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JAN 22 1970

OCTOBER TERM, 1969

In the Matter of:

THE UNITED STATES,

Petitioner

vs.

W. G. REYNOLDS, ET UX.,

Respondent.

Docket No. 88

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C O N T E N T S

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM

THE UNITED STATES, Petitioner	)	
vs	)	No. 88
W. G. REYNOLDS, ET UX., Respondent	)	

The above-entitled matter came on for hearing at 12:50 o'clock p.m. on Wednesday, January 14, 1970.

BEFORE:

WARREN E. BURGER, Chief Justice
HUGO L. BLACK, Associate Justice
WILLIAM O. DOUGLAS, Associate Justice
JOHN M. HARLAN, Associate Justice
WILLIAM J. BRENNAN, Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice

APPEARANCES:

SHIRO KASHIWA, Assistant Attorney General
Department of Justice
Washington, D. C.
On behalf of Petitioner

ERWIN S. SOLOMON, ESQ.
Hot Springs, Virginia
On behalf of the Respondent

PROCEEDINGS

MR. CHIEF JUSTICE BURGER: Number 88, the United States against Reynolds.

Mr. Kashiwa, you may proceed whenever you are ready.

ORAL ARGUMENT BY SHIRO KASHIWA, ASSISTANT ATTORNEY GENERAL, ON BEHALF OF PETITIONER

MR. KASHIWA: May it please the Court: This is a review of a decision of the Sixth Circuit, relating to the scope of the subject rule expressed by this Court in the Miller case in 1943, 317 U.S. 369.

Briefly, the factual situation was, first of all, this had to do with the Nolin Reservoir Project in Kentucky. The Reynolds' owned a total of 390 acres. The present case is the case of partial taking of 250 acres of the 390. In other words, after the taking inthis case there were 140 acres remaining.

Out of the 250 acres, 172 acres were for inundation, and 78 acres were for recreational purposes and it's the 78 acres which causes the question in this case.

Now, what relation to the project? The project was Congressionally authorized way back in 1938, as a flood control plan for the Ohio and Mississippi Rivers.

Incidentally, after 1938, in 1944, Congress passed a special statute authorizing acquisition of recreational areas in conjunction with reservoir projects.

In 1956, planning funds were appropriated for the

Nolin Project and in July 1958 a general design memoranda was approved. This design memoranda contained, contemplated recreational areas, definitely.

In September, 1958 funds were provided by Congress for the project and in January, 1959 the project was started.

In October 1959 this 78 acres for recreational purposes was specifically set aside in a memo by the United States Engineer.

On april 8, 1962 a suit was filed and declaration of taking filed in the case. Incidentally, going back, the Reynolds purchased this property in October of 1959. A portion of it in October 1959 and the balance of it in 1960. Of course, before the case was filed.

The -- we have to go into the proceedings of the trial court to fully understand the issues. In the trial court the court held, with relation to any enhancement testimony as to the 78 acres -- this is the recreational area, the court held that "It is a question for the trial court to decide." And it held that it will not allow any enhancement testimony. This is in the original, the first portion of the trial.

But, just before the case went to the jury the court changed its mind and said, "No," as to whether the 78 acres was within the scope of the project or not, it would allow the jury to consider it. And so the onus put on testimony with relation to the 78 acres, with and without enhancement.

The case went to the jury and the jury in thic ase found that the land was probably within the scope of the project. Under the instructions of the court if that was so, then enhancement was not to be allowed. Therefore, the jury returned a verdict of only $20,000.

In the Court of Appeals the court also, following the trial court, held that, whether it wasin the scope of the project, this question was for the jury. But the Appellate Court reversed the case, the $20,000 verdict because the jury was allowed to consider facts which were not in evidence. It happened in this way:

The Court at first took the scope of the project question and testimony was adduced only before the court. But, later when it changed its mind the witnesses testified; the Government attorney did not cover the testimony as fully as he did just before the court. But he remembered -- but the court, in considering the evidence, commenting on the evidence, went back to the evidence he heard while he was sitting out of court. And then in this mix-up the grounds for reversal came up.

I will go back tothis later. So, the first issue in this case is whether the scope of the project question is a determination for the court or for the jury.

This Court in the Miller case, a case with substantially similar factual background as in this case, held that it was for the trial court to rule upon and not a jury question.

Inthat case the respondents' attorney tried to put on evidence with relation to the valuation of the particular parcel and the Government attorney objected, because whatever he offered included enhancement. And the court took part in the questioning and specifically directed the witness not to include that enhancement in that testimony. And this was a direct ruling by the Court on that question.

But, in the latter part of the opinion there is a reference to jury instructions given by the court and with relation to these instructions the court commented that these instructions were not wrong. It's this portionof this Court's decision that has caused much difficulty in the courts below.

I maintain that the opinion means, and at best, that it was a question for the court. The later comment in the instruction -- it was really not an instruction given the jury any leeway as for deciding one way or the other; it was the comment by the court that "you shall not, with relation to this lot, consider enhancement." But that was taken by the Sixth Circuit, as well as the trial court to mean, well, there are two portions of this decision and therefore we'll let the jury have it.

We co tend that is a wrongful interpretation of what this Court held, because the evidence of enhancement was not allowed at all. How could the jury consider enhancement when it didn't have any evidence of enhancement before it? So, that was

a purely warning type of instruction.

And it is our position that as stated in the Wardy case of the Fifth Circuit Court decision which follows the Miller case, as we interpret it, the Circuit Court, Fifth Circuit, well put it: "The judge decides a legal question which limits the factors to the determination of just compensation."

We further point to Rule 71A(h) adopted in 1951. This is the rule that has to do with eminent domain. In essence, taking all the portion with relation to jury commissioners and all of that out, as material in this case, it reads: "Anybody may have a trial by jury on the issue of compensation." Then it further states: "Trial of all issues shall otherwise be by the court."

As I said, this rule was adopted after the Miller decision, but we contend that the rule is perfectly consistent with our position that legal questions which limit the factors to the determination of just compensation are for the trial court.

In fact, the way we read the rule it reads very much in our favor. We do admit that it does say "any party may have trial by jury of the issue of compensation."

What the, our opponents are saying, "Anything that has remotely to do with this compensation should be tried by the jury. We disagree, for various reasons. We contend that in most of these recreational area cases, quite a few of these,

the Government relies and also the Respondent relies on the records of the engineers. Andin this case, looking at both briefs, as far as the record of the engineer, there is no dispute as to the facts. The personnel of the engineers come and testify and that's so. All of these events happened on so and so date.

Now, some of these facts could become very, very complicated. They are not as simple as in this case. We have a case called the Crance case in the Eighth Circuit, which not only there was a general indication of recreational areas, and then the recreational area was determined, but they also had public hearings and at the time of these public hearings, the public attends and sometimes these areas are changed. In other words, they become very, very complicated. And usually, as I have said before, even in the Crance case the facts were in no dispute as to the records of the engineers office.

And so the both counsel stipulated, well, that's a question for the court. Nothing to argue about, let the court decide. And, by a preliminary hearing, a very ordinary way to decide a case --

Q What is it the court decides on this record?

A Whether the area in dispute is within the scope of the project, in the Reynolds case. If it's within the scope of the project then enhancement is not allowed; enhancement by the very general project. That is the rule.

Now, in the Crance case, as I said, these engineers fact were rather complicated, but it was disposed of in that manner and I think, very sensibly so. And where there isn't any dispute as to material facts, it should be before the court.

And within this preliminary questionin the Crance case there appeared two subsidiary questions. (1) question of Governmental estoppal, because of certain facts. And secondly, authorized or unauthorized acts of Government officials. These issues arose.

So, looking at the Crance case we suddenly realized that these issues could be very, very complicated and is not the type of question for the jury. And, especially so when the facts are not in dispute.

Another policy reason I'd like to advance as much as possible in this kind of a case, valuation testimony, which is not material, should not be allowed to the jury. There may be abuses.

Now, in the court below, the trial below, to be consistent with relation to the 172 acres which is the inundated area. No question about it, the enhancement is not allowed and of course, it wasn't raised, but that's the way the testimony is put in. If anybody raised the question the court would rule enhancement would not be allowed.

Now, what about with the 140 acres which remain? Under the eminent domain rules there is an after-value, so the

enhancement is added onto the remainder of the property. The judge in this case moved that enhancement will be added on. That was a question for the judge.

Q Now, you are talking now about what acres?

A The 140 which is the remainder after the 78 and the 172 were taken.

Q The part not taken at all.

A That's right.

Q Of this party's land.

A Yes. The enhancement is added on. In other words, the party did not benefit by the enhanced value.

Now, those were decided as preliminary questions by the court, so why not with relation to the 78 acres?

Now, if the court, with respect to this question, rules that it is a question for the court, because of the peculiar way the verdict was returned, our position is that the Sixth Circuit must be reversed.

Now, it's not a question for the jury. The Circuit Court held it was for the jury, so it must be reversed with relation to that. But, our position is that the verdict for $20,000 should be sustained, because the jury so found that this is the value without the enhancement.

Now, with relation, if this court decides the other way and it is a question for the jury, then we admit that the case must be remanded and retrial had because the facts outside

the record where it could be considered by the jury. At least if it was allowed to be considered.

Now, the second issue which we have prepared --

Q Excuse me. Is this an argument that where evidence went to the jury and should have gone to the jury and the jury found against enhancement --

A No, the court, in its comments --

Q All right. Let's assume it's the same thing as telling the jury it is in the record, something that is not in the record; is that right?

What was the comment of the judge? He said something tothe jury about evidence which was not heard by the jury; wasn't that it?

A The witness testified as tothe probability of taking the land for a recreational area and this is the area which the judge should not have --

Q But, even though the judge told the jury that the jury found there was no enhancement; isn't that right? A $20,000 verdict was a verdict based on the finding of no enhancement; was it?

A We maintain that this should not have gone to the jury at all.

Q I appreciate that, but how were you hurt by it going to the jury if the jury came in with a $20,000 verdict on the basis of no enhancement?

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said that there must be an indication at the outset of the project that a particular tract or area will be acquired. Now, this, we contend is a very narrow rule; that Third Circuit rule.

In the Eighth Circuit it is sufficiently clear that some land will be taken, even though the particular land is not identified. That is the rule of the Eighth Circuit and that was the rule in the Miller case.

We contend, and I call this the Department of Justice Rule, that the rule should be broader. The only requirement is that the land was within the general area influenced by the project. And we maintain that that should be the rule because the basic reason in the -- as stated in the Miller case -- was that owners ought not to gain by speculating on probable increased value due to governmental activities.

In other words, the government should not pay for the value it creates.

Another reason why the Third Circuit and Eighth Circuit rules are unduly harsh on the government -- if those rules are adopted it would be very difficult to change projects. Not the whole project but the scope relying to the project.

As I stated in the Crance case, for example, the public -- instead of the recreational area being here they want it over here and these changes are made by the engineer. And that should not affect the individual owner because it is within

the recreational areas we're contemplating. And the fact that we take it shouldn't change the rules.

If the Third and the Eighth Circuit rules are true we contend that perhaps the government will mark out a very large project as large as it should and then take within. This is what the government did in the Rock Creek case.

Then we also contend that these rules should be consistent. With relation to the 140 acres which was not taken. This is uppermost. We talk about enhancement. We don't have much, any strict rules as to that. In the remaining parcel the value was enhanced. We added onto that problem; that's all there is to it. In other words, it's in the general vicinity and it has been influenced by the taking.

Now, the words "scope of the project" we finally contend, as used in the Miller case, under the influenceof the project. This is what it really means. And if we adopt this view which is a view broader than the Third Circuit and the Eighth Circuit, I think that justice will be done in all of these cases and the government will not be paying for the value it creates. This is very, very important for we taxpayers.

MR. CHIEF JUSTICE BURGER: Mr. Solomon.

ORAL ARGUMENT BY ERWIN S. SOLOMON, ESQ.

ON BEHALF OF RESPONDENTS

MR. SOLOMON: If the Court pleases: First, I would like to correct certain statements that I know were inadvertently

in error. One is a crucial date -- I'll review the dates again because our position is this: The Miller case -- I'll go into the factual situation in a minute -- but the Miller case, we say, stands for the proposition that if, in the original design of a project the land is delineated to be taken or as in the Miller case, if it were marked out or designated that it would probably be taken, then there is no enhanced value.

If it's in the original scope and the original plans, no enhanced value, or as in the Miller case, where there was a railroad right-of-way over an area tobe flooded and they had marked out -- to use the terminology of the court in its opinion: "marked out," or "designated" where this right-of-way should be. That's they they use the words "probably would have taken." Or, when the government was committed to it.

In those two instances, we say that there would be no enhancement. However, as in our case, where the government in its original design and then in a later design, did not take in the property, the 78 acres, but later did so in a third memo. As we say, an afterthought, then we believe we are entitled to the enhanced value of that land.

Q How about the second stage?

A The second stage was eliminated, Your Honor. Erroneously -- I want to give the date of that in this particular case. For instance it was stated that construction funds were appropriated in September and October of '58.

Construction was started in January of '59. And on June 17th of '59 there was a design memo, outlining the recreational areas which did not contain the -- what we call the site of the 78 acres. It did not contain it.

In other words, on July 14th of '58 when the government approved the general design memo which contained all phases of the construction and land acquisition, the 78 acres was not in there and it was not in the memo for recreational areas of June 17, 1959. The Government permits this in its brief, on page 3.

Q Did I understand you, Mr. Solomon, to use the terms "original design," and "scope of the project" as being synonymous?

A No, sir. I'm saying that in the Miller case they used it synonymously. And I think that's what -- if the Court would realize the factual situation in the Miller case and then I think the ambiguities of the terminology and the vagueness of the verbiage and phrasing in the Miller case would be dissipated.

Knowing the factual situation where in the Miller case, in the original design they had marked out or designated where they were going to take a right-of-way. They didn't take it originally, but they had marked it up and designated it to be taken. And then they do take it and the court said, "This probably would have been in the scope originally, which it was,

because it was marked up on that map.

Q Mr. Solomon, where are all of these maps filed? Where do you find them?

A There were no maps filed in this case, Your Honor.

Q I mean, where is the original design?

A The design memo was not filed in this case. The government did not file it but the testimony of Max Bore, who is a government witness --

Q But I gather you have to get the internal records from some government department, condemning the land; is that it?

A Yes, sir.

Q That's how you discover what, originally was contemplated and that was mapped out and drawn out. Is that the way it worked?

A Yes, sir. As stated by the Government, the Justice Department, the judge in the -- the trial judge had put on a hearing out of the presence of thejury to begin with, to see whether, as a matter of law he could determine whether this land was entitled to enhanced value or not, being whether it was in the scope of the project or not.

And the government called its witness --

Q And they introduced the designs and the chronology of things; is that it?

A Yes, sir. Then, the other inadvertent error of the Justice Department was that while the opening statement was being made, not when the jury was being charged, but when the opening statement was being made. The judge called counsel to the bench and said that he was in error in his first finding saying that as a matter of law that no enhancement would be allowed. He said on further perusal of the Miller case while we were making our opening statement, he said he found it was a mixed question of law and fact, therefore it would be submitted to the jury. It wasn't -- it was during the opening statement that was made and out of the presence of the jury and then, as I remember the counsel for respondent asked whether he could amend his statement and the court allowed him to do so.

Q Well, if I understand the Miller language putting aside this specific factual situation in Miller, and taking the language: "If it is land which might or might not be taken that is ultimately taken, the enhancement of the value by the first stage taking may not be allowed and the jury is to be so-instructed." Isn't that what Miller held?

A Miller makes, has that verbiage, Your Honor, but then goes on and says other things: "If you are an adjacent landowner,"and this is where you get into trouble reading the Miller case, and I think that's where the trial court reversed itself. In reading the Miller case it goes on to say that if "it's merely adjacent lands and not originally contemplated in

the scope, then it shall take enhanced value."

Q Well, leaving out one category in there, the "might or might not be taken." The gray zone between the original plan and the perhaps nearby adjacent property. And the government's claim is that this property in question here, falls within that gray zone, which is the "might or might not be taken"language of Miller.

A Well, that's where our argument is, Your Honor, that you have to go back to Miller's factual situation where it is actually laid out in the original design and marked out. And that's what we're talking about, the adjacent land, "and there shall not be a windfall," when it was marked up in the original design that was well known. This was not the case here.

Q Well, the Miller doctrine the court goes on to explain, the theory behind that is that the man, that all the people should not pay for the value, which the taxes of all the people -- the value which the taxes of all of the people have created. This is, essentially it.

A Well, that's one view. The Third Circuit held differently.

Q Well, I think this is a case in this Court; isn't it?

A Yes, sir. But, I think this is what -- there is a variance between the different circuits at this point,

based on the Miller case, because of the vagueness of the language in the Miller case.

Q The Attorney General's argument is directed to it. He wants us to clear that up.

A Yes, sir.

Q You would like to clear it up one way and he wants us to clear up the other way.

A We would like to clear it up this way, but we're taking the position that where the original design and that's why we have no quarrel with the acreage that was taken below the 566 foot level of the reservoir, which is about 172 acres. We have no quarrel, because that was in the original design. We say we're not entitled to enhancement. But the 78 acres which was not in the original design or in the design of June 17, '59 we say there that we are entitled to an enhancement. We are requesting, respectfully of this Court that the government should not play around with other people's land and they are here.

For instance, we take this view: assume one improves his house and land around it and it raises the value of his neighbor's land next to it and his neighbor's land comes up for sale, isn't he going to have to pay the enhanced value? And we say this is true, whether it's the government or a neighbor or anyone else, that the taking of land, we take the position to begin with, is repugnant, unless the safeguards are put around

the taking.

Q I suppose there's a difference in condemnation under eminent domain in that the money of all the people is involved, public money, is involved in the one and private property is involved in the other.

A What is the instruction that was given to the jury in condemnation cases, of fair market value. A willing buyer, who is not forced to buy and a willing seller who is willing to sell. And that determines the fair market value. The government should not have the edge, so to speak. It should be a fair market value, based on other values.

Around this lake, Your Honor, there are at least 500 acres. They have taken eight sites, leaving, I assume -- I believe I am right about it, 250 to 300 more acres. Now, what is the value of the acreage not taken? It is enhanced by the lake value. Why should the government take land at a lower valuation if it's not in the original design memo? Why shouldn't that man be put on the park, the condemnee, with another landowner, by his side. We have, on this piece of land there was a man by the name of Slarb, S-l-a-r-b had the land. He has an enhanced value. We don't. Why not? It is because the government is the taker; is that the measure? We say it should not be.

I'd like to get on to the advantage of the residue to show the inequity of the government in this case. There is a

of 140 acres. Now, according to the trial court the government could show the enhanced value of the damages to the residue. In other words, it could show how the lake enhanced the value of the 140 acres that was left over and substract that from any award made by the jury. Now, where is the equity in that, where the government says, "We can havethe enhanced value where the residue is concerned, but you can't have it where we're taking the land." And these are the inequities that we run into in these cases.

And I agree thatthe Miller case, in some way, and the trial court on pages 48 and 49 of the appendix, stated several times that it was a very taxing case to travel before the jury.

Now, as far as the Rule 71A(h) is concerned, and submitting to the jury the trial court, we think, properly held is this case is a mixed question of law and fact -- we don't say it is. We think it is a matter of law only and law our way in that the land was not in the scope -- was not in the original design or in the second design memo.

But if it is a question of law and fact, that it should be submitted to the jury, because, as the Sixth Circuit held in its opinion, "Compensation and whether there is enhancement or not, where there is a mixed question of law and fact, are interrelated and to arrive at a proper valuation you must determine whether it's enhanced or not to begin with." And that was the instruction the court gave to the jury.

We came out on the short end. But if it's a proper question of law and fact it should be submitted to the jury so that the proper compensation can be given to the landowner.

Q I gather, in this case, even if we disagreed with you a few years ago and enhancements is an issue for the judge to decide, there still has to be a new trial in this case, doesn't there?

A Yes, sir, because the jury -- inadvertently --

Q This means that when you go to trial the second time, if you must, you may get something less than $20,000. In any event, nothing more; is that it? Or you don't know what a second jury will give you?

A We don't know what a second jury will give us.

Q Well, whatever it gives you it will have to be without enhancement, if this case goes against you here.

A Not necessarily.

Q Not necessarily. You might be able to convince the judge and you might never convince the jury. I mean, the judge may decide against the government on whether these lands are within the scope of the project.

A Yes,sir. It depends upon which facet you are going to take. Does the government have to have lands in the original design memo?

Q Well, if the government prevails here it is not going to escape the trial. There still is going to have to be a

new trial. And they may have, in the second trial, twice as much damages as were against them.

A Yes, sir.

Q And they may lose on the scope of the project question, too.

A Yes, sir.

Q Before the judge.

A Yes, sir. It depends on what this court annunciates as its rule.

Q As I read Judge Humphrey's findings in the record, Mr. Solomon, there seems to be a little bit more than a feeling of ambiguity about the Miller opinion. He says the Miller opinion is controlling and that for the questions of soundness of the Miller opinion and he seems to have been influenced to go off on his own because of that. He says: "I question the soundness of the rule, with all due respect to the Supreme Court."

A However, he may do it throughout the record that's before the Court and now Justice to Justice Swinford he said the Miller case would be controlling and he tried to control it under that, even though he said that it led to ambiguity. On Page 49 he says, "Now that that is why I am going to have to instruct the jury under this Miller case. Very frankly, as I say, I think the rule might be somewhat modified. I think it should be, but I am bound by it without modifying." And he goes

on in another case to say it's not up to his court to modify it. And he was going to be bound by it, but he makes remarks to us that in this particular situation that we had it was hard to apply. And the reasoning that he inadvertently, in summing up to the jury, exposed what went on when the jury was excluded was because he tried to explain the Miller case to the jury in layman's language and got involved. He did try to abide by the Miller case.

But, the factual situation, as I said before in the Miller case, it explains the Miller case. It's when the Miller case is taken out of context without realizing what the factual situation was, I think that is where the courts are getting in trouble and are misconstruing.

The Miller case uses vague language; it uses language like, "probable building of the scope of the project." "What is the contemplated taking of the government?" Well, who knows what the government is contemplating taking at the time of the original design would be. These all lead to uncertainty. Something that a good practitioner tries to avoid in a will or a deed. And yet it's here in this case in trying to fix compensation. The

The uncertainties, I agree with the Justice Department, should be cleared up. But we feel it should be cleared up our way.

The government's position is they want to enlarge the

Miller case and say that if the land is in the general area influenced by the project, there should be no enhancement. Now, I say if they would prevail you get into another ambiguity. You are leaving it to the lower court again to determine what might be in the general area. If we say to you: "Reasonably submit a memo; let the Corps of Engineers take in what they will." In my section of the country they have. We are building a dam right now. And they are taking in all the land around it. If they want to take it all in let them do it originally.

Q WEll, then, as a practical matter -- I'm not sure about this -- but as a practical matter if your view of the rule were to be adopted as the standard, wouldn't that lead the engineers topick the largest possible area for the project and then not worry about whether they took it all or not? That would be one way of meeting the problem.

A Well, it might be one way. I'm assuming the Corps of Engineers are pretty well qualified and they sould do better than take such an approach to taking.

Q But, wouldn't it be normal and reasonable to resolve all the doubts in favor of having the largest possible area so that you avoid this enhancement?

A That's one way they could get around it, but if Your Honors pleases: At what point is an adjacent landowner allowed to develop his land under the present rules? How do you know that the government won't come in two years later and

say this was within the scope of the original plan? There is the uncertainty right there.

Q I suppose the answer to that is you don't and you can't know. Many times, for these improvements, the government -- all governments, local, state and Federal make it a point to keep this a very great secret so that they don't encourage speculators. Isn't that a practical fact of life?

A I agree. But I see nothing wrong with speculating.

Q I suppose the public policy is not to let speculators speculate at the expense of the taxpayers.

A Right, sir. There are different types of speculation. I'm saying that after the government takes, and assume that that lake is there for five years and then the government comes in and says that was in the scope of our original -- or as the Justice Department would have -- this is in the general and suppose roads had been put in at that time, things of that sort. It would go back to the unenhanced value.

Q Well, we don't have that case before us today, though, do we?

A No, sir. But this is on 140 acres that if they come to take it, roads were put in there. Yes, sir, that would happen in this case if they went and condemned the residue of it. That is a fact of life in the residue of this property right now. So, theoretically, or even practically, it could happen on this

piece of land belonging to the Reynolds. They have roads and in the adjoining acreage of the residue.

Thank you.

Q I am right, this case has to go back?

MR. KASHIWA: We maintain that it should go back to the Circuit Court and the --

Q Now, you didn't take the case at the Circuit Court, did you? They took the case.

A That's right. They thought they got enough with $20,000.

But, if it's sent back, as far as it was a question for the court, that's the alternative I am speaking to.

Q Suppose we agree with you that it's for the court; then what happens in this case?

A Then the jury found without any enhancement $22,000 and we maintain that under the facts -- they don't argue it, about the facts as produced by the engineers.

Q It is the government's position that if you prevail here you are entitled to reinstatement of the $20,000 verdict?

A No.

Q Not unless the trial judge himself decides that this land was within the scope of the project.

A No, Your Honor, because we maintain as a matter of law that with all of the facts as agreed upon, even in their

brief they say these are the facts.

Q Well, that isn't what you ask for in the brief. All you have asked for in your brief, your conclusion is that we direct the District Court on remand to determine itself, whether the condemned lands were within the scope of the project. You don't say anything about reinstating the $20,000 verdict, under any circumstances. That's what your brief says.

Q And you never asked us -- you never asked the -- the Court of Appeals has ordered a new trial based on comments, improper comments of the judge.

A Well, we didn't appeal the --

Q I know you didn't. But the Court of Appeals has ordered a new trial based on -- and you didn't -- you up here have not said the Court of Appeals was wrong in ordering a new trial.

A That is on the other alternative.

Q Well, the thing comes down to this. The issue you brought to us is whether enhancement should have been determined by the court or by the jury. Andif you prevail, as I see it from whatyou have asked, from the relief you have asked, you're not quarreling with the order that you have to have a new trial. And there will have to be a brand new determination of compensation after the judge, if you prevail here, determines whether this was within the scope of the project. And you may really get a socking this time.

A We maintain that it's for the court to determine, and the Appellate Court, on the record, could say that on these facts under the case, the Miller case, there is nothing to decide. And so there is no enhancement to be given; so the verdict was $20,000.

Q Yes, but what if -- if you follow that request in your brief, at the very least, I would suppose the case would go back to the District Court, like you say it should and the judge --

A No, I'm saying that it should terminate at the Circuit Court.

Q Right.

Q That isn't what you say. You say that the decision of the Court of Appeals should be modified with instructions to direct the District Court on a remand to determine, itself, whether the condemned lands were within the scope of the project and to clarify the standards set forth by the court.

Q And what if the trial judge, then, determines that these lands were not within the scope of the project? Then there would have to be a redetermination of compensation.

A That is correct.

Q But, are you suggesting the Court of Appeals should, as a matter of law, determine whether this land was within the scope of the project?

A Of course, there is no issue as to the facts. The facts are just about stipulated.

Q Why don't you ask us to decide this case?

Q Do you want to give us all those records and drawings and designs and all the rest of it, and have us do it?

A No.

Q Well, then, why would you have the Court of Appeals do it?

A I maintain, that as far as the Court of Appeals -- they don't have to have all of these maps. This could be testified to and this is what happened in the trial court.

Q Is it because this land is close by or what? The 142 acres is close by; it was a part of the original land owned, or what is the reason that we don't need any other information?

A With relation to the 100 and --

Q Whatever it is.

A Well, we have 140 acre tract and --

Q Well, I'm talking about the tract that we are now talking about.

Q That's 78; 78.

Q Seventy-eight? What we're talking about. Why is it you say that we don't need any more facts; this Court or the Court of Appeals or the District Court, to say that no

enhancement is possible, as a matter of law?

A Because all of the material facts, there is no dispute and they concede that, I think, the material facts to decide this question.

Q Which is it's near the lake? It's close by the lake; it was in the original map; or what? It wasn't in the original map; right?

A No.

Q Wasn't in the original plans?

A Your Honor, the 172 acres were in no question in the original plans. That's the inundated area. The 78 acres were in this twilight area where it may be taken or it may not be taken, because recreational areas authorized to be taken in reservoir projects.

Q If it's in the gray area, automatically that's enough; is that your position?

A That is our position and that is the holding in the Miller case. That's the exact holding in the Miller case. And this case came exactly within the Miller case.

Now, counsel mentioned about the -- nothing being marked out, but in this Miller case it says, talking about the railroad right-of-way, "Ultimate routes were surveyed," and state that "intervals of 100 feet." In other words, there were various alternatives, according to the engineering part. It is not marked out inthe sense that "this is it."

MR. CHIEF JUSTICE BURGER: Your time is up now. When you finish, when you complete your answer to Justice Marshall --

A We submit.

MR. CHIEF JUSTICE BURGER: Thank you.

You have -- we are submitted. Thank you, gentlemen.

(Whereupon, at 1:45 o'clock p.m. the argument in the above-entitled matter was concluded)