

LITIGATING THE MINERAL RIGHTS CASE

John A. Draughon, Esq.
Mary Elizabeth Hand, Esq.
Sell & Melton, L.L.P.
Macon, GA

TABLE OF CONTENTS

I.	Definition of Mineral Interest.....	1
II.	Time of Valuation.....	2
III.	Methods of Valuation.....	2
	a. Comparable Sales.....	4
	b. Unit Times Price.....	6
IV.	Condition of Property on Date of Taking.....	15
V.	Uniqueness of Property.....	16
VI.	Measure of Consequential Damages.....	22
VII.	Leasehold Evaluation for Lessee and Lessor.....	24
VIII.	Surface Mining Permits.....	27
IX.	Conclusion.....	28

I. Definition of Mineral Interest

“Mineral interest” generally includes any interest in oil, gas, coal, clay, gravel, uranium, and all other minerals of any kind and nature, whether created by grant, assignment, reservation, or otherwise owned by a person other than the owner of the surface estate.¹

The State of Georgia is one of the nation’s leading producers of industrial minerals, and it leads all other states in the production of kaolin and fuller’s earth, clays, crushed granite, and dimension granite. During 2002, kaolin mining and processing brought an after-tax profit of \$36 million to Georgia’s economy.² In 2002, the estimated value of non-fuel mineral production for Georgia was \$1.45 billion.³ With such a plethora of minerals, attorneys litigating condemnation cases frequently have to decide exactly how to deal with mineral interests. This paper deals with just some of the issues which arise while litigating mineral rights cases in the eminent domain sector.⁴

II. Time of Valuation

Since the value of property fluctuates over time, it is important to establish the time when the value should be determined. The time at which the value for the

¹ Taken from the State of North Dakota website at <http://www.state.nd.us/lr//cencode/T38C181.pdf>, last accessed on December 30, 2003.

² Taken from the China Clay Producers Association website at www.kaolin.com, last accessed on December 30, 2003.

³ Taken from the United States Geological Survey website at <http://minerals.usgs.gov/minerals/pubs/state/ga.html>, last accessed on December 30, 2003.

⁴ China Clay Producers Association, *supra* note 2.

condemned property should be fixed is the time it is taken. *Gate City Terminal Co. v. Thrower*, 136 Ga. 456, 71 S.E. 903 (1911). Property is not to be valued as of the date on which the condemnation proceedings or public project were announced. *DOT v. White*, 173 Ga. App. 68, 325 S.E.2d 397 (1984). The property owner is entitled to the increased value if the property value is enhanced by the announcement of the project, but on the other hand, if the announcement decreases the value of the property, the owner is entitled only to that decreased value as of the date of taking. *DOT v. White*; *DOT v. Petersen*, 181 Ga. App. 380, 352 S.E.2d 580 (1986).

III. Methods of Valuation

In any condemnation case, the question which must be decided by a jury is what amount of just and adequate compensation is due the Condemnee for the property taken by the condemning authority. “The only relevant inquiry is the fair market value of the property at the time of the taking.” *DOT v. Petkas*, 189 Ga. App. 633, 638(5) (1988). Fair market value is defined as “the price a seller who desires, but is not required, to sell and a buyer who desires, but is not required, to buy, would agree is a fair price, after due consideration of all the elements reasonably affecting value.” *Wright v. MARTA*, 248 Ga. 372, 283 S.E.2d 466 (1981). In determining fair market value, all possible capabilities of the property may be considered. *DOT v. Kanavage*, 183 Ga. App. 143 (1987).

Under Georgia law, the presence of subterranean minerals is a relevant factor to be considered in determining the overall value of the property. *Williams v. Mayor, etc., of Carrollton*, 195 Ga. App. 590, 394 S.E.2d 389 (1990) (holding that (calculation of the overall value of property must include valuable soil deposits); *See generally State Hwy.*

Dept. v. Robinson, 103 Ga. App. 12, 15(2), 118 S.E.2d; *See Ga. Power Co. v. Owen*, 207 Ga. 178, 179, 60 S.E.2d 436 (1950). In a condemnation case involving mineral rights, it is important to remember that there cannot be a separate recovery for the land that is condemned and for the mineral deposits contained on the land. *Southern R. Co. v. Miller*, 94 Ga. App. 701, 704(1), 96 S.E.2d 297 (1956). “The land and its natural components are one subject matter and what is required is evidence of the fair market value of that one subject matter.” *DOT v. Brooks*, 153 Ga. App. 386, 265 S.E.2d 610 (1980).

The fact that land contains minerals is relevant in arriving at just compensation. “The measure of just compensation will be the fair market value of the whole property with the improvements on and the minerals in it. The owner does not recover for improvements on or minerals in the land except as they enhance the value of the whole property.” *United States v. 342.81 Acres of Land, etc.*, 134 F.Supp. 430 (N.D.Ga. 1955).

I. Comparable Sales

The courts have discussed two main methods of determining fair market value, comparable sales and the price per unit method. The comparable sales method is met with more approval than any other method of valuation. Comparable sales is considered the classic market approach to valuation, and as such, is the favored method to value property containing mineral deposits.

The market approach is probably the most widely used method [of valuation]. While there are several variations to this approach, the most common practice is to consider comparable sales or sales of similar properties that are not too remote in time from the date of taking and not too remote in distance from the property being

condemned. The appraiser may make adjustments in the sales price of the comparable sales to account for differences in time, location, size, or other physical characteristics.

The Georgia Supreme Court has equated the market approach or comparable sales method with the fair market value standard of value.

Pursley's Georgia Eminent Domain, § 6-2, (Daniel F. Hinkel, ed., 1993) (emphasis added).

Condemning authorities believe this method of valuation is the only method that assures that there is not a separate recovery for both the land and the mineral deposits.

Georgia is not the only state to hold that the proper method of valuation for property with mineral deposits is the price agreed upon in sales of comparable properties not too remote in time. In *United States v. Upper Potomac Properties Corp.*, 448 F.2d 913 (4th Cir. 1971), the court of appeals held the district judge did not abuse his discretion when he allowed the jury to consider the price paid for a coal-mining operation immediately adjacent to the condemned property, on the theory that comparable sales were the best evidence of value. A Louisiana court has also held that the best evidence of fair market value was to be found in comparable sales in the area within a reasonable time preceding the condemnation. *United States v. 71.29 Acres of Land*, 376 F.Supp. 1221 (D.C. La. 1974). See also *United States v. 180.37 Acres of Land*, 254 F. Supp. 678 (D.C. Va. 1966) (pointing out that the most common method of arriving at a value for land with underlying minerals was the comparable sales method, whereby recent sales of similar tracts in the same area were compared in arriving at the fair market value of the land.)

The comparable sales approach is said to be the best evidence of value for mineral

bearing properties. Courts typically only allow the use of other valuation approaches in the absence of comparable sales data. See *United States v. 24.48 Acres of Land*, 812 F.2d 216 (5th Cir. 1987); *United States v. 47.14 Acres of Land*, 674 F.2d 722 (8th Cir. 1982) (holding that market value can be shown best by comparable sales); *United States v. 179.29 Acres of Land in Douglas County*, 644 F.2d 367 (10th Cir. 1981); *Welch v. TVA*, 108 F.2d 95 (6th Cir. 1939). Under the comparable sales approach, it is presumed the value of the mineral deposit is reflected in the comparable sales data. For example, *United States v. 494.10 Acres of Land*, 592 F.2d 1130 (10th Cir. 1979), involved the value of sand and gravel deposits in farmland property. There, the court held that the landowner was not entitled to a value for those deposits over and above that indicated by the comparable sales since the value of the deposit was presumably reflected within the purchase price of the farmland sales. The Rhode Island Supreme Court has even gone so far as to hold as a general rule that the availability of a comparable sale operates to exclude evidence of fair market value based upon any other method of computation. *Lataille v. Housing Authority*, 109 R.I. 75, 280 A.2d 98 (1971).

b. Unit Times Price

A method that has been rejected as speculative by many courts is the unit times price method. In other words, one would simply calculate the quantity of tons or cubic yards of mineral present on the property taken and multiply that figure by the market value of the mineral. For example, if there were one million tons of kaolin taken and kaolin was selling at \$1.00 per ton, the value of that portion of the take was \$1,000,000.00. However, the unit times price method was seemingly disapproved of by the Georgia Court of Appeals in *Gunn v. DOT*, 222 Ga. App. at 685, 476 S.E.2d at 46.

In *Gunn*, the Georgia Court of Appeals stated:

Georgia law on the method of valuing land containing mineral or soil deposits suitable for extraction is clear. *See, e.g., Williams v. Mayor, etc., of Carrollton*, 195 Ga. App. 590, 394 S.E.2d 389 (1990) (calculation of the overall value of property must include valuable soil deposits). The presence of subterranean minerals is a relevant factor to be considered in determining the overall value of property. *Id.* at 591(2), 394 S.E.2d 389. *See generally State Hwy. Dept. v. Robinson*, 103 Ga. App. 12, 15(2), 118 S.E.2d 289 (1961). *See Ga. Power Co. v. Owen*, 207 Ga. 178, 179, 60 S.E.2d 436 (1950). Land containing valuable deposits may be of greater market value than land without such deposits, but the land and the deposits constitute one subject matter and there cannot be separate recovery for the land and also for the deposits. *Southern R. Co. v. Miller*, 94 Ga. App. 701, 704(1), 96 S.E.2d 297 (1956).

Id., 479 S.E.2d at 48 (emphasis added).

“The land and its natural components are one subject matter and what is required is evidence of the fair market value of that one subject matter.” *DOT v. Brooks*, 153 Ga. App. 386, 265 S.E.2d 610 (1980).

The fact that land contains minerals is relevant in arriving at just compensation. “The measure of just compensation will be the fair market value of the whole property with the improvements on and the minerals in it. The owner does not recover for improvements on or minerals in the land except as they enhance the value of the whole property.” *United States v. 342.81 Acres of Land, etc.*, 134 F.Supp. 430 (N.D.Ga. 1955).

“The presence of mineral deposits, sand, clay, gravel, timber, or other materials of value in or on land is therefore an element of value to be considered in arriving at market value. The rule has frequently been expressed, however, by the negative statement that the award may not be reached by separately evaluating the land and the deposits, since the latter, being only one element among many in determining the market value of the land, cannot be considered as an independent factor whose value is to be added to the value of the land. It is a general rule, however, that in ascertaining the amount of compensation to be awarded for taking property containing mineral deposits in eminent domain, the amount of the mineral deposits cannot be simply estimated and then be multiplied by

a fixed price per unit.”

26 Am. Jur. 2d Eminent Domain § 338 (emphasis added).

Numerous other courts throughout the United States rely on this rule, holding that there can be no separate recovery for minerals and the land. Courts have historically disfavored the method by which mineral value is fixed by multiplying the number of tons by a given price per unit. Nichols Eminent Domain § 14F.03. In ascertaining the amount of compensation to be awarded for taking property containing mineral deposits, the amount of the mineral deposits cannot be simply estimated and then be multiplied by a fixed price per unit. *United States v. 2560.00 Acres of Land*, 836 F.2d 498 (10th Cir. Okla. 1988); *Lehigh Clay Prods. v. Iowa Dept. of Transp.*, 512 N.W.2d 541 (Iowa 1994); *Knox Lime Co. v. Maine State Highway Comm.*, 230 A.2d 814 (Me. 1967); *Gulf Interstate Gas Co. v. Garvin*, 368 S.W.2d 309 (KY 1963); *In re Appropriation of Easements for Highway Purposes*, 190 N.E.2d 446 (Oh. 1963); *State by State Highway Comm. v. Arnold*, 218 Or. 43, 341 P.2d 1089 (1959); 26 Am. Jur. 2d § 338. “Such a formula fails to take into account considerations such as the cost of excavating the material, the cost of processing it, overhead expenses, and the market for the finished product, all of which would affect the net value which the owner could derive from the deposit.” 26 Am. Jur. 2d § 338; *U.S. v. 2560 Acres*, 836 F.2d 498; *Arkansas State Highway Comm. v. Stanley*, 234 Ark. 428, 353 S.W.2d 173 (1962).⁵ As

⁵ For other cases stating the rule that there can be no separate recovery for the land and deposits on the land, see *Farr v. State Highway Board*, 123 Vt. 334, 189 A.2d 542 (1963); *Iske v. Omaha Public Power Dist.*, 178 N.W.2d 633 (Neb. 1970); *Board of Park Com'rs of Columbus v. DeBolt*, 474 N.E.2d 317 (Ohio 1984); *State ex rel. State Highway Comm'n v. Mann*, 624 S.W.2d 4 (Mo. 1981); *Smith v. State Highway Board*, 209 A.2d 495 (Vt. 1965); *Harwell v. U.S.*, 316 F.2d 791 (10th Cir. 1963); *United States v. 158.76 Acres of Land*, 298 F.2d 559 (2nd Cir. 1962); *Eagle Lake Improv. Co. v. U.S.*, 160 F.2d 182 (5th Cir. 1947); *U.S. v. 881.39 Acres of Land*, 254 F. Supp. 294 (D.C. Okla. 1966); *U.S. v. 26.81 Acres of Land*, 226

stated by the Illinois Court of Appeals in rejecting use of the unit times price method:

We believe that a per unit valuation in Illinois would confuse the jury. It would result in inflated land values and valuation based upon speculation. It would ignore completely the cost factors which are affected by management. It would force consideration of the need of the condemnor rather than the loss of the condemnee. We believe that this is undesirable and therefore we will not adopt the per unit valuation rule in Illinois. (Emphasis added)

Dept. of Transp. v. Toledo, Peoria & Western Railroad Co., 59 Ill. App. 3d 886, 890, 376 N.E.2d 88 (1978).

In *Ross v. Palisades Interstate Park*, 101 A. 60 (N.J. 1917), a case dealing with valuation of condemned land containing stone, the court expressed the rule in its proper form when it held: “The value of the land as stone land suitable for quarrying is a proper subject of consideration both by the witnesses and the jury in fixing the amount of just compensation to be awarded, but not the value of the stone separately and apart from the land. The value of the land is not measured by such facts. The stone is a component of the land.” *Id.* at 63.

Furthermore, courts have held the unit times price method to be invalid because such valuation

“involves all of the unknown and uncertain elements which enter into the operation of the business of producing and marketing the product. It assumes not only the existence, but the continued existence of a stable demand at a stable price. It assumes a stable production cost and eliminates the risks all business men know attend the steps essential to the conduct of a manufacturing enterprise. It eliminates the possible competition of better materials of the same general description and of the possible substitution of other and more desirable materials produced or

F. Supp. 829 (D.C. Ark. 1964); *U.S. v. 116.00 Acres of Land*, 227 F. Supp. 100 (D.C. Ark. 1964); *Seattle & M.R. Co. v. Roeder*, 30 Wash. 244, 70 P. 498 (1902); *Knox Lime Co. v. Maine State Highway Comm'n*, 230 A.2d 814 (1967); *Searle v. Lackawanna and Bloomsburg Railroad Co.*, 33 Pa. St. 57 (1859); *Ringwood Co. v. North Jersey District Water Supply Comm.*, 143 A. 369 (1928).

possible of production by man's ingenuity, even to the extent of rendering the involved material unmarketable. It involves the assumption that human intelligence and business capacity are negligible elements in the successful conduct of business. It would require the enumeration of every cause of business disaster to point out the fallacy of using this method of arriving at just compensation. No man of business experience would buy property on that theory of value."

State ex rel. TVA v. Indian Creek Marble Co., 40 F. Supp. 811 (E.D. Tenn. 1941).

The land taken must be valued as land with the presence of mineral deposits.

With the deposits being given due consideration, it is improper to aggregate the value of the land and the value of the minerals when determining just compensation. The property instead must be valued as a whole. "A condemnation award is for the property taken, not for the sum of the different interests therein." Nichols, Eminent Domain § 14F.03. See *United States v. 91.90 Acres of Land*, 586 F.2d 79 (8th Cir. 1978), cert. denied, 441 U.S. 944 (1979) (holding that the existence of mineral deposits is a factor to be considered in determining market value, but landowner is not entitled to have the surface value of the land and the value of the underlying minerals aggregated to determine market value). In *Forest Preserve District of Cook County v. Caraher*, 299 Ill. 11, 132 N.E. 211 (1921), the Illinois Supreme Court stated "[t]he rule is that compensation must be estimated for the land as land, with all its capabilities, and if there is timber on it, or coal, oil or other minerals under the surface, they are to be considered so far as they affect the value of the land, but they cannot be valued separately." *Id.* at 17.⁶ One court has stated that even if the multiplication method is

⁶ See also *East Tennessee Natural Gas Co. v. Riner*, 387 S.E.2d 476 (Va. 1990); *Edwards v. Dept. of Environmental Resources*, 322 A.2d 138 (Pa. 1974); *Smith v. State Roads Comm'n*, 262 A.2d 533 (Md. 1970); *Iske v. Metropolitan Utilities Dist. of Omaha*, 157 N.W.2d 887 (Neb. 1968); *Reiter v. State Highway Comm'n*, 281 P.2d 1080 (Kan. 1955); *In re Lee*, 354 S.E.2d 759 (N.C. App. 1987); *State Highway*

used, all courts agree the total arrived at by multiplying the quantity by the unit price cannot be taken as the value of the land but must be used only as a factor in evaluating the land itself. *State by and through State Highway Comm'n v. Nunes*, 379 P.2d 579 (Or. 1963). The Tenth Circuit reversed a condemnation award in *United States v. 158.76 Acres of Land*, 298 F.2d 559 (2nd Cir. 1962), because the award was based upon an expert witness' testimony that capitalized the expected income from gravel deposits on the condemned land. The court stated that if condemned land contained a mineral deposit, it was proper to consider that fact in determining the value of the land as a whole, but that it was improper to determine separately the value of the mineral deposit and add it to the value of the land to determine the award.

Courts have additionally rejected the unit times price method of valuation as being based upon unknowns, relying on the fact that such a valuation is inherently speculative so that it cannot be accurately relied upon.

In eminent domain proceedings, the existence of valuable mineral deposits in the condemned land constitutes an element which may be taken into consideration if and in so far as it influences the market value of the land. The reason for this rule is said to be that the measure of compensation in such cases is the market value of the land to be condemned, taken as a whole and with due consideration of all the components that tend to make its market value. This rule has been applied to limestone deposits, gold ore, fire clay, coal, stone, and sand and gravel, but there can be no recovery for both the value of the land and its mineral deposits as two separate items. *Atlanta Terra Cotta Company v. Georgia Ry. and Electric Co.*, 132 Ga 537; *U.S. v 620.00 Acres of Land etc., D.C.* 101 F.Supp. 686; Orgel on Valuation, Under Eminent Domain, page 544, (rejecting the method of estimating the amount of stone in situ and multiplying this amount by a fixed price per unit); also citing *Searele v. Lackawanna and Bloomsberg Railroad Co.*, 33 Pa. 57. In rejecting the method of multiplying the estimated amount of clay by a fixed price per unit, the conclusion is largely based on speculativeness. In discussing this

Comm'n v. Jones, 363 N.E.2d 1018 (Ind. App. 1977).

