**Collection of References to Legal Instruction**

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**Basic Premise for Legal Instruction**

Legal questions often arise when applying these Standards to the facts of a specific appraisal assignment, requiring appropriate written legal instructions. Appraisers and agency counsel should work closely to ensure legal instructions not only are legally correct, but also adequately address the valuation problem to be solved. (0.1)

Circumstances arise in which a legal instruction is necessary to properly complete the appraisal assignment. Examples of situations in which a legal instruction may be required include: unity of title questions in a larger parcel analysis, scope of the government’s project questions, compensability of damages questions, special benefits questions, and effective date of value questions. (1.2.7.1)

**Statement of Assumptions and Limiting Conditions.**  Any assumptions and limiting conditions that are necessary to the background of the appraisal shall be stated. Any agency or special legal instructions provided to the appraiser shall be referenced and a copy of such instructions shall be included in the addenda of the appraisal report. (2.3.1.7)

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 an oral instruction from 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. (Footnote No. 116, pg. 59)

Most appraisals for federal acquisitions involve straightforward application of established legal standards to the facts. But some valuation problems require nuanced legal instructions to address complicated or undecided questions of law. (4.1.3)

**4.13.4. Attorneys.** Attorneys play a critical role in appraisals for federal acquisitions, whether or not litigation is involved. Legal instructions are necessary on a variety of valuation issues addressed throughout these Standards, such as ownership and title questions affecting the larger parcel determination (Section 4.3.3) or the proper application of the scope of the project rule to exclude government project influence on market value (Section 4.5). To do so, attorneys—whether agency counsel, Department of Justice attorneys, or landowners’ counsel—must often engage in nuanced discussions with appraisers to determine what legal instructions are necessary and appropriate. Agency counsel should consult the U.S. Department of Justice for assistance on novel or complex issues. (4.13.2)

**Identifying the Estate to be Acquired**

The appraiser must fully understand the nature of the estate(s) to be acquired, and request legal instructions if clarification is needed, for each assignment. (1.2.6.1)

The appraiser must always consult with the client and/or counsel before employing a hypothetical condition. If utilization of a hypothetical condition is required by the facts or nature of the acquisition, then written legal instructions must be provided to the appraiser and included within the appraisal report. (1.2.7.1)

Applicable water laws must be taken into account in determining market value for purposes of just compensation, and appropriate legal instructions may be required. (4.8.5)

As discussed in more detail in Section 4.6.5 (Easement Valuation Issues), it is critical for the appraiser to understand the precise property interest(s) being acquired and the impact of any existing encumbrances. Legal instructions are typically required. (4.11.3.1)

Again, legal instructions are typically required regarding the precise property interest(s) to be appraised and the effects of any encumbrances. Existing legal encumbrances must be considered when developing opinions of market value. (4.11.3.1)

The appraiser must understand the precise property interest(s) being acquired and the impact of any existing encumbrances. Typically, legal instructions are required. (4.11.3.2)

**Scope of the Project Rule**

**Proper application of the** scope of the project rule **is complex, and virtually always requires a** legal instruction. (Sidebar pg. 16)

Because the scope of the project rule involves interrelated factual and legal questions, the appraiser must request appropriate legal instruction if there is evidence the government’s project affected the market value of the property being appraised. (1.2.7.3.3)

**Whether the scope of the project rule applies and if so, how to apply it, are complex questions that require legal instruction**. **See Section 4.5.** (Sidebar pg. 111)

**(7) Project-Influenced Sales.** As discussed in depth in Section 4.5, valuations must disregard any value attributable to the government project prompting the acquisition. Consideration of project influence on market value is prohibited under the scope of the project rule. Whether the rule applies and how to apply it in a particular valuation assignment will require legal instructions. (4.4.2.4.2)

Proper application of the scope of the project rule requires careful legal and factual analysis of the government project and its influence on market value. Legal instruction is required, as the scope of the project rule raises questions of law “which limit [ ] the factors necessary to the determination of ‘just compensation’” and go beyond the appraiser’s function of assessing the government project’s influence, if any, on market value. (4.5)

**Legal Instructions**. Because the scope of the project rule involves interrelated factual and legal questions, the appraiser must request appropriate legal instruction if there is evidence the government’s project affected the market value of the property being appraised. (4.5.3 and Sidebar pg. 149)

Application of the scope of the project rule turns on the question: “Should the owner have the benefit of any increment of value added to the property taken by the action of the public authority[?]” As discussed in Section 4.5, the answer to this question depends on the precise facts of each acquisition, and “requires discriminating judgment” and legal instructions. (4.6.3)

**Damages and Special Benefits**

As with damages, whether a benefit is general or direct is a mixed fact/law question that requires a legal instruction. (1.2.7.3.6)

In federal acquisitions, whether under the Federal Rule or (with appropriate legal instructions) the State Rule, the ultimate goal is to fairly measure the owner’s actual compensable loss. (4.3.4.1)

**Exceptions.** Federal courts have recognized rare exceptions to the foregoing rules, allowing normally non-compensable damage to be reflected in unusual circumstances, such as the temporary acquisition of a business property or a partial acquisition with the effect of a total taking.817 Such exceptions always require legal instruction. (4.6.2.3)

**Distinguishing special and direct benefits from general and indirect benefits can raise complicated factual and legal questions, and virtually always requires a** legal instruction. (Sidebar pg. 162)

But correctly distinguishing special and direct benefits (to be considered) from general and indirect benefits (to be ignored) “can raise complicated questions” in practice, and virtually always requires a legal instruction. (4.6.3)

Because the taking plus damages method is apt to “arrive at something else, either more or less, than compensation” under the Fifth Amendment, it is generally improper in valuations for federal acquisition purposes, and cannot be used without legal instruction from the acquiring agency or the U.S. Department of Justice. (4.6.4.1)

The usual before and after valuation method for partial acquisitions does not readily allow the different treatment of the part acquired and the remainder property that § 595a requires. As a result, valuing partial acquisitions under § 595a may require use of a taking plus damages method—but only with appropriate legal instructions. (4.11.1)

**Zoning**

Zoning is a factor to be considered in evaluating property. Accordingly, if the property to be appraised is subject to zoning, the appraiser must identify the applicable restrictions and interpret the impact of such restrictions on the utility and value of the subject property. If zoning is uncertain, legal instruction may be required. (1.3.1.3)

However, in limited circumstances—and only with appropriate legal instructions—application of the scope of the project rule may allow or require the appraiser to disregard the impact of a zoning restriction on a piece of property. (4.3.2.4.1)

**Larger Parcel**

**The** larger parcel **is that tract of land which possesses a unity of *ownership* and has the same, or an integrated, *highest and best use***. **Determining unity of ownership may require** legal instruction. (Sidebar on pg. 23)

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. (1.4.6)

**Criteria for Analysis.** In determining the larger parcel, federal courts consider unity of use, unity of ownership (title), and physical unity (proximity or contiguity) as it relates to highest and best use—factors historically called the three unities. Because this analysis typically involves questions of law as well as fact, appropriate legal instructions are often required. (4.3.4)

Because unity of ownership raises not only factual but legal questions, appraisers must obtain legal instructions if they conclude that a single larger parcel exists when the ownership interests in all parts of the whole are not identical. (4.3.4.2)

**Legal Instructions**. While the larger parcel must ultimately be determined by the appraiser, legal instructions are often required to address questions of law that arise within the appraiser’s analysis. For example, whether unity of ownership exists based on the quality of the property interests held in different tracts raises not only factual but legal questions. Thus, an appraiser must obtain legal instructions if the ownership interests in all parts of the whole are not identical in a potential larger parcel. Similarly, whether there is sufficient evidence to support a finding of an integrated use involves legal as well as factual analysis. In addition, in federal condemnation litigation, the appraiser’s larger parcel analysis and conclusions will be evaluated by the court and/or the finder of fact (jury, land commission, or judge). (4.3.4.4)

**Inverse Condemnation**

Because inverse condemnation cases (either permanent or temporary) are very fact-specific, it is essential that the appraiser work very closely with the Department of Justice 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. (1.9.2)

Accordingly, the appraiser must receive appropriate legal instructions regarding the precise terms of the property interest(s) to be valued in an alleged inverse taking. (4.7.2)

Similarly, whether an alleged inverse taking is *temporary* or *permanent* is a legal question requiring legal instruction. (4.7.2 and Sidebar pg. 177)

**Land Exchange**

When appraising the federal land portion of the exchange, the regulations require that the appraiser “estimate the value of the lands and interests as if in private ownership and available for sale in the open market.” This is an assignment condition that requires a legal instruction and creates a hypothetical condition. Because the federal land is appraised as if in private ownership, to its highest and best use, any other surrounding federal land cannot be part of a larger parcel because (due to the hypothetical condition) it is under different ownership and has a different highest and best use. (1.12)

**Special Considerations in Land Exchanges.** Different considerations may be required in determining the larger parcel in appraisals for federal land exchanges (see Section 1.12). In such situations, legal instructions for the appraiser to assume a specific larger parcel determination may be necessary to comply with statutes or other federal requirements, as discussed in Section 4.10. (4.3.4.7)

But special legal instructions may be necessary due to statutory or regulatory requirements for land exchanges. (4.10)

**Government Improvements**

Therefore, appraisers should request legal instructions on how to treat government-constructed improvements that predate the date of value. (4.2.2.2.1)

Physical remnants of *improvements made by the United States* may require special treatment, and the appraiser must request appropriate legal instruction. (4.11.3.1)

**Unit Rule**

Any departure from the unit rule requires a legal instruction, as “the determination as to [the unit rule’s] applicability is one made by a court as a matter of law rather than by an appraiser.” (4.2.2.4 and Sidebar pg. 99)

Legal instruction **is required for any departure from the unit rule, as the rule’s application is a matter of law that cannot be determined by an appraiser.** (Sidebar pg. 172)

**Market Value Standard**

**Appraisers estimate market value, not just compensation. Departure from the market value standard is rarely justified in federal acquisitions, and inevitably requires appropriate** legal instruction. (Sidebar pg. 100)

Rarely, deviation from market value as the measure of just compensation may be required in federal acquisitions, but “only ‘when market value has been too difficult to find, or when its application would result in manifest injustice to owner or public.’” Such situations are highly unusual, and moreover, inevitably require appropriate legal instruction. Whether departure from the established market value standard is appropriate in a given set of facts is a legal question beyond the scope of an appraiser to determine. (4.2.6)

**Navigational Servitude**

Thus, whether the navigational servitude applies under federal law to a specific body of water that is navigable in fact must be determined on a case-by-case basis. Arising mainly (but not only) in inverse takings claims, this determination cannot be made by the appraiser; legal instructions are required. (4.11.1)