cir. 1954).

315. *H & R Corporation v. District of Columbia*, 351 F.2d 740, 742-743 (D.C. Cir. 1954); *United States v. 320.0 Acres of Land*, 605 F.2d 762, 819, n. 130 (5th Cir. 1979).

316. *United States v. 62.50 Acres of Land*, 953 F.2d 886, 890-893 (5th Cir. 1992); *United States v. 8,968.06 Acres of Land*, 326 F. Supp. 546, 548 (S. D. Tx. 1971).

317. 33 C.F.R. 323.2.

Other frequently encountered permits are discussed in Section D-6 of these Standards.

B-24. Federal Grazing Permits. In valuing ranch lands, appraisers cannot consider any value added to those lands as a result of their actual or potential use in combination with Taylor Grazing Act permit lands, as these permits to use the public domain for grazing are revocable and create no property rights in the holder.³¹⁸ To require the United States to pay for this value would be to create private claims in the public domain.³¹⁹ The same principle should apply to situations involving federal grazing permit lands held under permit authority other than the Taylor Grazing Act, where the permit is revocable and creates no property rights in the holder, such as permits issued by the U.S. Forest Service under 16 U.S.C. 580(L), for example.

318. *United States v. Fuller*, 409 U.S. 488, 492-493 (1973). See also, *Federal Lands Legal Consortium v. United States*, 195 F.3d 1190, 1196-1197 (10th Cir. 1999).

319. *United States v. Fuller*, 409 U.S. 488, 493 (1973).



Standards for Review of Appraisals

Introduction. The review and documentation of the appraisal process should be in conformity with these Standards, which are compatible with standards and practices of the appraisal industry and with the current edition of the *Uniform Standards of Professional Appraisal Practice (USPAP)*.³²⁰ It has been necessary, however, to invoke USPAP's Jurisdictional Exception Rule in certain instances, so as to conform these Standards to over-riding federal laws and regulations on the review of appraisal reports prepared for use in government land acquisitions.³²¹

Government review appraisers are often assigned administrative duties in addition to the technical review of individual appraisal reports. Those administrative duties vary from agency to agency and may range from contract administration or counseling management for general valuation issues to assisting the agency to meet both its non-appraisal and appraisal obligations under P.L. 91-646.³²² Some of these duties may fall outside the scope of USPAP. These administrative duties are also considered to fall outside the scope of these Standards and are therefore not covered in the following discussion.

The review of appraisal reports by a qualified reviewing appraiser is required. The minimum review process is prescribed in 49 C.F.R. 24.104, as follows:

The agency shall have an appraisal review process and, at a minimum:

- (a) A qualified reviewing appraiser shall examine all appraisals to assure that they meet applicable appraisal requirements and shall, prior to acceptance, seek necessary corrections or revisions.
- (b) If the reviewing appraiser is unable to approve or recommend approval of an appraisal as an adequate basis for the establishment of the offer of just compensation, and it is determined that it is not practical to obtain an additional appraisal, the reviewing appraiser may develop appraisal documentation in accordance with §24.103 to support an approved or recommended value.
- (c) The reviewing appraiser's certification or the recommended or approved value of the property shall be set forth in a signed statement which identifies the appraisal reports

320. The Appraisal Foundation, *Uniform Standards of Professional Appraisal Practice (USPAP)*, 2000 ed.

321. Section D-1 of these Standards describes the instances in which the jurisdictional exception rule is invoked. Both these Standards and USPAP 2000 edition were used for purposes of comparison. Appraisers should be aware that future changes in USPAP may require additional jurisdictional exceptions.

322. Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, P.L. 91-646, as amended, 42 U.S.C. §4601, et seq.

reviewed and explains the basis for such recommendation or approval. Any damages or benefits to any remaining property shall also be identified in the statement.

These requirements have been implemented by government land acquisition agencies by the adoption of various policies, rules, and regulations.³²³ Therefore, review appraisers should refer to the specific review standards established for the individual agencies for a detailed discussion of appraisal review requirements. Appraisal review standards which have been adopted by the federal land acquisition agencies generally set, as a minimum, Standard 3 of the *Uniform Standards of Professional Appraisal Practice* (USPAP), 2000 ed., although some agencies have found it necessary to invoke USPAP's Jurisdictional Exception Rule in some instances.

In accordance with these requirements, prior to the approval of an appraisal of property having more than token value, the appraisal reviewer for each agency should attach to the appraisal a written review report or review memorandum indicating the scope of the review and the reviewer's analysis and support for the action recommended. It is the review appraiser's responsibility to determine whether the appraisal is adequately supported, complies with recognized appraisal principles and practices, complies with the appraiser's contract (or assignment letter) and these Standards, and conforms to any governing legal premises that may have been prescribed by the agency or its legal counsel in the way of a written legal instruction.

Appraisals provided by an agency to the U.S. Department of Justice in support of a request to initiate condemnation proceedings shall be reviewed by the Appraisal Unit of the Department. It is the responsibility of the Appraisal Unit to insure that sound, proper, and suitable appraisals are available for settlement negotiation and trial purposes. In this regard, the Appraisal Unit shall confirm both technical conformance with these Standards and the reasonableness of the appraiser's value estimate(s). In addition, the Appraisal Unit shall determine the suitability of the appraisal report for trial purposes: it will identify weaknesses and strengths of the report under review and recommend actions that the government's appraiser and/or trial counsel can take prior to trial to strengthen the government's case. It should be recognized that appraisal reports may be found to be in technical conformance with these Standards and the appraiser's value estimate(s) reasonable, yet they may still be unsuitable for trial purposes.³²⁴

Due to the intended use, and intended user, of these appraisal reviews, the review appraiser within the Appraisal Unit shall not develop his or her own independent estimate of value.

C-1. Types of Appraisal Reviews. There are generally recognized two types of reviews that can be performed; a technical review and an administrative review.³²⁵

A technical review is performed by an appraiser in accordance with these Standards, and in accordance with agency-adopted policies, rules, and regulations. Such reviews are subject to Standard 3 of USPAP. In completing a technical review, the appraisal reviewer renders an opinion concerning whether the opinions of value are adequately supported and

323. E.g., *U.S. Forest Service Manual* FSM 5410 and *U.S. Forest Service Handbook* FSH 5409.12; *U. S. Army Corps of Engineers Real Estate Engineer Regulations*, ER 405-1-12, Chap. 4, §§ X-XI; *Bureau of Land Management Manual* 9310; *U.S. Fish & Wildlife Service Appraisal Handbook* 342 FW 1 and *Appraisal Review Handbook* 342 FW 2.

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

325. The Appraisal Foundation, *Uniform Standards of Professional Appraisal Practice* (USPAP), 2000 ed., Advisory Opinion 6.

in compliance with all appropriate standards, laws, and regulations relating to the appraisal of property for federal acquisition purposes. In addition, as a part of a technical review, the agency appraisal reviewer may reach a conclusion regarding whether to approve (or recommend approval), disapprove, or modify the conclusions presented in the appraisal report under review. If appropriate to the assignment, the agency review appraiser performing a technical review may render a separate opinion of value. However, if the review appraiser renders a separate opinion of value, the value opinion must be developed in accordance with Section C-4 of these Standards. The development of such opinions and further review of the initial reviewer's opinion of value and the support therefor may also be subject to the pertinent agency's policies, rules, and/or regulations.

An administrative review may be performed by an appraiser³²⁶ or a non-appraiser and is sometimes referred to as a compliance review. An administrative review is not subject to USPAP and is typically performed as part of making a business decision such as whether or not to pursue the purchase or sale of a property or whether or not to pursue litigation. The content and scope of an administrative review will vary with the intended use and intended user of the review. Some federal agencies or departments have adopted specific policies regarding the use of administrative reviews.³²⁷ An administrative review may include confirmation that the appraisal report conforms to contract/assignment letter requirements, to these Standards, and to applicable federal law for federal land acquisition appraisals. The administrative reviewer may also verify the accuracy of factual data and the mathematics presented in the appraisal report. The administrative reviewer shall not, however, form an opinion regarding the analysis, judgment or opinion(s) of value contained within the appraisal report under review.³²⁸ As such, administrative reviews do not meet the requirements of 49 C.F.R. 24.104. Administrative reviewers will often use a *checklist* similar to that shown is Appendix A of these Standards.³²⁹

C-2. Scope of Work. Technical reviews may be conducted as either desk reviews or field reviews. A desk review involves, in addition to confirmation that the report was prepared in accordance with these Standards, a thorough review and analysis of the information and analysis contained in the appraisal report under review and a careful examination of the internal logic and consistency. In a desk review, the appraisal reviewer limits the examination to the information and analysis presented within the appraisal report. The data contained within the appraisal report may or may not be confirmed and the reviewer may or may not identify additional comparative market data.

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

326. See The Appraisal Foundation, *USPAP Frequently Asked Questions*, 2000 ed., 56, Q98; *The Appraisal of Real Estate*, 11th ed. (Chicago: Appraisal Institute, 1996), 687, n. 2.

327. E.g., U.S. Department of Justice, Land Acquisition Section, "Establishment of policy regarding administrative appraisal reviews," 6/18/97.

328. If the administrative reviewer is an appraiser and forms an opinion regarding the analysis, judgment, or opinion(s) of value contained in the appraisal report, the review becomes a *technical review* and falls under the requirements of Standard 3 of USPAP.

329. This *checklist* is not an integral part of these Standards, nor is it intended to be used as part of a technical appraisal review, but has been included merely for easy reference by appraisers and reviewers.

The determination of the proper scope of work to be performed within the review process should be based on the dollar value of the property, the complexity of the appraisal problem, and the regulatory and policy requirements of the acquiring agency. Also, the degree of controversy surrounding the agency's project and/or acquisition may play a role in determining the scope of work.

It is critical that the review appraiser clearly identify the precise extent of the review process used in each review. The use of terms such as administrative or technical review, as well as desk review and field review, are terms of art which may not be understood by all users or readers of the review. Therefore, if these terms are used in the review report, they require precise definition.

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

C-3. Responsibilities of the Review Appraiser. Like the appraiser, review appraisers must remain objective in their appraisal review activities. They cannot let agency goals or adversarial pressure influence their opinions of an appraisal report's appropriateness or of the value estimate(s) it reports, nor can they let their personal opinions regarding the advisability of the agency's proposed acquisition enter into the review process.

Also, appraisal reviewers should not attempt to substitute their judgment for that of the appraiser unless they are willing and able to develop their own opinions of value, and become the agency's appraiser of record. Appraisal reviewers must recognize that technical deficiencies can be found in nearly every appraisal report. However, minor technical non-conformance with these Standards or USPAP standards should not be the cause of disapproval of an appraisal report, unless the deficiency affects the reliability of the value estimate, or the value estimate itself. Minor technical non-conformance with these Standards should never be used as an excuse to reject a report when the underlying reason for rejection is the reviewer's differing opinion of the market value of the property appraised.

In conducting an appraisal review the reviewer must:

- Identify the agency client and intended users of the reviewer's opinions and conclusions, and the purpose of the assignment.
- Identify the appraisal report under review, the date of the review, the property and ownership interest appraised³³⁰ in the report under review, the date of the report under review and the effective date of the value estimate(s) reported, and the names of the appraisers that completed the report under review.
- Identify the scope of work performed in the review.
- Develop an opinion as to the completeness of the appraisal report under review within the scope of work applicable to the appraisal assignment, which shall include these Standards.
- Develop an opinion as to the apparent adequacy and relevance of the data and propriety of any adjustments to the data.
- Develop an opinion as to the appropriateness of the appraisal methods and techniques used and develop the reasons for any disagreements.
- Develop an opinion as to whether the analyses, opinions and conclusions in the ap-

330. The reviewer also must confirm that the property rights valued by the appraiser are consistent with the estate to be acquired by the government.

raisal report under review are appropriate and reasonable, and develop the reasons for any disagreement.

- Prepare an appraisal review report in compliance with agency policies, rules, and regulations, and in accordance with Section C-6 of these Standards.³³¹

C-4. An Opinion of Value Expressed by a Review Appraiser. If a review appraiser cannot approve or recommend approval of an appraisal report reviewed, and it is determined that it is not practical to obtain an additional appraisal, 49 C.F.R. 24.104 permits the review appraiser to develop an independent opinion of value subject to that value opinion being documented in accordance with 49 C.F.R. 24.103. Various federal agencies have adopted policies, rules, and procedures that regulate the circumstances by which a reviewing appraiser may develop his or her independent value estimate and become the agency's appraiser of record.³³²

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

When it is appropriate for a reviewing appraiser to develop his or her own value estimate and become the appraiser of record, that value estimate must be supported and documented in accordance with Section A of these Standards. However, that does not mean that the reviewer must replicate the steps completed by the original appraiser. The data and analysis that the reviewer determined to be credible and in compliance with these Standards can be incorporated by reference into the review appraiser's review report using an extraordinary assumption.³³³ Those portions of the appraiser's report which the reviewer determined not credible or inconsistent with these Standards must be replaced in the review report with additional data and analysis by the review appraiser.³³⁴ The reviewer may use additional information that was not available to the original appraiser, but under such circumstances the effective date of the reviewer's estimate of value will generally be later in time than the effective date of the original appraiser's estimate of value. Therefore, the original appraiser's estimate of value cannot be compared directly to the reviewer's later estimate of value for any legitimate purpose.

C-5. Reviewer's Use of Information Not Available to the Appraiser. The typical appraisal review assignment involving a federal land acquisition has a scope of work exceeding that of the usual appraisal review because 49 C.F.R. 24.104 requires the reviewer to determine whether the appraisal report under review constitutes an adequate basis for the establishment of an offer of just compensation. In making that determination, circumstances may require the review appraiser to consider information that was not available to the appraiser who prepared the appraisal report under review. This information may have become available following the completion of the appraisal report.³³⁵ In light of the in-

331. See generally, USPAP Standards Rule 3-1.

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

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

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

335. E.g., additional market activity which occurred after the effective date of the appraisal, a change in the estate to be acquired by the government, or information that became available as a result of negotiations or through the discovery process.

tended use (i.e., basis for offer of just compensation) and intended user (i.e., agency management), the reviewer is required to consider all available information in making a recommendation to management. A recommendation to management based on outdated or incomplete information would fail to meet management's need to determine a *current* offer of just compensation and would not conform to the intent of 49 C.F.R. 24.104.

USPAP provides as follows:

The appraisal review must be conducted in the context of market conditions as of the effective date of the opinion in the work being reviewed. Information available to the reviewer that could not have been available to the appraiser as of or subsequent to the date of the work being reviewed must not be used by a reviewer in the development of an opinion as to the quality of the work under review.³³⁶

The appraisal reviewer's use of subsequent information that is required under the government's scope of work may be construed as being contrary to the above USPAP provision. If the reviewer appraiser's consideration of the subsequent information is so construed, such consideration is an exception to USPAP, under its Jurisdictional Exception Rule. However, it must be remembered that an appraisal reviewer may find that an appraisal report under review was prepared in accordance with these Standards and that the estimate of value reported was reasonable and reliable as of the effective date of the appraisal, and yet still find that the value estimate is unreliable as the basis for an offer to purchase by the government because of changed circumstances or new information that has become available. In such an instance, the appraisal reviewer must clearly explain all pertinent findings in the review report to avoid any impression that the appraisal report under review was disapproved because of its quality or the reasonableness of the value estimate as of the effective date of the appraisal. In these circumstances, some agency reviewers *accept* the appraisal report, but do not *approve* it.

C-6. Review Reporting Requirements. These Standards do not require a specific review report format or structure. A number of the federal land acquisition agencies have adopted required or recommended formats for review reports to provide consistency and efficiency in the review reporting process. Appraisal reviewers for these agencies should, of course, be familiar with and follow these agency-required or recommended formats. Irrespective of the review report format, all appraisal review reports shall be in writing and contain, at a minimum, the following:

- Identification of the agency client and intended users of the review report, the intended use of the review, and the purpose of the review assignment;
- Identification of the appraisal report under review, the date of the review report, the property and ownership interest appraised in the report under review, the date of the report under review and the effective date of the value estimate(s) reported, and the names of the appraisers that completed the report under review;
- Description of the scope of work performed in the review;
- Statement of opinions, reasons and conclusions reached concerning the appraisal report under review;
- Review appraiser's signed certification, in accordance with Section C-8 of these Standards.³³⁷

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

336. The Appraisal Foundation, *Uniform Standards of Professional Appraisal Practice* (USPAP), 2000 ed., Standards Rule 3-1(c).

337. See generally, USPAP Standards Rule 3-2.

C-7. Oral Review Reports. Oral appraisal review reports are contrary to 49 C.F.R. 24.104 and these Standards. Therefore, oral appraisal review reports are not permitted.

C-8. Review Appraiser's Certification. The technical appraisal review report shall include the reviewing appraiser's signed statement that the review appraiser, to the best of his or her knowledge and belief, certifies that:

- the statements of fact contained in the review report are true and correct;
- the reported analyses, opinions, and conclusions in the review report are limited only by the assumptions and limiting conditions stated in this review report, and are the reviewer's personal, unbiased professional analyses, opinions and conclusions;
- the reviewing appraiser has no present or prospective interest in the property that is the subject of the review report and no personal interest or bias with respect to the parties involved;
- the compensation received by the review appraiser for the review is not contingent on the analyses, opinions, or conclusions reached or reported;
- the appraisal review was made and the review report prepared in conformity with the Uniform Appraisal Standards for Federal Land Acquisitions.
- the appraisal review was made and the review report prepared in conformity with the Appraisal Foundation's Uniform Standards of Professional Appraisal Practice, except to the extent that the Uniform Appraisal Standards for Federal Land Acquisitions required invocation of USPAP's Jurisdictional Exception Rule, as described in Section D-1³³⁸ of the Uniform Appraisal Standards for Federal Land Acquisitions;
- the review appraiser has (not) made a personal inspection of the property that was the subject of the appraisal report reviewed; has (not) made a personal inspection of the market comparables cited in the appraisal report under review; has (not) verified the factual data presented in the appraisal report reviewed;
- no one provided significant professional assistance to the review appraiser. (If professional assistance was provided to the review appraiser, the name of the individual(s) providing such assistance must be stated. This requirement includes both professional appraisal review assistance and providers of subsidiary assistance, e.g., planning or permitting consultants, engineers, cost estimators, timber experts, mineral experts.)

338. Appraisal reviewers should recognize that USPAP changes frequently and, with future changes, there may be additional jurisdictional exceptions necessary which are not noted in Section D-1 of these Standards. In such an instance, review appraisers will have to identify and report those additional jurisdictional exceptions, as well as any jurisdictional exceptions which were necessary as a result of any policies, rules, or regulations unique to the client agency regarding appraisal reviews.



Standards for Unique and Miscellaneous Appraisal Problems

D-1. Comparison of USPAP and the *Uniform Appraisal Standards for Federal Land Acquisitions*.

D-1a. Introduction. Section A of these Standards notes that the Standards conform to Uniform Standards of Professional Appraisal Practice (USPAP),³³⁹ but that, in certain instances, it has been necessary to invoke USPAP's Jurisdictional Exception Rule to conform these Standards to federal law relating to the valuation of real estate for government acquisition purposes. The intent of Section D-1 is to identify the areas of these Standards that deviate from USPAP under the Jurisdictional Exception Rule.

USPAP's Jurisdictional Exception Rule simply provides that "[i]f any part of [the USPAP] standards is contrary to the law or public policy of any jurisdiction, only that part shall be void and of no force or effect in that jurisdiction." By way of explanation, the comment section of USPAP's Jurisdictional Exception Rule further provides: "By logical extension, there can be no violation of USPAP by an appraiser disregarding, with proper disclosure, only the part or parts of USPAP that are void and of no force and effect in a particular assignment by operation of legal authority." The comment also states, however, that "[i]t is misleading for an appraiser to disregard a part or parts of USPAP as void and of no force and effect in a particular assignment without identifying in the appraiser's report the part or parts disregarded and the legal authority justifying this action."

As made clear below, the conflicts between these Standards and USPAP that require invocation of USPAP's Jurisdictional Exception Rule are minimal. Invocation of the Jurisdictional Rule should never be invoked lightly, or without reference to the overriding federal policy, rule, or regulation which requires it. USPAP is not a particularly restrictive document, but it and these Standards require full and prominent disclosure to avoid misleading intended users (or even casual readers) of the appraisal report.

While these Standards are not themselves *law*, they are based on federal case law, legislation, and administrative rules. Also, these Standards have been specifically incorporated by reference into a number of statutes and regulations.³⁴⁰ In particular, the regula-

339. For purposes of this discussion, the 2000 edition of USPAP has been used. Again, appraisers are cautioned that USPAP changes frequently and, thus, additional jurisdictional exceptions to USPAP may be required.

340. E.g., 113 Stat. 1693 §4(b), (P.L. 106-38); 112 Stat. 879 §1(c), (P.L. 105-208); 112 Stat. 2681 §357(1), §605(a)(3), (P.L. 105-277); 110 Stat. 4093 §304(c)(4)(A) (P.L. 104-333); 106 Stat. 2112 § &(b) (P.L. 102-415); 106 Stat. 2258 § 2(d)(2)(A) (P.L. 102-453); 105 Stat. 1150 § 8126(a) (P.L. 102-172); 102 Stat. 1086 § 3(a) (P.L. 100-409), *amending* 43 U.S.C. §1716; 100 Stat. 4274 § 8(o) (P.L.99-663); 36 CFR 254.9; 43 CFR 2201.3.

tions³⁴¹ that implement the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970.³⁴² It is clear that the deviations between these Standards and USPAP noted below fall under USPAP's Jurisdictional Exception Rule; the legal authority justifying these exceptions consists of these Standards and the federal case law, legislation, and federal regulations upon which these Standards are based.

D-1b. Linking Estimate of Value to Specific Exposure Time. Section A-9 of these Standards provides that the appraiser shall not *link* an estimate of market value for federal land acquisition purposes to a specific exposure time. This is contrary to USPAP Standards Rule 1-2 and Standards Rule 2-2, and is considered a jurisdictional exception. The legal basis and reasoning for this jurisdictional exception may be found in Section B-2 of these Standards.

D-1c. Consideration of Land Use Regulations and Anticipated Public Projects. Section A-12 of these Standards provides that the appraiser disregard any changes in a property's neighborhood brought about by the government's project. Section A-13h further instructs appraisers that they must disregard recent rezoning (or the probability of rezoning) of the property under appraisal if such action was the result of the government's project. Section B-10 of these Standards, "Enhancement or Diminution in Value Due to the Project," explains the legal basis for these instructions. These instructions are contrary to USPAP Standards Rule 1-3(a), which requires appraisers to identify and analyze the effect on use and value of existing land use regulations and probable modifications thereof, and to Standards Rule 1-4(f) which requires appraisers to analyze the effect on value of anticipated public improvements located on or off site. Therefore, the instructions to appraisers in these Standards in this regard are considered jurisdictional exceptions.

D-1d. Review Functions. Section C-5 of these Standards notes that 49 C.F.R. 24.104 requires the reviewer to determine whether the appraisal under review constitutes an adequate basis for the establishment of an offer of just compensation. To do that, it may be necessary for the reviewer to consider information that was not available to the appraiser at the time the appraisal report was prepared. Standards Rule 3-1(c) of USPAP prohibits the reviewer from using information not available to the appraiser in development of an opinion as to the quality of the appraisal report under review. Review appraisers are cautioned that some may construe their consideration of such information in conducting their review and developing recommendations to management as contrary to Standards Rule 3-1(c). Therefore, review appraisers may wish to invoke USPAP's Jurisdictional Exception Rule in this regard, depending upon the specific circumstances of the review.

As noted in Section C-1 of these Standards, administrative reviews are not subject to USPAP and do not meet the requirements of 49 C.F.R. 24.104. In addition, *Draft Appraisal Reports*³⁴³ are not subject to USPAP, even though they may be reviewed for general conformance therewith, as well as conformance with these Standards. However, a technical review report covering a draft appraisal report does fall under the purview of USPAP and these Standards. However, the review appraiser typically does not approve, recommend for approval, disapprove, accept, or reject a draft appraisal report.

341. 49 CFR 24.103.

342. 42 USC§4601-4655, P.L. 91-646, 84 Stat. 1984 *et. seq.*

343. Draft appraisal reports, for purposes of these Standards, are written appraisal reports, or parts thereof, which are not signed by the appraiser and do not include a signed appraiser's certificate, or a signed letter of transmittal.

D-1e. Conduct of Preliminary Value Estimates and Appraisals for Federal Land Exchanges.

As noted in Section D-7 of these Standards, a preliminary value estimate prepared under 43 C.F.R. 2201.1(b) is not considered an *appraisal* even though it is to be prepared by a qualified appraiser. Therefore, the preparation of such preliminary value estimates are a jurisdictional exception to USPAP. It is noted that 36 C.F.R. 254.4(b) is silent on whether such a preliminary value estimate is considered an “appraisal” by the USFS.

D-1f. Specific Legislation and Regulations. Each land acquisition agency has its own policies, rules, and regulations relating to its land acquisition activities. While all of these rules and regulations work from a base of 49 C.F.R. Pt. 24, as do these Standards, specific agency program activities sometimes make it necessary to adopt rules and regulations which are, or may be construed to be, contrary to USPAP.³⁴⁴

Also, it is not uncommon for Congress to enact specific legislation relating to the acquisition of a specific property or properties to be acquired for a specific public project. In some instances, adherence to the provisions of that specific legislation may require the appraiser to invoke USPAP’s Jurisdictional Exception Rule and/or prepare an appraisal under a hypothetical condition or extraordinary assumption.³⁴⁵ In such instances, it is the agency’s responsibility to advise the appraiser of the special conditions under which the appraisal is to be conducted, of the specific law requiring the invocation of USPAP’s Jurisdictional Exception Rule, and, if necessary, of the hypothetical condition or extraordinary assumption.

D-1g. Conclusion. Any time appraisers confront a potential conflict between USPAP and these Standards, or the client agency’s appraiser instructions, they should always analyze the apparent conflict and avoid invocation of USPAP’s Jurisdictional Exception Rule whenever possible. Often, these Standards or the agency’s special appraisal instructions do not require a jurisdictional exception, but rather merely that the appraiser conduct an appraisal under a hypothetical condition or by adopting an extraordinary assumption.³⁴⁶

However, in making such an analysis, appraisers must be cognizant of the fact that The Appraisal Foundation does not enforce USPAP: the 50 state appraiser licensing/certification agencies enforce USAP standards. Therefore, interpretation of USPAP often varies among the jurisdictions; and states are not obligated to follow the Advisory Opinions of the Standards Board of the Foundation, because the 19 Advisory Opinions that have been issued to date do not establish new standards or interpret existing standards. Therefore, appraisers must implement the USPAP standards in a manner consistent with the interpretations thereof by the licensing/certification agency with enforcement responsibility in the jurisdiction where the property under appraisal is located. Appraisers are advised to bear in mind that **full disclosure** is the essential element in preparing an appraisal report in conformance with USPAP.

D-2. Federal Rules of Civil Procedure. If an appraiser will testify as an expert witness in a federal trial, the appraiser’s report must not only conform to these Standards, but must also conform to the content requirements of Rule 26(a)(2)(B) of the Federal Rules of Civil Procedure, which provides as follows:

344. E.g., see Section D-13 of these Standards.

345. The USPAP definitions of *hypothetical condition* and *extraordinary assumption* may be found in Section A-8 of these Standards.

346. For instance, the appraiser instructions discussed in Section D-1c could, with proper disclosure, be classified as a hypothetical condition rather than requiring the invocation of the Jurisdictional Exception Rule.

Except as otherwise stipulated or directed by the court, . . . disclosure shall, with respect to a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony, be accompanied by a written report prepared and signed by the witness. The report shall contain a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

If an appraisal report is prepared in accordance with these Standards, it is anticipated that the report will be found to conform with Rule 26(a)(2)(B). However, most *appraiser qualification* resumes do not include the information required by Rule 26, specifically, a list of all publications authored within the preceding ten years, a listing of all trials or depositions in which the appraiser has testified within the preceding four years, and disclosure of the fee received by the appraiser for the appraisal assignment and the fee anticipated for testifying. Therefore, when the possibility exists that an appraisal report may be used for litigation purposes, appraisers must supplement their standard qualification resumes to insure that they meet these requirements. In addition, it is recommended that appraisers include such information in any report being prepared for federal land acquisition purposes.

D-3. Appraiser Instructions, Assumptions and Limiting Conditions. An appraiser cannot make an assumption or accept an instruction that is unreasonable or misleading, nor can an appraiser make an assumption that corrupts the validity of the value estimate³⁴⁷ or alters the scope of work required by the appraiser’s contract or assignment letter. For example, it is improper, unless specifically instructed otherwise, to estimate the market value of a property assuming it is free of contamination when there is evidence, by the past use of the property or by the appraiser’s inspection thereof, that contamination may exist.³⁴⁸

“An extraordinary assumption³⁴⁹ may be used in an assignment only if:

- it is required to properly develop credible opinions and conclusions;
- the appraiser has a reasonable basis for the extraordinary assumption;
- use of the extraordinary assumption results in a credible analysis; and
- the appraiser complies with the disclosure requirements set forth in USPAP for extraordinary assumptions.”³⁵⁰

“A hypothetical condition³⁵¹ may be used in an assignment only if:

347. “Where unwarranted theories of law or assumptions of fact guide the expert and are used as a basis of value by the Court, the evaluation will be set aside and the cause remanded for new findings.” *United States v. Honolulu Plantation Co.*, 182 F.2d 172, 178 (9th Cir. 1950), cert. denied, 340 U.S. 820.

348. For guidance, see USPAP Advisory Opinion AO-9, “Responsibility of Appraisers Concerning Toxic or Hazardous Substance Contamination.”

349. “Extraordinary assumptions presume as fact otherwise uncertain information about physical, legal, or economic characteristics of the subject property or about conditions external to the property, such as market conditions or trends, or the integrity of data used in an analysis.” USPAP, Definitions.

350. USPAP, Standards Rule 1-2(g).

351. “Hypothetical conditions assume conditions contrary to known facts about physical, legal, or economic characteristics of the subject property or about conditions external to the property, such as market conditions or trends, or the integrity of data used in an analysis.” USPAP, Definitions.

- use of the hypothetical condition is clearly required for legal purposes, for purposes of reasonable analysis, or for purposes of comparison;
- use of the hypothetical condition results in a credible analysis; and
- the appraiser complies with the disclosure requirements set for in USPAP for hypothetical conditions.³⁵²

In light of the foregoing, it is also improper for an appraiser to classify conclusions reached after investigation and analysis as assumptions (e.g., an appraiser can, after proper investigation and analysis, conclude that a probability of rezoning for the property under appraisal exists, but it would be improper to *assume* such a probability).

Circumstances arise when agencies or their legal counsel need to provide some instruction to the appraiser. Agency instructions and/or legal instructions must have a sound foundation, must be in writing and must be included in the appraisal report.³⁵³ “Instructions by an attorney to the appraiser on a matter of law are certainly a proper element to be expressed in the attorney-appraiser relationship, but instructions to the appraiser on valuation are another matter. The appraiser has the choice of accepting or rejecting the attorney’s [valuation] premise. Once accepted without reservation, the premise becomes the appraiser’s responsibility.”³⁵⁴ “Opinions expressed by an attorney that are not valid and are without foundation should be disregarded by an appraiser.”³⁵⁵

Once received by the appraiser, written legal instructions that have a proper foundation *must* be accepted by the appraiser. Any written legal instruction received by the appraiser *must* be included in the appraisal report.

D-4. Appraiser’s Use of Consultant’s Reports. Appraisers are increasingly forced to rely on consultants’ reports on technical issues.³⁵⁶ However, the appraiser cannot merely accept such consultant reports as accurate,³⁵⁷ but rather must review such reports and adopt them only if reasonable and adequately documented and supported. The results of secondary valuation reports, such as mineral, fixture, or timber valuations, cannot simply be added to the value of the land to arrive at a value of the property as a whole without proper analysis by the appraiser. To do so is a violation of the unit rule³⁵⁸ and professional standards.³⁵⁹ The appraiser must consider these components of the property in light of how they contribute to the market value of the property as a whole.

If a consultant’s services are used to assist an appraiser in estimating a cost to cure damage amount in a partial acquisition, the appraiser must review and analyze the cost estimate with great care. It must be remembered that a cost to cure method of estimating a

352. USPAP, Standards Rule 1-2(h).

353. Agency and legal instructions fall under the definition of “Reports Prepared by Licensed or Certified Non Real Estate Appraisal Professionals.” Such reports “are generally based on accepted procedures or standards and represent informed opinions on matters beyond the appraiser’s expertise. Absent reasonable doubt, these reports usually can be accepted conditioned upon the qualification that they were prepared by recognized professionals.” “Guide Note 6, Reliance on Reports or Information Prepared by Others,” *Guide Notes to the Standards of Professional Appraisal Practice*, (Appraisal Institute, 1993), D-14.

354. *Divergences in Right-of-Way Valuations*, National Cooperative Highway Research Program Report No. 126 (Washington, D.C.: Highway Research Board, 1971), 12.

355. *Ibid.*, 16.

356. For a list of typical consultants, see Section D-15.

357. See “Guide Note 6, Reliance on Reports or Information Prepared by Others,” *Guide Notes to the Standards of Professional Appraisal Practice*, (Appraisal Institute, 1993).

358. See Section B-13 of these Standards.

359. USPAP, Standards Rule 1-4(e).

diminution in value is only valid when the cost to cure is less than the diminution in value if the cure is not undertaken. Even though a cost to cure method of estimating the diminution of value may be appropriate, it must be remembered that the remainder property is still to be valued in its uncured condition. Therefore, it is important that any cost to cure estimate of damage include not only the direct costs of the cure, but also the indirect cost, any effects of delay, and if appropriate, an entrepreneurial profit factor. “[T]o give no consideration whatsoever to entrepreneurial profit when estimating an appropriate cost to cure adjustment is ludicrous.”³⁶⁰

D-5. Legal Description of the Property. It is essential that the appraiser obtain an accurate legal description of the property to be appraised. The appraiser should receive an accurate legal description with the appraisal assignment. If the assignment involves a partial acquisition, the appraiser should receive both a legal description of the whole property and a legal description of the remainder property, or alternatively, a legal description of the area to be acquired and/or encumbered. If for any reason that is not done, the appraiser is responsible for obtaining an accurate legal description of the property to be appraised and the property remaining (or to be acquired) before endeavoring to conduct the appraisal.³⁶¹

The appraiser should verify the legal description both on *the ground* as the physical inspection of the property is made; with the owner of the property, if possible; and by comparing it with city or county maps, aerial maps, as available in county or other governmental offices; and with records available in the recorder’s, auditor’s, assessor’s, tax collector’s, or other appropriate city or county offices. If an error of significant importance is discovered, the appraiser should consult the agency from which the appraisal assignment was received before proceeding with the appraisal. If a minor error is discovered which is believed will not affect the completion of the assignment, the appraiser should make a note of explanation in the appraisal report, making reference to it in the legal description given in the assignment.

It must be determined whether the property interest to be appraised constitutes the fee simple estate, an easement, leasehold or other property right. Easements, mineral rights, rights of way, or any exception to the estate being acquired which limits the use of the property or grants certain uses to others, should be carefully ascertained. In the case of a partial acquisition the agency should provide a written description of the *estate to be acquired* to the appraiser.

D-6. Zoning and Other Land Use Regulations. Zoning is a factor to be considered in evaluating property. Accordingly, if the property to be appraised is in a zoned area, recite the restrictions in the appraisal report and interpret the impact of such restrictions on the utility and value of the subject property. In selecting comparable sales for use in the appraisal, the appraiser should select those sales that have the same or similar zoning as the property being appraised.

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

360. J. D. Eaton, *Real Estate Valuation in Litigation*, 2nd ed. (Chicago: Appraisal Institute, 1995), 299.

361. USPAP, Standards Rule 1-2(e).

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

The appraiser has an obligation to consider not only the effect of existing land use regulations, but also the effect of reasonably probable modifications of such land use regulations,³⁶² such as what impact on value any probability of a rezoning of the property being appraised might have. Although an appraiser might conclude that a property could be put to a higher and better use if it were zoned differently, this does not in itself suggest that a probability of rezoning exists.

If an appraiser concludes that a property has a highest and best use that is physically and economically contrary to existing zoning, an investigation of the probability of obtaining such a rezoning shall be undertaken. Areas of enquiry should include the following:

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

If an appraiser concludes a highest and best use that will require a rezoning of the property under appraisal, the appraisal report shall include a description of the investigation undertaken by the appraiser to determine that a probability of rezoning exists, the appraiser's analysis of the information gathered, and the factual support for the appraiser's conclusion.

Under no circumstances can a property be valued as if it were already rezoned for a higher use. The property must be valued only in light of the probability of obtaining a rezoning. Risk of being denied a rezoning, or that an exaction or other condition may be placed on the rezoning, always exists. The time delay and costs associated with the rezoning process must also be considered.

If the probability of a rezoning is impacted, either positively or negatively, by the government project for which the property under appraisal is being acquired, such impact must be disregarded.³⁶³ In the case of a partial acquisition, the probability of a rezoning must be re-analyzed in regard to the remainder property. If the probability of a rezoning for the remainder

362. See Section B-23 of these Standards. See also, USPAP, Standards Rule 1-3(a).

363. See Section B-10 of these Standards.

property is increased, a special benefit may exist,³⁶⁴ if such probability has been diminished, a severance damage may have occurred.³⁶⁵

In addition to zoning, the appraiser must consider the impact of other land use regulations on the utility and value of the property being appraised. These land use regulations may be of local, state, regional or national origin. Land use regulations, in addition to zoning, which may have an impact on property value include, among others:

Building codes	Health codes regulations	Environmental impact statement
Shorelines management requirements	Flood plain management regulations	Subdivision regulations
Mining regulations	Comprehensive land use planning documents	Timber harvesting regulations
Noise pollution controls	Air pollution controls	Water pollution controls
Hazardous/toxic waste controls	Open space requirements	Coastal zone management
Wetland regulations	Endangered species protection	Development moratoria

When an acquiring agency has identified special or unique land use regulations that may affect the value of a property, the agency should advise the appraiser of such potential at the time of the appraisal assignment.

D-7. Special Considerations in Appraisals for Federal Land Exchanges.

Federal land exchanges contrast from other federal land acquisitions in that an exchange must always be voluntary and therefore, the parties must reach agreement on the value of the properties. In direct acquisitions, the government always has the authority to force an owner to transfer his or her land by the exercise of its power of eminent domain, as long as the government's use of the land will be for a public purpose and the government pays the owner just compensation for the land. However, the government does not have the authority to force individuals to convey their lands and accept federal lands as compensation therefor. Likewise, the government "is not required to exchange any Federal lands. Land exchanges are discretionary, voluntary real estate transactions between the Federal and non-Federal parties."³⁶⁶ This does not mean, however, that such transactions are exempt from litigation relating to the valuation of the property involved and/or the adequacy of the appraisal report upon which the transaction was based.³⁶⁷

Most federal land exchanges are accomplished pursuant to the Federal Land Policy and Management Act of 1976 (FLPMA), as amended (43 U.S.C. 1701 et seq.).³⁶⁸ The two agencies most actively involved in federal land exchanges are the U.S. Forest Service (USFS), with an average of 115 exchanges per year for fiscal years 1989–1999, and the Bureau of Land Management (BLM), with an average of 238 exchange transactions³⁶⁹ per

364. See Section B-12 of these Standards.

365. See Section B-11 of these Standards.

366. 36 C.F.R. 254.3(a). See also 43 C.F.R. 2200.0-6(a).

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

368. Appraisers should be cautioned, however, that there are a number of specific statutes authorizing land trades that may not be entirely consistent with the provisions of FLPMA, as for example, certain National Wildlife Refuge System and National Park System exchange acts; the Alaska Native Claims Settlement Act, as amended (43 U.S.C. 1621); and the Alaska National Interest Lands Conservation Act (16 U.S.C. 3192). Appraisers must therefore confer with the client agency to insure complete understanding of the appraisal and appraisal report requirements applicable to the specific appraisal assignment.

369. BLM records the number of exchange *transactions* rather than the number of exchanges; thus, there would be at least two, and sometimes more, transactions for each exchange.

year over the same time period. Both the USFS and the BLM have adopted regulations that implement FLPMA and control their land exchange activities.³⁷⁰ USFS and BLM regulations are similar and both require some modifications of these Standards. These regulations define appraisal, highest and best use, and market value,³⁷¹ and appraisers must use these definitions when conducting appraisals for federal land exchanges.

Exchanges can be proposed by the USFS, BLM, or by any person, state, or local government. “To assess the feasibility of an exchange proposal, the prospective parties may agree to obtain a preliminary estimate of the values of the lands involved in the proposal. The preliminary estimate is generally not an appraisal but shall be prepared by a qualified appraiser.”³⁷² Such a preliminary estimate does not fall under these Standards and is also a jurisdictional exception to USPAP.³⁷³ The requirements for classification as a *qualified appraiser* under these exchange regulations are essentially the same as those for a contract appraiser under 49 C.F.R. 24.103(d)(2) and these Standards, as described in Section D-15.³⁷⁴

One of the initial steps in an exchange involving federal lands is the formulation of an *agreement to initiate an exchange (ATI)*.³⁷⁵ In that ATI, which does not legally bind any party to proceed with processing or to consummate the exchange,³⁷⁶ the lands proposed to be exchanged are specifically delineated, the estates to be conveyed are identified, and an assignment of responsibility between the parties for performance of required functions and the costs associated with processing the exchange (including the costs of necessary appraisals) is made.

An appraiser may be selected and retained by either party to the proposed exchange, as long as the appraiser is *qualified*. However, irrespective of which party retains the appraiser, the appraisal report must reference and be prepared according to the applicable regulations and, to the extent appropriate, these Standards.³⁷⁷ All appraisal reports prepared for federal exchanges are subject to review by federal agency review appraisers.³⁷⁸ Therefore, appraisers conducting appraisals for federal exchange purposes have a professional responsibility to recognize that both the federal agency and the private land owner are *intended users* of the appraisal report and to identify them as such in the appraisal report.³⁷⁹

If an appraiser is retained by a private party to prepare an appraisal for federal land exchange purposes and the client issues an instruction to the appraiser to make an extraordinary assumption or to adopt a hypothetical condition in the conduct of the appraisal which would conflict with the exchange regulations, or these Standards, the appraiser must advise the client of the conflict. If the client insists that the appraiser make the assumption or adopt the condition in conducting the appraisal, the appraiser may make the appraisal,

370. USFS regulations may be found in 36 C.F.R. 254 et seq., and BLM regulations may be found in 43 C.F.R. 2200 et seq.

371. 36 C.F.R. 254.2; 43 C.F.R. 2200.0-5.

372. 43 C.F.R. 2201.1(b). *See also*, 36 C.F.R. 254.4(b).

373. The preliminary estimate would fall within USPAP's definition of an appraisal. Therefore, without invocation of USPAP's Jurisdictional Exception Rule, the appraiser preparing a preliminary estimate would be subject to USPAP.

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

375. 43 C.F.R. 2201.1; 36 CFR 254.4.

376. *Ibid.*

377. 36 C.F.R. 254.9; 43 C.F.R. 2201.3. It should be noted that the USFS regulations correctly identify these Standards as the “Uniform Appraisal Standards for Federal Land Acquisitions: Interagency Land Acquisition Conference,” but the BLM regulations incorrectly identify these Standards as the “Department of Justice ‘Uniform Appraisal Standards for Federal Land Acquisitions.’”

378. 36 C.F.R. 254.9(d); 43 C.F.R. 2201.3-4.

379. USPAP Standards Rule 2-2(a)(i) and 2-2(b)(i).

but must clearly identify the assumption and/or condition in the appraisal report and also report that the value estimate has not been prepared in accordance with the exchange regulations and/or these Standards, so as to insure that the *intended users* of the report are not misled.

The major technical difference between appraisals prepared for federal land exchange purposes and those typically prepared under these Standards relates to the appraisal of multiple tracts and the appraiser's determination of the larger parcel.³⁸⁰ In the typical acquisition appraisal, the appraiser will apply the tests of unity of ownership, of unity of highest and best use, and of contiguity or proximity as it bears on unity of use in determining the larger parcel. However, for purposes of an exchange appraisal the tracts to be appraised are defined in the property description contained in the *agreement to initiate an exchange*. Even if the property described in the ATI is part of a larger contiguous ownership that clearly has a unitary use, the lands outside of the property described in the ATI should not be considered by the appraiser in either larger parcel determination or in reaching a conclusion of highest and best use.

If an appraiser concludes that the property described in the ATI constitutes two or more separate larger parcels, the method of valuation is generally fact dependent and, in most cases, will be controlled by the provisions of the ATI. In some instances, the appraiser may be instructed to value the different larger parcels as separate entities, while under other circumstances the appraiser may be instructed to value the larger parcels only as they contribute to the whole, as if the property described in the ATI would be sold from one seller to one buyer in one transaction.³⁸¹ If those instructions are contrary to the appraiser's highest and best use or larger parcel conclusion, it may be necessary for the appraiser to identify the instruction as an extraordinary assumption, or hypothetical condition, under USPAP. It is important, however, for the appraiser to recognize that the same method of valuation must be utilized for both the federal and non-federal lands.³⁸²

The regulations also provide for special treatment of the larger parcel issue in assembled land exchanges.³⁸³ This term is defined differently in the USFS and BLM regulations³⁸⁴ and, for that reason, assembled land exchanges may be administered differently by these agencies. Again, depending on the provisions of the ATI, the value of the various parcels may be estimated as independent parcels, or as a single tract to be sold in a single transaction.

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

The technical treatment of the larger parcel, as it relates to federal exchanges, is discussed under various scenarios on pages 2-37 - 2-45 and APPB-23 - APPB-32 of the Appraisal Institute's and American Society of Farm Managers and Rural Appraisers'

380. For discussion of the larger parcel see Sections A-14 and B-11 of these Standards.

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

382. 36 C.F.R. 254.9(b)(v); 43 C.F.R. 2201.3-2(a)(5).

383. 36 C.F.R. 254.5; 43 C.F.R. 2201.1-1.

384. An "*Assembled land exchange* means an exchange of Federal land for a package of multiple ownership parcels of non-Federal land consolidated for purposes of one land exchange transaction." 36 C.F.R. 254.2; An "*Assembled land exchange* means the consolidation of multiple parcels of Federal and/or non-Federal lands for purposes of one more exchange transactions over a period of time." 43 C.F.R. 2200.0-5(f).

Seminar Handbook for “Federal Land Exchanges and Acquisitions: Appraisal Issues and Applications.”

D-8. Special Considerations in Appraisals for Inverse Condemnation Claims.

The one major difference between a direct condemnation and an inverse condemnation claim is the question of government liability. In a direct condemnation the government purposely acquires a property or an interest in property, and by filing a direct condemnation case, acknowledges the actual or proposed acquisition of the property and the government’s obligation to pay for it. In the inverse condemnation case, the government’s legal position is that its actions do not constitute the taking of property or a property interest, requiring the payment of just compensation under the Constitution. If the government purposely exercises its power of eminent domain, it institutes formal condemnation proceedings because it is prohibited from “intentionally mak[ing] it necessary for the owner to institute legal proceedings to prove the fact of the taking of the real property.”³⁸⁵

Therefore, in an inverse condemnation action, the first area of enquiry is whether the government’s action constituted a taking of property that requires compensation. From a technical standpoint, the answer to that question is of no direct concern to the appraiser.³⁸⁶ Nevertheless, the appraiser may be asked to provide valuation services which will be used by government’s legal counsel in the liability phase of the litigation. If the government’s action resulted in the government’s permanent physical occupation of the land in question, the liability issue is a rather straightforward one.³⁸⁷ However, in the context of a taking by regulation, the federal courts have developed various *tests* to determine whether a taking has occurred: the character of the government action; the extent to which the regulation interferes with distinct, investment-backed expectations; and the economic impact of the regulation.³⁸⁸

The economic impact test above involves the valuation of the property in question before and after the government’s action.³⁸⁹ When conducting such an analysis, the appraiser’s application of the larger parcel tests may vary from those applied in the direct acquisition or condemnation³⁹⁰ because of the investment-backed expectations test noted above. Investment-backed expectations are typically considered as of the date upon which the owner acquired the property and in the regulatory environment that existed at that time. But, on the date of the alleged taking, the owner may have sold portions of the property previously acquired. For the court to accurately assess the *economic impact of the regulation*, it must know how the regulation impacted the owner’s reasonable investment-back expectations.³⁹¹ For that reason, it may be necessary for the appraiser to disregard the *unity of title* test of the larger parcel and to value the entirety of the tract that was originally

385. 49 C.F.R. 24.102(l).

386. The appraiser’s role is merely to estimate the market value of the affected property before and after the government’s action. Whether the government’s action resulted in a compensable taking of property is ultimately a legal question.

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

388. *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978).

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

390. In the context of inverse condemnation cases the courts have sometimes referred to the larger parcel determination as the issue of the *denominator*. E.g., see *Keystone Coal Association v. DeBenedictis*, 480 U.S. 470, 497 (1987). For a discussion of the larger parcel tests in direct acquisitions, see Sections A-14 and B-11 of these Standards.

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

acquired. Because the tests applied by the courts to determine the question of liability (i.e., whether a compensable taking has occurred) are quite complex, it is essential for the appraiser to confirm with legal counsel the appropriateness of the larger parcel determination before proceeding with the appraisal assignment.

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

If the court finds that a compensable taking has occurred, the appraiser's function generally is to estimate the market value of the affected property before and after the taking, as of the date of the taking, which should be provided to the appraiser by legal counsel. In this *valuation phase* of the inverse condemnation litigation, the appraiser will generally utilize the same larger parcel tests that are applied in direct acquisitions or condemnations. In other words, the larger parcel used in the liability phase of the trial may be different than the larger parcel used in the valuation phase of the trial. Inverse condemnation actions relating to temporary takings are discussed in Section D-10 of these Standards.

D-9. Comparable Sales Requiring Extraordinary Verification and Treatment. As has been previously noted in these Standards,³⁹² the federal courts have traditionally held that, in general, sales to a governmental entity were inadmissible, but the recent trend has been to admit them with the view that such evidence goes to its weight, not its admissibility. The following discussion, however, relates not to the admissibility of such evidence, but to the question of whether sales to the government should be used by appraisers in conducting appraisals for federal land acquisition purposes and, if so, the degree of weight placed on those sales by appraisers.

As has been noted, "government is a different type of player, not constrained to follow market economic rules;"³⁹³ thus, sales to the government should be immediately viewed by appraisers as *suspect*. When appraisals for federal land acquisitions are conducted, sales to the government should not be used as comparable sales unless there is such a paucity of private market data as to make a reliable estimate of market value impossible without the use of government purchases. However, the types of transactions conducted and lands acquired by governments are often unique. For instance, in the acquisition of lands for conservation or preservation, the acquired lands are often located in remote areas, are of extraordinary size, have little economic utility or value, and are located in areas of little market activity. To develop a reliable and supportable estimate of market value in these situations, appraisers may be forced to consider sales to the government in the sales comparison approach to value.

However, in situations when an appraiser is forced to consider sales to the government as comparables, there are certain steps that the appraiser must take before a sale to the government can be qualified as a valid comparable sale. Comprehensive and documented verification of government transactions is essential, and "[a]ppraisers have a special responsibility to scrutinize the comparability of all data used in a valuation assignment. They must fully understand the concept of comparability and should avoid comparing

392. See Section B-18 of these Standards.

393. *The Appraisal of Real Estate*, 11th ed. (Chicago: Appraisal Institute, 1996), 27.

properties with different highest and best uses, limiting their search for comparables, or selecting inappropriate factors for comparison.”³⁹⁴ “When nonmarket conditions of sale are detected in a transaction, the sale can be used as a comparable but only with great care. The circumstances of the sale must be thoroughly researched before an adjustment is made, and the conditions must be adequately disclosed in the appraisal.”³⁹⁵

The type and amount of information available to an appraiser about a sale to the government will vary, depending on the acquiring agency’s land acquisition documentation requirements. Small governmental entities, such as local service districts, may make some of their land acquisitions without written appraisals, appraisal reviews, or written records of negotiations. State and federal agencies, on the other hand, usually make their acquisitions in accordance with the Uniform Relocation Assistance and Real Property Acquisition Policies Act (or comparable state statutes), which requires extensive documentation of land acquisitions, including formal documented appraisals, written appraisal reviews, and written records of the negotiating process.

The availability of sales documentation for appraiser inspection and analysis will also vary from agency to agency, depending on the agency’s public disclosure policy and the applicable laws on access to government documents. The following is written under the presumption that the sales to be verified by the appraiser have been fully documented and that all documentation is available for the appraiser’s inspection. It is recognized that in many instances, this will not be the case. However, when documentation is not available for the appraiser’s inspection, the appraiser should report such fact and the impact of such unavailability on the reliability of the transaction as a valid comparable sale.

First, the appraiser should review the legislation which authorized and/or mandated the government’s acquisition. By this review, the appraiser should verify that the legislation provided that the property would be acquired at market value. Legislation that mandates acquisition at a price other than market value, or provides for acquisition at a price unaffected by particular market forces (e.g., disregard of the influence of the Endangered Species Act), may not result in a valid comparable sale representative of market value. Likewise, legislation that allows the acquiring agency to deviate from the market value measure if it finds it in the public interest to do so will often not result in a price representative of market value. The appraiser should next contact the acquiring agency and ask to inspect the appraisal upon which the acquisition was based, the agency review of that appraisal, the negotiator’s report (or file) in conjunction with the acquisition, and the agency’s acquisition file.

Examination of the agency’s appraisal, should include:

- Determination that the government’s acquisition was a *total acquisition* of the landowner’s property, as opposed to a partial acquisition wherein the acquisition cost may be a measure of the difference between the value of the whole property before and after the government’s acquisition, or a measure of the value of the parcel acquired plus damages to the remainder parcel, rather than an indication of the value of the property acquired.
- Determination that the sale was for the fee simple interest in the property, or an interest similar to the interest being appraised. Sales that are for something less than that the fee simple interest in an entire property (e.g., partial acquisitions, easement acquisitions) may not be valid comparable sales.

394. *Ibid.*, 171.

395. *Ibid.*, 410.

- A review of the appraiser's estimate of highest and best use. The highest and best use upon which the value estimate was estimated must be an *economic* highest and best use. That highest and best use must be the same as, or highly similar to, the highest and best use of the property under appraisal before the government acquisition can be considered a reliable comparable sale. A value estimate based on a highest and best use of *sale to the government*, conservation, or any use that contemplates taking the property out of economic productivity in perpetuity is not a valid highest and best use upon which to estimate market value.
- A review of the appraiser's final estimate of value. Determine whether the price paid for the property was equivalent to its appraised value. If not, determine whether the price paid was within the range of values indicated by the appraiser's comparable sales in the sales comparison approach and/or whether the price paid was within the range of the indicated value of the property by the different approaches to value developed by the appraiser.
- A review of the sales used by the government's appraiser in estimating value. If the sales relied on by the appraiser were substantially influenced by non-market factors (e.g., political pressure), they would be invalid indicators of market value, thus any value conclusion reached based on such sales may, likewise, be invalid.
- A review of any breakdown of value that the appraiser may have included in the appraisal report, such as different unit values for different land types included in the sale property, or the contributory value of improvements.

A review of the agency's appraisal review should next be undertaken, with particular note being made of any technical or factual errors reported by the review appraiser. A review of the negotiator's report and the agency's acquisition file regarding the process of negotiation between the agency and the property owner should also be conducted. Any suggestion that the property would be condemned if agreement cannot be reached should be noted. Likewise, any indication that the property owner has accepted the price paid with the understanding that the agency will support (or, at least not oppose) the property owner's attempt to take a tax write-off for a donation for some amount in excess of the actual price paid should be noted. Either of these circumstances may suggest a price below market value. Any suggestion that a property owner may have threatened to damage the property for the government's intended use (e.g., cutting the timber from land slated for acquisition as a park) if the owner's asking price was not paid can result in a price in excess of market value. Sales involving the exchange of property are generally unreliable for use as comparable sales.³⁹⁶

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

A reading should be conducted of any correspondence from the property owner's political representatives, and the agency's response thereto, to determine whether there may have been undue non-market pressure to consummate a sale at something other than market value. A reading should also be conducted of any newspaper clippings that may be in the file, to determine whether there was an undue amount of public pressure on the agency or the property owner to consummate a quick sale. Such public pressure can result in a price that is above or below the market value of the property.

396. See Section B-4 of these Standards.

A reading of the conveyance and closing documents will reveal the exact estate conveyed to the government. It should be confirmed that the estate conveyed is the same estate that was appraised by the government's appraiser. Care should be taken here because, during negotiations, some agencies have a practice of allowing the property owner to retain some rights in the property after acquisition not contemplated by the government's appraiser (e.g., a life estate in the property, or an estate for years, at zero or nominal rent, the right to continue to grow crops on the land, or use it for grazing, or, in some instances a physical reduction in the land area acquired).

If the estate acquired was only an easement, the sale is not a valid comparable either as an indication of fee simple value, or of the value of an easement. If only an easement is being acquired from the property under appraisal, the measure of value should not be based on the price paid for similar easements, but rather upon the usual before and after appraisal method.³⁹⁷

A reading and analysis should be undertaken of any documents produced by the agency or others, in an attempt to justify payment in excess of the approved appraisal. Legitimate reasons that a price in excess of an agency's approved appraisal may still represent a valid indication of market value might include:

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

Legitimate reasons that a government entity could justify a price in excess of its approved appraisal, but would eliminate the transaction as a valid comparable sale, at least without adjustment, might include:

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

Once the forgoing investigation and analysis have been completed, the appraiser should personally verify the sale with the purchaser *and* the seller, or their representatives. In conducting this verification, the appraiser should clear up any questions that may have arisen as a result of earlier research. It is recognized that an agency's appraisal does not represent the only reasonable estimate of market value, but if the government paid more

397. See Section B-20 of these Standards.

for the property than its approved appraisal, the appraiser should determine the justification used by the government to do so and whether such justification was based on valid market considerations or whether the justification was non-market related and, therefore, invalidates the price paid as an indication of market value.

In this same context, there is another category of sales that needs careful verification if the sales are going to be used as comparables. Occasionally, a government project will be created and acquisition will be authorized, but adequate funds for the entire acquisition project will not be appropriated. When the government project involves conservation/preservation lands, environmental organizations will sometimes acquire lands within the project area for the sole purpose of transferring those lands, often at the organization's cost, to the government when funding becomes available. Sales to environmental organizations under such circumstances, like direct sales to the government, are suspect as reliable comparable sales, because the purchaser's motivation was not economically driven by typical market forces.

Sales made under such circumstances may well be project-influenced.³⁹⁸ At times these environmental organizations are working so closely with the government agency administering the project³⁹⁹ that, from a practical standpoint (although not from a legal one), they essentially become an agent for the government. Also, the sellers of such land have been known to take (or attempt to take) a tax write-off for a contribution to the environmental organization and claim a value of the property sold in excess of the actual selling price. Because of these complications, appraisers should avoid using such sales as comparables. If a paucity of market data in the private market makes their use necessary, extreme care must be taken in the verification of such sales. The appraiser should determine whether the sale was based on a competent appraisal that estimated the market value of the property for its economic highest and best use, whether there were any tax-write offs taken, and whether the purchase was impacted by the pendency of the government's project. If the purchase price was not based on the market value of the property for its economic highest and best use, the sale will normally have to be discarded as a comparable. The same is true if tax write-offs were involved or if project influence was present, although it is sometimes possible to make adjustments to the sale for these factors. If, subsequent to the sale, the property has been transferred by the environmental group to the government, the fact and circumstances of the transfer must be reported.

A third category of sales that must be verified and treated with great care consists of those sales used in the appraisal of a property that has a highest and best use for some form of development that will require the procurement of rezoning or a land use permit. Sales of such property in the private market will generally take the form of initial options or *contingency sales*, the contingency being the purchaser's ability to procure the necessary rezoning or permitting to develop the property to its highest and best use. If the rezoning or permitting is denied, the contingency is not met and the sale does not close. Or, if an option is used and rezoning and/or permitting is not available, the option is not exercised. Therefore, when consummated, such sales do not represent the price at which a property would have sold if a purchaser had to procure a rezoning or permits after the date of closing. Instead, such sales represent the price of a property with zoning or permitting for development to its highest and best use in place. All of the risks, time delays, and costs associated with a rezoning or permitting have been removed from the transaction.

398. See Section B-10 of these Standards.

399. To the extent that the agency approves the organization's selection of an appraiser, assists in the development or provides the appraiser's instructions, and actually reviews the organization's appraisal before an offer to purchase is made.

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

Given this fact, appraisers must often resort to using sales which already have, on the date of consummation, their needed zoning/permitting in place. Under these circumstances, it is essential that the appraiser adjust the sales to reflect the differences in the regulatory environments of both the sales at the time of closing and the property under appraisal as of the effective date of the appraisal. Such adjustments must account for the risks inherent in the procurement of a rezoning or permitting, including the possibility that the regulatory agency may deny such a request, or place conditions on it.⁴⁰⁰ The time delays encountered in procurement of the rezoning and/or permitting and the costs associated with their procurement must also be considered. In certain circumstances, a purchaser may require an entrepreneurial profit in addition to an adjustment for risk.

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

D-10. Temporary Acquisitions. There are generally three situations in which the government's acquisition may be temporary: temporary construction easements (TCEs), temporary acquisitions by inverse condemnations, and leasehold acquisitions. This last category of acquisitions will be discussed in a separate section of these Standards.⁴⁰¹ Temporary construction easements and temporary inverse condemnation acquisitions will be discussed separately below because of their uniquely different characteristics.

A temporary construction easement is generally acquired in conjunction with a permanent acquisition and often abuts the boundaries of the permanent acquisition. The permanent acquisition area is used for permanent placement of the public improvement, whereas the TCE is used in addition to the permanent acquisition area for initial construction of the public improvement. After initial construction of the public improvement is completed, the construction easement expires and the unencumbered fee interest in the land reverts back to the owner. Another form of temporary easement sometimes acquired is an easement for a right of entry onto the land for purposes of surveying, inspection, and/or testing for contamination. These rights of entry are generally very short term in nature and are treated in the same manner as TCEs.⁴⁰²

Damages that result from TCEs are usually based on the economic or market rent of the affected area for the term of the temporary easement. Usually, the land area affected is

400. See Section D-6 of these Standards in this regard.

401. See Section D-12 of these Standards.

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

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

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

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

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

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

Temporary acquisitions by inverse condemnation may be by either physical invasion of the property by the government (or an agent of the government)⁴⁰³ or by regulation.⁴⁰⁴ The measure of value in a temporary inverse case is the same as in the acquisition of a TCE, that is, the rental value of the land taken for the term of the taking. The substitution of a return on the fee value of the land for an estimate of the rental value of the land is not generally an accepted alternative.⁴⁰⁵

403. E.g., see *Third Avenue Associates v. United States*, 30 Fed. Cl. 216 (1993).

404. E.g., see *First English Evan. Luth. Ch. v. Los Angeles Cty.*, 482 U.S. 304 (1987).

405. *United States v. 883.89 Acres of Land*, 442 F.2d 262, 264, 265 (8th Cir. 1971); *United States v. Michoud Industrial Facilities*, 322 F.2d 698, 707 (5th Cir. 1963); *United States v. 117,763 Acres of Land*, 410 F. Supp. 628 (S.D. Cal. 1976), *aff'd sub nom. United States v. Shewfelt Investment Co.*, 570 F.2d 290 (9th Cir. 1977).

In a regulatory taking situation, it is possible that the regulation temporarily precludes the use of the land for its highest and best use, but that secondary uses of the property remain available to the property owner. In such a case, a before and after estimate of the economic or market rent is estimated to determine the difference in the rent which could have been commanded by the property during the inverse taking period. The *before rent* is the market or economic rent of the property for its highest and best use for the duration of the taking, and the *after rent* is the market, or economic rent of the property for its secondary, but allowable, use during the taking period. In estimating the potential use of the property during the taking period, appraisers must take into account the limited duration of the period of use.⁴⁰⁶

Because inverse condemnation cases, either permanent or temporary, are very fact specific, it is essential that the appraiser work very closely with the DOJ attorney assigned to the case. Both appraiser and attorney must understand the precise question that must be addressed by the appraiser and the acceptable methodology to be used to answer it. This will often involve substantial legal research by the attorney, concluding with written legal instructions to the appraiser.⁴⁰⁷

D-11. Valuation of Mineral Properties. The appraisal of properties containing valuable minerals is a complex, specialized subject. As a result, appraisers must have specialized training and experience to properly understand and apply the proper methodologies established for estimating the market value of these properties.

In the development of an appraisal concerning mineral properties, it is particularly important to understand the unit rule.⁴⁰⁸ The courts have recognized that property must be valued as a whole for federal acquisition purposes, with due consideration of all of the components that make up its value. Its constituent parts are considered only in light of how they enhance or diminish the value of the whole, with care being exercised to avoid so-called *cumulative* or summation appraisals.⁴⁰⁹ “In the case of land that is underlaid with marketable minerals, . . . the existence of those minerals is a factor of value to be considered in determining the market value of the property, but the landowner is not entitled to have the surface value of the land and the value of underlying minerals aggregated to determine market value.”⁴¹⁰

Accordingly, it is improper for an appraiser to estimate the value of the surface of the property, add to it a valuation of the minerals, as estimated by a separate minerals expert, and thereby conclude a total market value for the property. Not only does this procedure result in a forbidden summation appraisal, it also results in no one individual being able to testify as to the market value of the property as a whole, if the case goes to trial. For these reasons, when consultants’ reports are used in the valuation of mineral property, appraisers must strictly adhere to the requirements of Section D-4 of these Standards relating to the use of consultants’ reports.

Highest and best use analysis is another critical element in the development of a reliable mineral property appraisal. Such a report must contain a well supported and

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

407. See Section D-8 of these Standards for additional discussion of inverse condemnations.

408. See Section B-13 of these Standards for a discussion of the legal basis for the unit rule.

409. *United States v. 91.90 Acres of Land*, 586 F.2d 79, 87 (8th Cir. 1978), cert. denied, 441 U.S. 944 (1979).

410. *Ibid.*

documented market analysis that clearly establishes whether or not there is adequate market demand for the minerals located on the property. The market analysis should provide the underpinning for the appraiser's conclusions regarding the marketability, price, and competition for the mineral commodity found on the property. It is critical that the appraiser adequately address the question of the market for the minerals found on the property because it has been ruled that an expert must "make a showing of some sort of market, poor or good, great or small, for the commodity in question before the quantity and price of the commodity or substance may be presented to the jury to be used as a factor in the expert's opinion testimony."⁴¹¹

Clearly, if no market exists for the commodity, then the expensive and time-consuming determination of the quantity and quality of the minerals on the property is unnecessary. If a market exists for a mineral, then a supportable determination must be made concerning both the legal permissibility of extracting the mineral and the physical characteristics of the minerals located on the property. Interpretation of permitting and other environmental requirements may necessitate the assistance of a consultant with specialized knowledge and experience in the area. Also, studies regarding the physical characteristics of the minerals are usually conducted by specialists (usually geologists and/or mining engineers) who make determinations concerning such important factors as the location, quantity, and quality of the mineral deposit, and any variations in the quality that might be found on the property. Additional determinations may be required regarding such factors as the accessibility of the mineral and problems and costs of extraction. This information then provides the basis for estimating the value of the property using the sales comparison and income approaches to value. However, before the adoption of these studies, it is the professional responsibility⁴¹² of the appraiser to thoroughly review and understand the reports prepared by other experts and adopt them only if the analysis and conclusions were prepared according to appropriate standards, are sound, and are adequately supported.

Another aspect of highest and best use analysis of mineral property that must be borne in mind is the *consistent use theory*. Under this concept, the "land cannot be valued on the basis of one use while the improvements [or minerals] are valued on the basis of another."⁴¹³ For example, it is improper "to value a property for agricultural purposes and then add a substantial value increment for gravel deposits under the surface of the land. If the gravel is mined, the land, in all probability, will have no value for agricultural purposes during or after the mining operation."⁴¹⁴ However, if the mineral deposit were oil, a concurrent use of the surface for grazing purposes would not, in most instances, be a violation of the consistent use theory.

As in the valuation of other property for federal acquisition purposes, if adequate sales data is available, the sales comparison approach is usually considered the best evidence of value.⁴¹⁵ While it is recognized that each property containing valuable mineral deposits is unique, the same may be said, to some degree, of all real estate. However, "[e]lements of sales of quite distant properties, even those with different mineral content, may be comparable in an economic or market sense when due allowance is made for variables."⁴¹⁶ Therefore, it is unacceptable for an appraiser preparing an appraisal under these Standards to

411. *United States v. Land in Dry Bed of Rosamond Lake*, 143 F. Supp. 314, 322 (S.D. Cal. 1956).

412. Guide Note 6, "Reliance on Reports or Information Prepared by Others," *Guide Notes to the Standards of Professional Appraisal Practice* (Appraisal Institute, 1991, amended 1/16/93). See also, Section D-4 of these Standards.

413. *The Dictionary of Real Estate Appraisal*, 3rd ed. (Chicago: Appraisal Institute, 1993), 72.

414. J. D. Eaton, *Real Estate Valuation in Litigation*, 2nd ed. (Chicago: Appraisal Institute, 1995), 59.

415. *Cloverport Sand & Gravel Co., Inc. v. U.S.*, 6 Cl. Ct. 178, 189 (1984).

416. *Foster v. U.S.*, 2 Cl. Ct. 426, 448 (1983).

simply state that there are no comparable sales transactions without providing adequate support for the conclusion.

In order to properly develop a sales comparison approach to value for a mineral bearing property, the appraiser needs to understand the level of information available concerning the mineralization found on the subject property. It is then important to identify comparable sales that had similar levels of information concerning mineralization available at the time of sale. The variables which must be given close attention include rights conveyed, conditions of sale, the presence of multiple ores on the same property, access for extraction purposes, topography and cover (stripping ratios), transportation availability and cost, and distance to smelters or refineries. All of these factors may require adjustment.⁴¹⁷ The verification of data concerning the comparable sales is a critical component of this analysis, and the assistance of experts in identifying all necessary areas of enquiry during the verification process may be required.

Also important in the sales comparison approach is the selection of the appropriate unit of comparison. Such selection should generally mirror that unit of comparison used by participants in the market and, as such, will generally result in the tightest bracket of value for the subject property. "However, arriving at a valuation by multiplying an assumed quantity of mineral reserves by a unit price is almost universally disapproved by the courts."⁴¹⁸

The income capitalization approach to value is also a valid means for estimating the market value of mineral properties, but should never be used exclusively if comparable sales are available for use in the sales comparison approach. The income capitalization approach can be especially applicable when the property under appraisal is already being mined, and thus the historical income stream from the property is available for analysis. In applying the income capitalization approach, appraisers must take care to consider only the income that the property itself will produce – not income produced from the business enterprise conducted on the property (i.e., the business of mining).⁴¹⁹ An appraiser who is not thoroughly experienced in the appraisal of mineral properties should not attempt to employ the income capitalization approach. Even when used by an appraiser experienced in this field, this appraisal approach can be highly speculative, and great care must be exercised in its use. As one court cautioned:

Great care must be taken, or such valuations can reach wonderland proportions. It is necessary to take into consideration manifold and varied factors, like future supply and demand, economic conditions, estimates of mineral recoverability, the value of currency, changes in the marketplace, and technological advances. Many of these factors are impossible to predict with reasonable accuracy.⁴²⁰

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

DCF analysis has been recognized by the courts as an appropriate method of valuation to be employed in the valuation of mineral properties.⁴²¹ In conducting DCF analysis, the

417. For a general discussion of the application of the sales comparison approach, see Section A-17 of these Standards.

418. *Cloverport Sand & Gravel Co., Inc. v. U.S.*, 6 Cl. Ct. 178, 188 (1984).

419. *Ibid*, 191.

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

421. *Whitney Benefits v. U.S.*, 18 Cl. Ct. 394, 408 (1989); *Foster v. U.S.*, 2 Cl. Ct. 426, 448-449 (1983).

appraiser must avoid estimating a property-specific investment value to a particular owner instead of estimating the market value of the property if it were placed for sale on the open market. Like application of the development approach to value, DCF analysis in the valuation of mineral properties can be highly complex.⁴²² As it relates to mineral properties, it often involves the creation of a detailed mining plan for the property. The essential ingredients in this approach are (a) the royalty rate, (b) the unit sale price of the mineral to which the royalty rate is applied (e.g., \$20 per ton), (c) the projected annual amount of mineral production (e.g., 100,000 tons per year) (with the product of these three ingredients yielding the annual income), (d) the projected number of years of production and the year when the production will begin, and (e) the proper capitalization, or discount, rate.

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

The size and timing of the investment needed, or capital costs, will include expenditures for services, construction and equipment related to mine development, pre-production, and production. Among the factors to be considered in this portion of the analysis are preliminary studies, such as exploration, environmental and engineering studies required to define the location and nature of the resource sufficiently to support the mining plan and ensure compliance with all applicable governmental permitting and land use regulations. The engineering costs related to the mining operation design must include contractors' fees and management. Other elements to be considered include site preparation costs, costs of facilities and improvements (including off-site improvements, such as rail or road facilities), and mining equipment and pre-production costs (including all of the costs required to bring the extraction process to full production, including the costs of *time-lag* and permitting).⁴²³

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

One of the most critical factors in the application of DCF analysis is the selection of the discount rate. Attempts have been made to apply various statistical techniques to mineral valuations⁴²⁴ to account for the extraordinary high risks associated with such

422. See Sections A-15 and B-8 of these Standards for discussion of the development approach.

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

424. E.g., probability weighted scenarios, Monte Carlo analysis, marketing uncertainty analysis, timing of development analysis.

operations. However, the application of various statistical techniques is not a substitute for discount rate selection derived from and supported by direct market data,⁴²⁵ which is the preferred and most widely accepted approach.⁴²⁶

D-12. Leasehold Acquisitions. The government will sometimes acquire only a leasehold estate in all or a portion of a property, thus acquiring the right of use and occupancy of the property for an identified period of time. Typically, compensation is equal to the present value of the market or economic rent of the premises to be occupied by the government for the term of the occupancy.⁴²⁷

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

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

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

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

As previously noted,⁴²⁸ there are occasions when the government acquires the leasehold interest in only a portion of a larger property. In those instances, the appraiser must

425. For a discussion of market extraction of discount rates, see The American Society of Farm Managers and Rural Appraisers' course material for "Advanced Resource Appraisal" – A-34, pp. m-1 - m-21, (1998).

426. *United States v. Certain Interests in Property in Monterey County, Cal.*, 186 F. Supp. 167, 170 (N.D. Cal. 1960), *aff'd*, 308 F.2d 595 (9th Cir. 1962). See also *United States v. Leavell & Ponder, Inc.*, 286 F.2d 398, 407 (5th Cir. 1961), cert. denied, 366 U.S. 944; *United States v. 158.76 Acres of Land*, 298 F.2d 559, 561 (2nd Cir. 1962).

427. See Section B-19 of these Standards for the legal basis of this statement.

428. *Ibid.*

consider the possibility of damages to the remainder property (i.e., that portion not to be occupied by the government). In those instances where severance damages may be significant, appraisers should consult with their client agency and/or its legal counsel before proceeding with the appraisal assignment to ensure that the appraisal will be prepared in accordance with current applicable law.

D-13. Updating Appraisal Reports. When an appraisal has been made any substantial period in advance of acquisition, the appraisal must be carefully reviewed and brought up to date to reflect current market conditions. Any change in the value estimate attributable to trending or updating should be fully supported by acceptable market evidence, rather than by reference to a market index based on unidentified information.

There can be no hard rule as to how often an appraisal report requires updating. While various government agencies recognize some *rules of thumb* in this regard (e.g., ever 6 months; every 12 months), the frequency of updating will depend on the type of property involved, its location, and the market conditions in the property's market area. For this reason, the U.S. Forest Service policy provides that, when approving an appraisal report, the review appraiser assigns a *life* to the approval, at the end of which the appraisal must be reviewed for updating. That approval life is based upon the variables noted above and can be quite short, especially when the property in question involves timber values in a very volatile market. Other agencies have also adopted formalized regulations. All agencies should develop procedures for automatic reviews of reports on a scheduled periodic basis.

For trial purposes, in order to accord maximum weight to the testimony of the appraiser, it is important that the appraisal report reflects (1) the value as of the date of taking,⁴²⁹ (2) the precise estate described in the complaint or any amendment thereof, and (3) the best market evidence of the value of the property available at the time of the trial.

If an appraisal report is being updated in preparation for trial, the appraiser should consider this an opportunity to critically review his or her initial findings, to address report weaknesses which may have come to light as a part of the appraisal review process, and to include all of the important market data and reasoning which led to the conclusion of value. In most instances, the updating of an appraisal report for trial purposes will require an entirely new appraisal report. This will give the appraiser the opportunity to include the most recent reliable market data in support of the estimate of value, even if the newly found market data does not alter the appraiser's original estimate of value,⁴³⁰ as well as an opportunity to purge the report of outdated data, analyses, and opinions. It further provides the appraiser with an opportunity to make sure that the report meets all requirements of Federal Rule of Civil Procedure 26(a)(2)(B), as discussed in Section D-2 of these Standards.

The appraiser should remember that copies of entire appraisal reports are often exchanged by legal counsel or are provided to opposing counsel through the discovery process⁴³¹ and that "[t]he thoroughness with which the appraisal is made and reported is the appraiser's greatest protection against professional embarrassment."⁴³²

D-14. Contacting Landowners. During the course of inspecting the property being appraised, the appraiser is expected to see and talk personally to the property owner or, in

429. For a discussion of the legal requirements regarding the date of taking, which is the effective date of value, see footnote 125 in Section B-2 of these Standards.

430. It is not an acceptable practice to merely state that newly-found market data supports the original value estimate. The new market data must be presented and analyzed.

431. Fed. R. Civ. Proc. 26(a)(2)(B).

432. William C. Himstreet, *Writing Appraisal Reports* (Chicago: American Institute of Real Estate Appraisers, 1971), 28.

the owner's absence, the owner's agent or representative. If the appraiser is advised that the property owner is represented by legal counsel, all owner contact and property inspections must be arranged through the owner's attorney, unless the attorney specifically authorizes the appraiser to make direct contact with the owner. Owners are generally a prime source of detailed information concerning the history, management, and operation of the property. In compliance with the provisions of Public Law 91-646,⁴³³ the owner or the owner's designated representative must be given an opportunity to accompany the appraiser during his or her inspection of the property.

D-15. Contracting for Appraisal and Other Expert Services. Careful selection of and coordination with contract appraisers is of paramount importance in the successful negotiation or condemnation of an interest in real estate. It is important to obtain the contract services of the best qualified appraisers available within the agencies' rules governing the contracting process. While price is certainly a consideration, more important factors are general appraisal experience, education, professional reputation, experience in conducting appraisals for federal land acquisitions under these Standards, court experience, and demonstrated competency.

Title XI of the Financial Institutions Reform, Recovery and Enforcement Act of 1989, amended, (FIRREA)⁴³⁴ required the establishment of state programs for the licensing and certification of appraisers. 49 C.F.R. 24.103(d)(2) provides that "[i]f the appraisal assignment requires the preparation of a detailed appraisal . . . and the Agency uses a contract (fee) appraiser to perform the appraisal, such appraiser shall be certified in accordance with title XI of [FIRREA]."

When an agency anticipates that a tract of land will have to be acquired by condemnation, the agency should work closely with the Land Acquisition Section of the Department of Justice and/or the U.S. Attorney's office in the area in which the property is located in selecting a suitable appraiser to present expert testimony. Employment of inadequate appraisers wastes money, since it will often be necessary to expend more money for additional appraisals of the same property, and settlement opportunities may be impaired if the government is required to change estimates of value in midstream.

Real estate appraisal is becoming increasingly sophisticated. Appraisers now find that preparation of an adequately supported estimate of market value often requires the assistance of specialized consultants. Before issuing an appraisal assignment, agencies should attempt to identify the need for such special consultants, and make arrangements for such services, either by contracting with the consultant directly or by providing for the appraiser's retention of the consultant in the appraisal contract. If an agency retains the consultant directly, it should select the consultant in cooperation with the appraiser, who will ultimately have to rely on the consultant's analysis and conclusion. The agency and the appraiser should jointly determine the scope of work and establish qualification criteria for any consultant retained. Irrespective of whether the consultant is retained by the agency or the appraiser, selection of the consultant must be by concurrence of both the appraiser and the agency.

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

433. Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. §§4601-4655.

434. P.L. 101-73, 103 Stat. 183, 511 (Aug. 9, 1989).

The types of special consultant most often needed include:

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

When contracting for appraisals, it is important to require the individual appraiser with whom the contract is made to actually prepare or be principally responsible for the appraisal and the appraisal report, and to be prepared to testify in court if it becomes necessary.

D-16. Confidential Nature of Appraisals. Appraisers' valuations and supporting appraisal reports are confidential information and the appraiser shall strictly abide by the Confidentiality provisions of the Ethics Rule of USPAP, which provides as follows:

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

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

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

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

49 C.F.R. 24.102 requires an agency to provide a property owner with an initial written offer of purchase together with a written statement explaining the basis of the offer. The Department of Justice strongly recommends that, during the negotiation process, agencies not disclose the contents of appraisal reports beyond what is required by 49 C.F.R. 24.102, because early disclosure of an appraisal report tends to weaken its viability and the viability of the appraiser in litigation. Agencies must recognize that early disclosure of appraisal reports may result in a Justice Department determination that it is in the best interest of the government for neither the appraisal report or the appraiser to be used for trial purposes. Such a determination will necessitate the procurement of a new appraiser and appraisal report for trial purposes.

Once a case has been referred to the Department of Justice for the filing of an action, agencies shall not divulge the contents of an appraisal report to anyone, without authorization from the Department.

Appraisers must use extreme caution in choosing what information to cite in developing their opinions of value. While it is common practice for appraisers in non-litigation appraisals to report that they have relied upon confidential information⁴³⁵ in addition to the supporting data reported, in developing their opinion of value, such a reference in a litigation report may subject the information to discovery. Appraisers should not reference such information in litigation reports unless they are prepared to reveal the information, often by order of the court.

D-17. Project Appraisal Reports. Some government projects require the acquisition of a large number of parcels of real property, and individual appraisers are assigned to appraise a number of these parcels at the same time. On occasion, it is logical to include the appraisal of more than one parcel in a single report. Thus, under certain circumstances, such *project* or *multiple parcel* appraisal reports may be appropriate. Project appraisal reports are not appraisal shortcuts; they are clerical shortcuts. Assuming that the criteria set forth herein is met, project appraisal reports may be acceptable for the purposes of negotiated purchase, and for initial review purposes by the Department of Justice, and even for trial purposes.

In preparation for trial, appraisal reports are generally exchanged between the parties or become subject to discovery. They are sometimes also used as exhibits during trial. Project appraisal reports may not be conducive to these purposes, and their use by trial attorneys is cumbersome. To introduce a project report as a court exhibit is to introduce a myriad of collateral issues. Also, the disclosure of an entire project report often discloses the estimated values of properties owned by persons not parties to the lawsuit, a disclosure which the government may not be prepared to make. For these reasons, agencies and appraisers should recognize that project appraisal reports for trial purposes may be unacceptable to the Department of Justice. However, given the high percentage of parcels within a project which are acquired short of trial, they can save valuable time and money for agencies engaged in larger projects.

When appraisal reports are updated for trial purposes, appraisers should be prepared to develop a totally self-contained narrative appraisal report for the individual parcel being updated, in accordance with Section A of these Standards.

Project appraisal reports are appropriate when 1) all of the parcels appraised are total acquisitions, or partial acquisitions of a nominal and/or consistent nature; 2) all parcels are vacant or have similar improvements; 3) all parcels are located within a relatively homoge-

435. E.g., information learned in the conduct of other appraisals, or information provided to the appraiser by market participants on the condition that it not be disclosed.

neous geographical area; 4) all parcels have the same, or a similar, highest and best use; 5) the most relevant method of valuation is the same for all parcels, and; 6) the same array of market data will be relied on in the valuation of each parcel.

The project appraisal report should consist of three major parts: 1) introduction, factual data, and analysis relating to all properties included in the report; 2) individual parcel reports; and 3) addenda and exhibits relating to all properties included in the report.

Part I—Introduction, General Factual Data and Analysis

1. Title Page. This should include the government project title, the number of individual parcels included in the report, the name and address of the individual(s) making the report, and the date on which the appraisals were prepared.

2. Letter of Transmittal. This should include the date of the letter, identification of the government project, the number of parcels included in the appraisal report, statement of the range of effective dates of the appraisals, identification of any hypothetical conditions, extraordinary assumptions, limiting conditions or legal instructions relating to all parcels included in the report, and the appraiser's signature.

3. Table of Contents. The major parts of the appraisal report and their subheadings shall be listed. The location of each individual parcel report shall be specifically identified and items in the addenda of the report shall be individually listed in the table of contents.

4. Summary of Findings. The appraiser should report the value findings for each parcel appraised. These findings should include the agency-assigned parcel number, the owner of the property, the effective date of the value estimate(s) and the value conclusion(s). In the case of partial acquisitions, the before value, after value, and difference should be shown.

If the project appraisal encompasses a larger number of parcels, it is desirable to include a second summary listed alphabetically, by owners' names.

5. Statement of Assumptions and Limiting Conditions.⁴³⁶ All assumptions and limiting conditions that universally apply to the appraisal of all parcels in the project appraisal report shall be listed. Assumptions and limiting conditions that are not applicable to all parcels included in the project appraisal report should not be included in this section, but rather should be noted in the individual parcel reports.

6. Scope of the Appraisal.⁴³⁷

7. Purpose of the Appraisal.⁴³⁸

8. Summary of Appraisal Problems.⁴³⁹ The appraiser should describe the principal appraisal problems encountered in estimating the market value of all parcels included in the report. Emphasis should be placed on general appraisal problems common to all parcels, leaving the appraisal problems specific to individual parcels for discussion in the individual parcel reports.

436. For content requirements, see Section A-7 of these Standards.

437. For content requirements, see Section A-8 of these Standards.

438. For content requirements, see Section A-9 of these Standards.

439. For general content requirements, see Section A-10 of these Standards.

If mineral and/or timber values are involved in a number of the parcels included in the project report, the treatment of those values is to be discussed. If the appraiser has relied on a project or multiple parcel mineral and/or timber appraisal, this appraisal shall be included in the addenda of the project report. If individual parcel mineral/timber appraisals were prepared, they shall be included in the addenda of the individual parcel reports.

9. Area, City and Neighborhood Data.⁴⁴⁰ In the case of partial acquisitions, this discussion should be clearly broken down into two subsections: before the acquisitions and after the acquisitions.

10. Zoning and Other Land Use Regulations. Include a general discussion of the zoning and other land use regulations that affect all parcels in the report. General trends in land use regulations in the area and recent zoning activity should be discussed.

In the case of partial acquisitions, this discussion should be clearly broken down into two subsections: before the acquisitions and after the acquisitions.

11. Analysis of Highest and Best Use.⁴⁴¹ Inasmuch as all parcels in the report will have the same or similar highest and best use, the appraiser should discuss and develop the highest and best use of the parcels in this section. If, after in-depth analysis, an appraiser determines that the highest and best use of a parcel is not the same as or similar to that of the other parcels to be included in the report, the unique parcel should be excluded from the project report and a separate narrative appraisal report should be prepared for this unique parcel in accordance with Section A of these Standards.

In the case of partial acquisitions, this discussion should be clearly divided into two subsections: before the acquisitions and after the acquisitions.

12. Discussion of Approaches to Value. The appraiser should discuss the standard approaches to value and their applicability or non-applicability to the parcels under appraisal in the project report. If any modification to the typical application of the approaches to value is required, such modification should be discussed.

In the case of partial acquisitions, this discussion should be clearly broken down into two subsections: before the acquisitions and after the acquisitions.

13. Land Valuation. The appraiser should identify, describe, and discuss all comparable land sales that will be used in the individual parcel reports. A discussion of how the comparable sales will be used in the individual reports can be included in this section of the report. Reference should be made to comparable sales data sheets, photos and a comparable sales map, which shall be included in the addenda of the report.

Universal adjustments to the comparables should be discussed and developed in this section of the report. Adjustments classified as universal would include such adjustments as time, or market condition, adjustments and cash equivalency adjustments; those adjustments that are not subject property dependent. Also, the general results of any study relating to land value (e.g., a size adjustment study) developed under item 17 (special studies) should be discussed.

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

440. For content requirements, see Section A-12 of these Standards.

441. For general content requirements, see Sections A-14 and A-23 of these Standards.

acquisitions, this discussion should clearly be divided into two subsections: before the acquisitions and after the acquisitions.

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

If depreciation studies using the market extraction or sales comparison method⁴⁴² have been developed, their content and development should be discussed and the general conclusions reached should be reported. Discussion of partial acquisitions should clearly be divided into two subsections: before the acquisitions and after the acquisitions.

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

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

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

17. Special Studies. This section of the report should be used to present any special studies that are appropriate and apply to all, or most, of the individual parcels included in the project appraisal report. Such studies might include (in addition to the capitalization rate, time, or market conditions, entrepreneurial profit, depreciation, and cash equivalency studies previously mentioned) easement studies,⁴⁴³ size adjustment studies, proximity studies,⁴⁴⁴ landlock studies, special benefit studies, and project influence studies. These studies may relate to the before situation, the after situation, or both.

442. For discussion of this method of estimating depreciation, see *The Appraisal of Real Estate*, 11th ed. (Chicago: Appraisal Institute, 1996), 371–374.

443. The impact of easements on encumbered areas and abutting unencumbered areas.

444. The impact on remainder property values by reason of their proximity to various public improvements.

Part II—Individual Parcel Report

Each individual parcel report should contain the following information. In the case of partial acquisitions, item 26 through 34 should be repeated in the after situation.⁴⁴⁵

18. Title Page.⁴⁴⁶

19. Table of Contents.⁴⁴⁷

20. Appraiser's Certification.⁴⁴⁸

21. Summary of Salient Facts and Conclusions.⁴⁴⁹

22. Photographs of Subject Property.⁴⁵⁰

23. Statement of Assumptions and Limiting Conditions. The appraiser should state that the assumptions and limiting conditions stated in item 5 of Part I of the project report are applicable to this parcel. If any additions, modifications or deletions to the general assumptions and limiting conditions are necessary, they shall be noted.

24. Scope of the Appraisal. The appraiser should state that the scope of the appraisal stated in item 6 of Part I of the project report is applicable to this parcel. If any additions, modifications or deletions to the general discussion are necessary, that shall be noted.

25. Summary of Appraisal Problem. The appraiser should discuss any specific appraisal problem unique to the individual parcel under appraisal and briefly describe its treatment.

26. Legal Description.⁴⁵¹

27. Area, City and Neighborhood Data. The appraiser should reference the area, city and neighborhood data in item 9 of Part I of the project report, discuss the parcel's location within the neighborhood and note any specific neighborhood factors uniquely affecting the subject parcel.

28. Property Data:

- a. Site.⁴⁵²
- b. Improvements.⁴⁵³
- c. Fixtures.⁴⁵⁴

445. For a general discussion of after situation item content requirements, see Section A, Parts IV, V, and VI of these Standards.

446. For content requirements, see Section A-1 of these Standards.

447. For content requirements, see Section A-3 of these Standards.

448. For content requirements, see Section A-4 of these Standards.

449. For content requirements, see Section A-5 of these Standards.

450. For content requirements, see Section A-6 of these Standards.

451. For content requirements, see Sections A-11, A-20, and D-5 of these Standards.

452. For content requirements, see Sections A-13a and A-22a of these Standards.

453. For content requirements, see Sections A-13b and A-22b of these Standards.

454. For content requirements, see Sections A-13c and A-22c of these Standards.

- d. Use History.⁴⁵⁵
- e. Sales History.⁴⁵⁶
- f. Rental History.⁴⁵⁷
- g. Assessed Value and Annual Tax Load.⁴⁵⁸
- h. Zoning and Other Land Use Regulations. The appraiser should reference the discussion of zoning and other land use regulations in Part I, item 10 of the project report. If additions, modifications, or deletions from that general discussion are required as they relate to the specific parcel, that should be noted.

29. Analysis of Highest and Best Use. The appraiser should reference the discussion of highest and best use in Part I, item 11 of the project report and relate that discussion specifically to the parcel under appraisal. The appraiser shall specifically state the highest and best use of the property, both in the before and after situations if a partial acquisition, and thoroughly explain the reasoning that led to the conclusion.

30. Land Valuation.⁴⁵⁹ The appraiser should reference the data and discussion of land sales in Part I, item 13 of the project report and shall specifically identify which of those sales are most comparable to the parcel under appraisal and have been relied upon in estimating the parcel's value. A comparative analysis between each of the selected comparable sales and the subject property shall be included.

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

31. Value Estimate by Cost Approach.⁴⁶⁰ The appraiser should reference the general discussion of the cost approach in Part I, item 14 of the project report. If computations or estimates are based on studies discussed and developed in Part I of the appraisal, the studies should be specifically referenced and related to the subject parcel.

32. Value Estimate by the Sales Comparison Approach.⁴⁶¹ The appraiser should reference the data and discussion of the whole property sales in Part I, item 15 of the project report and shall specifically identify which of these sales are most comparable to the parcel under appraisal and have been relied upon in estimating the parcel's value. A comparative analysis between each of the selected comparable sales and the subject property shall be included.

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

33. Value Estimate by the Income Capitalization Approach.⁴⁶² The appraiser should reference the data and discussion of whole property rentals in Part I, item 16

455. For content requirements, see Sections A-13d and A-22d of these Standards.

456. For content requirements, see Sections A-13e and A-22d of these Standards.

457. For content requirements, see Sections A-13f and A-22d of these Standards.

458. For content requirements, see Sections A-13g and A-22e of these Standards.

459. For content requirements, see Sections A-15 and A-24 of these Standards.

460. For content requirements, see Section A-16 of these Standards.

461. For content requirements, see Section A-17 of these Standards.

462. For content requirements, see Section A-18 of these Standards.

of the project report and shall specifically identify which of those rentals are most comparable to the parcel under appraisal and have been relied upon in estimating the parcel's economic, or market, rent. A comparative analysis between each of the selected comparable rentals and the subject property shall be included.

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

34. Correlation and Final Value Estimate.⁴⁶³

35. Acquisition Analysis. In the case of a partial acquisition, the appraisal report shall include an analysis of the government's acquisition in accordance with the requirements of Part VI (Sections A-29, A-30 and A-31) of these Standards.

36. Exhibits and Addenda:

- a. Neighborhood Map.⁴⁶⁴
- b. Comparable Data Maps. If the comparable data maps included in Part III of the project report are not clear enough to insure complete understanding of the relationship between the subject property and the comparable data relied on in the individual parcel report, comparable data maps should be included in the addenda of the individual parcel reports.⁴⁶⁵
- c. Detail of Comparative Data. Detailed comparable data sheets must be included in Part III of the project report. Those comparable data sheets relating to the specific comparables relied on in estimating the value of the individual parcel may also be included here for ease of reference.
- d. Plot Plan.⁴⁶⁶
- e. Floor Plan.⁴⁶⁷
- f. Title Evidence Report.⁴⁶⁸
- g. Other Pertinent Exhibits.⁴⁶⁹

Part III—General Exhibits and Addenda

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

37. Location Map. (Within the City or area). All maps should include a north arrow and the identification of the subject parcels.

38. Comparable Data Maps. These maps might include, among others things a comparable land sales map, a comparable improved sales map, and a rental comparables map. The maps should include a north arrow, and show the locations of the comparables and of the

463. For content requirements, see Sections A-19 and A-28 of these Standards.

464. For content requirements, see Section A-32 of these Standards.

465. For content requirements, see Section A-33 of these Standards.

466. For content requirements, see Section A-35 of these Standards.

467. For content requirements, see Section A-36 of these Standards.

468. For content requirements, see Section A-37 of these Standards.

469. For content requirements, see Section A-38 of these Standards.

parcels appraised. If this requires use of a map that is not of a readable scale, secondary maps, showing the specific location of each comparable relied on in making the individual parcel appraisals should be included in the addenda of the individual parcel reports.

39. Detail of Comparative Data.⁴⁷⁰

40. Other Pertinent Exhibits. These would include, for example, any written instructions given the appraiser by the agency or its legal counsel relating to all parcels in the project report, environmental studies relating to all parcels, fixture, timber and/or mineral appraisals relating to multiple parcels, and any charts or illustrations that may have been referenced in the body of the report and relate to all, or most, of the parcels in the project report.

41. Qualifications of Appraiser.⁴⁷¹

D-18. Responsibility of the Appraiser in Litigation. All appraisals should be made with recognition of the possibility that the question of value may be litigated, since it is not possible to predetermine how many tracts within an area will be acquired by voluntary conveyance.⁴⁷² The fact that an appraisal may require revision prior to trial to bring the effective date of valuation into conformance with the legally required date of value does not excuse an ill-prepared initial appraisal. *All* appraisal reports are often subject to discovery, and thus the appraiser may be embarrassed and the government's case weakened, by poorly prepared initial appraisals.

It is the responsibility of the appraiser to expend an adequate amount of time and effort to be thoroughly prepared for trial. Prior to undertaking this preparation and any necessary updating of the appraisal report, the appraiser should participate in a conference with the trial attorney. The attorney will often provide the appraiser with observations made by the Department of Justice Appraisal Unit and recommendations regarding the strengthening of the appraisal report. While appraisers should give serious consideration to the recommendations made by the attorney, they must also recognize that the recommendations are just that: recommendations. They are not *instructions*, and if the appraiser concludes that the adoption of the recommendations would jeopardize the objectivity, or the appearance of objectivity, of the appraisal report, they should be disregarded. The appraiser/attorney conference is also an opportunity for the appraiser to advise the attorney of any information that would be helpful in updating the report, or that would strengthen it, that was not previously available to the appraiser.⁴⁷³ The attorney may be able to procure this information from the property owner's legal counsel or, if necessary, obtain the information during the discovery process.

Appraisers have the responsibility to see that their appraisal reports conform to Rule 26(a)(2)(B) of the Federal Rules of Civil Procedure.⁴⁷⁴ In addition, it is possible that the particular court in which the condemnation case will be held has adopted *local rules* in regard to the content of expert reports. During the above noted appraiser/attorney conference, government's legal counsel should advise the appraiser of any such local rules.⁴⁷⁵

470. For content requirements of comparable data sheets, see Section A-17 of these Standards.

471. For content requirements, see Section A-39. See also Section D-2.

472. Appraisers should recognize that even strictly voluntary acquisitions may lead to litigation by third parties over matters of valuation and/or sufficiency of appraisals. E.g., see *Desert Citizens Against Pollution v. Bisson*, 231 F.3d 1172 (9th Cir. 2000).

473. E.g., historical income and expense information for the property which the property owner has refused to furnish to the appraiser, or verification of the price, terms, and conditions of an historical sale of the property under appraisal.

474. See Section D-2 of these Standards.

475. Appraisers would be well advised to ask government counsel to check these local rules if he or she has not done so.

During the preparation of the initial appraisal report, the appraiser may have had comparable sales verified by personnel from his or her office. Although this procedure is permissible under these Standards, appraisers *must personally verify* all comparable sales prior to testifying in deposition or at trial.

The importance of sound appraisals for litigation purposes cannot be overemphasized. Federal court is not the place for appraisers to attempt to try out new, untested, methods of valuation. The Federal Rules of Evidence “assign to the trial judge the task of ensuring that an expert’s testimony both rests on a reliable foundation and is relevant to the task at hand.”⁴⁷⁶ This task has been referred to as the court’s “gate-keeping obligation” in regard to the admissibility of expert testimony, and the following factors have been identified as bearing on the judge’s gate-keeping determination:

Whether a “theory or technique . . . can be (and has been) tested”; whether it “has been subjected to peer review and publications”; whether, in respect to a particular technique, there is a high “known or potential rate of error” and whether there are “standards controlling the technique’s operation”; and whether the theory or technique enjoys “general acceptance” within a “relevant scientific [appraisal] community.”⁴⁷⁷

It is incumbent upon appraisers to insure the techniques and methodologies they have employed in their valuations meet the above four tests applied by the federal courts in determining the admissibility of expert testimony. In order to be properly prepared to testify as to value in court, and to render the utmost assistance to counsel in preparation for trial, the appraiser needs to consider all *relevant* methods of valuation when making an appraisal for purposes of eminent domain. However, that does not give the appraiser license to experiment in federal court with valuation theories and techniques that have not received general acceptance in the appraisal profession.

Appraisers must recognize that condemnation cases are adversarial proceedings and attorneys are advocates for their clients’ interests. That truism applies both to government attorneys and property owners’ attorneys. That role of client advocate is exclusively reserved to the attorney. Appraisers must avoid being influenced by the attorney’s enthusiasm for the client’s interest. The appraiser is employed to express an opinion of value, which must be supported by factual data to warrant being accorded weight.⁴⁷⁸ While it is important that appraisers testify with the conviction that their valuations are correct, they also must bear in mind that it is neither their property nor their money and their only function is to testify to their impartial opinion of market value.

Appraisers must exercise sound judgment based on known pertinent facts and circumstances, and it is their responsibility to obtain knowledge of all pertinent facts and circumstances that can be acquired with diligent inquiry and search. They must then weigh and consider the relevant facts with good judgment and make their decision, entirely on their own, in a sound professional manner, completely unbiased by any consideration favoring either the owner or the government.⁴⁷⁹ In the determination of what facts and circumstances may be relevant, an attorney may request that an appraiser gather and become knowledgeable about facts and circumstances which, in the appraiser’s opinion, are not pertinent or relevant to the appraiser’s estimate of market value. Appraisers must bear in mind that government attorneys essentially have two cases for which to prepare: their direct case in support of the government’s value estimate, and their rebuttal case in opposi-

476. *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 597 (1993).

477. *Kumho Tire Company, Ltd. v. Carmichael*, 526 U.S. 137, 149-150 (1999) (quoting from *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 592-594 (1993)).

478. *Washington v. United States*, 214 F.2d 33, 43 (9th Cir. 1954) cert. denied, 348 U.S. 862.

479. It is for this reason that it is inappropriate for an appraiser to state in an appraisal report or in testimony that he or she gave the *benefit of the doubt* to either the government or the property owner.

tion to the property owner's claim of value.⁴⁸⁰ Under such circumstances, appraisers must recognize that the request from the attorney may not be directly relevant to the appraiser's estimate of value, but nonetheless is a legitimate request from the attorney for additional pretrial and trial support. It is the appraiser's responsibility to provide that additional support if the request is made in a timely manner.

Appraisers should also recognize that, though not directly relevant to the estimate of market value, the additional facts gathered and knowledge gained by the appraisers may better prepare the appraiser to withstand the rigors of cross-examination, which will form an important part of the appraiser's testimony. "It has been said that 'cross-examination takes the place in our legal system that torture occupied in the medieval systems of civilization.' From the attorney's point of view, the ultimate goal of cross-examination is to destroy the effect of the witness's direct testimony completely. If as a by-product the witness's professional reputation is tarnished or destroyed, so be it. This is, after all, an adversarial proceeding. Appraisers have sagely been advised that '[c]ross examination is the anvil of truth and you must be prepared for a thorough hammering.'"⁴⁸¹

480. E.g., An attorney may ask an appraiser to investigate the typical value and market demand for one-acre lots in the area after the appraiser has concluded that the existing zoning for the property under appraisal, which requires a five-acre minimum lot size, cannot be changed. The purpose of the request, of course, may well be because the owner's appraiser has applied a development approach to value, after concluding that there was an existing probability for a rezoning to one-acre lots and that the highest and best use of the property was for development into one acre-lots.

481. J. D. Eaton, *Real Estate Valuation in Litigation*, 2nd ed. (Chicago: Appraisal Institute, 1995), 494, (citations omitted).



Appraisal Report Documentation Checklist

Title Page

- Agency Name
- Agency Tract No.
- Appraiser's Address
- Property Address
- Appraiser's Name(s)
- Effective Date of Value

Letter of Transmittal

- Date of Letter
- Prop. Rights Appraised
- Special Assumptions
- Estimate of Before Value
- Appraiser Signature
- Identification of Property
- Effective Date of Value
- Special Instructions
- Estimate of After Value

Table of Contents

- Omitted
- Adequate
- Inadequate

Appraiser's Certification

- Facts True & Correct
- No Interest in Property
- Conforms to USPAP
- Property Inspection
- Professional Assistance
- After Value
- Limited Only by Assump.
- No Contingent Fee
- Conforms to Fed. Standards
- Offered Owner Accompl.
- Before Value
- Effective Date of Value

Summary of Salient Facts and Conclusions

- Ident. of Property
- H & B Use—Before
- Description Before Value Before:
- Cost
- Market
- Income
- Final Est.
- Effective Date of Value
- H & B Use—After
- Description After Value After:
- Cost
- Market
- Income
- Final Est.

Photographs of Subject

- Omitted
- Adequate
- Inadequate

Assumptions & Limiting Conditions

- Appropriate
- Extraneous Assumptions
- Suitable for Trial
- Limited Appraisal

Scope of Appraisal

- Omitted
- Adequate
- Inadequate

Purpose of Appraisal

- Defin. of Market Value
- Defin. of Property Rights

Sum. of Appraisal Prob.

- Omitted
- Adequate
- Inadequate

Legal Desc.—Before

- Omitted
- Adequate
- Inadequate

Area Data—Before

- Omitted
- Adequate
- Inadequate

Site Data—Before

- Adequate
- Present use
- Topog.
- Vegetation
- Land Shape
- Minerals
- Hazards
- Inadequate
- Access
- Soils
- Land Area
- Utilities
- Easements

Improvement Data—Before

- Adequate
- Type
- Actual Age
- Condition
- Occupancy
- Inadequate
- Size
- Effective Age
- Quality
- On-site Imp.

Fixtures—Before

- Omitted
- Adequate
- Inadequate

History—Before

- Omitted
- Adequate
- Inadequate
- Use
- Sales
- Rental
- Omitted
- Adequate
- Inadequate
- Omitted
- Adequate
- Inadequate

Assessed Value & Tax Load—Before

- Assessed Value
 Omitted Adequate Inadequate
- Tax Load
 Omitted Adequate Inadequate

Zoning & Land Use Regulations—Before

- Description
 Omitted Adequate Inadequate
- Rezone Probability
 Omitted Adequate Inadequate
- Land Use Regs.
 Omitted Adequate Inadequate

Highest and Best Use—Before

- Vacant
 Omitted Adequate Inadequate
- Improved
 Omitted Adequate Inadequate
- L.P. Considered
 Omitted Adequate Inadequate
- Reasonable Conclusion
 Yes No

Land Valuation—Before

- Comparables:
 Description
 Adequate Inadequate
- Photos
 Omitted Adequate Inadequate
- Analysis
 Omitted Adequate Inadequate
- Suitable for Trial
 Yes No
- Final Value Analysis
 Adequate Inadequate

Cost Approach—Before

- Justified Omission
 Yes No N/A
- Reproduction Cost
 Adequate Inadequate
- Depreciation:
 Market Supported
 Yes No
- Analysis
 Omitted Adequate Inadequate
- Final Estimate
 Adequate Inadequate

Sales Comparison Approach—Before

- Comparables:
 Description
 Adequate Inadequate
- Photos
 Omitted Adequate Inadequate
- Analysis
 Omitted Adequate Inadequate
- Suitable for Trial
 Yes No
- Final Value Analysis
 Adequate Inadequate

Income Capitalization Approach—Before

- Justified Omission
 Yes No N/A
- Gross Income Estimate
 Adequate Inadequate
- Vacancy
 Omitted Adequate Inadequate
- Expenses:
 Fixed
 Omitted Adequate Inadequate
- Operating
 Omitted Adequate Inadequate
- Reserves
 Omitted Adequate Inadequate
- Capitalization Rate:
 Market Supported
 Yes No
- Selection Method
 Adequate Inadequate
- Suitable for Trial
 Yes No

Final Value Estimate—Before

- Reasoned Analysis
 Omitted Adequate Inadequate
- Avoided Summation Appraisal
 Yes No
- Suitable for Trial
 Yes No

Legal Description—After (or Description of Acquisition)

- Omitted Adequate Inadequate

Neighborhood Factors—After

- Project Desc.
 Omitted Adequate Inadequate
- Project Impact
 Omitted Adequate Inadequate

Site Data

- Shape Utilities
- Size Access
- Easements
- Relationship to Project
 Adequate Inadequate

Improvements—After

- Description
 Omitted Adequate Inadequate

Fixtures—After

- Omitted Adequate Inadequate

History—After

- Use/Rental Since Take
 Omitted Adequate Inadequate

Assessed Value—Tax Load—After

- Estimated A.V.
 Omitted Adequate Inadequate
- Estimated Tax Load
 Omitted Adequate Inadequate

Zoning & Land Use Regulations—After

- Rezone Considered
 Omitted Adequate Inadequate

Highest & Best Use—After

- Change Considered
 Omitted Adequate Inadequate
- Intensity Considered
 Omitted Adequate Inadequate
- Restoration Considered
 Yes No N/A
- Effects of TCEs
 Yes No N/A
- Reasonable Conclusion
 Yes No
- Non-conformity
 Omitted Adequate Inadequate

Land Valuation—After

- Comparables:
 Same Comparables as Before
 Yes No
- Description
 Adequate Inadequate
- Photos
 Omitted Adequate Inadequate
- Analysis
 Omitted Adequate Inadequate
- Suitable for Trial
 Yes No
- Final Value Analysis
 Adequate Inadequate

Cost Approach—After

- Justified Omission
 Yes No N/A
- Reproduction Cost
 Adequate Inadequate
- Depreciation:
 Market Supported
 Yes No
- Analysis
 Omitted Adequate Inadequate
- Final Value Analysis
 Adequate Inadequate

Sales Comparison Approach—After

- Comparables:
 Same Comparables as Before
 Yes No
- Description
 Adequate Inadequate
- Photos
 Omitted Adequate Inadequate
- Analysis
 Omitted Adequate Inadequate
- Suitable for Trial
 Yes No
- Final Value Analysis
 Adequate Inadequate

Income Capitalization Approach—After

- Justified Omission
 Yes No N/A
- Gross Income Estimate
 Adequate Inadequate
- Vacancy
 Omitted Adequate Inadequate
- Expenses:
 Fixed
 Omitted Adequate Inadequate
- Operating
 Omitted Adequate Inadequate
- Reserves
 Omitted Adequate Inadequate
- Capitalization Rate:
 Market Supported
 Omitted Adequate Inadequate
- Selection Method
 Adequate Inadequate
- Suitable for Trial
 Yes No

Final Value Estimate—After

- Reasoned Analysis
 Omitted Adequate Inadequate
- Avoided Summation Appraisal
 Yes No
- Suitable for Trial
 Yes No

Acquisition Analysis

- Avoided Valuing Take
 Yes No
- Shown in Proper Form
 Yes No

Allocation & Explanation of Damages

- Value of Take/Damages Properly Allocated
 Yes No
- Damage Explanation
 Omitted Adequate Inadequate
- Noted Accounting Tabulation
 Yes No
- Cost to Cure Damage Estimated
 Yes No
- Cost Justified
 Omitted Adequate Inadequate
- Profit
 Omitted Adequate Inadequate
- Cost v. Diminution in Market Value Considered
 Omitted Adequate Inadequate

Special Benefits

- Adequately Explained
 Yes No N/A

Location Map

- Omitted Adequate Inadequate

Comparable Data Maps

- All Comps on Map
 Yes No
- Subject Shown on Map
 Yes No

Comparable Data Sheets

- Confirmed
 Yes No
- Terms Reported
 Yes No
- Buyer/Seller
 Yes No
- Date of Sale
 Yes No
- Recording Info
 Yes No
- Location
 Yes No
- Present Use
 Yes No
- H&B Use
 Yes No
- Zoning
 Yes No
- Legal
 Yes No
- Physical Description
 Adequate Inadequate

Plot Plan

- Property Boundaries Shown
 Yes No
- Dimensions Before
 Yes No
- Dimensions After
 Yes No
- Street Frontage Before
 Yes No
- Street Frontage After
 Yes No
- Photo Locations
 Yes No
- Improvement Locations
 Yes No

Floor Plan

- Adequate Inadequate N/A

Title Report

- Omitted Adequate Inadequate

Other Exhibits

- Adequate Inadequate N/A

Qualifications

- Omitted Adequate Inadequate

Recommended Format for Federal Appraisal Reports

Part I—Introduction

- A-1. Title page
- A-2. Letter of transmittal
- A-3. Table of contents
- A-4. Appraiser's certification
- A-5. Summary of salient facts and conclusions
- A-6. Photographs of subject property
- A-7. Statement of assumptions and limiting conditions
- A-8. Scope of the appraisal
- A-9. Purpose of the appraisal
- A-10. Summary of appraisal problems

Part II—Factual Data— Before Acquisition

- A-11. Legal description
- A-12. Area, city and neighborhood data
- A-13. Property data:
 - a. Site
 - b. Improvements
 - c. Fixtures
 - d. Use history
 - e. Sales history
 - f. Rental history
 - g. Assessed value and annual tax load
 - h. Zoning and other land use regulations

Part III—Data Analysis and Conclusions—Before Acquisition

- A-14. Analysis of highest and best use
- A-15. Land valuation
- A-16. Value estimate by cost approach
- A-17. Value estimate by sales comparison approach
- A-18. Value estimate by income capitalization approach
- A-19. Correlation and final value estimate

Part IV—Factual Data— After Acquisition

- A-20. Legal description
- A-21. Neighborhood factors
- A-22. Property data
 - a. Site
 - b. Improvements
 - c. Fixtures
 - d. History
 - e. Assessed value and annual tax load
 - f. Zoning and other land use regulations

Part V—Data Analysis and Conclusions—After Acquisition

- A-23. Analysis of highest and best use
- A-24. Land valuation
- A-25. Value estimate by cost approach
- A-26. Value estimate by sales comparison approach
- A-27. Value estimate by income capitalization approach
- A-28. Correlation and final value estimate

Part VI—Acquisition Analysis

- A-29. Recapitulation
- A-30. Allocation and explanation of damages
- A-31. Explanation of special benefits

Part VII—Exhibits and Addenda

- A-32. Location map
- A-33. Comparable data maps
- A-34. Detail of comparative data
- A-35. Plot plan
- A-36. Floor plan
- A-37. Title evidence report
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- A-39. Qualifications of appraiser

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