Offsetting Special Benefits and the Larger Parcel Test in Eminent Domain

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In the past several years there has been increased activity in the field of eminent domain in the state of Washington. The purpose of this article will be to examine several of the problems arising from a partial-taking of property in a situation wherein there are physically separated tracts of land having the same owner.[1] Solution of these problems requires a consideration of general benefits, special benefits, and the so-called "larger parcel test."

The Washington property owner is entitled to "just compensation."[2] The amount of just compensation is determined by adding to the value of the property taken, the damages to the remaining property (severance damages)[3] and deducting any special benefits which accrue to the remaining property because of the public improvement.[4]

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[1] Several years ago the Washington State Highway Commission initiated studies to ascertain the result freeways and highways had upon the values of remaining property where a portion of the owner's property was condemned and where the remaining properties were situated abutting or near freeway interchanges. As a result of these studies, the State of Washington has vigorously contended that new freeway construction throughout Washington has, on numerous occasions, resulted in special benefits, and that the value of the tract taken plus the severance damages had been more than offset by increases of value accruing to the remaining property. Additional data indicating the results of national studies about highway benefits can be obtained by reference to Highway Research Board Publications (January, 1964). Especially of note is the national survey made by Dr. David Levin, Bureau of Public Roads.

[2] "No private property shall be taken or damaged for public or private use without just compensation having been first made, or paid into court, for the owner . . . ." WASH. CONST. art. 1, § 16, amend. 9 (1920).

[3] State v. Calkins, 50 Wn.2d 716, 314 P.2d 449 (1957).

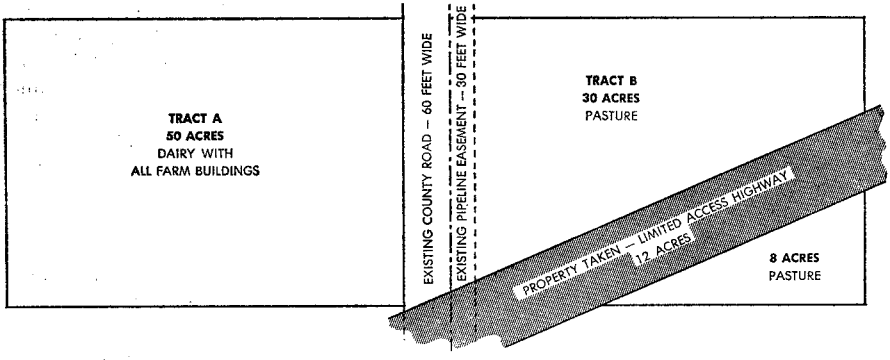
[4] "The order [adjudicating public use] shall direct that determination be had of the compensation and damages to be paid all parties . . . together with the injury, if any, caused by such taking and appropriation to the remainder of the lands . . . after offsetting against any and all such compensation and damages the special benefits, if any, accruing to such remainder by reason of the appropriation and the use . . . ." WASH. REV. CODE § 8.04.080 (1955) [hereafter cited as RCW]; State v. Fox, 53 Wn.2d 216, 332 P.2d 943 (1958); Lewis v. City of Seattle, 5 Wash. 741, 32 Pac. 794 (1893).

As an illustration, assume that a property owner owns two tracts of land, A and B, separated by an intervening property interest or water barrier. A portion of tract B is condemned, and the condemning agency claims that as a result of the condemnation, special benefits will accrue to the remaining portion of tract B and *all* of tract A.[5] Two basic questions are presented. First, are the benefits alleged to result from the contemplated improvement to the remaining land special or general? Second, if they are special, may such benefits be offset against the damages accruing to both tract A and the remaining portion of tract B? The first question involves the problem of general versus special benefits and the second involves the applicability of the "larger parcel test."

Both questions were recently presented to the court and jury in *United States v. Certain Parcels of Land in King County, Washington, Southcenter Corporation, et al.*[6] The State of Washington utilized the federal court for a test case because a combined state and federal freeway project in western Washington was involved.[7]

When property is taken by a railroad or other private corporation, however, the property owner is entitled to the value of the land taken and damages to the remaining land *without* any deduction for special benefits. Seattle & Montana R.R. Co. v. Roeder, 30 Wash. 244, 70 Pac. 498 (1902); Enoch v. Spokane Falls & No. Ry. Co., 6 Wash. 393, 33 Pac. 966 (1893).

[5] LARGER PARCEL: Before taking — 100 acres. After taking — 88 acres.



[6] United States District Court, Civil No. 6010 (W.D. Wash. 1965).

[7] Since both freeways will be a part of the interstate highway construction program, the State Highway Commission proceeded under the provisions of federal legislation and requested the federal government to acquire these properties. FEDERAL

GENERAL VS. SPECIAL BENEFITS: Unfortunately, there is no clear line which distinguishes special benefits from general benefits. The usual test employed to distinguish between general and special benefits is based on an examination of the geographical relationship between the public improvement, the particular tract of land in litigation, and other property in the vicinity not located adjacent to or near the improvement.[8]

In all cases involving only the United States, special benefits may always be offset against the value of the property

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HIGHWAY ACT, 42 STAT. 212 (1921), as amended, 23 U.S.C. § 107(a) (1958); PUBLIC BUILDINGS, PROPERTY, AND WORKS, 40 U.S.C. § 288(a-e)(1931); 40 U.S.C. § 257 (1888).

The United States acting on behalf of the Washington State Highway Commission took immediate possession of the property and paid $2.00 into the registry of the court for the acquisition of the property to be condemned. The federal government is entitled to take immediate possession of the property. FEDERAL HIGHWAY ACT, 42 STAT. 212 (1921), as amended, 23 U.S.C. § 107(a) (1958). If the State of Washington had commenced this action in the state court, the state could not take possession of the property until there had been a judicial determination of just compensation and payment thereof. WASH. CONST. art. 1, § 16, amend. 9 (1920); State *ex rel.* Eastvold v. Yelle, 46 Wn.2d 166, 279 P.2d 645 (1955).

If essential interests of the federal government are concerned, federal substantive law governs unless Congress has made state laws applicable. Federal substantive law controls in federal highway condemnations. United States v. 93.970 Acres of Land, etc., 360 U.S. 328 (1959); United States v. Miller, 317 U.S. 369 (1943); See Miller, *Federal and State Condemnation Proceedings-Procedures and Statutory Background,* 14 VAND. L. REV. 1085 (1961); Berger, *When is State Law Applied to Federal Acquisitions of Real Property,* 44 NEB. L. REV. 65 (1965).

Procedural law is governed by FED. R. CIV. P. 71A, 28 U.S.C., in condemnation proceedings litigated in federal courts. DECLARATION OF TAKING ACT, 40 U.S.C. § 258 (1952); United States v. 93.970 Acres of Land, etc., 360 U.S. 328 (1959); 29A C.J.S. *Eminent Domain* § 209 (1965); See Nealy, *Some Historical and Legal Aspects of Rule* 71A(h) *in Federal Condemnation Proceedings,* 23 FED. B.J. 45 (1963). If a state's power of eminent domain is utilized, however, 71A(k) requires that local procedure be followed in assessing damages if substantive rights under local law are to be preserved. City of Ketchikan, Alaska v. Lot 5, etc, 130 F. Supp. 263, 264 (1st Div. Alaska 1955).

[8] "In ascertaining the tests by which to distinguish between deductible special and non-deductible general benefits, two fundamentally different standards have been applied by the courts: (1) In most of the cases a more or less geographical standard is applied; general benefits are defined as those which are enjoyed, not only by the property in litigation, but also by other property . . . while special benefits are defined as those peculiar to the property in litigation. (2) In another line of cases the sole criterion by which to ascertain whether a benefit is special or deductible is whether such benefit increases the value (sale or market value) of the property in litigation." ANNOT., 145 A.L.R. 7,49 (1943).

taken and the amount of severance damages.[9] In cases involving states, all states except two, Oklahoma and Iowa, permit benefits to be offset.[10] Many states, including Washington,[11] permit special benefits to be offset against both the award for the value of the property taken and the severance damages.[12] Most jurisdictions do not allow general benefits to be offset, although the land remaining to

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[9] Bauman v. Ross, 167 U.S. 548 (1897); United States v. 2,447.79 Acres of Land, etc., 259 F.2d 23 (5th Cir. 1958); United States *ex rel.* T.V.A. v. Indian Creek Marble Co., 40 F. Supp. 811 (E.D. Tenn. 1941).

[10] A.B.A. REP., COMM. ON CONDEMNATION AND CONDEMNATION PROCEEDINGS, p. 87 (1965).

[11] RCW 8.04.080 (1955); State v. Fox, 53 Wn.2d 216, 332 P.2d 943 (1958); Lewis v. City of Seattle, 5 Wash. 741, 32 Pac. 794 (1893).

[12] ANNOT., 145 A.L.R. 7 (1943); 3 NICHOLS, EMINENT DOMAIN § 8.6206 (4th ed. 1965); 18 AM. JUR. *Eminent Domain* § 299 (1938); 25 APPRAISAL JOURNAL 555 (1957), *but see* RCW 8.12.190 (1909) relating to assessments for improvements by Washington cities.

COMPUTING SEVERANCE DAMAGES: The formulas for computing the amount of severance damages if there is a partial-taking, complicated by a claim of offsetting benefits, deserve additional consideration.

Severance damage is compensable only when the portion taken and the damaged remainder constituted a single unit at the time of the taking. Sharp v. United States, 191 U.S. 341 (1903). The availability of severance damages, if there is a partial-taking, is determined by the same factors to be weighed in deciding the applicability of the "larger parcel test" discussed *infra,* p. 83. See Note, 42 MINN. L. REV. 106, 110 (1957); Comment, 8 STAN. L. REV. 113 (1955). See generally Comment, 3 WILLAMETTE L.J. 59 (1964) and Note, 8 BAYLOR L. REV. 354 (1956) noting the problems encountered for recovery of severance damages if the property is geographically non-contiguous before the taking; and Note, 72 YALE L.J. 392 (1962) observing the lack of just compensation for loss of "use" not reflected in market value computations of severance damages in partial-takings.

In partial-taking cases, compensation is awarded for the land taken, and severance damages are allowed for a depreciation in value of the remainder *caused by the separation of the part from the whole.* Puget Sound Power & Light Co. v. Public Util. Dist. No. 1, 123 F.2d 286, 290 (1940), *cert. denied,* 315 U.S. 814 (1941); McCORMICK, DAMAGES § 130 (1935). *Cf.* State v. Calkins, 50 Wn.2d 716, 314 P.2d 449 (1957).

There are three recognized formulas for measuring "just compensation" in partial-taking cases: (1) damages to remainder included in value of parcel taken, (2) the value of the part taken plus the damage to the remainder, and (3) the difference between the market value before and after the taking. See 1 ORGEL, VALUATION UNDER THE LAW OF EMINENT DOMAIN §§ 48-51 (1953).

The Washington court has apparently used formula No. 2, State v. Calkins, 50 Wn.2d 716, 720, 723-24, 314 P.2d 449, 451, 453 (1959) and formula No. 3, State v. Ward, 41 Wn.2d 794, 801, 252 P.2d 279, 282 (1953).

Whichever formula is applied, the computations of fair market value of the part taken and the amount of severance damages may have particular ramifications

the condemnee is enhanced in value.[13] The denial of a general benefit offset is founded on the rationale that other land in the immediate vicinity belonging to other owners whose property is not being acquired is also enhanced in value.[14]

The general rule appears to be that the burden of proving the existence and the amount of special benefits is upon the condemning agency because the condemning agency seeks to diminish the award which otherwise would be paid to the property owner.[15] Special benefits must be the direct and proximate result of the improvement; they must be actual, appreciable and not conjectural.[16]

The usual test employed to determine the amount of special benefits is based on an increase of value for any

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when special benefits are to be offset. See Note, 1960 U. ILL. L.F. 313, 322-25. Hence, it may be important for the court to carefully segregate the "taken" award from the severance damage award throughout the valuation computation by the trier of fact. *Cf.* Department of Public Works & Bldgs. v. Griffin, 305 Ill. 585, 137 N.E. 523 (1922); ANNOT., 147 A.L.R. 7, 121-22 (1943). In either case, judicious evaluation of the evidence to be introduced and precise jury instruction on the elements to be considered, should result in a fair award of "just compensation."

[13] The property owner is entitled to just compensation in condemnation cases. "Just compensation" is the net market value of the uncondemned tract after the severance. State v. Calkins, 50 Wn.2d 716, 720, 723-24, 318 P.2d 449, 451, 453 (1957). General, as well as special benefits, necessarily affect net market value, which is not realistically measured if evidence of general benefits cannot be used in the benefits-offset situation. This is a logical inconsistency meriting judicial re-examination. See Haar and Hering, *The Determination of Benefits in Land Acquisition,* 51 CAL. L. REV. 833 (1963). This evidentiary inconsistency was posed in: Note, 3 WILLAMETTE L.J. 28, 33-34 (1964), NOTE, 38 ORE. L. REV. 86,90 (1958), and Note, 2 WASH. L. REV. 192,196 (1927).

[14] ANNOT., 145 A.L.R. 7 (1943); A.B.A. REP., COMM. ON CONDEMNATION AND CONDEMNATION PROCEEDINGS, p. 87 (1965). See Comment, 10 OHIO ST. L.J. 74 (1949).

[15] 29A C.J.S. *Eminent Domain* § 184 (1965); 3 NICHOLS, EMINENT DOMAIN § 8.62 (4th ed. 1965); Kirkman v. State Highway Comm'n., 257 N.C. 428, 126 S.E.2d 107 (1962); *but see,* State v. Amunsis, 61 Wn.2d 160, 377 P.2d 462 (1963) where the Washington court, in a total taking situation, held that the condemning agency has the burden of going forward with the evidence of value. After the condemning agency satisfies the value evidence burden, it is a jury question on the probable effect of such evidence irrespective of which party offered it.

[16] Bauman v. Ross, 167 U.S. 548 (1897); 3 NICHOLS, EMINENT DOMAIN § 8.6203 (4th ed. 1965). Some Washington statutes require special findings on the amount of benefits. RCW 8.12.190 (1909), 87.03.140 (1921), and .145 (1923); State *ex rel.* Beecher v. Gilliam, 146 Wash. 6, 262 Pac. 138 (1927).

use to which the uncondemned land might be adapted.[17] A property owner may not claim that his remaining property has *not* been specially benefited by the condemnation merely because he has not seen fit to devote it to the highest and best use.[18] Nor may a railroad company claim that the straightening of a waterway would not benefit it because the railroad did not ship by water.[19]

No hard and fast rule can be given for determining whether a benefit is special or general. Each case must be determined in the context of its own factual situation. The following are recent cases dealing with the problem of special and general benefits. In *State ex rel. State Highway Commission v. Ballwin Plaza Corporation,*[20] the court held that the trial court erred in submitting for jury consideration as a special benefit the increased adaptability of the land for use as a shopping center because the improvement did not change the highest and best use of the property, which already was a shopping center. It was also held by the Nebraska court in another case that a condemnee did not receive a special benefit by reason of a drainage ditch enlargement because the ditch was available to carry away drainage from his land prior to the condemnation; no additional value was realized from the improvement.[21] In *McMahon v. Carroll County,*[22] the court held that property formerly two and one half miles from a paved highway was specially benefited when the new highway ran several hundred yards from the condemnee's home.

In *Spokane Traction Co. v. Granath,*[23] the Washington supreme court held that the building and the opening of a bridge for highway purposes was a special benefit to property abutting on the approach.

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[17] City of Vancouver v. Corporation of Catholic Bishop of Nisqually, 90 Wash. 319, 156 Pac. 383 (1916); Newell v. Loeb, 77 Wash. 182, 137 Pac. 811 (1913); Northern Pac. R.R. Co. v. City of Seattle, 46 Wash. 674, 91 Pac. 244 (1907).

[18] Northern Pac. R.R. Co. v. City of Seattle, 46 Wash. 674, 91 Pac. 244 (1907).

[19] Newell v. Loeb, 77 Wash. 182, 137 Pac. 811 (1913).

[20] 382 S.W.2d 633 (Mo. 1964).

[21] Enterprise Co. v. Sanitary Dist. No. 1, 176 Neb. 271, 125 N.W.2d 712 (1964).

[22] 384 S.W.2d 488 (Ark. 1964).

[23] 42 Wash. 506, 85 Pac. 261 (1906).

If the condemning agency condemns for a new road where none existed before, an example of a special benefit might be the potential suitability of the property owner's remaining property as a gas station site. On the other hand, if the benefit from the new road is the property owner's ability to drive more rapidly to work, the benefit is clearly general, shared by him with all other land owners in the vicinity of the new road.

The practical difficulty of determining whether or not a benefit is special arises when the factual pattern of the case presents a situation between the two extreme examples above. Each case will be decided on its own merits by the jury.

LARGER PARCEL TEST: Once the determination is made that the benefit in question is a special benefit, the next question presented is the extent to which that special benefit may be offset.

When the taking involves a part of a single tract only, a relatively simple issue is presented. However, there may be other tracts which in fact or in law conceivably could be considered so related to the tract immediately affected by the proposed public use to justify their inclusion in a larger parcel. If such a relationship is found, special benefits accruing to the larger parcel will be offset against the award for the taking and damaging by the public agency. In determining whether special benefits can be offset against the larger parcel or unit composed of multiple tracts, the courts employ a three-fold test, which may, for convenience, be referred to as the "larger parcel test."[24] Reduced to its simplest terms, the test requires a finding of:

1. unity of ownership,[25]
2. unity of use,[26] and

[24] See generally Barnes v. North Carolina Highway Comm'n., 250 N.C. 378, 109 S.E.2d 219 (1959); ANNOT., 145 A.L.R. 7, 116-22 (1943); 4 NICHOLS, EMINENT DOMAIN § 14.3 (3rd ed. 1962); SCHMUTZ, CONDEMNATION APPRAISAL HANDBOOK, pp. 85-89 (Prentice-Hall 1963).

[25] Ralph v. Hazen, 93 F.2d 68 (D.C. Cir. 1937).

[26] ANNOT., 6 A.L.R.2d 1197 (1949).

3. contiguity.[27]

All three elements should exist simultaneously and the failure to establish any one of them prevents offsetting special benefits against the larger parcel.

Of the three conditions, unity of ownership is usually the simplest in application, requiring only that the land in question have a common owner.[28] The unity of ownership requisite may be satisfied even if the tracts are acquired at different times.[29] However, the time of purchase of various tracts may be important in the consideration of the unity of use requirement.

The second requirement, unity of use, usually presents a more difficult problem than does unity of ownership. One tract of land must be used with the other tract of land. Although there is some federal[30] and Washington[31] authority to the contrary, the use must be a present use, not a use to which the property may be put in the future[32] to allow an offsetting benefit against the larger tract of land.

The fact that two tracts of land lie adjacent to one another does not necessarily mean that they have unity of use. Conversely, although the two tracts are not geographically contiguous, unity of use may still exist if the two tracts have been utilized as a single unit.[33] If the owner has used

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[27] Bauman v. Ross, 167 U.S. 548 (1897); 3 NICHOLS, EMINENT DOMAIN § 8.6203 (4th ed. 1965).

[28] Ralph v. Hazen, 93 F.2d 68 (D.C. Cir. 1937).

[29] United States v. 153 Acres of Land, etc., 154 F. Supp. 770 (M.D. Pa. 1957); 4 NICHOLS, EMINENT DOMAIN § 14.31(2) (3rd ed. 1962).

[30] ". . . value may reflect not only the use to which the property is presently devoted but also that use to which it may be readily converted." United States *ex rel.* T.V.A. v. Powelson, 319 U.S. 266, 275 (1943).

[31] The asserted future use must be established as a "reasonable probability." State v. Motor Freight Terminals, Inc., 57 Wn.2d 442, 357 P.2d 861 (1960).

[32] Sharp v. United States, 191 U.S. 341 (1903); Cole Investment Co. v. United States, 258 F.2d 203 (9th Cir. 1958); City of Stockton v. Miles & Sons, Inc., 165 F. Supp. 554 (N.D. Calif. 1958); ANNOT., 6 A.L.R.2d 1197, 1203 (1949). In *United States v. Certain Parcels, etc., supra* note 6, the court permitted the jury to consider future uses and not just present or past uses, despite objections from the property owner. The court's position was consistent with United States *ex rel.* T.V.A. v. Powelson, *supra* note 30.

[33] "Integrated use, not physical contiguity . . . is the test. Physical contiguity is important, however, in that it frequently has great bearing on the question of unity

them for different and separate purposes, unity of use is lacking.[34] But if the tract could have been most advantageously used for different purposes although the property owner had not made such a division of use, it has been held that the unity of use requirement is satisfied.[35]

The last requirement of the larger parcel test is that of contiguity. Although contiguous is usually defined as meaning *in actual contact; touching; near, though not in contact;* or *neighboring,*[36] the courts have greatly expanded the ordinary meaning of the word in condemnation cases. An extreme interpretation of contiguity is found in a Puerto Rico case in which the court allowed the larger parcel test to be invoked despite the fact that the two tracts of land were on separate islands seventeen miles apart.[37] At the other extreme, the Washington court has held that special benefits can only be offset against the damages accruing to the part of a single tract that is not taken.[38] However, in a situation in which no issue of special benefits was involved, the Washington supreme court held that severance damages should be allowed although a road divided a farm into two tracts.[39]

Many factors may be considered in determining whether the properties are contiguous. Probably the most important is the type of property involved, that is, whether it is

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of use." Baetjer v. United States, 143 F.2d 391, 395 (1st Cir. 1944), *cert. denied,* 323 U.S. 772 (1944).

[34] Sharpe v. United States, 112 Fed. 893 (3rd. Cir. 1902). The condemning agency in *United States v. Certain Parcels, etc., supra* note 6, contended that the larger parcel test was applicable although the properties had not been used for a common purpose because the owner had purchased 180 acres with full knowledge of the proposed highway, had utilized the property within the proposed right of way by removing fill material for his remaining property, and the new highways had changed the highest and best use of the remaining property from farm land to shopping center use.

[35] Doud v. Mason City, F.D.R. Co., 76 Iowa 438, 41 N.W. 65 (1888).

[36] WEBSTER, NEW INTERNATIONAL DICTIONARY (2d ed. 1950).

[37] United States v. Baetjer, 134 F.2d 391 (1st Cir. 1944), *cert. denied,* 323 U.S. 772 (1944).

[38] *In re* Northlake Ave., 96 Wash. 344, 165 Pac. 113 (1917); *In re* Queen Anne Blvd., 77 Wash. 91, 137 Pac. 435 (1913).

[39] State *ex rel.* Biddle v. Superior Court, 44 Wash. 108, 87 Pac. 40 (1906).

agricultural or industrial.[40] Other factors which play an important part are intervening ownerships,[41] water barriers,[42] and roads.[43]

CONCLUSION

Partial-takings of geographically separated land present unique problems in eminent domain proceedings. If a benefit is alleged by the condemning agency, the nature of the benefit must be determined. If the benefit is special, then the factors of the larger parcel test must be examined before the special benefit will be offset. The three factors of the larger parcel test will also be determinative in the award of severance damages, which may have a substantial effect on the extent of the benefit-offset.

Obviously, in partial-takings, the issues are factual to be resolved by the jury. Because this is so, it is extremely difficult to predict the result of a partial-taking case complicated by a question of offsetting benefits. Counsel must, for the most part, rely on a basic understanding of the general principles applicable in this area of eminent domain.

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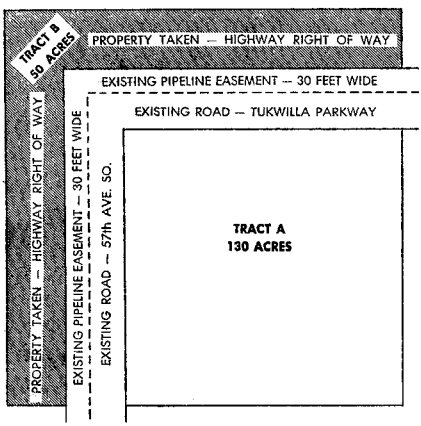
[40] ANNOT., 6 A.L.R.2d 1197, 1226 (1949).

[41] *Id.* at 1225.

[42] Cameron v. Pittsburgh & L.U.R. Co., 157 Pa. 617, 27 Atl. 668 (1893).

[43] Sharpe v. United States, 112 Fed. 893 (3rd. Cir. 1902); ANNOT., 6 A.L.R.2d 1197, 1220 (1949).

LARGER PARCEL: Before taking—180 acres. After taking—130 acres.



In *United States v. Certain Parcels, etc., supra* note 6 and diagram at left, the condemning agency took the position that a street and a pipeline right-of-way lying between the land taken and the owner's remaining tract did not separate the tract taken from the remaining tract in such a way to make them legally noncontiguous in a condemnation proceeding. On this premise, the agency argued that benefits to the remaining tract could be taken into consideration in determining the net award, and that benefits to the remaining tract were equal to the sum of the value of the land taken and the damages to the remaining tract. The agency paid $2.00 into court as a token payment in full. The trial judge submitted both the question of contiguity and the

question of an off-setting benefit to the jury, indicating that, under the rules of law considered appropriate by him, there was evidence in the record from which the jury would be justified in finding contiguity. The verdict was in favor of the land owner in the amount of $350,000. Under the circumstances of the case, it is possible to interpret the verdict of the jury as indicating: (1) that the requirement of contiguity was fulfilled, but (2) that there were no special benefits to be set off against the value of the tract taken or against the severance damages to the contiguous tract.