

1983

## Wyoming Eminent Domain Act: Comment on the Act and Rule 71.1 of the Wyoming Rules of Civil Procedure

Rodney Lang

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### Recommended Citation

Lang, Rodney (1983) "Wyoming Eminent Domain Act: Comment on the Act and Rule 71.1 of the Wyoming Rules of Civil Procedure," *Land & Water Law Review*. Vol. 18 : Iss. 2 , pp. 739 - 764.  
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Lang: Wyoming Eminent Domain Act: Comment on the Act and Rule 71.1 of t  
**WYOMING EMINENT DOMAIN ACT: COMMENT ON  
THE ACT AND RULE 71.1 OF THE WYOMING  
RULES OF CIVIL PROCEDURE**

In 1981 the Wyoming Legislature adopted the Wyoming Eminent Domain Act.<sup>1</sup> This Act is the culmination of extensive legislative study,<sup>2</sup> and contains new substantive sections and major revisions of former statutes. Impetus for the extensive changes came from increased use of eminent domain proceedings by public utilities and energy related industries,<sup>3</sup> a void in the Wyoming eminent domain law perceived by landowners as allowing abuse of eminent domain by non-governmental entities,<sup>4</sup> and accelerating market values of land, making one-time payments for compensation less satisfactory.<sup>5</sup>

The purpose of this comment is threefold. First, source materials and background information on the Wyoming Eminent Domain Act will be identified and presented. Second, an analysis of selected provisions of the Act will be made. Third, the relationship between the Wyoming Eminent Domain Act and Rule 71.1 of the Wyoming Rules of Civil Procedure will be examined.

### SOURCES AND BACKGROUND

A practitioner working with the Wyoming Eminent Domain Act should have a copy of the Uniform Eminent Domain Code drafted and adopted in 1974 by the National Conference of Commissioners of Uniform State Laws.<sup>6</sup> This Code served as a model for major portions of the new Wyoming Act, although as of June 30, 1980, it had not been adopted in any jurisdiction.<sup>7</sup> Interestingly, the historical note to the Code

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1. WYO. STAT. § 1-26-501 (Supp. 1982).

2. *Public Hearing Before the Eminent Domain Subcomm. of the Joint Judiciary Interim Comm.*, Casper (June 15, 1979) (statement of Ellis Livingston, Wyoming Farm Bureau, at 1) [hereinafter cited as Casper, June 15].

3. *Id.* at 2-3; Casper, June 15, *supra* note 2 (statement of Paul Etchepare, Warren Livestock Co., at 3, 16).

4. Casper, June 15, *supra* note 2 (statement of Paul Etchepare, Warren Livestock Co., at 2, 3 and 16).

5. Casper, June 15, *supra* note 2 (testimony of Gerald Palm, President, Wyoming Stockgrowers Ass'n, at 2).

6. UNIF. EMINENT DOMAIN CODE §§ 101-1605, 13 U.L.A. 1 (1974).

7. UNIF. EMINENT DOMAIN CODE at 1 (Historical Note), 13 U.L.A. 1 (1974).

states that: "It is conceived primarily as a procedural statute. . .,"<sup>8</sup> a reference which may have some bearing in the discussion of the interaction between Rule 71.1 of the Wyoming Rules of Civil Procedure and the Wyoming Eminent Domain Act.

The other key source for the Wyoming Eminent Domain Act is *West's Annotated California Codes of Civil Procedure*, sections 1230.010 to 1273.050.<sup>9</sup> The California Eminent Domain Law drafted by the California Law Revision Commission, became operative on July 1, 1976.<sup>10</sup> Wyoming's reliance on the California Eminent Domain Law prompted this comment: "To now attempt to apply the California condemnation concepts to Wyoming is inappropriate since the two states are far apart in land ownership patterns, population densities and social problems."<sup>11</sup> According to one source, the U.E.D.C. and the proposed California Codes were selected as models, in part, "because of the extensive comments developed to accompany the codes."<sup>12</sup> Arguments for interpretations of sections of the Wyoming Eminent Domain Act based upon comments to the similarly framed Uniform and California codes should be bolstered by this information.<sup>13</sup>

For an in-depth understanding of the Wyoming Eminent Domain Act, the numerous drafts, reports and hearings developed by the Legislative Service Office, and specifically by Joe Meyer, are a valuable resource.<sup>14</sup> After several bills were introduced in the 1979 legislature regarding eminent domain,<sup>15</sup> the decision was made to have a legislative study of

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8. UNIF. EMINENT DOMAIN CODE at 1 (Historical Note), 13 U.L.A. 1 (1974).
  9. CAL. CIV. PROC. CODE §§ 1230.010-1273.050 (West 1982).
  10. CAL. CIV. PROC. CODE § 1230.010 (West 1982); EMINENT DOMAIN SUBCOMM. OF THE JOINT JUDICIARY INTERIM COMM., REP. NO. 2, EMINENT DOMAIN STUDY 1 (May 1979) (prepared by the Wyoming Legislative Service Office) [hereinafter cited as REP. NO. 2].
  11. *Public Hearing Before the Eminent Domain Subcomm. of the Joint Judiciary Interim Comm.*, Casper (Nov. 8, 1979) (statement of Robert H. Martin for the Petroleum Ass'n of Wyoming, Exhibit "F," at 4) [hereinafter cited as Casper, Nov. 8].
  12. REP. NO. 2, *supra* note 10 at 1.
  13. *Cf. Dainton v. Watson*, No. 5744, slip op. at 3-4 (Wyo. Feb. 11, 1983) (Wyoming courts will follow California precedent where Wyoming Probate Code taken from California Probate Code, retains similarity, and matter is before the Wyoming court for the first time); *Woodward v. Haney*, 564 P.2d 844, 845 (Wyo. 1977) (Statute taken from another state is adopted with construction placed upon it by highest court of parent state).
  14. Mr. Joe Meyer of the Legislative Service Office in Cheyenne, Wyoming, has retained copies of all drafts, reports and hearings mentioned in this comment.
  15. The author is uncertain of the number of bills introduced at that time; however, unpublished notes to statements of Mr. Meyer at the Continuing Legal Education meeting refer to numerous bills on eminent domain. Reference to H.B. 434 may be found in Casper, June 15, *supra* note 2 (testimony of Gerald Palm, President, Wyoming Stockgrowers Ass'n, at 1).

the matter. The Joint Judiciary Interim Committee was assigned the task of studying and drafting legislation. The Legislative Service Office prepared its Report No. 1 Eminent Domain Study in April 1979. This is an excellent resource as it contains the Wyoming constitutional and statutory provisions on eminent domain (as they then existed), as well as the Model Code on Eminent Domain (used as a model for section 1-26-516), and the summary of the report of the California Law Revisions Commission.<sup>16</sup> Report No. 2 of the Legislative Service Office features the Wyoming eminent domain laws as they existed in May of 1979 and compares them with the U.E.D.C., the California Eminent Domain Law and the Model Code on Eminent Domain. Additionally, Report No. 2 has a column of comments reflecting the perceived problems or purposes for the various sections analyzed.<sup>17</sup> Report No. 3 is in the form of legislation and is a reworked draft in response to initial public hearings held in Casper on June 15 and 16, 1979.<sup>18</sup> This report was the basis for comment at the four public hearings held throughout Wyoming in November of 1979, and contains many comments by the drafters.<sup>19</sup>

As indicated previously, several working drafts were created; the first was in response to the initial Casper hearings.<sup>20</sup> A second working draft was created by August 6, 1979,

16. EMINENT DOMAIN SUBCOMM. OF THE JOINT JUDICIARY INTERIM COMM., REP. NO. 1, EMINENT DOMAIN STUDY (Apr. 1979) (prepared by the Wyoming Legislative Service Office).

17. REP. NO. 2, *supra* note 10 at 1.

18. Public hearings were held in Casper at the Administrative Building of Casper College on June 15 and 16, 1979. These hearings provided an initial point of departure in allowing discussion of proposed eminent domain legislation which had been before the 1979 Legislature, and in giving the Eminent Domain Subcommittee information to form its first working draft for new eminent domain legislation. The 3rd Report is a refined draft of possible legislation and refers to the Casper hearings in comments to different sections.

19. EMINENT DOMAIN SUBCOMM. OF THE JOINT JUDICIARY INTERIM COMM., REP. NO. 3, EMINENT DOMAIN STUDY (Sept. 1979) (prepared by the Wyoming Legislative Service Office). These public hearings were held in Laramie on November 7, 1979, Casper on November 8, 1979, Gillette on November 13, 1979, and Pinedale on November 19, 1979. The Legislative Service Office has summaries of the hearings and copies of the written statements submitted during the hearings, as well as some written statements received after the hearings.

20. Three documents received from the Legislative Service Office appear to qualify as Working Draft #1, although one was labeled #4, one was unlabeled, and the one labeled #1 had the #4 crossed out. After checking all three, the author determined they were, in fact, the same draft. Given the comments to the different sections which refer to the Casper hearings, the author believes these documents represent Working Draft #1. The date for this draft is July 12, 1979. In an introduction to Working Draft #1, Mr. Meyer indicated to the members of the Eminent Domain Subcommittee of the Joint Judiciary Interim Committee that several matters were still to be developed for inclusion in the bill:

"1. Public hearing on proposed routes;

2. Payment of annual easement fee adjusted annually;

and included changes requested by the subcommittee members. The Relocation Assistance Act and Wyoming statutory provisions relating to private roads were not changed.<sup>21</sup> Working Draft No. 3 is apparently the same as Report No. 3. A document dated March 31, 1980 summarizes comments received to Working Draft No. 3 (Report No. 3) from the four public hearings and includes copies of relevant federal laws, including Rule 71A of the Federal Code of Civil Procedure.<sup>22</sup> There is also a document variously labeled as Report No. 4 and Working Draft 4/15/80.<sup>23</sup> The Legislative Service Office has a number of other unlisted documents which might be of assistance to the practitioner in reconstructing the history of the Act and the possible "legislative intent" behind the Act.<sup>24</sup>

## EXAMINATION AND ANALYSIS OF SELECTED PROVISIONS

### *Section 1-26-501: Citation*

The initial section of the Wyoming Eminent Domain Act, section 1-26-501, is important for its circumscription of the power of eminent domain. It states: "Except as otherwise specifically provided by statute, the power of eminent domain may be exercised only as provided by this act and the Wyoming Rules of Civil Procedure to the extent the Rules of Civil Procedure do not conflict with this act."<sup>25</sup> The section indicates that other statutes may specifically provide for the exercise of

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3. Inclusion of compensation standards under ArticleX, Uniform Code;
  4. Modification of Relocation Assistance Act to cover all condemners;
  5. Actions for inverse condemnations;
  6. Blanket easements;
  7. Incorporate and modify (?) county road statutes." (question mark in original).

At some point all of the above were checked off, except numbers 4 and 7.

21. EMINENT DOMAIN SUBCOMM. OF THE JOINT JUDICIARY INTERIM COMM., WORKING DRAFT #2 (Aug. 6, 1979). The Relocation Assistance Act, WYO. STAT. §§ 16-7-101 to -121 (1982), assists persons displaced by the acquisition of real property for a program or project of an agency. Statutory requirements for the establishment of a private road are found at WYO. STAT. §§ 24-9-101 to -104 (1977). See generally, Note, *Property Law—Acquiring Access to Private Landlocked Tracts: Wyoming's Statutory Right of Way*, 16 LAND & WATER L. REV. 281 (1981). In the author's opinion, WORKING DRAFT #2 was the most direct adoption of the U.E.D.C. of the four drafts.
22. EMINENT DOMAIN SUBCOMM. OF THE JOINT JUDICIARY INTERIM COMM., EMINENT DOMAIN SECTION ANALYSIS (Mar. 31, 1980) (Joseph B. Meyer).
23. EMINENT DOMAIN SUBCOMM. OF THE JOINT JUDICIARY INTERIM COMM., WORKING DRAFT 4/15/80 (this is a personal working copy of Joe Meyer). This draft has many handwritten deletions and additions, and appears in context to be near the end of the different drafting stages.
24. These documents include such items as a copy of the handout from a Continuing Legal Education seminar, conducted by J. Meyer and W. Downes on October 23, 1981, a copy of the Wisconsin Eminent Domain Law, and copies of various cases and law review articles.
25. WYO. STAT. § 1-26-501 (Supp. 1982).

eminent domain powers, such as chapter 9, title 24 of the Wyoming Statutes, Establishment of Private Roads.<sup>26</sup>

More important is the section's provision that the Wyoming Rules of Civil Procedure are to apply to the extent that they do not *conflict* with the Act.<sup>27</sup> The legislative intent was for eminent domain proceedings to be controlled by rules that apply to civil actions, including Rule 71.1 of the Wyoming Rules of Civil Procedure, Condemnation of Property, unless such rules are in conflict with the Act. Prior Wyoming eminent domain law was replete with references to Rule 71.1 of the Wyoming Rules of Civil Procedure.<sup>28</sup> The current Act, however, contains only the one reference to the Wyoming Rules of Civil Procedure, and other statutes have been amended to delete references to Rule 71.1 of the Wyoming Rules of Civil Procedure. Accordingly, there may be confusion as to where the Act is predominant, where it conflicts with Rule 71.1, and where the procedures in Rule 71.1 are necessary.

*Section 1-26-502: Definitions section; Section 1-26-713: Loss of Goodwill*

The section on definitions, 1-26-502, will require judicial clarification of the boundaries of the Act. Essential to an understanding of the defined word "condemn" is the word "property"; likewise essential to the defined words "condemnee" and "condemnor" is the word "person."<sup>29</sup> Since the purpose of an eminent domain proceeding is to provide necessary legal access to "property" required for public use, it would seem that the courts should give the broadest possible definition to "property." Arguably, since the Wyoming Eminent Domain Act directly quoted the Uniform Eminent Do-

26. Continuing Legal Education seminar, Wyoming Eminent Domain Code--1981, at 1 (in the comments column) (Oct. 23, 1981) (unpublished handout) (available in the Wyoming Legislative Service Office) [hereinafter cited as unpublished handout]. Given this exception, *McGuire v. McGuire*, 608 P.2d 1278 (Wyo. 1980), and *Walton v. Dana*, 609 P.2d 461 (Wyo. 1980), should still be good case law. See generally, Note, *supra* note 21. In *McGuire* the Wyoming Supreme Court held that sections 24-9-101 to -104 of the Wyoming Statutes were not either impliedly or directly repealed by section 1-26-405 of the Wyoming Statutes or by Rule 71.1 of the Wyoming Rules of Civil Procedure. The court noted that implied repeals are not favored. 608 P.2d at 1289. Since sections 24-9-101 to -104 were not specifically repealed by the new Wyoming Eminent Domain Act, it would still seem to be in effect.

27. WYO. STAT. § 1-26-501 (Supp. 1982).

28. See, e.g., WYO. STAT. § 1-26-101 (repealed 1981); WYO. STAT. § 24-10-110 (1977, amended 1981); WYO. STAT. § 33-19-106 (1977, amended 1981).

29. WYO. STAT. § 1-26-502 (Supp. 1982).

main Code on the definitions of “condemn,” “condemnee” and “condemnor,” the Code definitions of “property” (an interest in real or personal property under the law of the State) and “person” (a natural individual, partnership, corporation, association, other legal or fiduciary entity, and a public entity) should prevail.<sup>30</sup> Additional support for a broad definition of “person” can be found in article 8 of the Wyoming Act, which grants the power of eminent domain to a host of condemners.<sup>31</sup>

The definition of litigation expenses as “reasonable costs, disbursements and expenses, including attorney, appraisal and engineering fees, associated with a condemnation proceeding,”<sup>32</sup> is more expansive than that provided in either the U.E.D.C. or the California code. Both of these sources required the costs, disbursements and expenses to be both “reasonable” and “necessary.”<sup>33</sup> The court in a California case relied on the qualifier “necessary” to disallow the costs of preparation of a map and survey by defendants for a trial in which no date was ever set for the hearing.<sup>34</sup> A different result might be reached in Wyoming depending upon court interpretation of the definition of litigation expenses.

The bare bones definition section omitted a crucial definition for the new area in Wyoming eminent domain law, loss of goodwill. In part, section 1-26-713 reads: “In addition to fair market value . . . the owner of a business . . . shall be compensated for loss of goodwill . . .”<sup>35</sup> A definition of “goodwill” can be found in subsection (b) of section 1-26-713, but no definition of “business” is provided. Comments in an unpublished handout on the Wyoming Eminent Domain Code, prepared for a Wyoming Continuing Legal Education Program, state “The term ‘business’ is defined in Section 103(3) of the UEDC to exclude a farm operation. That definition was not adopted by the Legislature.”<sup>36</sup> An argument could be made that the Wyoming Relocation Assistance Act of 1973, which is mentioned in section 1-26-713, contains the definition of “business,” since it is

30. UNIF. EMINENT DOMAIN CODE § 103, 13 U.L.A. 12-14 (1974). See *supra* note 13.

31. WYO. STAT. §§ 1-26-801 to -817 (Supp. 1982).

32. WYO. STAT. § 1-26-502(a)(iv) (Supp. 1982).

33. UNIF. EMINENT DOMAIN CODE § 103(14), 13 U.L.A. 13 (1974); CAL. CIV. PROC. CODE § 1235.140 (West 1982).

34. *City of Inglewood v. O.T. Johnson Corp.*, 113 Cal. App. 2d 587, 248 P.2d 536 (1952).

35. WYO. STAT. § 1-26-713(a) (Supp. 1982).

36. Unpublished handout, *supra* note 26, at 8.

also concerned with property and dislocation due to governmental actions. The definition of "business" in that Act specifically excludes "farm operation."<sup>37</sup>

The phrase "to transact business" contained in article 10, section 5 of the Wyoming Constitution has been interpreted to include ranching activities such as the buying and selling of livestock.<sup>38</sup> In discussing the definition of "business" for the purposes of the operation of the Workmen's Compensation Law, the Wyoming Supreme Court quoted with approval a Pennsylvania case stating "that the reference is to the habitual or regular occupation that the party was engaged in with a view to winning a livelihood or some gain."<sup>39</sup> Given the intent of the Wyoming drafters to reverse the general rule that loss of business goodwill does not require compensation in eminent domain,<sup>40</sup> and given the absence of any definition of "business" in the Act, courts should give the broadest possible definition to "business."<sup>41</sup> Such a definition would allow the rancher or farmer condemnee to attempt to make a showing of "loss of goodwill" according to the requirements of section 1-26-713.<sup>42</sup>

### *Section 1-26-503: Public use required; other acquisitions*

Section 1-26-503 may create some confusion since it is captioned "Public use *required*; other acquisitions." This unfortunate choice of captions is probably the result of an earlier draft provision which began, "The power of eminent domain may be exercised to acquire property only for a public use."<sup>43</sup> That provision was ultimately deleted in light of public comment that the Wyoming Constitution provides for eminent domain proceedings for private ways of necessity.<sup>44</sup> That public

37. WYO. STAT. § 16-7-102(a)(ii) (1982).

38. Gould Land and Cattle Co. v. Rocky Mountain Bell Tel. Co., 17 Wyo. 507, 101 P. 939, 940 (1909).

39. Lamont v. Intermountain Realty Co., 48 Wyo. 56, 41 P.2d 497, 502 (1935) (citing Marsh v. Groner, 258 Pa. 473, 102 A. 127, 129 (1917)).

40. Unpublished handout, *supra* note 26, at 8.

41. See Nimmo v. State, 603 P.2d 386, 390 (Wyo. 1979) (an overnarrow meaning should not be applied to statutes in disregard of obvious legislative intent).

42. Such a loss is not inconceivable. One example would be the taking of a rancher's prime haying land for wildlife conservation purposes, forcing the rancher to relocate to a distant area and enter a new market.

43. WORKING DRAFT #2, *supra* note 21, at 3.

44. WYO. CONST. art. I, § 32. Casper, Nov. 8, *supra* note 11 (statement of Robert H. Martin for the Petroleum Ass'n of Wyoming, Exhibit "F," at 4). The comments of Mr. Martin are typical of others: "[I]t is essential for you to keep in mind that Wyoming's constitu-



use is not a requirement for the exercise of eminent domain is further bolstered by subsection (b) of section 1-26-503, which only refers to "any person or public entity authorized to acquire property for a *particular use* by eminent domain . . . ." <sup>45</sup> Additionally, section 1-26-504, which specifies the requirements to exercise eminent domain, does not expressly require public use. <sup>46</sup>

*Section 1-26-504: Requirements to exercise eminent domain*

The caption to section 1-26-504, Requirements to exercise eminent domain, indicates its importance as well as its potential for controversy. In its entirety the section reads,

(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.

(b) Findings of the public service commission, the interstate commerce commission and other federal and state agencies with appropriate jurisdiction are prima facie valid 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. <sup>47</sup>

The section makes it clear that "except as otherwise provided by law" <sup>48</sup> the power of eminent domain may be exercised only

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tional language embraces both public and *private* uses and to reorient the philosophy of our people to limit eminent domain only to public uses would do violence to the very fabric of our social system." *Id.* (emphasis in original); See *Public Hearing Before the Eminent Domain Subcomm. of the Joint Judiciary Interim Comm.*, Big Piney (Nov. 19, 1979) (Mountain Fuel Supply Co., Exhibit "C," at 2).

45. WYO. STAT. § 1-26-503(b) (Supp. 1982) (emphasis added).

46. WYO. STAT. § 1-26-504 (Supp. 1982).

47. WYO. STAT. § 1-26-504 (Supp. 1982).

48. Statutory ways of necessity under WYO. STAT. § 24-9-101 (1977) would be an example of this exception.

if all subparts (i), (ii) and (iii) of subsection (a) are established. Subsection (b) provides a means of establishing, at least "prima facie," the elements of subsection (a). Other than subsection (b), the statute does not specify how, when, or in what form these elements are to be established.

Rule 71.1 of the Wyoming Rules of Civil Procedure on condemnation of property might be expected to specify the procedures for establishing the elements of section 1-26-504. However, Rule 71.1 does not currently require that the three elements of section 1-26-504 be pleaded in a complaint in a condemnation proceeding.<sup>49</sup> Under subsection (e) of Rule 71.1 a hearing shall be held not less than 15 days after service upon the defendant and "at the hearing . . . the district judge shall . . . hear and determine the questions of the plaintiff's right to make the appropriation, plaintiff's inability to agree with the owner, [and] the necessity for the appropriation. . . ."<sup>50</sup> It could be argued that the language of the Rule, "plaintiff's right to make the appropriation," requires the plaintiff to establish subparts (i), (ii), and (iii) of subsection (a) of the Act only at the hearing. This reading of Rule 71.1(e) is somewhat strained, however, since the rule also specifies that the judge shall hear and determine the "necessity for the appropriation" as separate from the "plaintiff's right to make the appropriation." If the showing for 71.1 (e) "plaintiff's right to make the appropriation" includes the section 1-26-504 requirements to exercise eminent domain, subpart (a) (i) of 1-26-504 already demands a showing of "necessity." An additional determination on the "necessity for the appropriation" as mandated by the rules seems superfluous.

The draft source for subsection (a) of section 1-26-504 was California Code of Civil Procedure section 1240.030.<sup>51</sup> Comments to the California section state: " 'Public interest and necessity' include all aspects of the public good including but not limited to social, economic, environmental, and esthetic considerations."<sup>52</sup> Whether Wyoming will adopt this broad definition of the factors involved in public interest and neces-

49. WYO. R. CIV. P. 71.1(c)(2); WYO. STAT. § 1-26-504(a)(i), (ii), and (iii) (Supp. 1982).

50. Wyo. R. Civ. P. 71.1(e).

51. Unpublished handout, *supra* note 26, at 1 (in the Source column).

52. CAL. CIV. PROC. CODE § 1240.030 (West 1982) (comments at 490).

sity remains to be seen. Even if it does, the question remains whether a showing of public good through esthetic considerations alone—or any factor alone—would be sufficient to establish public interest and necessity.

Section 1-26-504 (a) (ii) requires a showing that “the project is planned or located in the manner that will be the most compatible with the greatest public good and the least private injury. . . .”<sup>53</sup> Although a California case holds that a condemnation complaint does not have to allege that property is located in the manner that will be most compatible with the greatest public good and the least private injury,<sup>54</sup> this case seems of doubtful value for Wyoming since it goes on to specify that when the complaint and answer are silent, no issue is presented on the question.<sup>55</sup> The Wyoming statute makes it an issue, as the condemnor has the positive duty to establish that the project is planned and located in the manner which will be compatible with the greatest public good and the least private injury.<sup>56</sup> However, this duty does not necessarily require pleadings in the complaint. Additional consideration of public good and private injury may be found in California case law which asserts that a lesser public good cannot be balanced by a lesser private injury to make an appropriate location.<sup>57</sup>

California comment and case law may also embellish section 1-26-504 (a) (iii)’s requirement that “the property sought to be acquired is necessary for the project.” Suitability and usefulness of the property for the project seem to be all that is required, and not the absolute impossibility of doing the project without the specified land.<sup>58</sup>

Subsection (b) of section 1-26-504 provides an out for condemnors who are subject to findings by the Public Service Commission, (P.S.C.) the Interstate Commerce Commission, (I.C.C.) and other federal and state agencies “relative to determinations under subsection (a). . . .”<sup>59</sup> Since subsection (a) was

53. WYO. STAT. § 1-26-504(a)(ii) (Supp. 1982).

54. *Los Altos School Dist. v. Watson*, 133 Cal. App. 2d 447, 284 P.2d 513, 516 (1955).

55. *Id.*

56. WYO. STAT. § 1-26-504(a)(ii) (Supp. 1982).

57. *Montebello Unified School Dist. v. Keay*, 55 Cal. App. 2d 839, 131 P.2d 384, 387 (1942).

58. *City of Hawthorne v. Peebles*, 166 Cal. App. 2d 758, 333 P.2d 442, 445 (1959) (quoting 1 NICHOLS ON EMINENT DOMAIN § 4.11[4], at 4-203 (3d ed. 1981)).

59. WYO. STAT. § 1-26-504(b) (Supp. 1982).

adopted, in part, as a response to landowners' complaints that route choices by condemnors did not consider effects on the operations of the land being condemned,<sup>60</sup> determinations by the P.S.C. on route selection, which are based solely on rate differences, may not meet the spirit of subsection (a).

*Section 1-26-505: Condemnation of property devoted to a public use*

Wyoming statutes allow condemnation of property already dedicated to a public use, provided that the condemnor can show that the new proposed use will not unreasonably interfere with the existing use or expected future use.<sup>61</sup> This section contemplates compatible joint use of property and not displacement of a current public use by a new use.<sup>62</sup> The possibility of joint use accommodates the "corridor concept" whereby pipeline companies, electric utilities, railroads, and others seeking condemnation could locate their facilities in the same area on a rancher's land, minimizing the area that must be condemned.<sup>63</sup> Using previously established utility and transportation corridors, where possible, might also assist the condemnor in establishing that the project is located in the manner which will be the most compatible with the greatest public good and the least private injury.

*Section 1-26-506: Entry prior to condemnation action; Section 1-26-507: Same, court orders; Section 1-26-508: Same, damages*

Prior to the 1981 Act, only specified entities such as railroads, telephone and telegraph companies, electric transmission companies, and municipalities, in certain instances, were statutorily allowed entry upon land prior to con-

60. WORKING DRAFT 4/15/80, *supra* note 23, at 3.

61. WYO. STAT. § 1-26-505 (Supp. 1982).

62. CAL. CIV. PROC. CODE § 1240.510 (West 1976) (comments at 537). *See* Clarke v. Boysen, 39 F.2d 800 (10th Cir. 1930) (generally, property already designated for public use cannot be taken for another public use, where the second use will destroy or materially interfere with the first use, but statutes can allow joint use). *See also* REP. NO. 2, *supra* note 10 (Wyoming Statutes col. 6(a)).

63. *Public Hearing Before the Eminent Domain Subcomm. of the Joint Judiciary Interim Comm.*, Laramie, (Nov. 7, 1979) (statement by Doug Gibson, Wyoming Farm Bureau, Exhibit "E," at 2) [hereinafter cited as Laramie, Nov. 7]. *But see* Casper, Nov. 8, *supra* note 11 (Union Pacific Railroad, Exhibit "C," at 3). The Railroad opposed the corridor concept due to problems of conflict and potential personal injury. It also felt that parallel pipelines, unless properly cased could prohibit the use of the surface for railroad purposes and reduce the railroad's ability to expand plant and facilities.

demnation in the absence of landowner consent.<sup>64</sup> No Wyoming case law was discovered which authorized entry onto property prior to the commencement of condemnation proceedings in the absence of statutory grant or owner consent.<sup>65</sup> Sections 1-26-506, 1-26-507, and 1-26-508 of the new Act changed this.

Under section 1-26-506, entry by the potential condemnor prior to condemnation action is authorized for specified activities in order to determine if the property is suitable for and within his power to condemn, if the entry is "(i) Preceded by prior notice to and written authorization from the owner or his agent; (ii) Undertaken during reasonable hours, normally during daylight; [and] (iii) Accomplished peaceably and without inflicting substantial injury."<sup>66</sup> The condemnor is liable for any damages resulting from his pre-condemnation activities but is not subject to trespass charges.<sup>67</sup> One should note that the right to take "soundings, borings, and samplings" is considered a pre-condemnation action and not a "taking."<sup>68</sup> Standing alone, section 1-26-506 does not substantially change much, since both prior notice to *and* written authorization from the owner or his agent are required. Any condemnor with such owner authorization prior to the Act could surely have carried out the same activities based on a contract theory. The Wyoming section was drafted with reference to Uniform Eminent Domain Code section 301, which only required "reasonable efforts to notify the owner . . . ."<sup>69</sup>

If he cannot obtain the owner's authorization for entry prior to condemnation, the condemnor is granted the right to appeal to the district court under section 1-26-507 for an order permitting entry.<sup>70</sup> The wording of subsection (a) of section 1-26-507 indicates that the condemnor must attempt to gain

64. REP. NO. 2, *supra* note 10 (Wyoming Statutes col. 3(a)). Evidently no condemnor could enter on railroad right-of-ways. Requirements for prior entries varied with the statutes as section 1-26-302(b) required telephone and other companies to post a cash or surety bond of \$2,000. That section was repealed with passage of the new Act.

65. REP. NO. 2, *supra* note 10 (Comments col.).

66. WYO. STAT. § 1-26-506(a)(i) to (iii) (Supp. 1982).

67. WYO. STAT. § 1-26-506(b)(c) (Supp. 1982).

68. WYO. STAT. § 1-26-506(a) (Supp. 1982).

69. UNIF. EMINENT DOMAIN CODE § 301, 13 U.L.A. 28 (1974). CAL. CIV. PROC. CODE § 1245.010 and § 1245.020 (West 1982) are somewhat similar to the Wyoming provisions and may provide some case law assistance.

70. WYO. STAT. § 1-26-507 (Supp. 1982).

entry according to the terms of section 1-26-506, rather than rely on a unilateral decision that such an attempt would be futile, before seeking redress under section 1-26-507.<sup>71</sup> Section 1-26-507 demands notice and a hearing, and commands the court, unless "good cause to the contrary is shown," to permit entry and to include in its order terms and conditions as to the entry and the activities upon the property, for the benefit of both the condemnor and the condemnee.<sup>72</sup> Procedures in the nature of a hearing to show cause provide the framework for the condemnor, and the burden of persuasion should be upon the person resisting entry since the owner will be compensated for any damages caused by entry.<sup>73</sup> What is "good cause" is not detailed, and a case-by-case determination is necessary. However, the lack of power to take the property, the existence of recent data available to the condemnor of the kind for which entry is sought, and a showing of unreasonable proposed activities or "unnecessarily onerous investigation techniques" might all qualify as "good cause."<sup>74</sup>

If the district court issues an order permitting entry, the court shall make a determination of the amount, if any, that shall compensate the owner for physical injury to the property, and shall require a deposit of cash or other security before entry.<sup>75</sup> A court's determination as to the amount, if any, required to compensate the owner may in effect require the court to conduct a condemnation type hearing on damages at a time when the acquisition may or may not be required.<sup>76</sup> If damage deposits are made for physical injury to the property, the argument may be made that deposits should be deducted from any later awards for a taking of the same property, although the statute makes no such provision.<sup>77</sup> It should be noted that the Act provides for investment of the deposit, for a determination that no deposit is required, and for modification of court orders on pre-condemnation entry.<sup>78</sup>

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71. WYO. STAT. § 1-26-507(a) (Supp. 1982).

72. WYO. STAT. § 1-26-507(b) (Supp. 1982).

73. UNIF. EMINENT DOMAIN CODE § 302, 13 U.L.A. 29 (1974) (comments at 30).

74. UNIF. EMINENT DOMAIN CODE § 302, 13 U.L.A. 29 (1974) (comments at 30); Unpublished handout, *supra* note 26, at 3-4.

75. WYO. STAT. § 1-26-507(c) (Supp. 1982).

76. *Public Hearing Before the Eminent Domain Subcomm. of the Joint Judiciary Interim Comm.*, Gillette (Nov. 13, 1979) (Wyoming Municipal Power Agency, Exhibit "D," at 2).

77. Big Piney, Nov. 19, *supra* note 44 (Mountain Fuel Supply Co., Exhibit "C," at 3).

78. WYO. STAT. § 1-26-507(c) and (d) (Supp. 1982).

The cause of action for damages due to pre-action entry upon the property can be found in section 1-26-508. This section seemingly waives sovereign immunity defenses. Additionally, the types of damages, "physical injury" and "substantial interference," would prevent recovery for nominal or constructive damages not based on harm to property, and for "minimal annoyances or interferences that do not seriously impinge upon or impair the possession and use of the property."<sup>79</sup> Damages and use of this section are available whether the entry was pursuant to section 1-26-506, or required judicial order, or was simply unlawful.<sup>80</sup> In the case of an unlawful entry, it would seem that section 1-26-508 is not the exclusive remedy and an action in trespass should still be available.

The prevailing party in an action for damages under this section will be allowed her costs. The condemnee may be awarded litigation expenses under specified situations.<sup>81</sup> Since the claimant might have to pay costs, frivolous actions may be reduced. However, due to the fear of losing and being forced to pay costs, the assertion of rightful claims may be discouraged, especially by landowners with few resources.

Section 1-26-508 provides an alternative to a civil action by allowing application to the court for an award from money on deposit under section 1-26-507.<sup>82</sup> Whether such an award would be subject to the right of trial by jury was raised in a draft proposal.<sup>83</sup> However, no jury trial right is mandated in the statute.

79. UNIF. EMINENT DOMAIN CODE § 305, 13 U.L.A. 32 (1974) (comments at 33-34); CAL. CIV. PROC. CODE § 1245.060 (West 1982) (comments at 573); Unpublished handout, *supra* note 26, at 4.

80. UNIF. EMINENT DOMAIN CODE § 305, 13 U.L.A. 32 (1974) (comments at 33).

81. WYO. STAT. § 1-26-508(b) (Supp. 1982); Laramie, Nov. 7, *supra* note 63 (Tom Smith, Wyoming Ass'n of Municipalities, Hearing Transcript, at 3). Mr. Smith stated that the section should work both ways, with recalcitrant landowners being required to pay attorney's fees to prospective condemners. The author believes that given the condemnor's position of power and available resources, the threat of bearing litigation expenses might cause landowners to be "chilled" in any rightful resistance to pre-condemnation activities. It should also be noted that "costs" are defined in UNIF. EMINENT DOMAIN CODE § 103(8), 13 U.L.A. 13 (1974).

82. WYO. STAT. § 1-26-508(a) and (c) (Supp. 1982).

83. WORKING DRAFT 4/15/80, *supra* note 23, at 6; Laramie, Nov. 7, *supra* note 63 (Colorado Interstate Gas Co., Exhibit "F," at 3). Colorado Interstate Gas stated the words "subject to the right to trial by jury" should be inserted after "the court shall determine the amount," arguing that a condemnor is entitled to trial by jury before assessment of civil damages.

*Section 1-26-509: Negotiations; scope of efforts to purchase*

The Wyoming Act has incorporated provisions requiring efforts to purchase prior to resort to condemnation.<sup>84</sup> Section 1-26-509 states in part, "A condemnor shall make reasonable and diligent efforts to acquire property by good faith negotiation."<sup>85</sup> Interpretation of this section will, of course, depend upon what is considered "reasonable" and "diligent" as well as "good faith negotiation." Early drafts and the Uniform Eminent Domain Code section 202(a), after which part of the Wyoming Act was modeled, provided for negotiation and appraisal,<sup>86</sup> with the pre-negotiation appraisal by the condemnor establishing a price for the taking. An offer to purchase the property was not to be for less than the appraised value.<sup>87</sup> Comment against the appraisal process prevailed in Wyoming, with arguments that it would be too time consuming and unnecessary,<sup>88</sup> might exceed the cost of the taking, and was not specific as to who could do appraisals, what methods they would use, and how conflicting appraisals would be resolved.<sup>89</sup> That an appraisal would be helpful in establishing a basis for good faith negotiation, seems self-evident. Rule 71.1 of the Wyoming Rules of Civil Procedure outlines procedures for appraisal in a successful condemnation action; these procedures or a variation thereof might well work for a pre-negotiation appraisal.

As it stands now, the concept of "good faith negotiation" is open to broad and varying interpretation. One commentator noted that the first offer of the condemnor is often based on extensive research and study and is the best effort of the condemnor at a fair price, leaving little room for negotiation.<sup>90</sup> Another hearing participant defined good faith effort as in-

84. WYO. STAT. § 1-26-509 (Supp. 1982) (Negotiation; scope of efforts to purchase); WYO. STAT. § 1-26-510 (Supp. 1982) (Preliminary efforts to purchase); WYO. STAT. § 1-26-511 (Supp. 1982) (Purchase efforts waived or excused).

85. WYO. STAT. § 1-26-509(a) (Supp. 1982).

86. *E.g.*, UNIF. EMINENT DOMAIN CODE § 202(a), 13 U.L.A. 17 (1974); EMINENT DOMAIN SUBCOMM. OF THE JOINT JUDICIARY INTERIM COMM., WORKING DRAFT #1, at 10 (July 12, 1979).

87. REP. NO. 3, *supra* note 19, at 7.

88. Laramie, Nov. 7, *supra* note 63 (Colorado Interstate Gas Co., Exhibit "F," at 3-4). This same source stated that appraisal is only needed immediately prior to condemnation as a final step in negotiation.

89. Casper, Nov. 8, *supra* note 11 (statement of Robert H. Martin for the Petroleum Ass'n of Wyoming, Exhibit "F," at 2-3).

90. Casper, June 15, *supra* note 2 (statement by Frank Rhodes, Wyoming Rural Electric Ass'n, at 3-4).



cluding making annual rental or damage payments, replacing lost resources, making route changes, and compensating for isolated lands.<sup>91</sup> The summary of testimony offered for Basin Electric Power Corporation illustrates the issues:

[I]n his opinion negotiation does not mean offering more or less and bargaining in reaching a price. He stated Basin Electric has a flat amount which they will allow per acre for all landowners similarly situated and did not want to increase or decrease their offer. The offer computed by Basin Electric was Basin Electric's price and no more. He stated in his opinion if Basin Electric settled for different prices for land acquisition with different landowners they would encounter difficulties among landowners.<sup>92</sup>

### *Section 1-26-510: Preliminary efforts to purchase*

An action to condemn cannot be maintained if the condemnee objects, unless the condemnor made a "good faith effort to acquire the property by purchase before commencing the action."<sup>93</sup> The problem with this statutory language is whether an "offer" to purchase is to be assumed as a necessary element of any good faith effort to purchase. Subsection (b) of section 1-26-510 asserts that "Negotiations conducted in substantial compliance with W.S. 1-26-509(b)(i) through (vi) are prima facie evidence of 'good faith' under subsection (a) of this section."<sup>94</sup> However, the statute does not specify whether those negotiations are enough to show an "effort to acquire the property by purchase" or whether those negotiations must have resulted in an "offer" to purchase. The first sentence of section 1-26-513 reads, "At the time of commencing an eminent domain proceeding the condemnor shall deposit in court an amount equal to the condemnor's last *offer* of settlement prior to the action."<sup>95</sup> This sentence would seem to indicate that the legislature intends for the condemnor to make an "offer" as part of his good faith effort to purchase.

91. Casper, June 15, *supra* note 2 (Powder River Basin Resource Council, Letter of June 21, 1979, Exhibit "N," at 2).

92. Gillette, Nov. 13, *supra* note 76 (George Bartholomew, Basin Electric Power Coop., Hearing Transcript, at 4).

93. WYO. STAT. § 1-26-510(a) (Supp. 1982).

94. WYO. STAT. § 1-26-510(b) (Supp. 1982).

95. WYO. STAT. § 1-26-513(a) (Supp. 1982) (emphasis added).

*Section 1-26-511: Purchase efforts waived or excused*

The condemnor who has failed to meet the requirements of sections 1-26-509 and 1-26-510 can seek relief under section 1-26-511. Three exceptions to good faith negotiations are enumerated, the last being, "Due to conditions not caused by or under control of the condemnor, there is a compelling need to avoid the delay in commencing the action which compliance would require."<sup>96</sup> To fulfill the legislative intent of good faith negotiations, a condemnor asserting this open-ended excuse should bear the burden of showing the factual sufficiency and *bona fides* of the "compelling need," as well as the diligence with which the condemnor has pursued the action, and the effects of strict compliance with good faith negotiation requirements on factors beyond the condemnor's control.<sup>97</sup> The Wyoming Act does not address the problem of the landowner refusing to negotiate. In such a case, the court should impose some lesser standard of good faith negotiation.<sup>98</sup>

*Section 1-26-512: Contents of authorization*

Under the Wyoming Act, public entities must also meet requirements under section 1-26-512 before they may commence a condemnation action. Public entities must have a written resolution authorizing commencement and prosecution of the action and containing (1) a general statement of the proposed public use, (2) reference to the statutory authorization for the condemnation, (3) a description of the property allowing its identification, and (4) a declaration that the taking is necessary and appropriate for the proposed public use.<sup>99</sup> Since this written resolution would show that a considered decision to use condemnation has been made and since it would create a record of the action and an evidentiary basis for the action,<sup>100</sup> the resolution should be given the effect of "prima facie

96. WYO. STAT. § 1-26-511 (Supp. 1982).

97. UNIF. EMINENT DOMAIN CODE § 308, 13 U.L.A. 37 (1974) (comments at 37-38).

98. Unpublished handout, *supra* note 26, at 5.

99. WYO. STAT. § 1-26-512(a) and (b) (Supp. 1982). Report No. 2 noted that no statutes prior to the new act specifically required such a resolution, although it would be required in the condemnation action to prove the action was authorized. REP. NO. 2, *supra* note 10 (Wyoming Statutes col. 3(c)). Furthermore, *Hirt v. City of Casper*, 103 P.2d 394 (Wyo. 1940), was cited for the proposition that a formal resolution was not necessary where the city ratified the action after it was filed. Now, as noted in the text, a formal resolution is required by statute.

100. UNIF. EMINENT DOMAIN CODE § 309, 13 U.L.A. 38 (1974) (comments at 39).

evidence” of the requirements under section 1-26-504 subsections (a)(i) and (iii).<sup>101</sup>

*Section 1-26-513: Deposit at commencement of action*

The Wyoming Act mandates that a condemnor make a deposit equal to the condemnor's last offer of settlement prior to commencement of an eminent domain proceeding.<sup>102</sup> The Wyoming statute does not specify how condemnation actions are to be commenced. Rule 71.1(c)(2) speaks of commencement in connection with a complaint.<sup>103</sup> As section 1-26-513 is now written, the deposit is mandatory upon commencement and is to equal the condemnor's last offer.

However, even if one assumes that an offer is an inherent part of good faith negotiation, the open-ended excuse of “compelling need” to avoid delay, which waives purchase efforts, would appear to excuse the necessity of an offer and thus allow the condemnor not to make a deposit since no offer exists for the deposit to equal.<sup>104</sup> It is questionable whether the legislature would have intended such a result, especially when the excuse for non-negotiation and offer is “compelling need” to avoid delay, the very time one might want to specifically require a deposit to protect the landowner.

In Wyoming the condemnee has the right to withdraw any portion of the deposit prior to final judgment in the absence of other claims, but such withdrawal constitutes a lien against the property of the condemnee.<sup>105</sup> The Wyoming statutes do not provide for objections to withdrawal by the condemnor.<sup>106</sup> The right of immediate possession of the property goes to the condemnor if the condemnee exercises his right, however, and the condemnee waives all defenses to the action, except contest of the amount awarded.<sup>107</sup> These drastic limits on the con-

101. Unpublished handout, *supra* note 26, at 6.

102. WYO. STAT. § 1-26-513(a) (Supp. 1982).

103. WYO. R. CIV. P. 71.1(c)(2).

104. WYO. STAT. § 1-26-511(a)(iii) (Supp. 1982).

105. WYO. STAT. § 1-26-513(c) (Supp. 1982).

106. *Cf.* CAL. CIV. PROC. CODE § 1255.230 (West 1982). This provision was adopted by California to assist in the situation where the condemnor believes that other parties to the proceeding might exist and have interests in the property or where the condemnee has not filed the necessary “undertaking” securing payment for any portion withdrawn which exceeds the final determination.

107. WYO. STAT. § 1-26-513(c) (Supp. 1982).

demnee's access to the deposit will inhibit any resort to deposits by the condemnee since the landowner must leave the entire deposit intact or lose all his defenses against the condemnation.

When working with the deposit provisions, however, it should be remembered that several subsections that relate to security and deposits in a condemnation action may be found in Rule 71.1. The exact relationship between Rule 71.1 and section 1-26-513 is unclear.<sup>108</sup> The Act does not allow immediate possession initiated by the condemnor, but allows immediate possession when the condemnee withdraws *any* portion of a deposit. Rule 71.1, on the other hand, allows the condemnor to initiate immediate possession proceedings by paying a sufficient sum into court or by giving approved security.<sup>109</sup>

Two different situations are involved. If the condemnor can gain immediate possession under Rule 71.1 by paying a sufficient sum into court or by giving approved security, the condemnee should have access to that sum without jeopardizing his defenses against the underlying condemnation action. Since the condemnor is in possession, the condemnee may require additional funds to maintain the integrity of his operation. For example, if a condemnor, through his possession, were to cut off a condemnee's access to his stock watering pond or even to take the watering pond, prior to final judgment, the condemnee would have to devise another means of access or another pond. The condemnee should not have to provide the front end money for this activity since the condemnor, through his possession, created the problem. Although it is not written in the clearest language, Rule 71.1(l) seems to allow the condemnee access to the deposit. Under the Act this problem does not arise, since the condemnor cannot obtain possession until the condemnee withdraws part of the deposit. Since

108. Casper, Nov. 8, *supra* note 11 (Union Pacific Railroad, Exhibit "C," at 4). In reference to Report No. 3 and section 1-26-115 of that report, the Union Pacific Railroad stated: "It is not clear what relationship the deposit prescribed by this section has to the deposit or security required by Rule 71.1(d)(2), (e), in order for the condemnor to exercise the right of immediate possession." *Id.*

109. Wyo. R. Civ. P. 71.1(d)(2), (e). The drafters of the Act questioned whether, in the absence of statutory authority, the Wyoming Supreme Court has the authority to authorize pre-judgment possession of property as a procedural matter. REP. NO. 2, *supra* note 10 (Comments col. 4(c)). Since W.R.C.P. 71.1 is still the only apparent way a condemnor can initiate pre-judgment possession, the drafter's question would appear to remain relevant.

the right of immediate possession is not provided for under the Act, except when the condemnee has withdrawn some of the deposit, condemnors seeking possession will surely turn to the rules for possession. It is unfortunate that the legislature did not choose to address this situation by incorporating in the Wyoming Eminent Domain Act the portions of Rule 71.1 that deal with immediate possession and deposits.<sup>110</sup>

It is worth noting that neither the Act nor Rule 71.1 specifically requires a cash deposit. During the drafting stages of the Act, landowners sought to include the term "cash" deposit, but the Legislature did not comply with their requests.<sup>111</sup> Language in the Act which speaks of the investment of the deposit, interest, and a condemnee's right of withdrawal of the deposit may indicate, however, that a cash deposit is required.<sup>112</sup>

*Section 1-26-514: Interest taken; due compensation*

The interest in property granted by an eminent domain action may be an easement or a fee simple, if the condemnor is a public entity. The condemnor acquires only an easement, not including underlying minerals or mineral estate except what is necessary for subsurface support, if the condemnor is a non-

110. Written comments from Joe Meyer to Rod Lang (Mar. 4, 1983) (on file at the *Land and Water Law Review* office). In critique of the author's rough draft of this comment, Mr. Meyer raised some questions concerning the loss of defenses by a condemnee and the right of immediate possession by a condemnor. He questioned whether it was "fair" to allow a condemnee to withdraw the deposit if the condemnee intends to fight the condemnor's power to take the property. Additionally, if the condemnee were successful in preventing condemnation, the question arises of the condemnee returning the deposit with interest, since he only has a right to it where there is a successful condemnation.

The author finds the loss of defenses too drastic of a requirement for access to deposits, but agrees that the condemnee should be required to pay back any deposit with interest if the condemnee successfully stops the condemnation. A condemnation action can tie up a condemnee's resources, even without a physical invasion of the property. Certainly such an action will limit the condemnee's ability to borrow money on land involved in the action, or to otherwise dispose of the land until the condemnation action is resolved. It seems preferable for the condemnee, and of little harm to the condemnor, if the condemnee has to decide between using the deposit and possibly being forced to pay it back with interest, and using the deposit and conceding the condemnor's right to condemn.

Mr. Meyer indicated that the Legislature did not address the question of immediate possession because of intense landowner opposition to possession prior to court determination of the right to condemn and because it believed the decision to allow immediate possession might vary on a case by case basis depending on condemnor needs. The decision therefore might be resolved better by the courts.

111. Laramie, Nov. 7, *supra* note 63 (statement by Doug Gibson, Wyoming Farm Bureau, Exhibit "E," at 6). Mr. Gibson also noted that there may be extenuating circumstances which force the landowner to draw against the deposit. *Id.* at 7. See also Casper, Nov. 8, *supra* note 11 (Jessie Baker, Wyoming Wool Growers Ass'n, Exhibit "D," at 2).

112. WYO. STAT. § 1-26-513 (Supp. 1982).

public entity.<sup>113</sup> The methods of compensation for all interests are contained in subsection (b) of section 1-26-514, which in its one sentence simplicity was one of the most controversial sections in the proposed Act. This section states, "The court in determining due compensation may authorize a lump-sum payment or an annual installment or amortization payment to continue throughout the term of the easement."<sup>114</sup> This could possibly mean a lump-sum that is broken down into payments over the term of the easement, which would relieve the tax burden, or a lump-sum that is paid throughout the term of the easement. Comments to the unpublished handout of a continuing legal education seminar on the Act are worth repeating:

The substantial question was do Sections 32 and 33, Article 1, Wyoming Constitution, requiring the payment of 'due' and 'just' compensation prohibit annual rental payments for easements and require lump sum payments in condemnation actions. At least one other state, Wisconsin, allows for the payment of annual rentals. Although condemnors stated the bookkeeping of such payments alone would be staggering, the Committee was advised that many negotiated settlements currently provide for annual rental payments and probably some contain cost-of-living adjustments.<sup>115</sup>

Although condemnors focused much attention in public hearings on the 20-year "reopening" provision, which was eventually dropped,<sup>116</sup> annual rates also received comment. One commentator noted that eminent domain is viewed as a forced sale and that the condemnee only has the right to be made whole for the rights taken, with the possibility of future gain or loss passing to the condemnor.<sup>117</sup> Another commentator pointed out that annual payments and 20-year reopenings might sound

113. WYO. STAT. § 1-26-514(a) (Supp. 1982). Evidence of the amount of reworking which went into this statute may be found in the caption which up through the time of Senate File 37 read: "Interest taken; due compensation; costs allowed." This reflected the retention, even at that time, of subsection (c) which allowed litigation expenses up to specified amounts if the award exceeded or was less than specified percentages of the last offer. S. FILE No. 37, 46th Leg. 15-16 (1981) (81 LSO-049.01). The percentages keep changing with the drafts.

114. WYO. STAT. § 1-26-514(b) (Supp. 1982).

115. Unpublished handout, *supra* note 26, at 6-7; WIS. STAT. ANN. § 32.09(6r)(a) (West Supp. 1980).

116. Casper, Nov. 8, *supra* note 11 (Joseph Montano, Tri-State Power Co., Hearing Report, at 5); Casper, Nov. 8, *supra* note 11 (Pacific Power & Light Co., Exhibit "B," at 2) (Pacific Power & Light stated that it would not be willing to invest its capital without knowing it can maintain its structures as long as it wants to).

117. Laramie, Nov. 7, *supra* note 63 (Cities Service Gas Co., Exhibit "G," at 5).

good in periods of inflation and rising land values, but in times of recession and depressed values the landowner might be in trouble.<sup>118</sup> Yet another commentator stated that no project would ever be complete and arguments would continue indefinitely on such points as changes in the market and changes in escalation rates.<sup>119</sup>

Since "reopening" of the compensation issue is not authorized, the compensation is set and condemners' book-keeping problems are resolvable. Both parties to the condemnation action should make certain that the court order of compensation specifies whether there is one lump-sum to be broken down into payments or whether the same lump-sum is to be paid throughout the term of the easement.

*Section 1-26-515: Abandonment, etc.*

An easement authorized by the Act may be terminated through several means, including abandonment and nonuse for a period of ten years. As the Act is currently written, the nonuse-for-ten-years and abandonment provisions may not be as frequently litigated as the provision that provides for termination of the easement with "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. . . ."<sup>120</sup> For example, the result of a condemner's converting an existing electric transmission facility to a higher voltage facility within the existing right-of-way is not clear.<sup>121</sup> The new use is not identical in terms of voltage, but is identical in terms of the purpose for which the easement was acquired. If this is determined to be a non-identical use, then the question becomes one of whether the landowner is entitled to additional damages. *Nichols on Eminent Domain* maintains that a change in use may be effected "if the proposed use is similar in character to

118. Casper, Nov. 8, *supra* note 11 (Union Pacific Railroad, Exhibit "C," at 4).

119. Gillette, Nov. 13, *supra* note 76 (George Bartholomew, Basin Electric Power Coop., Exhibit "C," Comments On Report No. 3, at 6).

120. Wyo. STAT. § 1-26-515 (Supp. 1982).

121. Gillette, Nov. 13, *supra* note 76 (Wyoming Municipal Power Agency, Exhibit "D," at 2) (Agency believed that a strict reading of the statute as written in Report No. 3 would preclude transfer).

that of the existing use.”<sup>122</sup> An Ohio case held that the taking of a railroad easement by the state highway department did not terminate the railroad easement and require a new action in condemnation since it was for a similar use.<sup>123</sup> The use of the word “identical” in the Wyoming statute may force the courts not to accept “similar” uses. Finally, there is the question of who is the landowner who can claim a termination. Senate file 37 spoke of “new damages to the *original* landowner.”<sup>124</sup> The current Act speaks of the “landowner whose property was condemned for the original use” and would seem to include transferees of the original landowner.<sup>125</sup>

### *Section 1-26-516: Action for inverse condemnation*

The statutory recognition of an action for inverse condemnation under section 1-26-516 does not constitute the unveiling of such a right in Wyoming, since section 33, article 1 of the Wyoming Constitution mandates that private property will not be taken or *damaged* for public or private use without just compensation, and could be interpreted to authorize an action for inverse condemnation.<sup>126</sup> In the inverse condemnation section, the Act states, “When a person possessing the power of condemnation . . . substantially diminishes the use or value of land, due to activities on adjoining land without the authorization of the owner of the land or before filing an action of condemnation. . . .”<sup>127</sup> What the Legislature intended by the language “due to activities on adjoining land” is not entirely clear. Some commentators have suggested that the intent of this language is to exclude zoning activities from inverse condemnation proceedings.<sup>128</sup> Since zoning regulations are often the focus of inverse condemnation actions, future litigation will certainly determine if the phrase “due to activities on adjoining land” provides the magic words to deter such action.

### *Miscellaneous Sections*

A number of other changes in the Wyoming Eminent Domain Act should at least be noted. There is now an article 6,

122. 3 NICHOLS ON EMINENT DOMAIN § 9.35, at 9-108 (3d ed. 1981).

123. *State ex rel. Fogle v. Richley*, 55 Ohio St. 2d 142, 378 N.E.2d 472 (1978).

124. S. FILE NO. 37, 46th Leg., at 16 (1981) (81 LSO-049.01) (emphasis added).

125. WYO. STAT. § 1-26-515 (Supp. 1982).

126. Unpublished handout, *supra* note 26, at 7.

127. WYO. STAT. § 1-26-516 (Supp. 1982).

128. Unpublished handout, *supra* note 26, at 7-8. An interesting article on the inverse condemnation issue and regulations is: Susan Bayerd, *Inverse Condemnation and the Alchemist's Lesson: You Can't Turn Regulations into Gold*, 21 SANTA CLARA L.R. 171 (1981).



which establishes informal procedures for disputes involving limited amounts.<sup>129</sup> The date of valuation has been established as the date upon which the condemnation action was commenced.<sup>130</sup> This changes prior case law which uses the date of valuation as the date of taking.<sup>131</sup> The Wyoming statutes do not specify when commencement occurs. Section 1-26-708 is captioned: "Use by defendant, risk of loss," but contains no provisions for risk of loss.<sup>132</sup> Compensation may now be granted for crop damage, an item not usually compensable under prior law.<sup>133</sup> Petroleum and pipeline companies have specifically been granted the power of eminent domain.<sup>134</sup>

### WYOMING RULE OF CIVIL PROCEDURE 71.1 AND THE WYOMING EMINENT DOMAIN ACT

One of the major difficulties perceived with the new Act is its relationship to Rule 71.1 of the Wyoming Rules of Civil Procedure. Throughout the Act all references to Rule 71.1 have been deleted except to the extent that section 1-26-501 mentions the Wyoming Rules of Civil Procedure.<sup>135</sup> Amendments to existing statutes have deleted previous references to Rule 71.1.<sup>136</sup>

In its first report in the Eminent Domain Study, the Legislative Service Office raised the question: "Is the manner in which eminent domain cases are tried and compensation determined a matter of procedure to be specified by the Wyoming Supreme Court or is it a matter of substance controllable by statute?"<sup>137</sup> The task of determining the difference between procedure and substance is well characterized by the oft-repeated words of a University of Wyoming Professor of Civil Procedure: "This is slippery stuff, folks."<sup>138</sup> James and Hazard have cited the familiar notion of the difference as

129. WYO. STAT. §§ 1-26-601 to -604 (Supp. 1982).

130. WYO. STAT. § 1-26-703 (Supp. 1982).

131. State Highway Comm'n v. Triangle Dev. Co., 369 P.2d 864, 871 (Wyo. 1962), *reh'g denied*, 371 P.2d 408 (Wyo. 1962).

132. WYO. STAT. § 1-26-708 (Supp. 1982).

133. WYO. STAT. § 1-26-709 (Supp. 1982). See State Highway Comm'n v. Laird, 426 P.2d 439, 442 (Wyo. 1967).

134. WYO. STAT. § 1-26-814 (Supp. 1982).

135. WYO. STAT. § 1-26-501 (Supp. 1982).

136. E.g., compare WYO. STAT. § 33-19-106(b) (Supp. 1982) with WYO. STAT. § 33-19-106(b) (1977). See *supra* note 28.

137. REP. NO. 1, *supra* note 16, at 3 (emphasis in original).

138. Professor Christopher B. Mueller, University of Wyoming, Laramie, Wyoming.

[t]he rules of substantive law define the rights and duties of persons in their ordinary relations with each other or with the body politic, while procedural rules govern the decisional forms whereby these rights may be maintained or redressed when they have been violated, or when their violation has been threatened.<sup>139</sup>

That the Legislature has the power to establish both the substance and the procedure for eminent domain law has been established.<sup>140</sup> The Wyoming Supreme Court, utilizing its power to make rules, has provided for "procedures" to be used in condemnation actions, but these have not been modified to mesh with the new Act.

Legislative deletion of specific references to Rule 71.1 does not make the Rule ineffective. Although there might be argument on which provisions of the Act and Rule are substance and which are procedure, the important short term need is to make the two work together. One commentator at a hearing suggested that an amendment to the proposed legislation should be added which reads: "THE WYOMING RULES OF CIVIL PROCEDURE SPECIFICALLY GOVERNING EMINENT DOMAIN SHALL BE AMENDED TO CONFORM TO THIS ACT."<sup>141</sup> An alternative to legislative action would be for the Wyoming Supreme Court to amend Rule 71.1 to conform to the Act.<sup>142</sup>

As has been noted throughout this comment, numerous sections of the Act will require decisions by the condemner, condemnee, and the court of whether Rule 71.1 or portions thereof apply, or whether new procedures must be created. Exactly when the requirements specified in section 1-26-504 for exercising eminent domain must be shown, and how they differ from requirements in Rule 71.1 regarding the complaint and hearing, is unknown. The different results obtainable by a condemner desiring immediate possession under section 1-26-513 or Rule 71.1 highlight the problem of simply ignoring the existence of Rule 71.1. How the addition of compensation

139. F. JAMES AND G. HAZARD, *CIVIL PROCEDURE* 1 (2d ed. 1977).

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

141. *Laramie*, Nov. 7, *supra* note 63 (Colorado Interstate Gas Co., Exhibit "F," at 11).

142. Written comments from Joe Meyer to Rod Lang (Mar. 4, 1983) (on file at the *Land and Water Law Review* office).

for loss of goodwill will affect the appraisal process contained in Rule 71.1 is unclear.

In summary, the Wyoming Legislature and the Wyoming Supreme Court should utilize their Western heritage, take the bull by the horns, and grapple with the relationship between Rule 71.1 and the Wyoming Eminent Domain Act.

RODNEY LANG