LEGISLATIVE SOLUTIONS FOR WYOMING RURAL LANDOWNERS' EMINENT DOMAIN CONCERNS

TO: JIM MAGAGNA, EXECUTIVE VICE PRESIDENT, WYOMING STOCK GROWERS ASSOCIATION
FROM: UNIVERSITY OF WYOMING RURAL LAW CENTER LEGISLATIVE RESEARCH SERVICE
SUBJECT: LEGISLATIVE SOLUTIONS FOR WYOMING RURAL LANDOWNERS' EMINENT DOMAIN CONCERNS
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INTRODUCTION

Rural landowners in Wyoming are at a disadvantage when dealing with private entities exercising the right of eminent domain. This memo explores various options to level the playing field for rural landowners. First, this memo offers suggestions to enhance the "good faith" negotiations required of private companies seeking to exercise eminent domain. Second, this memo specifically addresses the role of mediation and how it could play a more prominent role in settling disputes over eminent domain. Third, this memo discusses the various ways of affording rural landowners attorney representation or the costs of such representation in negotiating and litigating eminent domain claims. Fourth, this memo looks at possible ways to redefine the "public good" required for a private entity to exercise eminent domain. Finally, this memo explores the present and future possibilities of alternative compensation structures in eminent domain agreements.

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"GOOD FAITH" NEGOTIATIONS

Prior to filing a condemnation action in Wyoming, a public or private entity with legal authority to exercise eminent domain power is required to make reasonable and diligent efforts to acquire property by good faith negotiations. Wyo. Stat. Ann. § 1-26-509(a) (2012). If the condemnor negotiates in good faith and cannot come to an agreement with the landowner, only then can the condemnor commence a condemnation action. Wyo. Stat. Ann. § 1-26-510(a) (2012). What actually constitutes "good faith negotiations" has been a common point of contention between landowners and condemnor entities in Wyoming. The term "good faith negotiation," is not specifically defined. In its most recent published opinion of a case involving the issue of good faith negotiations, the Wyoming Supreme Court cited to *6 Nichols on Eminent Domain*, which states that "the negotiation requirement is generally held to have been satisfied when they have proceeded sufficiently to demonstrate that agreement is impossible." *Bridle Bit Ranch Co. v. Basin Elec. Power Co-op.*, 118 P.3d 996, at 1016, (Wyo. 2005) (citing *6 Nichols on Eminent Domain,§24.14* and *Sufficiency of Condemnors Negotiations Required as Preliminary to Taking in Eminent Domain*, 21 A.L.R.4th 765 (1983 and Supp.2004)). This explanation still leaves the qualifications of good faith negotiations vague.

The Wyoming Legislature most recently addressed this concern in 2007 when it amended the state's eminent domain negotiation statutes to further define good faith negotiations. *See* 2007 Wyoming Laws Ch. 139 (H.B. 124). Those amendments have been regarded as a step forward in defining good faith negotiations by some landowner advocacy groups. "The 2007 Amendments have set forth in detail the minimum steps and timeline a condemnor must follow prior to filing for condemnation … . [F]or the first time in Wyoming, the statutes themselves set forth for landowner and condemnor alike a road map for what constitutes good faith." Matt Micheli, Mike Smith, *The More Things Change, the More Things Stay the Same: A Practitioner's Guide to Recent Changes to Wyoming's Eminent Domain Act,* 8 Wyo. L. Rev. 1 (2008). As it stands now, Efforts made in compliance with the

statutes constitute prima facie evidence of the condemnor's good faith. Wyo. Stat. Ann. § 1–26–510; *Bridle Bit Ranch Co. v. Basin Elec. Power Co-op.* 118 P.3d at 1014.

Current Issues with Wyoming Good Faith Negotiation Laws

While the amendments provide clear steps to the negotiation process and ramifications for condemnors and landowners alike who have been found to have not negotiated in good faith, they do not assure that the negotiations are conducted fairly or give the landowners an equal footing in the negotiations. Some of the notice problems landowners may have and issues concerning negotiation inequality that could be addressed by amendments to this statute include:

- Little knowledge about the project the land is needed for or the entity that is initiating the negotiations.
- Who else the entity has, is, or plans to negotiate with for its project.
- Little knowledge of the "good faith negotiation" requirements with which landowners and the entity must comply.
- What a landowner's options are for assistance in the negotiations with the entity.
- Negotiations often done purely through letter correspondence are disadvantageous to landowner because landowners often do not have the time or expertise to express their concerns sufficiently.
- The entity the landowner is negotiating with does not have to explain why it turns down counter offers from the landowner.
- Landowners' view that the entity's condemnation authority undermines the negotiations from the start.

Proposed Changes to Improve Negotiating Ability of Landowners

Continuing issues landowners have with the good faith negotiations that can be addressed by amending the good faith negotiation statute (Wyo. Stat. Ann. § 1-26-509) to improve (1) notice requirements by the condemnor at the outset of negotiations and throughout the negotiating process along with (2) requirements that allow the landowner more influence on the negotiations and limit the entity's superior negotiating position by the fact that it holds condemnation power. Making these types of amendments would increase the ability of the landowner to negotiate with potential condemnors on more equal footing.

Several key changes to Wyo. Statute § 1-26-509 that would increase the amount of information the landowner has about the project for which his land is being sought, the value of his own land and what constitutes a "good faith negotiation" would give the landowner a better understanding as he or she negotiates with the condemnor. This could be accomplished by either requiring the condemnor to state certain things in the initial written notice to the landowner that aren't currently required and/or require the condemnor to provide the landowner with a state sponsored pamphlet outlining the state's eminent domain laws along with the landowner's rights and requirements under those laws. More detailed notice requirements in the good faith negotiation statute currently are required by some states as discussed below. Providing an eminent domain rights and responsibilities pamphlet is required by several states including Idaho, which enacted such a law in the year 2000. *See* 2000 Idaho Laws Ch. 354 (S.B. 1515):

> "Whenever a state or local unit of government or a public utility is beginning negotiations to acquire a parcel of real property in fee simple, the condemning authority shall provide the owner of the property a form containing a summary of the rights of an owner of property to be acquired under this chapter."

Idaho Code Ann. § 7-711A (2012).

The following is a list of potential amendments to Wyo. Statute § 1-26-509 concerning the written notice that must be provided to the landowner upon the initiation of negotiations. Following each proposed amendment is a short explanation of what issue each amendment addresses and other states' laws that are similar to the amended statute. Most of these amendments could be made independent of each other and a few are contradictory so one or the other would have to be made.

§ 1-26-509. Negotiations; scope of efforts to purchase

(c) Good faith negotiation shall include, but not be limited to, written notice of the following:

(i) To the extent reasonably known at the time, the proposed project, the land proposed to be ~~condemned~~ needed for the project, plan of work, operations and facilities in a manner sufficient to enable the condemnee to evaluate the effect of the proposed project, plan of work, operations and

facilities on the condemnee's use of the land; All other proposed alternate routes for the project and why this route was chosen.

Written notice should use language that stresses condemnation is not the preferred method, but rather a reluctant back up method. Stressing this view to the landowner with the initial written notice will help get negotiations off to a better start. Requiring this disclosure puts the landowner in a more informed position for the first negotiation and preempts the landowner's likely first question of why his land and this route.

(C) An estimate of the fair market value of the property sought and ~~the general basis for such estimate~~; if requested, a copy of appraisal upon which the offer is based.

This would provide landowner with more information for initial negotiations than a general basis estimate. It is required by several states including North Dakota. *See* N.D. Cent. Code Ann. § 32-15-06.1 (2012).

(E) Notice that the condemnor shall attempt to negotiate personally with the owner or his or her representative of the property followed by an offer to acquire the property sought, allowing the condemnee up to sixty-five (65) days from the date the initial written offer was sent via certified mail to respond or make a counter-offer in writing; ~~and~~

Negotiations in person will give landowners a better ability to express concerns and get answers from condemnor entities.[1]

(i) The Condemnor will then attempt to schedule to negotiate personally with the owner or his or her representative within 30 days of the sending the notice.

This amendment seems necessary to enforce an in-person negotiation under subsection (E) without violating the 65 day response requirement in subsection (E).

(F) A written notice that the condemnee is under no obligation to accept the initial written offer but if the condemnee fails to respond to the initial written offer the right to object to the good faith of the condemnor may be waived under W.S. 1-26-510(a), that the condemnor and the condemnee are obligated to negotiate in good

[1] Based on a Wisconsin Statute. Wis. Stat. Ann. § 32.06 (2012).

> faith for the purchase of the property sought, including what the negotiations must include and what the condemnor's and condmenee's responsibilities are for them to be considered good faith negotiations, that formal legal proceedings may be initiated if negotiations fail and that the condemnee has a right to seek advice from an attorney, real estate appraiser, or any other person of his choice during the negotiations and any subsequent legal proceedings.

Stating up front what "good faith negotiations" must entail for both parties will help the landowner identify when the condemnor has not met the "good faith" standard and puts the landowners on notice of what is required of them.

> (G) Notice to the landowner that the actions described under subsection (h) of this section are available at the condemnee's or condemnor's request.

The earlier a landowner knows about dispute resolution options, the more power he or she has in the negotiation process. The landowner may request dispute resolution before negotiations become impossible. Making dispute resolution/ mediation mandatory is another option discussed in other sections of this memorandum.

> (iv) A written response from the condemnor to any counter-offer made in writing by the condemnee to the initial written offer pursuant to subparagraph (iii)(E) of this subsection~~.~~ with an explanation if the response declines the counter-offer.

Providing the landowner with more information when condemnor declines a counter-offer would create more information-sharing that would give the landowner more options for continued negotiations.

> (f) A condemnee shall make reasonable and diligent efforts to negotiate in good faith with the condemnor including a timely written response to the written offer identified in subparagraph (c)(iii)(E) of this section, specifying areas of disagreement. and stipulating if he or she would agree to actions described under subsection (h) if necessary.

This would create a situation where both parties would be aware of dispute resolution options and know if the other party would be willing to try dispute resolution.

MEDIATION

Enlisting the help of an experienced mediator during negotiations could strengthen the position of landowners. Wyoming Statutes Annotated section 1-26-509 subsection (h) provides that "[a]t any time in the negotiation, at the request of either party and upon mutual agreement, dispute resolution processes including mediation or arbitration may be employed or the informal procedures for resolving disputes established" by the Wyoming Agriculture Mediation Service. This informal mediation procedure was created through the Wyoming Agriculture and Natural Resource Mediation board.

The statute provides for a board of mediators consisting of six members who may promulgate rules for the process and select qualified mediators. Wyo. Stat. Ann. § 11-41-103-105. The entire process is confidential. *Id.* at § 106. "To participate in mediation, the parties shall submit a request for mediation, together with an agreement to mediate, to the board on forms prepared by the board." *Id.* at § 108(c). The board then provides a list of names of mediators to the parties from which the parties can select one, or alternatively request the board to select one. *Id.* at § 108(e). The costs will be shared equally among the parties. *Id.* at § 105(c). The mediator and the parties shall prepare a written agreement. WY Rules and Regulations AGRM GEN Ch. 1 § 11. "The parties have full responsibility for reaching and enforcing any agreement among them." Wyo. Stat. Ann. § 11-41-109. Generally, the dispute shall be resolved within 60 days; however, the parties can extend the time by mutual agreement. *Id.* Each party has the right to withdraw at any time. *Id.*

Therefore, a landowner at any time during the negotiations has various options to resort to mediation, arbitration or the procedure created by Wyoming. The rules promulgated by the board are very detailed. It seems this procedure has been underused by landowners in the context of condemnation in the past, most likely due to a lack of awareness.

Pros and Cons of Mediation

Mediation may be a tool to even out the negotiation power between the landowner and the condemnor. Courts generally encourage mediation, especially in standstill situations to achieve a speedy cost-efficient dispute resolution. *Dep't of Transp. v. City of Atlanta,* 380 S.E.2d 265, 267 (Ga. 1989). Mediations proceedings and results are not part of the public record, and the process can happen much more quickly than litigation, saving both time and expense. Even if the parties end up in litigation, mediation allows both sides to test their theories and describe the dispute in a less confrontational setting and without the restrictions of civil procedure. Furthermore, in mediation, the parties actively participate in the resolution of their dispute. The parties, rather than the mediator, retain control, since each party must agree to any settlement. The process also allows for more creative remedies, and the parties may select a mediator who is skilled in the subject matter and negotiating strategy of the parties.

There are logistical downsides to mediation. First, both parties must agree to mediate and must agree to the solution. If one or both parties are unwilling to submit to mediation or to ultimately compromise, the matter will still end up in court. Further, it may be better for the parties to litigate in court if there is an unsettled issue of law at the center of the dispute. It is possible to mediate without an attorney. An unrepresented landowner in mediation may be no better off than a landowner locked in litigation. Any use or requirement of mediation must keep these issues in mind.

Mediation Statutes in Other States

Both Utah and Virginia have rules regarding mediation in their condemnation statutes. Utah law provides for voluntary mediation or arbitration with the Office of the Property Rights Ombudsman. Utah Code Ann. § 78B-6-522(1). This process does not bar or stay any action for occupancy of the premises as otherwise authorized by the law. *Id.* at § 522(2). The mediator has standing in a condemnation action and may file a motion to stay the action pending mediation. *Id.* at § 522(3). In addition, the landowner has the right to request that the mediator authorize an additional

appraisal, which will be paid for by the condemnor should the mediator determine that the appraisal was reasonably necessary to reach a resolution. *Id.* at § 522(4).

Virginia, on the other hand, requires mandatory mediation every time a condemnation petition is filed with the court. Va. Code Ann. § 25.1-205.1. Both parties shall attend one information session and further sessions as agreed to by all parties. *Id.* During the information session a neutral intake specialist shall inform the parties of the available dispute resolution options, screen for factors that would make the case appropriate for mediation, and assist the parties in determining whether their case is suitable for mediation. *Id.* at § 8.01-576.5.

Proposal

Considering the already existing provision for voluntary dispute resolution, minimal statutory changes are recommended. The existing provisions address most of the concerns of mediation. Wyoming Statute Annotate section 1-26-509(h) specifies that mediation may be initiated by one party or by mutual agreement; The rules by the by the Wyoming Agriculture Mediation Service ensure an experienced mediator; Mediation in condemnation proceedings usually concern issues of fact or the amount of compensation and rarely an issue of law, so mediation is appropriate; and the process is treated confidentially. Generally, neither party desires public disclosure.

Statutory change could be made by amending the existing 1-26-509 or by adding a new statute to deal directly with mediation. One change could require the condemnor to notify landowners of the present possibility of mediation in the required written notice. The legislature could also give the mediator standing to request a stay of the litigation and the right to request another appraisal—and charge it to the condemnor—if reasonably necessary to reach a resolution. *See* Utah Code Ann. § 78B-6-522(3). Further, mediation could possibly be a pre-requisite before bringing a legal action. *See* Va. Code Ann. § 25.1-205.1.

Under current law, each party bears its own costs of the mediation and the costs of the proceedings are shared equally. These costs mainly involve the fees of the mediator. This may act as a

deterrent for a landowner to initiate proceedings. A well negotiated agreement may address the issue of who bears the costs and may burden the condemnor with these expenses. In the case of mandatory mediation, the condemnor could be required to bear the cost. If mediation remains voluntary, the statute could be worded to only penalize the condemnor if it is found to have acted in bad faith. Otherwise, a condemnor would never agree to submit to mediation. For a further discussion of representation costs, see the section entitled "Representation," below.

TABLE 1: PROPOSED STATUTORY CHANGES ADDRESSING MEDIATION

§ 1-26-509. Negotiations; scope of efforts to purchase

Possibility 1:

…

(c) Good faith negotiation shall include, but not be limited to, written notice of the following:

…

(iii) An initial written settlement offer that shall include:

…

(F) A written notice that the condemnee is under no obligation to accept the initial written offer but if the condemnee fails to respond to the initial written offer the right to object to the good faith of the condemnor may be waived under W.S. 1-26-510(a), that the condemnor and the condemnee are obligated to negotiate in good faith for the purchase of the property sought, that formal legal proceedings may be initiated if negotiations fail ~~and~~, that the condemnee has a right to seek advice from an attorney, real estate appraiser, or any other person of his choice during the negotiations and any subsequent legal proceedings and that the condemnee has a right to employ dispute resolution processes including mediation, arbitration or the informal procedures for resolving disputes established by the Wyoming Agriculture Mediation Service pursuant to W.S. 11-41-101 through 11-41-110.

…

(g) The condemnor shall reimburse the condemnee for all reasonable litigation expenses as well as any expenses incurred by alternative dispute resolution processes pursuant to subsection (h) if a court finds the condemnor failed to negotiate in good faith as required under subsections (b) through (e) of this section or to comply with W.S. 1-26-504(a)(ii) and (iii).

(h) At any time in the negotiation, at the request of either party and upon mutual agreement, dispute resolution processes including mediation or arbitration may be employed or the informal procedures for resolving disputes established pursuant to W.S. 11-41-101 through 11-41-110 may be requested through the Wyoming agriculture and natural resource mediation board.

(i) A mediator or arbitrator, acting at the request of the property owner, has standing in an action brought under this chapter to file with the court a motion to stay the action during the pendency of the mediation or arbitration if a stay is reasonably necessary to reach a resolution of the case through mediation or arbitration.

(j) The private property owner may request that the mediator or arbitrator authorize an additional appraisal. If the mediator or arbitrator determines an additional appraisal is reasonably necessary to reach a resolution of the case, the mediator or arbitrator may have an additional appraisal of the property prepared by an independent appraiser and require the condemnor to pay the costs of the first additional appraisal. [2]

[2] *See* Utah Code Ann. § 78B-6-522. "Dispute resolution."

Possibility 2:

…

(g) The condemnor shall reimburse the condemnee for all reasonable litigation expenses as well as any expenses incurred by alternative dispute resolution processes pursuant to subsection (h) ~~if a court finds the condemnor failed to negotiate in good faith as required under subsections (b) through (e) of this section or to comply with W.S. 1-26-504(a)(ii) and (iii).~~

~~(h) At any time in the negotiation, at the request of either party and upon mutual agreement, dispute resolution processes including mediation or arbitration may be employed or the informal procedures for resolving disputes established pursuant to W.S. 11-41-101 through 11-41-110 may be requested through the Wyoming agriculture and natural resource mediation board.~~

(h) Following the filing of a petition initiating a condemnation proceeding, the court shall refer the matter to a dispute resolution process, such as mediation, arbitration, or the informal procedures for resolving disputes established pursuant to W.S. 11-41-101 through 11-41-110. The court shall set a date for the parties to return to court in accordance with its regular docket and procedure, irrespective of the referral to informal dispute resolution processes. The parties shall notify the court in writing if the dispute is resolved prior to the return date.[3]

(i) A mediator or arbitrator, acting at the request of the property owner, has standing in an action brought under this chapter to file with the court a motion to stay the action during the pendency of the mediation or arbitration if a stay is reasonably necessary to reach a resolution of the case through mediation or arbitration.

(j) The private property owner may request that the mediator or arbitrator authorize an additional appraisal. If the mediator or arbitrator determines an additional appraisal is reasonably necessary to reach a resolution of the case, the mediator or arbitrator may have an additional appraisal of the property prepared by an independent appraiser and require the condemnor to pay the costs of the first additional appraisal.

Possibility 3:

§ 1-26-509. Negotiations; scope of efforts to purchase

…

(g) The condemnor shall reimburse the condemnee for all reasonable litigation expenses as well as any expenses incurred by alternative dispute resolution processes pursuant to § 1-26-509a if a court finds the condemnor failed to negotiate in good faith as required under subsections (b) through (e) of this section or to comply with W.S. 1-26-504(a)(ii) and (iii).

~~(h) At any time in the negotiation, at the request of either party and upon mutual agreement, dispute resolution processes including mediation or arbitration may be employed or the informal procedures for resolving disputes established pursuant to W.S. 11-41-101 through 11-41-110 may be requested through the Wyoming agriculture and natural resource mediation board.~~

[3] *See* Va. Code Ann. § 25.1-205.1. "Mandatory dispute resolution orientation session."

§ 1-26-509a. Informal Dispute Resolution.

(a) Following the filing of a petition initiating a condemnation proceeding, the court shall refer the matter to a dispute resolution process, such as mediation, arbitration, or the informal procedures for resolving disputes established pursuant to W.S. 11-41-101 through 11-41-110. The court shall set a date for the parties to return to court in accordance with its regular docket and procedure, irrespective of the referral to informal dispute resolution processes. The parties shall notify the court in writing if the dispute is resolved prior to the return date.

((or, to retain the voluntary nature:))

(a) At any time in the negotiation, at the request of either party and upon mutual agreement, dispute resolution processes including mediation or arbitration may be employed or the informal procedures for resolving disputes established pursuant to W.S. 11-41-101 through 11-41-110 may be requested through the Wyoming agriculture and natural resource mediation board.

(b) A mediator or arbitrator, acting at the request of the property owner, has standing in an action brought under this chapter to file with the court a motion to stay the action during the pendency of the mediation or arbitration if a stay is reasonably necessary to reach a resolution of the case through mediation or arbitration.

(c) The private property owner may request that the mediator or arbitrator authorize an additional appraisal. If the mediator or arbitrator determines an additional appraisal is reasonably necessary to reach a resolution of the case, the mediator or arbitrator may have an additional appraisal of the property prepared by an independent appraiser and require the condemnor to pay the costs of the first additional appraisal.

REPRESENTATION

Until changes were passed the 2013 legislative session, Wyoming did not statutorily provide for the award of attorney fees in a successful challenge to a condemnation or taking act, unless the condemnor was found not to have negotiated in good faith.[4] *See Town of Wheatland v. Bellis Farms, Inc.*, 806 P.2d 281 (Wyo. 1991). However, many other states allow for a landowner's attorney fees. *See generally,* Mont. Code Ann. 70-30-305 (see proposed update, introduced on January 24, 2013); Colo. Stat. Ann. 38-1-122; Minn. Stat. Ann. 117.045; Kan. Stat. Ann. 26-509; Florida Stat. Ann. 73.092; N. Car. Stat. Ann. 136-119; N. Car. Stat. Ann. 40A-8. Wyoming's SF0118 provides:

> If a court or jury finds that the fair market value of the property sought by the condemnor is more than one hundred fifteen percent (115%) of the final offer required by subsection (e) of this section, the condemnor shall reimburse the condemnee for all reasonable litigation expenses incurred after the condemnee's receipt of the final offer.

Passage of this bill brings Wyoming into line with many other states and boosts condemnee's negotiating power. Even so, a brief discussion of future additional possibilities follows.

A bill unsuccessfully proposed during the 2013 Wyoming Legislative session, listed as House Bill No. HB0211, included an eminent domain amendment that created a new subsection (c) under Wyoming Statutes section 1-26-702. The proposed subsection (c) provides: "In addition to the compensation paid for the property to this act, the condemnor shall pay to the condemnee fifty percent (50%) of the condemnee's litigation expenses. Provided, however, the condemnor shall pay one hundred percent (100%) of the condemnee's litigation expenses if immediate possession is requested, the action is discontinued or the condemnor has failed to substantially comply with W.S.

[4] Wyo. Stat. Ann. § 1-26-509(g) (2012): The condemnor shall reimburse the condemnee for all reasonable litigation expenses if a court finds the condemnor failed to negotiate in good faith as required under subsections (b) through (e) of this section or to comply with W.S. 1-26-504(a)(ii) and (iii).

1-26-504." A future alteration of the bill could be brought to the legislature requiring the 100%-of-costs penalty provision while striking the 50% automatic contribution to costs.

Additionally, Wyoming legislators could add language to the Wyoming Constitution similar to the Montana Constitution. Montana constitutionally provides for the prevailing landowner's expenses. See Mont. Const. Art. II, § 29. Amending the Constitution would clearly be a bigger fight that amending a statute, but it is nevertheless a possibility. Montana's Constitution reads:

> Private property shall not be taken or damaged for public use without just compensation to the full extent of the loss having been first made to or paid into court for the owner. In the event of litigation, just compensation shall include necessary expenses of litigation to be awarded by the court when the private property owner prevails.

Mont. Const. Art. II, § 29. Similarly, Wyoming's Constitution uses "due compensation" instead of "just compensation." Wyo. Const. Art. I § 32. An additional clause could define "due compensation" to include expenses for prevailing landowners. (See below).

Our research found no other states creating a state agency to represent landowners. If Wyoming wanted to create an agency, it could do so through the Wyoming Government Reorganization Act. Wyo. Stat. Ann. 9-2-1701 *et seq*. However, because of high long- and short-term costs, the creation of a new state agency may not be the most feasible option. Additionally, it may be difficult to recruit competent attorneys to work for such an agency. The expertise needed in property law and oil and gas law for eminent domain work may translate to higher salaries at private firms outside the state government. The legislature could alternatively create a temporary agency through section 9-2-1704(c) to last up to four years as a pilot program. This option would allow the legislature to explore the viability of such an agency and the benefits to landowners without confronting all of the long-term costs up front.

Our research also failed to turn up other states designating funds for landowner's representation in eminent domain actions. However, there are a few possibilities of accomplishing this. First, the legislature could add the responsibility to the Wyoming Oil and Gas Conservation

Commission. Section 30-5-104 lists the authority and responsibility of the Commission. The legislature could add that the Commission has the authority to appoint attorneys to represent landowners in eminent domain actions. Alternatively, a fund could be set up through the Department of Agriculture. Having a fund such as this would allow the landowners to use the attorney of their choosing and mitigate the travel costs that might otherwise be associated with an agency attorney traveling across the state to represent various parties. The account could be funded through excise or ad valorem taxes. Section 1-26-815, governing eminent domain actions for oil and gas companies and wind collector systems, could be amended to require a contribution to the fund. An additional statute could then set forth the management of and access to the fund.

TABLE 2: PROPOSED STATUTORY CHANGES ADDRESSING

REPRESENTATION

§ 1-26-702. Compensation for taking.

Possibility 1:

…

(c) In the event of litigation and when the condemnee prevails by receiving an award in excess of the final offer of the condemnor, the court shall award necessary expenses of litigation to the condemnee.[5]

Possibility 2:

…

(c) In the event of litigation and when the condemnee prevails either by the court not allowing condemnation or by the condemnee receiving an award in excess of the final written offer of the condemnor that was rejected, the court shall award necessary expenses of litigation to the condemnee.[6]

Possibility 3:

…

(c) If the court finds that a petitioner is not authorized by law to acquire real property or interests therein sought in a condemnation proceeding, it shall award reasonable attorney fees, in addition to any other costs assessed, to the property owner who participated in the proceedings.

(d) In connection with proceedings for the acquisition or condemnation of property in which the award determined by the court exceeds ten thousand dollars, in addition to any compensation awarded to the owner in an eminent domain proceeding, the condemning authority shall;

(i) reimburse the owner whose property is being acquired or condemned for all of the owner's reasonable attorney fees incurred by the owner where the award by the court in the proceedings equals or exceeds one hundred thirty percent of the last written offer given to the property owner prior to the filing of the condemnation action.

(e) Nothing in subsection (c) or (d) of this section shall be construed as limiting the ability of a property owner to recover just compensation, including attorney's fees, as may otherwise be authorized by law.[7]

[5] Language from Mont. Code Ann. § 70-30-305.
[6] Language adapted from 2013 Montana House Bill no. 417.
[7] Language adapted from Colo. Rev. Stat. Ann. § 38-1-122.

Wyo. Const. Art. I, § 32. Eminent Domain

Private property shall not be taken for private use unless by consent of the owner, except for private ways of necessity, and for reservoirs, drains, flumes or ditches on or across the lands of others for agricultural, mining, milling, domestic or sanitary purposes, nor in any case without due compensation. Due compensation shall include necessary expenses of litigation to be awarded by the court when the private property owner prevails.

§ 30-5-104. Oil and gas conservation commission; power and duties; investigations; rules and regulations

…
(d) The commission has authority:
…

(x) To appoint and pay for an attorney to represent the condemnee in eminent domain negotiations and proceedings.

§ 1-26-815. Right of eminent domain granted; ways of necessity for authorized businesses; purposes; extent

…

(e) All entities authorized to exercise the right of eminent domain according to (a) shall be required to contribute 1% of annual revenues to the Landowner Representation Fund, governed under § 1-26-815a.

§ 1-26-815a. Landowner Representation Fund; management; access.

(Unfortunately, our expertise in creating this type of statute is limited. Creation of this statute will be better left to experts.)

REDEFINING "PUBLIC GOOD"

In 2005, the United States Supreme Court held that the condemnation of private property for the purpose of economic development by city of New London, Connecticut satisfied the "public use" requirement of the Fifth Amendment of the United States Constitution. Kelo v. City of New London, Conn., 545 U.S. 469 (2005). In doing so, the Court interpreted the "public use" requirement of the Fifth Amendment to mean "public purpose." Id. Therefore, so long as the project serves a public purpose, the courts are to defer to legislative judgment. The Court, however, made it clear that States may "impose 'public use' requirements that are stricter than the federal baseline. Some of these matters have been established by state law, while others are expressed in state eminent domain statutes that carefully limit the grounds upon which takings may be exercised." Id.

Wyoming's Constitution gives the rights of eminent domain to private entities for private use in the limited circumstances of "agricultural, mining, milling, domestic, or sanitary" purposes. Wyo. Const. Art. I, §32. The Wyoming Supreme Court has held that "mining" includes development and production of gas. *Coronado Oil Co. v. Grieves,* 603 P.2d 406, 412 (Wyo. 1979). Section 1-26-504 requires the condemnor to establish the project is required by the public interest and necessity, the project is planned in a manner that will be most compatible with the greatest public good and the least private injury, and that the property is necessary for the project. One of the best ways we can protect landowners is by making it more difficult for private entities to exercise eminent domain.

A constitutional amendment is an option, but one that may not be fruitful because of the greater difficulty in passage. In a state dependent on energy, a prohibition on the private right of eminent domain is not likely. North Dakota, a fellow energy state, instead limits the definition of "public good" in its Constitution:

> For purposes of this section, a public use or a public purpose does not include public benefits of economic development, including an increase in tax base, tax revenues, employment, or general economic health. Private property shall not be taken for the use of, or ownership by, any private individual or entity, unless that property is necessary for conducting a common carrier or utility business.

N.D. Const. Art. I, § 16. Wyoming's Constitution could be amended to provide that even the private entities listed must show a public purpose, public use, or public interest before exercising the right. Further, the Constitution could exclude public benefits of economic development from the definition of public use or public interest.

Statutory options may be more successful. First, the legislature could list "public good" or "public interest" as definitions in section 1-26-502. The present absence of a definition of "public use" in that section seems to be a glaring omission. These definitions could exclude public benefits of economic development. More narrowly, they could restrict "public good" and "public interest" to the "possession, occupation and enjoyment of the land . . . for the purpose of public health safety." *See* Arizona Private Property Rights Protection Act, § 12-1136. Additionally, Wyoming statutes could allow consideration only of the public good to the citizens of Wyoming. This would create issues because the health and safety benefits of Wyoming energy production may accrue only to residents of other states. Our research did not find another state with such a narrow definition.

The eminent domain statutes seem to use terms interchangeably. *See* § 1-26-503 ("public use"); § 1-26-504 ("public interest," "public good"). Amendments could change these terms to be uniform and then choose to define that unified term in section 1-26-502. Alternatively, if different meanings are intended, the terms could be defined separately in section 1-26-502. The legislature could also add the definitional language as a section (c) to section 1-26-503.

Section 1-26-504 requires that the property acquired for a project be "necessary." Additional subsections could define "necessary" in one of many ways. The Supreme Court defined the word to mean "reasonably convenient or useful." *Bridle Bit Ranch Co. v Basin Electric Power Coop.,* 118 P.3d 996 (Wyo. 2005). The amendment could track the language of *Bridle Bit* and require "more than reasonably convenient or useful." On another extreme, the statute could provide that "necessary" means there are no viable alternatives. As a middle ground, the statute could require the condemnor

to show "reasonable need" or to give reasons for choosing the land in question over reasonable alternatives. As a corollary to the definition of "necessary," section 1-26-504 could add a provision requiring a private condemnor to prove the project is not planned or located to avoid locating the project on or across federal or state lands.[8]

[8] Adapted from Wyoming House Bill No. HB0211. 2013 Session. This bill also proposed changing subsection (b) to define the findings of the public service commission to be one factor rather than prima facie evidence of "public interest" and "necessity." *Id.*

TABLE 3: PROPOSED STATUTORY CHANGES ADDRESSING "PUBLIC GOOD"

Wyo. Const. Art. I, § 32. Eminent Domain

Private property shall not be taken for private use unless by consent of the owner, except for private ways of necessity, and for reservoirs, drains, flumes or ditches on or across the lands of others for agricultural, mining, milling, domestic or sanitary purposes, nor in any case without due compensation. Any condemnor under this section must nonetheless establish the private use benefits the public interest.

§ 1-26-502. Definitions.

Possibility 1:

(a) As used in this act:

. . .

(vii) "Public good" or "public purpose" means the possession, occupation and enjoyment of the land by a public entity for the purpose of public health and safety.[9]

Possibility 2:

(a) As used in the act:

…

(vii) "Public good" or "public purpose" means the possession, occupation and enjoyment of the land by a public entity for the purpose of public health and safety of Wyoming citizens.

Possibility 3:

(a) As used in this act:

. . .

(vii) "Public good" or "public interest" does not include public benefits of economic development, including an increase in tax base, tax revenues, employment, or general economic health.[10]

§ 1-26-503. Public use required; other acquisitions

(a) Nothing in this act requires that the power of eminent domain be exercised to acquire property. Whether property necessary for public use is to be acquired by purchase, other means or by eminent domain is a decision left to the discretion of the person authorized to acquire the property.

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[9] Arizona Property Rights Protection Act, § 12-1136.

[10] Adapted from N.D. Code Ann. § 32-15-01; New Hampshire Bill 287, 2013.

(b) Subject to any other statute relating to the acquisition of property, any person or public entity authorized to acquire property for a particular use by eminent domain may also acquire the property for the use by grant, purchase, lease, gift, devise, contract or other means.

(c) Notwithstanding any other provision of law, a public good or a public interest does not include public benefits of economic development, including an increase in tax base, tax revenues, employment, or general economic health.[11]

§ 1-26-504. Requirements to exercise eminent domain

Possibility 1:

(a) Except as otherwise provided by law, the power of eminent domain may be exercised to acquire property for a proposed use only if all of the following are established:

(i) The public interest and necessity require the project or the use of eminent domain is authorized by the Wyoming Constitution;

(ii) The project is planned or located in the manner that will be most compatible with the greatest public good and the least private injury; and

(iii) The property sought to be acquired is necessary for the project~~.~~ and

(A)"Necessary" in this contexts means more than reasonably convenient or useful.

(iv) The project is not planned or located to avoid locating the project on or across federal lands.

(b) Findings of the public service commission, the interstate commerce commission and other federal and state agencies with appropriate jurisdiction ~~are prima facie valid~~ may be considered relative to determinations under subsection (a) of this section if the findings were made in accordance with law with notice to condemnees who are parties to the condemnation action. ~~and are final with no appeals from the determinations pending.~~

Possibility 2:

(a)(iii)(A)"Necessary" in this contexts means the condemnor can show reasonable need

Possibility 3:

(a)(iii)(A)"Necessary" in this contexts means there are no viable alternatives

[11] Adapted from ND Code Ann. § 32-15-01.

ALTERNATIVE COMPENSATION

Eminent Domain is the power of the government to take private property for public use. *Kelo v. City of New London, Conn.,* 545 U.S. 469, 496 (2005). *See* U.S. Const. arts. V, IV. This privilege is accompanied by the requirement for "just compensation" to be paid the private property owner. *Brown v. Legal Foundation of Wash.,* 538 U.S. 216, 231-32 (2003). "Just compensation" is meant to spread the cost of condemnation from one private individual to the public. *Kelo,* 45 U.S. at 497; *See Monongahela Nav. Co. v. U.S.,* 148 U.S. 312, 325 (1893). In Wyoming, mining companies are given the right to eminent domain by way of the Constitution. See Wyo. Const. Art. 1, § 32. Further, the Eminent Domain Act allows condemnation for pipeline transmission easements. See Wyo. Stat. Ann. § 1-26-814 (2012). However, the Wyoming Supreme Court has held the state's Eminent Domain Act is to be "strictly construed in favor of the landowners to the end that no person will be deprived of the use and enjoyment of his property except by a valid exercise of that power." *L.U. Sheep Co. v. Bd. of Cnty. Comm'rs.,* 790 P.2d 663, 671 (Wyo. 1990).

Under the Act, a landowner is compensated for the fair market value of the land taken. Wyo. Stat. Ann. § 1-26-702(a) (2012). For property for which there is a relevant market, fair market value is defined as the "price which would be agreed to by an informed seller who is willing but not obligated to sell, and an informed buyer who is willing but not obligated to buy." Wyo. Stat. Ann. § 1-26-704 (a)(i) (2012). For property for which there is no such market, fair market value may be determined "by any method of valuation that is just and equitable." Wyo. Stat. Ann. § 1-26-704(a)(ii) (2012). Any compensation method must look at what the owner has lost rather than what the taker has gained. *See Boston Chamber of Commerce v. Boston,* 217 U.S. 189, 195 (1910); M. Patrick Wilson, *Eminent Domain Law in Colorado–Part II: Just Compensation,* Colo. Law. 47, 50 (November 2006). Specifically, Wyoming law seeks to require compensation that would make the private landowner "whole" and place him or her in the same position as if the property had never been taken. Wyo. R. Civ. P. § 71.1(h)(3).

Determining a true fair market value, however, may be impossible because "there is always the threat of condemnation if an agreement is not reached." Brief for Appellant Barlow, *Barlow Ranch, L.P. v. Greencore Pipeline Co. LLC,* No. S-12-0038, at 21, Wyoming Supreme Court (April 27, 2012) [hereinafter *Brief for Appellant Barlow*]. Further, commentaries argue that "fair market value" actually undercompensates takees. *See* Matthew C. Williams, *Restitution, Eminent Domain, and Economic Development: Moving to a Gains-Based Conception of the Takings Clause,* 41 Urb. Law. 183, 184 (2009); Katrina Miriam Wyman, *The Measure of Just Compensation,* 41 U.C. Davis L. Rev. 239 (2007); Daphna Lewinsohn-Zamir, *Can't Buy Me Love: Monetary Versus In-Kind Remedies,* 2013 U. Ill. L. Rev. 151 (2013). This portion of the memo will look at the problems and possibilities of measuring and delivering just compensation in an attempt to better calculate and compensate rural landowners in condemnation actions. Of course, the use of some of these ideas will negate the need for others. In contrast, some changes may depend upon and work together with other changes.

Measuring "Just Compensation"

The Tenth Circuit recently certified a question regarding measuring just compensation to the Wyoming Supreme Court in *Bison Pipeline, LLC v. 102.84 Acres of Land,* 2012 WL 5834653. There, the question is whether, in a partial-takings case, just compensation can be measured by using the greater of (1) the value of the property rights taken and (2) the amount yielded under the "before and after" test. *Bison Pipeline,* 2012 WL 5834653, at *1. As the facts of the Bison Pipeline case show, "the value of property rights taken," shown by comparable lease and easement agreements, can yield "significantly larger just compensation than dictated by the before–and-after test." *Id.* In *Barlow v. Greencore Pipeline*, 2013 WY 34, the Wyoming Supreme Court recently held that the "before and after" test was not the exclusive means of determining compensation. *Barlow,* 2013 WY 34, ¶23. Rather, just compensation would be the greater of the value of the land taken or the decreased value of what remains after the taking. *Id.* The *Bison Pipeline* case will likely be decided similarly under this precedent. Therefore, legislative action may not be needed on this point. Regardless of the outcome,

however, landowners may prefer a more explicit endorsement of the "value of property rights taken" measure of compensation.

The legislature could therefore amend section 1-26-702(b) to additionally provide: "The value of the property rights taken may be valued by means other than the amount by which the fair market value of the entire property immediately before the taking exceeds the fair market value of the remainder immediately after the taking." Similarly, "A condemnee is not bound to use the "before and after" test if another equitable measure of just compensation would yield a greater value of property rights taken." Either of these choices would technically be superfluous, however, because of the present wording of the statute. Alternatively, the addition of a means of evaluating "the value of the property rights taken" in the statute would show legislative intent for it to remain a viable option for valuation of a partial taking. To that end, the legislature could incorporate the language of the Wyoming Supreme Court in *L.U. Sheep Co.*: "(b) If there is a partial taking of property, the measure of compensation is the greater of the value of the property rights taken, measured by any rational method so long as she or he is able to introduce competent evidence to that end, or the amount by which the fair market value of the entire property immediately before the taking exceeds the fair market value of the remainder immediately after the taking." *See L.U.Sheep Co.,* 790 P.2d at 672. To be clear, another provision could be added, "Competent evidence may include the amounts and methods of payment on similar property by one other than the condemnor."[12]

> In this area, Arkansas law could be instructive. In that state,
>
> The measure of damages in a condemnation case depends on whether the land is taken by the sovereign or by another entity. When the sovereign exercises its right to

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[12] Part of this language was taken from a New Mexico Statute, which states:

> The price paid for similar property by one other than the condemnor may be considered on the question of the value of the property condemned or damaged if there is a finding that there have been no material changes in conditions between the date of the prior sale and the date of taking, that the prior sale was made in a free and open market and that the property is sufficiently similar in the relevant market with respect to situation, usability, improvements and other characteristics.

N.M. Stat. Ann. § 42A-1-24(F) (2012).

> take a portion of a tract of land, the proper measure of compensation is the difference in fair market value of the entire tract immediately before and after the taking. When another entity such as a railroad, telephone company, or . . . an electric company exercises the right of eminent domain, just compensation is measured by the value of the portion of the land taken plus any damage to the remaining property.

Pope v. Overton, 376 S.W.3d 400, 404 (Ark, 2011) (internal citations omitted). Arkansas, therefore, utilizes the "before and after" test when land is taken by the sovereign, and the "value of the portion of the land taken" when land is taken by another entity. Following this model, section 1-26-702(b) could delineate between the measure of compensation required depending on the identity of the condemnor:

> If there is a partial taking of property (i) by the state, the measure of compensation is the amount by which the fair market value of the entire property immediately before the taking exceeds the fair market value of the remainder immediately after the taking. (ii) by another entity, the measure of compensation is the value of the property rights taken.

Landowners may prefer, however, to have the choice between the two methods regardless of the identity of the condemnor.

Annual Payments

Annual payments are now expressly permitted in Wyoming under *Barlow Ranch, LP v. Greencore Pipeline Co., LLC,* 2013 WY 34, handed down on March 19, 2013. The Appellants in that case argued that Wyo. Stat. Ann. § 1-26-509 explicitly allows for alternative payment methods. *Brief for Appellant Barlow,* supra, at 34. Section 1-26-509 provides that a condemnor may negotiate and contract "with respect to . . . [t]he time and method of payment of agreed compensation or other amounts authorized by law." Wyo. Stat. Ann. § 1-26-509 (b)(vi). Appellant also noted section 1-26-514 expressly allows the court to authorize "an annual installment or amortization payment to continue throughout the term of the easement." Further, Appellant argued annual payments do not violate the provision requiring compensation to be set at a fixed valuation date because there are methods to account for the time value of money. *Brief for Appellant Barlow,* supra, at 34-35 (citing

United States v. 14.4756 Acres of Land in Christiana Hundred, New Castle Cnty., 71 F. Supp. 1005, 1008 (D. Del. 1947) (holding annual payments a proper payment method for condemnation)); see Wyo. Stat. Ann. § 1-26-703 (2012). Finally, Appellants argued that the market in a given area may call for annual payments, making that payment form a true measure of fair market value. *Brief for Appellant Barlow,* supra, at 35-36.

Even though the Wyoming Supreme Court accepted Barlow's arguments, however, landowners may want the protection of statutory reform regarding annual payments. This language could be inserted in various places. First, section 1-26-704(a) could be amended to accomplish this result. A subsection (iv) could be added to the end of section (a) to say: "Fair market value is not defeated by the use of annual installment, "through-put", or other payment methods agreed to by the parties or ordered by the court." Second, the legislature could add a section 704a entitled "Method of Payment." This section would expressly provide that "The method of payment agreed upon by the parties or imposed by the court may include (a) a lump sum; (b) annual payments with an adjustment for inflation based upon the consumer price index; (c) for pipelines and transmission lines, payments based on a percentage of value of the material or commodity transmitted through the pipeline or transmission line; or (d) any other equitable method."

Through-Put

Through-put compensation has not been implemented in any of the states we surveyed. Further, we can find no evidence of proposed legislation or guidance documents on the subject from other states. However, there are arguments that can be made to try and get this idea passed in Wyoming.

The idea of "fair market value" contemplates a willing buyer and a willing seller coming to an agreed and un-coerced price. *See* Wyo. Stat. Ann. § 1-26-704(a)(ii) (2012). This agreed price can be a percentage of the value of the commodity flowing through a pipeline. Arguments against through-put compensation may attempt to characterize the payment as a royalty or as a percentage of

ownership in the production of a certain commodity. Those opponents would then argue that the price no longer reflects compensation for what was lost because it would be tied to what the taker gains. *See Boston Chamber of Commerce v. City of Boston,* 217 U.S. 189, 195 (1910) (holding that compensation must be tied to what the owner has lost rather than what the taker has gained). However, a through-put method of payment can still be compensation. The difference between through-put compensation and a lump sum or annual payment is that a lump sum or annual payment can be determined as a sum certain, and through-put compensation cannot. This alone, however, should not affect its classification as compensation. A willing buyer and a willing seller certainly could agree to compensation tied to the value of what travels through a pipe or transmission line. Arguably, such an arrangement would happen more frequently without the availability of condemnation to a pipeline or utility company.

Further, "government should grant private property owners their share of many kinds of benefits created by government action utilizing that property." Abraham Bell & Gideon Parchomovsky, *The Hidden Function of Takings Compensation,* 96 Va. L. Rev. 1673, 1689 (2010) (citing Richard A. Epstein, Takings: Private Property and the Power of Eminent Domain (1985)). There is even stronger reason for this principle to apply when a private entity exercises eminent domain.

Landowners presumably want through-put compensation to better approximate their losses. However, the strongest argument for using through-put compensation may be that it incentivizes companies to use public land for their easements. According to Ryan Lance at the Wyoming State Department of Lands and Investments, that Department stopped their efforts in initiating a through-put compensation model in order to avoid pushing more transactions onto private land. Laying the groundwork for private landowners to claim through-put compensation would allow the state to do the same with its trust lands. Further, having a through-put model will incentivize companies to accept a term limit on the easements in negotiations with landowners. The Office of State Lands and

Investments has found that having the term limits in place has increased their revenue by allowing for repeated negotiations and adjustments over time.

A through-put measure could be modeled after an Indiana statute which creates a tiered compensation scheme. As part of statutory reform in 2006, Indiana's legislature created tiers of compensation depending on the type of land taken. *See* 2006 Ind. Leg. Serv. P.L. 163-2006 H.E.A. No. 1010. For agricultural land, a condemnor must pay 125% of fair market value or the transfer of ownership interest in other agricultural land. IN-ST 32-24-4.5-8 (2012). For residential property, a condemnor has to pay 150% of fair market value plus damages and relocation costs. *Id.* All other land is subject to 100% of fair market value. *Id.*

Similarly, Wyoming's section 1-26-702 could be amended to provide that in order for a private entity to exercise eminent domain, the condemnor must pay 125% of fair market value or an agreed upon percentage of the value of the commodity flowing through the pipeline or transmission line. This change would complement any changes to the method of measuring "just compensation," discussed above. The requirement of more than fair market value might incentivize companies to look at through-put compensation when they otherwise might not, especially if accompanied by stronger protections for landowners in negotiations. See the section entitled "Good Faith Negotiations" above. Although most states do require only fair market value, Indiana's alternative statute has been in place for nearly 8 years now.

Empirical data show landowners would often prefer to receive an in-kind compensation instead of money. Lewisohn-Zamir, *supra*, at 186. Specifically, "people tend to derive greater utility from a relief that is of the same type as the injury inflicted." *Id.* In-kind compensation better matches the loss with the correction. *Id.* at 174. Through-put compensation could be considered an in-kind compensation, as the landowners are paid according to the material that actually moves through the pipeline or transmission line. However, other in-kind compensation could also be considered. For example, the Indiana statute also gives landowner the election to receive other land instead of money.

See IC 32-24-4.5-8 (2012). Another possibility, at least when eminent domain is exercised by the government, is the grant of development rights, particularly when a landowner could not use condemnation proceeds to purchase such rights. *See* Lewisohn-Zamir, *supra,* at 186. However, these developmental rights may be less important to rural landowners.

Admissible Evidence

Another issue related to compensation is the permissible evidence allowed to show the landowner's loss. In *Barlow*, appellants successfully used the price of comparable easements in the area. *Barlow,* 2013 WY 34, ¶ 27. An Illinois case holds that "whatever can be shown to adversely affect market value is admissible." *Illinois Gas and Elec. Co. v. Hoffman,* 468 N.E.2d 977, 980 (1984) (expressly allowing evidence that the unsightly nature of the telephone wires affected the agricultural property's value in the eyes of the "purchasing public."). Similarly, *L.U. Sheep* seems to hold that any evidence showing a rational connection to fair market value should be allowed. *See* 790 P.2d at 672. However, if the evidence is too speculative, it will be insufficient to support an award for condemnation damages. *See Sheridan Drive-In Theatre, Inc. v. State,* 384 P.2d 597, 600-01 (Wyo. 1963).

Wyoming's section 1-26-704(a)(ii) states, "the fair market value for which there is no relevant market is its value as determined by any method of valuation that is just and equitable." The next subsection lists various "generally accepted appraisal techniques" that may be used in valuation. Wyo. Stat. Ann. § 1-26-704(a)(iii) (2012). In order to clarify and expand the types of evidence allowed, the legislature could add to this list: "(D) The unsightly nature of structures to be added to the property; (E) Any evidence rationally related to the property's fair market value." An additional amendment could expressly provide that evidence of similar easements can include evidence of the methods of compensation for similar easements.

TABLE: PROPOSED STATUTORY CHANGES FOR ALTERNATIVE COMPENSATION

§ 1-26-702. Compensation for taking

Possibility 1:

(b) If there is a partial taking of property,

(i) The measure of compensation is the greater of the value of the property rights taken or the amount by which the fair market value of the entire property immediately before the taking exceeds the fair market value of the remainder immediately after the taking.

(ii) The value of the property rights taken may be valued by means other than the amount by which the fair market value of the entire property immediately before the taking exceeds the fair market value of the remainder immediately after the taking.

Possibility 2:

(b) If there is a partial taking of property,

(i) The measure of compensation is the greater of the value of the property rights taken or the amount by which the fair market value of the entire property immediately before the taking exceeds the fair market value of the remainder immediately after the taking.

(ii) A condemnee is not bound to use the "before and after" test if another equitable measure of just compensation would yield a greater value of property rights taken.

Possibility 3:

(b) If there is a partial taking of property, the measure of compensation is the greater of the value of the property rights taken, measured by any rational method so long as she or he is able to introduce competent evidence to that end, or the amount by which the fair market value of the entire property immediately before the taking exceeds the fair market value of the remainder immediately after the taking. Competent evidence may include the amounts and methods of payment on similar property by one other than the condemnor.

Possibility 4:

(b) If there is a partial taking of property

(i) by the state, the measure of compensation is the ~~greater of the value of the property rights taken or the~~ amount by which the fair market value of the entire property immediately before the taking exceeds the fair market value of the remainder immediately after the taking.

(ii) by another entity, the measure of compensation is the value of the property rights taken.

Possibility 5:

(a) Except as provided in subsection (b) and (c) of this section, the measure of compensation for a taking of property is its fair market value determined under W.S. 1-26-704 as of the date of valuation.

(b) If there is a partial taking of property by the state, the measure of compensation is the greater of the value of the property rights taken or the amount by which the fair market value of the entire property immediately before the taking exceeds the fair market value of the remainder immediately after the taking.

(c) If there is a partial taking of property by an entity other than the state, the measure of compensation is 125% of fair market value or an agreed upon percentage of the value of the commodity flowing through the pipeline or transmission line for which the land was taken.

§ 1-26-704. Fair market value defined

Possibility 1:

(a) Except as provided in subsection (b) of this section:

(i) The fair market value of property for which there is a relevant market is the price which would be agreed to by an informed seller who is willing but not obligated to sell, and an informed buyer who is willing but not obligated to buy;

(ii) The fair market value of property for which there is no relevant market is its value as determined by any method of valuation that is just and equitable;

(iii) The determination of fair market value shall use generally accepted appraisal techniques and may include:

(A) The value determined by appraisal of the property performed by a certified appraiser;

(B) The price paid for other comparable easements or leases of comparable type, size and location on the same or similar property;

(C) Values paid for transactions of comparable type, size and location by other companies in arms length transactions for comparable transactions on the same or similar property.

(iv) Fair market value is not defeated by the use of annual installment, "through-put", or other payment methods agreed to by the parties or ordered by the court.

Possibility 2:

(a) Except as provided in subsection (b) of this section:

(i) The fair market value of property for which there is a relevant market is the price which would be agreed to by an informed seller who is willing but not obligated to sell, and an informed buyer who is willing but not obligated to buy;

(ii) The fair market value of property for which there is no relevant market is its value as determined by any method of valuation that is just and equitable;
(iii) The determination of fair market value shall use generally accepted appraisal techniques and may include:

(A) The value determined by appraisal of the property performed by a certified appraiser;

(B) The price paid and method of payment for other comparable easements or leases of comparable type, size and location on the same or similar property;

(C) Values paid for transactions of comparable type, size and location by other companies in arms length transactions for comparable transactions on the same or similar property;

(D) The unsightly nature of structures to be added to the property;

(E) Any evidence rationally related to the property's fair market value.

Proposed § 1-26-704a. Method of Payment

The method of payment agreed upon by the parties or imposed by the court may include
(a) a lump sum;
(b) annual payments with an adjustment for inflation based upon the consumer price index;
(c) for pipelines and transmission lines, payments based on a percentage of value of the material or commodity transmitted through the pipeline or transmission line; or
(d) any other equitable method.

ABANDONMENT

In Wyoming, "easements may be perpetual, or for an indefinite duration, or for so long as they are needed for their intended purpose or so long as the necessity continues." *Bridle Bit Ranch Co. v. Basin Elec. Power Co-op.,* 118 P.3d 996, 1016 (2005). Even "indefinite" easements, however, are limited by section 1-26-515, which provides for the termination of easements because of nonuse, upon certain transfers, or where a new use is not identical to the original use. *Id.* The Wyoming Marketable Title Act does not affect easements. Richard Bale, *Exotic Easement Problems to Intrigue the Title Examiner,* 102A-RMMLF-INST 12, n. 69 (1998); *see* Wyo. Stat. Ann. § 34-10-104(v).

"Ordinarily, when an easement terminates, it is extinguished and the fee owner of the servient tenement at the time of termination is the owner of the land free of the easement." Richard Bale, *Exotic Easement Problems to Intrigue the Title Examiner,*102A RMMLF-INST 12, n. 70 (1998). The Wyoming statute gives specified conditions under which the easement terminates.[13] Wyo. Stat. Ann. § 1-26-515. The logical conclusion, therefore, is that the property reverts back to the condemnee. However, the condemnee is left with no enumerated procedures to regain that property.

Other states have "repurchase" options that could be implemented in Wyoming. New York requires the easement holder to first offer the property to the former fee holder if it chooses to transfer the property within ten years of its acquisition. *See* NY EM DOM PROC § 406. The easement holder must offer for the former fee holder to purchase the property at the fair market value at the time of the offer. *Id.* If the original acquisition was a partial taking, the easement holder only has to give the former fee holder this right of first refusal if the fee holder retained title to the contiguous remainder parcel. *Id.* If the easement holder attempts to find the former fee holder "in

[13] New Mexico has similar language. Upon abandonment, "the easement is extinguished and the possession of the property reverts to the owner or his successor in interest of the fee free from any rights in the condemnor." N.M.S.A. § 42A-1-33. The legal effect is the same in that the condemnee will regain title to the condemned property.

good faith and with reasonable diligence," the failure to find him or her will not invalidate a subsequent disposition of the easement. *Id.* New Hampshire has a similar provision.[14]

Pennsylvania statutes contain the same time limit but allow the condemnee to reacquire the property "at the same price paid to the condemnee by the condemnor." 26 Pa. C.S.A. § 310. Pennsylvania also extends the time within which the condemnor must give the condemnee the first right of refusal to 21 years if the land is outside corporate county lands, is undeveloped, and was devoted to agriculture at the time of the condemnation. *Id.* If the offers to the condemnee are not accepted, however, Pennsylvania law further restricts the condemnor by limiting any disposition of the property to only public uses for 21 years after condemnation. *Id.* The statute does allow for a shorter time period upon proof of changed circumstances. *Id.*

Virginia similarly allows the condemnee to repurchase the property and places the responsibility on the condemnor to offer the property at the price it acquired it plus an annual interest rate of 6% and the fair market value of any improvements. VA Code Ann. § 25.1-108. In Vermont, unused rights are subject to condemnation for a public use by another public service entity. *See* 30 V.S.A. § 117. South Carolina allows for repurchase of property condemned for sewerage services. SC ST § 58-7-25.

Texas has a comprehensive scheme that could serve as a model for Wyoming.[15] In Texas, the landowner has a right to repurchase the property from the condemnor when the public use for which the property was acquired is canceled before the property is put to that public use, when no actual progress is made toward that public use for ten years, or when the property becomes unnecessary for the public use. TX PROPERTY § 21.101. Importantly, the landowner may file suit

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[14] New Hampshire similarly allows for a condemnor to dispose of the easement by sale or otherwise. See N.H. Rev. Stat. § 498-A:12. If the condemnor wishes to do so (or if the purpose for which the property was acquired has been served) within ten years of acquiring the property, the condemnor must first offer the easement back to the condemnee at the current fair market value. *Id.*

[15] Utah has a similar although less comprehensive model at Utah Code § 78B-6-520.3.

and request the district court to determine whether any of these events have occurred, or the landowner may request the condemnor to make such a determination after ten years from the time of the taking. TX PROPERTY § 21.1021. The condemnor must respond within 90 days. *Id.*

Recent proposed legislation in Texas would shorten the amount of time a condemnee would have to wait from ten years to one year and allow the condemnee to request such a determination from the condemnor annually. *See* 2013 Texas Senate Bill No. 180, Texas Eighty-Third Legislature. Texas also places an affirmative responsibility on the condemnor to notify the condemnee of his or her right to repurchase the property within 180 days of determining the condemnee has that right. TX PROPERTY § 21.102.

The condemnor must offer to sell the property to the condemnee for the price paid at the time the property was acquired through eminent domain. TX PROPERTY § 21.103. This is a recent change. Judon Fambrough, *Understanding the Condemnation Process in Texas,* Real Estate Center at Texas A&M University Technical Report 394 at 7 (2011) (noting the effective date of September 1, 2011). The statute used to require instead an offer of fair market value. *Id.* The condemnee has 90 days to respond to the offer. *Id.* The condemnee's right to repurchase extinguishes one year after the 180 notice period noted above if the condemnor makes a good faith effort to locate the condemnee and does not receive any response. TX PROPERTY § 21.1022. After that, the condemnor is free to sell the property to a third party. Fambrough, *supra,* at 7. Further, the condemnor must inform the landowner of this right to reacquire the property at the time the property is acquired. *Id.*

Wyoming provides no repurchase option to landowners. A repurchase option would—at least in theory— allow landowners to reacquire their land outside of a court proceeding. Landowners could request proof from the condemnor that the easement was being used for the purpose for which it was condemned, and the condemnor would have the obligation to provide the condemnee with notice of its right to repurchase as well as the statutorily specified offer for purchase. An interim period before a condemnee could make such a request is reasonable in that it allows the condemnor

to develop the project for which the land was condemned. After that interim period, however, it might be wise to incorporate the proposed change in Texas to allow for the condemnee to request proof of continuing use at periodic intervals. Every year may be too burdensome, but every three years might be appropriate.

The legislature will also have to choose a valuation method for the repurchase price. Other states' options vary from full fair market value at the time of the offer to only the price paid in the original negotiation. *See* NY EM DOM PROC § 406; TX PROPERTY § 21.103. Clearly, it is more advantageous to landowners to impose the valuation of the price paid at the time of the original transaction. Since there is an involuntary element to a landowner's sale of their property, it would not be unfair to require a condemnor to accept back what it had originally paid. It may be fair, however, to consider the time value of money. Since the goal of "just compensation" in eminent domain actions generally is to make the landowner whole, a reciprocal principle could apply upon repurchase. Therefore, an appropriate valuation measure may be the price paid at the original transaction plus an interest rate reflecting the time value of money. The legislature could instead argue that the loss of the time value of money is a fair price to the condemnor when the condemnee lost the time value of the property over the same time period. Both options are shown below.

Jurisdictions vary on whether a condemnee may validly waive the right to repurchase condemned property. *See* Utah Code 78B-6-520.3(9) (Allowing for written waiver); VA Code Ann. § 25.1-108 (A) ("Any contractual provision or agreement by the former owner waiving the right to receive an offer to sell from the condemnor is void and unenforceable."). Perhaps an appropriate view would be that waivers will be subject to critical scrutiny in order to ensure they were not entered into under undue influence or duress. It is foreseeable that condemning entities may seek to negotiate for a waiver in return for a higher price. Landowners should be free to contract, however, as long as there is no indication of foul play.

TABLE 5: PROPOSED STATUTORY CHANGES ADDRESSING ABANDONMENT & REPURCHASE

§ 1-26-515. Right of Repurchase for Abandonment, Nonuse or New use[16]

~~Upon abandonment, nonuse for a period of ten (10) years, or transfer or attempted transfer to a use where the transferee could not have condemned for the new use, or where the new use is not identical to the original use and new damages to the landowner whose property was condemned for the original use will occur, any easement authorized under this act terminates.~~

(a) A person from whom a real property interest is acquired by an entity through eminent domain, or that person's heirs, successors, or assigns, is entitled to repurchase the property as provided by this subchapter if:

(1) the property acquired through eminent domain is abandoned;[17]

(2) the property is not used for a period of ten (10) years; or

(3) the property is transferred or attempted to be transferred to a new use where the transferee could not have condemned for the new use, or where the new use is not identical to the original use and new damages to the landowner whose property was condemned for the original use will occur.

(b) Not later than the 180th day after the date an entity that acquired a real property interest through eminent domain determines that the former property owner is entitled to

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[16] Alternatively, these subsections could be broken out into a new Article 9 under Chapter 26 (Eminent Domain) for the Right of Repurchase. Title names could be taken from TX PROPERTY § 21.101 through 21.103, on which these changes are based.

[17] "Abandoned" would then be defined by common law principles unless the legislature added a subsection defining it for this section. Texas added a subsection to define "actual progress" as the completion of two or more listed actions. *See* TX PROPERTY § 21.101. The Wyoming Legislature may want to add a definition of "abandon" that requires lower proof than the common law doctrine. *See Mueller v. Hoblyn,* 887 P.2d 500, 505 (1994) (requiring the plaintiff to show on the part of the defendant nonuse as well as an intent to abandon and refusing to find abandonment even though easement holder had not attempted to use the easement in twenty-seven years and used an alternate route during that time); *Richards Asphalt Co. v. Bunge Corp.,* 399 N.W.2d 188, 192-93 (Minn. App. 1987) (refusing to find abandonment after sixteen years of non-use and obstructing tracks with four to seven feet of fill dirt to control periodic flooding) . However, since the current statute also includes "nonuse for a period of ten (10) years as grounds for termination, the additional definition may be unnecessary for landowner protection.

repurchase the property under Section (a), the entity shall send by certified mail, return receipt requested, to the property owner or the owner's heirs, successors, or assigns a notice containing:

(1) an identification of the property that was acquired;[18]

(2) an identification of the public use for which the property had been acquired and a statement that:

(A) the property acquired through eminent domain is abandoned;

(B) the property has not been used for a period of ten (10) years; or

(C) the property is transferred or attempted to be transferred to a new use where the transferee could not have condemned for the new use, or where the new use is not identical to the original use and new damages to the landowner whose property was condemned for the original use will occur.

(3) a description of the person's right under this subchapter to repurchase the property.

(c) (1) On or after the 10th anniversary of the date on which real property was acquired by an entity through eminent domain, a property owner or the owner's heirs, successors, or assigns may request that the condemning entity make a determination and provide a statement and other relevant information regarding:

(A) whether the easement has been abandoned;

(B) whether the property has not been used for a period of ten (10) years; and

(C) whether the property has been transferred or attempted to transfer to a new use where the transferee could not have condemned for the new use, or whether the new use is not identical to the original use and new damages to the landowner whose property was condemned for the original use will occur.

(2) A request under this section must contain sufficient detail to allow the entity to identify the specific tract of land in relation to which the information is sought.

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[18] The Texas statute adds that the identification does not need to be a legal description. *See* TX PROPERTY § 21.102.

(3) Not later than the 90th day following the date of receipt of the request for information, the entity shall send a written response by certified mail, return receipt requested, to the requestor.

Possibility 2 for (c):

(c) (1) On or after the 10th anniversary of the date on which real property was acquired by an entity through eminent domain, and every three (3) years thereafter, a property owner…

(d) Notwithstanding Section (c), the right to repurchase provided by this subchapter is extinguished on the first anniversary of the expiration of the period for an entity to provide notice under Section (b) if the entity:

(1) is required to provide notice under Section (b);

(2) makes a good faith effort to locate and provide notice to each person entitled to notice before the expiration of the deadline for providing notice under that section; and

(3) does not receive a response to any notice provided under that section in the period for response prescribed by Section (e).

(e) (1) Not later than the 180th day after the date of the postmark on a notice sent under Section (b) or a response to a request made under Section (c) that indicates that the property owner, or the owner's heirs, successors, or assigns, is entitled to repurchase the property interest in accordance with Section (a), the property owner or the owner's heirs, successors, or assigns must notify the entity of the person's intent to repurchase the property interest under this subchapter.

(2) As soon as practicable after receipt of a notice of intent to repurchase under Subsection (1), the entity shall offer to sell the property interest to the person for the price paid to the owner by the entity at the time the entity acquired the property through eminent domain. The person's right to repurchase the property expires on the 90th day after the date on which the entity makes the offer.

Possibility 2 for (e):

(e) (1)…

(2) As soon as practicable after receipt of a notice of intent to repurchase under Subsection (1), the entity shall offer to sell the property interest to the person for the present fair market value of the property. The person's right to repurchase the property expires on the 90th day after the date on which the entity makes the offer.

Possibility 3 for (e):

(e) (1)…

(2) As soon as practicable after receipt of a notice of intent to repurchase under Subsection (1), the entity shall offer to sell the property interest to the person for the price paid to the owner by the entity at the time the entity acquired the property through eminent domain plus the fair market value of any improvements. The person's right to repurchase the property expires on the 90th day after the date on which the entity makes the offer.

Possibility 4 for (e):

(e) (1)…

(2) As soon as practicable after receipt of a notice of intent to repurchase under Subsection (1), the entity shall offer to sell the property interest to the person for the price paid to the owner by the entity at the time the entity acquired the property through eminent domain plus an annual interest rate of x%.[19] The person's right to repurchase the property expires on the 90th day after the date on which the entity makes the offer.

[19] Virginia uses 6%. *See* VA Code Ann. § 25.1-108.

(f) A condemnee may validly waive the right to repurchase condemned property, but such waiver shall be subject to critical scrutiny in order to ensure it was not entered into under undue influence or duress.

APPENDIX: SIGNIFICANT STATUTES FROM OTHER JURISIDCTIONS

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Fla. Stat. Ann. § 73.092. Attorney's fees.

(1) Except as otherwise provided in this section and s. 73.015, the court, in eminent domain proceedings, shall award attorney's fees based solely on the benefits achieved for the client.

(a) As used in this section, the term "benefits" means the difference, exclusive of interest, between the final judgment or settlement and the last written offer made by the condemning authority before the defendant hires an attorney. If no written offer is made by the condemning authority before the defendant hires an attorney, benefits must be measured from the first written offer after the attorney is hired.

1. In determining attorney's fees, if business records as defined in s. 73.015(2)(c) 2. and kept by the owner in the ordinary course of business were provided to the condemning authority to substantiate the business damage offer in s. 73.015(2)(c), benefits for amounts awarded for business damages must be based on the difference between the final judgment or settlement and the written counteroffer made by the condemning authority provided in s. 73.015(2)(d).

2. In determining attorney's fees, if existing business records as defined in s. 73.015(2)(c) 2. and kept by the owner in the ordinary course of business were not provided to the condemning authority to substantiate the business damage offer in s. 73.015(2)(c) and those records which were not provided are later deemed material to the determination of business damages, benefits for amounts awarded for business damages must be based upon the difference between the final judgment or settlement and the first written counteroffer made by the condemning authority within 90 days from the condemning authority's receipt of the business records previously not provided.

(b) The court may also consider nonmonetary benefits obtained for the client through the efforts of the attorney, to the extent such nonmonetary benefits are specifically identified by the court and can, within a reasonable degree of certainty, be quantified.

(c) Attorney's fees based on benefits achieved shall be awarded in accordance with the following schedule:

1. Thirty-three percent of any benefit up to $250,000; plus

2. Twenty-five percent of any portion of the benefit between $250,000 and $1 million; plus

3. Twenty percent of any portion of the benefit exceeding $1 million.

(2) In assessing attorney's fees incurred in defeating an order of taking, or for apportionment, or other supplemental proceedings, when not otherwise provided for, the court shall consider:

(a) The novelty, difficulty, and importance of the questions involved.

(b) The skill employed by the attorney in conducting the cause.

(c) The amount of money involved.

(d) The responsibility incurred and fulfilled by the attorney.

(e) The attorney's time and labor reasonably required adequately to represent the client in relation to the benefits resulting to the client.

(f) The fee, or rate of fee, customarily charged for legal services of a comparable or similar nature.

(g) Any attorney's fee award made under subsection (1).

(3) In determining the amount of attorney's fees to be paid by the petitioner under subsection (2), the court shall be guided by the fees the defendant would ordinarily be expected to pay for these services if the petitioner were not responsible for the payment of those fees.

(4) At least 30 days prior to a hearing to assess attorney's fees under subsection (2), the condemnee's attorney shall submit to the condemning authority and to the court complete time records and a detailed statement of services rendered by date, nature of services performed, time spent performing such services, and costs incurred.

(5) The defendant shall provide to the court a copy of any fee agreement that may exist between the defendant and his or her attorney, and the court must reduce the amount of attorney's fees to be paid by the defendant by the amount of any attorney's fees awarded by the court.

IDAHO

Idaho Code Ann. § 7-711A. Advice of rights form- Rights when condemning authority acquires property.

Whenever a state or local unit of government or a public utility is beginning negotiations to acquire a parcel of real property in fee simple, the condemning authority shall provide the owner of the property a form containing a summary of the rights of an owner of property to be acquired under this chapter. If the condemning authority does not supply the owner of the real property with this form, there will be a presumption that any sale or contract entered into between the condemning authority and the owner was not voluntary and the condemning authority may be held responsible for such relief, if any, as the court may determine to be appropriate considering all of the facts and circumstances. The form shall contain substantially the following:

(1) The (name of entity allowed to use eminent domain proceedings pursuant to chapter 7, title 7, Idaho Code) has the power under the constitution and the laws of the state of Idaho and the United States to take private property for public use. This power is generally referred to as the power of "eminent domain" or condemnation. The power can only be exercised when:

(a) The property is needed for a public use authorized by Idaho law;

(b) The taking of the property is necessary to such use;

(c) The taking must be located in the manner which will be most compatible with the greatest public good and the least private injury.

(2) The condemning authority must negotiate with the property owner in good faith to purchase the property sought to be taken and/or to settle with the owner for any other damages which might result to the remainder of the owner's property.

(3) The owner of private property to be acquired by the condemning authority is entitled to be paid for any diminution in the value of the owner's remaining property which is caused by the taking and the use of the property taken proposed by the condemning authority. This compensation, called "severance damages," is generally measured by comparing the value of the property before the taking and the value of the property after the taking. Damages are assessed according to Idaho Code.

(4) The value of the property to be taken is to be determined based upon the highest and best use of the property.

(5) If the negotiations to purchase the property and settle damages are unsuccessful, the property owner is entitled to assessment of damages from a court, jury or referee as provided by Idaho law.

(6) The owner has the right to consult with an appraiser of the owner's choosing at any time during the acquisition process at the owner's cost and expense.

(7) The condemning authority shall deliver to the owner, upon request, a copy of all appraisal reports concerning the owner's property prepared by the condemning authority. Once a complaint for condemnation is filed, the Idaho rules of civil procedure control the disclosure of appraisals.

(8) The owner has the right to consult with an attorney at any time during the acquisition process. In cases in which the condemning authority condemns property and the owner is

able to establish that just compensation exceeds the last amount timely offered by the condemning authority by ten percent (10%) or more, the condemning authority may be required to pay the owner's reasonable costs and attorney's fees. The court will make the determination whether costs and fees will be awarded.
(9) The form contemplated by this section shall be deemed delivered by United States certified mail, postage prepaid, addressed to the person or persons shown in the official records of the county assessor as the owner of the property. A second copy will be attached to the appraisal at the time it is delivered to the owner.
(10) If a condemning authority desires to acquire property pursuant to this chapter, the condemning authority or any of its agents or employees shall not give the owner any timing deadline as to when the owner must respond to the initial offer which is less than thirty (30) days. A violation of the provisions of this subsection shall render any action pursuant to this chapter null and void.
(11) Nothing in this section changes the assessment of damages set forth in section 7-711, Idaho Code.

NORTH DAKOTA

N.D. Cent. Code Ann. § 32-15-06.1. Duty to negotiate-Just compensation-Appraisals

1. A condemnor shall make every reasonable and diligent effort to acquire property by negotiation.

2. Before initiating negotiations for the purchase of property, the condemnor shall establish an amount which it believes to be just compensation therefor and promptly shall submit to the owner an offer to acquire the property for the full amount so established. The amount shall not be less than the condemnor's approved appraisal or written statement and summary of just compensation for the property.

3. In establishing the amount believed to be just compensation, the condemnor shall disregard any decrease or increase in the fair market value of the property caused by the project for which the property is to be acquired or by the reasonable likelihood that the property will be acquired for that project, other than a decrease due to physical deterioration within the reasonable control of the owner.

4. The condemnor shall provide the owner of the property with a written appraisal, if one has been prepared, or if one has not been prepared, with a written statement and summary, showing the basis for the amount it established as just compensation for the property. If appropriate, the compensation for the property to be acquired and for the damages to remaining property shall be separately stated.

NEW HAMPSHIRE
N.H. Rev. Stat. § 498-A:12 Abandonment of Project.

I. If a condemnor has condemned a fee and thereafter abandons the purpose for which the property has been condemned, the condemnor may dispose of it by sale or otherwise; provided, however, that if the property has not been substantially improved, it may not be disposed of within 10 years of condemnation without first being offered to the condemnee, his heirs and assigns at the same price paid to the condemnee by the condemnor. The condemnee, his heirs and assigns shall be served with notice of the offer in the same manner as prescribed for the service of notices in RSA 498-A:4, and shall have 90 days after receipt of such notice to make the written acceptance thereof.

II. If a condemnor has acquired a fee and thereafter abandons the property, after the purpose is served for which the property was acquired, or abandons the property for any reason within 10 years of acquisition, the property may not be disposed of without first being offered to the landowner, his heirs and assigns at a price equal to the current appraised value of the property including any improvements made thereon. The landowner, his heirs and assigns shall be served notice pursuant to RSA 498-A:12, I. This provision shall not apply to those properties purchased as early or total acquisitions at the landowner's request.

N.M. Stat. Ann. § 42-1-24. Determination of compensation and damages; interest

A. For the purposes of assessing compensation and damages, the right thereto shall be deemed to have accrued as of the date the petition is filed, and actual value on that date shall be the measure of compensation for all property taken, and also the basis of damages for property not taken but injuriously affected in cases where such damages are legally recoverable; the amount of the award shall be determined from the evidence and not be limited to any amount alleged in the petition or set forth in the answer.

B. Whenever just compensation shall be ascertained and awarded in such proceeding and established by judgment, the judgment shall include as a part of the just compensation awarded interest at the rate of ten percent a year upon the unpaid portion of the compensation awarded from the date the petition is filed to the date of payment or the date when the proceedings are finally abandoned. The judgment shall not include interest upon the amount represented by funds deposited by the condemnor pursuant to the provisions of Sections 42A-1-19 and 42A-1-22 NMSA 1978.

C. The court shall have the power to direct the payment of delinquent taxes, special assessments and rental or other charges owed out of the amount determined to be just compensation and to make orders as the court deems necessary with respect to encumbrances, liens, rents, insurance and other just and equitable charges.

D. The judgment shall credit against the total amount awarded to the condemnee any payments or deposits paid over to him made before the date of entry of judgment by the condemnor as compensation for the property taken, including any funds which the condemnee withdrew from the amount deposited by the condemnor pursuant to the provisions of Section 42A-1-19 or 42A-1-22 NMSA 1978.

E. If the amount to be credited against the award under Subsection D of this section exceeds the total amount awarded, the court shall require that the condemnee pay the excess to the condemnor.

F. The price paid for similar property by one other than the condemnor may be considered on the question of the value of the property condemned or damaged if there is a finding that there have been no material changes in conditions between the date of the prior sale and the date of taking, that the prior sale was made in a free and open market and that the property is sufficiently similar in the relevant market with respect to situation, usability, improvements and other characteristics.

26 Pa C.S.A. § 310. Abandonment of project

(a) Disposition of property.--If a condemnor has condemned a fee and then abandons the purpose for which the property has been condemned, the condemnor may dispose of it by sale, lease, gift, devise or other transfer with the following restrictions:

(1) If the property is undeveloped or has not been substantially improved, it may not be disposed of within ten years after condemnation without first being offered to the condemnee at the same price paid to the condemnee by the condemnor.

(2) If the property is located outside the corporate boundaries of a county of the first or second class and is undeveloped or has not been substantially improved and was devoted to agricultural use at the time of the condemnation, it may not be disposed of within 21 years after condemnation without first being offered to the condemnee at the same price paid to the condemnee by the condemnor.

(3) If the property is undeveloped or has not been substantially improved and the offers required to be made under paragraphs (1) and (2) have not been accepted, the property shall not be disposed of by any condemnor, acquiring agency or subsequent purchaser for a nonpublic use or purpose within 21 years after condemnation. Upon petition by the condemnor, the court may permit disposal of the property in less than 21 years upon proof by a preponderance of the evidence that a change in circumstances has abrogated the original public purpose for which the property was taken.

(b) Notice.--The condemnee shall be served with notice of the offer in the same manner as prescribed for the service of notices in section 305(b) (relating to notice to condemnee) and shall have 90 days after receipt of notice to make written acceptance.

(c) Certain conditional offers prohibited.--The condemnor may not condition any offer required to be made to a condemnee under subsection (a) on the payment by the condemnee of additional fees, real estate taxes or payments in lieu of taxes or other costs.

(d) Definitions.--As used in this section, the following words and phrases shall have the meanings given to them in this subsection:

"Agricultural commodity." As defined in section 2 of the act of June 10, 1982 (P.L. 454, No. 133)1, referred to as the Right-to-Farm Law.

"Agricultural use." Land which is used for the purpose of producing an agricultural commodity or is devoted to and meets the requirements and qualifications for payments or other compensation pursuant to a soil conservation program under an agreement with an agency of the Federal Government. Land containing a farmhouse or other buildings related to farming shall be deemed to be in agricultural use. The term includes a woodlot and land which is rented to another person and used for the purpose of producing an agricultural commodity.

TEXAS
TX PROPERTY § 21.101. Right of Repurchase

(a) A person from whom a real property interest is acquired by an entity through eminent domain for a public use, or that person's heirs, successors, or assigns, is entitled to repurchase the property as provided by this subchapter if:

(1) the public use for which the property was acquired through eminent domain is canceled before the property is used for that public use;

(2) no actual progress is made toward the public use for which the property was acquired between the date of acquisition and the 10th anniversary of that date; or

(3) the property becomes unnecessary for the public use for which the property was acquired, or a substantially similar public use, before the 10th anniversary of the date of acquisition.

(b) In this section, "actual progress" means the completion of two or more of the following actions:

(1) the performance of a significant amount of labor to develop the property or other property acquired for the same public use project for which the property owner's property was acquired;

(2) the provision of a significant amount of materials to develop the property or other property acquired for the same public use project for which the property owner's property was acquired;

(3) the hiring of and performance of a significant amount of work by an architect, engineer, or surveyor to prepare a plan or plat that includes the property or other property acquired for the same public use project for which the property owner's property was acquired;

(4) application for state or federal funds to develop the property or other property acquired for the same public use project for which the property owner's property was acquired;

(5) application for a state or federal permit to develop the property or other property acquired for the same public use project for which the property owner's property was acquired;

(6) the acquisition of a tract or parcel of real property adjacent to the property for the same public use project for which the owner's property was acquired; or

(7) for a governmental entity, the adoption by a majority of the entity's governing body at a public hearing of a development plan for a public use project that indicates that the entity will not complete more than one action described by Subdivisions (1)-(6) before the 10th anniversary of the date of acquisition of the property.

(c) A district court may determine all issues in any suit regarding the repurchase of a real property interest acquired through eminent domain by the former property owner or the owner's heirs, successors, or assigns.

TX PROPERTY § 21.102. Notice to Previous Property Owner Required

Not later than the 180th day after the date an entity that acquired a real property interest through eminent domain determines that the former property owner is entitled to repurchase the property under Section 21.101, the entity shall send by certified mail, return receipt requested, to the property owner or the owner's heirs, successors, or assigns a notice containing:

(1) an identification, which is not required to be a legal description, of the property that was acquired;

(2) an identification of the public use for which the property had been acquired and a statement that:

(A) the public use was canceled before the property was used for the public use;

(B) no actual progress was made toward the public use; or

(C) the property became unnecessary for the public use, or a substantially similar public use, before the 10th anniversary of the date of acquisition; and

(3) a description of the person's right under this subchapter to repurchase the property.

TX PROPERTY § 21.1021. Requests for Information Regarding Condemned Property

(a) On or after the 10th anniversary of the date on which real property was acquired by an entity through eminent domain, a property owner or the owner's heirs, successors, or assigns may request that the condemning entity make a determination and provide a statement and other relevant information regarding:

(1) whether the public use for which the property was acquired was canceled before the property was used for the public use;

(2) whether any actual progress was made toward the public use between the date of acquisition and the 10th anniversary of that date, including an itemized description of the progress made, if applicable; and

(3) whether the property became unnecessary for the public use, or a substantially similar public use, before the 10th anniversary of the date of acquisition.

(b) A request under this section must contain sufficient detail to allow the entity to identify the specific tract of land in relation to which the information is sought.

(c) Not later than the 90th day following the date of receipt of the request for information, the entity shall send a written response by certified mail, return receipt requested, to the requestor.

TX PROPERTY § 21.1022. Limitations Period for Repurchase Right

Notwithstanding Section 21.103, the right to repurchase provided by this subchapter is extinguished on the first anniversary of the expiration of the period for an entity to provide notice under Section 21.102 if the entity:

(1) is required to provide notice under Section 21.102;

(2) makes a good faith effort to locate and provide notice to each person entitled to notice before the expiration of the deadline for providing notice under that section; and

(3) does not receive a response to any notice provided under that section in the period for response prescribed by Section 21.103.

TX PROPERTY § 21.103. Resale of Property; Price

(a) Not later than the 180th day after the date of the postmark on a notice sent under Section 21.102 or a response to a request made under Section 21.1021 that indicates that the property owner, or the owner's heirs, successors, or assigns, is entitled to repurchase the property interest in accordance with Section 21.101, the property owner or the owner's heirs, successors, or assigns must notify the entity of the person's intent to repurchase the property interest under this subchapter.

(b) As soon as practicable after receipt of a notice of intent to repurchase under Subsection (a), the entity shall offer to sell the property interest to the person for the price paid to the owner by the entity at the time the entity acquired the property through eminent domain. The person's right to repurchase the property expires on the 90th day after the date on which the entity makes the offer.

UTAH
Utah Code Ann. § 78B-6-522. Dispute Resolution
(formerly cited as UT ST § 78-24-21)

(1) In any dispute between a condemner and a private property owner arising out of this chapter, the private property owner may submit the dispute for mediation or arbitration to the Office of the Property Rights Ombudsman under Section 13-43-204.

(2) An action submitted to the Office of the Property Rights Ombudsman under authority of this section does not bar or stay any action for occupancy of premises authorized by Section 78B-6-510.

(3)(a)(i) A mediator or arbitrator, acting at the request of the property owner under Section 13-43-204, has standing in an action brought in district court under this chapter to file with the court a motion to stay the action during the pendency of the mediation or arbitration.

(ii) A mediator or arbitrator may not file a motion to stay under Subsection (3)(a)(i) unless the mediator or arbitrator certifies at the time of filing the motion that a stay is reasonably necessary to reach a resolution of the case through mediation or arbitration.

(b) If a stay is granted pursuant to a motion under Subsection (3)(a) and the order granting the stay does not specify when the stay terminates, the mediator or arbitrator shall file with the district court a motion to terminate the stay within 30 days after:

(i) the resolution of the dispute through mediation;

(ii) the issuance of a final arbitration award; or

(iii) a determination by the mediator or arbitrator that mediation or arbitration is not appropriate.

(4)(a) The private property owner or displaced person may request that the mediator or arbitrator authorize an additional appraisal.

(b) If the mediator or arbitrator determines that an additional appraisal is reasonably necessary to reach a resolution of the case, the mediator or arbitrator may:

(i) have an additional appraisal of the property prepared by an independent appraiser; and
(ii) require the condemnor to pay the costs of the first additional appraisal.

VIRGINIA

VA Code Ann. § 25.1-108. Offer to sell to former owner

A. If a condemnor has acquired a fee simple interest in property by exercise of its power of eminent domain and subsequently declares that the property is surplus, the condemnor shall offer, within 30 days following such determination, to sell such property to the former owner or his heirs or other successors or assigns. If (i) the work or improvements described in any written statement required by law or in the petition for condemnation made pursuant to § 25.1-206 have not been let to contract or construction commenced within a period of 20 years from the date that the fee simple interest in the property vested in the condemnor, and the property is not being used for other public uses that are within the limitations set forth in § 1-219.1 or (ii) at any time the property is no longer used or needed for the public use for which the property was taken as may be described in any written statement required by law or in the petition for condemnation or for another specific public use that is within the limitations set forth in § 1-219.1, the condemnor shall declare its fee simple interest in the property to be surplus and offer to sell the property to the former owner or his heirs or other successors or assigns. Additionally, if the conditions described in clause (i) or (ii) occur, the former property owner or his heirs or other successors or assigns may make a written demand that the condemnor (a) declare its fee simple interest in the property to be surplus and (b) offer to sell the property to the former owner or his heirs or other successors or assigns. Any contractual provision or agreement by the former owner waiving the right to receive an offer to sell from the condemnor is void and unenforceable. The offer to sell shall be made in writing by the condemnor at the price paid by the condemnor to the former owner plus interest at the annual rate of six percent, provided that the condemnor may increase the price by the fair market value of the condemnor's improvements, determined at the time the offer to sell is made. In no case shall the price established by the condemnor exceed the fair market value of the property at the time the offer to sell is made. The offer to sell shall comply with the requirements of subsection B. If the former owner or his heirs or other successors or assigns do not accept in writing an offer to sell that complies with the requirements of this section within six months after the offer to sell has been made as provided in subsection B, the former owner or his heirs or other successors or assigns shall have no further right to purchase the property pursuant to this section. An offer to sell that satisfies the requirements of this subsection and subsection B shall be deemed a valid offer to sell under this section.

B. The condemnor shall (i) send the offer to sell to the former owner by certified mail, return receipt requested, to (a) the last known address of the former owner and (b) the address of the former owner as it appears in the tax records of the treasurer for the locality in which the property is located and (ii) publish the offer to sell in a newspaper having general circulation in the locality in which the property is located. The offer to sell shall be published once a week for two successive weeks, shall identify the former owner from whom the condemnor acquired the property, shall briefly describe the property and the date title vested in the condemnor, shall state the offer is made pursuant to this section, and shall state that the offer is open to any heirs, successors, or assigns of the former owner, who shall be named in the offer as parties unknown.

C. This section shall apply only to a fee simple interest in real property acquired by a condemnor in the exercise of its power of eminent domain. This section shall not apply to property acquired by the Commissioner of Highways pursuant to Title 33.1. Further, this section shall not apply to property acquired by a locality for transportation projects, including for bond-funded transportation projects or for future transportation improvements, regardless of whether such projects are undertaken in conjunction with the Commonwealth Transportation Board, provided that as to any such acquisitions by a locality the provisions of § 33.1-90 shall apply mutatis mutandis to the property and any disposition thereof. Also, this section shall not apply to property that is acquired by the owner of a railroad for actual operating purposes if the property is unsuitable for independent development.

VA Code Ann. § 25.1-205.1. Mandatory dispute resolution orientation session

Following the filing of a petition initiating a condemnation proceeding, the court shall refer the matter to a dispute resolution orientation as provided in § 8.01-576.5. The court shall set a date for the parties to return to court in accordance with its regular docket and procedure, irrespective of the referral to an orientation session. The parties shall notify the court, in writing, if the dispute is resolved prior to the return date.

Upon such referral, the parties shall attend one orientation session. Further participation in a dispute resolution proceeding shall be by consent of all parties. Attorneys for any party may be present during a dispute resolution proceeding.

The procedure in condemnation in all matters except acquisitions under s. 32.05 or 32.22, acquisitions under subch. II, acquisitions under subch. II of ch. 157, and acquisitions under ch. 197, shall be as follows:

(1) Determination of necessity of taking. The necessity of the taking shall be determined as provided in s. 32.07.

(2) Appraisal. (a) The condemnor shall cause at least one (or more in the condemnor's discretion) appraisal to be made of the property proposed to be acquired. In making any such appraisal the appraiser shall confer with the owner or one of the owners, or the personal representative of the owner or one of the owners, if reasonably possible.

> (b) The condemnor shall provide the owner with a full narrative appraisal upon which the jurisdictional offer is based and a copy of any appraisal made under par. (a) and at the same time shall inform the owner of his or her right to obtain an appraisal under this paragraph. The owner may obtain an appraisal by a qualified appraiser of all property proposed to be acquired, and submit the reasonable costs of the appraisal to the condemnor for payment. The owner shall submit a full narrative appraisal to the condemnor within 60 days after the owner receives the condemnor's appraisal. If the owner does not accept a negotiated offer under sub. (2a) or the jurisdictional offer under sub. (3), the owner may use an appraisal prepared under this paragraph in any subsequent appeal.

(2a) Agreed price. Before making the jurisdictional offer under sub. (3) the condemnor shall attempt to negotiate personally with the owner or one of the owners or his or her representative of the property sought to be taken for the purchase of the same. In such negotiation the condemnor shall consider the owner's appraisal under sub. (2)(b) and may contract to pay the items of compensation enumerated in ss. 32.09 and 32.19 where shown to exist. Before attempting to negotiate under this paragraph, the condemnor shall provide the owner or his or her representative with copies of applicable pamphlets prepared under s. 32.26(6). When negotiating under this subsection, the condemnor shall provide the owner or his or her representative with the names of at least 10 neighboring landowners to whom offers are being made, or a list of all offerees if less than 10 owners are affected, together with a map showing all property affected by the project. Upon request by an owner or his or her representative, the condemnor shall provide the name of the owner of any other property which may be taken for the project. The owner or his or her representative shall also have the right, upon request, to examine any maps in the possession of the condemnor showing property affected by the project. The owner or his or her representative may obtain copies of such maps by tendering the reasonable and necessary costs of preparing copies. The condemnor shall record any conveyance by or on behalf of the owner of the property to the condemnor executed as a result of negotiations under this subsection with the register of deeds of the county in which the property is located. The condemnor shall also record a certificate of compensation stating the identity of all

persons having an interest of record in the property immediately prior to its conveyance, the legal description of the property, the nature of the interest acquired and the compensation for such acquisition. The condemnor shall serve upon or mail by certified mail to all persons named therein a copy of the statement and a notice of the right to appeal the amount of compensation under this subsection. Any person named in the certificate may, within 6 months after the date of its recording, appeal from the amount of compensation therein stated by filing a petition with the judge of the circuit court of the county in which the property is located for proceedings to determine the amount of just compensation. Notice of such petition shall be given to all persons having an interest of record in such property. The judge shall forthwith assign the matter to the chairperson of the county condemnation commissioners for hearing under sub. (8). The procedures prescribed under subs. (9)(a) and (b), (10) and (12) and chs. 808 and 809 shall govern such appeals. The date the conveyance is recorded shall be treated as the date of taking and the date of evaluation.