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COMMENT

THE USE OF OPINION TESTIMONY FOR VALUING REAL PROPERTY IN AN EMINENT DOMAIN SUIT

With the increasing demand on Wyoming's natural resources, many Wyoming citizens, especially ranchers, are required to relinquish for just compensation some of their property to facilitate the need for development of those resources. Thus, the legislature has granted several entities the power of eminent domain.¹ When property is condemned and either the condemnor or landowner is not satisfied with the amount of assessment found by the court, either party may demand a jury trial.² The only issue to be resolved is that of just compensation,³ which is defined by statute as fair market value.⁴

Although the landowner is the defendant,⁵ he carries the burden of proof.⁶ In practice, both parties present evidence to establish the value of the land taken. Because the value of real property cannot be determined by the "application of any exact principle of science," value of the property is determined by "opinions of witnesses who are sufficiently well informed on the subject to be helpful to the jury."⁷

This comment will discuss the presentation of opinion testimony in an eminent domain suit. Since partial takings of real property are the usual case, the discussion will concentrate on that area. This comment will review the compensation provisions set out in the Wyoming Eminent Domain Act,⁸ along with three fairly recent Wyoming Supreme Court cases⁹ that clearly explain the correct methods for developing and presenting opinion testimony in eminent domain actions. Attention will be focused on the presentation of opinion testimony, the factors on which the opinion must be based and the qualifications of experts.

1. WYO. STAT. § 1-26-801 (Supp. 1983) (state, counties and municipal corporations); WYO. STAT. § 1-26-802 (Supp. 1983) (water companies); WYO. STAT. § 1-26-810 (Supp. 1983) (railroad companies); WYO. STAT. § 1-26-813 (Supp. 1983) (public utilities); WYO. STAT. § 1-26-814 (Supp. 1983) (petroleum or other pipeline companies); WYO. STAT. § 30-1-129 (1977) (owner or operator of any mining claims); WYO. STAT. § 35-3-110 (1977) (sanitary and improvement districts); WYO. STAT. § 41-7-210 (1977) (irrigation districts); WYO. STAT. § 41-9-202 (Supp. 1983) (drainage districts). *See also* WYO. STAT. § 1-26-815 (Supp. 1983) which provides that any person, association, company or corporation may condemn a way of necessity over, across or on lands of others for the location, construction, maintenance and use of, inter alia, reservoirs, power lines, railroad trackage and roads, including mine truck haul roads.

2. W.R.C.P. 71.1(j).

3. *Id.*

4. WYO. STAT. § 1-26-702 (Supp. 1983).

5. W.R.C.P. 71.1.

6. *Energy Transp. Sys., Inc. v. Mackey*, 650 P.2d 1152, 1157 (Wyo. 1982); *Coronado Oil Co. v. Grieves*, 642 P.2d 423 (Wyo. 1982). *See also* 5 NICHOLS ON EMINENT DOMAIN § 18.5 (3d ed. 1981). The author will cite NICHOLS throughout this comment, since the Wyoming Supreme Court has consistently depended upon NICHOLS as authority for most of its rules.

7. 5 NICHOLS, *supra* note 6, at § 18.4.

8. WYO. STAT. §§ 1-26-501 to -817 (Supp. 1983).

9. *Belle Fourche Pipeline Co. v. Elmore Livestock Co.*, 669 P.2d 505 (Wyo. 1983); *Energy Transp. Sys., Inc. v. Mackey*, 650 P.2d 1152 (Wyo. 1982); *Coronado Oil Co. v. Grieves*, 642 P.2d 423 (Wyo. 1982).

WYOMING EMINENT DOMAIN ACT¹⁰

The United States Constitution and the Wyoming Constitution both provide that private property shall not be taken without just compensation.¹¹ By enacting the Wyoming Eminent Domain Act¹² (Act), the legislature codified some of the well-defined principles of eminent domain law while it changed others. For example, the Act defines just compensation as the fair market value of the property taken at the date of valuation,¹³ which is the common law definition of just compensation.¹⁴ The date of valuation by statute is the "date upon which the condemnation action was commenced,"¹⁵ whereas in common law, it was the date of the actual taking.¹⁶

If there is a partial taking, the Act provides that just compensation is "the greater of the value of the property rights taken or the amount by which the fair market value of the entire property immediately before the taking exceeds the fair market value of the remainder immediately after the taking."¹⁷ The Wyoming Constitution provides that property shall not be "taken or damaged" without just compensation.¹⁸ Prior to the Act, the Wyoming Supreme Court had determined that if there was a partial taking, the landowner would be compensated for the land actually taken and for the damage to the remainder, known as severance damage.¹⁹ The measure of the severance damage was identical to that defined in the Act: the difference between the value of the entire parcel immediately before the taking and that immediately after the taking.²⁰

Section 1-26-704 of the Eminent Domain Act²¹ defines fair market value as the price at which an informed seller who is not obligated to sell and an informed buyer who is willing but not obligated to buy would agree. This provision codifies the well established willing-seller, willing-buyer test of common law.²² Therefore, any factor that would influence a prospective

10. WYO. STAT. §§ 1-26-501 to -817 (Supp. 1983). This comment will discuss only those sections of the Act that pertain to proof of market value. For a discussion of other aspects of the Act, see 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 (1983).

11. U.S. CONST. amend. V, provides that "private property [shall not] be taken for public use, without just compensation." WYO. CONST. art. 1, § 32 provides that:

[p]rivate 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* (emphasis added).

WYO. CONST. art. 1, § 33 provides that:

Private property shall not be taken or *damaged* for public or private use without *just compensation* (emphasis added).

12. WYO. STAT. §§ 1-26-501 to -817 (Supp. 1983).

13. WYO. STAT. § 1-26-702(a) (Supp. 1983).

14. Coronado Oil Co. v. Grieves, 642 P.2d at 433. See also 4 NICHOLS, *supra* note 6, at § 12.1.

15. WYO. STAT. § 1-26-703 (Supp. 1983).

16. 4 NICHOLS, *supra* note 6, at § 12.23.

17. WYO. STAT. § 1-26-702(b) (Supp. 1983) (emphasis added).

18. See *supra* note 11.

19. State Highway Comm'n v. Scrivner, 641 P.2d 735, 738 (Wyo. 1982).

20. Coronado Oil Co. v. Grieves, 642 P.2d at 433. See also 4A NICHOLS, *supra* note 6, at § 14.05.

21. WYO. STAT. § 1-26-704 (Supp. 1983).

22. Coronado Oil Co. v. Grieves, 642 P.2d at 434. See also 4 NICHOLS, *supra* note 6, at § 12.2[1].

purchaser and seller in fixing a price may be considered.²³ Section 1-26-705²⁴ provides that a factor which may not be considered is any change in value before the date of valuation due to the condemnation action or the likelihood that the property would be acquired for a certain project. Again, this provision codifies a common law rule.²⁵ In the case of a partial taking, the fair market value of the remaining property will reflect any changes in value caused by the impairment of the use of the remainder because of condemnation (severance damages), any increase in damage to the property by the general public which could reasonably be expected to occur as a result of the proposed actions of the condemnor, and any work to be performed under an agreement between the parties.²⁶

RECENT COURT DECISIONS

In three fairly recent opinions written by Justice Raper, the Wyoming Supreme Court emphasized the importance of properly presenting opinion evidence when the value of real property is at issue. The landowner lost in each case because the opinion testimony he presented was found to be incompetent, while the condemnor's evidence was held to be quite competent. The supreme court used each of these cases to educate the Wyoming attorney as to the proper method of presenting opinion evidence and the proper basis of an opinion in an eminent domain action. Since the new Eminent Domain Act codifies many of the rules stated in these cases, it is worth examining carefully each case.

*Coronado Oil Company v. Grieves*²⁷

In this partial taking case, Coronado Oil Company sought to condemn an easement over the private property of two different ranches to gain access for exploration and drilling of federal oil and gas leases.²⁸ A jury trial was held and the jury returned a verdict awarding each landowner a substantial amount of compensation.²⁹ The Wyoming Supreme Court overruled the award and remanded the case to district court for a new trial.³⁰

Errors found by the court dealt primarily with the presentation of opinion evidence to prove the value of property before and after the taking. The court emphasized that an opinion witness must do more than give lip service to the before and after rule.³¹ If his opinion does not have a sound and

23. 5 NICHOLS, *supra* note 6, at § 18.11.

24. WYO. STAT. § 1-26-705 (Supp. 1983).

25. See 4 NICHOLS, *supra* note 6, at §§ 12.21 and 12.3151 [3].

26. WYO. STAT. § 1-26-706 (Supp. 1983). See *infra* notes 149-159 and accompanying text. Other sections of the Wyoming Eminent Domain Act provide additional compensation for crops growing on the property on the date of valuation (WYO. STAT. § 1-26-709(a) (Supp. 1983)), for improvements on the property (WYO. STAT. § 1-26-709(b) (Supp. 1983)) and for loss of goodwill (WYO. STAT. § 1-26-713 (Supp. 1983)).

27. 642 P.2d 423 (Wyo. 1982).

28. *Id.* at 426.

29. *Id.* at 425. The jury awarded compensation of \$132,000 for an easement across Grieves' property and \$161,000 for an easement across Reiland's property. *Id.*

30. *Id.* at 443.

31. *Id.* at 437.

reasonable basis, it is too speculative and conjectural to sustain the landowner's burden of proof and should be stricken from the record.³²

In *Coronado*, each of the landowners testified as to the value of his property, but based that figure on what the property was *worth to him*.³³ Since this factor bore no relationship to market value, the court held that the opinions of the landowners had no probative value.³⁴ The court held that the opinion testimony of the landowner's expert appraiser also should have been stricken because it was formulated on an inadequate basis.³⁵ This appraiser used only one comparable sale to determine the before value of each property and used no comparable sales to determine the after value.³⁶ He determined the after value by use of his "best judgment,"³⁷ taking into account "dust, sightseers, hunters, poachers, dogs, noise and inconvenience to the landowners."³⁸ The court made a point of noting that this expert used no standard or formula in reaching an opinion on the value of the land.³⁹ The basis for the expert's opinion was not rational or factual and not founded on market value but rather in the owner's personal losses.⁴⁰

Justice Raper emphasized those factors which may not be considered when valuing real property in an eminent domain action. Personal inconvenience, mental anguish, discomfort and annoyance are not compensable unless they are "causative factors" that diminish the fair market value of the land.⁴¹ In addition, damages for trespass and tortious acts of third persons may not be considered in a condemnation action.⁴²

According to the supreme court, the only properly presented valuation evidence was that presented by Coronado's expert witness.⁴³ However, that evidence was "mutilated by the trial judge."⁴⁴ Coronado's expert testified that the market value figures for the taking of the easement on each rancher's property was \$1,249.00 and \$1,940.00.⁴⁵ He also testified that the values of the ranches were not diminished because of the easement.⁴⁶ At this point in the trial, the judge granted a motion to strike this testimony on the ground that it shocked the conscience of the court.⁴⁷ The following day, he reversed the ruling and reinstated the evidence, after the witness was no longer available for further examination.⁴⁸ The supreme court held that this "irregularity" was an abuse of discretion and prejudicial to a fair trial.⁴⁹ Consequently, Coronado's motion for a mistrial should have been granted.⁵⁰

32. *Id.*

33. *Id.* at 434-35.

34. *Id.* at 434.

35. *Id.* at 437.

36. *Id.* at 435.

37. *Id.* at 436.

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.* at 439.

42. *Id.* at 438.

43. *Id.* at 440.

44. *Id.* at 442.

45. *Id.* at 430-31.

46. *Id.* at 431.

47. *Id.*

48. *Id.* at 432, 440.

49. *Id.* at 440-41.

50. *Id.* at 442. See W.R.C.P. 59(a)(1).

Coronado presented an appraiser with a "proper background in education, training and experience."⁵¹ He was a university graduate who had completed several courses for appraisers and belonged to the American Association of Certified Appraisers, a branch of the National Board of Realtors.⁵² He had been a real estate broker for thirty-three years and a real estate appraiser for the past twenty-five years.⁵³ Coronado's expert was well qualified and based his opinions on accepted appraisal procedures using comparable sales and adjusting them in "good appraiser-like" fashion.⁵⁴

*Energy Transportation Systems, Inc. v. Mackey*⁵⁵

Energy Transportation Systems, Inc. (ETSI) sought to condemn an underground pipeline easement across ranchlands owned by Mackey.⁵⁶ The jury awarded Mackey almost \$50,000 as just compensation for this partial taking.⁵⁷ The Wyoming Supreme Court held that the owners failed to prove the just compensation to which they were entitled, since neither the owners nor their expert testified as to the before and after value of the property.⁵⁸

In this case, ETSI presented the only competent testimony as to the value of the property. The evidence was presented by two "qualified and experienced professional appraisers" who both used comparable sales to reach a before and after value.⁵⁹ Since the jury verdict was not supported by the evidence, the court reversed the judgment and remanded the case for a new trial.⁶⁰

The supreme court also held that the failure of the trial judge to instruct the jury on burden of proof and preponderance of the evidence was error.⁶¹ Although the landowners are named defendants in a condemnation action, they have the burden of proof because they have turned down an offer deemed fair by the condemnor and thus created the issue.⁶²

*Belle Fourche Pipeline Company v. Elmore Livestock Company*⁶³

This case did not concern a condemnation, but the issue was the difference between the before and after value of real property. The Elmores filed suit for damages to their real property and groundwater caused by a Belle Fourche pipeline which ruptured, spilling oil onto Elmore's land.⁶⁴ A

51. 642 P.2d at 440.

52. *Id.* at 430.

53. *Id.*

54. *Id.* at 440. The court did not explain in detail how the expert adjusted the comparable sales figures to determine the value of the land.

55. 650 P.2d 1152 (Wyo. 1982).

56. *Id.* at 1153-54. The easement would occupy 10.1 acres. The Mackey ranch consisted of 3,840 acres of deeded land, 640 acres under state lease and 6,400 acres of federally leased land. *Id.* at 1154.

57. *Id.* at 1154. The jury in a special verdict form found that the before fair market value of the property was \$50,500.00 and the after value was \$505.00. Thus, the just compensation was to be \$49,995.00.

58. *Id.* at 1155-56.

59. *Id.* at 1155. The court did not give any details concerning the qualifications of the experts or to the appraisal method employed.

60. *Id.* at 1156, 1159.

61. *Id.* at 1157.

62. *Id.*

63. 669 P.2d 505 (Wyo. 1983).

64. *Id.* at 508. Approximately three acres of Elmore's land was covered by oil.

jury awarded the Elmores \$40,000 for the damage to their land.⁶⁵ The Wyoming Supreme Court held that the landowner's evidence did not support the award for damages and remanded the case for a new trial.⁶⁶

When property is damaged and cannot be repaired except at great expense, the measure of damages is the difference between the value of the property immediately before and the value immediately after the injury.⁶⁷ Since this is the same rule for valuing real property in a condemnation action, the supreme court applied the same principles.⁶⁸ Again the court held that the expert testimony on behalf of the landowner was not competent.⁶⁹ The expert witness testified that the highest and best use of the land was as forty acre ranchettes, and based his opinion on comparable sales of similar ranchettes in the area.⁷⁰ On cross-examination, defendant's counsel discovered that this expert had not examined the public records and, therefore, was not aware that the property was encumbered with a coal lease.⁷¹ The lease terms gave the lessee exclusive use of the surface of all the land which was damaged.⁷² This destroyed the basis of the expert's opinion on valuation of the damaged property. Since he gave no other estimate of the land value for any other use, the court held that the only valid evidence of market value was that presented by the expert for Belle Fourche Pipeline.⁷³

Following "accepted appraisal practices," Belle Fourche Pipeline's expert witness based his opinion on comparable sales and the highest and best use of such land for ranching and mineral production.⁷⁴ In doing this, he concluded that the market value of the entire ranch was not affected by the oil spill.⁷⁵ However, there was damage to the land and the owner was entitled to something.⁷⁶ Therefore, Belle Fourche's expert valued the land by using a capitalization approach which considers the productivity of the damaged land.⁷⁷ Capitalization is a method of appraisal used when the comparable sales approach is not acceptable under the circumstances.⁷⁸

After remanding the case, the court again emphasized those factors which may be used to determine the fair market value of property. The expert appraiser must consider damage to the *entire* ranch and value the *entire* ranch property immediately before and immediately after the injury (or

65. *Id.* at 509. The jury also found that Belle Fourche Pipeline should pay \$57,250 to restore the polluted groundwater beneath the damaged land.

66. *Id.* at 514. The court also reversed and set aside the judgment requiring the payment of \$57,250 to restore the polluted groundwater. The court held that although Wyoming Statute § 35-11-901 (1977) would allow such a suit as this, the Elmores did not follow proper procedure. *Id.* at 509-11.

67. *Id.* at 511.

68. *Id.*

69. *Id.* at 514.

70. *Id.* at 512-13.

71. *Id.* at 513.

72. *Id.*

73. *Id.* at 514.

74. *Id.*

75. *Id.* The expert compared the oil spill to other problems found on the comparable sales (pipelines, power lines, closed paved roads, etc.). *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

taking) occurred.⁷⁹ In determining the amount of damage to Elmore's property, the landowner's expert considered only the smaller "home ranch."⁸⁰ However, Belle Fourche's expert based his opinion on the whole ranch as an operating unit, which was consistent with the rule that valuations are related to the entire parcel.⁸¹

The court also stated that when "raw land" is being appraised, it must be considered in its present condition as a whole.⁸² In this case, the land could not be valued for its potential development as ranchettes without consideration of the costs involved in developing the land for such a use.⁸³

OPINION TESTIMONY OF AN EXPERT WITNESS

These three cases demonstrate that an attorney must not only himself be prepared, but, also, he must obtain a qualified expert who has done his homework well and has valued the land according to accepted standards. Applying the principles set out in Wyoming case law and the new Eminent Domain Act, this comment will consider several aspects of the expert witness' opinion testimony.

Qualification of the Expert Witness

The ideal real estate expert would be an individual who has accumulated a considerable fortune in a reputable manner through many types of real estate endeavors, including appraising, over a period of many years; also has acquired several college degrees along with many real estate professional designations, including the SRA, MAI, and ASA; has an actor's ability to communicate clearly to his audience; a teacher's ability to explain with patience; the endearing humbleness of a great preacher; and a willingness to prepare an appraisal and testify for a modest fee.⁸⁴

The Wyoming Supreme court has indicated, on several occasions, those factors which qualify a witness as an expert in a condemnation proceeding. An expert is qualified if he has shown his familiarity with the property in question along with other property in the vicinity.⁸⁵ He should have experience in the real estate or appraisal business and be familiar with the state of the market and with sales of similar property in the area.⁸⁶ Ideally, he should be a professional appraiser with formal training in real estate appraisal and memberships in related professional organizations.⁸⁷

79. *Id.* at 515-16.

80. *Id.* at 512-13. The home ranch was 1,760 acres whereas the entire Elmore holding was 7,800 acres. *Id.*

81. *Id.* at 516.

82. *Id.* at 518.

83. *Id.* at 517-18.

84. 10 NICHOLS, *supra* note 6, App. C-2(b) at 250.

85. Coronado Oil Co. v. Grieves, 642 P.2d at 436; State Highway Comm'n v. Newton, 395 P.2d 606, 610 (Wyo. 1964). See 2 AM. JUR. PROOF OF FACTS Appraisals, Proof 1 (1959) and 5 NICHOLS, *supra* note 6, at § 18.41[1].

86. See note 85.

87. Energy Transp. Sys., Inc. v. Mackey, 650 P.2d at 1155; Coronado Oil Co. v. Grieves, 642 P.2d at 430.

The supreme court in *Coronado* made a point of comparing the two experts who testified. The landowner's expert had no formal training in real estate appraisal, while the condemnor's expert had a university degree, formal training and belonged to the American Association of Certified Appraisers—a branch of the National Board of Realtors.⁸⁸ An appraisal expert should be a member of a professional society, such as the Society of Real Estate Appraisers, and should have obtained a designation, such as an M.A.I. (Member of the Appraisal Institute) or an S.R.P.A. (Senior Real Property Appraiser).⁸⁹ To obtain these designations, the appraiser generally must graduate from an accredited college, have several years experience as an appraiser, attend special schools and seminars and pass comprehensive tests.⁹⁰

The expert should have several years experience, the more the better, and he should be very familiar with the area of the land that is being valued. In *Belle Fourche Pipeline*, the condemnor's expert had over twenty years of appraisal experience,⁹¹ and the condemnor's expert in *Coronado* had twenty-five years of experience as a real estate appraiser.⁹²

Foundation and Competency of Expert's Opinion

Although the court has taken a liberal view in the matter of foundation for opinion evidence to prove land value, the expert must still be well prepared.⁹³ Not only should he personally examine the property to be condemned, but, in a partial taking case, he should also examine the entire property owned by the condemnee and interview the owner to become more familiar with the property and its use.⁹⁴ A lack of completeness in the expert's investigation or reliance on improper factors may serve as grounds for an objection to the witness' testimony based on inadequate foundation.⁹⁵

For example, in *Belle Fourche Pipeline*, the landowner's expert based his opinion of the value of the land upon the property without any encumbrances.⁹⁶ The condemnor's attorney discovered on cross-examination that this expert had not examined the public records and was not aware that the property was subject to a coal lease which gave the lessee an exclusive right to use the surface.⁹⁷ At this point, counsel for the condemnor could have objected to the competency of the expert's testimony and asked that it be stricken to preserve the error.⁹⁸

88. 642 P.2d at 430.

89. Record at 946, *Belle Fourche Pipeline Co. v. Elmore Livestock Co.*, 669 P.2d 505 (Wyo. 1983). See 10 NICHOLS, *supra* note 6, App. B-3.

90. See *supra* note 89.

91. *Id.* at 948.

92. 642 P.2d at 430.

93. *Coronado Oil Co. v. Grieves*, 642 P.2d at 436.

94. *Barber v. State Highway Comm'n*, 342 P.2d 723, 728 (Wyo. 1959).

95. *Coronado Oil Co. v. Grieves*, 642 P.2d at 436; *State Highway Comm'n v. Newton*, 395 P.2d at 609.

96. *Belle Fourche Pipeline Co. v. Elmore Livestock Co.*, 669 P.2d at 513.

97. *Id.*

98. *Id.* at 519 (Brown, J., dissenting). In *Belle Fourche Pipeline*, the condemnor's counsel made no objection to the competency of the landowner's expert testimony. Instead, counsel asked for a directed verdict at the close of the landowner's case in chief on the ground that he had failed to sustain his burden of proof and had failed to demonstrate a prima facie case of damages. The supreme court held that the motion should have been

One way to avoid the above problem is for the attorney to conduct a thorough pre-trial interview with his expert to determine whether his appraisal will be acceptable; i.e., it is based on proper factors and obtained by utilization of accepted methods and standards.

In a partial taking case, the expert testimony should include two opinions—a before value opinion and an after value opinion. In *ETSI v. Mackey*, the court held that neither the landowner's nor the expert's testimony were competent since neither had an opinion as to the before and after value of the ranch.⁹⁹

Basis of the Opinion

Rule 704 of the Wyoming Rules of Evidence allows an expert to state his opinion as to the value of the property even though it is the "ultimate issue" to be determined by the jury in a condemnation suit.¹⁰⁰ Although the expert may express his opinion without prior disclosure of the underlying data, lenient rules of cross-examination allow for the disclosure of the basis for his opinion.¹⁰¹ The supporting data testified to must be relevant and competent, since it may influence the jury more than his opinion.¹⁰²

As mentioned before, in a partial taking case, the expert may consider only those factors that cause a depreciation of the fair market value of the land.¹⁰³ Some factors that may affect the value of the land are a loss of productivity or rental value,¹⁰⁴ interference with the present use,¹⁰⁵ destruction of water supply,¹⁰⁶ and inability to make use of the remaining land without additional expense.¹⁰⁷ Any depreciation in value must be by reason of severance damage to the land itself or to the owner's property rights.¹⁰⁸ Thus, the expert witness must base his opinion on fair market value alone.¹⁰⁹

Since appraisal is not an exact science, the expert should testify not only to the facts which support his conclusion, but also to the methods he employed in reaching his opinion.¹¹⁰ He should use accepted standards and techniques of appraisals.¹¹¹ According to the supreme court, an opinion

granted. *Id.* at 512. Justice Brown dissented stating that the condemnor waived any claim of error with respect to competency of the testimony and, therefore, the disclosures on cross-examination go only to the weight of the evidence. *Id.* at 519 (Brown, J., dissenting). See also *Coronado Oil Co. v. Grieves*, 642 P.2d at 436-38 and 3 D. LOUISELL & C. MUELLER, FEDERAL EVIDENCE § 400 (1979).

99. 650 P.2d at 1154-56.

100. W.R.E. 704.

101. W.R.E. 705.

102. *Coronado Oil Co. v. Grieves*, 642 P.2d at 436-37. See also 5 NICHOLS, *supra* note 6, at § 18.42[1].

103. See *supra* note 41 and accompanying text. See generally 4A NICHOLS, *supra* note 6, at §§ 14.08-14.19.

104. See 4A NICHOLS, *supra* note 6, at § 14.10.

105. *Id.* at § 14.11.

106. *Id.* at § 14.15[3].

107. *Id.* at § 14.14.

108. *Coronado Oil Co. v. Grieves*, 642 P.2d at 439; *Wyo. State Highway Dept. v. Napoletano*, 578 P.2d 1342, 1346 (Wyo. 1978).

109. *Coronado Oil Co. v. Grieves*, 642 P.2d at 436-37. See 5 NICHOLS, *supra* note 6, at § 18.42.

110. 5 NICHOLS, *supra* note 6, at § 18.42[1].

111. *Belle Fourche Pipeline Co. v. Elmore Livestock Co.*, 669 P.2d at 514; *Coronado Oil Co. v. Grieves*, 642 P.2d at 436. Appraisers use three basic methods to determine the market value of land: the cost approach, which is a process of estimating replacement cost of improvements less accrued depreciation and adding the value of the land; the income

that is based on an expert's "best judgment" or is a product of his "own brain computer" is worthless.¹¹² The expert should explain as simply as possible what appraisal method he has used and how it was applied in each particular case.¹¹³

1. Comparable Sales

One of the most common appraisal methods applied is the market value approach, which is based in evidence of comparable sales.¹¹⁴ Evidence of comparable sales may also be offered as independent substantive evidence of value or used to test the knowledge of the expert on cross-examination.¹¹⁵ The properties involved in a comparable sale should be sufficiently similar and proximate to the property in question to aid the jury and the appraiser in determining a market value.¹¹⁶

After an investigation of comparable sales, the appraiser adjusts the value of the property in litigation by taking into consideration unique factors of each property.¹¹⁷ Adjustments are made in order to compare the sales to the subject property. Factors considered may be the location of the property sold, its size, when the property is sold, terms of the sale, and its physical characteristics.¹¹⁸ These adjustments, usually expressed in terms of a percentage, should be calculated according to an accepted formula.¹¹⁹

The attorney employing the expert should be certain that the expert has found several comparable sales. The expert witness for the landowner in *Coronado* based his opinion of the before value of the property on only one comparable sale and used no comparable sales to determine the after value.¹²⁰ The supreme court held that the expert's opinion was, therefore, an "uninformed guess" and too "uncertain and conjectural" to form an adequate basis for an opinion on market value.¹²¹

In order to truly reflect fair market value, comparable sales must have been voluntary.¹²² This well established rule is parallel to the statutory definition of fair market value which is the agreed upon price of a *willing* buyer and a *willing* seller.¹²³ If the comparable sale is an agreement

approach, which is a process of capitalizing the income from the property; and the market data approach, which is a process of comparing sales that have been made in the market place with the property that is being appraised. Interview with Thomas H. Cole, Professional Appraiser, in Cheyenne, Wyoming (October 20, 1983). See 10 NICHOLS, *supra* note 6, App. C-2(a) at 237-45.

112. *Coronado Oil Co. v. Grieves*, 642 P.2d at 436, 437.

113. 10 NICHOLS, *supra* note 6, App. C-2(a) at 235-39. See also 2 AM. JUR. PROOF OF FACTS *Appraisals*, Proof 2 (1959).

114. *State Highway Comm'n v. Newton*, 395 P.2d at 608.

115. *Id.* *State Highway Comm'n v. McNiff*, 395 P.2d 29, 30 (Wyo. 1964).

116. *State Highway Comm'n v. McNiff*, 395 P.2d at 30. See also 5 NICHOLS, *supra* note 6, at § 21.31[1].

117. *Belle Fourche Pipeline Co. v. Elmore Livestock Co.*, 669 P.2d at 514.

118. Interview with Thomas H. Cole, Professional Appraiser, in Cheyenne, Wyoming (October 20, 1983).

119. *Coronado Oil Co. v. Grieves*, 642 P.2d at 436. The supreme court looked favorably upon Coronado's witness who had "followed accepted appraisal procedures, found several comparable sales, compared and adjusted them in good appraiser-like fashion." *Id.* at 440.

120. *Id.* at 435.

121. *Id.* at 436-37.

122. *Id.* at 440. See also *City of Cheyenne v. Frangos*, 487 P.2d 804, 806 (Wyo. 1971).

123. WYO. STAT. § 1-26-704(a) (i) (Supp. 1983).

reached under threat of condemnation, such evidence is inadmissible to prove value and is in itself prejudicial and grounds for reversal.¹²⁴

In the same manner, offers to purchase (or asking prices) are inherently unreliable, since they are speculative and may not have been made in good faith.¹²⁵ Therefore, offers to purchase the subject land or other similar land in the vicinity are inadmissible to show market price.¹²⁶

2. Highest and Best Use

The owner is entitled to have consideration given to all the possible uses of his property, not only to the use to which it has been devoted, but also to any use to which it may reasonably be adapted.¹²⁷ An expert witness may then value the land at its "highest and best use."¹²⁸ Perhaps the best approach is to have the expert value the property at its highest and best use and at its present use. In *Coronado, ETSI and Belle Fourche Pipeline*, the condemnors' experts testified that the highest and best use of the land was its present use.¹²⁹ After the supreme court held that the expert's opinion based solely on highest and best use of the land for ranchettes was incompetent, the landowner in *Belle Fourche Pipeline* had no other evidence of market value on which to depend.¹³⁰

Generally, the landowner will present evidence that the highest and best use of his agricultural land is as some sort of subdivision.¹³¹ If this evidence is to be found competent, the landowner should have more than just a plan for a subdivision. The filing of a subdivision map may not be enough.¹³² The value of raw land bought for potential development is less than the value of land after development.¹³³ Preparing the land for a subdivision is expensive and those costs must be considered when valuing the land.¹³⁴ A note of caution is in order here, since these costs may be considered too uncertain and conjectural to be computed.¹³⁵ Raw land, land without roads or land with little or no improvements, may not be valued as if it were in fact subdivided.¹³⁶

For example, in *Belle Fourche Pipeline*, the landowner's expert divided the home ranch into forty acre tracts, even though the ranch had never been surveyed or developed for such a division.¹³⁷ The expert testified that

124. See *supra* text accompanying note 102. See also Annot., 55 A.L.R. 2d 79 (1957).

125. *State Highway Comm'n v. Triangle Dev. Co.*, 369 P.2d 864, 868 (1962). See also 4 NICHOLS, *supra* note 6, at § 12.311[2].

126. *Energy Transp. Sys., Inc. v. Mackey*, 650 P.2d at 1155; *State Highway Comm'n v. Triangle Dev. Co.*, 369 P.2d at 868.

127. 4 NICHOLS, *supra* note 6, at § 12.2[3].

128. *Id.* at § 12.314.

129. 669 P.2d at 514; 650 P.2d at 1155; 642 P.2d at 430.

130. 669 P.2d at 514.

131. *Id.* at 512.

132. *State Highway Comm'n v. Triangle Dev. Co.*, 369 P.2d at 870 (1962). See also 4 NICHOLS, *supra* note 6, at § 12.3142[1][a].

133. *Belle Fourche Pipeline Co. v. Elmore Livestock Co.*, 669 P.2d at 517.

134. *Id.* "[T]here must be roads built at great expense. . . . Salesmen must be paid commissions to sell the ranchettes. There is the expense of surveys, fixing values for each tract, promoting their sale, etc." *Id.*

135. *Id.* at 517-18 (quoting 4 NICHOLS ON EMINENT DOMAIN at § 12.3142[1][a] (3rd ed. 1981)).

136. *Id.* at 517 (quoting 4 NICHOLS ON EMINENT DOMAIN at § 12.3142[1][a] (3rd ed. 1981)).

137. *Id.* at 513.

in his opinion each ranchette before the oil spill would sell at \$600 an acre on the average.¹³⁸ Thus, each forty acre tract he valued at \$24,000 (40 x \$600).¹³⁹ Since forty-four individual tracts could be carved out of the home ranch, the total before value of the ranch he estimated to be \$1,056,000 (44 x \$24,000).¹⁴⁰

To determine the after value, this expert applied the same formula but determined the value of each ranchette to be \$4,000 (about \$100 an acre on the average).¹⁴¹ Although this appears to be an objective means of valuation, the supreme court clearly stated that this method may not be employed for raw land since the costs of developing the ranchettes cannot be ignored and may be too conjectural to be computed.¹⁴² Land must be considered for its highest and best use in its *present* condition as a whole.¹⁴³ However, an expert may consider any enhancement in the value of the property because of its adaptability to subdivision development.¹⁴⁴

3. Other Factors

As a general principle, evidence of any matter which would influence a prospective purchaser and seller in fixing a price to consummate a sale may be considered.¹⁴⁵ The Wyoming Eminent Domain Act (Act) provides that in the case of a partial taking, the fair market value of the entire property *shall not* include any increase or decrease in value before the date of valuation that is caused by: (1) the project for which the property is taken; (2) the reasonable likelihood that the property would be acquired for the project; or (3) the condemnation itself.¹⁴⁶ This codified the common law rule that forbids consideration of the effect of the proposed project upon the value of the land itself.¹⁴⁷

Section 1-26-706 of the Wyoming Statutes,¹⁴⁸ however, provides that fair market value of the remainder of the property (the after value) shall reflect any increase or decrease *in value* caused by the proposed project. The statute lists several factors that must be considered.¹⁴⁹ The first factor, the impairment of the use of the remaining property,¹⁵⁰ would, no doubt,

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.* The expert was considering the damage to groundwater and the presence of the oil spill. *Id.*

142. *Id.* at 517. The court did not give any details as to how the expert arrived at the after value of \$996,000.

143. *Id.* at 518. See also 4 NICHOLS, *supra* note 6, at § 12.3142[1][a].

144. See *supra* note 143.

145. 5 NICHOLS, *supra* note 6, at § 18.11.

146. WYO. STAT. § 1-26-705(a) (Supp. 1983). The statute also provides that if there is an additional taking before the project is completed, the fair market value of the additional property will not include any decrease in value but will include any increase in value before the date on which it became reasonably likely the expansion would occur, if the decrease or increase is caused by any of the factors listed in the text above. Also, any decrease in value caused by the physical deterioration of the property within the reasonable control of the owner, and by his unjustified neglect, may be considered in determining fair market value. WYO. STAT. § 1-26-705(b) and (c) (Supp. 1983).

147. 4 NICHOLS, *supra* note 6, at § 12.21.

148. WYO. STAT. § 1-26-706 (Supp. 1983).

149. Only the first two factors listed will be discussed. The third factor listed is any work performed under an agreement between the parties. WYO. STAT. § 1-26-706(a) (iii) (Supp. 1983). This list does not appear to be exclusive.

150. WYO. STAT. § 1-26-706(a) (i) (Supp. 1983).

affect the market value of the property. The consideration of this factor to determine value would have been proper before the statute was enacted.

The second factor that must be considered to determine value is the increase in damage to the remainder by the general public which could reasonably be expected to occur.¹⁵¹ At first glance, this provision seems to be very favorable to the landowner, but construed strictly it is another codification of case law. Before the Act, the general rule was that loss of business, personal inconvenience, trespass and negligence are not compensable in a condemnation action unless they affect the value of the land itself.¹⁵² In *Coronado*, the court held that the landowner's expert based his opinion of fair market value on such improper factors as the increase of traffic by the public on the property, which would cause a substantial amount of dust to settle and would bring more "sightseers, hunters, poachers, dogs, noise and inconvenience."¹⁵³ Although these factors would probably be considered by a willing buyer and a willing seller, the court has required proof that these factors actually affect the market value of the land before an opinion may be based on them.¹⁵⁴ The court also required proof of effect on the market value for injury to the property which may occur because of trespass or negligence, since an injury that may possibly occur in the future by reason of the condemnation or operation of the project is too remote or speculative to merit consideration.¹⁵⁵

The second factor listed in section 1-26-706 appears to allow compensation for the above-mentioned damages if they can reasonably be expected to occur.¹⁵⁶ However, the statute provides that these damages will be considered only if the landowner can prove that they affect the increase or decrease in value of the remainder.¹⁵⁷ Consequently, this provision merely codifies the general rule that only those factors which affect the value of the land may be considered.¹⁵⁸ If *Coronado* was decided under the Wyoming Eminent Domain Act, the result probably would have been no different.

Another factor which may not be considered in the valuation of real property is loss of business, since a business and its fruits are too uncertain and speculative to be used in determining market value.¹⁵⁹ The supreme court has held that "where a cattle operation was involved, injury to a business conducted on the land is not an element of just compensation."¹⁶⁰

151. WYO. STAT. § 1-26-706(a) (ii) (Supp. 1983).

152. *Coronado Oil Co. v. Grieves*, 642 P.2d at 435, 438, 439; *Gillespie v. Bd. of Comm'rs of Albany County*, 47 Wyo. 1, 30 P.2d 797, 802 (1934).

153. 642 P.2d at 435-36.

154. *Id.* at 432, 439. See also *Sheridan Drive-In Theatre, Inc. v. State*, 384 P.2d 597, 599 (Wyo. 1963).

155. 642 P.2d at 438.

156. WYO. STAT. § 1-26-706(a) (ii) (Supp. 1983).

157. WYO. STAT. § 1-26-706(a) (ii) (Supp. 1983).

158. See *supra* note 155.

159. *Coronado Oil Co. v. Grieves*, 642 P.2d at 435; *Sheridan Drive-In Theatre, Inc. v. State*, 384 P.2d at 599. See also 4 NICHOLS, *supra* note 6, at § 13.3[1].

160. *Coronado Oil Co. v. Grieves*, 642 P.2d at 435. WYO. STAT. § 1-26-713 (Supp. 1983) provides that in addition to fair market value, the owner of a business may be compensated for "loss of goodwill," which, before this Act was not compensable in a condemnation action. See 4 NICHOLS, *supra* note 6, at § 13.31. An argument can be made that this statute applies to ranches. See Comment, *supra* note 10, at 744-45.

4. Cross-Examination

Several methods exist for impeaching an expert witness in an eminent domain case and have proven very effective. Of course, the expert's qualifications may be impeached by disclosure to the jury of the expert's personal incompetence or bias.¹⁶¹ Carelessness or a lack of preparation on the expert's behalf can be devastating to his opinion. In *Belle Fourche Pipeline*, the condemnor's attorney discovered on cross-examination that the expert failed to investigate the public records to find that the property was subject to a coal lease.¹⁶² The supreme court held that his testimony was incompetent.¹⁶³

Other methods of impeachment include disclosure to the jury of the expert's lack of appraisal education and training.¹⁶⁴ The supreme court in *Coronado* noted that on cross-examination the condemnor's attorney discovered that the landowner's expert had no formal training in real estate appraisal.¹⁶⁵ Of course, the expert's qualifications may be impeached by showing he lacks real estate experience generally or lacks local experience.¹⁶⁶

Counsel must also explore the appraisal techniques employed by the expert and search for any imperfections on the application of those techniques.¹⁶⁷ In *Belle Fourche Pipeline*, the landowner's expert used a "lot method" approach to valuation but he arbitrarily determined the value of each lot.¹⁶⁸ In *Coronado*, the expert "plucked from the air" figures to determine the after value of the land in question.¹⁶⁹ The expert must be able to explain the formula he used to determine market value, along with the variables used within that formula.

THE LANDOWNER'S OPINION

As a general rule, an owner is qualified to testify as to the market value of his property by virtue of his ownership of the property in question.¹⁷⁰ However, the Wyoming Supreme Court has noted on several occasions that the landowner's opinion testimony is not competent and has no probative value unless it is based upon the proper standard for determining fair market value.¹⁷¹ The owner, therefore, must base his opinion on the same factors on which the expert must rely.¹⁷²

161. 10 NICHOLS, *supra* note 6, App. C-2(b) at 255-56.

162. 669 P.2d at 513.

163. *Id.* at 514.

164. *See supra* note 162.

165. 642 P.2d at 430.

166. *See supra* note 162.

167. *Id.*

168. 669 P.2d at 513.

169. 642 P.2d at 436.

170. *Coronado Oil Co. v. Grieves*, 642 P.2d at 434. *See also* 5 NICHOLS, *supra* note 6, at § 18.4[2].

171. *Energy Transp. Sys., Inc. v. Mackey*, 650 P.2d at 1156; *Coronado Oil Co. v. Grieves*, 642 P.2d at 434.

172. A suggested jury instruction concerning the landowner's opinion may read as follows:

The law permits an owner of property, in which land is taken in an eminent domain trial to testify as to his opinion of the market value of such land and the testimony of an owner as to value is to be weighed and considered by you the

"What the property is worth to an owner is not a correct basis for an opinion."¹⁷³ The attorney for the landowner must carefully formulate his questions on direct and prepare his witness in answering those questions. For example, the landowner in *Coronado* stated that he did not know the market value of his land after the taking.¹⁷⁴ The court held that his opinion should have been stricken from the record since he disclaimed any knowledge of the market value.¹⁷⁵ In the same case, the other landowner was asked how much the land had decreased in value to him.¹⁷⁶ An owner's personal losses are not compensable since they bear no relationship to market value.¹⁷⁷ The landowner also testified that after the partial taking, he would not want the ranch at all.¹⁷⁸ According to the court, this statement demonstrated that the landowner would not be a willing buyer, and therefore, was not evidence of fair market value.¹⁷⁹

The price fixed by a reluctant owner does not meet the test for evidence of market value.¹⁸⁰ No consideration may be given to the sentimental value to the landowner.¹⁸¹ The owner, like the expert, may not base his opinion on any factors that do not affect the market value of the land. Therefore, he may not consider personal inconvenience, mental anguish, discomfort or annoyance unless the land itself is damaged.¹⁸²

CONCLUSION

The Wyoming Eminent Domain Act has codified several well established rules of condemnation while it has changed others. The only issue arising in an eminent domain case is that of just compensation which is defined by statute to be fair market value.¹⁸³ If there is a partial taking, just compensation is the greater of the value of the property taken or the amount determined by applying the before and after rule.¹⁸⁴ Proof of fair market value depends, for the most part, on opinion evidence. The general common law rules concerning the presentation of opinion evidence still remain applicable. These rules were emphasized in three recent Wyoming Supreme Court decisions¹⁸⁵ which should be read as a primer for the eminent domain lawyer.

An expert appraiser is usually employed to present an opinion on the market value of the land. He should be well-qualified and well prepared. His

the time of the taking. You should determine if the reasons given in support of the landowner's opinion as to market value are sound or unsound and you may reject that opinion or give it any weight you may think it deserves.

10 NICHOLS, *supra* note 6, App. C-3(b) (i) at 300.

173. *Coronado Oil Co. v. Grieves*, 642 P.2d at 434.

174. *Id.*

175. *Id.* at 435.

176. *Id.*

177. *Id.* at 435-36; *Edwards v. City of Cheyenne*, 19 Wyo. 110, 114 P. 677, 688 (1911).

178. 642 P.2d at 435.

179. *Id.*

180. *Id.* at 434.

181. 4 NICHOLS, *supra* note 6, at § 12.22[2].

182. *Coronado Oil Co. v. Grieves*, 642 P.2d at 439.

183. WYO. STAT. § 1-26-702(a) (Supp. 1983).

184. WYO. STAT. § 1-26-702(b) (Supp. 1983).

185. *See supra* note 9.

testimony should include a simple explanation of the appraisal method he used in forming his opinion.

The landowner also is qualified to give an opinion on the market value. Both the landowner and the expert must base their opinions upon those items that are causative factors affecting land value. Opinion evidence based on any factors which do not reflect market value is incompetent.

In a partial taking case, the landowner and expert should give opinions as to the immediately before value and the immediately after value in order to fully aid the jury. Finally, if on cross-examination an attorney discovers that the expert is not qualified or that foundation to express an opinion on market value is lacking, he should object to the evidence and ask that it be stricken from the record in order to preserve the question for appeal.

The Wyoming Eminent Domain Act must be read in light of the common law rules which the court has established. Although the Act appears to favor the landowner, he still must prove the fair market value of the land. Proof of market value must center on well-settled principles of eminent domain law.

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