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THE MORE THINGS CHANGE, THE MORE THINGS STAY THE SAME: A PRACTITIONER'S GUIDE TO RECENT CHANGES TO WYOMING'S EMINENT DOMAIN ACT

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I. INTRODUCTION

In 2007, the Wyoming Legislature passed the first extensive amendments to the Wyoming Eminent Domain Act¹ since the Act's adoption twenty-six years ago. Shortly after the Act itself was passed, one commentator stated:

Impetus for the extensive changes came from increased use of eminent domain proceedings by public utilities and energy related industries, a void in the Wyoming eminent domain law perceived by landowners as allowing abuse of eminent domain by nongovernmental entities, and accelerating market values of land, making one-time payments for compensation less satisfactory.²

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¹ WYO. STAT. ANN. § 1-26-501 (2007).

² Rodney Lang, Comment, *Wyoming Eminent Domain Act: Comment on the Act and Rule 71.1 of the Wyoming Rules of Civil Procedure*, 18 LAND & WATER L. REV. 739, 739 (1983) (internal citations omitted).

While much has changed in Wyoming over the last quarter-century, the justifications for changing the laws governing eminent domain have remained relatively constant. And while many of the specific statutory requirements under the Act have changed significantly under the 2007 amendments, the law will not change how the vast majority of companies and public entities that exercise the responsibility of eminent domain conduct themselves in negotiations with landowners. Nevertheless, it is vitally important that practitioners make themselves aware of the new changes prior to initiating negotiations with property owners for possession of property, or resorting to filing a condemnation action to seek a court's help in gaining such possession. This article will attempt to set forth the general legal framework and standards governing condemnation cases as developed through case law over the years, and to describe within that context the specific changes made to the Wyoming Eminent Domain Act in 2007.

II. PRE-CONDEMNATION ACCESS

Sections 506, 507 and 508 govern pre-condemnation access, a process whereby a company or entity with condemnation authority can gain access to properties to conduct "surveys, examinations, photographs, tests, soundings, borings and samplings, or engage in other activities for the purpose of appraising the property or determining whether it is suitable and within the power of the condemnor to condemn. . . ."³ Under the law prior to the 2007 amendments, a condemnor only had to make a reasonable effort to gain permissive access to the property, and show those efforts were obstructed or denied, in order to qualify for an order from a court granting such access.⁴ The new law is much more prescriptive. Now when a condemnor requests access from the landowner, the notice requesting access must specify the particular activities to be undertaken, must explain the proposed use and potential recipients of the data collected during the activities, and must give the landowner at least fifteen days to grant written authorization for the activities prior to initiating court action.⁵ While the prior statute always directed that the authorized activities be accomplished without inflicting substantial injury, the new statute specifies that a condemnor must not inflict substantial injury "to land, crops, improvements, livestock or current business operations."⁶ Finally, the 2007 amendments added a new subsection:

(d) Subject to applicable confidentiality restrictions under federal or state law, the results of survey information acquired from the property sought related to threatened and endangered

³ WYO. STAT. ANN. § 1-26-506(a) (2007).

⁴ WYO. STAT. ANN. § 1-26-507(a) (2005).

⁵ WYO. STAT. ANN. § 1-26-506(a)(i) (2007).

⁶ WYO. STAT. ANN. § 1-26-506(a)(iii) (2007).

species, cultural resources and archeological resources shall be made available to the condemnee upon request.⁷

The changes to Section 506, in addition to ensuring landowners have a set amount of time to respond to a request for access before facing a court action, are centered around providing more information to landowners pre- and post-access. The agriculture industry is especially interested in ensuring information collected during surveys is provided to the landowner. This concern is rooted in the fact that the federal government forces many project developers to survey for threatened and endangered species and cultural resources prior to construction. The presence of such species or resources could not only impact the ability of the project developer to move forward, but significantly impact the landowner's current operations. To the extent possible, the legislature sought to ensure the landowner has access to such information on an equal footing with project proponents and the federal government.

III. GENERAL LEGAL STANDARDS GOVERNING CONDEMNATION

A. *Wyo. Stat. Ann. § 1-26-504—Requirements to Exercise Eminent Domain*

While Wyoming Statute § 1-26-504(a) was not altered by the recent changes to the Eminent Domain Act, its requirements remain at the heart of the right to condemn under Wyoming law. Understanding these requirements and their application is the first step in prosecuting or defending a condemnation action. Wyoming statutes require a condemnor to prove the following three elements before the court awards condemnation:

- (i) The public interest and necessity require the project or the use of eminent domain is authorized in 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.⁸

⁷ WYO. STAT. ANN. § 1-26-506(d) (2007).

⁸ WYO. STAT. ANN. § 1-26-504(a) (2007).

1. *If the Condemnation is Authorized By the Wyoming Constitution, the Condemnor Does Not Need to Establish Public Interest or Necessity*

If the right to condemn is grounded in the Wyoming Constitution, the condemnor is not required to show public interest and necessity as set out in the statutes. The Wyoming Constitution authorizes the use of eminent domain 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.”⁹ Important to Wyoming’s mineral industry, the Wyoming Supreme Court has ruled in *Coronado Oil Co. v. Grieves*,¹⁰ that “mining” includes development and production of oil and gas. When the Wyoming Constitution authorizes a specific right of condemnation, there is no need to show “public interest or necessity.”¹¹ If condemning for one of these purposes, a condemnor has satisfied the first statutory requirement for condemnation.

2. *Other Rights of Condemnation Granted By the Statutes*

In addition to the rights in the Constitution, the Wyoming Legislature recognized certain projects and important developments could not come to fruition without a right of condemnation. To meet this need, the legislature provided limited entities with the statutory right to condemn private property. These include, for example, pipeline companies, railroad companies, transmission lines, county and local governments, etc.¹²

3. *Public Interest and Necessity Under Wyoming Law*

When the right to condemn is based on a statutory grant, the condemnor must meet the first requirement of 504(a) and show the condemnation serves the public interest and necessity. “[The Wyoming Supreme] Court has ascribed a broad meaning to the phrase ‘public interest and necessity,’ and that is consistent with the overall tenor of Wyoming’s eminent domain statutes.”¹³ A condemnor is not required to establish an absolute public necessity. Rather,

[w]hen a condemnor seeks to establish the requirement of necessity in an eminent domain proceeding, it need only show a reasonable necessity for the project. As explained by one court, the term ‘necessity,’ when used in the context of an eminent

⁹ WYO. CONST. art. 1, § 32.

¹⁰ *Coronado Oil Co. v. Grieves*, 603 P.2d 406, 412 (Wyo. 1979).

¹¹ See WYO. STAT. ANN. § 1-26-504(a)(i) (2007).

¹² See WYO. STAT. ANN. §§ 1-26-801-815 (2007).

¹³ *Bridle Bit Ranch Co. v. Basin Electric Power Coop.*, 118 P.3d 996, 1014 (Wyo. 2005).

domain proceeding, means 'reasonably convenient or useful to the public.'¹⁴

It is not essential that the entire community, or even a considerable portion thereof, directly enjoys or participates in the project for the use to be considered a public use.¹⁵ A taking of private land can be upheld if there is some benefit to the public from the taking.¹⁶

Recently, there has been some concern over whether the right of condemnation should extend to private pipeline, transmission line, or railroad companies to transport Wyoming's natural resources to other states. For decades, Wyoming has specifically acknowledged that condemnation in aid of mineral development is in the public interest: "We are not unaware of the great public interest in and imminent need for energy. While at the time of adoption of the constitution the concern was one of developing the economy and settlement of the state, the urgency has now become one of survival."¹⁷ The need to develop natural resources and transport them to market is undeniably in the public interest. The public need for energy is beyond dispute. The public necessity of getting raw materials to markets and manufacturing plants is more evident now than ever. In addition, the end consumer of these products receives goods necessary to our society. We need electricity, heating fuels, and gasoline to function. These products require transportation from their source to the markets. Finally, producers, royalty owners, governments, schools, service companies and employees, and taxpayers in Wyoming all benefit from the construction and completion of these projects.

The Wyoming Supreme Court has also ruled that the trial courts cannot evaluate whether one alternative considered by a condemnor is better than another, stating:

The language of W.S. 1-26-504(a)(i) *does not permit the district court to balance the competing interests*. Once the [condemnor] presents evidence that the project will [be in the public interest], it has met its burden as to that particular determination. The burden then shifts to those opposing the condemnation to present evidence of bad faith or abuse of discretion.¹⁸

¹⁴ Board of County Com'rs of Johnson County v. Atter, 734 P.2d 549, 553 (Wyo. 1987).

¹⁵ Associated Enterprises, Inc. v. Toltec Watershed Imp. Dist., 656 P.2d 1144, 1148 (Wyo. 1983).

¹⁶ *Id.* at 1149.

¹⁷ Coronado Oil Co. v. Grieves, 603 P.2d 406, 411 (Wyo. 1979).

¹⁸ Town of Wheatland v. Bellis Farms, Inc., 806 P.2d 281, 284 (Wyo. 1991) (emphasis added).

Thus, a landowner cannot argue that one or another of the alternative routes or methods of transportation would be better than the chosen route.¹⁹ Once a condemnor demonstrates a public interest, a landowner must try to overcome the condemnation by introducing evidence of the condemnor's alleged bad faith or abuse of discretion.²⁰

4. *The Location and Development of the Project Must Be Most Compatible With Greatest Public Good and Least Private Injury*

To comply with Wyo. Stat. § 1-26-504(a)(ii), the condemnor must introduce evidence that it has planned and located the project in a manner most compatible with the greatest public good and the least private injury.²¹ The use of the word “most” requires that the condemnor plan and/or locate the project with these requirements in mind.²² However, because the State delegated the power of eminent domain to the condemnor, it enjoys wide discretion over the final plans and actual condemnation.²³ To establish this element, the condemnor must demonstrate that it considered multiple factors and designed and developed a project with the “greatest public good and least private harm” requirement in mind.²⁴

Once the condemnor makes the showing that it considered those factors in developing the project, the burden shifts to the landowner to prove that the condemnor acted in bad faith or abused its discretion.²⁵ The landowner is not allowed to present evidence as to the merits of the alternatives considered by the condemnor. He is limited to evidence that demonstrates the condemnor acted in bad faith or abused its discretion.²⁶

5. *The Proposed Easements Must Be Necessary For the Project*

Finally, the condemnor must show that the easements to be condemned are necessary to the project.²⁷ When determining whether the property is “necessary” a court must determine whether the property is “reasonably convenient or useful”

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Conner v. Board of County Com'rs of Natrona County*, 2002 WY 148, ¶ 121, 54 P.3d 1274, 1282 (Wyo. 2002).

²² *Town of Wheatland*, 806 P.2d at 283.

²³ *See Bridle Bit*, 118 P.3d at 1015.

²⁴ *See id.*

²⁵ *Id.* at 1014-15.

²⁶ *See id.* at 1014.

²⁷ WYO. STAT. ANN. § 1-26-504(a)(iii) (2007).

to the project.²⁸ To establish this element, the condemnor must put on evidence that the land sought to be condemned is “reasonably convenient” to the project. Once again, “there is necessarily left largely to the [condemnor’s] discretion the location and area of land to be taken.”²⁹

The process of establishing the right to condemn under Wyo. Stat. § 1-26-504(a)(iii) should be the same as §§ 1-26-504(a)(i) and 504(a)(ii) discussed above.³⁰ The condemnor must first present prima facie evidence that the easement is necessary or “reasonably convenient” for the development of the pipeline project. Once the condemnor meets this standard, the burden shifts to the landowner to show bad faith or abuse of discretion.³¹ Again, the landowner is limited to introducing evidence showing bad faith or abuse of discretion.³²

B. Changes to Section 504—New Wyo. Stat. Ann. § 1-26-504(c)

The only change to Section 504 as it existed prior to 2007 is directed solely at public entities.³³ The amendment attempts to ensure that private property owners receive early and meaningful notice and opportunity to be heard when public entities are in the planning stages of projects that may impact private property:

(c) When a public entity determines that there is a reasonable probability of locating a particular public project on specifically identifiable private property and that the project is expected to be completed within two (2) years of that determination, the public entity shall provide written notice of the intention to consider the location and construction of the project to the owner as shown on the records of the county assessor. The notice shall include a description of the public interest and necessity of the proposed project. The public entity shall provide an opportunity for the private property owners to consult and confer with representatives of the public entity regarding the project.

From a practical standpoint, public entities should be careful to include impacted landowners in discussions of a project at the earliest possible time. Such an approach not only will ensure compliance with the new law, but it is good policy and can help avoid problems down the road by showing the proper respect for constituents possibly impacted by a project. Nevertheless, there are circumstances

²⁸ *Conner*, 54 P.3d at 1282.

²⁹ *Bridle Bit*, 118 P.3d at 1015.

³⁰ See *Town of Wheatland*, 806 P.2d at 284.

³¹ *Id.*

³² *Id.*

³³ “Public entity” means the state of Wyoming and its agencies, municipalities, counties, school districts, political subdivisions and special districts.” WYO. STAT. ANN. § 1-26-502(a)(v) (2007).

when notice too early in the planning process is not advisable, and might only serve to alarm a host of landowners about a project that may never prove to be feasible. The new language in Section 504 attempts to balance those competing concerns, but in doing so presents a host of possible problems for public entities that may lead to increased litigation. For instance, when has an entity determined there is a “reasonable probability” of locating a project on “specifically identifiable private property?” Must a public entity notify all landowners possibly impacted if a project is likely to go forward, but the entity is considering several different locations, or can the entity wait until it has chosen the particular site before providing notice? What if a public entity determines to develop and construct a project on a particular parcel, but the project will not be completed for five years? The bottom line is landowners have a new line of attack for discovery and trial in arguing the public entity did not provide notice in a timely manner, and public entities and their lawyers need to be cognizant of the potential pitfalls in failing to engage landowners as early as possible.

C. Wyo. Stat. Ann. § 1-26-509—Good Faith Negotiations

In addition to the statutory elements imposed by Wyo. Stat. Ann. § 1-26-504, the condemnor must show it made “reasonable and diligent efforts to acquire property by good faith negotiation.”³⁴ The condemnor will introduce evidence to show that its negotiations conform to the following provisions outlined in Wyo. Stat. Ann. § 1-26-509(b):

- (i) Any element of valuation or damages recognized by law as relevant to the amount of just compensation payable for the property;
- (ii) The extent term or nature of the property interest or other right to be acquired;
- (iii) The quantity, location or boundary of the property;
- (iv) The acquisition, removal, relocation or disposition of improvements upon the property and of personal property not sought to be taken;
- (v) The date of proposed entry and physical dispossession;
- (vi) The time and method of payment of agreed compensation or other amounts authorized by law; and

³⁴ WYO. STAT. ANN. § 1-26-509(a) (2007); *see also* WYO. STAT. ANN. § 1-26-510(a) (2007).

(vii) Any other terms or conditions deemed appropriate by either of the parties.³⁵

Wyoming courts have never expressly described what is necessary in order for negotiations to be considered “good faith negotiations.” However, in *Bridle Bit*,³⁶ the Wyoming Supreme Court upheld the district court’s determination that the prerequisite good-faith negotiations had occurred and cited to *6 Nichols on Eminent Domain*³⁷ to support its decision. This treatise claims “the negotiation requirement is generally held to have been satisfied when they have proceeded sufficiently to demonstrate that agreement is impossible.”³⁸ Similarly, Colorado courts have determined, “lengthy face-to-face negotiations are not required. The making of a reasonable offer to purchase in good faith by letter and allowing the property owner time to respond is sufficient.”³⁹ “If the property owner remains silent or rejects the offer without making an acceptable counter-offer, a condemnation action may be instituted.”⁴⁰

D. The Good Faith Road Map—New Wyo. Stat. Ann. §§ 1-26-509 (c) through (h)

The heart of the changes made in 2007 are found in Section 509. While the Wyoming courts have not set forth what qualifies as “good faith” negotiations, the legislature has now stepped in, and with the 2007 amendments has set forth in detail the minimum steps and timeline a condemnor must follow prior to filing for condemnation. From the authors’ experience, most of the requirements are nothing new to the vast majority of entities with the power of condemnation. But for the first time in Wyoming, the statutes themselves set forth for landowner and condemnor alike the road map for what constitutes good faith.

Subsections 509 (c) and (d) require that initial written notice, and offer of settlement, be sent certified mail at least ninety days prior to commencement of a condemnation action. The initial notice and offer must include:

- a description of the proposed project, the land to be condemned, plan of work, operations and facilities in a manner sufficient to enable the condemnee to evaluate the effect of the project on the landowner’s use of the land;

³⁵ WYO. STAT. ANN. § 1-26-509(b) (2007).

³⁶ *Bridle Bit*, 118 P.3d at 1016.

³⁷ *6 Nichols on Eminent Domain*, § 24.14.

³⁸ *Id.*

³⁹ *City of Thornton v. Farmers Reservoir & Irrigation Co.*, 575 P.2d 382, 392 (Colo. 1978).

⁴⁰ *Id.*

- contact information for condemnor, including name, address, telephone and facsimile numbers;
- a description of the property sought;
- an offer to walk the land with condemnee within the sixty five days allotted for condemnee to respond to the settlement offer;
- a discussion of planned reclamation;
- an estimate of the fair market value of the property and its basis;
- an offer to acquire the property and sixty five days for condemnee to respond;
- notice that the condemnee is under no obligation to accept the initial written offer, but that if he fails to at least respond to the offer, he waives his right to object to the condemnor's good faith;
- notice that both parties have an obligation to negotiate in good faith; that if negotiations fail formal legal proceedings may be initiated;
- a statement that the condemnee has a right to consult an attorney, appraiser or other person during the process.

Under the new statute, once an initial written offer is made to a landowner, the landowner has sixty five days to respond to that offer.⁴¹ For the first time, the good faith requirement runs to the landowner as well as the condemnor.⁴² If a landowner fails to respond within the sixty five days, the landowner waives the right to object to the good faith of the condemnor.⁴³ If the landowner makes a written counter-offer within the sixty five days, a condemnor must respond in writing to the counter-offer.⁴⁴ In addition to the initial written offer which must be sent at least ninety days prior to filing a condemnation action, the condemnor must send a notice of final offer at least fifteen days prior to filing the action.⁴⁵

⁴¹ WYO. STAT. ANN. § 1-26-509(c)(iii)(E) (2007).

⁴² WYO. STAT. ANN. § 1-26-509(f) (2007): "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."

⁴³ See WYO. STAT. ANN. §§ 1-26-509(c)(iii)(F) (2007) and 1-26-510(a) (2007).

⁴⁴ WYO. STAT. ANN. § 1-26-509(c)(iv) (2007).

⁴⁵ WYO. STAT. ANN. § 1-26-509(e) (2007).

The Legislature also included a significant attorneys' fees provision in Section 509. If a court finds a condemnor failed to negotiate in good faith by failing to comply with the requirements of Section 509, or that the project was not planned or located in a manner most compatible with the greatest public good and the least private injury, or that the property sought was not necessary for the project, then the condemnor must reimburse the landowner for all reasonable litigation expenses.⁴⁶

E. Wyo. Stat. Ann. § 1-26-510

As stated earlier, this section was amended to state that “[a] condemnee may not object to the good faith of the condemnor if the condemnee has failed to respond to an initial written offer as provided in W.S. 1-26-509(c)(iii)(E) and the condemnor has met the requirements of W.S. 1-26-509(c).

F. Wyo. Stat. Ann. § 1-26-511

Section 511 allows for exceptions to the general requirement that a condemnor negotiate in good faith with the landowner prior to filing a condemnation action. The 2007 amendments further restricted the exceptions. Previously, a condemnor could avoid the good faith requirement when “due to conditions not caused by or under the control of the condemnor, there is a compelling need to avoid the delay in commencing the action which compliance would require.”⁴⁷ Now the compelling need to avoid delay in commencing the action must be “due to an emergency affecting public health or safety. . . .”⁴⁸

IV. WYO. STAT. ANN. § 1-26-704—
COMPENSATION AND FAIR MARKET VALUE

One of the most difficult questions surrounding condemnation in general and condemnation under the changes to the Wyoming Eminent Domain Act relate to the amount of compensation that should be paid to the landowner. Everyone should agree the landowner must be made whole. How to make the landowner whole, however, is more complicated than it may seem. While the landowner is entitled to payment for any and all damages he receives, he should not receive a windfall from the action that, in the end, will be born by the populace as a whole. On the other hand, there can be hidden damages or damages that are difficult to calculate that should be awarded to the landowner. The United States Supreme Court determined that when computing compensation in an eminent domain

⁴⁶ WYO. STAT. ANN. § 1-26-509(g) (2007).

⁴⁷ WYO. STAT. ANN. § 1-26-511(a)(iii) (2007).

⁴⁸ WYO. STAT. ANN. § 1-26-511(a)(iii) (2007).

case “the owner is to be put in as good as position pecuniarily as if the property had never been taken.”⁴⁹

The changes made in Section 704 dealing with fair market value will undoubtedly spur the most litigation and raise the most questions in application. The language added to this section may allow in limited instances the use of comparable arms-length transactions on same or similar parcels to be used to help determine fair market value, and attempts to ensure the terms of such comparable agreements are kept confidential if required by the prior agreement:

704(a)(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.

704(d) In determining fair market value under this section, no terms or conditions of an agreement containing a confidentiality provision shall be required to be disclosed unless the release of such information is compelled by lawful discovery, upon a finding that the information sought is relevant to a claim or defense of any party in the eminent domain action. The court shall ensure that any such information required to be disclosed remains confidential. The provision of this subsection shall not apply if the information is contained in a document recorded in the county clerk’s office or has otherwise been made public.

These changes raise the question of whether a court should consider prices paid to other landowners for similar easements as a basis for compensation. When the changes to the Act are read in context and with the requirements of the U.S. Constitution, the Wyoming Constitution, and the law governing compensation, the changes should help make the landowner “whole” and place the landowner in the same position as if the property had never been taken. The Act accomplishes this by only allowing appraisers to consider transactions with a willing seller and

⁴⁹ U.S. v. Miller, 317 U.S. 369, 373 (1943).

a willing buyer; following the mandates of the Wyoming Constitution that the landowner receives “just compensation;” not allowing appraisers to consider value added to the property resulting from the project itself; and requiring in the context of a partial taking, that the appraisers only consider the value of the entire parcel before and the value of the entire parcel after the taking. These four principles set out in the Act should guide courts so that the landowner is the same “position pecuniarily as if the property had never been taken.”⁵⁰

A. The New Provisions of the Wyoming Eminent Domain Act Require the Appraisers to Rely Only on Arm's Length Transactions

In order to make the landowner “whole,” the provisions added to the Wyoming Eminent Domain Act in Section 1-26-704(a)(iii) now require that the appraiser rely on “generally accepted appraisal techniques” in determining fair market value: “the determination of fair market value *shall* use generally accepted appraisal techniques.”⁵¹ The Wyoming Supreme Court has been clear that “[w]here the legislature uses the word ‘shall,’ this Court accepts the provision as mandatory and has no right to make the law contrary to what the legislature prescribed.”⁵² Therefore, under this statute—any determination of fair market value must be based on generally accepted appraisal techniques.

The statute then uses permissive language to describe what “*may*” be considered to determine the fair market value. “Generally, the verb ‘may’ when used in a statute makes that statute directory instead of mandatory.”⁵³ Thus, the second part of Wyo. Stat. § 1-26-704 (a)(iii) provides for direction for the type of things that may be considered.

When interpreting these provisions, a court must “begin by making an inquiry respecting the ordinary and obvious meaning of the words employed according to their arrangement and connection.”⁵⁴ The court is required to “construe the statute as a whole, giving effect to every word, clause, and sentence, and we construe all parts of the statute in *pari materia*.”⁵⁵ Under these principles, the only way to read the “shall” mandatory language and the “may” directory language is that a court is always required to use generally accepted techniques to determine fair market value and “may” examine the items listed in Wyo. Stat. § 1-26-704 (a)(iii)(A-C), so long as the use of those items complies with the generally accepted appraisal techniques. Any other reading would nullify the “shall” component of that statute.

⁵⁰ *Id.* at 373.

⁵¹ WYO. STAT. ANN. § 1-26-704(a)(iii) (2007) (emphasis added).

⁵² *Stutzman v. Office of Wyo. State Eng’r*, 130 P.3d 470, 475 (Wyo. 2006).

⁵³ *In Interest of MKM*, 792 P.2d 1369, 1373 (Wyo. 1990).

⁵⁴ *Sponsel v. Park County*, 126 P.3d 105, 108 (Wyo. 2006).

⁵⁵ *Id.*

B. Generally Accepted Appraisal Techniques Require an Arm's Length Transaction With a Willing Seller and Willing Buyer

According to the Dictionary of Real Estate Appraisal, market value means:

the most probable price, as of a specific date, in cash or in terms equivalent to cash or in other precisely revealed terms, for which the specified property rights should sell after reasonable exposure in a competitive market under all conditions requisite to a fair sale, with the buyer and seller each acting prudently, knowledgeably, and for self interest, and assuming that neither is under undue duress.⁵⁶

In 1993, the Appraisal Institute Special Task Force on Value Definition put forward the following definition of market value:

The most probable price which a specified interest in real property is likely to bring under all of the following conditions:

Consummation of a sale occurs on a specified date;

an open and competitive market exists for the property interest appraised;

the buyer and seller are each acting prudently and knowledgeably;

the price is not affected by undue stimulus;

the buyer and seller are typically motivated. . . .⁵⁷

The International Valuation Standards Committee defines market value for the purpose of international standards as follows:

Market value is the estimated amount for which property should exchange on the date of valuation between a willing buyer and a willing seller in an arm's length transaction after proper marketing wherein the parties had each acted knowledgeably, prudently, and without compulsion.⁵⁸

⁵⁶ THE DICTIONARY OF REAL ESTATE APPRAISAL 177 (4th ed. 2002).

⁵⁷ *Id.*

⁵⁸ *Id.* at 177 (*International Valuation Standards 2001*, London, International Valuations Standards Committee, 2001, 92). Cited in THE DICTIONARY OF REAL ESTATE APPRAISALS.

Courts have long recognized that standard appraisal techniques include a transaction with a willing buyer and a willing seller. For instance, the United States Supreme Court has determined that under proper appraisal methods “it is usually said that the market value is what a willing buyer would pay in cash to a willing seller.”⁵⁹ Wyoming courts have likewise been clear that standard appraisal techniques require that there be a willing seller and a willing buyer.⁶⁰ “The price fixed by a reluctant owner, not a willing seller, hardly meets the test for evidence of market value which requires a willing seller.”⁶¹ Similarly, a price paid by a compelled purchaser, where the property was a necessary piece of a larger project, cannot be used as the basis for fair market value.⁶²

With the types of cases where condemnation is available, by definition, the property sought is “necessary” for the overall project. In these situations, the project proponent has three choices, it can pay whatever amount the landowner requests, drop the project, or proceed with condemnation.⁶³ The proponent of the project does not have the option of buying a different piece of property to complete the project and therefore he is not a “willing buyer.” The price paid in this type of situation is an amount to avoid litigation and to insure that the project is completed. Because the proponent is not a willing buyer, the price does not reflect the value of the land and under “generally accepted appraisal techniques,” these values should not be considered when calculating the fair market value. The same applies to a landowner that is not a willing seller but has sold its property under the threat of condemnation. Landowners in this situation could sell for less than they would otherwise receive because they wish to avoid the hassle and expense of condemnation proceedings. These types of transactions cannot be considered in the valuation stage of condemnation.

It is clear that “generally accepted appraisal techniques” require that there be a willing seller and willing buyer in order to determine the fair market value of the property. The “*shall* use generally accepted appraisal techniques” language is mandatory. An appraisal is valid only if it complies with this section and only considers arms-length transactions or transactions that comply with the valuation standards. The use of the term “may” then has to mean that the appraiser can use the “price paid for other comparable easements or leases of comparable type, size and location on the same or similar property” only if that transaction complies with the generally accepted appraisal techniques, *i.e.*, sold without undue influence, compulsion, or undue duress. Thus, sales where the property sought

⁵⁹ *Miller*, 317 U.S. at 374.

⁶⁰ *Coronado Oil Co. v. Grieves*, 642 P.2d 423, 432-40 (Wyo. 1982) [hereinafter *Coronado II*].

⁶¹ *Id.* at 434.

⁶² *Id.* at 440.

⁶³ *See id.*

was necessary for a larger project or where the property was purchased under the threat of condemnation cannot be considered as part of the valuation hearing.

C. The Wyoming Constitution Requires That Appraisers Only Consider Arm's Length Transactions

As stated above, the express language of the Wyoming Eminent Domain Act requires the court only consider arm's length transactions and not consider settlement agreements or agreements where the buyer or seller were compelled to purchase or sell the property. Additionally, the Wyoming Constitution supports such a result. Under the Wyoming Constitution, a landowner is entitled to "just compensation." The just compensation standard contained in the Wyoming Constitution has been firmly defined and established to require the landowner receive a value based on the value of the land itself and not an amount paid as a settlement to avoid litigation or insure that the project is timely completed.

When a statute has more than one possible interpretation, courts must adopt the interpretation that will allow the statute to be applied within the confines of constitutional requirements.⁶⁴ "[I]t is the duty of the court to so interpret the legislative intent as to harmonize the provisions of the act with the constitution, if this can be done reasonably."⁶⁵

The Wyoming Constitution sets forth the requirements for payments when property is taken through eminent domain. Wyoming Constitution art. 1 § 32 states:

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*."

The next provision of the Wyoming Constitution declares: "Private property shall not be taken or damaged for public or private use without *just compensation*."⁶⁶

Thus, under the Wyoming Constitution, condemners have a right to condemn, contingent on paying "due compensation" or "just compensation." In *Coronado Oil Co. v. Grieves*,⁶⁷ the Wyoming Supreme Court commented

⁶⁴ See *Brown v. Clark*, 34 P.2d 17, 21-22 (Wyo. 1934).

⁶⁵ *Id.*

⁶⁶ WYO. CONST. art. 1, § 33 (emphasis added).

⁶⁷ *Coronado II*, 642 P.2d at 432.

that “the only purpose of the trial was to determine ‘due compensation’ or ‘just compensation’ for the taking of an interest in the land of its owners” under the Wyoming Constitution.

With this limited analysis in mind, the Wyoming Supreme Court made the following statements regarding the “just compensation” element of the Wyoming Constitution:

- “The price fixed by a reluctant owner, not a willing seller, hardly meets the test for evidence of market value which requires a willing seller.”⁶⁸
- “A witness must base his opinion upon market value, and market value alone. Witnesses who are not familiar with market values, or who insist on applying some other test of value than that which the courts have agreed upon as the proper one, should be excluded from the stand.”⁶⁹
- “It must be the result of the uncontrolled bargaining of a vendor willing but not obliged to sell with a purchaser willing but not obliged to buy. Western Production had no recourse but to pay the demanded price or resort to condemnation. It was obliged to buy. That is not a willing-seller, willing-buyer atmosphere within the rule. It is an agreement reached under threat of condemnation.”⁷⁰
- “There was other evidence suggesting some sort of an interest in production was paid by some oil companies. It appears that oil companies are under a compulsion to meet the landowners’ demands, proceed by condemnation in the fashion selected by Coronado in this case, or not have a road. Such evidence is inadmissible to prove fair market value and is in itself prejudicial and grounds for reversal.”⁷¹
- “The rights of an owner to recover *just compensation* are not to be measured by the generosity, necessity, estimated advantage, or fear or dislike of litigation, at least where

⁶⁸ *Id.* at 434.

⁶⁹ *Id.* at 437.

⁷⁰ *Id.* at 440.

⁷¹ *Id.*

rights-of-way across another's land are necessary. In *Colorado Interstate*, supra, it was the need for a pipeline easement that also created a disproportionate award.⁷²

Under the identical language in the U.S. Constitution, the United States Supreme Court determined, "Such compensation means the full and perfect equivalent in money of the property taken. The owner is to be put in as good as position pecuniarily as he would have occupied if his property had not been taken."⁷³ The Supreme Court then ruled that "as where the formula is attempted to be applied as between an owner who may not want to part with his land because of its special adaptability to his own use, and a taker who needs the land because of its peculiar fitness for the taker's purpose. These elements must be disregarded by the fact finding body in arriving at the 'fair' market value." The Court concluded, "Since the owner is to receive no more than indemnity for his loss, his award cannot be enhanced by any gains to the taker. . . . [I]ts special value to the condemnor as distinguished from others who may or may not possess the power of condemn, must be excluded as an element of market value."⁷⁴

The Wyoming Constitution grants certain groups a right to condemn if they pay "just compensation." Just compensation has been defined to mean an arm's length transaction and cannot "be measured by the generosity, necessity, estimated advantage, or fear or dislike of litigation, at least where rights-of-way across another's land are necessary."⁷⁵ The landowner is entitled to be made whole, but cannot receive more "than indemnity for his loss." The valuation and compensation cannot include the unique value to the taker or the value that the taker offers or pays in order to avoid litigation, complete the project, or achieve good will with the landowners. To read the statute to allow these types of transactions into evidence would take away a constitutional right and would therefore make the statute unconstitutional. The court should only consider transactions that comply with the general appraisal techniques, constitute true arm's length transactions, and that are not influenced by undue considerations or compulsions. Any other reading would make the Wyoming Eminent Domain Act unconstitutional.

D. The Wyoming Eminent Domain Act Does Not Allow Appraisers to Consider Value the Project Added to the Property

In addition to the plain language of Wyoming Statute § 1-26-704 and the requirements of the Wyoming Constitution, reading the entire valuation statutes

⁷² *Id.* (emphasis added).

⁷³ *Miller*, 317 U.S. at 373.

⁷⁴ *Id.* at 375.

⁷⁵ *Coronado II*, 642 P.2d at 440.

together shows that valuation cannot consider the increase in value the project brings to the property.

Wyoming Statute § 1-26-705 states:

The fair market value of the property taken, or the entire property if there is a partial taking, does not include an increase or decrease in value before the date of valuation that is caused by:

- (i) the proposed improvement or project.

Therefore, in order to determine “just compensation” as required by the Wyoming Constitution and put the landowner in the same position as if the condemnation never occurred, the Wyoming statutes dictate that a jury cannot consider value that has been added to the property because of the project.

In applying a similar analysis, the Texas Supreme Court determined that in an easement situation, it is improper to value the easement that is being taken based on what other similar easements have sold for.⁷⁶ The court determined that “in determining fair market value, the project enhancement rule provides that the factfinder may not consider any enhancement to the value of the landowners property that results from the taking itself.”⁷⁷ In this case, the landowner argued that the “highest and best use” of the land was a pipeline corridor. The landowner then tried to use the value paid for a similar easement as the value that should be recovered in a condemnation action. The Texas Supreme Court determined that but/for the pipeline project, there would not be a pipeline easement, and therefore, the value of the easement only came about because of the project. The court then determined that “[t]o compensate a landowner for a value attributable to the condemnation project itself, however, would place the landowner in a better position than he would have enjoyed had there been no condemnation.”⁷⁸ The value recoverable in condemnation could not include a value that was added to the land because of the project.⁷⁹

To put the landowner in the same position he would have been in without the condemnation action, the court cannot include value added to the property by the project. A value that can only be achieved by the completion of the project should not be considered.

⁷⁶ See *Exxon Mobil Co. v. Zwah*, 88 S.W.3d 623 (Tex. 2002).

⁷⁷ *Id.* at 627.

⁷⁸ *Id.* at 628.

⁷⁹ *Id.*

E. Compensation for a Partial Taking is the Value of the Whole Parcel of Land Before the Taking Less the Value of the Whole Parcel of Land After the Taking

Wyoming Statute § 1-26-702 requires that when there is a partial taking of the property, the proper way to value the taking is by considering the value of the entire parcel before the taking and the value of the entire parcel after the taking. If properly done, this evaluation takes into account all damages received by the landowner. As such, adding damages to this calculation or calculating damages under a separate method would likely result in a windfall for the landowner and a double recovery in violation of the “just compensation” standards of the Wyoming Constitution.

The Wyoming Supreme Court has determined that in an easement situation, the valuation statutes mean the landowner should recover the difference in the value of his property before the taking and the value of the property after the taking.⁸⁰ “If properly done, the before and after valuation appraisals should capture and reflect any severance damages. For this reason, the severance damage clause of the eminent domain compensation formula is, at best, superfluous.”⁸¹ The court continued:

It is incorrect to think of ‘severance damage’ as a separate and distinct item of just compensation apart from the difference between the market value of the entire tract immediately before the taking and the market value of the remainder immediately after the taking. In the case of a partial taking, if the ‘before and after’ measure of compensation is properly submitted to the jury [or in the present case, considered by the commission], there is no occasion for the lawyers or the trial court to talk about ‘severance damage’ as such, *and indeed it may be confusing to do so. The matter is taken care of automatically in the ‘before and after’ submission.*⁸²

The compensation awarded must put the landowner in the same position pecuniarily as if the property had never been taken.⁸³ The “before and after” test is the best, most comprehensive formula to achieve that result. After a partial taking, the remainder of the land has to have value. The landowner is entitled to recover the difference in value from his property before the partial taking and the

⁸⁰ See *State Highway Comm’n v. Scrivner*, 641 P.2d 735, 738 (Wyo. 1982).

⁸¹ *Mayland v. Flitner*, 28 P.3d 838, 851 (Wyo. 2001).

⁸² *Id.* at 851-52 (emphasis in original).

⁸³ *Miller*, 317 U.S. at 373 (1943).

value of his property after the taking. Under this scenario, the landowner owns an asset. He is compensated for any depreciation that the condemnation and related construction activity causes to that asset. This formula insures that he will be in the same position pecuniarily, before and after the project.

F. Practical Consideration Require That Appraisers Only Consider Arm's Length Transactions

In addition to the legal arguments set out above, practical considerations dictate that a court not consider the price paid as settlements to purchase necessary easements. First, these values artificially increase the value of lands. Already land speculators are buying up easement rights with the hope that they can force pipelines, transmission lines and railroads to use the negotiated settlement values that have been paid in limited circumstances as a floor for negotiations for a specific projects. If these speculators can recover the price paid in settlement agreements in other actions as compensation in a condemnation action, they then speculate that they can force condemnors to pay an added premium to settle cases with them. That added premium paid then becomes the floor for the next condemnation action and the condemnor will have to pay yet another premium to avoid litigation. The endless process results in a death spiral with prices continually increasing.

Allowing these other agreements into a condemnation valuation hearing will ultimately result in a loss to landowners, especially landowners who are willing to work with condemnors. In the past, condemnors, especially private companies, have been willing to pay extra to landowners in order to move the project along quickly, encourage good landowner relations, and avoid costs associated with litigation. If a company feels like those agreements will be allowed into court and used to value property taken in a condemnation action, it no longer has the ability to reward cooperative landowners. The only way to stop the death spiral discussed above is to not pay anyone a premium to settle and cooperate. The courts would, in effect, be tying the condemnors' hands and preventing them from making a deal. This would discourage settlements and encourage litigation.

To understand how this process works, we have to first understand that these agreements are settlement agreements. As stated above, by definition, the property sought in the condemnation action is necessary for the project. The condemnor does not have a choice to purchase a separate piece of property. It can either pay the demands, stop the project, or go to litigation. In this situation, condemnors are generally willing to pay a bonus to move the project along and avoid litigation. However, if that bonus can later be used against them, the companies will not have the ability or desire to pay that bonus.

For an illustration, we should look at a medical malpractice case. If two parties entered into a settlement agreement to avoid a medical malpractice lawsuit, that

settlement is confidential.⁸⁴ A court would never consider allowing a settlement of one case to be presented to the jury in order for the jury to determine what a plaintiff should recover in a different case.⁸⁵ That is because the plaintiff is entitled to recover the sum of money to make him “whole” and not an amount of money that some other insurance company paid in a different case to avoid litigation. This is one of the most time honored principles of damage valuation in American Jurisprudence.⁸⁶ If, on the other hand, an insurance company knew that any payment it made as a settlement in one case would be later presented to a jury as evidence for damage valuation, the insurance company would not be willing to offer a premium to settle cases. A change in the policy would have a chilling effect on settlement and actually hurt plaintiffs who want to settle cases outside of litigation. This same analysis and conclusions apply to condemnation cases.⁸⁷ The compensation for a landowner should not “be measured by the generosity, necessity, estimated advantage, or fear or dislike of litigation.”⁸⁸

“[T]he evidence of an offer to compromise is irrelevant since it may be motivated by a desire for peace, rather than any concession of weakness.”⁸⁹ “The most important purpose of the rule, however, . . . is the promotion of dispute settlement.”⁹⁰ Payments made to settle claims have very little to do with making the landowner “whole” or putting the landowner in the same position he would have been in had the project never happened. If these types of settlement agreements are allowed into condemnation cases, the net impact will be that condemnors will know that any payments made will be used against them in court. Condemnors, therefore, will no longer have the ability to pay a premium to settle cases outside of litigation. This policy will hurt courts, it will hurt entities trying to condemn, but most of all it will hurt landowners who want to cooperate with the condemnation authority and avoid litigation.

V. ADDITIONAL CHANGES TO THE ACT

A. *Wyo. Stat. Ann. § 1-26- 714—Reclamation*

Section 714 is entirely new and affirmatively states that a condemnor is responsible for the reclamation and restoration of the land condemned, and “shall return the property and improvements to the condition existing prior to the condemnation to the extent that reasonably can be accomplished.”

⁸⁴ Wyo. R. Evid. 408 (1978).

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Coronado II*, 642 P.2d at 440.

⁸⁸ *Id.*

⁸⁹ *Hursh Agency, Inc. v. Wigwam Homes, Inc.*, 664 P.2d 27, 36 (Wyo. 1983).

⁹⁰ *Id.*

B. Wyo. Stat. Ann. § 1-26-801(c) and (d)—Kelo Fix

A description of the infamous *Kelo* decision by the United States Supreme Court is beyond the scope of this article.⁹¹ The uproar the decision caused throughout the nation is well-documented. The changes to Section 801 are designed to prevent a similar case in Wyoming. Subsection (c) ensures that a public entity may not take private property for the purpose of transferring the property to another private individual or entity, except in the case of protecting the public health and safety. Subsection (d) sets forth a rebuttable presumption that if a public entity acquires property in fee simple and fails to make substantial use of the property for ten years, then that the property is to be returned to the previous owner upon repayment of the amount originally received for the property in the condemnation action.

VI. CONCLUSION

The changes made to the Wyoming Eminent Domain Act provide significant benefits to both the entity using the power of condemnation and a landowner faced with condemnation. In addition to “fixing” a possible *Kelo* situation, the changes provide an outline for good faith negotiations, protections for information gained through surveys, and clarification for reclamation standards. The determination of fair market value should help to make landowners “whole” and only consider true arm’s length transactions.

⁹¹ *Kelo v. New London*, 545 U.S. 469 (2005).