COMMENT

*UNITED STATES V. FULLER**: JUST COMPENSATION?

I. INTRODUCTION

Eminent domain has been defined as "the power of the sovereign to take property for public use without the owner's consent upon making just compensation."[1] Although the Constitution does not expressly grant the power of eminent domain to the federal government, the Supreme Court has nevertheless held that "such an authority is essential to its independent existence and perpetuity."[2] In addition, the fifth amendment of the Constitution implicitly recognizes the power of eminent domain by requiring the payment of just compensation upon the taking of private property by the federal government.[3]

In an attempt to fulfill the fifth amendment mandate, courts have labored to find a satisfactory standard by which to measure the value of condemned land. At least three possible standards are available: the value to the condemnor, the value to the condemnee, and the market value. Courts have rejected the standard of the value of the condemned property to the condemnor because of the fear that the Government might have to pay an inflated price for land needed for public projects, one which the Supreme Court has labelled the "hold-up" price.[4] As early as 1893 the Court rejected the value to the condemnee when it observed that "just compensation . . . is for the property, and not to the owner. . . . [T]he personal element is left out and the 'just compensation' is to be a full equivalent for the property taken."[5] Thus, while the market value of the land seems to have become the prevailing measure of compensation, courts have nevertheless alternated between awarding the market value and full indemnity to the owner for all losses incurred, a measure which is less than the value of the land to the condemnee but greater than its market value.

Although the articulated standard is market value, courts have been known to depart from that measure in situations where paying market value alone would be inequitable.[6] On the other hand, commentators have long noted that the concept of eminent domain is inconsistent with the notion of full indemnity.[7] The mere act of the Government's taking may cause the condemnee to sustain real losses or costs that are not compensable by the measure of market value—for example, moving or relocation costs, brokerage fees, legal expenses, increased cost of financing or renting a new dwelling, fencing in an area when there has been a partial taking, loss of

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* 409 U.S. 488 (1973).

1. 1 P. Nichols, Law of Eminent Domain § 1.11 (rev. 3d ed. 1973). For an overview of the nature and origin of eminent domain law, see id. §§ 1.12-.4.

2. Kohl v. United States, 91 U.S. 367, 371 (1875).

3. U.S. Const. amend. V. The Supreme Court has made compensation a requirement of due process, binding on the states through the fourteenth amendment. Griggs v. Allegheny County, 369 U.S. 84 (1962); Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).

4. The "hold-up" price reflects speculation as to what the Government can be forced to pay. United States v. Cors, 337 U.S. 325, 334 (1949). See text accompanying notes 21-27 infra.

5. Monongahela Navigation Co. v. United States, 148 U.S. 312, 326 (1893).

6. United States v. Certain Property, Borough of Manhattan, 388 F.2d 596 (2d Cir. 1968).

7. J. Bonbright, Valuation of Property (1937); Bigham, "Fair Market Value," "Just Compensation" and the Constitution: A Critical View, 24 Vand. L. Rev. 63 (1970); Johnston, "Just Compensation" For Lessor and Lessee, 22 Vand. L. Rev. 293 (1968); Comment, Eminent Domain Valuations in an Age of Redevelopment: Incidental Losses, 67 Yale L.J. 61 (1957).

income, loss of good will, loss of rental due to anticipated taking and loss of profits. However difficult it may be for a court to endorse full indemnity as the measure of just compensation, there are cases where restoring the condemnee to the position he was in before the taking can justifiably exceed fair market value without subjecting the Government to payment of "hold-up" value. Two such cases were recently before the Supreme Court.

In *Almota Farmers Elevator & Warehouse Co. v. United States*,[8] the Supreme Court offered an unambiguous directive by holding that when the Government condemns a leasehold, just compensation to the lessee must include the value of the improvements erected by the lessee, which is to be determined by their useful life regardless of the lease term.[9] However, before any tribunal had an opportunity to implement *Almota*, the Court on the same day narrowed the scope of just compensation in *United States v. Fuller*.[10] By refusing to allow a jury to consider the availability of grazing permits on nearby public land in determining just compensation, even though the permits were not disturbed during the condemnation proceedings,[11] the Court in *Fuller* cast doubt upon the prospects for evenhanded application of the just compensation doctrine. Although the standard established in *Almota* would seem to be fair and workable, by departing from that standard in *Fuller*, the Court appears to have created a double standard in eminent domain law where the condemned land abuts public land.

II. BACKGROUND

To obtain land for a flood control and reservoir project, the United States Government in September, 1967, instituted an eminent domain proceeding[12] to acquire title to 920 of 1280 acres of land owned by Chester and Maxine Fuller. At the time of the proceeding the Fullers operated a "cow-calf" ranch[13] on their own land, on an adjacent 12,027 acres of land which they leased from the state of Arizona, and on 31,461 acres of federal land for which the Fullers held grazing permits issued under the Taylor Grazing Act.[14]

Fuller raised the question of whether the measure of compensation for land taken by the United States includes the value attributable to grazing permits on adjoining federal land. The district court instructed the jury to consider the availability and accessibility of public lands in the condemnation award so long as consideration was also given to the possibility of the withdrawal of the permits at any time without compensation.[15] On this basis the jury returned a verdict fixing $350,000 as just compensa-

8. 409 U.S. 470 (1973).

9. Id. at 473.

10. 409 U.S. 488 (1973).

11. Id. at 493.

12. The action was brought under the authority of the Declaration of Taking Act, 40 U.S.C. §§ 258a-258f (1970), and the Flood Control Act, 33 U.S.C. §§ 701-09 (1970).

13. A "cow-calf" ranch is a year-round cattle operation in which a breeding herd is maintained to produce a yearly crop of calves. It differs from a "steer" operation in which a rancher purchases steers each year, fattens them until the food runs out and then sells them for slaughter. A "cow-calf" ranch is more profitable than a "steer" operation, but is dependent on a constant source of food and water. 409 U.S. at 488; Brief for Respondents at 2-3, United States v. Fuller, 409 U.S. 488 (1973).

14. 43 U.S.C. §§ 315-16 (1970).

15. The relevant portion of the jury charge at issue is as follows:

> [R]eference has been made to grazing permits held by the defendants on public land. You are instructed that such permits are mere licenses which may be revoked and are not compensable as such. However, if you should determine that the highest and best use of the property taken is a use in conjunction with those permit lands, you may take those permits

tion for the 920 acres.[16] The Government appealed, arguing that compensation should not include the value attributable to the proximity of the Fuller land to public grazing land.[17] The Court of Appeals for the Ninth Circuit affirmed the judgment.[18] The Supreme Court reversed in a five-to-four decision holding that the fifth amendment does not require compensation for any value added by revocable grazing permits.[19]

III. APPLICABLE CASE LAW

Justice Rehnquist, writing for the majority in *Fuller*,[20] based his decision on two lines of cases. He first cited *United States v. Cors*[21] and *United States v. Miller*[22] for the proposition that the Government does not have to pay for an increment in value created as a result of government activity. In *Cors* the Court held that just compensation paid to the owner of a tugboat requisitioned by the Government during World War II did not include the increased market value created by the Government's need.[23] The requisition was pursuant to a statute authorizing the President to take such action during a state of national emergency.[24] The Court awarded compensation based upon the tug's market value before a state of national emergency had been declared in 1939. Justice Douglas stated that during a national emergency "the demand of the government for an article or commodity often causes the market to be an unfair indication of value."[25] In refusing to pay the 1942 market value of the tug, the Court noted that it would be unfair for the Government "to pay the enhanced price which its demand alone [had] created."[26] Justice Douglas reasoned that this enhanced value, which he labelled the "hold-up" value,[27] was not within the definition of market value.

The *Cors* decision turned in part upon a statute that was limited to a state of national emergency, which gave rise to the circumstances necessitating the taking. The denial of current market value was inextricably intertwined with this unique statute and the Government's simultaneous wartime acquisition of equipment. Thus the *Fuller* majority's reliance on *Cors* was misplaced since the increased value at issue in *Fuller*, based on the availability of Taylor permits, was not analogous to the circumstances of *Cors*, which involved an increased value created by the governmental need for tugboats during a period of national emergency.

In *Miller* the Court held the measure of compensation for land that was within the scope of a government project did not include the increase in value created by the

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into consideration in arriving at your value of the subject land, keeping in mind the possibility that they may be withdrawn or cancelled at any time without a constitutional obligation to pay the compensation therefore . . . . In fixing the fair market value of the fee land being taken and the compensation to be awarded, you are not to award defendants any compensation for the land owned by the United States or the State of Arizona.

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

16. The opinion of the United States District Court for the District of Arizona is unreported.

17. The government, using its own basis for valuation, had reached a figure of $135,000. 442 F.2d at 505.

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

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

20. Justice Rehnquist was joined by Justices Blackmun, Burger, Stewart and White.

21. 337 U.S. 325 (1949).

22. 317 U.S. 369 (1943).

23. 337 U.S. at 333.

24. The applicable statute was § 902 of the Merchant Marine Act of 1936. 46 U.S.C. § 1242 (1970).

25. 337 U.S. at 333.

26. Id.

27. Id. at 334.

government's plan, necessitated by imminent flooding, to relocate railroad tracks.[28] However, the Court created an exception to this general rule where the land to which value was added by a public project was outside the original scope of the project but later taken.[29] The increased value at issue in *Fuller* was created neither by a government project nor condemnation action, but by a permit allowing Fuller to use adjacent government land. Thus, to the extent that the Government "created" any increment in market value in *Fuller*, it did so in a way which distinguishes *Fuller* from both *Cors* and *Miller*, and obviates the possibility of the Government's having to pay the "hold-up" value Justice Douglas referred to in *Cors*.

The second line of cases relied on by the Court was *United States v. Rands*[30] and *United States v. Twin City Power Co.*,[31] which held that when taking waterfront land, the Government need not compensate for an increment of value attributable to access to navigable waters. The condemnee in *Rands* owned land on the Columbia River, which Congress had condemned as part of a plan for the development of the river. The Court, relying on the Government's "unique position . . . in connection with navigable waters,"[32] denied compensation for the land's additional value as a potential port site. Reasoning by analogy in *Fuller*, Justice Rehnquist felt *Rands* was controlling because "[i]f . . . the Government need not pay for value which it could have acquired by exercise of a servitude arising under the commerce power, it would seem *a fortiori* that it need not compensate for value which it could remove by revocation of a permit for the use of lands which it owned outright."[33] In *Twin City* the condemnee owned land on the Savannah River which it hoped to use for a hydroelectric power plant, but which was subsequently condemned by Congress for a flood control project. In arriving at the appropriate measure of compensation, the Court declined to include the additional value of the land as a potential power plant site.[34]

On the basis of the above authorities the majority in *Fuller* articulated a "general principle that the Government as condemnor may not be required to compensate a condemnee for elements of value which the Government has created, or which it might have destroyed under the exercise of governmental authority other than the power of eminent domain."[35]

In his dissenting opinion in *Fuller*,[36] Justice Powell argued that the majority had diluted the meaning of just compensation under the fifth amendment. He agreed with the district court's jury instruction and objected to the majority's application of the existing case law. Justice Powell limited the *Cors* and *Miller* cases to "support only the modest generalization that compensation need not be afforded for an increase in market value stemming from the *very Government undertaking* which led to the condemnation."[37] He also confined the reasoning of *Rands* and *Twin City* to "cases involving the Government's 'unique position' with regard to 'navigable waters,' "[38] first, because "they cut sharply against the grain of the fundamental notion of just compensation, that a person from whom the Government takes land is entitled to the market value, including location value, of the land,"[39] and second, because they have since been overruled by Congress.[40]

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28. Id. at 377.
29. Id. at 376.
30. 389 U.S. 121 (1967).
31. 350 U.S. 222 (1956).
32. 389 U.S. at 122.
33. 409 U.S. at 492.
34. 350 U.S. at 225-26.
35. 409 U.S. at 492.
36. Justice Powell was joined by Justices Brennan, Douglas and Marshall.
37. 409 U.S. at 499 (emphasis added).
38. Id. at 500.
39. Id.
40. 33 U.S.C. § 595a (1970); see text accompanying note 46 infra.

The *Rands* and *Twin City* cases relied on by the majority are distinguishable from *Fuller* primarily on the basis of the Government's unique power in relation to navigable waters. Pursuant to the commerce clause,[41] Congress may regulate interstate commerce[42] and enforce its dominant servitude over navigable streams, "which extends to the entire stream and stream bed below the ordinary high-water mark."[43] Furthermore, the power which Congress may exercise is exclusive and "can completely preempt, leaving no vested private claim that constitute[s] 'private property' within the meaning of the Fifth Amendment."[44]

The Supreme Court's interpretation of the power vested in Congress by the commerce clause has created an exception to the fifth amendment just compensation requirement. Because it is an exception, it should not be extended by analogy to cases such as *Fuller,* which do not involve federal power over navigable waters.[45] *Rands* and *Twin City* present very different factual situations from *Fuller.* The additional value at issue in these cases concerned a future use (potential port site or power plant site) in conjunction with a navigable river that the Government could regulate. Such future use rendered speculative any attempt to estimate market value. The facts of *Fuller,* on the other hand, show a current use of private property with government property, through the Taylor permit, with no question raised as to value for potential use. Finally, and most importantly, in 1970 Congress overruled the result in the *Rands* decision by a statutory enactment providing that in the taking of land contiguous to navigable streams, the compensation should be the fair market value based upon all reasonable use for the property, including any use which is "dependent upon access to or utilization of navigable waters."[46]

IV. FAIR MARKET VALUE

The majority and the dissent in *Fuller* agreed that a condemnee in an eminent domain proceeding should receive the fair market value of his property as just compensation. In *United States v. Reynolds*[47] the Court articulated the fifth amendment just compensation requirement as "the full monetary equivalent of the property taken."[48] The Court further stated that "[t]he owner is to be put in the same position monetarily as he would have occupied if his property had not been taken."[49] In addition, the concept of "fair market value" was defined in *United States v. Miller* as "what a willing buyer would pay in cash to a willing seller."[50] The effect of this broad measure is to include all elements of value, such as location and permit rights to neighboring land, which the parties normally perceive as enhancing the worth of the property.[51]

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41. U.S. Const. art. I, § 8.

42. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824).

43. 389 U.S. at 123. Compensation must be paid, however, when land above the high-water mark is taken. United States v. Kansas City Life Ins. Co., 339 U.S. 799 (1950).

44. 350 U.S. at 227.

45. As Justice Powell pointed out in his dissent, "these are water rights cases and nothing more." 409 U.S. at 500 n.3.

46. 33 U.S.C. § 595a (1970). In fact, the statutory language used by Congress is nearly identical to the jury charge at issue here. See note 15 supra. The point was raised only incidentally in respondent's brief and was not discussed by the Court. See Brief for Respondents at 17, United States v. Fuller, 409 U.S. 488 (1973).

47. 397 U.S. 14 (1970).

48. Id. at 16 (footnotes omitted).

49. Id.

50. 317 U.S. at 374.

51. A general rule to be followed in determining what a willing buyer would consider is the following:

In *Fuller* the Government argued, and the majority agreed, that any value added to Fuller's property by Government land derived solely from the fact that Fuller held Taylor grazing permits. This, however, ignores the strategic location in the middle of public grazing land of the Fuller property itself. Such a location would be a significant factor in determining what a willing buyer would pay, since any buyer would have the same opportunity as Fuller to obtain a Taylor grazing permit. In adopting the Government's position, the majority failed to address itself to the favorable location of the Fuller land, which, as the dissent pointed out, is "the central fact."[52]

V. VALUATION BASED ON LAND USE

For forty years the Supreme Court has adhered to a fundamental principle of the law of eminent domain that just compensation includes all elements of value. The theory was first established in *Olson v. United States*,[53] in which the Court recognized that valuation may include the fact that the most profitable use of a particular parcel can be made only in combination with lands owned by other private parties.[54] In *Fuller* an exception to this principle has been created where the parcels to be aggregated with the taken land are owned by the United States and used by the condemnee under a government permit. The exception is predicated on the theory that in eminent domain proceedings the Government does not have to pay for an increment of value it creates.[55] Justice Rehnquist reasoned that in *Fuller* the Government created the value through its ownership of the adjacent grazing lands and the availability of those lands through Taylor permits.[56] Since the Government could destroy this value by revoking the permits, he concluded that the enhanced value of the Fuller land was not proper for consideration by the jury.[57]

> [W]hatever in its location, surroundings, and appurtenances contributes to the availability of land for valuable uses is considered proper evidence to place before the trier of fact. Generally speaking, prevailing rules permit proof of all the varied elements of value; that is, all facts which the owner would properly and naturally press upon the attention of a buyer with whom he is negotiating a sale, and all the facts which would naturally influence a person of ordinary prudence desiring to purchase.

4 P. Nichols, Law of Eminent Domain § 12.2[3] (rev. 3d ed. 1971).

52. 409 U.S. at 503. The "willing buyer/willing seller" interpretation of fair market value is used by the Internal Revenue Service to determine the value of a decedent's estate:

> The value of every item of property includible in a decedent's gross estate . . . is its fair market value at the time of the decedent's death . . . . The fair market value is the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of relevant facts.

Internal Revenue Service Regulation, 20.2031-1(b). It would be both inconsistent and inequitable for the Government to tax Fuller for the favorable location of his property, as embodied in the fair market value definition of the Internal Revenue Service Regulation, but refuse to include that value in a condemnation award.

53. 292 U.S. 246 (1934).

54. Justice Rehnquist summarized *Olson:*

> This Court has held that generally the highest and best use of a parcel may be found to be a use in conjunction with other parcels, and that any increment of value resulting from such combination may be taken into consideration in valuing the parcel taken.

409 U.S. at 490.

55. See United States v. Miller, 317 U.S. 369 (1943).

56. 409 U.S. at 492.

57. Id.

At least three responses can be made to Justice Rehnquist's reasoning. First, the Government has not created value by the activity necessitating condemnation, and therefore is not faced with paying for the "hold-up" value that its activity helped to create, as in *Cors*. Second, to a great extent the value added to the Fuller property derives from the nature of the public grazing lands and only secondarily from the Government's action in making them available through Taylor permits. The value of these lands cannot be realized without the proximity of the privately owned base land. Thus, the instrumentality of the Taylor grazing permit, the "government's action," is insufficient by itself to "create" the value for which the Fullers seek compensation.

The final response involves the question of use. If the property owners in *Rands* and *Twin City* had actually put their land to the use contemplated (a port and hydroelectric plant), the Government presumably would have had to compensate for the increased value of the land arising from the improvements.[58] Since the question of improvements on the Fullers' condemned land was not raised, the Court was free to treat the Fullers' land by analogy to the condemned property in *Rands* and *Twin City*. However, value added by improvements may be likened to value added by use; in both *Rands* and *Twin City* any improvements would necessarily have been made in conjunction with the projected use. Both improvements and use would, in turn, have been inextricably related to increased market value. In *Fuller* the use alone, assuming no improvements on the condemned land, created the added value. Under the Court's analogy to *Rands* and *Twin City*, however, the Fullers were not to be compensated merely because the use that created the added value was possible without improvements. In both instances—the hypothetical *Rands* and *Twin City* uses and the *Fuller* case—there would be a real increase in market value, one not compensable under the *Fuller* holding.

The principle articulated in *Olson* requires that valuation account for the best use of the land, which may be a use in combination with surrounding property. Here, the best use of the Fuller land is in the operation of a "cow-calf" ranch, which is made possible because of access to year-round grazing on public rangelands abutting Fuller's property. The *Olson* Court noted "the fact that the most profitable use of a parcel can be made only in combination with other lands does not necessarily exclude that use from consideration if the possibility of combination is reasonably sufficient to affect the market value."[59] Because of his use of the rangelands in conjunction with his own land over a period of years, Fuller would meet the *Olson* criterion of "reasonable possibility" of aggregated use. The *Olson* Court relied on the fact that the fair market value a willing buyer would pay a willing seller would indeed reflect this increased value due to aggregation. Just compensation in these circumstances was "the amount that in all probability would have been arrived at by fair negotiations between an owner willing to sell and a purchaser desiring to buy."[60] If a private owner abutted Fuller, and if Fuller had leased grazing rights from that owner, Fuller would have been allowed to aggregate those parcels under the best use doctrine. To create an exception to the best use principle in cases where the Government owns some of the property would be penalizing an owner for the location of his land.

The *Fuller* majority consistently confused the role of the Government as condemnor with the role of the Government as property owner. As an owner of property the Government could lease its land through a device such as a Taylor permit. If the permit were revoked, the permit holder would not have a claim for relief under the terms of the statute. Moreover, as a property owner the Government could change the use of its property, assuming no nuisance were created, without incurring any

58. Almota Farmers Elevator & Warehouse Co. v. United States, 409 U.S. 470 (1973).
59. 292 U.S. at 256.
60. Id. at 257.

liability to abutting landowners. Thus, if the rangelands were flooded instead of the Fuller land and the Taylor permit consequently extinguished, the Fullers would not have a claim for relief. Similarly, if the Fullers leased grazing rights from an abutting private owner and that land were taken through an eminent domain proceeding, the Fullers would be without recourse. Thus the Government may be treated as any private property owner until it asserts its sovereign powers of eminent domain. But when the Government acts as condemnor, and not as property owner, it must then pay the fair market value of the property, which in this case should include the value attributable to the best use through aggregation. The best use valuation principle of *Olson* should not be subjected to an exception because the Government owns the abutting property.

VI. TAYLOR GRAZING PERMITS

A. Legislative Intent

The legislative history of the Taylor Act reflects a desire on the part of Congress to aid the livestock industry and prevent the misuse of the rangelands.[61] The passage of the original Taylor Grazing Act in 1934[62] was the culmination of a fifteen-year political battle over federal regulation of public rangelands. After years of unregulated use, government lands had been damaged by overgrazing, erosion and the destruction of the natural forage. The combination of drought, poor forage and low prices was destroying the livestock industry.[63] The avowed purpose of Congress in passing the Taylor Act was to "provide the most beneficial use of the public grazing range,"[64] thereby implementing its policy of stabilizing the livestock industry for the benefit of both individual ranchers and the consuming public.

The decisive factor in *Fuller* is the existence of grazing permits issued pursuant to the Taylor Act.[65] The majority viewed these permits as an element of government-created value that could be revoked without compensation. However, Justice Rehnquist quoted the Act out of context when he stated that "its provisions 'shall not create any right, title, interest, or estate in or to the lands.' "[66] Notwithstanding this limitation, the provisions of the Taylor Act do create valuable rights, and it is merely "the *issuance* of a permit pursuant to the provisions of this chapter [which] shall not create any right, title, interest, or estate in the lands."[67] The "right" that the statute denies is an interest the permittee might possibly claim in fee. The legislative policy intended that the permittee would have no right to a claim of adverse possession in these lands.[68] However, there is no indication of a congressional intent that the permits are to be denied value altogether.

Permits granted under the Taylor Act create real value to a livestock rancher, regardless of whether or not they can be narrowly classified as property rights. The fact that grazing permits can be revoked without any right to compensation does not

61. The history of the Taylor Act is collected in P. Gates, History of Public Land Law Development 607-34 (1968).

62. 48 Stat. 1269; as amended 43 U.S.C. § 315 (1964).

63. See Gates, supra note 61.

64. Hatahley v. United States, 351 U.S. 173, 177 (1956).

65. 43 U.S.C. § 315 et seq. (1970).

66. 409 U.S. at 489. It should be noted that the Government phrased the Taylor Act exactly as Justice Rehnquist did. Brief for Government at 10-11, United States v. Fuller, 409 U.S. 488 (1973). This inaccuracy should have been attacked by the respondents during oral argument.

67. 43 U.S.C. § 315b (1970) (emphasis added). Justice Rehnquist, it is interesting to note, admitted *sub silentio* that the Taylor permit does have value, since under his analysis the revocation of the permit would destroy the government-created value.

68. See Gates, supra note 61 at 629-30.

render the permits valueless. Although courts have construed the permits to be mere privileges[69] revocable without compensation, interests created by the permits have nevertheless been accorded protection. In *Red Canyon Sheep Co. v. Ickes*,[70] for example, the court held that the holder of Taylor permits was entitled to enjoin the Secretary of the Interior from exchanging his permit lands in an illegal manner.[71] The court offered the following rationale:

> We recognize that the rights under the Taylor Grazing Act do not fall within the conventional category of vested rights in property. Yet, whether they be called rights, privileges, or bare licenses, or by whatever name, while they exist they are something of real value to the possessors and something which have their source in an enactment of the Congress.[72]

Interpreting a provision of the Taylor Act relating to preferences regarding qualification for a permit, the court in *McNeil v. Seaton*[73] cited *Red Canyon* with approval, noting that ranchers qualifying for permits "definitely acquired 'rights.' "[74] In *Oman v. United States*[75] the court allowed a permit holder to sue government agents under the Federal Tort Claims Act because the agents had wrongfully permitted third party livestock operators to use the land on which the plaintiff held a Taylor permit.[76] And finally, the court in *Sproul v. Gilbert*[77] held that rights under the Taylor Act were sufficiently possessory to be taxable within the meaning of a statute imposing a tax on property of the United States held under lease.

An element common to the foregoing cases, present in the *Fuller* situation also, is the unrevoked status of the permits. In 1967 when the eminent domain proceedings were instituted, the Fuller permit remained unrevoked. Since over three hundred acres of the Fuller land is unaffected by the government taking, it is reasonable to expect that the permit will continue to be granted.[78]

The value of the Taylor grazing permit is further underscored by the provision in the Range Code[79] which makes the permit transferable, either as an appurtenance to the base property or to entirely new property. Where base property is transferred, the permit follows unless the grantor expressly reserves the permit by transferring it to other property owned by him which qualifies as base property.[80] Thus, possession of a Taylor permit creates real value for a rancher by enhancing the saleability of his land, which is a critical factor in an eminent domain proceeding utilizing the fair market value as the appropriate measure of compensation.

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69. Osborne v. United States, 145 F.2d 892, 896 (9th Cir. 1944). There are two exceptions where payment of compensation is required: 1) the permittee is entitled to an administrative compensation when his land is taken for defense purposes, 43 U.S.C. § 315q (1970); 2) the permittee may be compensated for the value of improvements which he has made on the permit land, 43 U.S.C. § 315c (1970).

70. 98 F.2d 308 (D.C. Cir. 1938).

71. Id. at 324.

72. Id. at 315.

73. 281 F.2d 931 (D.C. Cir. 1960).

74. Id. at 934.

75. 179 F.2d 738 (10th Cir. 1949).

76. The court reasoned that so long as the permits were unrevoked, the Government had an affirmative duty to safeguard the permits against third parties and could not itself infringe on the grazing privileges. Id. at 742. Such duty goes directly to the preservation of the value of the lands as grazing acreage for the permittee.

77. 226 Ore. 392, 359 P.2d 543 (1961).

78. Neither the Court nor the parties in their briefs discussed the basis for the granting or revoking of Taylor permits.

79. 43 C.F.R. § 4110 (1973). The Range Code governs the administration of the Taylor Act.

80. 43 C.F.R. § 4115.2-2 (1973).

Justice Rehnquist's interpretation of the Taylor Act could frustrate the congressional purpose of preventing abuse of the public rangelands by the cattle industry. If the permit creates no interest in the land for its holder, permit holders might cease to care for the land and overgraze their cattle, resulting in the very evil legislated against forty years ago. For the Government on the one hand to encourage ranchers to take advantage of Taylor permits in order to effectuate the legislative policy of preserving the rangelands, and on the other hand to penalize these ranchers in the event of a condemnation proceeding because they have dealt with the Government, is inequitable to the individuals involved and destructive of the salutary policies behind the Taylor Act. Thus Taylor permits must be considered of value if only to insure the incentive necessary to effectuate congressional intent.

B. The Double Standard in Eminent Domain Law

On the same day the Supreme Court decided *Fuller*, it again split five to four in *Almota Farmers Elevator & Warehouse Co. v. United States*.[81] In that decision, Justice Stewart, joining the justices who formed the *Fuller* dissent, concluded that the compensable value of improvements on a leasehold is the market value that a willing buyer would pay for such improvements. In appraising the lessee's improvements, the Court held that the Government must consider the fact that the lessee held the land under a series of unbroken leases since 1919. The railroad which leased the property had an interest in keeping Almota as lessee because it shipped the grain Almota stored. The Court rejected the argument posited by Justice Rehnquist in dissent that the mere expectation of lease renewal does not amount to a compensable property right.[82] The Taylor permit in *Fuller* presents a situation analogous to the *Almota* expectation of lease renewal. Both are expected to continue, and yet in *Fuller* the Court disallowed consideration of the existence of the permit in determining just compensation.

The only explanation of the Court's failure to apply the *Almota* standard in valuating the Fuller property, and of the seeming inconsistency between *Almota* and *Fuller*,[83] is the application of a special rule to the case where the enhanced value of condemned property results from its proximity to government land. But such a rule would impose on condemnation law an arbitrary right-privilege distinction[84] and burden unfairly anyone whose neighbor happened to be the Government. By reasoning that the Taylor permit constitutes a revocable privilege, gratuitously bestowed by the Government and therefore not to be considered in a valuation of land, the *Fuller* majority resorted by implication to a distinction that the Court has recently abandoned in other areas of law.[85] Thus it has been held that the "privilege" of welfare benefits cannot be terminated without a hearing;[86] that the "privilege" of public employment cannot be arbitrarily withdrawn;[87] and that the "privilege" of a license to practice law cannot be revoked without regard to due process.[88] The receipt of government largess should not, therefore, provide a basis for limiting a landowner's constitutional right to just compensation.[89]

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81. 409 U.S. 470 (1973).

82. Id. at 483.

83. See note 91 infra.

84. See K. Davis, Administrative Law Treatise § 7.13 (3d ed. 1972).

85. Board of Regents v. Roth, 408 U.S. 564, 571 (1972); Graham v. Richardson, 403 U.S. 365, 374 (1971); Bell v. Burson, 402 U.S. 535, 542 (1971). See Van Alstyne, The Demise of the Right-Privilege Distinction in Constitutional Law, 81 Harv. L. Rev. 1439 (1968).

86. Goldberg v. Kelly, 397 U.S. 254 (1970).

87. Greene v. McElroy, 360 U.S. 474, 496 (1959).

88. Schware v. Board of Bar Examiners, 353 U.S. 232 (1957).

89. Pickering v. Board of Educ., 391 U.S. 563 (1968). See generally Note, Unconstitutional Conditions, 73 Harv. L. Rev. 1595 (1960).

Because Fuller acquired a Taylor permit in order to benefit his own business enterprise, and thereby furthered the federal policy of proper and economical use of the rangelands,[90] he has been asked to forfeit his fifth amendment right to just compensation. By refusing to follow its own standard articulated in *Almota*, the Court has effectively imposed a special rule as a condition precedent to the grant of a Taylor permit. The just compensation measure of *Almota* is an interpretation of the right guaranteed by the fifth amendment in the event of public condemnation of private land; the special rule framed by the *Fuller* Court offers something less than this constitutional right to just compensation as measured by what a willing buyer would pay to a willing seller.

VII. CONCLUSION

The Supreme Court's latest statements on just compensation in *Almota* and *Fuller*, rather than effecting consistency and fairness for the condemnee, will engender an arbitrary dichotomy in eminent domain decisions depending upon whether land adjacent to the condemned property is government-owned.[91] The Court has eschewed location value of land, the standard touchstone in this area, in a case that does not call for a departure from previous case law. The jury charge that the Supreme Court and the Government found objectionable,[92] the fair market value of land, does protect the Government because the value as determined by a willing buyer and willing seller would necessarily include any risk either of condemnation or revocation of the Taylor permit. Furthermore, the jury charge, as framed, was adequate protection for the Government from any type of "hold-up" value and from any undue burden on government activity, which would necessitate condemning private land used in conjunction with public land. The charge struck a reasonable balance between government interest and the interest of a private property owner consistent with the standard of what a willing buyer would pay to a willing seller.

In attempting to reconcile the broad holding of *Almota* with *Fuller*, one can only conclude that the Court distinguished the two cases on the fact that the condemned land in *Almota* abutted private land, whereas Fuller's land abutted public land. There is not present in *Fuller* any danger of the Government's having to pay "hold-up" value sufficient to justify application of this inconsistent standard. If the *Fuller* decision is viewed as precedent in this area, a rancher might well hesitate before seeking a Taylor permit, for under the *Fuller* decision just compensation, should his land be condemned, would be limited to the value of the land excluding its location and best use, a value approaching the scrap value which the Court rejected in *Almota*.[93]

Although Justice Rehnquist stated in *Fuller* that "[t]he constitutional requirement of just compensation derives as much content from the basic equitable principles of fairness . . . as it does from technical concepts of property law,"[94] the majority

90. See text accompanying notes 61-64 supra.

91. Justice Stewart was the only one of the nine justices who could reconcile *Almota* with *Fuller*. 409 U.S. at 476 n.3. Since the dissent in *Fuller* was comprised of the same four justices who had joined Justice Stewart in the *Almota* majority, the disparity in eminent domain law which must inevitably result from the double standard generated by these decisions is due solely to the reasoning of one justice, and not a majority of the Court.

92. See note 15 supra.

93. Although the Court used the concept of market value to determine the monetary equivalent of just compensation in both *Almota* and *Fuller*, there is wide disparity in the compensation received by the two condemnees. Almota received $274,625 for nearly twenty-three acres of land. Fuller received $135,000 for 920 acres of land. The figures standing alone are not necessarily conclusive because each piece of land is unique. Since *Fuller* has been remanded, the award may well be changed.

94. 409 U.S. at 490.

nevertheless interpreted a law so narrowly as to deny substantial justice to a property owner whose only sin was reliance on the market value of his land as affected by its abutment to public grazing land. Surely the preferable approach for the Supreme Court to have taken was that expressed by the majority in *Almota*—the condemnee should not be in a better position than if it had sold to a private buyer, "[b]ut its position should surely be no worse."[95]

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95. 409 U.S. at 478.